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Tribhuvanamahesvara
"Great Lord of the Three-Fold World"
Siem Reap Province of Cambodia

Photo courtesy of Markus Zimmer, Advisory Council Chair

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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 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.

IACA
INTERNATIONAL ASSOCIATION FOR COURT ADMINISTRATION

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 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.

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International Association For Court Administration

In this issue:

On The Cover

Approximately 20 km north of the great Angkor Wat Temple complex in the Siem Reap Province of Cambodia and near the foot of the Kulen Mountains, one comes upon the extraordinarily beautiful small Banteay Srei Temple or "Citadel of the Women." Consecrated on 22 April 967, it was built by Yajnavaraha, Counselor to King Rajendravarman. Sometimes described as the "Jewel of Khmer Art, Banteay Srei enshrines important elements of Hindu mythology and belief. The photograph was taken by Markus Zimmer in mid-March 2010 during his three-month assessment of the Extraordinary Chambers of the Courts of Cambodia and the UN Assistance to the Khmer Rouge Trials.

From the Executive Editor

By Markus Zimmer

DISPATCH FROM PHNOM PENH

Greetings to all IACA members and friends from the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC functions as a unique *ad hoc* temporary criminal court whose limited jurisdiction extends to what qualify as crimes and serious violations of Cambodian penal law, international humanitarian law, and international conventions recognized by Cambodia and committed between 17 April 1975 and 6 January 1979. Although the ECCC was established under Cambodian law, it functions more as a hybrid legal system managed and operated through a dual organizational framework. The United Nations Assistance to the Khmer Rouge Trials (UNAKRT) comprises the international component of that framework, the ECCC the national or Cambodian component. UNAKRT's function is support-oriented with Cambodians leading the tribunal. Its judges include nationals drawn from the Cambodian courts and internationals from France, Poland, Austria, Japan, Sri Lanka, Australia, New Zealand and Netherlands, reflecting a dizzying assortment of civil and common law system backgrounds. That framework of separate national and international components working in concert also extends to most key offices, from prosecution to defense teams and across court-support and administration functions.

The Cambodian court system, heavily influenced by French colonialists during nearly a century of political and economic domination, features investigating judges. ECCC criminal investigations are initiated by prosecutors who, after a preliminary effort, hand over that role to the investigation judges who, after a sustained effort, hand it over to the trial judges whose inquiry into the truth is joined by prosecution and defense. The ECCC is the only *ad hoc* tribunal featuring the investigation judge mechanism. As is characteristic of the *ad hoc* international criminal tribunals and their hybrids, case progress at the ECCC is described by some as glacial, with elderly and ill defendants held in pretrial detention for years. But these tribunals deal with complicating factors unknown in most national court systems. At the ECCC, translation and interpretation of case files and court proceedings encompass three languages, the native Khmer, English, and French. And the criminal charges being adjudicated involve crimes committed in the latter 1970s, often in remote areas throughout this semi-developed country. Occasionally, witnesses sought by the tribunal reside in floating villages on Cambodia's largest inland lake, Tonle Sap, where there are no set postal addresses. Entire villages sometimes float from one area of the lake to another between the wet and dry seasons, creating unprecedented challenges for process servers.

Ad hoc tribunals pursue horrendous criminal enterprise masterminds, the senior leaders, leaving lesser prosecutions to the national and local courts whose records are mixed. Here in Cambodia, there have been few. This bitter irony is not lost on victims, many of whom lost everything and everyone close to them, who survived. Paradoxically, it does not manifest itself in open public outrage, demands for retribution, violence against suspects, or other typical western reactions. The challenge of a life which for many borders on day-to-day subsistence may leave precious little energy and will to focus on revenge. There is, however, considerable interest in the ECCC's live-streamed public proceedings to which Cambodians increasingly have access.

The first lesson of the justice curriculum must be that it is imperfect. To be certain, significant progress has been achieved, but Cambodia reminds us that much remains to be made.

Time Standards as A Court Management Tool: The Experience in American State and Local Trial Courts

By David C. Steelman[1], National Center for State Courts (NCSC)[2]

As a public institution, the courts must be accountable for their use of a nation's resources. The institutional independence of the judiciary from political influences and the decisional independence of individual judges in specific cases are intended not for the personal benefit of judges, but for the benefit of the society as a whole and of all those who come before the courts. Indeed, the very legitimacy of government as a whole can be powerfully reinforced by the effective operation of an independent judiciary.[3]

Yet the independence of the judiciary is not likely to be achieved if a court does not manage itself, measure its performance accurately, and account publicly for its performance.[4] If a court has the leadership and commitment required for the successful introduction of caseflow management improvement efforts, an important element of day-to-day court leadership will be to do the actual management of all its cases. This involves the creation of expectations about what constitutes "success," monitoring and measuring the court's actual performance in view of such expectations, and then taking responsible steps to bring actual court performance into greater compliance with expectations. This article summarizes the experience in American state and local trial courts with the use of time standards as an important element of court management, and more specifically, managing the progress of cases to just dispositions.

A. Time Standards as a Court Management Tool

If one of the objectives of court and caseflow management is to promote "prompt" justice, then it is desirable to have measures of what constitutes "prompt" justice. That a court of first instance should establish and comply "with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload," is one of the standards offered in the United States in 1990 by the Commission on Trial Court Performance Standards.[5] Furthermore in the United States, the American Bar Association, the Conference of [State Court] Chief Justices, and the Conference of State Court Administrators have all urged the adoption of time standards for expeditious caseflow management.

Courts with successful caseflow management programs know what they are trying to accomplish because they have goals reflected in case processing time standards they have adopted. Time standards or guidelines should not be based on what had transpired in the most difficult and complex cases that judges can remember from their own experience as lawyers or on the bench. Nor should they be set at a level that simply reflects what can easily be accomplished given current circumstances and practices among judges and the practicing trial bar. Rather, such standard or guidelines should reflect what is reasonable for citizens to expect for the prompt and fair conclusion of most cases of a given type. In determining what is reasonable for citizens to expect, court officials setting time standards should keep in mind the general principle set forth by the American Bar Association: "From the commencement of litigation to its resolution, . . . any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated."[6]

The adoption of case-processing time standards reflects a commitment to timely completion of these cases as an important goal. In operation, time standards serve several other important ends:

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1 Principal Court Management Consultant, National Center for State Courts (NCSC). Email: dsteelman@ncsc.org.

2 This article is based primarily on Chapter V of the author's book entitled, Caseflow Management: The Heart of Court Management in the New Millennium (NCSC, 2000 and 2004), with the addition of information on current time standards for trial courts in American states (© 2009 NCSC) and Measures 2-5 of the core court performance measures known as "CourTools" (© 2005 NCSC). It is a modified version of a paper provided to the Kingdom of Saudi Arabia under an agreement dated July 14, 2009, between KPMG Al Fozan & Al Sadhan and NCSC. The points of view and opinions expressed in this article are those of the author and do not necessarily represent the official position or policies of the Kingdom of Saudi Arabia or KPMG.

3 From the 18th-century constitutional debate in the United States, see Alexander Hamilton, *The Federalist* No. 17 (1787): "The ordinary administration of civil and criminal justice . . . contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government."

4 NCSC and Bureau of Justice Assistance, United States Department of Justice, *Trial Court Performance Standards with Commentary* (1990), p. 18.

5 Ibid., Standard 2.1.

6 American Bar Association (ABA), *Standards Relating to Trial Courts, 1992 Edition*, Section 2.50.

- **Motivation.** By providing goals for judges and other participants in the court process to seek to achieve, both in managing caseloads and with regard to individual cases, time standards are motivators.
- **Measurement.** Time standards provide yardsticks for measuring management effectiveness, serving as benchmarks for determining whether the pace of court proceedings is acceptable.
- **Management.** Time standards provide a starting point for developing specific procedures to meet the goals they set forth.
- **Information System Development.** Time standards are useful only if judges and other participants in the court process receive information on the extent to which they are being achieved; and such standards should lead to the development of systems for monitoring caseload status and progress toward caseflow management goals.[7]

Adoption and implementation of time standards is also likely to have an effect on the assessment of court resource needs for judges and non-judge personnel. There is ample evidence that case-processing times do not relate to the size of a court or its caseload per judge,[8] and that adding new permanent judgeships is not the only possible cure for court delay.[9] Yet even fast courts can reach a "saturation point," at which they cannot absorb and process more cases without additional judicial or non-judicial staff resources.[10] In a setting where the court is managing its caseflow, time standards help to highlight the level of its judicial and non-judicial personnel needs.

1. Time Standards for Intermediate Case Events. As a means to focus on the progress of cases from initiation and assure that no case is "lost between the cracks," courts should have time standards for the progress of each major type of case through each of its key intermediate stages from filing through disposition and the completion of all postdisposition court work.[11] Elapsed time between key events in cases is what judges and court managers customarily see and count from day to day. How long ago was the last court event in this case? Has today's scheduled event been continued from a previous date? When is the next scheduled event?

Examples of such intermediate standards in the United States or other common law countries are those that might be adopted for civil, domestic relations, felony, juvenile delinquency, and abuse and neglect protection cases:

- Caseflow management of general civil cases or domestic relations cases is aided by intermediate standards for the time from filing to the completion of the pleadings, completion of discovery, and trial start or nontrial disposition.
- For felony cases, intermediate time standards might include those for time from arrest through key court events, including bail hearing, probable cause determination, felony arraignment, and trial start or nontrial disposition.
- For juvenile delinquency cases, elapsed times from arrest to detention hearing, adjudication hearing and disposition hearing should be subject to time standards for purposes of managing caseflow.
- In an abuse and neglect case, intermediate standards might address time from when a child is removed from the home to temporary custody hearing, adjudication hearing, disposition hearing, and permanency hearing. (To avoid "foster care drift" in child protection cases,[12] standards in appropriate circumstances should also address time from the removal of a child from the home to events after the abuse and neglect proceedings, such as a petition to terminate parental rights and a petition for adoption.)

Time goals for intermediate stages give the court criteria for monitoring the progress of cases from the time of case initiation through judgment and the conclusion of all post-judgment court work. Such monitoring permits the early

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7 See Barry Mahoney, et al., *Planning and Conducting a Workshop on Reducing Delay in Felony Cases. Volume One: Guidebook for Trainers* (1991), page P5-3.

8 National research on court delay reduction has consistently shown that disposition times are unrelated to the size of a court or the number of filings per judge. See Thomas Church, et al., *Justice Delayed* (1978), pp. 21-24; Mahoney, et al., *Changing Times in Trial Courts* (1988), p. 46; and John Goerdt, Chris Lomvardias, Geoff Gallas and Barry Mahoney, *Examining Court Delay* (1989), pp. 26-30 and 71-75.

9 Barry Mahoney, Larry Sipes and Jeanne Ito, *Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings from Current Research* (1985), p. 30.

10 See Goerdt, Lomvardias. Gallas and Mahoney, *Examining Court Delay* (1989), p. 30.

11 See ABA, *Standards Relating to Trial Courts, 1992 Edition*, Section 2.51C.

12 See the Adoption and Safe Families Act of 1997 (ASFA) (PL 105-89), effective November 19, 1997.

identification of cases whose progress has been impeded. These are the cases that may need further management attention from the court to reach fair outcomes in a timely manner.

2. Overall Time Standards. In addition to time standards for case progress through intermediate stages, a court should have overall standards for the time from case initiation to trial or disposition by other means. Such standards for total elapsed time provide a basic framework for caseflow management efforts. For example, if 99 percent of all civil cases should be disposed in two years, then the court's caseflow management plan should be designed to dispose of a substantial majority of its cases within 12 to 18 months, allowing the last six months for those cases that are somewhat more complex.

Furthermore, the overall time goals provide the basis for determining the types of information that will be most useful in court caseflow management reports. For example, if one of the court's goals is to dispose 90 percent of all felony cases within 6 months after arrest, what percentage of the court's disposed or pending cases exceed this time standard? Which individual cases are approaching the longest time standard or various interim goals?

Time standards developed by the National Conference of State Trial Judges and approved by the American Bar Association (ABA) are a common point of reference for the consideration of overall time standards. See Table 1.

The earliest efforts to introduce time standards in state court systems were made in the 1970s and early 1980s. By the end of the 1980s, over 20 states had adopted statewide goals for the time required to process cases in the state trial courts. By November 1994, this number had increased to 34 states and the District of Columbia. As of late 2007, 41 states and the District of Columbia had some form of case processing time standards.[13]

Virtually all of these jurisdictions have time standards for general-jurisdiction civil cases and felonies, and most also have standards for domestic cases, misdemeanors and limited-jurisdiction civil cases. There are 31 jurisdictions with standards for juvenile cases, and 12 have standards for probate cases. In many states, the time standards are mandatory, while in others they are voluntary or advisory.[14]

TABLE 1. AMERICAN BAR ASSOCIATION TIME STANDARDS[15]

	Time Within Which Cases Should be Adjudicated or Otherwise Concluded		
Case Type	90%	98%	100%
General Civil	12 Months	18 Months	24 Months
Domestic Relations	3 Months	6 Months	12 Months
Felony	120 Days	180 Days	365 Days
Misdemeanor	30 Days	--	90 Days

a. Civil Cases. Among the states with time standards in 2007, 38 have guidelines for civil matters in general-jurisdiction trial courts. At least nine jurisdictions have adopted standards that are identical to or very close to the ABA standards shown above in Table 1. Standards in some states provide that cases should be disposed within six or 12 months, but the largest number suggest that all cases should be disposed within 18 or 24 months.

13 NCSC, Knowledge and Information Services (KIS), "Case Processing Time Standards in State Courts, 2007 (February 10, 2009).

14 Ibid. In at least nine states, time standards are articulated in a fashion like that in the American Bar Association time standards (the time from case initiation within which 90%, 98% and 100% of the cases of a given type should be disposed). (ABA, *Standards Relating to Trial Courts, 1992 Edition*, Section 2.52.) Other states have standards that cover only 99% of cases (Arizona and Minnesota), 95% (Utah) or 80% (Vermont), accepting that the remainder will take longer to be disposed. In still other states, there is either a flat standard (with no percent specified) or a standard for 100% of all cases of a given type.

15 ABA, *Standards Relating to Trial Courts, 1992 Edition*, Section 2.52.

ABA time standards do not include guidelines for limited-jurisdiction civil matters (usually torts, contracts and real property matters with less than a specified dollar amount at stake). Yet 23 states and the District of Columbia have time standards for such cases. Although time expectations vary more than those for general-jurisdiction matters, the largest number indicate that all of these cases should be decided within six months or less.

For civil matters using summary hearing procedures, such as small claims and landlord-tenant cases, ABA standards recommend disposition within 30 days after filing. Seven states and the District of Columbia have time guidelines for these cases, but only one has adopted the ABA standard. Most of the others provide that all such cases should be disposed within three months or less after initiation.

b. Criminal Cases. In 2007, there were felony time standards adopted by the court systems of 35 states and the District of Columbia. Although only a small number of jurisdictions have adopted the full ABA time standards shown in Table 1 for felonies, standards in a total of several states provide that all cases should be disposed within a year. An even large number states have shorter time standards, typically providing that all felonies should be disposed within 180 days.

Misdemeanor time standards had been adopted in 31 states and the District of Columbia by 2007. At least eight states agree with the ABA standard that 100% should be disposed within 90 days. Some states have standards shorter than 90 days for all cases, and the largest number have longer time standards.

c. Traffic Cases. Although ABA time standards do not include separate standards for traffic cases, those for misdemeanors – that 90% of cases should be disposed within 30 days after initiation, and that 100% be disposed within 90 days – may be considered applicable as well to traffic cases. At least nine states had time standards in 2007 for traffic cases.[16]

d. Juvenile Delinquency Cases.[17] Since the 1970s, several organizations have suggested time standards for delinquency cases. One of the earliest was the Joint Commission on Juvenile Justice Standards [a combined effort of the Institute for Judicial Administration (IJA) and the American Bar Association (ABA)], which issued recommendations in 23 separate volumes between 1977 and 1980. Another prominent set of standards was issued in 1980 by the National Advisory Committee for Juvenile Justice and Delinquency Prevention (NAC), created by the federal legislation creating the Office of Juvenile Justice and Delinquency Prevention (OJJDP). Following the release of those standards, ABA's National Conference of State Trial Judges included juvenile standards in their court delay reduction standards in 1984, which were incorporated in ABA trial court standards revised in 1992. Finally, the National District Attorneys Association (NDAA) issued standards for the handling of delinquency cases in 1992. Table 2 shows the different time standards offered by these groups.

Court systems in 30 states and the District of Columbia had time standards for delinquency cases in 2007.[18] Many had time standards to detention hearing, to adjudication, and to disposition, distinguishing detention from non-detention cases. Only a handful of states had time expectations equal to or shorter than the standards suggested by IJA/ABA, NAC/OJJDP and ABA for detained juveniles, however. The standards for most of the states were at least twice as long as those offered by these groups, and those for at least six states were longer than those of NDAA.

16 See NCSC, KIS, "Case Processing Time Standards in State Courts, 2007 (2009).

17 Discussion of national time standards for juvenile delinquency cases is based on Jeffrey Butts and Gregory Halemba, *Waiting for Justice* (1996), pp. 20-25.

18 See NCSC, KIS, "Case Processing Time Standards in State Courts, 2007 (2009).

TABLE 2.
TIME EXPECTATIONS IN NATIONAL DELINQUENCY STANDARDS[19]

	Maximum Days from Referral to Adjudication	Maximum Days from Adjudication to Disposition	Total Maximum Days from Referral to Disposition
Detained Juveniles			
• IJA/ABA	15	15	30
• NAC/OJJDP	18	15	33
• ABA	15[a]	15	30[a]
• NDAA	30	30	60
Released Juveniles			
• IJA/ABA	30	30	60
• NAC/OJJDP	65	15	80
• ABA	30[b]	15	45[b]
• NDAA	60	30	90

- Time limit begins at point of detention admission rather than police referral.
- Time limit begins at filing of delinquency petition rather than police referral.

e. Child Protection Cases. In 1995, the National Conference of Juvenile and Family Court Judges (NCJFCJ) developed "Resource Guidelines" for improving the court process in child abuse and neglect cases. These guidelines were developed in consultation with representatives of the Conference of Chief Justices, the National Center for State Courts, and the American Bar Association. The purpose of the guidelines is to help courts hearing abuse and neglect cases to meet demands placed on them by federal and state laws conducting proper court hearings, managing court calendars, and dealing with necessary resource demands and costs.[20]

The guidelines offer recommendations on the timing of key events in the court process:

- A preliminary protective hearing should occur within 72 hours after a child has been placed outside the parents' care if removal has not occurred after a completed court hearing and pursuant to a court order.
- When a child is in emergency protective care, adjudication should be completed within 60 days after the removal of the child.
- Disposition should ordinarily be completed within 30 days after adjudication.
- Review of children in foster care must occur at least once every six months to meet the requirements of federal law.[21]
- Permanency planning hearings, which federal law formerly required within 18 months after placement, must now be held within 12-14 months of a child's being taken into care.
- If a petition is filed for termination of parental rights, a termination trial should be set within 60 days of completion of service of process.

In 1997, through the Adoption and Safe Families Act (ASFA) (P.L. 105-89), Congress mandated that states shorten the length of time that children spend in foster care, and that they provide an array of permanency options to provide safe and stable homes for children.[22] Child protection agencies at the state or county level are required by ASFA to give highest

19 Source: Jeffrey Butts and Gregory Halemba, *Waiting for Justice: Moving Young Offenders Through the Juvenile Court Process* (National Center for Juvenile Justice, 1996), p. 25.

20 NCJFCJ, *Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases* (1995).

21 See 42 U.S.C. §675(5)(B).

22 See David Steelman, *Effects of Adoption and Safe Families Act of 1997 on Wisconsin Proceedings in "CHIPS" Cases (Those Involving "Children in Need of Services")* (1999).

priority to the health and safety of children, focusing on permanency from the beginning of a child protection case. Courts hearing child protection cases are called on to ensure that cases progress to permanency in a fair and timely manner. By 2007, every state had enacted legislation implementing ASFA, thereby introducing time standards for child protection cases that may have been quite different from prior time expectations.

ASFA defines when a child has "entered foster care." Since ASFA indicates that a child is considered to have entered foster care on the earlier of either (a) the date of the court's first finding that the child has been abused or neglected, or (b) 60 days after the child was removed from the home, timetables in cases where there are reasonable efforts to preserve or reunify the family have up to 60 days added to elapsed time from when a child was taken into care.

If a court finds that reasonable efforts to preserve or reunify a family are required, the court must hold a permanency planning hearing to more than 12-14 months after athe child was taken into care. Subsequent review hearings must then be held by the court, with reasonable efforts findings, not less than every 12 months after the previous hearing until a child is adopted or the permanency plan is completed.

ASFA identifies circumstances in which the filing of a petition to eliminate parental rights is mandatory unless doing so would not be in the best interests of the child. One of these circumstances is when the child has been in foster care for 15 of the last 22 months.

Proposed federal regulations suggest that a petition to terminate parental rights must in this situation be filed at the end of the fifteenth month. Calculation of when the petition must be filed must consider when the child was "entered foster care" and must include up to 60 days from the time the child was removed from the home. In effect, this provision for a mandatory petition to terminate parental rights thus comes into play when the child has been in foster care for 15 months in the last two years.

The second circumstance for a mandatory petition to terminate parental rights is when the court finds that reasonable efforts to reunify the family are not required. In that situation, the court must hold a permanency planning hearing within 30 days after it has found that reasonable efforts to reunify are unnecessary, and then a petition to terminate parental rights must be filed as soon as possible. Proposed federal regulations suggest that the court determination that reasonable efforts to reunify must be made within 60 days after the child's removal from the home. The inference is that a permanency hearing must be held within 90 days after removal if the court finds that reasonable efforts to reunify are not required.

f. Divorce Cases. There were 33 states that had time standards for domestic relations cases in 2007. As Table 1 shows, ABA time standards suggest that 90% of these cases should have initial dispositions within 3 months after filing, 98% within 6 months, and 100% within 12 months. Although only one state had completely adopted the ABA standard, the standards in eleven states agreed that 12 months is appropriate for all or most divorce cases. Seven states had shorter time standards for all such cases, and standards in seven states distinguished between contested and uncontested cases in terms of expectations for time to disposition.

g. Probate Cases. The time standards recommended by ABA include none specifically for probate cases. In many states, statutory provisions may provide guidelines for the timely administration of simple and other decedent estates. In 2007, court systems in 12 states had time standards for probate cases, probably intended largely for decedents' estates.[23] In recognition of the fact that most such estates are relatively uncomplicated, the standards in the majority of these states provide that estate administration should be concluded within a year. Other states' standards acknowledge the small percent of estates that are more complex, and they generally provide that such matters should be concluded within 24 months. Because of their nature, such case types as trusts, guardianships and conservatorships may properly remain open for years depending on the individual circumstances of beneficiaries or their estates.

h. Cases on Appeal. Although this paper focuses largely on trial courts, time standards have also been developed for appellate courts. Since 1971, when Illinois and Ohio became the first states to implement standards for the appellate courts, many other states have chosen to follow suit. As of late 1995, 12 states had adopted some form of appellate time standards. By late 2007, 20 states and the District of Columbia had adopted appellate case processing time standards.[24]

[23] See NCSC, KIS, "Case Processing Time Standards in State Courts, 2007 (2009).

[24] Ibid.

B. Other Related Court Management Goals and Policies

Associated with meeting time standards are specific goals relevant to the effectiveness of a court's caseflow management efforts. Relating directly to caseflow management is the size of a court's pending inventory of cases and its continuance policy. Of more general importance are the effects of court practices and procedures on the cost of access to justice and the court's maintenance of equality, fairness and integrity.

1. Reduction Size and Age of Pending Inventory. Keeping current with its incoming caseload is an important element of optimal performance by a trial court.[25] The size of a court's pending inventory is a key measure of the effectiveness of the court's caseflow management efforts. National research in the United States shows that the size of a court's inventory of pending cases, in relation to the number of dispositions per year, is strongly associated with delay. Slow courts are almost always "backlogged" courts.[26] In contrast, having fewer pending civil cases per judge is strongly correlated with shorter times to disposition.[27]

A court's goals with regard to its pending inventory may have two different parts: reducing the size and age of the inventory, and then maintaining it at a level that will permit the court to comply with its time standards. If a court's case processing times are too long, its inventory includes an unacceptable number of cases that are "backlogged" – that is, there is too high a percentage of cases in the inventory that have been pending for longer than the time standards adopted by the court.

For example, a court may have adopted the ABA time standards for civil cases, that all but a small number of exceptional cases be disposed within two years after filing. (See Table 2.) If the court has a pending inventory of 5,000 civil cases, of which 1,500 (or 30%) are more than two years old, then the court has a "backlog problem." In this circumstance, the court's caseflow management improvement plan must include steps specifically directed toward reducing the backlog. For a period of time, the court must dispose of more cases than are filed, until the age of the pending inventory is dramatically reduced, to the point where no more than 50-100 (1-2%) of its pending civil cases are more than two years old.

The second part of a court's goals for its pending inventory is to avoid future backlog and to maintain a pending inventory that is manageable in terms of the workload of judges and court staff members. What constitutes a "manageable" pending inventory? In simplest terms, it is the number of pending cases that the court can maintain and still meet its time standards without heroic efforts on the part of judges and staff or undue burdens on parties and counsel. If, after having eliminated its backlog, a court disposes of as many cases each year as are filed, the size of the pending inventory should remain relatively stable and manageable. (The court must not be misled that it can keep its pending inventory manageable simply by disposing of all its easiest cases, leaving all the more difficult cases unresolved. In that event, the mix of older and more complex cases in the pending inventory may increase even if the overall size of the inventory does not.)

2. Court Policy on Time Extensions or Rescheduling of Court Events.[28] In order for case progress from initiation to conclusion to be more predictable and reliable, judges must adhere to a clearly articulated policy on the court grant of time extensions and requests to reschedule court events. Having established time standards and goals regarding the pending inventory, the court can spell out for itself and other participants in the court process what kind of policy on extensions or rescheduling will aid the accomplishment of those standards and goals.[29] As the Court Delay Reduction Committee of the National Conference of State Trial Judges has observed, even the most effective calendar operation cannot (and should not, in fairness) eliminate all such extensions or rescheduling. Yet they can be kept to a minimum by adhering to firm enforcement standards, under which they are granted only for good cause shown, and requests for extensions or rescheduling must be in writing and are recorded in case files and the court's case management information system.[30]

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25 See BJA and NCSC, *Trial Court Performance Standards and Measurement System Implementation Manual* (1997), Standard 2.1.

26 Mahoney, et al., *Changing Times in Trial Courts* (1988), p. 195; Goerdt, Lomvardias, Gallas and Mahoney, *Examining Court Delay* (1989), pp. 36-39, 42.

27 Goerdt, Lomvardias and Gallas, *Reexamining the Pace of Litigation in 39 Urban Trial Courts* (1991), p. 55.

28 In the United States, such a policy is often called a "continuance" policy. It is helpful to define what is meant by the word "continuance." In some courts, a case is "continued" any time it is scheduled for a subsequent court event, even when the scheduling is done after the conclusion of a court event that occurred on the date it was initially scheduled to happen. That is not what is meant here. For purposes of caseflow management, a "continuance" is the rescheduling of a court event that did not happen on the scheduled date, whether it is granted by the court at the request of a party or is necessary because the court could not reach the case on its calendar. Compare the definition of "number of continuances" in Conference of State Court Administrators and NCSC, *State Court Model Statistical Dictionary 1989* (1989), p. 47.

29 Institute for Law and Social Research (INSLAW), *Guide to Court Scheduling* (1976), p. 14.

30 ABA, *Standards Relating to Trial Courts, 1992 Edition*, Section 2.55.

In an individual case, the grant of a request to extend or reschedule obviously means a delay in its progress to conclusion. In the broader context of caseflow management, however, a court's policy and practices about such requests also affects the view that others (attorneys and other case participants) have about the court's commitment to caseflow management and timely disposition of cases:

> If the court is lenient on continuances, a busy attorney may be less likely to be prepared or likely to be less prepared. Time will be devoted to the most pressing business, and postponements will be requested for less urgent matters, including cases in which a continuance due to unreadiness can be obtained. Each time the court grants such a request, it reinforces counsels' perception of the court's leniency and lack of case management orientation.[31]

Court policy should be to keep approval of requests to extend or reschedule to a minimum. In 1973, caseflow management expert Maureen Solomon recommended that a maximum "continuance rate" should be among the management goals in a court's caseflow management system:

> Some judges feel that it is impossible or unrealistic to set a maximum on the number of continuances since each request must be evaluated on its merits. However, experience in both large and small courts of general jurisdiction indicates that when the continuance rate rises about 20 percent of the scheduled cases, the court is failing to be rigorous in evaluating continuance requests. Thus, when the continuance rate rises above the rate determined to be acceptable to the court, special attention should be directed to the continuance problem and steps taken to remedy it.[32]

Whatever is the "continuance rate" deemed acceptable to the court, attorneys and parties must have the expectation that requests to extend or reschedule are more likely than not to be denied, and that any such request other than for a good reason will be denied by the court.

Policy and practices for the grant of such requests in pretrial matters can be distinguishable from those for trial continuances. As part of a court's exercise of control over case progress, it may enter orders soon after case commencement to govern the timeliness of evidence submission and exchange, as well as any referral to mediation or another form of alternative dispute resolution (ADR). Such an order may also the timing of court events to allow opportunities for parties to reach negotiated resolution of issues, as well as trial dates (as in common law countries) or dates for completion of evidence submission to the court (as in civil law countries). As long as they do not threaten case progress to conclusion, short extensions of time before that may be granted more freely. Indeed, a short extension of time that demonstrably aids progress to early resolution of a case may be a valuable caseflow management tool. In contrast, given the critical importance to successful caseflow management of credible dates for trial or submission of all evidence, the court should be very strict about not granting time extensions for trial or submission of all evidence.

3. Controlling Costs of Justice. Court performance standards suggest that a court should ensure that "the costs of access to the court's proceedings – whether measured in terms of money, time or the procedures that must be followed – are reasonable, fair and affordable."[33] As thus defined to include time and procedures as well as money, costs of justice present an additional dimension from which to view court management of the pace of litigation.

Extensions of time and rescheduling court events must be viewed as an area where concern for delay and concern for costs intersect. In addition to delaying individual cases and affecting case participants' expectations of how serious the court is about caseflow management, continuances cause additional activities in a case for judges and court staff.

Extensions of time or rescheduled court events can also involve significant costs for litigants and witnesses. If extension or rescheduling means additional court appearances for attorneys that are not offset by demonstrable savings as a result of settlement, then the costs of attorney fees can be increased. Moreover, parties and witnesses taking time off from work for a hearing or trial that is then continued must then appear again later, experiencing not only further delay and additional out-of-pocket costs, but also increased frustration with the court process.

4. Maintaining Equality, Fairness and Integrity. Over the years, many have observed that attention to expediting the court process must not overshadow attention to fairness and doing justice in individual cases. Professor Maurice

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31 Maureen Solomon and Douglas Somerlot, *Caseflow Management in the Trial Court: Now and for the Future* (1987), p. 29.

32 Solomon, *Caseflow Management in the Trial Court* (1973), p. 39.

33 *Trial Court Performance Standards and Measurement System Implementation Manual* (1990), Standard 1.5.

Rosenberg once observed that an obsession with speedy justice without attention to substantive results can erode the integrity of the justice process. He wrote, "Slow justice is bad, but speedy injustice is not an admissible substitute."[34]

But concern for timeliness is hardly irreconcilable with concern for justice. In the American Bar Association's trial court standards, the committee of the National Conference of State Trial Judges that developed delay reduction standards addressed the tension between the competing goals of delay reduction and substantive justice. They wrote that it is only elapsed time in a case "other than reasonably required for pleadings, discovery and court events" that is unacceptable and must be eliminated.[35] Professor Ernest Friesen, a leading American expert on caseflow management, has observed that all of the essential functions of courts – such as doing justice in individual cases, appearing to do justice in individual cases, and protecting citizens from arbitrary government intrusion in their lives – are all defeated by delay.[36]

Effective implementation of a caseflow management improvement plan can be thoroughly consistent with trial court performance standards for equality, fairness and integrity.[37] Through the faithful and consistent implementation of its caseflow management improvement plan, the court can help to provide a fair and reliable judicial process. Court decisions and actions in such areas as the grant of continuance requests should be based in individual attention to cases and without undue disparity among like cases. The court should make clear how compliance with its orders relating to scheduling and other caseflow management issues can be achieved. Finally, the court should take appropriate responsibility for seeing that case participants actually comply with its orders on scheduling and other caseflow management issues.[38]

C. Monitoring and Measuring Actual Performance

Successful caseflow management requires that a court continually measure its actual performance against the expectations reflected in its standards and goals. For this purpose, the court should regularly measure times to disposition, whether it is disposing of as many cases as are being filed, the size and age of its pending caseload, and the rates at which trials and other court events are being continued and rescheduled.

Caseflow-management information should be provided as part of the management reports produced with the aid of the court's automated case management information system.

Although measuring performance is vitally important for effective caseflow management, it is possible to suffer from "information overload." To avoid such overload, court leaders measuring performance should give attention to the key types of caseflow management information. To this end, a court would be well served to apply four of the performance measures that are part of "CourTools" (© 2005 NCSC), and which focus specifically on caseflow management:[39]

- Clearance Rates (the number of outgoing cases as a percentage of the number of incoming cases): This measures whether the court is keeping up with its incoming caseload. If cases are not disposed of in a timely manner, a backlog of cases awaiting disposition will grow.
- Time to Disposition (the percentage of cases disposed or otherwise concluded within established time frames): This measure compares a court's performance with local, state, or national guidelines for timely case processing.
- Age of Pending Caseload (the average age of active cases pending before the court, measured as the average number of days from filing until time of measurement): Knowing the age of the active pending caseload is an important measure of a court's case management. This measure differs from "Time to Disposition," in that these cases have not reached a court disposition. It should only be used to calculate the age of active pending cases, since those that are inactive will exaggerate the overall age of cases pending before the court.
- Certainty of Trial Date or of Final Submission of All Evidence (the average number of times that cases must be scheduled for trial or final hearing before they are ready for judgment): Research in the United States has found that a court's ability to set firm trial dates is associated with shorter times to disposition. In a country whose courts do not necessarily provide oral trials as in the American common law practice, this measure is applicable in a

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34 Rosenberg, "Court Congestion: Status, Causes, and Proposed Remedies," in American Assembly, *The Courts, The Public, and the Law Explosion* (1965), p. 58.

35 See ABA, *Standards Relating to Trial Courts, 1992 Edition*, Section 2.50.

36 See presentation by Friesen in NCSC's Institute for Court Management videotape, *Caseflow Management Principles and Practices: How to Succeed in Justice* (1991).

37 See *Trial Court Performance Standards and Measurement System Implementation Manual* (1990), Standards 3.1 through 3.6.

38 See Trial Court Performance Standard 3.5.

39 See NCSC, "CourTools – Trial Court Performance Measures" (© NCSC 2005), http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm (as downloaded from the Internet in June 2009).

different way, having to do with certainty about the date of final hearing, on which all evidence must be submitted to the court for decision. In either circumstance, this measure provides a tool to evaluate the effectiveness of calendaring practices, the continuance rate, and whether there are enough judges and staff.

Measurement by itself does not solve problems. Judges and court administrators must use it as a tool to manage cases and caseflow, by asking key questions.[40] The individual judge should be asking such questions as the following on an ongoing basis:

- **Case-related questions.** What is happening in this case? How old is it? What is its status? What should be happening next? By when?
- **Calendar-related questions.** What is the overall status of my calendar? How many pending cases are there, and what is their age and status? What are the oldest cases, and are they beyond the time standards? Why are they old? What needs to be done about them?

For a state-level court leader, trial court chief judge or trial court manager, there are different questions to ask in order to use information effectively to measure caseflow management and delay reduction efforts:

- **Overall status of calendar.** How many old cases are there? That is, how many cases are pending beyond the time suggested by time standards? What is the "backlog" (the number of cases that cannot be completed within a tolerable time period, as defined by the time standards)?
- **Troubleshooting questions.** Are there problems with particular types of cases? Are there particular procedural bottlenecks? Are particular judges experiencing difficulties?

Regular attention by the chief judge and court manager to the court's performance in light of its caseflow management goals and objectives is a powerful way to enhance the likelihood of court success. If the chief judge and the court manager meet regularly to review reports and measures of the court's caseflow management performance, they can deal promptly with caseflow management problems as they arise.

Measuring performance in such a way with the use of relevant information, the court should be able to identify problems and determine where caseflow management efforts are needed. The steps taken to address problems should be consistent with basic principles of effective caseflow management.

D. Assuring Accountability and Taking Responsible Steps to Meet Expectations

Having reasonable expectations about performance (such as time standards and related goals for caseflow management) is one important part of accountability. Another part is to have means to measure actual performance in comparison to those expectations. The third part is to assure that responsible steps are taken to assure that actual performance is in compliance with appropriate expectations.

1. Internal Accountability. Within the court itself, accountability has to do with the assignment of specific responsibility to particular persons. The results of national-scope research on caseflow management and delay reduction in urban trial courts suggest that courts with successful program have judges with clearly defined responsibility for managing cases. Furthermore, non-judicial court staff members – such as judges' secretaries, in-court clerks, and data-entry personnel – have clear roles and responsibilities in case processing, whereby their effectiveness can be periodically assessed.[41]

2. External Accountability. Both judges and court staff can measure their performance against caseflow management standards and goals, as well as the court's caseflow management improvement plan. To the extent that they have been publicly promulgated (as they should be), the standards and goals and the plan can serve as measures for both internal and external accountability. Periodic reports to the general public on the court's progress under its caseflow management standards and goals and improvement plan address three important external accountability goals: (1) they show the court's use of public resources; (2) they show the effects on litigants of the court's caseflow management activities, and (3) they promote public trust and confidence that the court functions are expeditious, fair and reliable.[42]

3. Responsible Steps to Assure Prompt Justice. If a court finds that its actual performance falls significantly short of relevant time standards, then it must take steps to close the gap. These involve the consistent application of such caseflow management principles as the following in each case:

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40 Mahoney, et al., *Planning and Conducting a Workshop on Reducing Delay in Felony Cases. Volume One: Guidebook for Trainers* (1991), pp. P6-7 through P6-9.

41 Mahoney, et al., *Changing Times in Trial Courts*, pp. 203-204.

42 See *Trial Court Performance Standards with Commentary* (1990), Standards 4.2 and 5.2, and Reginald K. Carter, *The Accountable Agency* (1983), p. 31.

- Early court intervention and continuous court control over case progress;
- Differentiated case management (DCM); [43]
- Realistic schedules and meaningful court events;
- Providing a firm and credible date by which all evidence must be submitted, whether in terms of documents filed with a court or evidence presented orally in a trial;
- Management of the submission of evidence; and
- Management of post-judgment motions, proceedings in execution of judgment, and other court events after the entry of judgment by a trial court or court of first instance.

Although courts may differ in their specific approaches to caseflow management, those approaches can generally be considered to be variations on these basic methods or techniques that successful courts have in common.

E. Conclusion

Caseflow management must ultimately be an activity that judges and court managers actually do on a day-to-day basis. The actual process of managing any operation, whether it be a small business, a large business corporation, a law firm, or a governmental organization such as a court, involves the establishment of performance expectations, measurement of actual performance against such expectations, and having mechanisms of accountability. These are the critical activities involved in managing a court generally, and they are necessary to the success of any effort to improve a court's caseflow management.

[43] "Differentiated case management" (DCM) is a means for ongoing court control of case progress by which a court distinguishes among individual cases in terms of the amount of attention they need from judges and lawyers and the pace at which they can reasonably proceed to conclusion. In the absence of case differentiation, it has been customary for courts to apply the same procedures and timetables to all cases of a given type. Typically, courts would give attention to cases in the order they were filed, maintaining that older cases must be disposed before those filed later. Such an approach fails however to recognize the differences among individual cases, however. Treating all cases alike may mean that some cases are rushed while others are unnecessarily delayed. Some cases needing little attention from a judge may appear on calendars for more appearances than they need, restricting the judge's ability to give more attention to cases that need it. Management by differentiation can be seen as a "triage" process, under which very complex cases and very simple cases are distinguished from "standard" cases in terms of time expectations and procedural complexity.

For discussion of DCM in the American court context, see Holly Bakke and Maureen Solomon, "Case Differentiation: An Approach to Individualized Case Management,' 73 *Judicature* (No. 1, 1989) 17. For a discussion of DCM in the courts of the Philippines, see Justice Zenaida Elepano, "Case Management Reform: The Philippine Experience," in *Judicial Reform Handbook,* Draft Chapter 4: Case Management Reform and Delay Reduction (Asia Pacific Judicial Reform Forum, Singapore Roundtable Discussion on the Handbook on Judicial Reforms in the Asia-Pacific Region, January 19 – 21, 2009), http://www.apjrf.com/content-document-pdf/draft_chapter04.pdf.

Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment

By Professor Thierry KIRAT[1]

The efficiency of civil justice has become a central issue in several communities, including national states that have undertaken to reform their civil procedures rules and/or to implement methods of case management (such as the USA and United Kingdom)and international organizations such as the Council of Europe and the World Bank. Of course, there has always also been interest on the part of legal academics and judicial/court administration professionals.

Court systems have two aspects: on one side, as public institutions, their funding, the recruitment of judges and clerks and employees, the procedural rules they must comply with, are determined by the state. On the other side, as organizations producing dispute resolution services, their operation and management are borne by the chiefs of courts. The importance of capacity management of the former, who are most often judges, is now acknowledged by most specialists, even if the compatibility between legal rationality and managerial rationality is questioned by some of them. This article seeks to explain the situation of French courts, focusing on court administration that can not be addressed without taking account of the broader framework of State policy concerning most specifically the budget-setting process which has undergone recent radical reforms.

Almost a decade ago, proponents of the Organic Act enacted 1 August 2001 on budget acts[2] reforming the "financial constitution" of France wanted to base the allocation of public funds not on a "logic of spending", but on a "logic of the performance" (Loi organique aux lois de finances – hereinafter LOLF) . It is with this objective that the organic Act amended the budget framework and categories of public policy by developing a complex architecture of missions, programs and actions with indicators designed to measure cost-effectiveness, public policies and the level of performance achieved by managers of public resources. In parallel, , the reform of public accounting, largely inspired by the accounting standards of the private sector, was implemented, in principle, in order to measure the cost of state policy[3]. Many analysts have seen in these reforms a radical change of French administrative culture, with a great step made towards the principles of the New Public Management[4]. However, the spirit of the recent reform is not without precedent; the winds of efficiency and performance have been blowing in French public administration, since the introduction of a method of cost-benefit valuation of state action in 1968. The so-called "Budgetary Choice rationalisation" (*Rationalisation des Choix Budgétaires* – hereinafter RCB) was then inspired by the model of the American *Planning Programming Budgeting System* (PPBS). The guiding idea was to assess the efficiency of state action thanks to economic and monetary valuation of discounted costs and benefits of public money spending. From an institutional view point, the implementation of RCB methods involved mainly economists and experts in economic valuation within an economic unit of the Ministry of Finance: the *Direction de la Prévision*. The RCB experience turned into a sterile process for a series of reasons, among

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[1] Thierry Kirat is a Full Research Professor at the National Centre for Scientific Research, Université de Paris Dauphine. His academic works concern Law and Economics and sociology of law. He works on comparative law of public contracts, defense procurement, dismissal law and management of public services. He teaches economics and management of justice and evaluation of law in law schools (business law & comparative law) at the Université Paris1-Panthéon Sorbonne and Paris Dauphine. Recent publications include T. Kirat & L. Vidal "Litigation on Public Contract Performance: A Comparative Study of the Treatment of Additional Costs and Contract Equilibrium by Administrative Judge in the United States and France", Public Contract Law Journal, 38-1, Fall 2008, pp. 153-185 and R. Dalmasso & T. Kirat, "Comparer, mesurer, classer: l'art périlleux de la leximétrie du licenciement", Travail et Emploi, n° 109, oct-déc 2009.

[2] Loi organique du 1er août 2001 relative aux lois de finances (thereinafter LOLF). Its implementation was phased over several years. The Budget Act 2006 was the first to be fully prepared, adopted and enforced under the new budget framework.

[3] Y. Biondi, T. Kirat, "Les enjeux de la réforme des normes comptables de l'État", journée d'étude de l'IRISES : "Expertise, réforme de l'État et transformation de l'action publique", Paris-Dauphine, February 9, 2007 ;Y. Biondi, "Should Business and Non-Business Accounting Be Different? A Comparative Perspective Applied to the New French Governmental Accounting Standards", 12th Biennial CIGAR Conference Paper, University of Modena, Italy, May 28-29, 2009 (downlable at http://ssrn.com/abstract=1414751).

[4] For instance: S. Maury, "La LOLF est-elle un bon moyen d'évaluer les politiques publiques?", Actualité Juridique-Droit Administratif (AJDA), 2008, at. 1366 ; J.-P. Jean & H. Pauliat, "An evaluation of the quality of justice in Europe and its developments in France", Utrecht Law Review, 2(2), dec. 2006, 44-60 ; A. Vauchez, "Le chiffre dans le 'gouvernement' de la justice", Revue Française d'Administration Publique, 2008/1, 111-120. For a broader overview based on CEPEJ datas and reports: Gar Yein Ng, Marco Velicogna and Cristina Dallara, "Monitoring and Evaluation of Courts Activities and Performance", International Journal For Court Administration (1)1, January 2008, 59-64.

which the main one is that the administrative structures were not appropriate to allow a useful implementation of economic valuation[5].

After of the end of the RCB era, the reformers of the budget law and its budgetary framework in 2001 responded to an administrative and financial logic, quite different from the previous experience. Between the RCB and the LOLF of 2001, the communities involved have nothing in common: economists and economist-statisticians have not been associated in the preparation and implementation of LOLF. They have been invited neither to contribute to the setting-up of indicators for measuring the performance nor to assess the effectiveness of missions, programs and actions of the state. Therefore, the question may be asked, what measures the performance indicators, their role in allocating resources, and more importantly, their legitimacy with respect to service users should play. The question is particularly sensitive for a sovereign function, such as justice.

The effects of LOLF on the efficiency of judicial services and cost-effectiveness of courts deserve attention: how far did its implementation led to an improvement of courts performance? That issue is the focus of the present article, which must first set-up the broader institutional framework within which courts operate. To date, few judges and few lawyers are interested in this issue[6]. Two particularly important aspects of the budgeting and administration of justice must be considered: First, the definition of missions, programs, actions and performance indicators that managers of funds must agree on in order to inform the development and discussion of the budget laws. Second, that the LOLF had the intention to bring the organization and management of courts under a regime of autonomy and accountability.

From the outset there was a discrepancy between the 2001 Act spirit and the real conditions of courts funding and administration. This issue is discussed below. Considering the preparatory reports of the 2001 Act, one may expect the emergence of a new model of courts funding and administration, allowing the chiefs of courts more autonomy and responsibility to achieve higher levels of efficiency and quality. The assessment of performance of courts management through a series of indicators is in theory the core issue: the link between the political-budgetary process involving Government and Parliament on one side, and the judicial administration process on the other. However, as is argued below, these two processes remain separate: the allocation of funds to courts remains broadly speaking disconnected to the performance achieved in courts management. Meanwhile, at the court level, a huge increase in workload of administrative and budgetary tasks compromises the achievement of efficiency and quality of justice. The two issues, namely the performance-based budgetary process on the one and the administrative and financial responsibilities of courts on the other, are then connected.

The article is divided as follows: Section 1 is devoted to the budgetary aspects and performance indicators established for judicial justice within the LOLF framework. Section 2 discusses the conditions of the court management from the perspective of the appeal courts and first instance court levels. It will focus on the managerial responsibilities of chiefs of courts.

I- New Framework for Public Policies: "Mission Justice" and Performance Indicators

The architecture of the LOLF has several levels of spending cutbacks; in mission, programs, and actions, indicators are being placed at the chain end to evaluate the level of performance in achieving the objectives of state action. In the “mission justice” as the first floor, the administrative courts have succeeded again in escaping the institutional history of France by eluding their integration into the Ministry justice. Instead, they are integrated into another mission ("state control and counsel").". On the second floor are located five programs: 166: *Judicial Justice,* Program 107: Penitential *administration,* Program 182: *Judicial Protection of Youth,* Program 101: *Access to law and justice,* Program 213: *administration of justice and related agencies.* Each program has its own associated objectives, which correspond to various program activities. These five programs comprise 60 indicators[7].

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[5] see F. Ecalle, "De la rationalisation des choix budgétaires à la LOFL", Rapport du Conseil d'Analyse Economique, Economie politique de la LOLF, La Documentation française, 2007, 239-252.

[6] For a first assessment, see: l'*Actualité Juridique Pénal* 2006, 473 à 496, which includes contributions from several judges on various aspects of LOLF (general principles, legal costs, operating services, prison); see also Revue Française d'Administration Publique, n° 125, 2008/1, in particular the contribution of the First President of the Court of Appeals of Caen, Justice Didier Marshall: "L’impact de la loi organique relative aux lois de finances (LOLF) sur les juridictions", id., 121-131.

[7] An exhaustive and updated list of indicators is provided by the government website : http://www.performance-publique.gouv.fr/la-performance-de-laction-publique.html

These are the indicators of the judicial justice program we will attention here, mainly because of the centrality of this program for the mission. Even if these indicators fit well within the framework outlined by the LOLF (1), their design is far from the classical definition of the measuring instrument (2), and this results in paradoxical conclusions on the indicators of performance (3). We will discuss issues 1-3 below.

The Design of Indicators as Part of the Budgetary Process Under The 2001 Act

According to the LOLF: *"A program includes funding for implementing an action or a coherent set of actions within a department, which are associated with specific goals, defined in terms of objectives of general interest, and with expected results that can be evaluated.* "Henceforth, annual performance plans ("Plan annuel de Performance") for each program should be annexed to the Budget Law. These plans must state:" *The presentation of actions, costs, objectives pursued, the results obtained and expected in the coming years, measured by precise indicators whose choice is justified* "(Loi organique relative aux lois de finances, art. 51, 5°, a).

Three types of objectives are broken down: "- *The objectives of socio-economic efficiency to meet people's expectations (...), which show not what the government produces , but the impact of what it does: its (socio-economic) objectives of service quality relevant to the user, the efficiency objectives of management relevant to the taxpayer. These objectives intend to increase production or public activities with the same level of resources, or to maintain the same level of activities with fewer resources. "*[8].

The methodological guide for the implementation of the LOLF published by the Ministry of Economy and Finance in June 2004 states that indicators must *be "relevant, that is to say, can assess the results actually obtained (consistent with the objective related to a substantial aspect of the result, to make judgements, avoiding adverse effects to those sought* "). Do indicators provided for the program “judicial justice" live up to these criteria?

The Design of Indicators for the "Judicial Justice" Program

A series of quantitative indicators have been set up to define *ex ante* the objectives and assess the performances *ex post*. The methodology of the quantitative index is not questioned as such here. We focus on the prevailing ones and try to assess their relevance for their own purpose. Indicators have been set-up for the 2006 Budgetary Law, but the list of indicators on Justice has since been adapted. Some of them were not filled in the first years due to lack of information; others were added since 2006. The broad framework remains unchanged. As stated earlier, the "Mission Justice" is divided into five programs, each of them including a series of objectives associated with performance indicators. It is not possible to provide here due to a lack of space a complete presentation of the totality of indicators. I focus instead on the main program of the Mission Justice: the Judicial Justice Program (Program 166). As shown in the following table (table 1), the list of indicators has been modified since the first Budget Law project set-up in the LOLF framework.

[8] quoted from the methodological guide for applying the organic law published by the Ministry of Finance in June, 2004 : *Guide méthodologique pour l'application de la loi organique relative aux lois de finances du 1er août 2001. La démarche de performance : stratégie, objectifs, indicateurs.*

Table 1 – Judicial Justice Program: a comparison between 2006 and 2010 Budget Law Projects

Programme 166 –	in 2006 Budget Law	Indicators in the 2010 Budget Law
1. Issuing decision in reasonable time in civil case	1.1. average duration of cases adjudication, by level of jurisdiction	1.1. average duration of cases adjudication, by level of jurisdiction
	1.2. theoretical of the stock of terminated cases, by kind of jurisdiction	1.2 (modified) Percentage of courts exceeding a ceiling duration of case processing
	1.3. average seniority of the backlog, by kind of jurisdiction	1.3. average seniority of the backlog, by kind of jurisdiction
	1.4. Average time for delivering of the judgment with the executory formula	1.4. Average time for delivering of the judgment with the executory formula
	1.5. *query rate interpretation, for correction of clerical errors and failure to rule*	(cancelled)
	1.6. rate of reversal by the higher court in civil cases	1.5 rate of reversal by the higher court in civil cases
	1.7 Number of civil cases handled by the judge or by the reporting judge	1.6 Number of civil cases handled by the judge or by the reporting judge
	1.8 Number of cases handled by civil servant in charge within the courts	1.7 Number of cases handled by civil servant in charge within the courts
2. Issuing quality decision in reasonable time in criminal cases	2.1. average duration of criminal procedures	2.1. average duration of criminal procedures
	2.2 rate of non-admittance of criminal recording by the the national criminal register (Casier judiciaire national)	2.2 rate of non-admittance of criminal recording by the the national criminal register (Casier judiciaire national)
	2.3. average duration of transmission of notice of criminal sentence to the national criminal register	cancelled
	2.4. rate of reversal by the higher court in criminal cases	2.3 rate of reversal by the higher court in criminal cases
	2.5 Amount of offences that may be prosecuted by public prosecutors department officers	2.4 Amount of offences that may be prosecuted by public prosecutors department officers
	2.6 Number of criminal cases handled by the judge or by the reporting judge	2.5 Number of criminal cases handled by the judge or by the reporting judge

Beyond the changes made in the list of indicators, it is worth noting that several among them have not been filed since the beginning. This is the case, for instance, with the number of judges involved in civil and criminal cases (indicators 1.7 and

2.5 in the 2010 Budget Act, table 1 above). In fact, the data delivered by the statistical service within the Ministry of Justice do not provide all the necessary information to enable the ministry to adequately fill these indicators out: the statistical data available to determine this figure is the actual budget, but this does not distinguish between the numbers of judges appointed to the civil law divisions in the courts and the number of judges appointed to the criminal law divisions in the courts. One solution was found by the Ministry of Justice for the Project of Budget Act for 2008 by a complex matching of several administrative payroll and personnel files.

One can admit that the first condition for an indicator to help determine an outcome is that the aim is precisely defined. However, many targets identified in the various actions and programs within the "mission Justice" resemble less specific goals as statements of intent, such as those among the objectives of prison management, *"adapt the management of housing stock to penitentiary population groups (minors -major), "develop the facilities of punishment", "optimize the judicial pathway of the young" ...*

Moreover, the vast majority of indicators are not *stricto sensu* performance indicators but focus strictly on raw quantitative empirical data. Strictly speaking, talking of indicators in these conditions is a misnomer. Indeed, a genuine performance indicator of performance should be like: "if x% of civil cases are processed within Y months, the score of the indicator" time "X is on a scale from 1 to N". Only some indicators are authentic indicators of performance, understood in terms of (average) productivity of judges. This is the case in the Judicial Justice Program, with indicators like "number of civil cases handled by judge or by the reporting judge, " and "number of criminal cases handled by the judge or by the reporting judge". However, the calculation of average duration of a case in the court is based on the aggregation of both cases heard and decided *and* referral of cases. This choice is far from being the most relevant. It would have been more appropriate and meaningful to retain the principle of calculating the duration by type of legal issues within each jurisdiction. Moreover, the Ministry of Finance "Methodological Guide" advocates variance indicators instead of average ones. The single indicator which is closer to a variance approach is the "percentage of courts exceeding a ceiling time" (1.2. in the 2010 budget law), which constitute a rather minimalist compliance with the Ministry of Finances recommendations.

One may consider that for each program objective, that includes several indicators. One would expect that indicators be developed that synthesize information on the associated actions. The core indicators should be commensurable (that is to say, expressed in a "metric" policy) and possibly ponderable.

Finally, one may wonder if the rate of reversal of decisions of first instance courts by appeal courts or of appeal courts by the court of cassation provides a good assessment of judicial quality. Some scholars consider it a good proxy of judicial quality[9]. However, the issue has been controversial among the judiciary in France. Some professional organizations, such as the Syndicat de la magistrature, have expressed their doubt about such indicators[10].

The Paradoxical Nature of Indicators and Their Interpretation

The development and definition of indicators was not achieved without resistance within the judiciary. For instance, professional organizations of judges have expressed doubt about the construction of a quality indicator based on the rate of Cassation. Some unions of the judiciary have tried in vain to attract the attention of the ministry to the limitations of the indicator *"query rate interpretation, for correction of clerical errors and failure to rule",* given that these complaints are often dilatory and it would have been better to measure the rate of admission of these requests. As a matter of fact, such an indicator was given up a couple of years after the 2006 budget law.

More generally speaking, professional organizations of magistrates as well as the Sénat continue to express their concern about strictly quantitative indicators, owing to the fact that they do not reflect the reality of the judicial activities within the courts. The Chief of the Court of appeals of Caen, Didier Marshall, reflects the views of the major critics regarding the

9 see Martin R. Schneider, Judicial Career Incentives and Court Performances. An Empirical Study of the German Labour Courts of Appeal, European Journal of Law and Economics, 20:127-144, 2005

10 According to a report of the Sénat, one major objection towards the reversal rate lies in a difference between civil and criminal cases. See Sénat, La mise en oeuvre de la LOLF dans la justice judiciaire, Rapport d'information n° 478 (2004-2005) de M. Roland du LUART, fait au nom de la commission des finances, déposé le 13 juillet 2005. Senator du Luart regrets that the professional organizations have not be invited to participate, even been consulted, to the setting-up of indicators concerning justice.

"reasonable time" indicators in both civil and criminal cases: The time of adjudication depends on the kind of cases and their legal base, which in turn are a function of the socioeconomic context of the courts[11].

More generally, many concerns were expressed about the interpretation of indicators and how to draw consequences from the standpoint of resource allocation. Indeed, the use of indicators for the budget decision may lead to paradoxes. A simple example helps to understand: an indicator of performance is the prisons' *'escape rate'* (indicator on *Penitentiary Administration*). Two opposite conclusions can be drawn from a high escape rate. If this rate reflects an insufficient supervision, then it would be logical to increase the capacity of the Program to address safety problems. Alternatively, if it represents a misuse of resources available, this should be sanctioned by a reduction of funds, with the risk of aggravating the situation. It is often impossible to draw practical conclusions relating to outcomes of measurements of indicators, and government departments are careful not to do so. As a matter of fact, it seems that the indicators are more Government- and Parliament-oriented than oriented at providing monitoring information at the courts level. In short, they cannot serve as assessment and management tools within the courts, due to the fact that, according to Judge Didier Marshall, they do not capture the "quality of work achieved' within the courts[12].

Under these circumstances, it is useful to consider the conditions of management of courts in the post-LOLF era.

II- The Management of Courts: Towards More Autonomy, Accountability, and Efficiency?

A basic principle of the LOLF is to empower managers of funds by giving them some leeway in the decisions of resource allocation, that is to say, ensuring their "fungibility." Chief program officers are expected to be able to reallocate funds according to needs and local constraints, such as redeployment of operating funds to capital expenditure. This fungibility is not absolute: it is "asymmetric" as we shall see later.

Management of "Asymmetric Fungibility"

The principle of "asymmetric fungibility" established by the LOLF is the ability to allocate authorised funds (wages, operating expenses, investment) for other uses than in projected appropriations, with the provision that managers shall not convert funds into additional wages. In short, it is possible to draw on wage funds to finance the operating expenses, but not *vice versa*...

To get a clear understanding of the issues of autonomy and accountability, a couple of key characteristics of the programs architecture should be remembered. : Each program is the responsibility of an executive official (usually at the level of "director" within the government). Each program is divided into *'operational budgets of program'* (*Budget Opérationnel de Programme* - BOP), comprising *"the share of funding a program available to an identified responsible for an area of activity (for example part of the program) or territory (region, department ...), in order to harmonize the management of funds from spot* [12.]

For the Mission Justice, the chiefs of courts are responsible for BOP: there is one BOP for each appeals court. One would expect that the asymmetric fungibility can be implemented by chiefs of courts as being responsible for BOP, but in practice fungibility is controlled and decided by the program executive manager -- the Director of Legal Services within the Ministry of Justice. In this respect, a persistently high level of centralization of decision making is inconsistent with the spirit of "accountability" of funds managers that LOLF is supposed to promote[13].

Authorization of Expenditure

What about the administrative and budgetary management of courts? Since 1996 the management of courts is supported by the Regional Administrative Services (RAS)[14] which depend on chiefs of appeal courts. The RAS were benefiting an administrative support provided by the state administration at the local level (*préfectures)*: management of authorization of expenditure was provided the *préfectures*. A 2004 decree transferred to the chiefs of court the task of expenditure

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11 D. Marshall op. quoted, at p. 124.

12 D. Marshall, op. quoted, at p. 124.

13 The statement of the First President of the Court of Appeal of Caen, Mr. Didier Marshall, illustrates this diagnosis: "Never Chancery was also mandatory in the management of resources. The LOLF eventually resulted in both early years, a highly centralized management leaving no initiative to jurisdictions posing on the regional administrative services, sometimes treated as external services of the central government, considerable pressure". D. Marshall, op. quoted, at p. 130.

14 SAR (Service Administratif Régional) in French.

authorization, excluding capital expenditures[15]. The shift of these accounting functions from local-level State Administration to the Chiefs of Courts is not without both technical and institutional problems.

The institutional problem concerns the fact that one can not separate the financial management of courts from the judiciary (and its basic principles). The chiefs of courts are simultaneously the first presidents and prosecutors of the Courts of Appeal. The fact that they are authorizing expenditures may undermine the principle of separation of judicial power and prosecution. The conference of first presidents of the *Cours d'appel* has unsuccessfully published a motion against this change in the management pattern of courts: *"The establishment of a very complex co-scheduling, which makes the implementation of the budgets of courts dependent on the signatures of the first President and the Attorney General, causes confusion. It causes confusion between prosecution and the representation of the public interest, which is the sole authority of the Attorney General who is hierarchically subordinate to the Ministry of Justice on the one hand and the judicial activity which is the sole responsibility of independent judges.*"[16]

As to the technical problems, they are due to the fact that before the 2004 reform, the time-consuming management of authorization of expenditure was provided by the services of the *préfecture*. Indeed, the transfer of responsibility to the heads of court was not accompanied by additional staff resources. The chiefs of courts were forced to assign officers to this heavy job, while the administrative staff is already inadequate in the courts and the clerks are not trained to perform accounting and financial management functions. Moreover, the balance between the judicial and administrative responsibilities within the courts is severely affected. The relationship between the chief clerks with responsibilities and managers/judges seems marked by a tension on the one hand; on the other hand, the relationships between the President of the Court of Appeals and the Prosecutor concerning funds allocation and utilization is not yet clarified and seems to vary according the level of jurisdiction. According to Jean-Paul Jean and Hélène Pauliat [17] and a Report of the Sénat[18], at the level of the Courts of Appeals, the general prosecutors seem to be more committed to administrative matters than the First President, more sensitive to the case-workload *stricto sensu*, whereas that at the level of the Tribunaux de Grande Instance , the reverse situation prevails: the prosecutors devote more time to prosecution than to management of the court, which is tackled by the President.

The Apportionment of Funds between Jurisdictions

The chiefs of courts must also allocate funds within the first instance courts in the jurisdiction of their court of appeal. The apportionment of funds is made after consultation with presidents of courts of all levels within a region, by means of a budget conference. Since January 1, 2006, the chiefs of Courts of Appeal assume, as part of their Operational Program Budget, the management of the entire funds allocated to the courts located within their jurisdiction. These resources are allocated as a lump sum**,** the amount of which is determined after a series of budgetary conferences organized at the regional level. These conferences are to discuss budget requests and check their justification. The chiefs of courts of appeal are received by the director of judicial services at the Ministry of Justice for a negotiation of management issues, after which the tradeoffs are made and the final budget is notified to the operational programming budgets (BOP). The chiefs of courts then organize the distribution of funds among the courts of their jurisdiction.

As noted by senators Détraigne and Dutour in their report on the Project of Budget Law 2008 concerning Justice and access to justice, the chiefs of courts as well as the Presidents of lower courts have only a very small leeway in managing credit. It follows that any savings or efficiency improvement realized by courts of first instance was not returned to them. Thus, the Tribunal de Grande Instance of Nanterre had achieved savings of 1.4 million euros over the post of legal fees without getting a matching contribution equivalent to another item of expenditure, contrary to expectations stimulated by the principle of interchange ability (fungibility) of credits[19]. The conditions under which the funds have been delegated to

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15 Decree No. 2004-435 of May 24, 2004 - art. R. 213-30 of the Code of judicial organization.

16 See the Statement of the Conference of First Presidents of the Courts of Appeal dated June 2, 2005.

17 Jean-Paul Jean, Hélène Pauliat, "An Evaluation of the Quality of Justice in Europe and its Developments in France", Utrech Law Review, (2)2, dec. 2006, at. p. 53 and following.

18 Sénat, Rapport d'information fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale par la mission d'information sur l'évolution des métiers de la justice par M. Christian COINTAT, Annexe au procès -verbal de la séance du 3 juillet 2002, n° 345.

19 Sénat, Avis présenté au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur le projet de loi de finances pour 2008, Adopté par l'Assemblée nationale, tome III : Justice et accès au droit, par MM. Yves Détraigne et Simon Dutour, Session ordinaire de 2007-2008 - Annexe au procès-verbal de la séance du 22 novembre 2007.

first level courts by the appellate courts are not satisfactory. It seems that appeal courts are reluctant to give some leeway to the courts of first instance, which does not contribute to the empowerment of managers as intended by the LOLF.

Legal Aid and Legal Costs: A More Restrictive Budgetary Pattern, a Legally-Driven Shift of Cost Bearers

As regards justice, provisional funds were traditionally allocated to finance two kind of legal expenses that depend only to a small extent on judges' decisions. The main part of these expenses (such as telephone tapping or forensic evidence in criminal cases, investigations into the social field of protection of minors, etc.) and legal aid are not under the sole control of the judiciary. Their amount depends on other actors than the judges, such as police services and litigants. These two sources of expenditures in recent years, have become a genuine obsession on the part of the political majority in parliament[20].

Regarding legal aid, reforms introduced since 1991 drive the change in the same direction: the transfer of costs from the state to other cost-bearers. The Act of July 10, 1991 provides that "in any matter, counsel for party benefiting partial or total legal aid may ask the judge to order the losing party to pay the lawyers fees, if he does not benefit himself legal aid…" According to a report in Parliament, this provision of the 1991 Act was scarcely implemented because the lawyers were pessimistic about the recovery of their fees from the losing party". They had more confidence on the payment of their fees based on public funds rather than on money in the pockets of the losing parties in trials.

In 2005, two steps towards were made as regards the shift in the cost-bearing pattern. First, the Ministry of Justice enacted a directive dated January, 12 about divorces[21]. The directive recommended the judges to take a better account of positive changes in the financial capacities of litigants benefiting legal aid in the course of the judicial process. Second, a similar directive dated 25 February concerning filing and examination of legal laid applicants by the Legal Aid Bureau reminded the latter that the benefit of a counsel ex officio should not automatically imply the benefit of legal aid[22]. The Directive also specified that the ex officio lawyer must agree on the fees which he will claim with the person whom he assists, if this one has resources higher than the ceiling for obtaining a legal aid.

Two years later, a law enacted 19 February 2007 concerning insurance of legal protection[23] provides that the principle of subsidiarity of legal aid is comparable to the benefit in insurance of legal protection. With that law, the burden of litigation costs is allocated on the insurance industry rather than on state funding.

In addition to legal aid, control *of legal costs* has become a central policy objective, after finding an alarming and excessive raise of these costs in recent years (e.g. in the appropriations acts, they increased by 48% between 2000 and 2004).

The desire to control and reduce legal costs has led to a series of steps: first to convert these credits, originally provisional credits, into limitative ones. In the first case, the funds were assessed on an interim basis, and upward adjustments as needed were available. In the second case, the funds allocated are final and no overtaking is allowed. The governments' commitment to lower the funds allocated to legal costs has also led to negotiation of discounted rates with mobile phone operators for the costs of wiretapping in criminal proceedings. In regard of another costly process, namely the deployment of genetic and medical expertise, the Ministry of Justice has launched a competitive tendering process towards laboratories for fingerprinting for a national computerized file of DNA.

In addition, the allocation of legal costs is directed primarily to the criminal at the expense of investigations or expertise in civil proceedings, to an extent that it is not feasible to measure it accurately.

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20 Sénat, Commission des finances, Rapport d'information n° 23 de M. Roland du Luart, sénateur de la Sarthe (rapporteur spécial de la mission "Justice") : *L'aide juridictionnelle : réformer un système à bout de souffle*, 2007. An expanded version of what follows is provided by T. Kirat & E. Serverin, ""L'allocation des moyens en fonction de la performance : les limites du modèle de régulation issu de la LOLF pour le financement et l'administration de la justice", Annales de la Régulation,vol. 2 (2009), Bibliothèque de L'institut de Recherche Juridique de la Sorbonne - Institut André Tunc, IRJS Editions, 59-78.

21 Circulaire du 12 janvier 2005 relative à la mise en œuvre de la réforme du divorce.

22 Circulaire du 25 février 2005 relative à l'enregistrement et à l'instruction des demandes d'aide juridictionnelle.

23 Loi n° 2007-210 du 19 février 2007 portant réforme de l'assurance de protection juridique.

Conclusion

In conclusion, we must insist on the two main effects of the LOLF and the reforms that accompany it: First, a huge increase of management responsibilities for the chiefs of courts of appeal and the heads of the lower courts, without an allocation of means to adequately administer these time consuming responsibilities. (And knowing that the increased budget for the mission "judicial justice" primarily benefits the program "Penitentiary administration"). Second, the chiefs of courts have not gained a real autonomy in terms of management and budgetary decision making. Ultimately, the implementation of the LOLF results, for courts and regional administrative services, in an overload of managerial and administrative tasks, without additional human resources, even without efforts to train judges and clerks in order to enable them to deal adequately with their administrative and budgetary responsibilities. In this regard, there is good empirical evidence that the increase of administrative and managerial tasks performed by the judges is correlated with a higher duration of case processing, a worse clearance rate, and a lower quality of justice[24].

In other words, under the new clothes of LOLF and the language of "performance" and "quality", judicial justice is the subject of actions unfavourable to a smooth functioning of the courts, given the heavier management tasks for judges and clerks, without autonomy, without adequate means, without the possibility for court to find a positive reward for their budgetary efforts to improve the administration of the courts in terms of means and results. The case illustrates the judicial justice to the environmental elements of diagnosis posed by the First President of the *Cour des Comptes* on the occasion of his speech at the solemn annual assembly of this institution, stressing that "the budget management in accordance with the 'LOLF regime' remains largely the domain of theory". President Seguin also put the emphasis on "the continuing of old budgetary practices and management" but, more importantly, he questioned the quality and relevance of indicators of performance, hence the realism and relevance of some "annual performance reports". President Seguin finally focused on "a kind of contradiction" between the LOLF and the organization of the governmental administration[25]. This last issue reflects the contradictions outlined above between the logic of autonomy and accountability brought by LOLF regarding the chiefs of courts, and the persistence of poor budgetary responsibilities and centralized decision-making.

24 see Edgardo Buscaglia & Maria Dakolias, *Comparative International Study of Court Performance Indicators. A Descriptive and Analytical Account,* The International Bank for Reconstruction and Development / The World Bank, 1999 ; on Brazilian courts, Luciana Luk-Tai Yeung & Paulo Furquim de Azevedo, "Beyond Conventional Wisdom and Anecdotal Evidence: Measuring Efficiency of Brazilian Courts", Escola de Economia de São Paulo, Fundação Getúlio Vargas, São Paulo, Brazil ; on Norvegian courts, see Sverre A.C. Kittelsen & Finn R. Førsund, "Efficiency Analysis of Norwegian District Courts", *The Journal of Productivity Analysis*, 3, 1992, 277-306.

25 Discourse of President Seguin, séance solennelle de rentrée de la Cour des comptes, January 27, 2009.

Digital Technology Leading the Way in Court Recording

More courts all over the world are setting up systems to ensure that accurate, accessible and reliable court records of proceedings are captured.

The court record may include the transcript, audio or audio and video recordings of any hearings, appearances and courtroom proceedings. Making the court record available to judicial practitioners and judges is seen as one of the best ways to show open and fair justice for all.

The use of electronic recording (ER) is becoming commonplace in the modern courtroom. Over the last 15 years, more than 30,000 courtrooms have adopted digital audio and video recording technology to capture, store and manage the court record. Compared to its analog counterpart, digital recording technology offers significant, tangible benefits both immediately and in the long term.

Most digital systems today are comprised of at least four (4) components: recording, note-taking, playback and storage. For best clarity and to facilitate the creation of verbatim transcripts, courtrooms typically require that at least four (4) independent audio channels (from a minimum of four microphones – one each for the judge, prosecution, defense and witness) are recorded. An increasing number of courts are finding tangible value in recording video as well as the audio.

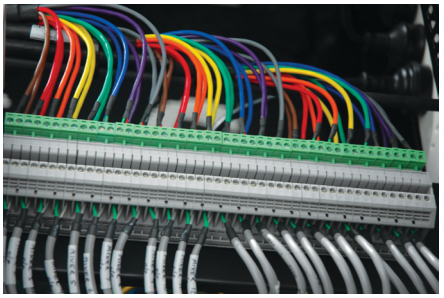
Users can take notes on the court proceedings through companion software programs. Some digital systems include electronic annotation programs that enable notes to be time-stamped and hyperlinked to the particular point in the recording when the note was made. This approach makes it extremely quick and easy to locate specific points within a court proceeding.

As for playback, digital recordings can be played back on any computer, which is one of their primary benefits. Recordings can also be stored for future use either on optical media or on network storage systems. Considering that official court records are often required to be stored for lengthy periods, courts often benefit from significant savings in storage space and cost by going digital.

Once the court has a digital recording system installed, there are many benefits that judicial administrators can take advantage of to speed up the administration of justice.

As mentioned earlier, one of the most tangible benefits is quick and immediate access to recordings of past proceedings - the ability to see and hear what happened during the case as opposed to relying on one's memory and hand written notes.

The latest technologies enable all courts to be connected to a unified system that has a central repository for all records, including audio/video recordings of a proceeding and associated linked notes (made either during or after the case). Thus, a simple search of the repository for specific keywords (e.g. Case Number) can be conducted in order to locate the relevant notes file and the corresponding segment of audio/video.



An example of the application of the technology can be best realized through some typical scenarios. Court proceedings are often transcribed from recorded proceedings such that they can be reviewed by attorneys, especially during the appeals process. The transcript for a case, for example, could easily include hyperlinks that can point to the exact moment in time during the case that the particular words were spoken; this capability is especially useful when reviewing a case in preparation for trial.

As another example, if a court has the appropriate infrastructure, all cases that have been recorded can be set up to be accessed in the same way that a web page is found by use of a web based search engine i.e. if a Case Number is entered in the search then all recordings that include mention of the case are presented in chronological order.

Judges can quickly benefit through immediate access to the court record, along with the ability to make their own private notes to assist with review at a later time. If the court uses a

designated transcription service provider, the recording can be relayed directly to the transcribers via the Internet, so that transcript production can start as soon as the courtroom proceedings commence.

Digital technologies can be customized in a myriad of ways to suit the infrastructure, operating environment, user profile and requirements of a particular courtroom; it can be implemented in as basic or as sophisticated a manner as necessary. With increasing pressure on operational budgets and the demand for faster throughput, digital recording systems offer a clear advantage.

For courts that have never recorded their proceedings, just the thought of going down that path, can be a daunting one. However, the good news is that digital courtroom recording technology and processes have evolved over the years to the point where they are becoming ubiquitous. Justice venues across the world are realizing the value of having a high quality, safely preserved yet easily accessible court record. This realization, coupled with the time and cost savings associated with increased workflow efficiency and employee productivity, is only serving to increase the rate of adoption of digital court recording.

Installation of the digital recording system is now one of the easiest ways to exploit advancement in technology without causing disruptive change to current work practices. The digital system can be adapted to suit the way that administrative staff carry out their day to day functions in the courtroom.

Digital recording can provide short and long term benefits, regardless of the type or size of court. It can deliver a proven return on investment that is in line with current and future demands on operational expenditure for judicial administrations.

Organization Development of the Dutch Judiciary, between Accountability and Judicial Independence

By Philip M. Langbroek[1]

Introduction

The Netherlands are a country on the European Continent with a French inspired legal system as far as civil and criminal law is concerned. Administrative law has followed a different development and reflects the middle position of the Netherlands between the French, English and German administrative law systems, while maintaining a dominant procedural position of public administration. However, the organization of the Dutch judiciary mainly follows the lines of the original French conceptions: it has been organized in accordance with the concepts brought to the low countries by Napoleons' army. This traditional continental judicial organization, operated by the ministry of justice and court presidents' for over 150 years has gone through considerable institutional and organizational change during the last 15 years.
In this article I will sketch the outcomes of a mayor evaluation research of the changes in the Dutch judiciary that started in 1995 and evolve until today. I will do this by first describing the change process against the background of the New Public Management. Second, I will describe the proposals for change and the actual changes. Finally I will describe the most salient outcomes of the evaluation study. I will conclude with a brief discussion of these outcomes.

New Public Management and the change process in the Dutch Judicial Organization

In 200 years the judiciary went through a development that started with a relatively unimportant position. During the 19th century the courts evolved into adjudicators by means of juridical interpretation of law. They had a limited capacity to block or reverse political decision-making. That position has remained to date, but judges are now an integrated part of court-organizations, which are subjected to intensified public and political accountabilities. The final transition is the result of the New Public Management inspired development of the Dutch Judicial organization.

The approach taken towards the Dutch courts fits the New Public Management approach to public administration. This approach propagates to implement models for the organization of competition oriented organizations – businesses - to organizations of public administration.[2] The drive behind this model is the strong suggestion that this would cause such organizations to provide better services to the general public and a better legitimacy of such organizations towards both the general public and political branches of government, by means of better accounting mechanisms. It should be stressed however that the New Public management does not imply a uniform regime of organization and policy development in public administration. The same holds for the promise that NPM-models automatically lead to a better legitimacy of a public organization, e.g. by more respect from policymakers and by a higher trust of the general public. Apparently success or failure of NPM-reforms in public administration, do depend on other factors than just implementing business models in public administration.[3]

The position of courts and judges in relation to other branches of government still has recognizable original French traits.[4] Courts are e.g. not allowed to review legislation against constitutional norms, and there is a Court of Cassation for civil and criminal cases (and for tax cases) . Within the context of applying legal rules, precedent, especially precedent set by the highest courts, plays an important role. This allows the courts sometimes to play a role with societal and political effects, as a consequence of cases brought before them. It should be stressed that court decisions on e.g. the right to

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[1] Philip Langbroek is professor of justice administration and judicial organization at the Montaigne Center of Utrecht Law school, Utrecht University, the Netherlands. The research reported on here was performed by Miranda Boone, Langbroek (Utrecht University) and Petra Kramer, Steven Olthof and Joost van Ravesteijn (Kpmg).

[2] There is a lot of literature on New Public Management: e.g. Kate MacLaughlin, Stephen J.Osborne and Ewan Ferlie (eds.), *New Public Management, Current trends and future prospects*, Routlegde, London 2002; Christopher Pollitt, Sandra Van Thiel and Vincent Homburg (eds.), *The New Public Management in Europe, Adaptation and Alternatives*, Palgrave Macmillan, February 2007; for a critical approach: John Seddon, *Systems Thinking in the Public Sector*, Triarchy Press, Axminster 2008. In the Netherlands, the book of David Osborne and Ted Gaebler, Reinventing government: how the entrepreneurial spirit is transforming the public sector, Reading, Adisson Wessely, 1992, was exceptionally popular amongst policymakers at that time.

[3] E.g. Steven van de Walle, Perceptions of administrative performance, the key to trust in government, Leuven, 2004, Belgium, who stresses that better accounting of administrative performance do not necessarily lead to a higher public trust.

[4] J.H. Merryman, The French deviation, American Journal of Comparative Law. issue 44, 1999, p. 113-114.

strike or criminal prosecution in cases of euthanasia on request, in countless taxation cases and other decisions of administrative courts, are based on case by case development of judicial doctrine by the Dutch Court of Cassation.

Also the judges' associations act as trade unions and professional associations only without reference to debates in the domains of political parties, parliament and government. The Dutch judges' association e.g. may take a stand on the relation between media and the courts, and on the provision of information by the courts. This however, is related much more to the position of judges and the relation of the courts with the general public than to the political domain of political parties, parliament and government.
This means the Dutch courts and judges usually do not have a strong political profile, even although sometimes politically sensitive cases are brought to the courts. A current example is the -complaint based - criminal case against populist politician Geert Wilders, accusing him of discrimination against the Muslim population by sowing hate against them. And, like in all cases, a court cannot refuse to decide a case when all conditions for the courts' competence are fulfilled, with, or without political profile.

The change process in the Dutch Judiciary was directed at making the judges more aware of the advantages of cooperation within their courts and between their courts, in order to maintain public trust and political respect. The aims were also to get organised to come to grips with fast societal changes, and also to develop itself into an organization that would be able to withstand public pressures. Improving services for the public, but also protecting judicial independence understood as unbiased judicial decision making have been key values throughout the process.

The evolution of change[5]
The formal situation before the change of the Judicial Organization Act in 2002, was as follows. The judiciary is a constitutional institution and, judges are to be appointed for life. However the actual organization was considered the responsibility of the ministry of justice. The former Judicial Organization Act instituted nineteen 'Arrondissementen' (the geographical areas of the first instance courts) and five 'Ressorten' (the larger geographical districts of the secondary appeal courts) for the criminal and civil jurisdictions. Arrondissementen and Ressorten were organised as geographic areas for adjudication, as territorially decentralized services of the ministry of justice. In each arrondissement a public prosecutions office functioned, together with a district court and a different number of 'kanton' courts (small claims/small crimes).The service organizations served both the courts *and* the public prosecutions offices in their districts. They were headed by a director, who, as a civil servant, was responsible to the ministry.

Judges and courts, as an institution, developed in the nineteenth century. Legislation has grown in numbers and laws have been periodically updated during the last century at an ever growing speed. At the same time, judges maintained their own unique and highly individualistic professional ethos and working culture, where professional status and individual autonomy prevailed. Judges had no inclination to work together as civil servants in other public organizations, most of which rely on hierarchy and project management for coordination and cooperation to get work done. This attitude of most judges was felt as an extension of the constitutional requirement of an independent judiciary, and was sometimes presented as a strong point.[6] On the other hand, in terms of preparing courts and judges to adapt to social changes, it represented a weakness. Judges by definition must deal with changing social situations, and apply the law in disputes that arise in constantly changing social contexts. The Netherlands had become a multicultural society; ICT did change public and private organizations and the way people work and communicate; and medical and biological breakthroughs provided choices that seemed impossible 25 years earlier, with both legal and ethical implications. Legislators try to adapt the law to meet new circumstances by means of new legal statutes, including. environmental law, privacy law, health care law, law on bio-technical experiments, law on procedures for asylum-seekers, law on reintegration of unemployed, the internationalization of crime and so on. Judges are also increasingly confronted with cases that cross national borders. This is not only true for trade law but also for criminal law. Furthermore, the European Union (EU) was and is standardizing regulations in many fields – thus prompting constant change in the national laws of the member states.[7]

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[5] For an overview of the Dutch legal system and its societal functioning, see: Erhard Blankenburg and Freek Bruinsma, Dutch Legal Culture, Kluwer, Boston, Deventer 1994.

[6] This view was expressed by the president of the supreme court when the bill of the new judicial organization act was already sent for advice to the Council of State. See: Th. B. ten Kate, W.E. Haak, De modernisering van de rechtsprekende macht, Nederlands Juristenblad 2000, p. 1607-1610.

[7] Market Competition is dominant Area, but also the European cooperation in the field of Criminal Law. Amongst the latest developments are the implementation of the Framework decision on the European Arrest Warrant (an arrangement for surrendering of convicts and suspects between EU member-states), and the Framework decision on the European Evidence Warrant – the latter not yet having entered into force.

Eventually judges realized that even courts and judges had to go through considerable efforts of organization and training to be able to deal adequately with these changing subjects, while also having to deal with increasing media pressure.[8]

During the 1990s several changes were implemented. First of all, the concept of 'integral management' was introduced. The courts would get a separate court manager, and this functionary would have to cooperate with the president of the court for the court's organizational management. This was a difficult position, because the court manager was a civil servant responsible towards the ministry of justice, but also had to actually serve the president and the court organization. Next, in 1994, sectors for administrative law were added to the district courts. Except for the Council of State, the administration of the specialized administrative appeal courts (social insurances, economic competition, industrial relations, students' grants and loans tribunals) was transferred from their different ministries to the ministry of justice.

Following the parliamentary inquiry into the drug trafficking policies of the Public Prosecutions Offices, the PPO has been reorganised. This also involved a reorganization of the services of court districts (arrondissementen), separating services for the PPOs and the courts. These formal changes took place while a debate evolved on the position and tasks of the judiciary as a whole. It should be noted that while these changes were implemented, a fundamental debate about the position and organizational functioning of the judiciary within the judiciary and between the judiciary and political branched of government evolved. At that time, the trust of the general public was at a fair level of about 60%, although 'repeat players' and business executives held the judiciary in higher regard.[9]

It has been a happy coincidence that the National Building Service launched a plan to improve the court buildings in 1989. Most of the court buildings were too small for the increased numbers of judges, court staff and files. The overcrowding caused judges to work mainly at home; and many of them wrote judgments by hand instead of using a computer. Over the following 12 years, many new court buildings were built, some of them with extraordinary designs, with enough room for judges and court staff to work in the courts' back-offices. Thus the new buildings helped to create an environment in which judges and court administrators could cooperate.

With more crimes brought to justice, it also became apparent that there was not enough prisons capacity; and convicted criminals for whom there was no space in jail were sent home. The public, the press and many politicians protested against this policy. This occurred while the building program for new prisons was underway. On the investigative side, a parliamentary committee on criminal investigations was established. Its 1996 report outlined the problems of the Public Prosecutor Office's management of investigative activities by the police, especially the methods used against drug-related crimes. Methods included telephone taps, searches on order of a public prosecutor, infiltrations into allegedly criminal organizations by police or informants; and pseudo-purchases of and trafficking in illegal goods to advance criminal investigations. In response to increasing political pressure, public prosecutor offices engaged in their own war on crime. They did this by organizing their actions independently in each court district, without adequate control of the police and without legal legitimacy or control by the courts (including the appellate courts), but especially without adequate control of investigating judges. The blame for this was assigned to the respective public prosecutor's offices. But the majority of members in the Lower House of Parliament at that time also blamed themselves for applying excessive pressure on the police and the prosecutions service to combat crime. The conclusion that the courts had failed to control the criminal investigations adequately was almost ignored in the public debate. But a group of judges feared that the next parliamentary inquiry might be directed at the judiciary. They wanted to prevent being that much exposed to public scrutiny, risking losing the trust of the general public altogether. They called themselves: the Future of the Judiciary. The group was led by Mrs. Charlotte Keijzer, a judge then working temporarily at the Judicial Administration Service of the Justice Department, and Mr. Jan Nijenhoff, a judge from Arnhem district Court and Secretary of the Dutch Association of Judges at that time (1995).

As criticism of the courts by politicians began to increase, one of the foremost critics was the Queens Governor of the Province of North-Holland, Van Kemenade. Other politicians of like mind said the government was overburdened because conflicts between citizens and public bodies became too heavily embedded in too many legal rules. This applied especially to the new administrative legal protection system based on the General Administrative Law Act of 1994

[8] Of course, this is not an exclusive Dutch phenomenon. See e.g. the excellent Study of Pamela D.H. Schulz, Courts on Trial: Who appears for the Defence?, PhD Thesis, University of South Australia, Adelaide 2007.

[9] A.W. Koers, J.A.M. Vennix, J.M.M. Austen, Waar staat de ZM?, Utrecht 1996. This also is shown in figure 6.1. A. Hendriks and J.van Erp, Waardering van de rechtspraak, in: J.G. van Erp (red.) Kwantitatieve Ontwikkelingen Rechtspraak 2000-2005, Informatie ten behoeve van de Evaluatiecommissie Modernisering Rechterlijke Macht, WODC, The Hague, Cahier 2006-10, p. 68. from 1997 to 2005, the trust of the Dutch public as measured in the Eurobarometer fluctuates around 60%

(GALA).This involved the instalment of administrative law sectors (Dutch courts have separate divisions for civil, criminal and administrative cases and a division is called: 'sector') in the district courts, and thus the creation of many new judicial positions at those courts. Many of those judges had been working as juridical staff at the Council of State and pursued similar ways of judging as the Council of State before the introduction of the GALA. This involved occasional dismissal of decisions of e.g. mayors of several cities to close down drug-café´s that caused trouble in the neighbourhood. Because of such decisions, which also took the rights of the café-owners into account, the mayors showed their discontentment openly in the media. Because mayors are appointed politicians, they also used their party connections to complain, and the complaints received support by the judicial division of the Council of State, whose jurisprudence restricted discretion of first administrative first instance court judges.

It was in the 1990s that newspapers and television programs also took increased interest in criminal cases, with court proceedings in the spotlight, as crime went on the upswing and quickly became a political issue. While there was no equivalent of the O.J Simpson trial, it was clear that courts and judges were under media and political pressure to account for how they dealt with every type of case.

However, there was also a bright side. Judges generally did not participate in public political debate, and the public for its part exhibited a fair degree of trust in the judiciary.[10] Even so, criticism of courts and judges has increased even more in the years since 2002, including among the public commentators, barristers, solicitors, scholars and litigants, but above all, politicians. Politicians frequently suggested courts were inefficient, especially when proceedings took years of expensive court time. New technologies and thus even more transparency of the body of jurisprudence have brought to light inconsistent judgments in similar cases. Prosecution of a purse snatch in Amsterdam and a purse snatch in the town of Assen should not be decided too differently, as the media and lawyers alike closely watch court verdicts, but above all judgments in similar cases heard in a particular court should not differ materially.

Pressure for change; proposals bottom-up:
The appearance of the Future of the Judiciary group appeared to be timely, as the discussion among experts on public and political accountability for public services had intensified, leading to more scrutiny of the position of judges within the court organization and their traditional institutional independence. The Future of the Judiciary initiative had two aims: (i) to begin a debate among judges about the significance of societal developments for courts and judges; and (ii) to establish an agenda for the judiciary to deal with the outcome of these discussions.[11]

The overall aim was to establish the judiciary as a significant societal player based on general trust of the public and respected by the political branches of government. The project was financed by the Department of Justice and organised with a very low political profile to keep the process free from political comments or possible interference. The ownership was in the hands of stakeholders, in this case an assembly of leading judges of the District and Appeal Courts. It consisted first of consultation rounds with all court management boards to encourage participation by individual courts. Second, views of stakeholders (insurance companies, the public prosecutions department, trade-unions, employers, administrative office holders, scholars in law, public administration, sociology of law and ICT) were solicited as well as the view of some 100 judges participating in 10 sessions on the work and organization of the judiciary. Advice was sought from Jaques Vennix, an expert in group model-building as a tool for strategic choices in organization development[12]. The outcome of this first round of consultations was presented to all members of the judiciary. The third phase of the project consisted of a final round of some 14 discussion sessions throughout the country, with the participation of 175 judges. The outcome was very clear; judges agreed they should change their ways and that organization development was necessary.

For the judges, the most important themes were:

- Coordination of jurisprudence within and among the courts.

  Participating judges were in favour of making each other's jurisprudence accessible to all by means of ICT. Guidelines relating to the use of rules of procedure and, for specific issues also relating to the content of court decisions (e.g. alimony calculations, sentencing guidelines, calculation of compensation in case of involuntary dismissal from a job), were discussed.
- Quality of jurisprudence and court sessions.

  Judges have mainly been focussed on the content of their work, not on the organization. Judges believed treatment of clients by the court administration could be improved, but the role of judges in this remained open to debate.

[10] Idem.

[11] See footnote 5.

[12] J.A.M. Vennix, Group Model Building: Facilitating Team Learning Using Systems Dynamics, Chichester, 1996.

- The gap between judges and court clerical staff.

Many judges believed this was not right, but did not know how to take responsibility for the organization of services without a clear definition of judicial and organizational responsibilities. The uneasy feeling of the judges about working relations was generally shared by members of the clerical staff who also pleaded for better career possibilities.

- A council for the judiciary with administrative competences.

Many judges explicitly referred to the ministry of justice as the cause of their discontentment. They believed there should be some institutional mechanism to defend their interests towards Parliament and the ministry, and to communicate with the media and the public about all issues concerning the judiciary. Members of this council should be judges with managerial skills.

Restructuring the Judicial organization in the State: proposals top - down.

After the conclusion of the parliamentary debate on the inquiry into criminal investigations, the Lower House asked the then minister of justice, Sorgdrager, to start an inquiry into the organization and equipment for the judiciary.[13] In June 1997, the Leemhuis[14] Committee was installed, and reported in January 1998. It proposed to improve the judicial organization in regard to judicial independence, quality and efficiency. Main problems to be solved were: a tensions in the relationship between the Justice Department and judges; a lack of organization among judges;, a shortage of personnel to develop and implement necessary changes; a lack of leadership; and the absence of decision making structures for judges. The Committee proposed that a Council for the Judiciary be instituted. This council would be the public body governing the judicial organization as a whole, with tasks in the fields of budgeting, judicial co-operation, personnel policy, quality management, public services, appointment of judges, and of course the management of housing, security, IT, and information. The council would also have a main task in annually negotiating funds for the judiciary with the justice department and dividing funds amongst the courts. The council was proposed to have five members: three judges and two others who should be experts on finance and organization. The general idea was to have a buffer between politics and the courts. The other major element of the Leemhuis Committee's advice was to introduce a new management model for the courts. Each court would have a board consisting of two judges, the president, the director for quality management (a judge) and the director for organizational management (a professional manager). The board would sit above the judges of each court regarding their organizational functioning (e.g. planning and case management. It would, of course also direct the members of the local court service organization. For its financial and organizational management, the courts' management boards would be accountable to the Council for the Judiciary.[15] This would involve following strict accounting rules and developing reliable registries on production, finances and quality management.

A further milestone in the ongoing change-process was the decision of the Dutch Cabinet that the proposals of the Leemhuis Committee would be the basis for changes in the Act on the Judicial Organization. Investments in the courts would be prepared by the Judicial Organization Reinforcement Project (*Project Versterking Rechterlijke Organisatie-PVRO*). It should be noted that this outcome was the result of a political compromise. Politicians were willing to invest in the judiciary if the judiciary would be willing to take responsibility and to be accountable for its functioning. The PVRO project commenced in the spring of 1999. The assignment of the project group was to implement the ideas developed by the Leemhuis Committee in accordance with the Cabinet decision.

This project was an effort to develop the judicial organization into separate organizational domains. The projects within the PVRO concerned the decision-making and management structure, personnel policies, ICT, working processes, quality management, co-ordination of punishment-sentences, regulations for handling complaints, regulations for divorcing, and applications of rules of civil and administrative procedure.[16] The idea was that judges themselves would develop and implement the changes on the subjects at hand. So, for example, a PVRO working party developed a model for personnel policies within the judicial organization, and a local change team would be expected to organise the implementation of that model within each separate court organization.[17] These changes could not be of a permanent character if the institutional setting of the courts and the judges were not changed as well. Hence bills for a new Judiciary Organization Act and for an Act on the Council for Judicial Administration were sent to Parliament in June 2000.

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[13] December 10, 1996, TK 1996-1997, 25000 VI, nr. 30.

[14] At that time the Queen's governor of the Province of South-Holland.

[15] Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis), Rechtspraak bij de tijd, Den Haag, januari 1998.

[16] PVRO; programmaplan April 1999.

[17] Derde voortgangsreportage PVRO, 1e halfjaar 2000, van landelijk naar lokaal, Amersfoort 2000.

The new Judicial Organization Act

The bill for a new Judiciary Organization Act[18] proposed some important institutional changes. First the Act provided a legislative basis for a situation which had developed since the late 1980s: the existence of a management board for each individual court (district courts, appeal courts, but not the Supreme Court), consisting of a president, the co-ordinating vice presidents of the different courts sectors, and the managing director (not a judge). Under the Act, these members are to be appointed by Royal Decree for a period of 6 years. The idea behind this limited period is that it should be possible to replace a member of a board if s/he does not fulfil their function adequately. Reappointment is possible for another 6 years. This was a revolutionary change, because until then the president of a court was appointed in that function for life. The consequence of this change was that – in principle, a president or a judicial board member can be dismissed from the courts' management board, but, of course, not from their judicial office. So far, such a dismissal has not occurred.

The tasks of the management board are to take care of ICT and information management, accommodation and security, quality management and personnel. Other tasks are to further consistency of judgements and their juridical quality. In these matters judges and court staff alike are subordinated to the management board organizationally. But the management board must not influence the application of rules of procedure or law in concrete cases. This may be viewed as an expression of the fact that Dutch judges are formally called 'judicial civil servants', in the Statute act regulating their labour position.

Via the budgeting process, the Minister of Justice has competences to oversee and enforce the well functioning of the Council for the Judiciary, especially concerning financial and production reports. The Council is accountable to the ministry for providing information on production and quality of services, and for money received and spent. The budgeting system is arranged by Royal Decree (order in council). It was the cabinets' plan that the courts would receive annual funds according to the number of cases decided in the year before. This system was intended to stimulate the courts to prevent backlogs and increase productivity[19] (productivity is number of cases in a year divided by the total amount of fte employed by the courts). However, the introduction of a separate and effective system of quality management is thought of as a necessary precondition for implementing such a budgeting system. To date, both such an out-put based budgeting system and a related system for quality management are functioning.

Another major change is the integration of the kanton courts (small claims/ small crimes) as a separate sector into the district-courts. This did not imply a physical centralisation of court activities, but kanton courts would cease to exist as separate organizational units. Sub-district judges had resisted this change effectively for almost 10 years[20], but they lost their battle to maintain their own organizational culture, which differed considerably from the organizational cultures of the district courts. Kanton judges had developed a way of dealing with issues which was based on their practical experiences, rather than on theoretical considerations. This pragmatism may be seen to have developed as a consequence of the large number of cases they had to deal with (and continue to have to deal with). For instance, to make guidelines for the application of material law in the fields of divorcing or damages at involuntary discharges was seen as anathema by most judges of the civil and criminal court sectors. The pragmatism of kanton judges went even further, as they preferred to apply the sentencing guidelines of the public prosecutions office in most traffic offences. It is therefore arguable that 'professional autonomy' probably had a different meaning for judges of the civil and criminal court sectors compared to kanton judges. Most kanton judges had had to operate in more organizationally-constrained environments which required pragmatic approaches to resolving issues.

From a continental law system perspective, the new judicial organization Act also enabled a much more flexible deployment of judges throughout the country. Under this Act, each judge is now appointed as a substitute judge in all the other courts at the same level. This was intended to allow the courts to engage in deployment of their judges to any a court in need of their capacity. Based on this arrangement, special provisions have been made for the allocation of aliens' cases and of 'mega' criminal cases. The latter are allocated to the courts with sufficient capacity at the time the case is fit for trial.[21]

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[18] TK 1999-2000, 27 181 nrs. 1-3.

[19] Commissie Meijerink, Recht van spreken, interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak, The Hague, July 1, 1999

[20] The way they did this was described by Pim Albers, in his dissertation: Met Recht Herzien, Een onderzoek naar de beleidsvoorbereiding en implementatie van de eerste en tweede fase van de herziening van de rechterlijke organisatie, Tilburg 1996.

[21] Mega cases are defined as cases with more than 30 hours hearing time. Also see: Mirjam Freudenthal and Philip M. Langbroek, assignment of cases to the courts in the Netherlands, in: Case Assignment to and within Courts, a comparative study in 7 countries, Philip.M. Langbroek, Marco Fabri (eds. and research directors), Shaker Publishing, Maastricht, November 2004, p. 167-191.

The judicial profession remained quite sceptical about the proposed budgeting system.[22] They feared their professional autonomy, if not their independence, would be affected by financial and economic considerations.[23] Others criticized the proposed Act heavily from a constitutional point of view.[24] And even the President and the Procurator General at the Supreme Court objected to the speed with which the cabinet wanted to have the acclaim of Parliament for both bills.[25] The criticism was not only generated by lawyers. Sociologists of law also doubted the effects the bills will have on the authority of judges.[26] Nonetheless, the bills to change the judicial organization act were adopted by parliament, even although in the senate quite some scepticism was expressed. The political promise to invest in the judiciary was more compelling than holding on to traditional judicial views on the position of the judiciary within the state organization. The new Act entered into force on January 1, 2002.

Money according to production

The Council for the Judiciary and the courts are not autonomous legal persons according to civil law. They are legally a part of the organization of the national state and their finances are a part of the ordinary financial accounting system under the law on financial accountability. The Order in Council on the finances of the courts, therefore is of great importance for the relationship between the Council for the Judiciary and the courts, and for the position of the Council in relation to the Ministry of Justice.

During the years 2002- May 2005, the new accounting system was introduced into the courts. The system of production measurement and related budget allocation was not put into effect until May 2005, even although measured production showed a huge increase of numbers of cases decided during 2003-2004. From input orientation the financing system was changed to output orientation. According to the new financing system the courts and the judiciary as a whole receive money in accordance with the production of cases decided in the year previous to the budget year. A small part of the budget, however, is allocated as a lump sum, related to special projects and special costs for court-proceedings (e.g. hiring experts by the courts). Special projects usually are started on request of one or more courts (e.g. mediation in administrative law proceedings, or mutual coaching of judges in their performance of court hearings (there are some 100 of such projects going on in Dutch courts). The courts' production is measured in 49 categories of cases. To each of these categories an amount of minutes (time units) is attributed, meaning the average court time necessary to handle such a type of case. This amount of minutes is based on empirical workload measurement to be repeated every 3 years. Therefore, the money the separate courts are entitled to is: number of cases decided per category x minutes per case x minute price. No need to say, this system requires reliable production registries and accounting systems in the courts.

The Council for the Judiciary receives money from the ministry of justice (as a part of the budget bill for the ministry of justice) according to the aggregate production of all the courts together. In the relationship between the Council and the Ministry of Justice, the number of categories has been reduced to 11 categories, but in the relationship between the Council and the courts, the 49 categories remain. For these 11 categories the Minister of Justice sets the price per minute every three years.
A budget rule is that each court may have a reserve capital of maximum 5% of its annual budget. When they have earned more, the extra money flows back to the account of the Council for the Judiciary.

It is an essential part of the financing system that a nation-wide system of quality management is activated in the courts, so as to counterbalance the possible economizing effects of the financing system on the courts and judges.

Evaluation of the first 4 years

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[22] See: A.M. Hol, Wijsheid of efficiëntie, over de spanning tussen rechtspraak en management, in: P.M. Langbroek e.a. (red). Kwaliteit van rechtspraak op de weegschaal, Utrecht/Zutphen 1998, p. 255-267. The editors of NRC-handelsblad (one of the leading national newspapers in the Netherlands feared cynical effects of such a budgeting system. Editorial August 17, 1999.

[23] Ibid. p 65. F.C.J. van der Doelen, Measuring the Quality of Judges, argues measuring the quality of the performance of judges by the courts does not have to interfere with their independence at all, in: Marco Fabri and Philip M. Langbroek (eds.) The Challenge of change in judicial systems, developing a public administration perspective, IOS Press, Amsterdam, Washington DC , September 2000, p. 155-166.

[24] P.P.T. Bovend'Eert, C.A.J.M. Kortmann, Het Court-Packing Plan van het kabinet Kok, Nederlands Juristenblad 2000, p. 1769-1775.

[25] Th. B. ten Kate, W.E. Haak, De modernisering van de rechtsprekende macht, Nederlands Juristenblad 2000, p. 1607-1610.

[26] Nick Huls, Wie bewaakt de eenheid en de kwaliteit van de derde macht?, Nederlands Juristenblad 2000, p. 1776-1777.

In 2006 the new setting of the judiciary was evaluated from several organizational and professional aspects. The evaluation took place under the guidance of the Deetman Committee[27]. Within this framework, the study I participated in focussed on the functioning of the court organizations between the council for the judiciary and the judges.[28] We wanted to see how the Council for the Judiciary and the courts' management boards dealt with their tasks in applying the new accounting system, and especially how the judges have experienced the new situation from the point of view of the content quality of their work. There are many other aspect to the organization development of the judiciary but I restrict myself to the quantity-quality aspects of the judicial work. The study involved a methodology of questionnaires (2900, response 63%), self evaluations of the 25 courts' management boards in the Netherlands and interviews and round tables with almost 200 judges and court managers.[29]

What we found was that the Council for the Judiciary and the management boards of the courts have invested heavily in the introduction of the new system of measuring and accounting for production. They also invested time and effort in the development and implementation of the system for quality management, but the production and finances registries were priority number one. The system for quality management became effective one year later (2007) than the financing system (2006). For the Council and the management boards of the courts the most important issue was to show (to the ministry of justice and the ministry of finance and parliament) that they could manage public money adequately. So, even from 2002-2005, when the financing and accounting system was being installed and the budget for the judiciary was also based on other factors than 'measured production', the Council for the Judiciary and the management boards of many courts were chasing after productivity[30] increases and shorter throughput times. This was especially sought after by the Council, as they discovered differences in productivity between the courts, and therefore they had decided to award increases in productivity with extra money. As a result, by 2006, 9 out of 19 district courts had a financial reserve larger than the allowed 5% of their annual budget – the surplus flew back to the account of the Council for the Judiciary.

Other developments, that had been set in motion already by the PVRO-project, concerned the consistency of judging in all court sectors. Guidelines were developed on administrative and civil procedure, on alimony payments and damages in cases of involuntary dismissal; and even in the criminal law sectors, developments started to use the policies of the Public Prosecutions' office for sentencing demands as 'points of orientation' for sentencing. Furthermore, the Council had issued guidelines to reduce postponements (in order to use court capacity as efficiently as possible, and in order to reduce average throughput times), also in criminal cases. We encountered judges who felt they were being pushed to increase production. Because of their loyalty to their courts – as they told us- they worked many more hours than they were supposed to. Together with the courts' management boards they neglected their training and education programs – they often simply did not go to courses even although they had subscribed to them.

According to the judicial organization Act of 2002, the management boards of the courts have as tasks to further the quality of the judicial work, but also the consistency of judging. We asked judges how far they felt free to deviate from guidelines on procedure and from guidelines on the content of judgements. The answer to this question was rather divergent. In the questionnaire, 34% (N=1270) of the judges indicated that they would be called to account (peers, sector chair) when they would deviate from arrangements on procedure, but 54% nonetheless felt free to do so and about 60-70% indicated they almost never do. Concerning organizational arrangements on the contents of judgements almost 25% (n= 1282) indicated they would be called to account for deviations, although 74% felt free to do so, but about 60% of the judges indicated they only seldom deviate from guidelines. Nonetheless, research amongst advocates and other repeat players showed that consistency of judging still is not sufficient according to their perception. Courts still are relatively unpredictable. In the interviews, however, judges complained they did not have enough time to go into the depth of a case, and that deviations were not desirable for efficiency reasons.

What also confused us in interpreting these results is that the overall increase in productivity from 2002-2005, was about 8%, so on average 2% per year. Most of this production increase has been realised in the small claims/ small crimes

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[27] Mr. Wim Deetman is a former minister of education and was mayor of the Hague (until 2008). See also: http://www.rechtspraak.nl/Gerechten/RvdR/Achtergrondinformatie+Commissie+Deetman.htm, especially the final report: Rechtspraak is kwaliteit, December 2006.

[28] The evaluation study was conducted by KPMG and Utrecht School of Law, published in Dutch: Miranda Boone and Philip Langbroek (Utrecht University), Petra Kramer, Steven Olthof en Joost van Ravesteijn (KPMG), Financieren en Verantwoorden, Het functioneren van de rechterlijke organisatie in beeld, Boom Juridische Uitgevers, Den Haag 2007.

[29] Space limits for this essay make it impossible for me to go into full details and nuances of our analysis.

[30] Productivity is defined as production of cases decided measured in standard time spent on these cases/ by the number of fte employed by the courts.

sectors (the former kanton courts) of the first instance courts. Production was raised much further (about 8% annually in the first 2 years and slightly less in the fourth year), but this may be explained by the expansion of personnel in the courts since 2001.[31] Politics lived up to their promises; the judiciary was one of the few branches in public administration that did not suffer from cut backs in public expenses. Nonetheless, we encountered many judges complaining about work pressure, but we encountered also only a modest increase in productivity. Why then our findings of timidity and protest against the ways in which the courts were being led?

Several sector chairs from the first instance courts we interviewed told us they were glad the older generation, several of which were considered 'stubborn' judges, had almost entirely retired. So we also see a process of rejuvenation of the Dutch judiciary with many persons entering the courts either as young trainees or as side in-streamers, for example from law-firms. They are being socialized in a changing judicial culture where conformism, fear of having a judgement reversed in appeal[32], and perhaps also fear of negative exposure in the media, have become more dominant. There have been several recognized miscarriages of justice in the recent past (for example, the park-murder of Schiedam; the temporary release of a women trafficker for humanitarian reasons), and public debates are ongoing about the appropriateness of final judgements in several other criminal cases. Several TV programs have displayed misgivings about judgements, and criticized sentences as being too soft on crime.

What we perceived from this evaluation is that a process of restructuring of the actual functioning of the courts has continued since the PVRO process started, where judges have increasingly become organizationally embedded within their court sectors. The courts have made great progress in their organization development. They have become manageable organizations, and this should be applauded as a necessary development in the light of the immense societal pressures exerted on the courts by the media, members of the public and by the ministry of justice and members of parliament. Without organization they would be almost defenceless against those.

Discussion: Courts and Judges Under Public Pressure Versus Professional Judicial Self-Assertion In The Media

From the evaluation research it seems as if judges have become much more 'functionaries' only than they were before the change process started. Of course, there are differences between court sectors and there are differences between courts and, above all, differences between judges. But this is the overall trend. Given the immense societal challenges for the judiciary, I found the one sided economization of judicial work questionable. The role of the Council for the Judiciary and managing judges in the boards of several courts in that process was at stake, because interviewed judges complained they had to give in on content quality. On the other hand, also in the courts, organization development is not possible without a certain discipline of the members of the organization. To date, the Council has changed course and stresses the need for quality of judging. That expressed need comes with a elaborated policies for training, specialization and a change of the geographical court map. Efficiency has remained an organizational aim, however.

From a point of view of judicial independence – not from the constitutional point of view, but regarding the judicial attitude - a certain sensitivity of first-instance court judges for implicit organizational pressures on production and with consequences for their case management should be a matter of concern. In so far, Dutch judges and the Council for the judiciary have been the Ministry of Justice' most loyal civil servants. In a reaction to the report of the Deetman Committee, the Dutch government has stated that indeed attention for quality is necessary, but within the parameters of continued attention to efficiency.[33] In that respect the new judicial organization in the Netherlands lives up to the suggestion of Guarnieri and Pederzoli, according to which a solution to the rising tension between the judiciary and politics is necessary, balancing restraints on judicial power with a safeguarded judicial independence. They fear for a judiciary as a major political power within the (actual) constitution.[34] However, in the current Dutch judicial system, judges do not take such a position. It is a question if this condition should be evaluated as the new and desirable balance between the judiciary and political branches of government as Guarnieri and Pederzoli have referred to.

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[31] See: W. vander Heide and D.E.G. Molenaar, Personeel en uitgaven rechtspraak, in: J.G. van Erp (red.) Kwantitatieve Ontwikkelingen Rechtspraak 2000-2005, Informatie ten behoeve van de Evaluatiecommissie Modernisering Rechterlijke Macht, WODC, The Hague, Cahier 2006-10, table 5.3. The increase from 2001-2002 was 1300 fte; from 2002 to 2003 498 fte. In 2005 the judiciary (judges plus juridical staff) counted 8174 fte. Administrative court staff are not part of these figures.

[32] This is a marker in the quality system.

[33] Kabinetsstandpunt inzake de evaluatie van de modernisering van de rechterlijke organisatie, letter of June 27, 2007 to the Lower House, p. 18. Also see the reasons for the bill sent to Parliament to redress the problems discovered by the evaluation exercise: Evaluatiewet modernisering rechterlijke organisatie, TK 2008–2009, 32 021, nr. 3, where 'efficiency' is a key word.

[34] Probably based on their Italian experience. Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges, Oxford 2001, p. 191-196.

There may be many reasons for the way the Dutch judiciary developed since the new Judicial Organization Act entered into force in 2002. The organizational changes were absolutely necessary regarding the increasing public and political criticisms on the judiciary. The Judiciary needed a decision-making and organizational structure, on the national and on the court levels. Without such a structure, the courts and the judiciary would be quite defenceless against the media, other critics and, possibly, members of parliament.

Under the pressure of production-based financing and the new organizational hierarchy for accounting purposes the Council and the courts' management boards have transformed the courts into production-oriented organizations. Many managing judges and ordinary judges have shown to be sensitive to the expectations put upon them, and for the persuasions exerted towards them. The introduction of the new financing system carried the risk that judge-managers were not able to resist economizing pressures and that several judges appeared to be conformist against expectations put onto them. Many first instance court judges prioritized production over guarding a high content quality during the first transition years.

It should be also noted, however, that although many judges did complain heavily about working pressures, they also did not go to court to fight their situation. Apparently, breaches of judicial independence as stated in the Dutch constitution or in the European Convention on Human Rights did not occur. Appointed judges - as civil servants - never addressed the civil servants' court (The Central Appeals Tribunal, a specialised administrative court) to stand up for their legal position in their court organization. They complained to us during the interviews but they abided with working pressures. This may be explained by their loyalty to their court organization, but maybe they were also convinced of the inevitability of the organizational changes.

In reaction to the evaluation study commissioned by the Deetman committee, the Council for the Judiciary and the managing judges in the courts try to reinforce the professional capabilities of judges and court-staff. It also tries to improve the management skills of managing judges. Thus it tries to strengthen the autonomy of court organizations. The purpose of this is to increase content quality of judicial decision making, and also to enhance organizational support for judicial work. And another purpose is to enable the courts to further develop interactions with their societal environment (e.g. the general public, advocates, notaries, journalists, child protection agencies).

During 2009, negative media exposure of the judiciary has continued and leading judges like the president of the court of cassation and the president of the Dutch judges' associations have called upon their colleagues to engage in more efforts to explain judicial work to the general public.[35] Thus they have tried to inspire their colleagues to assert themselves professionally in public when need be. Because of the responsiveness of leading judicial policy makers, and given the success of the efforts for organization development and accountability so far, the judiciary has a good chance to further enhance its position within the Dutch state, society and in the media. This latter aspect, however, is a subject for further analysis beyond the scope of this article.

[35] G.J.M. Corstens, De derde macht, Lunchlezing voor de Wetenschappelijke Raad voor het Regeringsbeleid, 16 april 2009; Reinier van Zutphen Television interview, October 25, Hilversum, The Netherlands.

Budgeting in the Era of Judicial Independence

By Jesper Wittrup

Introduction

In this paper judicial independence is viewed from the angle of economics. Economic historians have identified judicial independence as a key element in explaining why some nations have had a more successful economic development than others. Empirically it is shown that perceived judicial independence correlates with economic growth. I argue that the crucial importance of judicial independence and how it is perceived poses a challenge with regard to judicial budgeting, and that this true with regard to both basic models of judicial budgeting presently found in Europe: the traditional model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and the more "modern" approach which grants this authority to an independent judicial council. However as illustrated with practical examples, in both cases the use of carefully designed and transparent statistical performance indicators may help authorities to deal more properly with the challenge posed by judicial independence.

Judicial independence is a key value of modern judicial systems. In this paper, I argue that we should support judicial independence not only out of principle, but also because it helps generate economic growth. I then go on to argue that the concern for judicial independence poses a severe challenge with regard to budgeting for courts, implying that there is a need to consider carefully the organizational and institutional tools applied for handling judicial budgets. In addition however, I argue that the use of carefully designed and transparent statistical performance indicators may help authorities to deal more properly with the challenge posed by judicial independence, and that this is true with regard to both basic models of judicial budgeting presently found in Europe: the traditional model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and the more "modern" approach which grants this authority to an independent judicial council .

The outline is as follows: First, I will briefly introduce the specific understanding of judicial independence from the perspective of economics. The economic angle is especially relevant because economists have had a major role in the development of the current and widespread consensus about the crucial importance of judicial independence. Second, I will present empirical evidence that perceived judicial independence impacts economic growth. Third, I will explain why the concern for judicial independence poses a challenge for both basic models of judicial budgeting, and how the use of well designed statistical indicators as the primary tool for making budgetary decisions may help alleviate this. The handling of judicial budgeting in Denmark will serve as an example to illustrate this point.

The economic approach to judicial independence

When law scholars talk about judicial independence they sometimes (but not always, though) tend to treat the concept as an entirely positive and abstract ideal, implying that it is always better for society to grant more independence to judges. It is clear, however, that only in the very abstract can judicial independence be conceived as entirely positive. Whenever we consider real-world institutional solutions, established to bring about such independence, there is a negative as well as a positive impact to consider.

This is one reason why it may be refreshing to turn to the "dismal" science of economics. If economists support the idea of institutionalising judicial independence they do so only because they see it as a means to an end, and this "end" is of course about money. Judicial independence will receive support from economists if it is logically and empirically shown to contribute to societal prosperity.

Modern thinking about the impact from judicial institutions on economic performance is to a large extend inspired by the work of economic historians who have identified relative judicial independence as one of the key factors which may explain the power and prosperity gained by England over its continental rivals. For instance, Glaeser and Shleifer (2002) argue that the main point of deviation regarding the legal and political history of the English and French courts is to be found in the twelfth and thirteenth centuries. At that time French feudal lords were so powerful that they were more afraid of each other than of the king, and as a consequence made sense for them to delegate the power of dispute resolution to the sovereign, even if he had his own stake in the matter. People demand a dictatorship when they fear a dictator less than they fear each other.

In contrast, feudal lords in England were less powerful, and more afraid of the king than of their neighbors. As a consequence, they were willing to pay the king to allow them to resolve disputes locally. This could occur because in England, but not in France, the royal power was sufficient to protect local law enforcers. From this perspective, the Magna

Carta in 1215 essentially represented a bargain between English King John and the nobility, the latter receiving cash and peace for agreeing to accept the rule of law. Most importantly, substantial control over judicial decisions was surrendered to juries consisting of local notables. In France, the then-existing juries were instead abolished, and Philip Augustus and Louis IX took advantage of the rediscovery of the Justinian law. The modernization of this law provided by scholars from Bologna, inspired the installment of a system with judges directly beholden to the king, who would question witnesses privately and separately, prepare written records, and themselves determine the outcome of the case. French kings had considerable influence over these judges via appointments, reappointments and bribes.

Economic historians have argued that such differences in judicial systems have had a crucial impact on economic development. The basic reasoning relates to the traditional Hobbesian telling of the state as contractual liberation from a chaotic state of nature. The state has the opportunity to provide the fundamental conditions for transactions by securing the rights to life and property and establishing and enforcing the basic rules for exchange, competition and cooperation (North, 1981: 21ff). Given an economic perspective, however, those who possess state powers must also be expected to act with rational intent and selfish concerns. This establishment of a strong state to protect rights thus confronts us with another dilemma which has been baptized "the fundamental political dilemma" (North and Weingast, 1989; North, 1990; Weingast, 1993): The government that is strong enough to protect property rights will also be strong enough to confiscate the wealth of its citizens. If citizens anticipate this, they will be less likely to generate wealth in the first place, since it is likely to be confiscated anyway.

It is not necessary to know much about human history to know that the fundamental dilemma is not merely a theoretical curiosity. Even if it had somehow dawned on governments that the arbitrary confiscation of property and wealth may reduce incentives to engage in economic activity and thus lower the future opportunities for wealth generation (and confiscation), history is full of evidence that absolutist governments have given in to the temptation to do so, especially when faced with an acute financial crisis (North, 1981: 143-57).

From this point of view, the "Glorious Revolution" in England in 1688 represents another crucial moment time. By the end of the 16th century, there were two powerful political groupings in England – the Whigs and the Tories – with considerably different perceptions of the ideal role of the king. The Whigs were predominantly merchants and in favour of secure and untouchable property rights, low taxes on economic activity, and the active protection of England's trade interests. The Tories were mainly landowners. They preferred a low international profile and low taxes on land property. They were strong supporters of the church and were against explicit restrictions on royal power.

The last Stuart kings tended to transgress the rights of the Whigs and gain support from the Tories. The almost permanent financial crisis of the time forced the Stuarts to invent new ways to get money, including forced loans (that were almost never paid back) and in some instances outright confiscations of private fortunes. The state also made money by selling monopoly rights and selling the right to be exempted from specific legal rules. When James II got into a conflict with the Tories in the 1680s, the Whigs and Tories united to rebel against the King, who had to flee. In addition to a coup d'état, this resulted in significant constitutional change. The Whigs and Tories now agreed upon a set of fixed restrictions on royal power with an explicit and formal "Bill of Rights" supported by a consensual agreement to enforce these rights. The king was no longer considered to be above the law; his ability to collect taxes was severely restricted; and royal expenses were more clearly restricted in order to avoid exceeding a specified tax income.

According to Barry Weingast, the combined effect of explicit constitutional restrictions on royal power and a fundamental consensus to enforce these institutions made the difference:

> …*the appropriate set of political institutions is important for maintaining boundaries of state behavior. But they alone are incapable of producing a government that adheres to them. Because rules can be disobeyed or ignored, something must be added to police deviations. Our approach assumes that the foundation for institutional restriction fundamentally rests on the attitudes of the citizens*… (Weingast, 1993: 305)

The period after the Glorious Revolution in England was characterized by very rapid economic development. North and Weingast (1989) argue that this was exactly because of the effective restrictions on the powers of the state. It created the necessary incentives for the establishment of a well-functioning loans market, meaning that an unprecedented level of funds was made available to private citizens and the king alike. It also increased entrepreneurial activities as entrepreneurs were now less afraid of having their fortunes confiscated. All in all, the constitutional changes following the Glorious Revolution may have been instrumental not only in achieving economic growth, but also in achieving world dominance. England could not have beaten France without its financial revolution (North, 1990: 139).

North (1990: 113ff) explains the 17th century decline of Spain from its peak as a leading western power as mainly being the result of the failure of the Spaniards to reach a similar solution to the fundamental dilemma. While the English lost power, Queen Isabella of Spain succeeded in gaining control over the Spanish church as well as the unruly warlike barons, but Spain's large centralized state bureaucracy combated against the constant threat of bankruptcy using a mix of regulations, confiscations and increased taxation. Profitable careers could be found in the army, the church and the bureaucracy, but certainly not in entrepreneurial enterprise.

Notice the crucial role played by "informal institutions" or the "mental models" of the actors in this account. The constitutional constraints on government only work if they are backed by expectations of severe consequences if the rules are violated. While in the 19th century, American Supreme Court Justice Joseph Bradley could state with conviction that "a violation of the constitution will result in a revolution within one hour" (Weingast, 1993: 303), the countries of Latin America that have attempted to copy the constitution of the United States have not had this informal constraint; consequently, they have not had success (North, 1990: 96)

Economic historians have in this way pointed to judicial independence as crucial for economic development, but there appears to be no reason that the logic should not also apply to modern times. Modern governments will also need to address the fundamental dilemma and find ways to credible commit to promises. Most governments will want to attract investments by promising to enforce property rights. Once invested, however, government is subject to a short-term temptation to attenuate (in some way or another) the investor's property rights, and knowing about this temptation the investor may not want to invest in the first place. Then again, if a neutral third party (the judiciary) has the competence to ascertain whether any of the conflicting players has reneged on its promises, incentives to honour one's promises are substantially increased. In this way, an independent judiciary may help sustain economic growth in a modern economy (Hayo & Voigt, 2007).

Empirical evidence

To investigate the impact on economic growth from perceived judicial independence I have used a measure based upon the annual Executive Opinion Survey carried out by the World Economic Forum organization (I use the results from the 2006-survey)[1]. This survey polls over 11,000 business executives worldwide, who are selected in order to reflect the structure of each country's economy. Among other things, the respondents are asked whether they consider the judiciary in their country to be independent from the political influence of the members of government, citizens and firms, this influenced rated from 1 (heavily influenced) to 7 (entirely independent).

A common approach to assessing variables which might influence economic growth is estimating a growth equation of the following general form (Levine and Renelt, 1992; de Haan and Sturm, 2000; 2005):

$$\mathbf{Y} = \beta_i \mathbf{I} + \beta_m M + \beta_z \mathbf{Z} + \alpha + \varepsilon$$

where Y is a vector of rates of economic growth[2] in a cross-section of countries for a given period of time; M is our variable of interest; I is a vector of a small number of standard economic explanatory variables, which previous empirical studies have shown to be robustly linked with economic growth and which are normally always used in such regressions; and finally, Z is a vector of additional explanatory variables that are used to test the robustness of the impact of I.
In Wittrup (2008) I provide much more detailed discussion of this model and a comprehensive test of the impact from perceived judicial independence. In this context, it suffices to present some basic results shown in table 1 below which models economic growth[3] for 95 countries (for which relevant data are available) in the period from 1980 to 2003.

The first column (1) shows that three basic economic (M-vector) variables - 1) initial GDP per capita; 2) the rate of secondary school enrolment[4]; and 3) the average annual population growth rate[5] - correlate significantly with economic

[1] Source: Porter et al. (2006)

[2] Economic growth can be measured in several different ways, all of which have their pros and cons. The standard approach, which is the approach I will adopt here, is to take the average of the annual growth rates of GDP for the period concerned. I apply data from the Penn World Table version 6.2 (Heston et al, 2006), which provides annual growth rates for a large number of countries for the period from 1960 to 2003.

[3] I apply data from the Penn World Table version 6.2 (Heston et al, 2006), which provides annual growth rates for a large number of countries for the period from 1960 to 2003.

growth. A low initial GDP per capita, a high level of secondary school enrolment and low population growth all appear to be conducive to higher average growth rates. Together, these variables explain about 25 percent of the variance in economic growth for the 95 countries which are included in the study.

Table 1: OLS regression of economic growth (1980-2003) on judicial outcomes and controls[6]

Economic growth	(1)	(2)
Perceived judicial independence	-	0.562*** (5.98)
Log of real GDP per capita in 1980	-0.688** (2.54)	-1.032*** (4.10)
Log of secondary school attainment rate in 1980 (in %)	0.724** (2.09)	0.698** (2.15)
Average annual population growth (in %)	-0.669*** (4.17)	-0.509*** (3.38)
Dummy for transition countries	-1.572*** (3.09)	-0.817* (1.91)
Constant	6.086***	6.261***
R^2	0.267	0.411
F	7.44	16.56
Observations	95	95

When we then add (see column 2 of table 1) the measure of perceived judicial independence to the model, this variable also turns out to be highly significant, and notably the overall explanatory power of the model increases to roughly 40 percent. A very strong result indicating that perceived judicial independence may very well have a huge impact on economic growth. In Wittrup (2008) I show that this result holds for different time periods, and also when we add different controlling variables to the model.

I hasten to point out that the above analysis does not by itself prove beyond any doubt that perceived judicial independence explains economic growth. An alternative interpretation could be that the causal relationship may be reverse, i.e. economic growth determines perceived judicial independence; given the particular specification of the model above, which relates the measure of judicial independence to a later point in time than the time period for which growth is measured, that possibility obviously cannot be ruled out. Nevertheless, when we pair the empirical results with the theoretical arguments mentioned above, we do seem to have a promising case: Perceived judicial independence is a serious candidate when we want to explain why some countries have a higher economic growth than others.

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4 The data for the secondary school enrolment is taken from the Barro and Lee (2001) dataset

5 The data for population growth and initial GDP is taken from PWT6.2 (Heston et al, 2006).

6 The numbers in brackets are t-values based upon White's heteroscedasticity-corrected standard errors. ***, **, and * show that the estimated parameter is significantly different from zero on the 1, 5, or 10% level, respectively. Models 1 and 3 cover only those countries that have a non-missing value for perceived judicial independence. The reported R^2 is not adjusted. VIF is consistently below 3 for all variables.

While perceived judicial independence appears to have a substantial impact on economic growth, formal characteristics of judicial systems do not. Feld & Voigt (2003, 2006) construct a de iure index of formal legal foundations of judicial independence (e.g. related to constitutional safeguards of judicial independence and formal procedures for appointing or removing judges) and show that it has no impact on economic growth. This result is confirmed by Wittrup (2008) using a wider set of data. As discussed above, merely copying formal institutions of judicial independence – as this has been experienced in some South American countries – appears to be a poor strategy – independence has to be for real if it is going to have a positive economic impact.

What we should care about then is the perception of judicial independence. Governments should be very much aware how their actions towards the judiciary are perceived. I adopt this perspective in the following discussion of how judicial independence poses a challenge to judicial budgeting.

The European Models of Judicial Budgeting

To simplify things, let us consider just two basic models of judicial budgeting: One model which grants the authority to manage and allocate the judicial budget to the Ministry of Justice, and another model which grants this authority to an independent judicial council. The table below depicts the model of judicial budgeting for a number of European countries (as the situation was in 2006). As a second dimension I consider in this table also the amount of influence judges have on electing or appointing members to the judicial council. I consider this influence to be strong if the majority of the council members are elected by the judges by popular vote and the chairman or president of the council is not appointed by the executive power. I consider the influence to be weak if judges are a minority within the council, or if there are no formal requirements for the government to ask the judiciary for nominating members of the judicial council[7].

It is evident that the majority of European countries still stick with the traditional Moj-model for judicial budgeting. It is worth noticing, however, that by the mid-90'es only Sweden had granted its judicial council (or Courts Administration) authority to manage the judicial budget. We have thus seen a dramatic shift towards the council model in recent years.

It also appears that among countries where judges have only a weak or moderate influence on the composition of the judicial council, there is a higher tendency to grant the council authority over handling the budget. The most obvious exception to this rule is Hungary, but it should be noted in Hungary the judicial council has no say over the budget of the Supreme Court.

Table 2: European Models of Judicial Budgeting

		Judge´s influence on the composition of the judicial council (1=low; 4=high)			
		Weak	**Moderate**	**Semi-strong**	**Strong**
Model for judicial budgeting	**Council Model**	Ireland, Netherlands, Norway, Sweden	Cyprus, Denmark	(Albania), Bulgaria, Georgia, Iceland	Hungary
	Moj Model	England	Croatia, Estonia, Finland, Greece, Serbia, Spain, Turkey	Belgium, France, Malta, Portugal, Slovakia	Bosnia, Italy, Latvia, (Lithuania), Macedonia, Moldova, Poland, Romania, Slovenia
Countries without a national judicial council			Austria, Czech Republic, Germany, Luxembourg, Switzerland		

Finally, it is worth noticing that among countries normally classified as having a French legal origin it is very rare to have the judicial budget managed by the judicial council. Albania appears to be the only exception to this pattern.

[7] See Wittrup (2008) for a more detailed discussion of the power of European judicial councils.

The Challenge for the "Ministry of Justice" – model

According to economic theory, as well as the empirical evidence discussed above, governments should not only care about maintaining an actual high level of judicial independence, but they should also care very much about how their actions toward the judiciary, however well-intentioned these may be, are perceived by others. This poses an obvious challenge to the traditional model of judicial budgeting which grants the authority to manage the judicial budget to the Ministry of Justice. Rumors may easily arise that the government tries to use the budget to punish or reward the judiciary for its actions.

In Denmark, for example, there was a consistent rumor that the government's demand for reductions of the total judicial budget in the beginning of the new millennium was a kind of punishment for a famous Supreme Court verdict (in the so-called Tvind case) which had declared unconstitutional a law passed by parliament banning schools run by a certain "sectarian" movement (Tvind) from receiving public funds. If a government stand on the total judicial budget is enough to raise concerns over possible violations of judicial independence, this becomes of course even more critical when the government does also have the power to allocate the judicial budget among courts, because it can then in theory direct funds to those courts and those judges it likes, and away from those it does not like.

On the other hand, there is also a risk that the government becomes so afraid of causing such rumors that it refrains from altering the judicial budget at all. This is clearly an inefficient solution since judicial activity is rarely constant. If the judicial budget is going to be used efficiently, it is necessary to continuously adjust budget allocations to ensure that the more busy courts receive more funds, while less busy courts may do with fewer resources.

The answer to the dilemma on how the Ministry of Justice may efficiently manage the judicial budget without causing accusations for violating judicial independence lies then in the development of a transparent system of valid and "objective" indicators for court workload and court performance. Such indicators will allow the Ministry to justify rational adjustments to budget allocation and may also provide important information to consider when negotiating the overall judicial budget.

Indeed, more and more countries have in recent years embarked upon the development of systems of indicators guiding budgetary decisions. Among countries with a Moj-model, for instance Germany and Finland have developed sophisticated models for assessing the workload of courts, which are then used as important inputs to budgetary decision-making.

The Challenge for the "Judicial Council" – model

Another option if one is concerned that management of the judicial budget by the Ministry of Justice may be perceived as problematic with regard to judicial independence, is to grant the authority to manage and allocate the judicial budget to a more or less independent body, a judicial council or a Courts Administration. As argued above, the recent trend in Europe has been exactly this solution.

It is important to realize, however, that transferring the authority over the judicial budget to another institution may not entirely eliminate concerns that the budget may be used in attempts to unduly influence courts. Furthermore, removing the budgetary authority away from government raises the question of how the "independent" institution should be held accountable for its economic management. With regard to both these concerns the example from the establishment of the independent Courts Administration in Denmark, which took responsibility for managing the judicial budget in 1999, may serve to illustrate some important points.

When the Courts Administration took over the management of the judicial budget it was obvious that there was a need out of concern for efficiency to consider budgetary reallocations, since the Ministry of Justice had for many years allocated the budget (maybe out of fear from being accused of violating judicial independence) based upon historic traditions rather than upon assessments of the workload and performance of the different courts. It was, however, also obvious that the new management of the Courts Administration, even though it was independent from the government, needed to legitimate and justify changes in the budgetary allocation by developing a transparent and "objective" model for assessing the workload and performance of each court. Lacking such a model, it is likely that the Courts Administration would have been met with severe resistance and accusations of favoritism from those courts that would have to face a reduction in their budgets and staff.

It is worth noticing that judges sometimes appear to consider other judges, and not the government, to be major threat to their independence[8]. In the light of this the judges occupying leading positions in the management of the new independent Courts Administration faced exactly the same dilemma as did the Ministry of Justice: Only by basing budgetary decisions upon a transparent and objective model of court workload could the Court Administration avoid accusations of having abused its budgetary power.

In addition, the transfer of budgetary authority to the Courts Administration raised concern for how the public and the parliament was to hold this independent institution accountable for its economic management. When the law of the Courts Administration was put forward in Parliament, it was stated that the General Public Auditor should have the same competence in regard to the Courts Administration as in regard to any other public agency. This implies that the General Public Auditor can demand from the Courts Administration any information he may consider of importance to fulfilling his duties as auditor, and he can at any time make inspections of the council and the courts. The discussion of the law in parliament, however, focused on what to do, if the Courts Administration and its independent board of governors did not react appropriately to critique from the General Public Auditor?

Because of this concern, it was finally agreed that that the Minister of Justice can, if the General Public Auditor has issued severe criticism of the financial management, instruct the Courts Administration to take the measures the minister and the public auditor can agree upon. If the Court Administration and its board of governors do not comply with these instructions the minister can dismiss the entire board.

As this example illustrates the concern for judicial independence and the concern for judicial accountability may go hand in hand[9]. If one increases judicial independence by granting the authority over the judicial body to an independent body this naturally creates a demand for a mechanism to hold the independent body accountable for its economic management. Again, performance indicators and indicators used for allocating the budget efficiently play a crucial role in this regard. The Courts Administration in Denmark has vehemently developed and used such indicators to show that it does indeed deliver "value for money". Similar developments are seen in other countries which have recently established judicial councils to administer the judicial budget, e.g. in Norway and the Netherlands.

Conclusion

We are living in an era of judicial independence in the sense that the international consensus about the importance of the independence of judges and courts has probably never been as intense and wide-spread as it is now. As shown in this paper, the value of judicial independence appears to be very concrete since it may be measured in the amount of economic growth it helps to generate. For this reason, every government should take very seriously how its actions toward the judiciary are perceived.

As I have argued in this paper, the concern for judicial independence poses a challenge for both basic models of judicial budgeting found in Europe: The "Ministry of Justice"-model and the "judicial Council"-model. In both cases, however, the best way to deal with this challenge appears to be investing in the development of valid and objective indicators of court workload and court performance.

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[8] See e.g. Malleson (1997), and also Transparency Internationals report on "Magistrate's Perceptions of Judicial Independence", published on the website of Transparency International Romania: www.transparency.org.ro .

[9] In the judicial reform debate accountability and judicial independence are values that are often considered to be in tension. See Contini & Mohr (2007) for a more thorough discussion on how accountability and independence may be seen as part of the very same effort of protecting and improving key values on which our judicial systems are based.

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Sink or Swim: Evolving a Broader Definition of Courts Through the Multi-Door Approach to Dispute Resolution and the Implications it has for Traditional Court Systems

By Hon. Justice L.H. Gummi OFR, Chief Judge, High Court of the FCT- Abuja, Nigeria

This article comprises three parts. The first part addresses the Nigerian Court system, detailing the hierarchy of courts that make up our legal system or as the topic suggests the traditional court system.

The second predominantly dwells on the introduction of the Multi- Door court system into our judicial landscape, and the uniqueness of its operation.

The third offers my analysis, based on my experience as a court administrator on whether, with the introduction of the Multi-Door system we have swam or sank, and my advice to other judicial systems that are yet to imbibe the ADR culture.

In Nigeria we had a very interesting history of dispute resolution as it existed before the modern day courts. Prior to colonial rule, like in most other African societies there existed dispute resolution systems recurrent in most Nigerian cultures. This traditional approach to dispute resolution was a multi- faceted one. Comaroff and Roberts identified four options for dispute resolution in most of these settings[1].

The disputants would usually make personal attempts to resolve the issues in dispute. This process can best be described as Negotiation. If this fails, then the assistance of a senior kinsman is sought to help parties mediate. Parties could also seek to have the benefit of the intervention of a clan head or the headsman of a neighborhood in continuation of the process. If the disputants are yet unable to settle, then the authority of the chief/king or his designate is resorted to for a final and binding decision (Arbitration).

This known judicial system was completely changed with the advent of colonial rule and introduction of the modern court system. It was replaced by an adjudicatory judicial structure designed to address the disputes of litigants and also provide appellate opportunities for those not satisfied with court decisions.

As at today, The **SUPREME COURT OF NIGERIA** is the apex court in the hierarchy of courts in Nigeria. It consists of the Chief Justice and such number of Justices of the Supreme Court not exceeding twenty-one as may be prescribed by an Act of the National Assembly[2]. While the Supreme Court is generally a court of appellate jurisdiction, it is also conferred with an original jurisdiction in any dispute between the federation and a state or between states if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right [3] depends. Next in line is the **COURT OF APPEAL.** It consists of a President and such number of Justices of the Court of Appeal not less than forty-nine of which not less than three shall be learned in Islamic Personal Law and not less than three also learned in Customary Law.[4] Like the Supreme Court, it is also a court of appellate jurisdiction with original jurisdiction. Sec. 239 (1) confers it with original jurisdiction in certain circumstances (i.e. Presidential Election Petitions).

There is one Federal High Court[5] . The Federal High Court was first established by the Federal Revenue Court Act of 1973 and known under that statute as the Federal Revenue Court. It was restyled the Federal High Court by section 230 (2) of the Constitution 1979 a nomenclature adopted by the 1999 constitution. Section 251 of 1999 CONSTITUTION vests

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1 J.L. Comaroff & S. Roberts; Rules and Process: The Cultural Logic of Dispute in African Context. University of Chicago Press, 1981

2 Section 230(2) Constitution of the Federal Republic of Nigeria 1999(1999 Const)

3 Sec. 232 (1) 1999 Const.

4 Sec. 237 1999 Const.

5 See generally SS.249-253 of the Constitution 1999

the Federal High Court with jurisdiction inter –alia ; revenue of government, taxation of companies and other bodies established to carry on business in Nigeria, customs and excise, banking, banks, other financial institutions etc.
On the other hand, there are The State High Courts and the High Court of the FCT.
Under 1979 Constitution, the State High Courts were courts of unlimited jurisdiction and as such any matter could be commenced there.[6]

Under 1999 Constitution the Jurisdiction of the State High Court is limited by section 251 of the Constitution, which confers exclusive jurisdiction on the Federal High Court in certain matters.

These are courts of general and wide jurisdiction limited only by provisions of the constitution that expressly exclude or curtail their jurisdiction.[7]

Other Courts recognized by the constitution include the **SHARIA COURT OF APPEAL.** The Court shall in addition to any other jurisdiction as may be conferred upon it by a Law of a State exercise appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic Personal Law (See section 277 (2) 1999 Constitution for matters the court can adjudicate upon). They relate to marriage, family relationships, gift, wills, guardianship of infants, succession, maintenance or guardianship of a physically or mentally infirm Muslim. The Court also has jurisdiction on any question where all the parties are Muslims and have elected that the case be determined in accordance with Islamic personal law.

Section 280 (1) of the 1999 Constitution provides that there shall be for any state that requires it a **CUSTOMARY COURT OF APPEAL**. It consists of a President and such number of Judges as may be prescribed by the House of Assembly of a State. The President and Judges are appointed by the Governor on the recommendation of the National Judicial Council.

In addition to we also have Magistrate Courts, Area Courts and Customary Courts. Though not courts of record, they also assist in the daily dispensation of justice.

As much as these courts try daily to efficiently dispense justice, in Nigeria like everywhere else, certain dissatisfaction against the court system had brewed over time. This was as a result of the inability of the court system to provide users with justice that was fast, efficient and cost effective. It is characteristic for trials to continue almost unending leaving parties impoverished in the process. Relationships were broken and alliances ruined. I must point out that the reason was not that Judges were not working hard enough- infact, they are most times overstretched. The reason was simply that the growth in awareness of citizens of their rights[8] and the rapid expansion of business led to an avalanche of cases the adversarial system was not prepared for. The concern over delays in the justice process has even prompted doubts over the wisdom of adversarial ethics, and invited suggestions of importing inquisitorial elements in litigation. It has been rightly pointed out by one writer that, ***"The traditional adversary process was never primarily motivated by the desire to avoid delaying justice. It was propelled by other forces which had little, if anything, to do with ensuring that the general public could obtain quick access to, and speedy relief from, the courts of law."***[9]

The traditional adversary process may work well in less litigious societies but certainly cannot survive the modern, fast-paced world we find ourselves in. As more laws are created to regulate the increasingly complex social framework, caseloads are constantly rising and there is resulting pressure on the courts to perform efficiently. As society now demands more of the justice system, the modern judiciaries have to find their new niche while not acting beyond their constitutional role and functions.

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6 section 236 CFRN 1979.

7 See generally SS.255-257 (for FCT) and SS.270-274.

8 Especially with the enthronement of Democracy in 1999

9 Jeffrey Pinsler "Reforms in Civil Procedure: An Analysis of the Amendments to the Rules of Court" in Review of Judicial and Legal Reforms in Singapore between 1990 and 1995 (1996) at pg. 6-7)

Further stating this fact, The United Nations Development Programme (UNDP) in a 2004 report indicated that the justice system is frequently weakened by: Long delays; prohibitive costs of using the system; lack of available and affordable legal representation that is reliable and has integrity; and weak enforcement of laws and implementation of orders and decrees. Furthermore the report noted as a challenge, severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent. Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures). Ultimately, would be court users avoid the legal system due to economic reasons, fear, or a sense of futility of purpose.[10]

At this point I will share with you a classical example of the frustrations faced by litigants in their quest for a just and speedy determination of matters they are involved in. the case is ***Emeka Nwana V. Federal Capital Development Authority.*** [11] Mr. Nwana was a staff of the Federal Capital Development Authority (FCDA) from May 1982 to 11th April 1989 when his appointment was terminated on the grounds that he had absented himself without leave and putting up fraudulent claims for journeys he never embarked upon.

He sued the FCDA at the High Court of the FCT in 1989. Being dissatisfied with the judgment of the High Court delivered on Tuesday, 12, November 1991, he appealed to the Court of Appeal and that court delivered its judgment on Monday, 10th January 1994. A close consideration of the judgment of the Court of Appeal revealed that vital documents were not forwarded to it and it all the same went ahead to determine the appeal after formulating a lone issue for determination not in any way related to the issues for determination filed before the court. The appeal was thrown out and obviously aggrieved by this decision, Mr. Nwana appealed again to the Supreme Court.

While allowing the appeal and setting aside the decision of the Court of Appeal via a judgment delivered on the 27th of April 2007, the Supreme Court remitted the case back to the lower court to be heard *de novo*.

Re-tracing the history of this case would reveal that it had gone on a long and tumultuous journey from the High Court to the Supreme Court spanning about 18 years. Here is a man, whose appointment was determined, bearing the brunt of the litigation process for 18 years, bearing the cost of the process and not to talk of man-hours both sides lost over those years. I ask you, is that justice, bearing in mind the weather beaten adage; justice ***delayed is justice denied***?

This case typifies what people suffer in courts daily not because Judges have not lived up to expectation, but mainly because the process is adversarial, inflexible, fraught with technicalities and above all the shear number of cases in the dockets of courts.

Having taken you back on that 18 years journey, I yet take you back another 33 years to 1976 to trace the origin in modern times of a spirited attempt to provide succor to an ailing judicial system then in America but minded that what the American judicial system faced then was not different from what we were confronted with and the same also applying to most jurisdictions of the world. Recall that it was in an attempt to address these challenges that in April of that year[12] at a national conference in honour of Dean Roscoe Pound on the popular dissatisfaction with the administration of justice, Professor Frank Sander of the Harvard Law School delivered an address on the "varieties of dispute processing". In that address Sander's proposed solution of a dispute resolution center offering a panoply of dispute resolution services addressed two main concerns or causes for the dissatisfaction. First, matching dispute resolution mechanisms to the individual character of the dispute and secondly reforming the systems of court and their procedure. Furthermore, his fundamental suggestion and the one that is of lasting importance to us was to explore alternative ways of resolving disputes to the adversarial , litigious procedure and to institutionalize the alternative dispute resolution processes in a

10 Access to Justice : UNDP Practice Note -9/3-2004

11 Nwana V. F.C.D.A. (2007) 11 NWLR 59

12 6th-7th April, 1976

single resolution center . Sander was considered to develop a system of justice that was most effective in handling the full suite of disputes that came before the courts. This necessitated first addressing the characteristics of the various dispute resolution processes and secondly developing criteria for allocating various types of disputes to different dispute resolution processes. [13] Sander reminded conference participants of the limitations of traditional litigation with it's "use of a third party with coercive power, the usually 'win or lose' nature of the decision, and the tendency of the decision to focus narrowly on the immediate matter in issue as distinguished from a concern with the underlying relationship between the parties." He urged conference participants to envision alternatives, a "rich variety of different processes, which, I would submit, singly or in combination, may provide far more 'effective' conflict resolution." and he reminded them of "the central quality of mediation", namely "its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[14]

In summary, Sander imagined a courthouse where there will be several dispute resolution 'doors' and that each case will be diagnosed and referred to an appropriate 'door' or mechanism best suited to its resolution. The special feature of the concept is the diagnostic stage in the process, which is called Intake Screening and Referral.[15] This address by Sander over thirty years ago could be said to have effectively laid the foundation for the integration of Alternative Dispute Resolution (ADR) into the court system and the institutionalization of Multi-Door Courthouses.

The Multi-Door Concept in Nigeria

The first multi-door courthouse in Africa, the Lagos Multi-Door Courthouse (LMDC) was established in Lagos, Nigeria on June 11, 2002. This was done via collaboration between the Negotiation and Conflict Management Group (NCMG) and the High Court of Lagos State. The High of Lagos provided space while the NCMG and the Law firm of Aina, Blankson & Co. funded the project.

Sixteen months later on October, 13 2003 we established the Abuja Multi- Door Courthouse (AMDC) in the Federal Capital Territory, Abuja. It was officially commissioned by the then Chief Justice of Nigeria.[16] The AMDC is wholly funded and staffed by the High Court of the Federal Capital Territory.[17]

Commencement of Action at the AMDC[18]

STAGE 1

1) Request Form **(Form 1)** is filled and filed at the AMDC by the initiating party, attaching a brief Statement of Issues (4 copies).[19]

2) Within 7 days of filing a Request Form at the AMDC, Notice of Referral is sent to the other party (ies) by the ADR Registrar along with a Submission Form **(Form 2),** Memorandum to Parties **(Form 3)** and a copy of the Applicant's Statement of Issues.[20]

3) Within 7 days, the Responding party/ies is/are to return the duly completed Submission Form to the AMDC, indicating submission to the ADR processes and certification to the receipt and understanding of the Memorandum to Parties. Four (4) Copies of the Respondent's brief Statement of Issues is to be attached.[21]

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13 Hon. Jus. Brian J.Preston: The land and Environmental Court of New South Wales: Moving towards a Multi- Door Courthouse.

14 See also: L Ray & A. Clarke 'The Multi Door Courthouse idea: Building the Courthouse of the Future ... Today' (1985) Journal on dispute Resolution Vol. 1:1 7.

15 This process will be explained in the course of this paper.

16 www.amdcng.net

17 Other states in Nigeria that have followed fast on the heels of Abuja and Lagos include Kano and Akwa-Ibom

18 For the purposes of this paper we will consider the procedure at the AMDC

19 Article 2.2 (a) & (b) of the Practice Direction (PD) of the Abuja Multi-Door Courthouse, the ADR Centre

20 Ibid (c)

STAGE 2

4) The ADR Registrar confirms receipt of the Statement of Issues between parties. Thereafter, Intake Screening is carried out and a pre-session meeting may be convened with the Dispute Resolution Officer (DRO). Here, the process is explained, issues clarified, interest identified and an ADR process agreed upon.[22]

At this stage, the DRO provide the parties with a Confirmation of Attendance Form **(Form 4)** and a Confidentiality Agreement Form **(Form 5**), which are to be filled and signed by the parties. Also the bio-data of the recommended neutral (Mediators or Arbitrators) are given to the parties so that they can select the neutral of their choice.[23]

STAGE 3

5) An ADR Session is scheduled tentatively, and a Notice sent to the Mediator or Arbitrator along with the Disclosure Form.[24] The Mediator or Arbitrator is to reply to the Notice within 7 days accepting or declining his nomination with the duly completed Disclosure Form returned to the ADR Registrar.

6) A Mediation or Arbitration session is convened.

The AMDC process starts with a Screening Conference, which serves as the primary diagnostic tool to determine the needs of each case. An experienced Dispute Resolution Officer (DRO) conducts the conference, which takes about 30-45 minutes. The conference is confidential. Parties or counsel must be prepared to discuss case substance, procedure and dynamics.

The goal of the Screening Conference is to resolve procedural problems and to discuss dispute resolution processes.

The screener reviews the full range of AMDC dispute resolution options, helps the parties decide how the case should proceed, and explains the scheduling. The screener usually makes a recommendation, but the parties and their counsel always have the final decision.

If the parties decide to participate in one of the ADR options, the screener presents the list of Neutrals and or may assign a neutral based on his or her content-area, expertise and the dynamics of the case. The selection is subject to the approval of all parties.

What Kind of Cases Does the AMDC Handle?

Whether it is a commercial, employment, Banking, Maritime, Energy, a family or business dispute, the AMDC provides clients and their attorneys with effective alternatives for resolving disputes.

Cases come in to the AMDC in several ways and at any stage of litigation, or even before the filing of a lawsuit. Cases may be referred by judges or selected randomly from the cause list of the courts.

The AMDC also welcomes walk-in cases when all or one of the parties and/or attorneys agree to come to the AMDC or there is a provision for arbitration or any ADR process in an agreement.[25]

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21 Ibid (d)
22 Article 3.1 & 3.2 Op cit
23 Ibid 3.3
24 Ibid at page 11, paragraph 5
25 Ibid See generally pp 10-13

Relationship with Court Process

The main reason why Multi- Doors are set up is to encourage the practice of Alternative Dispute Resolution (ADR) within the Court system. It is therefore impossible to look at the Multi- Door concept without mentioning ADR. In the following couple of paragraphs, I have tried to look at the relationship between ADR[26] and court process, as it affects our jurisdiction. It might be instructive to look at what the law says;

Section 18 of the High Court Act,[27] states'

> ***Where an action is pending, the Court may promote reconciliation among the parties thereto and encourage and facilitate the amicable settlement thereof.***

The law therefore enjoins the courts to promote ADR. The problem before now has been lack of a forum or a structured process through which the court will achieve its mandate as stipulated in the Act. Again, the new[28] High Court of Lagos State (Civil Procedure) Rules 2004[29] provides in Order 25, Rule 1that,

"(1) Within 14 days after close of pleadings, the claimant shall apply for the issuance of a pre-trial conference Notice as in Form 17.

(2) Upon application by a claimant under sub-rule 1 above, the Judge shall cause to be issued to the parties and their legal practitioners (if any) a pre-trial conference notice as in Form 17 accompanied by a pre-trial information sheet as in Form 18 for the purposes set out hereunder:

(b)giving such directions as to the future course of the action as appear best adapted to secure its just, expeditious and economical disposal;

(c) Promoting amicable settlement of the case or adoption of alternative dispute resolution.[30]

The above provision of the Law, in the two jurisdictions in which the Multi-Door courthouse operates, has been highlighted to show that the law already envisages reconciliation of interests[31] as against determination of rights.

Agreements reached in the course of mediation can be endorsed as consent judgment. We have an ADR Judge who facilitates this

Furthermore, as The Chief Judge of the High Court of the FCT, Abuja pursuant to S.259[32] of the Constitution of The Federal Republic of Nigeria 1999 I had designed the Practice Direction of the AMDC, which contains the rules that will guide proceedings at the Centre. As stated earlier, these rules show that ADR was meant to be part and parcel of court process. The problem was that before the advent of the Multi-Door Courthouse, there was no forum for the attainment of what the law envisaged. Interestingly, with the innovations introduced so far, the query as to the relationship of ADR with Court Process does not arise.

After our initial experiment with the Multi- Door Concept, I and many in my jurisdiction have come to the inevitable conclusion that dispute resolution is indeed a very turbulent body of water and for any justice system to swim across it and berth successfully, that system must shed as much load as possible. The Multi- Door should therefore be considered a willing ally of this progressive process. The other option is for the system to stand aloof and suffer the fate of the proverbial carpenter limited by his tools, the only tool in his possession being a hammer. There is no doubt that the a

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26 The Multi-Door Courthouse specifically

27 CAP. 510 Laws of the Federation of Nigeria, 1990, See also Section 26 and 27 of the District Court Act, Cap 495. Sections 82 through to 88 provide specifically for Officials, Special Referees and Arbitrators. See also Order 19 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure Rules) Act Cap 511 Laws of the Federation of Nigeria 1990.

28 These rules commenced on the 4th of March, 2004

29 As contained in the High Court of Lagos State (Civil Procedure) Law 2004

30 Emphasis is that of the author.

31 This is exactly what a court-annexed ADR program is designed to do.

32 The Practice Direction of the AMDC was made pursuant to Section 259 of the 1999 Constitution.

judiciary in this century that prides itself as the cauldron of conservatism avoiding the much encouraged paradigm shift will carry the excess baggage of overloaded dockets and citizen frustrations and capsize midstream.

With the launch of a Multi- Door courthouse in Abuja, I cannot say we have swam successfully to the promised land but we surely have remained buoyant. In the last six years the; AMDC has taken its own fair share of the judicial load entertaining an average of over a hundred cases in each legal year with a settlement rate of about 70%. In this legal year alone, we have received matters from almost every conceivable genre and a tabular representation is presented below.

CASES RECEIVED 2008/2009 LEGAL YEAR

CATEGORY	**%**
Commercial Contracts	50
Land Disputes	20
Matrimonial Causes	10
Accident Claims	3
Tenancy	10
Banking	3
Labour	4
TOTAL	**100**

This breakdown shows that while a majority of the matters are commercial contracts, increasing use of the Multi-Door to resolve other category of disputes is on the increase.

The inevitable conclusion I draw from this is that for any Judicial System to effectively cross these waters and assume the status of a modern court having the ability to uphold the age long tradition of effectively dispensing justice, that court must adopt a broader definition for itself. That definition would be in line with the thinking of Prof. Sanders. This new and emerging modern definition of courthouses should ginger courts to search for ways to contain escalating legal cost of proceedings while providing access to justice for all users of the system.

An abiding attraction of the Multi-Door concept and the prominent processes it offers is that the parties retain control at all times; a benefit the conventional court cannot offer. A blend of litigation and ADR under one roof now gives parties the opportunity of choosing from a rich menu of resolution processes including litigation.

Worthy of note is also the fact that the multi- door gives parties the chance to reach decisions themselves. Apart from Arbitration where an enforceable award is delivered, the other processes of negotiation, mediation and conciliation all have parties driving the resolution process until they arrive at an agreement. Because the agreement is theirs and not handed down by a third party, they find it easier to keep thereby obviating the need for appeals.

I'm sure many of us here have presided over cases where for years the main actors in the dispute did not have the privilege of airing their grievance. The court is called upon to hear one motion after another and this vicious cycle of motions , counter motions and appeals continue until one of them is wearied out or the res is completely extinguished . At a Multi- Door, the parties have a chance to air their grievances in a relaxed atmosphere. The emotional comfort of being allowed "to have a say" is incalculable and proceedings are confidential.

While courts determine issues in dispute and controversy between parties, it has never been the preoccupation of courts to consider the relationship of parties. Restoration of pre- dispute relationship is a cardinal focus of a multi- door courthouse. Parties in dispute must have had a relationship and a successful ADR session culminates not just in a wise and efficient agreement suited to parties' needs but also one that parties are comfortable with in addition to restoring their pre -dispute relationship as my next example will show.

With the kind permission of the parties involved I reproduce in brief a matter resolved after just three hours of mediation at the AMDC. This matter had been pending in court for six years.

It was between a teacher and one of his former students. The teacher had sold a plot of land to one of his former students and after the transaction had been perfected; a second plot of land bigger in size was allocated at another location based on the first allocation which was cancelled. Both laid claims to the second allocation and were in court for six years. The court referred the matter to the AMDC and both parties appeared before a mediator. In the course of mediation it became apparent that the underlying dispute was the fact that the student had called his former teacher a cheat. This matter was resolved by a mere apology.

Another point that is particularly interesting to note is that most matters are even settled at the pre- session stage. The Dispute Resolution Specialists who conduct the pre-session are also trained mediators and can lead parties towards settlement in the course of a pre- session if an opportunity presents itself. It would interest you to know that from the settlement rate of 70%, 50% of the cases are actually settled at the pre- session and only twenty percent actually proceed to Mediation or Arbitration. This further reduces the expected time of resolution from three months to one month.

The cumulative effect of this analysis is simply a reduction in the case dockets of judges, speedy resolution of disputes, reduction in parties expenses and time and increased Public satisfaction with the justice system as our testimony at the AMDC has established.

We have faced some challenges in this pursuit and I cannot guarantee that should you choose to follow in our footsteps you will not face same.

For instance, we initially at inception came against a brick-wall in the Bar. It is only natural that people fear what they do not know. A conservative Bar with a high majority schooled only in adversarial litigation perceived the philosophy of the Multi-Door as an attempt to deprive them of their means of livelihood. Patient education, one-on-one meetings, workshops and seminars were some of the strategies we devised to assuage some of the misgivings lawyers initially had. Though these apprehensions still exist in some quarters, it has been reduced to muffled murmuring incapable of causing any collateral damage.

The voluntary nature of the ADR though in some quarters is an advantage has been turned into a disadvantage by many. We have had instances where parties outrightly refuse to come to the MDC while other times they come but refuse to corporate by the good faith use of ADR. We are working at going round this hurdle and I think adopting the option of the courts in England sound like a more viable option.[33] A party who refuses to explore this option could be made to face uncomfortable cost consequences.

Conclusion and Opinion

If I may at this point take you back to the topic, which court system will swim or sink? It is my submission that the one that has expanded the menu it provides by displaying an interesting and rich array of alternatives thus making it not just a court but a Center of effective dispute resolution (where disputes are matched with appropriate processes)[34] will swim to victory while others sink. It has been said over and over again and I agree that the people do not present lawyers with problems to be litigated. Far from it. They present them with problems they want resolved. We in the judiciary need to take the frontline charge in ensuring that we provide avenues within our courts for the resolution of disputes not just litigation. In most societies, the initiation of legal proceedings marks the beginning of a life long enmity between the parties and in

[33] Dunnet v. Railtarck

[34] Some now prefer to refer to ADR as Appropriate Dispute Resolution

extreme cases even future generations. A popular Yoruba[35] adage maintains that "***we do not come back from court and remain friends".*** The attempt here is not to castigate litigation or paint it as an inactive alternative in dispute resolution. However where it is the only option for resolving disputes then the mono- door is prone to face the challenges of congestion, escalating cost, and incapable of meeting the challenges of modern day business related disputes where time is of the essence and a reconciliation of the interests of disputants is key as against a mere determination of who is right or wrong.

The Multi–Door concept presents an opportunity for the public justice system to provide access to a wide variety of options for resolving disputes. Some of these processes could be adjudicatory in nature to service those clients for whom confidentiality is a key factor but who in the same breath want to marshal evidence and engage in discoveries. This aptly captures the Arbitration process. Conversely, other process may solely rely on the desire of parties to reach an agreement by themselves through the facilitation of a neutral third party (consider mediation / conciliation). Whatever the process chosen, an abiding attraction of the Multi- Door approach to dispute resolution is that parties have a say in the process and are involved in the flexible, economic and rich array of processes it provides. Customer choice is respected.

Further, courts are expected to provide and enhance access to justice. Access to justice in this sense must be given a wide and broader definition and not the restrictive definition of guaranteeing access to judges, lawyers and a judicial forum. It should be defined within the context of justice that is dispensed speedily, efficiently, cost effectively and in a user friendly environment. Unfortunately the traditional court system cannot always guarantee this.

Effective access to justice is one of the fundamental conditions for the establishment of the rule of law as well as a just and egalitarian society. Any judicial system that is unable to provide it has failed completely in its responsibility as a bastion of hope. In the past, the right of access to judicial protection meant essentially and almost exclusively the aggrieved individual's formal right to litigate or defend a claim, defined in strictly legal terms. A broader view of what is going on behind such claims, which characterizes ADR (as epitomized in the Multi- Door concept) , opens new pathways to resolving disputes, relieving the overcrowding that makes court cases unnecessarily slow.

In particular, a Multi-Door Courthouse providing ADR services is of significant importance to justice systems when effective establishment of alternative means of dispute resolution can significantly reduce the number of minor disputes before the civil courts, helping to improve the availability of judges for cases which must be tried.

The Abuja Multi- Door was founded on notions of greater access to justice for all, improved satisfaction with dispute resolution processes, and meaningful choices for resolving disputes in mutually satisfying ways. What we visualised and are now reaping from is a Multi-Door Courthouse, with doors swinging wide open revealing a broad range of dispute resolution processes, where disputes could be efficiently addressed through the mechanism best suited for the parties and the issues involved. Our experience has shown that users are usually more satisfied with the outcomes because they are at most times on the driving seat of the resolution process ; crafting their own solutions and outcomes to meet the peculiar needs of their disputes. In this regime, there is the need "to reserve the courts for those activities for which they are best suited and to avoid swamping and paralyzing them with cases that do not require their unique capabilities".[36]

The Multi- Door concept represents the future of the practice of law in Nigeria and everywhere else. It is a step in the right direction. The Courts of today must be armed with all the tools necessary to provide qualitative service to clients. As mentioned earlier, if the only tool a carpenter has is a hammer, he tends to see every problem as a nail. Well, we have to acquire more tools if we are to be master craftsmen rather than mere joiners of wood. For us, a Multi-Door has guaranteed the availability of these tools.

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[35] The Yoruba people live primarily in southwest Nigeria and eastern Benin and speak Yoruba, a Niger- Congo language. **Source: Microsoft ® Encarta ® 2008.**

[36] http://www.multidoor.org

Finally, it is my hope that the day will come when every court will be an Effective Dispute Resolution (EDR) Centre with a mechanism for the resolution of every dispute that might be referred to it. In conclusion, I note that the problem with the justice system; the delay; the congestion and the loss of confidence has nothing to do with either the existing physical structures or paucity of judicial officers; rather it has everything to do with, as Harvard Law Professor Frank Sander said, “the forum not fitting the fuss”.