

IMPROVING THE PERFORMANCE OF JUSTICE INSTITUTIONS

Recent experiences from selected OECD countries relevant for Latin America

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IMPROVING THE PERFORMANCE OF JUSTICE INSTITUTIONS

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Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
BJA	Bureau of Justice Assistance
CCJE	Consultative Council of European Judges
CEJA/JSCA	Centro de Estudios de la Justicia de las Américas/ Justice Studies Center for the Americas
CEPEJ	European Commission for the Efficiency of Justice
CGPJ	Consejo General del Poder Judicial
DPLF	Due Process of Law Foundation
ECtHR	European Court of Human Rights
EFQM	European Foundation for Quality Management
ENM	Ecole Nationale de la Magistrature
EU	European Union
GTZ	German Agency for Technical Cooperation
HMCS	Her Majesty's Courts Services
ICT	Information and Communications Technology
IDB	Inter-American Development Bank
INDECOPI	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual
INK	Instituut Nederlandse Kwaliteit (Netherlands Quality Institute)
ISO	International Organization for Standardization
LAC	Latin America & Caribbean
LOLF	Loi Organique relative aux Lois de Finances
M&E	Monitoring & Evaluation
MCV	Mechanism for Cooperation and Verification
MDBs	Multilateral Development Banks
MICs	Middle Income Countries
NGO	Nongovernmental Organization
NCSC	National Center for State Courts
NCVS	National Crime Victimization Survey
NPM	New Public Management
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
SAR	Services d'administration régionaux

Latin American Justice Reforms: Recent Achievements And Pending Challenges

SATURN	Study and Analysis of Judicial Time Use Research Network
TCPS	Trial Court Performance Standards
TQM	Total Quality Management
UCR	Uniform Crime Reporting
UK	United Kingdom
UN	United Nations
U.S.	United States
USAID	United State Agency for International Development
WBG	World Bank Group

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Executive Summary

Justice sector institutions across the world face the challenge of delivering better services to those seeking justice. The courts in a number of member countries of the Organization for Economic Cooperation and Development (OECD) have undergone large scale reform programs incorporating both performance-based approaches of New Public Management (NPM), as well as private sector practices.

Terms such as client satisfaction, cost-benefit analysis, total quality management and performance evaluation, which originated in the private sector, are now increasingly applied to justice institutions in more advanced OECD countries-- and other countries beginning to follow suit. For almost two decades, justice authorities in OECD countries have been trying to improve the performance of their courts. Some have had more success than others. The wealth of experience that has been generated about how (and how not) to approach court performance can be shared with others for cross-country learning. In recent years, the focus of reforms has increasingly shifted from approaches focusing on narrow quantitative efficiency to those focusing on managing quality. Radical changes have also taken place in the organizational cultures of justice institutions in order to steer them towards providing better services for the citizens and society as a whole.

Justice reformers in Latin America should not be surprised to find that some OECD countries are still struggling to respond to the same issues they face. Justice institutions generally have a complex setup in which the dysfunctions of a single agency can generate externalities that quickly impact the performance of other agencies, with the latter having little or no ability to correct those externalities. However, in designing their own solutions, Latin American reformers may find the experience of OECD countries which are facing similar challenges to be a useful reference. In the same way that legal reforms cannot simply be transplanted from one country into another, any lessons learned from OECD countries should be carefully adapted to the particularities of Latin American justice institutions which have a different history and reflect different social and economic contexts. Perhaps the most important lessons to be learned from OECD countries are those that may help avoid generating unmanageable expectations or raising the bar too high.

This paper presents a selection of experiences from OECD countries in managing justice institutions which are the most relevant for performance improvement of their counterparts in Latin America. The scope of the paper is mostly limited to the courts, but comprises all types of courts: specialized courts as well as courts of general jurisdiction, civil as well as criminal and administrative courts, first instance as well as appellate and

supreme courts. Issues of legal reform, judicial training, alternative dispute resolution or access for the poor are not considered in this paper.

The first chapter provides an overview of the justice sector reform experience in Latin America over the last two decades, and how these reforms coincide with or follow OECD country trends. Latin America's legal systems are based on the legal systems of their former colonial powers but, naturally, have developed their own distinct features. The transition to democracy in the 1980s generated citizen demand for justice reforms, with most reform efforts focusing on modernizing institutions and expanding access to justice. The reforms required substantial investment programs with significant financial and technical support of OECD donors and multi-lateral development banks. These legal and institutional reforms have changed the structure and operations of the justice sector in Latin America, and have improved the quantity and quality of the available resources. Managerial and administrative reforms have also had some impact.

However, the broad scope of reform programs made them difficult to evaluate and vulnerable to criticism. Also, conflicting interpretations about the new institutional framework have led to frequent conflicts within the justice sector and with other branches of government. Despite some progress in functional performance, public trust has not improved as much as expected.

The second chapter outlines the context of the debates regarding the performance and quality of justice services in OECD countries prior to the 1990s. Vastly different histories and legal traditions have shaped the justice systems in OECD countries. More recently, increased globalization has led to some common trends and cross-fertilization, but the structure and performance of these systems continue to vary significantly. Interestingly, the available data regarding aspects such as costs and delay point to differences across OECD countries, even among those of the same legal tradition. The extent to which people use the courts for settling their disputes varies significantly as does the size and structure of the court systems, budget allocations, and number of practicing lawyers.

In the early 1980s, a new wave of reforms in the broader public sector began in many OECD countries under the broad label of New Public Management. A key feature of the new approach was the integration of performance information and targets into all stages of the budget cycle. Due to a strong institutional culture, concerns about judicial independence, and under-developed managerial capacity and vision in many places, courts initially resisted being included in this broader reform process. Instead of developing their own managerial capacity and approach, in many OECD countries those in charge of the courts preferred changes in substantive and procedural laws and increasing human and financial resources to address issues of raising caseload and growing delay. Calls for increased accountability in performance were often discarded based on an understanding of judicial independence that was largely perceived as an entitlement of judges rather than the right of citizens to have access to an independent judge who would still be accountable to the public for her or his performance. Modern information and communication technology, however, made performance data more readily avail-

able and the press became a voice for citizens' dissatisfaction with the justice system. Societal change required more radical responses and kept pushing for greater service orientation and performance accountability. Within this context, public budgets were also coming under close scrutiny.

Many OECD justice systems entered the 1990s with an increasing sense of crisis. As the civil justice system in many common law countries was perceived to have become too labor intensive, too costly, and too slow, reforms initiated in the United Kingdom under Lord Woolf successfully addressed cost issues. These ideas then spread to other jurisdictions, while other reform goals, such as delay reduction and procedural simplification, also showed some results. Some civil law countries developed their own approaches and were able to address challenges successfully. In some other countries, the same period seems to have been characterized by increases in human and financial resources in the courts with little impact on challenges posed by caseload, delay, or lack of access. The more successful OECD judiciaries retained leadership of the reform process and were able to proactively shape and drive the reform process themselves. The more traditionally-minded systems, however, suffered from strong external pressures, which sometimes led to struggles with the executive. At best these struggles concluded with a stalemate, but with little or no improvement in the delivery of justice.

The third chapter discusses the transition from traditional justice reform approaches in OECD countries to the NPM approaches that began in the 1990s. Initially, justice sector institutions in many countries were reluctant to engage in NPM reforms out of a concern for institutional independence. Some of the resistance was also rooted in the conservative, legalistic, and non-managerial attitude of the legal profession. This resistance delayed, but could not prevent, the transition to performance-based reforms. Growing demands from the executive, legislative and external stakeholders made more fundamental reforms inevitable. In other cases, the reforms were driven from within the Judiciary itself. Funding mechanisms provided the critical nexus between judicial independence and accountability. On the one hand, there was a risk that funding mechanisms would become a tool in the hands of the executive to make the judiciary more sympathetic to the government's agenda, particularly in highly polarized and politicized environments. On the other hand, excessive financial independence could be used by some judiciaries to shield themselves against legitimate reform efforts and reasonable expectations regarding performance. As explored in more detail below, different countries took different paths to resolve this tension.

The growing degree of European integration had also begun contributing to judicial reform efforts, and the decisive role of regional organizations such as the European Union and the Council of Europe is by far more influential than that of their Latin American counterparts. It is also true, however, that because (among other things) of the limited number of official languages spoken in Latin America, the continent has a longer tradition of cross-fertilization and sharing of experiences, while Europe had to create specific formal mechanisms and *fora* to encourage similar cross-country dialogues.

For the European Union, the quality of justice and rule of law became a crucial element in the functioning of the common market. Moreover, the legal harmonization process within the E.U. also contributed to increasing awareness of, and cooperation in, this area. The rule of law also acquired a very prominent role in E.U. accession negotiations. A Mechanism for Cooperation and Verification was put in place for some new member states where the situation with respect to justice and rule of law was still considered to be problematic post-accession. More recent developments point to a slow shift from normative reforms aimed at ensuring compliance with the *acquis communautaire* to a more empirically based approach looking at the actual implementation of these norms on the ground.

The Council of Europe has been actively engaged in the justice field by setting standards, gathering cross-country data, undertaking research and developing tools to improve the functioning of the justice sector. The core standard, namely the right to a fair trial within reasonable time, is set out in article 6 of the European Convention on Human Rights. The European Court of Human Rights in Strasbourg receives and adjudicates complaints about violations of the Convention and has established detailed case-law related to it. Ever since the 1990s, the Court has been facing an exponentially increasing case-load, thus threatening its ability to function. In 2002, the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) was created in an attempt to prevent this workload from increasing further. Today, CEPEJ is largely operating as a think tank by: generating cross-country comparative data about the functioning of the justice system in its 47 member states, undertaking in-depth research and analysis, and developing practical tools to address dysfunctions in the courts. By making cross-country data available about justice sector issues, CEPEJ has significantly contributed to generating much needed momentum for reform. The initial focus on quantitative data and the supply side of justice has more recently been complemented by initiatives to tackle the demand side of justice as well as the quality of judicial services.

The fourth chapter presents five major cases of reforms in public expenditure, human resources, and organizational restructuring in the justice sectors of five different countries. In the United Kingdom, judicial reform efforts targeted resource allocation mechanisms. The judiciary is involved in resource planning, but the executive has the last word with respect to priorities. A government decision to make the civil justice system self-financing by establishing the principle of full cost-recovery has been implemented. In addition, the court fee system acted as a powerful disincentive to the growth in litigation, one of the achievements of the reforms initiated under Lord Woolf.

France introduced program budgeting throughout its public sector, including the justice system. The definition of performance indicators was one of the most challenging aspects of the new systems and the one that justice sector practitioners opposed most strongly. While measuring court productivity was relatively straight-forward, quality assessments proved substantially more complex. Cost control was a clear initial benefit of the new budgetary approach, whereas performance contracts have had some impact on delay and backlogs.

In Spain, an incentive-based salary system for judges was short-lived due to the Constitutional Court's concerns for judicial independence. Under the leadership of the Judiciary, the Netherlands embraced NPM approaches by linking court budgets with performance. The creation of a new Judicial Council in charge of the courts' management strengthened judicial independence but also increased management responsibility. A comprehensive court evaluation system started to operate in 2002 based on quality control standards. The reforms have resulted in improvements in productivity and cost effectiveness, but the courts remain concerned about their ability to continually improve the quality of their work. In the U.S., the Trial Court Performance Standards developed in 1990 represented the first comprehensive framework to introduce performance measurement in the court system, but was too complex for day-to-day use. The challenges surrounding implementation led to the development of a simplified tool.

The fifth chapter describes recent trends in OECD countries regarding quality controls in court service delivery which share approaches with the private sector. Various models were developed focusing on setting standards for quality, quality control and quality assurance, quality improvement, and client feedback. These models are comprehensive in that they do not simply focus on the final product or service, but are designed to take the overall "production" process into account in order to facilitate continuous improvement. Courts in various OECD countries have focused on improving the quality of their services through quality assessments, court performance measurement frameworks, benchmarking circles, court user surveys, and mechanisms of internal and external dialogue.

The International Framework for Court Excellence inspired by approaches developed in Australia, Europe, North America and Singapore was launched in 2008. It allows for the assessment of court performance against seven detailed areas of court excellence. These measurable areas are based on commonly accepted court values such as equality, fairness, impartiality, independence, competence, integrity, transparency, accessibility, timeliness and certainty. The Framework uses a balanced scorecard to facilitate self-assessments. It acknowledges that the effective implementation of improvement initiatives is a gradual process which requires the collection of data measuring both quantity and quality of justice services provided.

The paper concludes with some suggestions about areas where Latin American judiciaries may benefit from experiences of OECD countries. The success of justice sector reforms depends on cooperation of a range of institutional actors that only strong reform leaders can build. Ownership of, and support for, the reform process by the judiciary is essential to avoid deadlock and to sustain the reforms in the long-term. Feedback and performance data are key features of successful reform efforts, but they entail a risk of politicization. A sound and balanced set of indicators is crucial when linking budgetary and performance information. At the same time, basic efficiency and integrity standards must be reached before moving into complex quality enhancement programs.

Introduction

After decades of mixed reviews, justice sector institutions in Latin America face the challenge of delivering on the promises made to improve performance¹ to ever more demanding populations. The main questions posed by sector leadership and external stakeholders are: how to improve the quality of service delivery? How can the bar be raised for the courts to reach or surpass the standards of other public sector agencies? To answer these questions, Latin American justice institutions have always looked at the experience of other developing and developed countries.²

The courts in a number of member countries of the Organization for Economic Cooperation and Development (OECD) have also undergone large scale reform programs, not only reflecting the performance-based approaches of New Public Management (NPM)³ but also sharing private sector practices. Terms such as client satisfaction, cost-benefit-analysis, total quality management and performance evaluation that originated in the private sector are now commonly applied to justice institutions in many OECD countries. For almost two decades justice authorities in these countries have been trying to increase the performance of their own courts. Some were more successful than others. Either way, a wealth of experience about how, (and how not) to approach court performance has been generated and can be utilized for cross-country learning.⁴

In recent years, the focus of reforms has shifted increasingly from quantitative approaches to quality management. Radical changes have also taken place in the organizational culture of judicial institutions as they steer towards providing better services for citizens and society as a whole.

Justice reformers in Latin America should not be surprised to find that some OECD countries are still struggling to face the same issues as them. Justice institutions generally have a complex setup in which the dysfunctions of a single agency (for instance, the prosecutors) can generate externalities which quickly and negatively impact the performance of other agencies (for instance, the courts) that have little power to correct such

1 The terms “performance” and “responsiveness” are used in this paper with the meaning proposed in Manning 2009: 21, 22.

2 Lora 2007: 50-51.

3 As defined in Manning 2009: viii “a management culture that emphasizes the centrality of the citizen or customer, as well as the accountability for results.”

4 “There are clouds on the OECD public management horizon. In sharing experiences from the OECD it is important to note that not everything in the public management agenda is rosy or easily predictable.” Manning 2009:117.

dysfunctions.⁵ However, in designing their own solutions, Latin American reformers may find a useful reference in the experience of some OECD countries vis-à-vis similar challenges. In the same way, however, that legal reforms cannot simply be transplanted from one country to another, any lesson learned from OECD countries should be carefully adapted to the realities of Latin American justice institutions, which have a different history and reflect different social and economic realities. In particular, lessons from OECD countries may be useful to avoid generating unmanageable expectations or raising the bar too high, as some of the cases discussed in this report will show.⁶

This paper presents a selection of experiences from OECD countries in managing justice sector institutions, (mainly the courts). Experiences were selected because they were considered to be the most germane to Latin American reformers when reforming their own, corresponding, institutions. These considerations, along with time and space limitations meant that other significant aspects of the reform experience such as law reforms, judicial training, or access for the poor were not addressed. The fascinating discussion about potentially conflicting concepts of “rule of law” in certain Latin American countries also had to remain unaddressed in order to keep the focus on the more technical aspects of measuring or improving performance. This paper is, thus, not intended as a comprehensive review, but rather as a collection and analysis of short case studies that reformers in Latin America may find of interest in the design of their own reform proposals. The authors’ applied selection criteria based on their direct contacts with the OECD and Latin American countries’ experiences.

The scope of the paper is primarily limited to the courts, yet addresses all types of courts: specialized courts as well as courts of general jurisdiction, civil as well as criminal and administrative courts, first instance as well as appellate and supreme courts. Of course a variety of other institutions are involved in the governance of the justice sector and, ultimately, the service delivery chain is only as good as its weakest link. Each part of the chain has different incentives and governance structures; however, looking at all of them in depth would be beyond the scope of this paper. Given that the courts are at the core of the justice sector, a special focus on them seems justified and is, thus, the primary subject of this paper, with only cursory references made to Ministries of Justice, Public Prosecutors or Public Defenders.

5 In general, most justice sector institutions qualify as “high threshold for structural change/complex political control” agencies (like Supreme Audit Institutions and Central Banks) with the consequent “high institutional continuity” and “low responsiveness” results. See Manning 2009: 40.

6 The OECD countries are not a homogeneous group. Their public sector traditions, histories, and levels of institutional capacity are not the same. From a number of experiences, this report has selected the aspects that the authors believe are most easily applicable to Latin America, in particular from Western European countries which share a civil law tradition with Latin American countries. As a consequence, some countries or experiences have only cursory treatment and others could not even be considered. Conversely, an in-depth review of non-Western European countries belonging to the common law tradition would be required to ascertain the most relevant experiences for the English-speaking Caribbean countries, a sub-region that certainly deserves a separate treatment.

The first chapter provides an overview of the justice reform experience in Latin America during the last two decades, and the latest trends in establishing reforms which are parallel to those of the OECD countries; it also identifies common features of and significant departures between OECD and Latin American reform trends in the justice sector. The second chapter outlines the context of the debates on justice reform in OECD countries, specifically regarding the performance and quality of justice services before the 1990s. The third chapter discusses the transition from traditional justice reform approaches in OECD countries to NPM approaches that began in the 1990s and the fourth chapter presents five major cases of reforms directed at public expenditure, human resources, and organizational restructuring. The fifth chapter describes recent trends in OECD countries to incorporate approaches from the private sector regarding quality controls to court service delivery. It will also summarize the main features of the most recent tool for quality management in the courts, namely the International Framework for Court Excellence. The paper concludes with some suggestions about areas where Latin American judiciaries may benefit from experiences in OECD countries.

Latin American Justice Reforms: Recent Achievements And Pending Challenges

OVERVIEW OF THE LEGAL SYSTEM AND THE JUSTICE SECTORS⁷

1. **Latin America's legal systems are based on the traditions of their former colonial powers but have developed their own distinct features.** Latin American legal systems are based on the civil law tradition inherited from Spain, Portugal, France or the Netherlands during colonial times.⁸ The Spanish-speaking nations and Brazil have also been influenced by the U.S. legal system especially in regards to commercial law and judicial review powers. Latin American courts are used to exercising powers of judicial review, overturning laws or administrative decisions and responding to individual complaints via *amparos* or *tutelas*, designed to challenge violations of fundamental rights through fast track procedures.
2. **Recent legal reforms have been largely influenced by developments in certain OECD countries.** The earlier independence of the Spanish and Portuguese colonies partially isolated them from Western European trends, giving rise to a distinctly Latin American model that retained some colonial practices. Yet the effective implementation of these legal reforms was limited by the political instability and social inequality which resulted, among other things, in high levels of informality --even affecting dispute resolution systems. More recently, the revisions of substantive and procedural codes have generally followed Western European models (in particular French, Italian Spanish and German precedents) and the introduction of judicial councils and constitutional courts after World War II was rapidly replicated in Latin America. The U.S. criminal procedures have influenced recent reforms in countries such as Bolivia, Chile, Colombia, Mexico and Panama. The elites of the legal profession in Latin America are often educated in the U.S. or Western Europe at the graduate level and develop close contacts with law firms

7 Some of the information contained in this chapter was based on Hammergren (2007) and Hammergren (2008).

8 English-speaking Caribbean countries have common law systems, and follow British, U.S., Canadian, Australian and New Zealander developments closely. Caribbean Group for Cooperation in Economic Development (CFCED) (2000).

and legal scholars in OECD countries. However, the conservative perspective of the legal profession has also been a major source of resistance to change in the Latin American justice sectors.

- 3. Institutional isolation was a key characteristic of the region's justice sectors.** No significant reforms or major investments were made in the sector until the early 1960s, and then only fledgling changes were made. Justice was seen by society at large as a monopoly of the legal profession. The courts and other agencies remained state providers of justice services for citizens (especially in criminal justice), and provided work for the large number of the attorneys produced by local universities. Demand remained restricted, with services largely outside the reach of the majority of the population who could not afford to hire a lawyer to represent them and who, in any case, found it difficult to understand the workings of a system largely designed to service the preferences of the legal community. In countries with large indigenous populations, conflict resolution occurred through their own communal mechanisms. Alternative means, such as arbitration and mediation slowly started to flourish, particularly among the business community.
- 4. The justice sectors in Latin America are comprised of a number of public/non-public organizations involved in dispute resolution.** Nowadays, the justice sector in Latin America is a complex set of public and non-public organizations that includes institutions involved in the law-based resolution of disputes. The court system retains a central role, but a number of public sector agencies are also major sector players: prosecutors and public defenders, the police, property and commercial registries, and administrative agencies with court-like functions, in particular for bankruptcy or insolvency cases (for instance, *Supersociedades* in Colombia or INDECOPI in Peru). Non-public organizations are also very active members the sector: the bar associations, law schools, chambers of commerce, and community justice operators provide key justice services such as legal aid and alternative dispute resolution (ADR) services.
- 5. The justice sector may have significant economic and social impacts but its complex structure results in protracted decision-making processes.** Courts in Latin America have broad constitutional mandates that sometimes extend to determining major economic or financial issues for the State (for instance, in Costa Rica) or determining how public funds should be allocated in the health and education sectors (for instance, in Colombia). Yet lengthy decision making processes are not unusual, with delays exceeding as much as 10 years in some cases, and posing serious structural challenges for some countries. Indeed, delays are the most common source of dissatisfaction with justice sector performance.
- 6. The Inter-American Legal System has developed key legal instruments to facilitate international judicial cooperation and high-level consultations mechanisms are producing interesting results.** Several international conventions sponsored by the Organization of American States (OAS) govern the recognition and enforcement of judicial decisions among countries in the hemisphere. The

Inter-American Human Rights Commission and Court have built up a solid body of jurisprudence that includes standards of fairness and access to justice. Moreover, the Center for Justice Studies of the Americas (CEJA) has conducted research and training programs for judicial officers and other justice sector operators in OAS member countries. Headquartered in Santiago, Chile, CEJA has continued evolving towards a role analogous to that of CEPEJ in Europe, with the support of other donors active in the region serving as a “clearing house” of best practices and analytical tools. It has also proposed quality and performance standards, though they have yet to be approved by the countries. Periodic consultation mechanisms like the Justice Summit of the Americas or the Conference of Justice Ministers of Ibero-America have issued statements and declarations on particular aspects of the court systems’ operations as well as that of other sector agencies.

JUSTICE REFORM OBJECTIVES AND INSTRUMENTS

7. **The 1980s transition to democracy generated citizen demand for justice reforms.** The latest wave of justice reforms that has passed through most countries in Latin America was originally one of the by-products of the Region’s democratic transition of the early 1980s. During this period, issues such as limited independence, perceptions of corruption, poor quality, and limited access were open to public debate after decades of military dictatorships. The performance and access issues were specifically linked to rules and practices, poorly prepared and underpaid staff, low budgets, and inadequate infrastructure and equipment.⁹
8. **Justice reforms were also expected to deliver higher level political and economic benefits.** Although most of the reform programs aimed at improving the performance of the court system and other dispute resolution institutions, they were also expected to enhance sector contributions to higher level objectives such as improved governance (including greater political stability, and reduction of crime and violence) and enhanced economic performance (higher growth, reduced poverty, and equitable access by all citizens). The transition to democracy was a period of high expectations and reformers felt obliged to address the broadest possible range of concerns in ambitious reform packages.¹⁰
9. **Reform programs most typically included organizational mechanisms and tools to modernize institutions and expand access.** In pursuing sector reforms and their higher-level objectives, Latin American reformers focused on standard

9 This low starting point of most justice reforms in Latin America has to be taken into account while assessing the progress made in recent years. By the beginning of the 1980s most judiciaries in the Region were still at the level of “centralized power/patronage” and had not even reached the “due process” public service stage. Manning 2009: 9 and 20. Contrary to general public sector reform trends, the justice reforms carried under authoritarian rule have mostly failed, although the ones pursued during periods of democratic government have not always been successful. Spink 1999.

10 Rico 1997

organizational modernization tools including capacity building (professional development of sector staff, improved administrative systems), and mechanisms to expand access to all citizens (legal assistance, ADR, citizen information and education programs). The procedural reform experiences from Western Europe and the U.S. were considered a useful precedent, while performance-based reforms were mostly ignored.

10. **The reforms required substantial investment programs with considerable financial support of OECD donors and multilateral development banks (MDBs).** Latin American countries invested significant amounts in these reform programs, sometimes mandated by constitutional or legal reforms that allocated specific minimal percentages of the national budget to the operation of the judiciary and other sector agencies. In some cases this was well above the OECD average of 0.40% of GDP (See Figure 1). The United States Agency for International Development (USAID), the Inter-American Development Bank (IDB) and the World Bank were the principal external actors, joined at a later stage by the United Nations (UN) and the European Union (EU). Other bilateral donors (Britain, France, Germany, Spain) and foundations (Ford, DPLF) also made substantial contributions.¹¹
11. **OECD bilateral donors have been active in the Latin American justice sectors pursuing their own assistance priorities.** OECD bilateral donors have been supporting justice reforms in Latin America since the 1960s, initially within the framework of the Law and Development Movement that emphasized the reform of laws as part of the development process. In the early 1980s the main rationale for reform was the connection between the justice sector and democratic governance: the courts were considered the weak pillar of democracy and, thus, the key to establishing politically stable regimes in the region. In the 1990s, the rationale for donor support changed: the justice sector provided a basic public service for citizens and enterprises that needed modernization. Some donors (the United States, Germany) preferred to focus on the criminal justice out of concerns for growing trans-national crime and citizen insecurity. Other donors (European Union, France, Spain, United Kingdom) have kept a broader focus that allows them to work not only with sector institutions but also with the social dimension of justice (for instance, dispute resolution services for vulnerable groups such as indigenous peoples).
12. **The MDBs arrived late to justice sector reform in Latin America but with larger programs.** Until the early 1990s, the World Bank and the IDB did not pursue any direct work with branches of Governments other than the Executive. The neo-institutional economic theories on the connection between rule of law and market development provided a rationale for MDBs support in the broader context of the Washington consensus reforms. Subsequent studies by the MDBs¹² attempted to establish statistical correlations between justice sectors and economic growth,

¹¹ Inter-American Development Bank 2004; Biebesheimer and Payne 2001.

¹² Kaufman et al. 2007 and earlier; World Bank 2004.

and found relationships between rule of law and indicators of social welfare. More recently, the UN Legal Empowerment report¹³ has also emphasized a connection between justice institutions and poverty reduction.

JUSTICE REFORM ACHIEVEMENTS

13. **Legal and institutional reforms have changed the structure and operations of the justice sector in Latin America.** Reforms brought radical changes in the structure and operations of the justice sector in Latin America. The most drastic were legal and institutional, and included: (a) modernizing judicial councils, public defender and prosecution agencies (Attorney General's Office or Public Ministry), ombudsperson offices, and anti-corruption offices; and (c) increasing the involvement of courts in protecting procedural and substantive laws particularly related to criminal justice;¹⁴ (b) creating new organizations such as constitutional courts or chambers, responsible for protecting constitutional rights and deciding on the constitutionality or legality of executive policies.¹⁵
14. **Justice reforms have improved the quantity and quality of the resources available to sector institutions.** The justice sector's financial and human resources augmented over the last years (See Figures 1 and 2). The judiciary, prosecution and public defenders, and the police have all benefited from increased budget allocations. Staffing levels were brought in line with increased demand but an average of 8 judges per 100,000 inhabitants remains substantially lower than the average for Western European countries (See Figure 3). Higher salaries have attracted more qualified professional staff.¹⁶

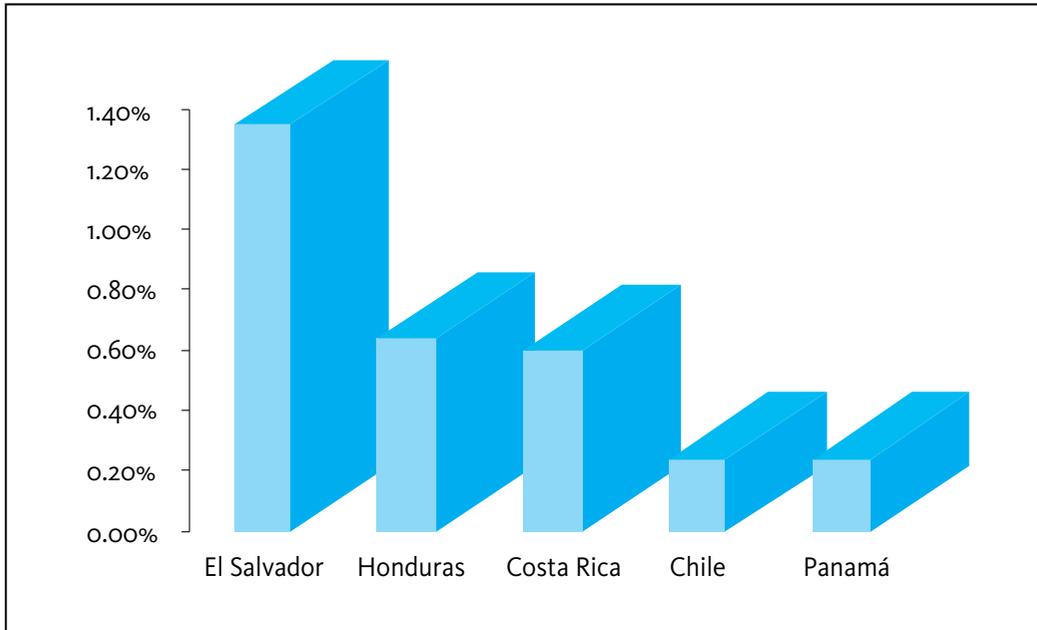
13 United Nations 2008.

14 CEJA website at <http://www.cejamericas.org>.

15 DeShazo, Peter and Juan Enrique Vargas 2006.

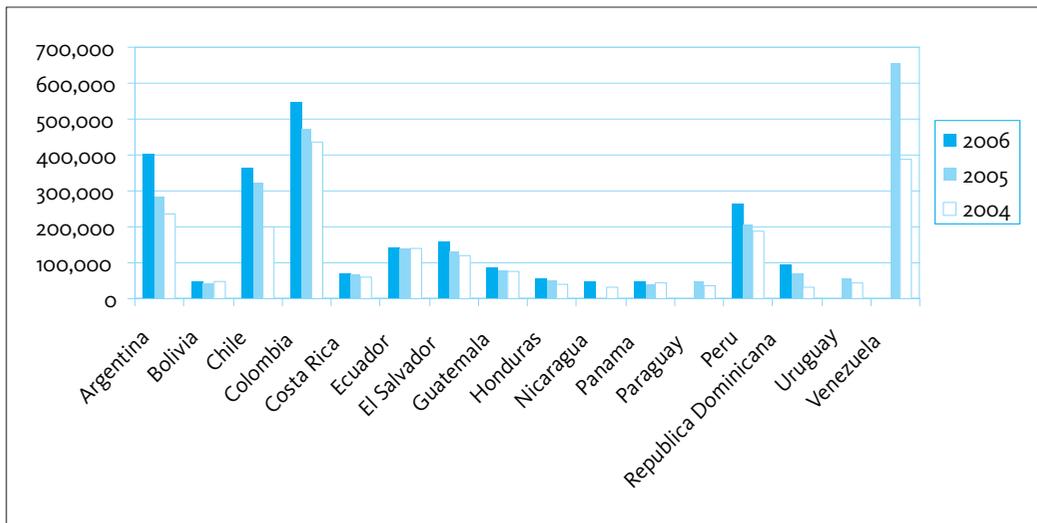
16 World Bank 2009.

Figure 1. Judiciary budget as percentage of GDP



Source: CEJA, 2008

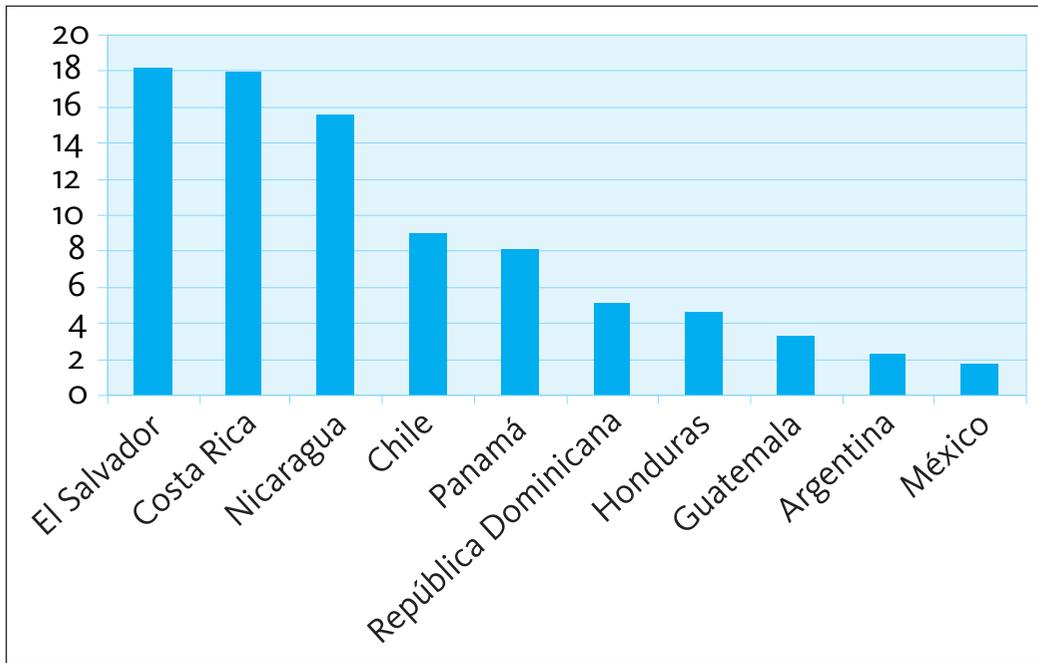
Figure 2. Total judicial budgets (current USD 1,000)



Source: CEJA, 2008¹⁷

17 In this and subsequent tables, data from large federal countries (Argentina, Brazil and Mexico) has not been included when the available data does not aggregate state and federal courts in a way that allows comparisons with centralized countries.

Figure 3. Number of judges per 100,000 population



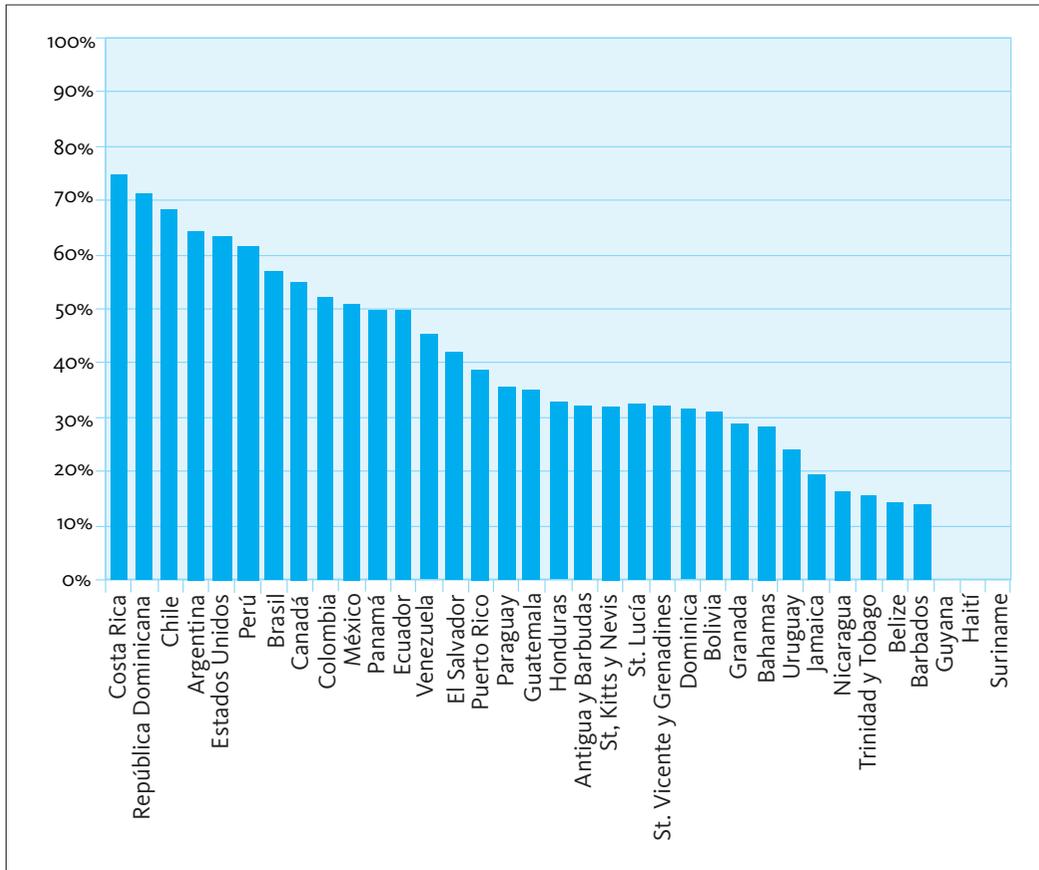
Source: CEJA, 2008

15. Managerial and administrative reforms were less radical but still significant.

Although less ambitious, reforms at the managerial/administrative level also had a significant impact in: (a) strengthening of internal administrative systems, through case tracking systems; (b) expanding the information made available to the public on caseload management and court administration, through ICT (See Figures 4 and 5); and (c) improving selection, promotion and disciplinary systems for sector professionals, in an effort to enhance staff profiles and decrease political interference.¹⁸

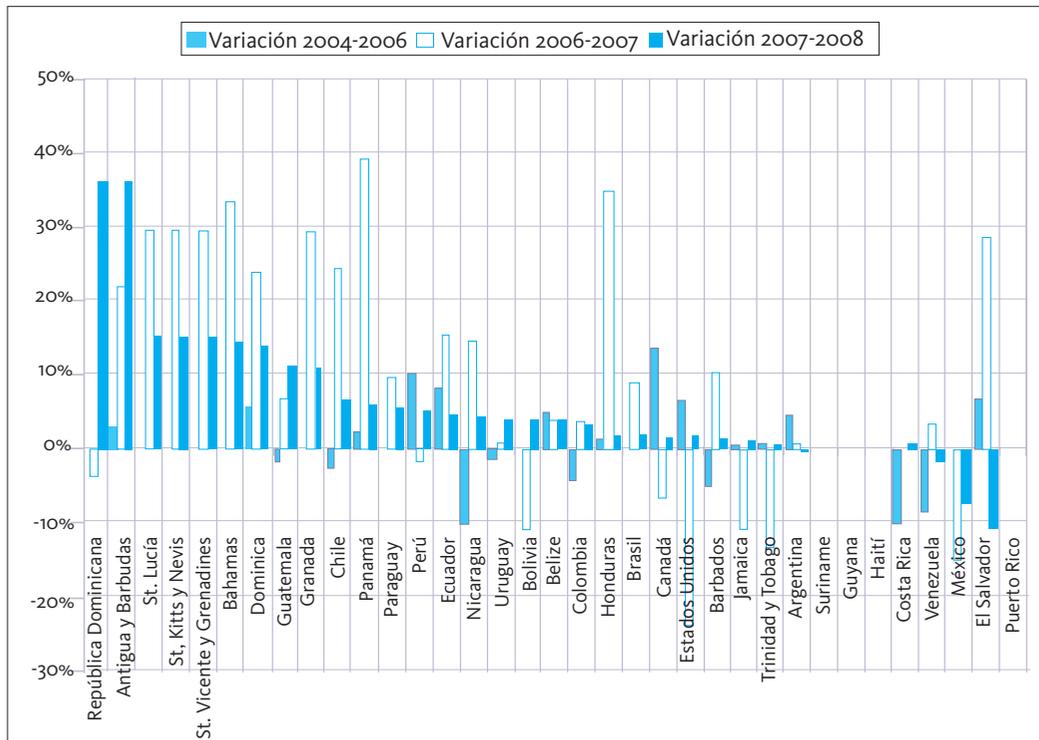
¹⁸ Due Process of Law Foundation 2007.

Figure 4. Global access to justice sector information through the internet (2008)



Source: CEJA, 2008

Figure 5. Global access to justice sector information through the internet (2004-2008 Changes)

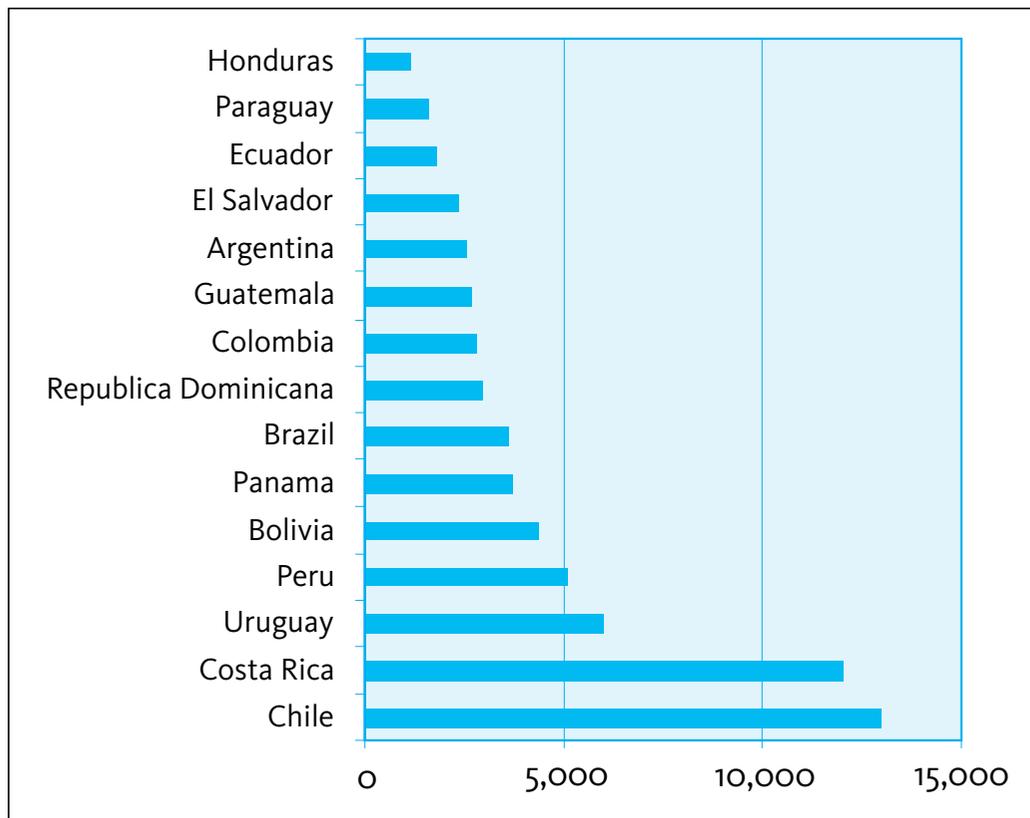


Source: CEJA, 2008

16. Justice reforms benefited external users and set the ground for further reforms. The reforms generated tangible benefits for users. In general, improvements in sector inputs/outputs led to substantial progress in terms of: (a) addressing human rights abuses; (b) controlling external influences; (c) reducing delays in handling cases and the associated transaction/opportunity costs for users; and (d) facilitating access for vulnerable citizens and private sector actors. The progress made has also set the basis for planning/implementing more ambitious changes, while generating demand for deeper reforms from external users. Additional demand, as evidenced by litigiousness rates, was substantially higher than those of top performing European OECD countries (See Figure No. 6). This suggests that higher public trust may lead to more intensive use of justice institutions at the risk of eroding the efficiency gains of some reforms.¹⁹

19 Manning 2009. In that paper, public trust is considered a proxy for administrative legitimacy.

Figure 6. Litigiousness rate (Number of incoming cases per 100,000 inhabitants)

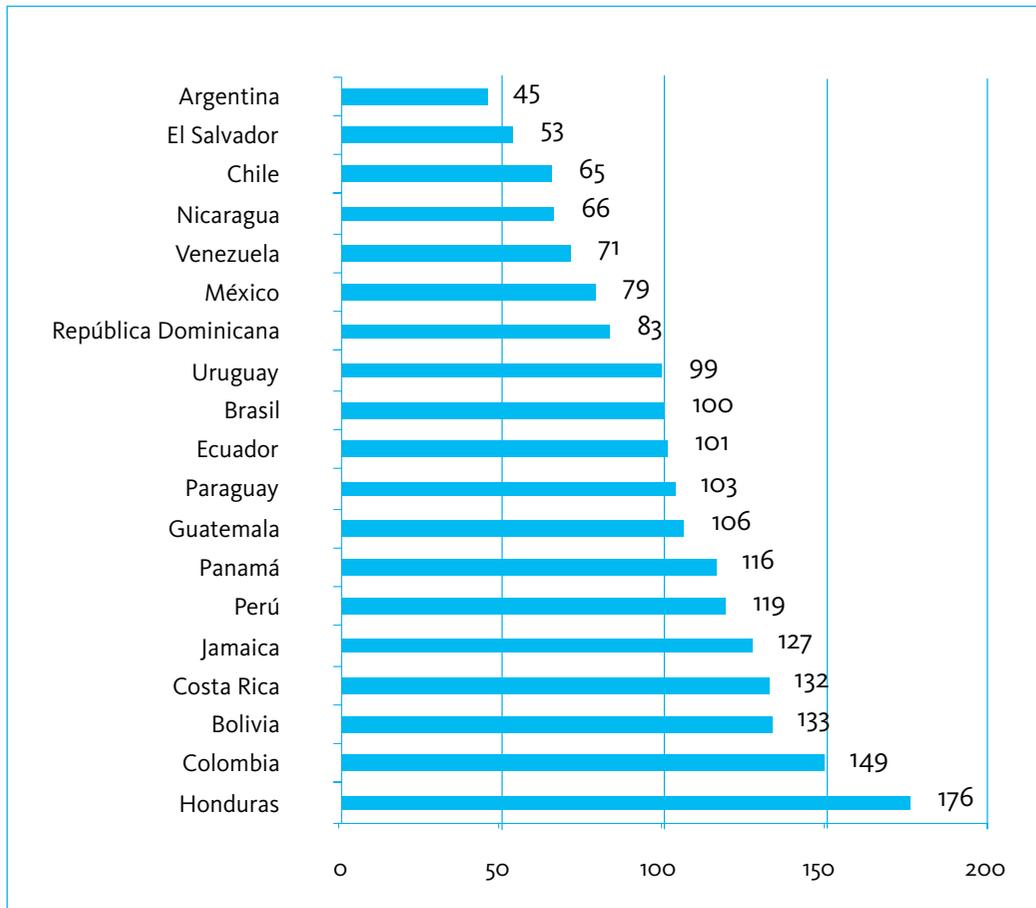


Source: CEJA, 2008

JUSTICE REFORM SHORTCOMINGS

17. **The broad scope of reform programs made them both difficult to evaluate and vulnerable to criticism.** The activities included in Latin American justice reforms covered a broad range and a variety of purposes. This wide scope may have worked against the programs' ability to make or track specific improvements. It has also made some programs more vulnerable to criticism, either of the reform leadership (when political conflicts arise about the potential social and economic effects of the reform) or of the supporting donor (when programs are seen as advancing the interests of investors over those of the country). The high level impacts anticipated from the reforms (e.g. on political stability or economic and social development) were not easy to measure. Over-selling the reforms with objectives that were difficult or impossible to measure may have also generated skepticism about real impacts or tangible results. The fact, for example, that Latin American countries still rank very low in the worldwide Doing Business indicator of contract enforcement suggests that private sector stakeholders remain dissatisfied with the services received from the court system (see Figure 7).

Figure 7. Doing Business 2009– Contract enforcement (World rankings of Latin American and Caribbean countries)



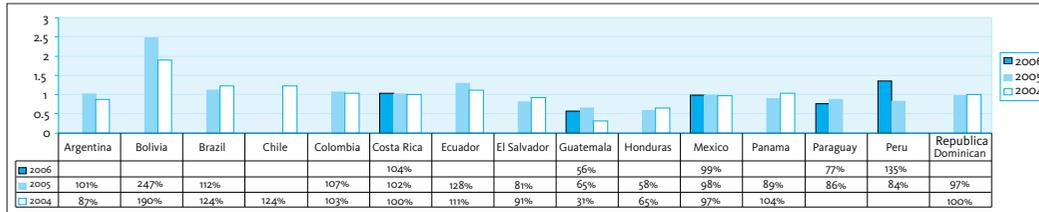
Source: Doing Business, 2009

It is estimated that, on average, it takes 707 days to enforce a standard commercial contract through the courts in Latin America and the Caribbean, as opposed to 462 days in OECD countries. Not only is this slower, but also more expensive than OECD countries. The overall costs equal about 19% of the value of the claim in OECD countries, as compared to more than 31% in Latin American and the Caribbean.

18. **Unanticipated contradictions between objectives and instruments may be the main reason for limited results in some areas.** Output/outcome shortfalls have also been attributed to reform design issues related to unanticipated conflicts between objectives and instruments: efforts to increase budgetary autonomy through cost-recovery fees may limit access, increases in access may aggravate delays and congestion, and greater independence may counter efforts to combat corruption. The uneven performance of various countries as measured

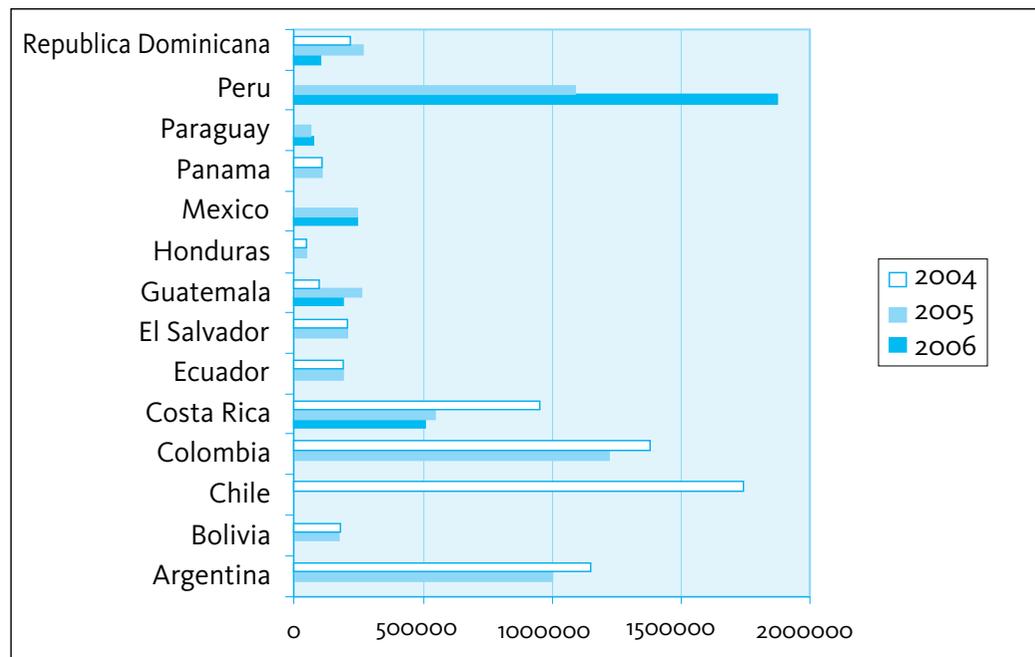
by the clearance rate indicator suggests that the same type of reforms may yield very different results in different countries and that some improvements are not sustainable over time (See Figures 8 and 9).

Figure 8. Clearance rate 2004-2006 (Selected countries)



Source: CEJA, 2008

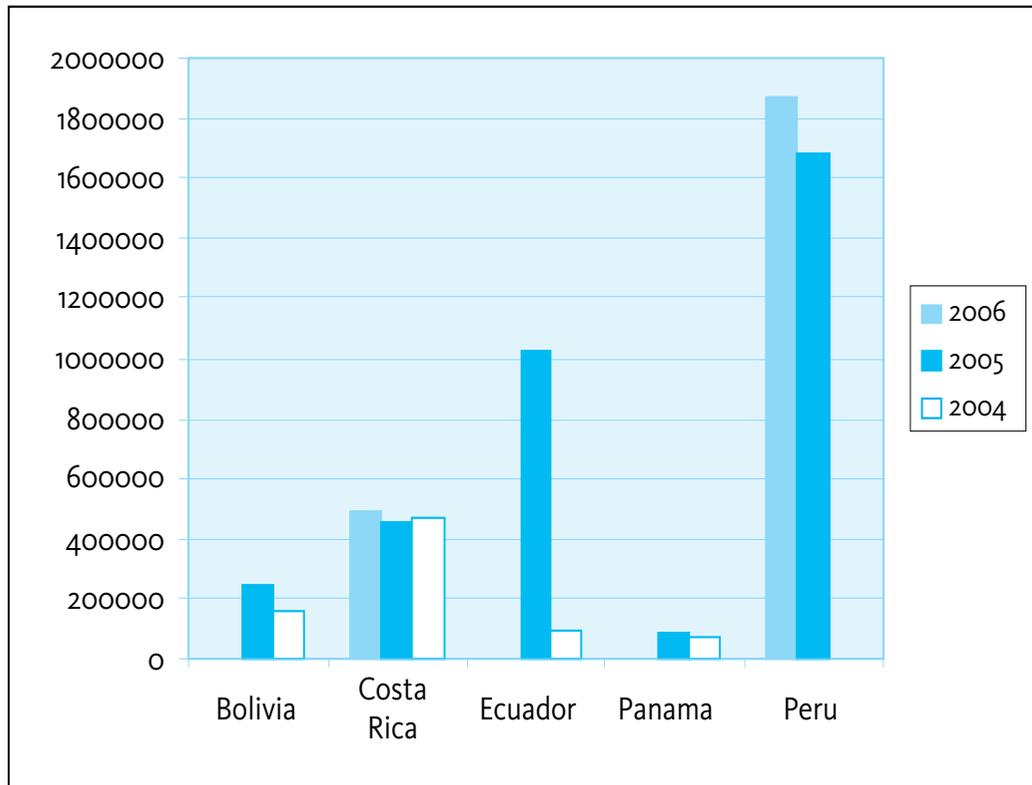
Figure 9. Total number of outgoing cases



Source: CEJA, 2008

19. **The disconnect between higher costs and unmet demand in service provision remains unaddressed.** The main dissatisfaction with recent reforms is the intractable disconnect between the costs of sector operations and the gap in services supply-demand revealed by higher backlogs in a number of countries in the Region (see Figure 10). While most of the sector budget is spent on salaries, which have increased substantially, the supply for justice services has not matched the demand, suggesting that further reforms are needed on the side of expenditure efficiency.

Figure 10. End-of-year backlog



Source: CEJA, 2008

- 20. A new balance between institutional independence and accountability has to be found.** Other branches of government as well as citizens are demanding greater accountability for sector resources and actions. As agencies are bestowed with higher budgets and more independence, they should make responsible and transparent use of these resources, and account for their use. Progress in this area has been limited and requires the commitment of the highest levels of the sector governance bodies.
- 21. The reform process has been influenced by powerful vested interests within the justice sector.** Judges, prosecutors, public defenders, and bar associations have been especially active in shaping reforms, particularly through procedural codes that frequently reflect their views and interests. Self-interested rulings and lobbying have also been common tools in reform processes. Lawyers in particular have remained a major reform constituency, and in some cases have successfully blocked changes affecting their economic interests including broader *pro se* representation, higher court fees or limited appeals.

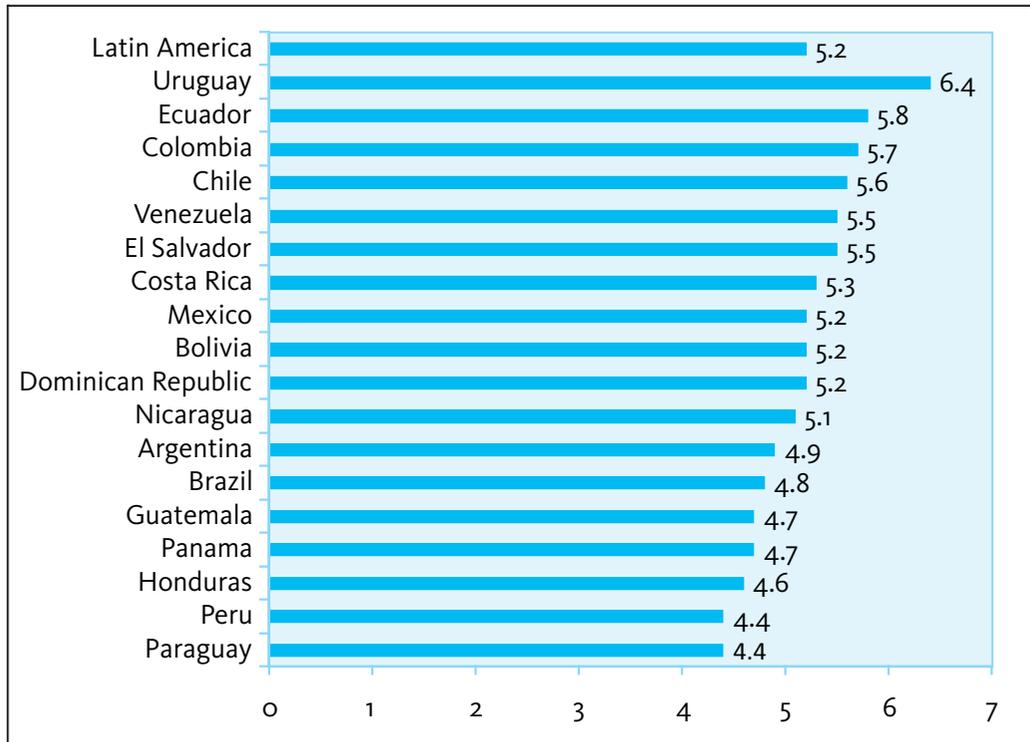
22. **Conflicting interpretations about the new institutional framework have led to frequent conflicts within the justice sector and/or with other branches.** The reforms have changed the sector's checks and balances. Disputes between sector organizations and other branches of government around modified legal and constitutional frameworks have become frequent in such countries as Bolivia, Ecuador, Colombia, Costa Rica and the Dominican Republic. While many of these are only the short-term consequences of organizational adjustments to new roles and responsibilities, others arise from fundamental disagreements about how the new distribution of functions and balance of power are exercised.²⁰

JUSTICE SECTOR CONTRIBUTION TO STATE LEGITIMACY: CITIZENS' TRUST/CONFIDENCE

23. **Justice sector agencies have a strong impact on societal perceptions and behaviors in Latin America.** Seeking to provide a broader justification for justice sector reform, numerous public opinion studies done in the region over the past few years have attempted to trace the relationships between the justice sector and citizens' perceptions about governance and the rule of law. It has proven difficult to directly attribute changes in these areas to the justice sector alone because there are many other contributing factors. However, one area has been found where the linkages are clear: the perceptions about the state's ability to enforce laws (Figure 11). According to the Latinobarómetro, since 2004 there has been only a modest increase in the perception that laws are enforced in the region (from 4.5 to 5.2 on average).

20 Pásara, Luis 2004 in Hammergren 2007.

Figure 11. States' ability to enforce laws, 2008: Question: "the State assures the compliance with every law," ranked 1 (no ability) to 10 (high ability).

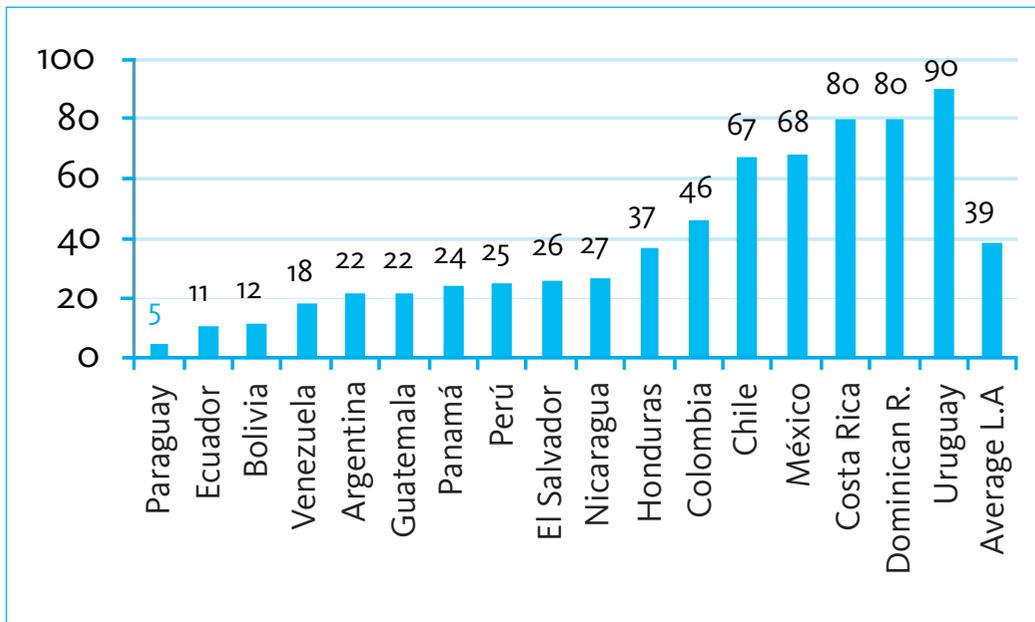


Source: Latinobarómetro 2008-2009

24. **The confidence of legislators in the judiciary is another indicator of levels of societal pressure to undertake reforms.** In Figure 12, the highest-scoring countries (Chile, Costa Rica and Uruguay) appear at the upper end, and the gaps between them and the lowest-scoring countries are greater than in citizen perceptions. Some high scores (Mexico, Honduras, the Dominican Republic) may coincide with recent justice sector reforms, in which the Congress or the ruling party were involved, suggesting that members of the political branch of government are sensitive to the electorate's demand for justice reform.
25. **Perceptions of citizens as to the quality of rule of law show consistently good performers, but also some downward trends.** According to perception data, there is less public trust in the rule of law in most countries, an indicator in which the performance of the courts and other sector institutions factors significantly. Because no data is available from earlier periods, it is not possible to determine whether, in the long-term, Latin American justice reforms have produced some improvements to this critical perception. Countries such as Costa Rica, Chile, and Uruguay receive consistently high ratings (Figure 13) while others record serious deterioration in citizen perceptions about the justice institutions. Overall the confidence in the judiciary has remained stable during the past 13 years though

with some clear downward trends (Figure 14). In the same period judiciaries have ranked among the lowest in public confidence (only above political parties) when compared with other institutions. The Catholic Church continues to be the most trusted institution and the most notable improvements in trust have been achieved by the Governments (Figure 15).

Figure 12. Confidence in the Judiciary by Congresses (2006)
 Percentage of Congress members that trust the Judiciary

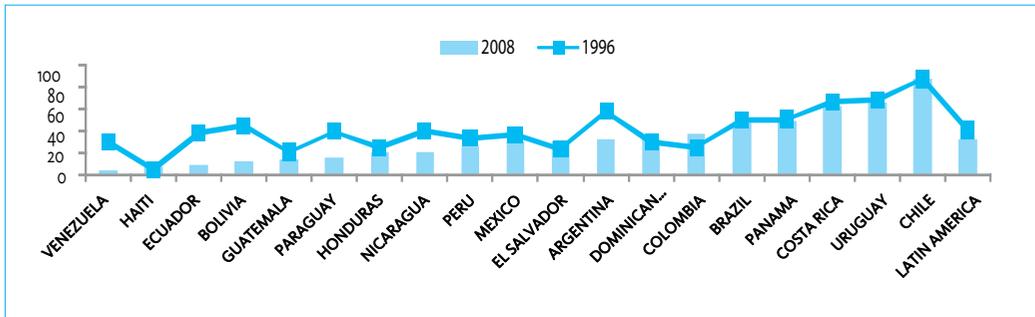


Source: Instituto Interuniversitario de Iberoamérica de la Universidad de Salamanca, Observatory of Parliamentary Elites in Latin America, Parliamentary Elites Boletín No. 9, Evaluation of Public Institutions: The Judiciary, Spain, 2006

26. In spite of some progress in functional performance, public trust has not improved as expected. The reforms may have overcome some operational weaknesses of the justice sector, but justice issues continue to be high on the agenda. Despite the emphasis on criminal justice, crime rates keep growing while impunity of organized crime and corrupt politicians are unabated. Not surprisingly, public trust has not increased and in most countries perceptions about the sector have worsened. Only in a few countries (Chile, Costa Rica and Uruguay) with a strong tradition of legitimacy and credibility, does citizen trust in justice institutions remains relatively high. Citizens' skepticism may be related to the fact that corruption continues to be an issue or that political interference has not disappeared altogether.²¹

21 Due Process of Law Foundation 2007a; Grafe 2009.

Figure 13. Rule of law in Latin America from 1996 -2008 (percentile rank)²²



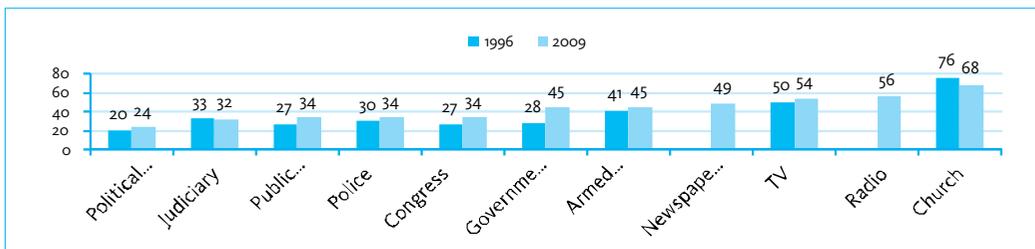
Source: World Bank Governance Indicators, 2008

Figure 14. Evolution of the Confidence in the Judiciary in Latin American countries, 1996 -2009



Source: Latinobarómetro, 2009

Figure 15. Confidence in the Judiciary in Latin American countries compared to other institutions (1996-2009)



Source: Latinobarometro, 2009

22 Figure 13 ranks countries from 0-100 by indicating the percentage of countries worldwide that rate below the selected country. Scores reflect the statistical compilation of responses on rule-of-law quality conducted by various survey institutes, think tanks, non-governmental organizations, and international organizations. Countries' relative positions are subject to margins of error as discussed in Kaufman et al (2004).

Justice Institutions In OECD Countries: Performance Issues And Traditional Approaches To Reform

DESPITE COMMON TRENDS, MANY DIFFERENCES REMAIN AMONG JUSTICE SECTORS IN OECD COUNTRIES

- 27. Vastly differing histories and legal traditions have shaped the justice systems in OECD countries.**²³ Although they are all high income or upper middle-income countries, they are far from homogenous.²⁴ Their legal systems belong to different branches of the civil and law families, including the continental European civil law tradition (Austria, Belgium, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and Turkey), non-European civil law countries whose systems are inspired by the continental European ones (Japan, Korea, Mexico), European countries with a civil law origin combined with a more recent influence of post-communist transition (Czech Republic, Hungary, Poland, Slovak Republic), and the common law family (Australia, Canada, Ireland, New Zealand, United Kingdom, and United States).²⁵
- 28. Increased globalization has led to some common trends and cross-fertilization, but the structure and performance of these systems continues to vary.** The comparability of quantitative cross-country data about the structure of the justice system is limited because of a lack of common definitions and statistical

23 For ease of comparison most data in this document refers to European members of the OECD. Data from other countries like the U.S., Canada, Australia or New Zealand is presented only as a general reference and is not fully comparable.

24 Current members are Australia, Austria, Belgium, Canada, Czech Republic, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. Current accession candidate countries are Chile, Estonia, Israel, Russia, and Slovenia.

25 This grouping into “legal families” is not as clear cut as it may seem. Many of these systems have experienced cross-fertilization in some areas, but not in others. Also, the distinction is largely based on an analysis of countries’ civil (as opposed to criminal or administrative) law system. Please note that the name for the “continental European civil law countries” is a well established convention and generally used to distinguish them from “common law” countries, but sometimes misleading, because “civil law” is the term otherwise used to distinguish this area of law from criminal or administrative law – in continental European civil law countries as well as common law countries.

systems.²⁶ Comparable cross-country data about judicial performance are exceptionally rare. At times, trust in the justice system is used by some as a proxy for performance because it seems reasonable to assume that trust in poorly performing systems is lower than trust in well performing systems. However, trust is also affected by many other factors such as scandals, press coverage, variations in trust of government in general etc. For example, the Fall 2009 Eurobarometer shows, as many would expect, that eight out of ten respondents in Denmark are satisfied with the courts, which is similar to Finland (74%) and Austria (67%). The scores for (former) transition countries are intuitively lower: Bulgaria (17%), Croatia (15%), Latvia (26%), Lithuania (15%), Macedonia (20%), Romania (28%), and Slovenia (19%), even for those now members of the OECD, such as the Czech Republic (29%), Poland (31%), and Slovakia (29%). In Turkey, 65% of respondents have trust in the justice system.²⁷ These ratings roughly coincide with the country ratings in Transparency International's Corruption Perception Index²⁸ and the scorecards established by Global Integrity.²⁹ However, Eurobarometer also shows that upward or downward ratings can fluctuate significantly and are subject to factors other than performance. Compared to six months earlier, trust in the courts had decreased by 13 points in the Netherlands and Sweden, by 11 points in France, Slovenia, and the Czech Republic, by 9 points in Lithuania, and by 8 points in Malta, whereas trust in the Greek courts went up by 8 points.³⁰ It is unlikely that court performance has changed as dramatically over this period of time.

29. **Available data about aspects such as costs and delay point to differences in the performance of courts across OECD countries, even among those with the same legal tradition.** The cross-country data of the World Bank's Doing Business series indicate that when it comes to enforcing a commercial case through the court system, there are significant differences across OECD countries. Luxembourg and Italy are two extremes with respect to the ease of enforcing contracts, although they are both members of the EU and, more specifically, the civil law tradition. Out of 181 economies, Luxembourg ranks 2nd and Italy 156th. Enforcing contracts is cheaper in Luxembourg than anywhere else among the OECD countries. It is most expensive to enforce a contract in Italy. Despite different legal traditions, Denmark and the United Kingdom have very similar scores with respect to all three variables (number of procedures, time, and cost).³¹

26 In Europe, the comparability has improved since the CEPEJ has started their cross-country comparative statistics based on common definitions in 2004, but even when similar data, for example about case-load, is available for non-European OECD countries, extreme caution has to be used when interpreting it, because underlying definitions may be different.

27 Eurobaromètre 2009: 122.

28 See Transparency International's website at <http://www.transparency.org>.

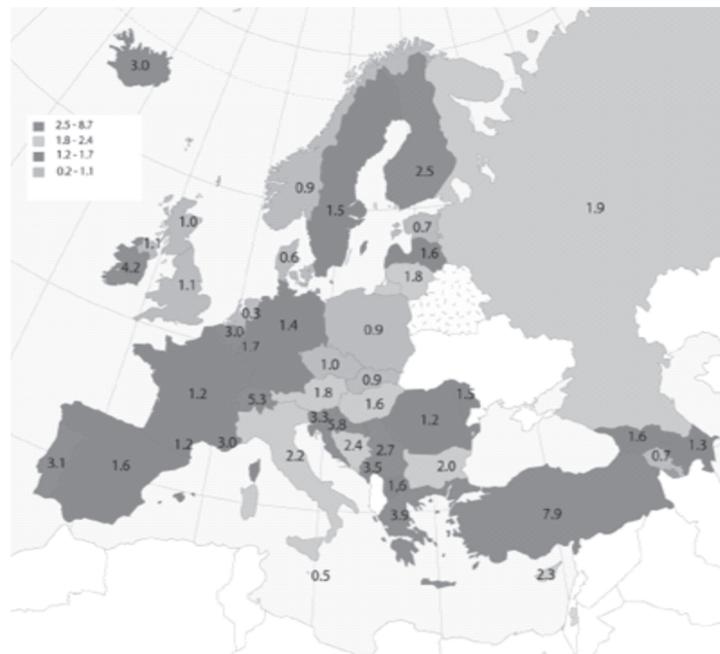
29 See Global Integrity's website at <http://www.globalintegrity.org>.

30 Eurobaromètre 2009: 122.

31 The entire Doing Business dataset is available online at <http://www.doingbusiness.org>.

30. **The extent to which people use the courts varies significantly across OECD countries.** The number of incoming first instance cases per 100,000 inhabitants in European OECD countries clearly shows a wide range of court use per population.³² A regional preference for out-of-court settlements may explain the location of Scandinavian countries at the lowest level of the litigiousness rate. Apart from that, the available data below is inconclusive and does not suggest a correlation with income per capita or recent regime changes (long time EU member states versus transition countries). There is no clear divide in this respect between Northern and Southern Europe either.³³
31. **There are also differences in the size and structure of the court systems.** The number of court locations per number of inhabitants varies across European OECD countries. These differences do not seem to be correlated with the density of population, the size of the country, or the number of cases per inhabitant. Additional information on historical traditions and sub-national pressures for wider coverage may be required to interpret this institutional landscape:³⁴

Map 1. Court locations per 100,000 inhabitants (2006)



Source: CEPEJ 2008

32 Only additional empirical research could explain these variances. It would have to cover the entire spectrum of judicable disputes and the way they do or do not get resolved, including through ADR mechanisms, similar to the empirical research undertaken by Genn 1999 for England and Wales.

33 CEPEJ 2008: 132.

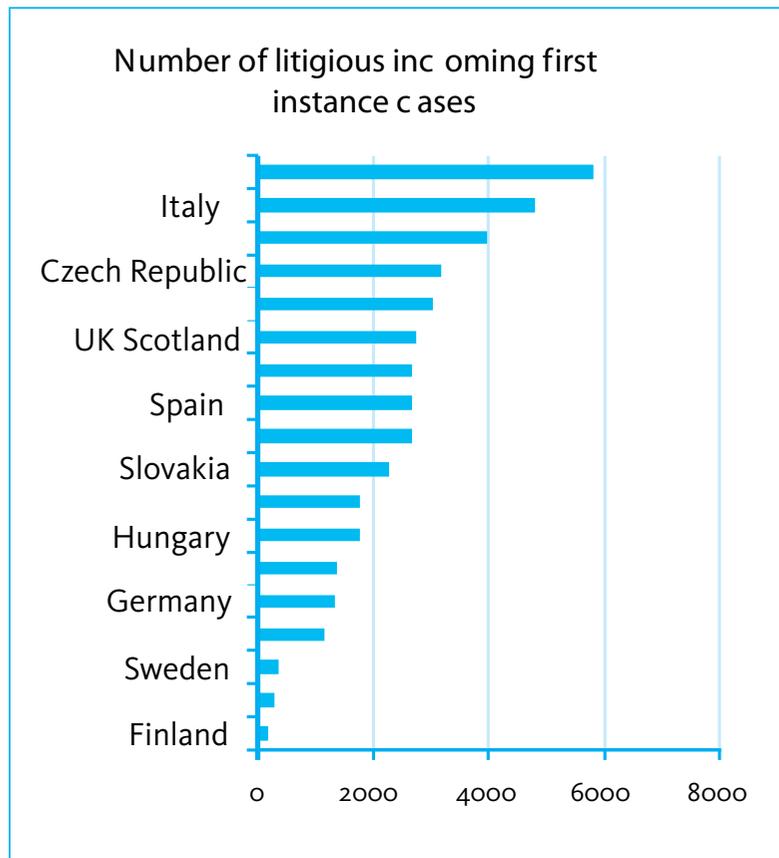
34 CEPEJ 2008: 80.

Figure 16. Ease of Enforcing Contracts (Doing Business in 2010)

Economy	Enforcing Contracts			
	Rank	Procedures (number)	Time (days)	Cost (% of claim)
Luxembourg	2	26	321	8.8
Iceland	3	26	393	6.2
Finland	5	32	235	10.4
United States	6	32	300	9.4
Norway	7	33	310	9.9
Korea	8	35	230	10.3
Germany	9	30	394	14.4
France	10	30	331	17.4
New Zealand	11	30	216	22
Hungary	12	33	335	13
Austria	13	25	505	16.6
Australia	21	28	395	20.7
Japan	21	30	316	22.7
Belgium	22	25	505	16.6
United Kingdom	24	30	404	23.4
Denmark	29	34	380	23.3
Switzerland	32	32	417	24
Netherlands	34	25	514	24.4
Portugal	34	34	577	14.2
Ireland	39	20	515	26.9
Slovakia	47	30	565	25.7
Spain	54	39	515	17.2
Sweden	55	30	508	31.3
Canada	58	36	570	22.3
Gr�ec	85	39	819	14.4
Czech Republic	95	27	820	33
Italy	156	41	1,210	29.9

Source: Doing Business in 2010.

Figure 17. Use of courts per population



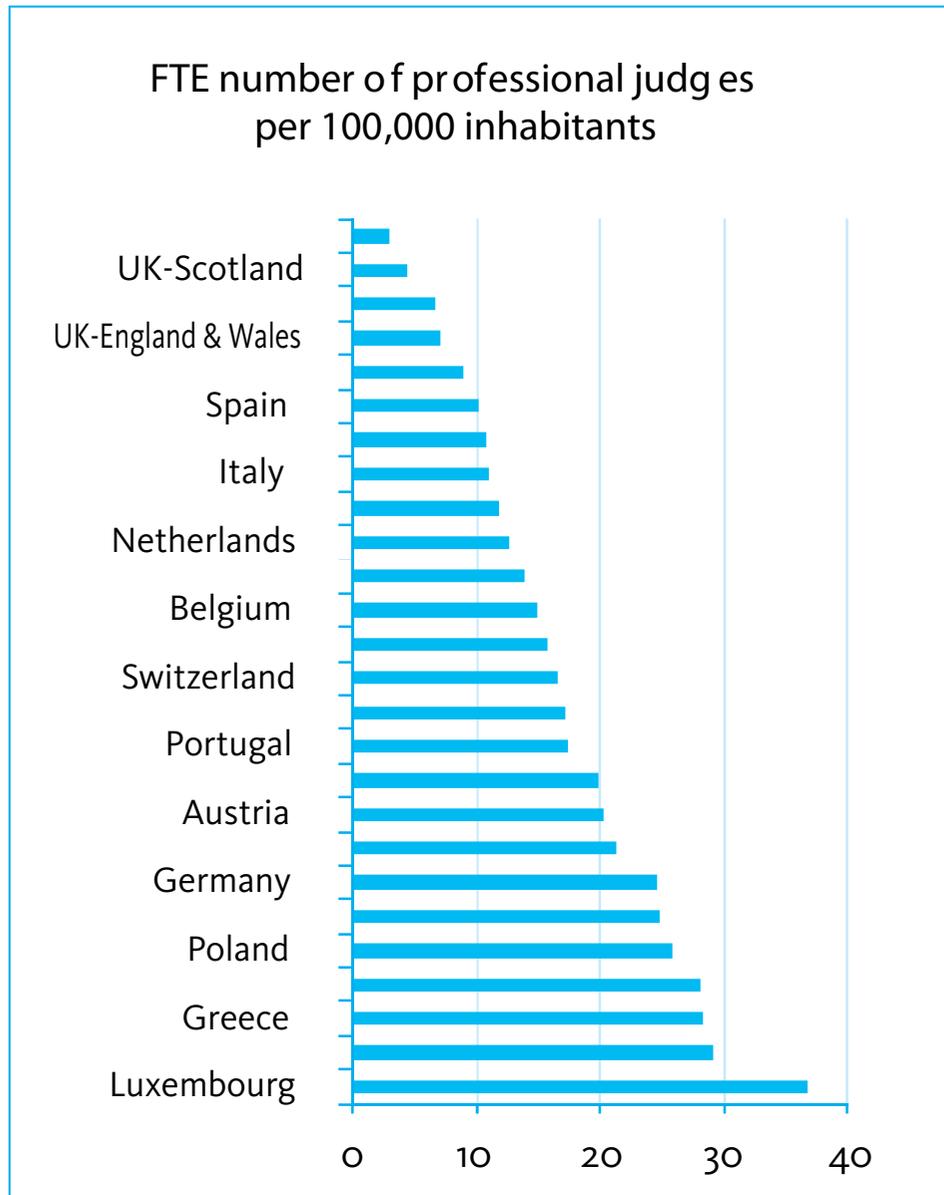
Source: CEPEJ 2008

32. **The number of judges also varies significantly from country to country.** The following table shows the number of professional full-time judges (as opposed to lay judges) per 100,000 inhabitants across the European countries of the OECD. Again, this data may reflect different societal preferences, historical developments, and political decisions, but not necessarily cost-benefit analyses. Interestingly, no clear correlation between the number of judges and the number of litigious cases³⁵ as shown above (Figure 17) can be established:³⁶

35 This category comprises all cases other than the cases in matters of non-contentious jurisdiction. The latter include matters relating to probate, guardianship, and various public registers.

36 CEPEJ 2008: 110.

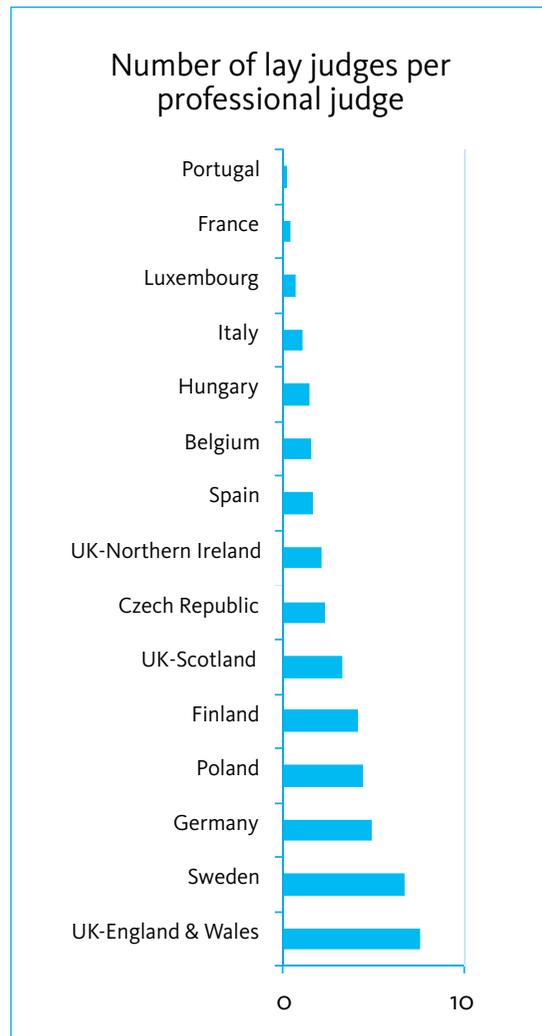
Figure 18. Number of judges per population



Source: CEPEJ 2008

33. Some countries make more use of lay judges than others. This also highlights structural differences in the supply side of the justice sector. An overview of the number of lay judges (as part of the formal justice sector) per professional judge in selected countries suggests a stronger presence of societal representation in the settlement of disputes in the United Kingdom and Northern European countries as opposed to a preference for adjudication by specialized experts, i.e. professional judges, in Southern European countries:³⁷

Figure 19. Number of lay judges per professional judge

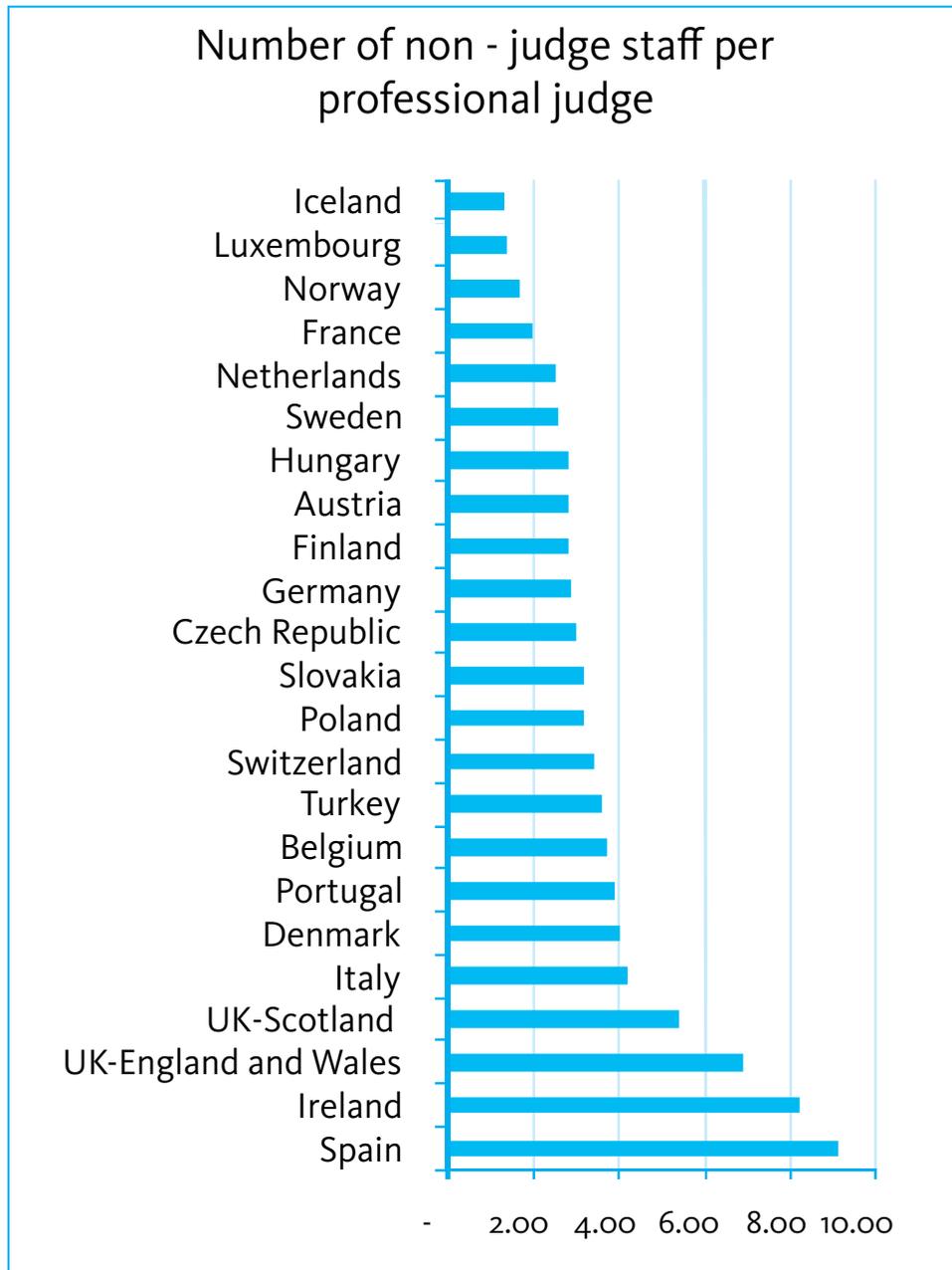


Source: CEPEJ 2008

34. **The number of support (non-judge) staff, essential for the day-to-day functioning of the courts, also shows significant variation.** There are significant differences among OECD countries in the number of support staff and their ratio per judge. This may reflect differences in division of labor, administrative traditions, societal standing of judges or other aspects enabling the judiciary in some countries to make the case for higher ratios of support staff not necessarily connected with efficiency or quality considerations. The role of unions or professional associations would also have to be explored:³⁸

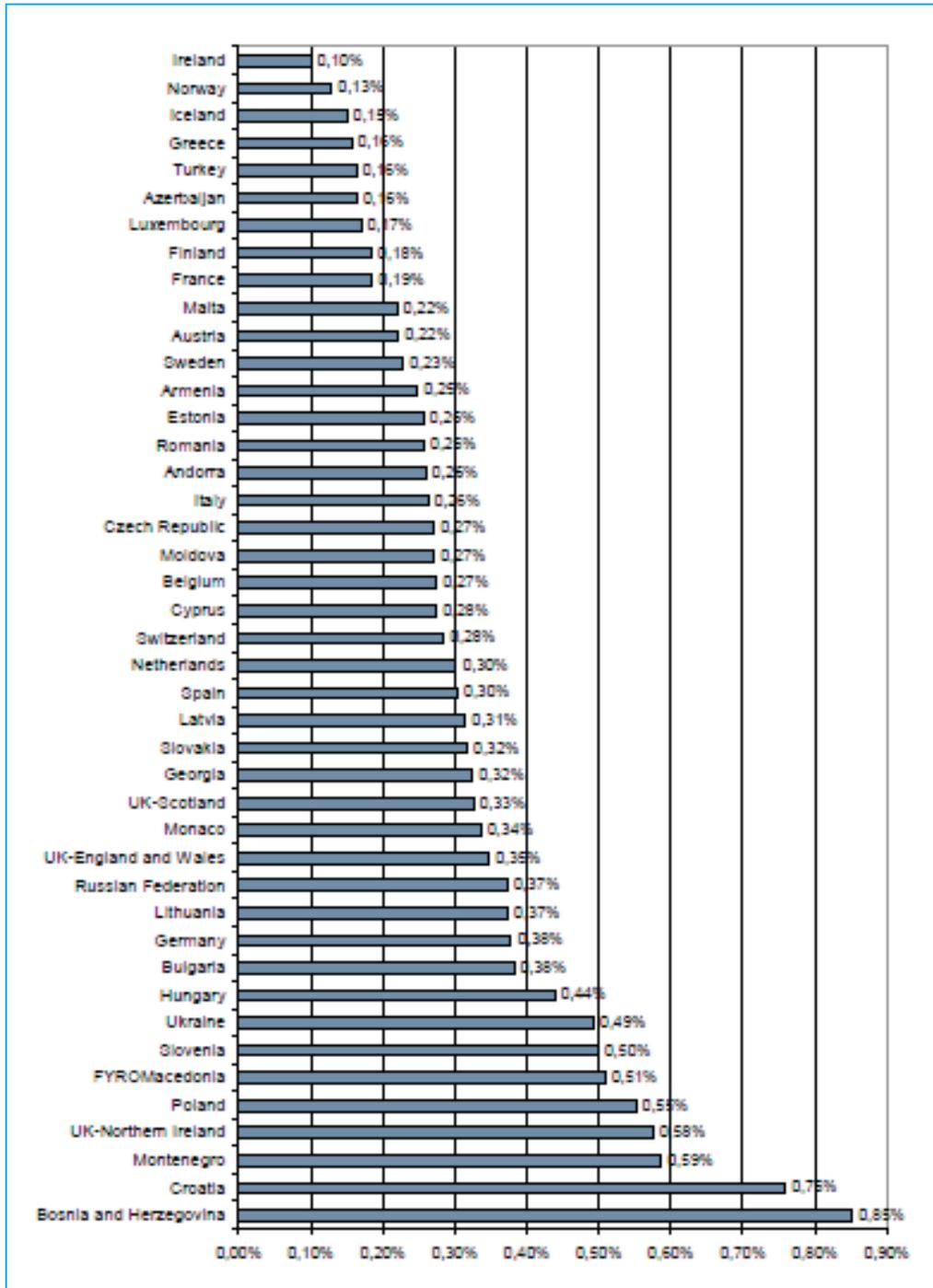
38 CEPEJ 2008: 122.

Figure 20. Number of administrative staff per judge



Source: CEPEJ 2008

Figure 21. Annual public budget (courts, prosecution, legal aid) as a percentage of GDP per capita



Source: CEPEJ 2008

35. **The amount of the judicial budget also varies across OECD countries.** The amount of the annual public budget for the courts, prosecution services and legal aid as a percentage of GDP per capita varies substantially, as indicated by data for 2008 from the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ). Not surprisingly, some countries that have recently experienced violent conflicts still record a very high percentage, which may reflect donor support for institution-building efforts in the justice sector:³⁹
36. **The amounts allocated to different institutions within the justice sector also vary.** The European data available on expenditures for the courts, prosecution and legal aid show structural differences and divergent spending priorities. The United Kingdom, for example, has a policy of full cost recovery for the civil courts and has high spending for legal aid services⁴⁰ which may explain why the composition of its budget looks significantly different from most continental European systems:⁴¹
37. **Salaries of judges across various OECD countries also highlight structural differences.** It is useful in this context to look at the salary at the start of a judge's career and the salary for the highest judicial position in the country and then to compare that to the average gross annual salary. This comparison enables the identification of wage compression issues. Again, the case of the United Kingdom stands out vis-à-vis continental Europe in terms of higher salaries and substantially less compression. The reason is that a judge in the United Kingdom enters the profession after an extensive career as a lawyer. There are fewer of them as compared to other countries, and the system makes wider use of lay judges. In civil law countries, the salaries are lower on average, because law school graduates enter the profession at a much younger age, after some form of traineeship. The situation of some Eastern European countries may reflect budget constraints and different labor market structures:⁴²

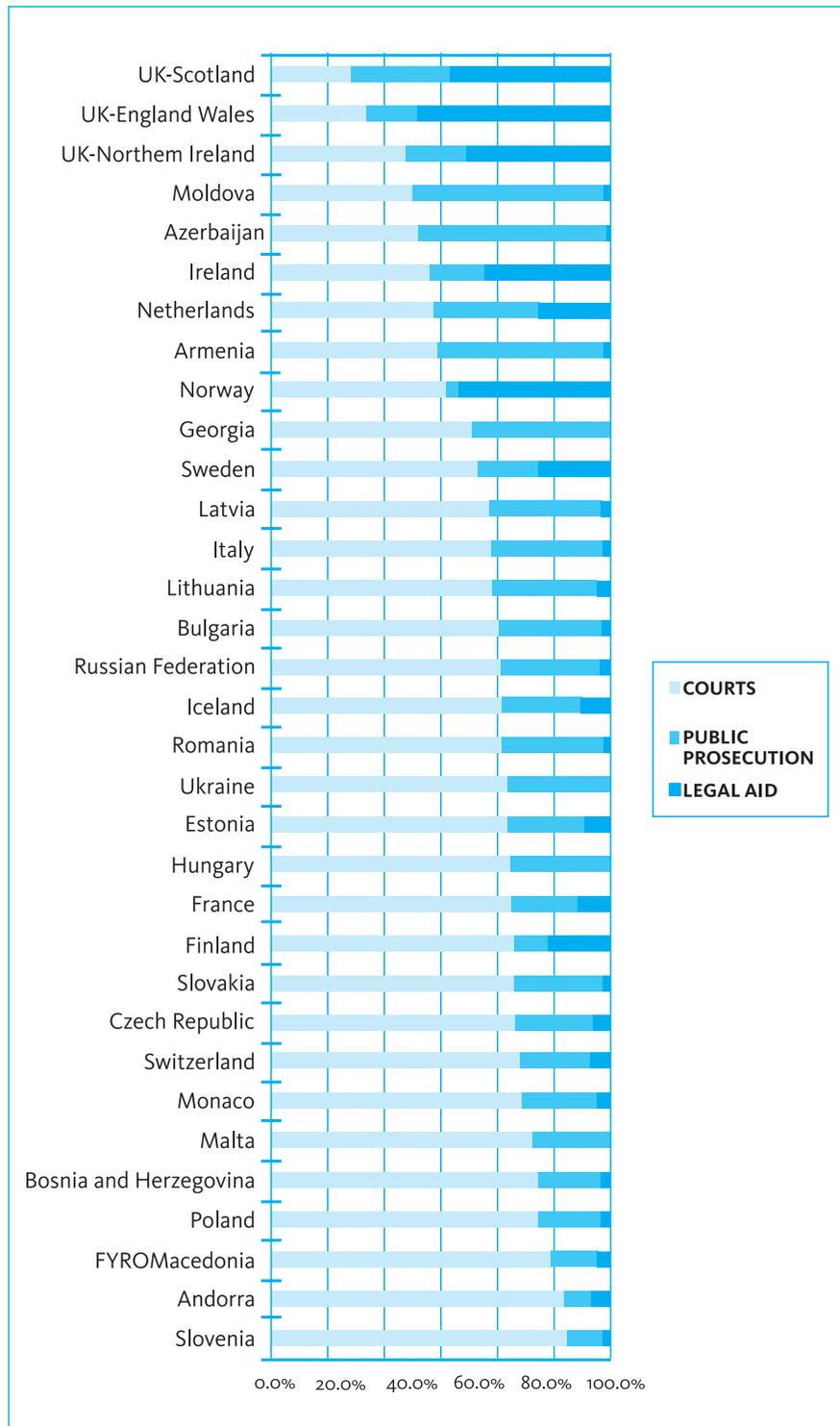
39 CEPEJ 2008: 45. As explained in Manning 2009: 26 most OECD countries require the consideration of performance targets and past performance information during budget preparation but this is not the sole or predominant factor in formulating budgets.

40 With further insights: Genn 2010.

41 CEPEJ 2008: 46.

42 CEPEJ 2008: 187.

Figure 22. Expenditure for courts, prosecution, legal aid

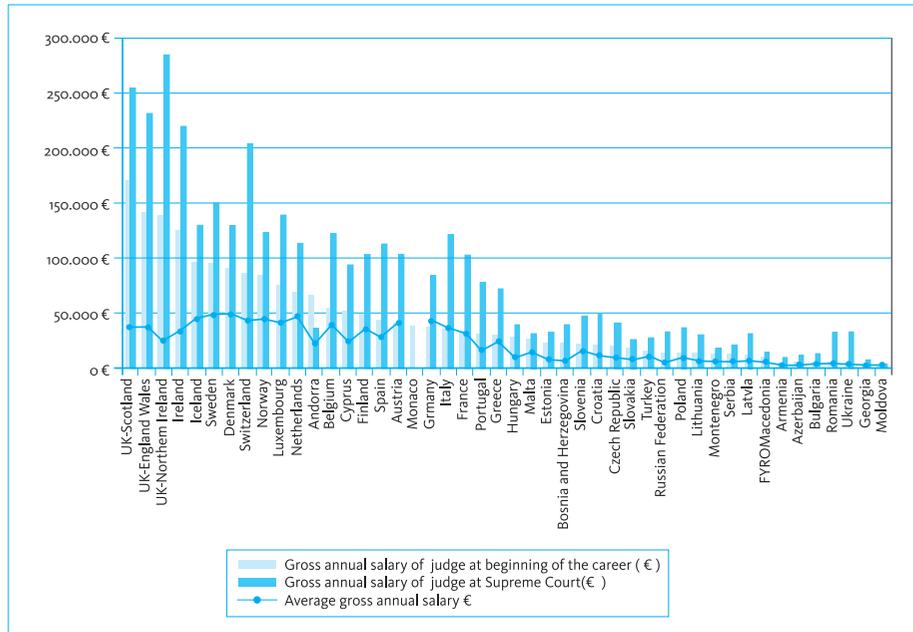


Source: CEPEJ 2008

38. **The number of lawyers also varies from country to country even among countries of the same legal tradition.** Although this number may be public budget neutral, the differences among countries are nonetheless significant, in particular because of its potential connection with litigiousness rates and price levels for attorney services. The on average higher number of lawyers per inhabitant roughly indicates a North-South divide in European OECD countries, which some attribute to a culture favoring litigation in Southern Europe. However, the data in figure 17 does not support this argument. Even if there were a correlation, it would not be clear how the correlation runs, or if it rises to the level of causality. Other factors may also blur the picture.⁴³
39. **Court systems in OECD countries are not homogeneous and feature substantial differences, but certain common trends in improving justice sector performance have emerged over the last decades.** Despite sometimes significant differences in structure and legal tradition, a series of common developments and cross-fertilization across different court systems have been observed in the EU, especially in recent years as a result of the accession process and adoption of common standards and benchmarks. Nevertheless, some caution has to be exercised when making cross country analysis because: (a) solutions suitable for one country may not be transferred to another country without adjusting the approach to the very specific context of the other country—i.e. cross-fertilization is possible, but requires context specific adaptation in order to be successful; (b) cross-country comparisons of justice systems are challenging because of the structural differences and the still limited availability of meaningful cross-country data about the performance of justice systems. If cross-country data is available at all, it tends to focus on the supply side of justice, but does not deal with the demand side of justice, namely, the types of issues citizens would need the justice sector to resolve, and the extent to which the sectors of different countries are able to meet this demand.

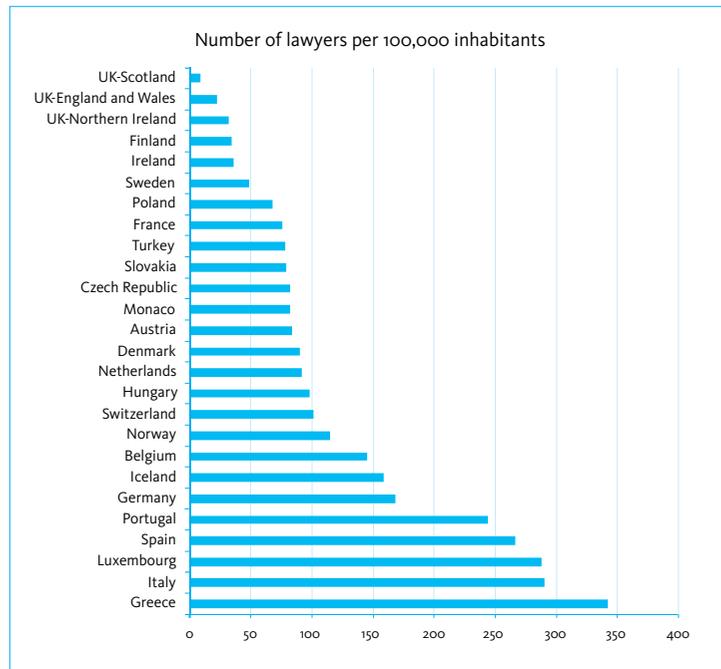
43 CEPEJ 2008: 214.

Figure 23. Gross annual salary of a judge at different career stages compared to average gross annual salary



Source: CEPEJ 2008

Figure 24. Number of lawyers per 100,000 inhabitants



Source: CEPEJ 2008

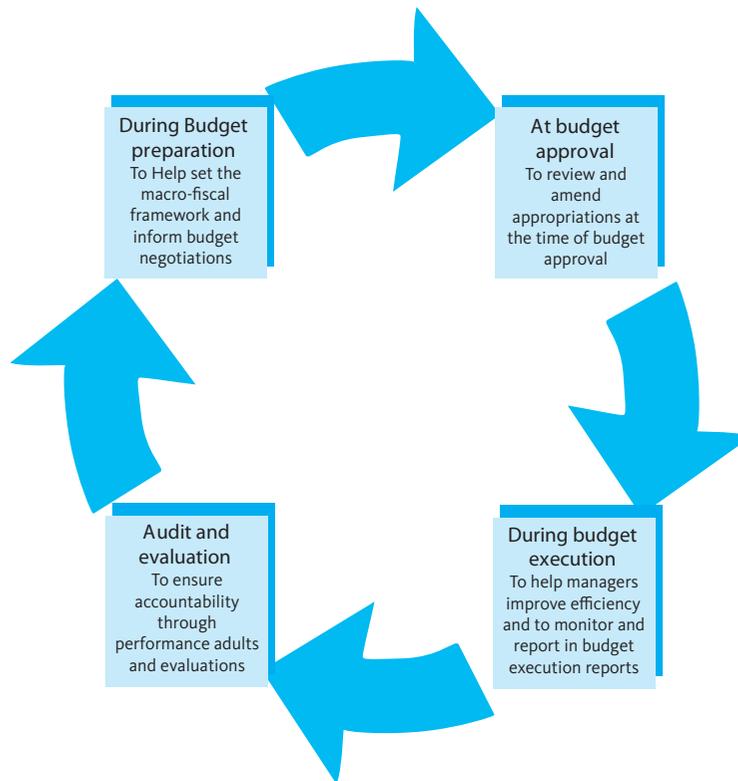
THE BROADER CONTEXT: GENERAL PUBLIC SECTOR MANAGEMENT TRENDS IN OECD COUNTRIES

40. **New Public Management (NPM) proposed a radical new focus on service delivery and cost-effectiveness in order to change public sector organization and culture.** In the early 1980s a new wave of reforms in the broader public sector started across most OECD countries. Under the broad label of NPM, new approaches started to be developed and implemented. The overall theme of these reforms was an increase the efficiency in the use of public resources, through: (a) service delivery promises to clients in the form of measurable outputs; and (b) delivery of these outputs in a cost-effective manner. To be effective, this output-focused approach required the measurement of results and the use of such measurements for management purposes. The increasing use of the potential of modern information and communication technology (ICT) facilitated and reinforced this reform approach. A new management culture for the public sector emerged emphasizing the centrality of the citizen or customer, as well as accountability for results of public sector operators. Structural or organizational choices were tested to promote decentralized control through a wide variety of alternative service delivery mechanisms, including quasi-markets with public and private service providers competing for resources from policymakers and donors. The intended result was a more efficient use of scarce public resources.⁴⁴
41. **A cornerstone of NPM was a comprehensive approach that converted budgeting into a powerful monitoring and evaluation tool.** NPM also changed the budget management approach by integrating the functions of planning, programming, and evaluation with budgeting. The intention was to enable politicians and policy-makers to refocus resources on priority areas, introducing new budget rules that organized the budget by results (outputs, programs etc.) rather than by input (line-items), thus enhancing transparency in resource usage and accountability of senior officials for deliverables.
42. **Performance-based budgeting makes use of performance information at all stages of the budget cycle.** The main features of the new approach were: (a) the explicit focus on the achievement of public program objectives and their alignment with government policies, as evidenced by: (i) a greater use of performance targets; and (ii) the generation of a wide array of performance information throughout the budget system; (b) new institutional arrangements that create a network of structured performance agreements, which provide incentives for the public sector to move beyond a compliance focus toward a performance culture; and (c) an emphasis on holding senior officials accountable for deliverables, often with an accompanying change in the nature of expenditure controls, away from detailed line item input controls to one where managers are held accountable for

44 Manning 2009: v.

both the results and the use of inputs. The potential uses of performance information in the budget cycle can be demonstrated as follows:⁴⁵

Chart 1. Performance information in the budget cycle



Source: Arizti et al 2009: 6

43. **The variety of experiences among OECD countries increased exchanges among reformers and promoted cross-fertilization.** Some OECD countries, for instance the United Kingdom, started these reforms earlier and pushed the reforms inspired by the principles of NPM. Other countries, such as France, focused on particular aspects of NPM such as performance contracts. The variety of initiatives and approaches fostered significant cross-fertilization; latecomers learned from the experiences of early reformers. Moreover, all reformers benefited from improved ICTs that allowed a high degree of interconnectedness and the existence of “clearing house” organizations that facilitated the exchanges, such as the OECD secretariat. Thus, globalization facilitated the establishment of a community of practice among public sector reformers that was previously unknown.

45 Arizti et al 2009: 6.

TRADITIONAL RESPONSES TO THE CHALLENGES OF RAPID EXTERNAL CHANGE IN OECD JUSTICE INSTITUTIONS

44. **Starting in the early 1990s Western European courts experienced a wave of rapid organizational and technological changes.** OECD courts and justice sectors took some time to initiate NPM-based reforms.⁴⁶ Still bound by the conservative culture of the sector, members of the judiciaries and external stakeholders of the justice sectors of European countries entered the 1990s wondering if and how the changes the world was witnessing would affect the structure and operation of justice institutions. These institutions were characterized by an organizational culture deeply rooted in stability and tradition, taking pride in a strong sense of independence. The situation changed rapidly in continental Europe where the end of the cold war had just revealed that even situations that had been taken for granted could change almost overnight. Moreover, a wave of ICT seemed to sweep away work processes and habits that had evolved over centuries. Not only had the world started to become a global village but change was no longer a matter of amending legal rules after years of discussion in the legislatures. Court staff and users suddenly started to experience multi-dimensional changes (managerial, attitudinal) at an ever accelerating pace.
45. **Globalization and societal change resulted in shifts in the type of services requested from the courts and in the demands of court users for better services.** The impact of changing economies and societies on the role of courts was significant and rapidly translated into the need for change in the justice sector. In European and other OECD countries the immediate changes were the direct result of deep social changes, in the aftermath of a major geo-political and technological change. In their day-to-day operations, the justice sector institutions were increasingly confronted with the many changes affecting in their societies (global brands, global trade, global immigration). New types of problems and litigation appeared. The courts' workload increased due to these factors but also because of the higher levels of judicialization of economic and social disputes that before had been handled outside the court system through other dispute resolution mechanisms (for instance, labor disputes): an increasingly consumerist culture also started affecting the relationship between the courts and their users, the latter developing higher expectations with respect to service delivery. It was not clear, then, whether the courts would embrace the changes and how they would adjust to the changing demands for their services. Many justice sectors in OECD countries entered the 1990s with an increasing sense that the external crises would soon generate major internal changes. The concrete symptoms and

46 In terms of "sources of legitimacy" most OECD countries' judiciaries were still at the stage of the "due process" public service and have not even reached the "equitable" stage of other government agencies. The 1990s represented a major leap ahead through the "responsive-performing" public service concepts. Manning 2009: 6.

the level of intensity of the “crisis” differed across OECD countries. According to Zuckerman,⁴⁷ the most common dysfunctions, though, were delay and cost. In spite of some structural differences, this was true for common law as well as civil law jurisdictions.⁴⁸

46. **In some common law jurisdictions, the civil justice system had become too labor intensive, too costly, and too slow.** In the U.S., the federal criminal caseload grew dramatically between the 1980s and the mid 1990s. Although criminal cases accounted for only one-fifth of the federal caseload, they required a disproportionate share of resources.⁴⁹ This growth also influenced the passing of the Judicial Improvement Act of 1990 that intended to tackle less than optimal capacity issues in the sector through the creation of more judgeships. In England and Wales the cost and delay involved in civil litigation had been a source of concern for some time already.⁵⁰ Similarly, in Australia the system was no longer able to cope with the huge increase in the volume and complexity of litigation. It had become too labor intensive and, therefore, too costly and slow.⁵¹ In both countries, the strain of the legal aid budget had proved unsustainable. The growing cost (see Table 1) and lack of productivity of the courts in England and Wales were attributed to factors such as the parties’ control over the pace of litigation, the fact that the loser had to pay the winner’s costs, and the way legal aid services were paid for by the State.⁵² Other civil justice reviews also used crisis rhetoric and were more explicit about the pressure on resources than the Lord Woolf report. In Canada, the Canadian Bar Association Task Force on Civil Justice saw their system functioning under ever-increasing pressures including “reduced funding and dwindling resources [...] and increased demands on the system.” The 1996 Civil Justice review of Ontario tried to find ways “to provide a speedier, more streamlined and more efficient structure which will maximize the utilization of public resources allocated to civil justice.”⁵³
47. **The Lord Woolf Report identified a number of dysfunctions in the court system and proposed reforms.** The empirical research undertaken for the 1996 Woolf Report clearly identified the disconnect between the value of the disputed claims and the adjudication cost. Table 2 shows that aggregate costs for the smallest claims exceeded the value of the disputed claim; in other words, in claims up to £12,500, the court costs that can be recovered by one party from the other (i.e. about two-thirds of the cost incurred by the winning side) exceeded the amounts in question.⁵⁴

47 Zuckerman 1999: 12.

48 This would be epitomized by the title of Adrian Zuckerman’s landmark publication on comparative perspectives of civil procedure in 1999.

49 Beale 1996.

50 Zuckerman 1999: 12.

51 Davies 1999: 167.

52 Zuckerman 1999: 13.

53 Genn 2010: 58, 59.

54 Michalik 1999: 146.

48. **The Lord Woolf Report inspired justice reforms throughout the common law world.** The Lord Woolf Report recommended what it saw as practical ways to achieve proportionality (i.e. connection between the size and complexity of a given case and the applicable procedure) and predictability in judicial adjudication, while reducing cost and delay associated with complexity such as: (a) to grant the courts control over litigation through effective judicial case management including pre-trial protocols and the establishment of three standardized tracks (small claims, fast track, multi-track); (b) to restrict recoverable costs; and (c) to unify and simplify court rules.⁵⁵ As many common law jurisdictions faced challenges similar to those of the United Kingdom, the Lord Woolf's approaches started to be widely discussed. For example in Australia the concept of "just dispute resolution" was developed, comprising elements such as more proactive judges, proportionality, and early settlement through alternative dispute resolution (ADR) mechanisms.⁵⁶ Also, in Australia, the most sophisticated and comprehensive civil justice review was undertaken by the Victorian Law Reform Commission and published in 2008. It was aimed at streamlining litigation processes, reducing costs and court delays and achieving greater uniformity between different courts. In Hong Kong, a working group was established in 2000 to conduct a civil justice review much influenced by the Lord Woolf report. The subsequent reforms had the benefit of being informed by evaluations of the British experience and therefore remained more balanced. In Canada, British Columbia published a Civil Justice review in 2006 promoting a strong emphasis on access to justice and proportionality.⁵⁷

Table 1 - Government spending on courts and legal aid in the United Kingdom (in million £)

Lord Chancellor's Department	1992-93	1993-94	1994-95	1995-96	1996-97
Total legal aid	1,090	1,212	1,301	1,389	1,478
Civil legal aid	463	544	602	643	671
Court service	816	813	862	842	762
Total	1,905	2,025	2,163	2,231	2,240
Northern Ireland Court Service	43	37	50	55	53

Source: Michalik, 1999.

55 Michalik 1999: 153.

56 Davies 1999: 167.

57 Genn 2010: 60, 61.

Table 2 - Median court costs by category of case and value (recoverable costs as % of claim)

	Up to £12,500 %	£12,000- £25,000 %	£25,001- £50,000 %	£50,001- £100,000 %	£100,001- £250,000 %	Over £250,000 %	Overall median	Overall mean
Medical negligence	137	57	46	33	21	12	15,531	29,380
Personal injury	135	41	28	22	13	13	12,134	19,382
Professional negligence	135	54	43	41	27	15	14,834	32,866
Official referees	158	96	48	53	31	19	19,320	35,844
Breach of contract	138	46	32	21	12	5	N.A.	N.A.
Chancery	119	62	40	17	8	2	N.A.	N.A.
Queen's Bench	154	44	33	14	5	3	N.A.	N.A.
Commercial	174	54	27	38	16	2	N.A.	N.A.
Bankruptcy/ Companies Court	115	39	18	15	10	1	N.A.	N.A.

Source: Michalik, 1999.

49. **Many of these reviews of civil justice systems were based on perceptions rather than empirical evidence.** Although more recent reviews acknowledge that “adequate empirical data and appropriate measures of performance and feedback from key participants in the process, including regular users of the court system, are necessary if reform is to be effective,”⁵⁸ and express surprise at the lack of available evidence,⁵⁹ it is noteworthy how the perception of crisis and the belief in the suggested solutions were able to drive civil justice reviews without any serious effort at generating empirical data to substantiate them and to measure impact. It seems that reformers in government and law commissions thought they already knew what the problems were and how they may be resolved.⁶⁰ However, in the absence of empirical data, perception may misguide reformers in identifying challenges and adequate solutions. Even if the issues are identified and addressed successfully, discussions about success or failures of the reforms tend to remain and may be misguided by perceptions and interests of various stakeholders, precisely because there is no empirical evidence available to substantiate either position.⁶¹ Although no large-scale research had been undertaken to support the Lord Woolf report, a subsequent study was commissioned by the Lord Chancellor’s Department to provide baseline information about litigation *prior* to the implementation of the reforms. It identified the difficulty of generalizing about civil litigation as

58 Victorian Law Reform Commission Report, as quoted by Genn 2010: 63.

59 British Columbia Civil Justice review, as quoted by Genn 2010: 62.

60 Genn 2010:52.

61 Hammergren 2002a: 1.

a whole. Interestingly, the data of this baseline study are inconsistent with some of the more far-reaching claims and predictions characterizing the Lord Woolf debate.⁶²

50. **More than a decade after the Lord Woolf Report, the empirical evidence suggests that certain types of delays have been reduced and that ‘proportionality’ has improved the operation of civil justice.** However, the rules of civil procedure have become more elaborate since they were introduced, countering the Lord Woolf reform’s efforts for simplification. Also, empirical data indicates that the achievement of reducing delay in the settlement of litigated claims may have been bought at the expense of an increase in the delay in settling claims pre-trial, which constitutes the majority of cases. Moreover, the empirical data suggests that overall case costs have increased substantially over pre-2000 costs for cases of comparable value.⁶³
51. **Across Southern Europe the delay issue was unsuccessfully addressed through increases in the number of judges.** Many countries in Southern Europe saw a steep increase in the volume of litigation and a substantial increase in delays. In Italy, delay appeared to be out of control, as ordinary litigants had to wait as much as ten years to obtain a final resolution of their disputes.⁶⁴ In Portugal, the civil justice system had become unable to respond the demands by those seeking justice in reasonable time. The number of pending civil cases per 100,000 inhabitants, for example, increased from 2,563 in 1992 to 4,863 in 1996.⁶⁵ Despite the simultaneous increase in the number of judges (1,032 to 1,231), prosecutors (817 to 939) and court clerks (6,161 to 7,185), and an increase in the number of disposed cases per 100,000 inhabitants from 2,410 to 3,188, the system was not able to deal with a steep increase of incoming civil cases from 2,699 to 4,148 per 100,000 inhabitants.⁶⁶ This poor performance began undermining the credibility of the judicial system as a dispute resolution mechanism. In Spain, the system seemed to be “so beset by anachronistic complexity that it has become a veritable jungle of localized rules and special proceedings, all of which put pressure on resources and contribute to delays.”⁶⁷ The number of incoming civil cases increased by 10% every year between 1981 and 1996. The Judiciary tried to deal with this issue through an increase in the of number of judges from approximately 1,500 in 1985 to around 3,500 in the late 1990s but still was not able to reduce delays and abide by the legal deadlines. In the late 1990s, a small claims procedure took an average of 436 days (instead of 100), a juicio de cognición 320 days (instead of 65), a juicio verbal 207 days (instead of 36), and a debt enforcement proceeding, which should last no

62 Genn 2010: 67.

63 Fenn et al. 2009: 33, Lord Justice Jackson 2009.

64 Zuckerman 1999: 13.

65 Leitão et al. 1999: 439.

66 Leitão et al. 1999: 439.

67 Zuckerman 1999: 13.

longer than 20 days where the debtor is not involved, took about 250 days on average.⁶⁸ France had seen an explosion in the volume of litigation and a substantial increase in delays. Increasing costs were also a source of concern, although some were offset by efficiency gains.⁶⁹ Nonetheless, the situation deteriorated significantly towards the end of the decade.⁷⁰

52. **Northern Europe and Japan were more successful in dealing with increased workload.** Compared to the Southern European justice systems, Germany, the Netherlands, Switzerland, and the Scandinavian countries were faring better in terms of addressing increased workload, but were not without challenges of their own.⁷¹ In Sweden and Japan, the judicial statistics reveal a counter-cyclical link between economic growth and litigation rates. A significant increase in caseload between 1991 and 1997 coincided with the end of the economic boom. With the same number of judges, the system was nonetheless able to produce efficiency gains and keep the number of pending civil cases constant by disposing of more cases. It seems that this was largely possible through the increased use of pre-trial conferences.⁷²
53. **The most innovative OECD judiciaries retained leadership of the reform process while the most traditionally-minded fell prey to strong external pressures.** The initial reaction of most judiciaries, governments and legislatures was to stick to traditional approaches focusing on increasing resources. However this was also occurring during a time when public budgets were increasingly strained and judiciaries were risking ultimately losing the support of the other branches of government if they were unable to show results. These judiciaries were subsequently forced into more far-reaching reforms by the pressure of public opinion and under the leadership of the other branches of government. By contrast, the more innovative judiciaries started embracing new approaches to justice reform that fundamentally questioned the way of doing business in the courts. Not surprisingly, these judiciaries were able to proactively shape and drive the reform process themselves, with less external pressures.

68 Días-Picazo Giménez 1999: 392, 396, 395.

69 Zuckerman 1999: 13; Cadiet 1999: 291.

70 Jean 2008: 9.

71 For many: Zuckerman 1999.

72 Hasebe 1999: 259.

The Transition From Traditional Approaches To Performance-Based Justice Reforms In Selected OECD Countries

INITIAL OBSTACLES: INSTITUTIONAL INDEPENDENCE AND CONSERVATIVE ORGANIZATIONAL CULTURES

54. **In many countries, justice sector agencies were initially reluctant to engage in NPM reforms out of concerns for institutional independence.** The most common initial reaction of the OECD justice sectors to NPM was skeptical. Even admitting the potential positive impact of the new approaches, NPM was not considered applicable to the justice sector because of the high risks entailed for judicial independence. More specifically the fear was that the proposed management tools might simply disguise an attempt by the executive to control the judiciary. In some countries this reaction was wholly unjustified-- in a few highly politicized contexts (particularly in some Southern European countries) serious conflicts existed between the executive and the judiciary. In most cases, however, reformers found that this risk could be managed and it was possible to develop mitigating strategies.⁷³
55. **Resistance to the application of NPM in justice institutions was also due to the conservative nature of the legal profession.** In most countries, NPM approaches were resented by justice sector practitioners as a challenge to the existing organizational culture. Judges, for instance, felt strongly that their first duty was to apply the law and only indirectly to provide services to citizens. The most entrenched groups were attached to the emblematic mission of justice sector institutions and felt their job was not to deliver services but to exercise the State authority to administer justice. Reformers were accused of trying to convert the courts into “judgment factories” governed by reformers disguised as “factory directors.” Ingrained in the professional and cultural background of the legal profession, judges and other sector operators could not understand or accept a managerial perspective for the justice sector and approached judicial reform either as changes in substantive and procedural laws or as a simple increase of resources. In some cases, those resisting change struck nationalistic tones denouncing NPM

73 This “institutional independence” concern is similar to the stress on the management of the political-administrative boundaries discussed in Manning 2009: 7.

or other managerial approaches as a negative foreign influence (for instance, talking about the “Americanization of justice” in some Western European countries).⁷⁴

56. **Insufficient consensus-building efforts delayed the transition from traditional justice reforms to NPM.** Reformers may have contributed to the polarization of the debate by failing to engage in an inclusive dialogue so as to make a convincing case rather than overpowering the groups to be affected by the reforms. Insufficient consensus-building efforts would later undermine the implementation of the reforms. Although the various developments in different OECD countries cannot be reduced to a single, straight forward story line, many countries seem to have experienced two subsequent phases of judicial reforms. The first phase was characterized by an increased number of judicial reform initiatives that remained within the traditional parameters. The second phase witnessed the introduction of NPM approaches in the justice sector involving significant changes in the way courts do their work.

TRANSITION FROM TRADITIONAL JUSTICE REFORMS TO PERFORMANCE-BASED REFORMS: NEW WINE IN OLD SKINS

57. **Supply-driven justice reforms in Western European countries did not look into the fundamental issues of work processes or organizational structures.** For some time, the judiciaries in many Western European countries continued resisting reforms based on approaches which were similar to NPM. While acknowledging the need for reforms to address geopolitical and technological challenges, reformers preferred traditional fixes largely based on requests for more funding, more judges, more support staff, and more courts. Modernization attempts were limited to the introduction of ICT. The fundamental questions remained unanswered: would the well-established work practices or the traditional organizational structure of justice institutions be able to cope with completely new challenges? Not surprisingly, the main outcome of these traditional reforms was the increase in the number of judges per capita (see Table 3).
58. **The disconnect between the problems and their solutions became more apparent after infrastructure refurbishment failed to reduce caseload or delays, or to increase quality.** Systemic dysfunctions such as delays or lack of access continued to be attributed primarily to external factors, such as lack of financial and human resources, legislative inflation (especially in the area of criminal law), and excessive and unjustified use of the courts in a context of increased judicialization and litigiousness. In Belgium, Italy and France, for example, most efforts were

74 The U.S. legal system has become increasingly influential in the world, and some of its features can now be found in other systems. For instance, the American-style plea bargaining is becoming more prevalent across the world, see Langer 2004.

concentrated on building more courts or improving/renovating existing courts.⁷⁵ Yet, the caseload kept growing in civil courts (see Table 4) and in even further in administrative courts (see Table 5). Delays continued to grow in many countries,⁷⁶ and the appeal rates as well as the rates of cassation or revision went up, suggesting a decline of quality of judicial decisions (see Table 6).

59. **Growing demands from the executive, legislative and external stakeholders created an enabling environment for NPM reforms.** At best, the results generated by traditional reforms were mixed and their impact was insufficient. A “business-as-usual” approach to reform failed to address the challenges posed by the new economic and social realities. The executive and legislative branches as well as external stakeholders grew more disillusioned and in some countries they joined forces to hold the justice sector more accountable for performance and push for far-reaching changes. The executive’s emphasis on increased efficiency and potential savings in public spending in the justice sector was probably the most significant driver of NPM reforms in many countries. For the broader public and potential court users, the main driver was dissatisfaction with services received and outrage caused by increased media attention on the dysfunctions in the justice sector, highlighted not only by periodic scandals, but also by structural problems such as the lack of a service culture in the courts and the self-interest of the justice apparatus.

PERFORMANCE-BASED REFORMS IN JUSTICE INSTITUTIONS: WHAT GETS MEASURED GETS DONE BETTER⁷⁷

60. **Prior to the NPM wave, justice statistics were scarce and had not been used to measure institutional performance.** Justice institutions had always produced statistics of some sort. In some countries, such as in [France](#), crime statistics had been the starting point for the development of official justice statistics. However, this statistical data was used more to examine the social issues facing the country rather than to evaluate the performance of the justice sector. Most of the quantitative data generated by other sources, for example cost of malpractice insurance provided to the legal profession, was considered to be a by-product of the professional practice and remained inaccessible to the general public. A fundamental change occurred in the 1990s when the stakeholders in the justice sector were suddenly seized by with what one author calls a “*frénésie quantificatrice*” or “quantifying furor”.

75 Vigour 2008: 24. Growth in litigation in the U.S. has also been consistent, with nearly 17 million civil law suits yearly. For a discussion of how the U.S. has reacted, controlled, or ignored this growth see Olson 2004.

76 For many: Blankenburg 2003.

77 Manning 2009: vii. “NPM ... places more emphasis on managerialism than formal rules or procedural standards.”

Table 3 - Judges per 100,000 inhabitants

	Germany(*)	France	Italy	Spain	Netherlands	Portugal	Austria	England & Wales
1990			10.4	8.0	5.5	10.3	20.1	4.0
1995	27.7	10	10.9	8.5	9.8	11.7	22	4.5

(*)East (1985): 9; West: 28

Source: European Data Base on Judicial Systems, Bologna 2000

Table 4 - Number of cases filed for civil procedure per 100,000 inhabitants.

	Germany(*)	France	Italy	Spain	Netherlands	Portugal	Austria
1990	2,464	2,032	1,227	1,344	1,393	2,061	1,733
1995	2,656		1,299	1,897	1,626	3,762	1,662

(*) 1990: West, 1995: United

Table 5 - Number of administrative cases filed per 100,000 inhabitants

	Germany(*)	France	Italy	Spain	Netherlands	Portugal
1990	200	120	115	158	130	18
1995	275	160	170	317	260	38

(*) 1990: West, 1995: United

Table 6: Number of incoming appeal cases by 100,000 inhabitants

		Germany(*)	France	Italy	Spain	Netherlands	Portugal	Austria
Appeals in civil courts Cassation/ revision	1990	240	287	67	134		91	505
	1995	198	373	70	255	38	127	550
	1990	7.2	33.4	13.1	8.9		16.1	38.4
	1995	6.0	33.6	17.0	9.5	2.2	16.5	48.2

(*) 1990: West, 1995 United⁷⁸

Source: European Data Base on Judicial Systems, Bologna 2000

61. The public's interest in more reliable data of court performance was a powerful force behind the transition to NPM. The increased availability and use of quantitative data about court performance may have been the single most significant factor contributing to more fundamental reforms inspired by NPM approaches, which rely heavily on quantitative data. The output-focused approach requires the measurement of results and the continuous use of such measurements for management purposes. The increasing use of modern ICT technology made this change possible. The justice sector's strong resistance to non-legal approaches to reforms or to measuring its own performance was unable to counter the overwhelming power of simple (albeit sometimes overly

⁷⁸ As Blankenburg 2003 explains, the numbers for Germany were still relatively low in 1995, as many cases from Eastern Germany did not yet reach the appellate courts.

simplistic) numbers made available by new information systems that easily quantified courtroom activities. The increasing reporting of these quantitative data in national public debates, for example in France,⁷⁹ allowed the media to start taking a more active role in these debates and feeding the public opinion with opinion polls and rankings. Starting in 2003, the World Bank would launch its Doing Business series that includes a contract enforcement indicator.⁸⁰ In the U.S., a number of quantitative data methods, catering to specialized topics, was established. For example, both the National Crime Victimization Survey (NCVS) and the Uniform Crime Reporting (UCR) offer important information on criminal victimization. However, the two programs were created to serve different purposes. The primary objective of the UCR was to provide a reliable set of criminal justice statistics for law enforcement administration, operation, and management. The NCVS was established to provide previously unavailable information about crime (including crime not reported to police), victims, and offenders. These data developed by the NCVS and UCR could then be used to inform and influence projection for future resources allocated to state and federal U.S. courts.

- 62. Reformers took advantage of the interaction of many internal and external variables to make NPM justice reforms happen.** The availability of objective data joined the real or perceived crisis of justice sectors, the reduced credibility of the vested interests against the reform, and the converging interests of external stakeholders opened a window of opportunity for more fundamental reforms that the executive was not willing to miss. Over time, experience would reveal that those reforms undertaken in cooperation with the judiciary had significantly better chances of success, while reforms imposed on judges were more prone to failure.
- 63. Funding mechanisms provided the critical nexus between judicial independence and accountability.** Reformers followed different paths in each country but the most critical element of the reform was the backbone of judicial operations, namely the funding mechanism. Reformers had to strike a delicate balance between the constitutional principle of judicial independence that allows judges to do their job without undue interference, and an appropriate level of accountability for the use of public funds that holds judges to a reasonable standard of performance. The question of justice sector governance, in connection with funding mechanisms, became paramount in the transition to NPM. The risk of funding issues becoming a tool in the hands of the executive used to make the judiciary more docile to the government's agenda was quickly raised, particularly in the highly polarized and politicized countries in Southern Europe. On the opposite side of the spectrum, excessive financial independence could be used by some judiciaries to shield themselves against legitimate reform efforts and reasonable expectations of performance. This tension between these equally perilous extremes suggested that reformers needed to look for a nexus between the way the funding

79 Vauchez 2008: 113, 114.

80 See the Doing Business website at <http://www.doingbusiness.org>.

of the courts was determined and the manner justice service delivery was evaluated. This nexus was needed to maintain a delicate balance between independence and accountability. In absence of an “ideal” approach, ultimately the reform depended on the political economy and stakeholder dynamics of each country. To illustrate the difficult issues and options faced by the reformers this report will present five country scenarios in Western Europe and the United States in chapter 4.

EUROPEAN INTEGRATION AND QUALITY OF JUSTICE SERVICES

64. **Experience with NPM-based reforms confirmed the need to focus on both quantitative and qualitative aspects of justice service delivery.** One of the key lessons from NPM-inspired reforms is that the quality of the services provided has to be captured by evaluation tools in order to avoid perverse incentives arising from a limited focus on cost-effectiveness. Typically OECD countries responded to this challenge by developing quality management approaches to improve the countries’ ability to address this issue. For the justice sector, obligations under the European Convention for Human Rights, such as the right to a fair trial within a reasonable time, require member States to act to ensure both efficiency and quality of justice. The Council of Europe became actively involved in developing tools for European countries to comply with quality objectives.
65. **For the European Union, the quality of justice is a crucial element in the functioning of the common market.** In the context of European integration it became clear that although cost effectiveness and efficiency of justice systems are key goals, membership in the European Union (EU), which is a *communauté de droit*, requires that the quality of services is also guaranteed to consistently implement the EU rules and procedures (*acquis communautaire*). EU’s activities in this field have to be seen against the background of the overall process of harmonization within Europe. The EU considers quality of legal systems as a precondition of mutual confidence and mutual recognition of court decisions.⁸¹ The 1999 European Council proclaimed the principle of mutual recognition of judicial decisions to be the “cornerstone of the area of freedom, security and peace” (or “the third pillar”).
66. **Over time, the legal harmonization process has advanced not only in civil and commercial matters but also in criminal matters, and requires common standards of quality.** Two milestones that directly affected EU citizens across national jurisdictions were: (i) Regulation (EC) No. 44/2001 of 22 December 2002 on jurisdiction and recognition and enforcement of judgments in civil and commer-

81 Com (2005) 195 of 19.05.2005.

cial matters from other member states;⁸² and (ii) the European Arrest Warrant.⁸³ After these decisions, strengthening mutual trust became more crucial within the European judicial arena. For instance, the Hague Program (3.2) also indicates that the quality of justice is considered an essential aspect for strengthening mutual trust.⁸⁴ High judicial standards are an integral part of ‘*Guaranteeing an effective European area of justice for all*’; thus making it one of the ten priorities for the five year action plan.⁸⁵ The increasing interlocking of judicial actions across borders (i.e. enforcement of judicial decisions in civil matters from other member states – see Box 1) in Europe can only work if there is a safeguard for an adequate level of judicial quality.

- 82 Official Journal L 12, 16.1.2001, p. 1–23, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:NOT>
Three other closely related Regulations in the field of civil matters are Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0805:EN:NOT>), (ii) Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1896:EN:NOT>) and (iii) Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32007R0861:EN:NOT>).
- 83 Official Journal L 190, 18.07.2002 P. 1, 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:HTML>
- 84 The Hague Programme, Annex 1 to the Presidency Conclusions of the Brussels European Council, November 2004, http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/doc/hague_programme_en.pdf
- 85 http://ec.europa.eu/justice_home/news/information_dossiers/the_hague_priorities/doc/09_area_of_justice_en.pdf p. 1.

Box 1. Facilitating Enforcement of Judgments across Europe – Unified Procedural Laws in the E.U.

The E.U. has adopted three regulations over the past years to simplify and harmonize the enforcement of judgments across member states

1. Since 2004, the European enforcement for uncontested claims (Regulation (EC) No 805/2004 of April 21, 2004) eliminates certain time-consuming and costly formalities for cross-border enforcement in cases of uncontested claim against citizens of other EU states.
2. The European order for payment procedure (Regulation [EC] No. 1896/2006) provides a uniform procedure across the E.U. judiciaries for creditors to recover uncontested civil and commercial claims before the courts of the Member States. It is based on standardized forms and can be carried out electronically. The decisions are automatically enforceable throughout the E.U.
3. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure introduces an E.U.-wide mechanism that enables an easy and cheap procedure to enforce cross-border claims up to € 2,000. The procedure allows enforcement in the usual adversarial civil proceedings and harmonizes the procedural steps for civil and commercial matters (from the initiation of the procedure to the enforcement of the court decision).

The Small Claims Regulation introduces standard forms for a written procedure and provides that no unnecessary costs can be imposed on the unsuccessful party. It abolishes any intermediary mechanisms for recognition of judgments by Courts from other member states and ensures automatic enforceability.

Chart 2. EU pre-accession evaluation criteria



67. The EU has also developed a number of special systems to implement common quality standards, evaluation systems and mechanisms. Operational systems have been set up for implementing European conventions (i.e. Schengen Agreement⁸⁶) or evaluating the application of international treaties on a national level

86 Joint Action of 5 December 1997, OJ L 344, 15.12.1997, p. 7.

(fight against terrorism⁸⁷ or organized crime⁸⁸) or the evaluation of EU policies on Freedom, Security and Justice.⁸⁹ The performance analysis in these cases is a combination of practical, legislative and institutional approaches⁹⁰ and deals only with specific issues, not the quality of national judiciaries as a whole.

- 68. The quality of justice has also been a critical element in EU accession negotiations.** According to the accession criteria set out by the European Council in Copenhagen, candidate countries must have “stable institutions that guarantee democracy, the rule of law, human rights.”⁹¹ In 1995, the Madrid European Council further clarified that a candidate country must also be able to put the ‘*acquis communautaire*’ into effect. Accession also requires the candidate country to create the conditions for integration by adapting its administrative structures.⁹² As a consequence, the EU evaluates the judicial systems of the candidate.
- 69. The application of the accession criteria has technical dimensions focusing on quality of justice.** The Council of the European Union’s Joint Action, adopted on June 29, 1998⁹³ established a mechanism for evaluating compliance with the ‘*acquis communautaire*’ in the field of Justice and Home Affairs by candidate countries. It only made reference to an evaluation method (group of experts) *but not to evaluation* indicators. Measurable indicators did not exist since the overall accession process was a political process, and the justice sector was only one aspect of the “readiness” of a candidate country to join the E.U.
- 70. More recently, the European Union has established a cooperation and verification mechanism (MCV) for new member states.** As the judicial systems of some of the new E.U. member states did not meet the efficiency standards required of a member state, a European Commission Decision established the MCV for them.⁹⁴ Similar to the accession process, the progress of the judicial system against specific benchmarks is measured on a regular basis.

87 Decision of 28 November 2002, OJ L 349, 24.12.2002, p. 1.

88 Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, Official Journal L 349/1, 24.12.2002. <http://eurlex.europa.eu/Notice.do?mode=dbl&lng1=es,en&lang=&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=276105:cs&page=&hwords=null>

89 COM(2006) 332 final of 28.6.2006 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0332:FIN:EN:PDF>

90 Jean et al. 2006: 50

91 <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en>

92 http://ec.europa.eu/enlargement/the-policy/conditions-for-enlargement/index_en.htm

93 OJ L 191, 7.7.1998, p. 8, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:191:0008:0009:EN:PDF>

94 Decision 2006/928/CE of the Commission of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, JO L 354 14.12.2006, p. 56-57.

71. **The EU has launched initiatives towards the establishment of a common reference framework and comprehensive approach to quality of justice.** In 2004 the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament published a working document on the quality of criminal justice and the harmonization of criminal legislation in the Member States (“Costa Report”)⁹⁵. The report is a short and general policy document that proposes a quality charter for criminal justice. The charter should facilitate the consolidation of a - yet to be specified - set of criteria for comparing the quality of criminal justice. The report proposes also an evaluation mechanism that should include various components: (i) comparative statistical basis; (ii) ‘benchmarking’ exercises; (iii) dissemination of best practices; and (iv) an annual evaluation report on compliance with the quality charter. Based on the Costa Report the European Parliament adopted a recommendation to the Council but the Council⁹⁶ has not taken further actions in that regard.
72. **Other initiatives include the Justice Forum of 2008 and Crystal Scales of Justice Prize.** Although a quality charter has not been adopted, most EU justice evaluation efforts relate to single topics and a comprehensive quality approach was only articulated in broader policy documents, the Commission undertook a new initiative in 2008 towards improving quality of justice for civil and criminal matters.

95 http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/549/549073/549073en.pdf

96 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2005-0030+o+DOC+PDF+Vo//EN>

Box 2. Putting the word out there – Best Practices and Quality Awards

Best practice is a method that is repeatedly proved useful in connection with quality of the justice sector. Quality standards and quality management approaches have a long-standing connection to best practices. Quality management was invented by and initially applied to the private sector which has successfully used Quality Awards to make best practices known. For the past 20 years the “Malcolm Baldrige National Quality Award” that is based in the idea of Total Quality Management (TQM) is given by the United States Institute for Standards and Technology for quality service in the business, health care, education, and nonprofit sectors (<http://www.quality.nist.gov/>). Since 1992 the “EFQM Excellence Award” is awarded by the European Foundation for Quality Management for organizational excellence and has been awarded to Europe’s best performing companies and not-for-profit organizations. (<http://www.efqm.org/Default.aspx?tabid=154>)

Along the lines of this tradition the European Award «Crystal Scales of Justice» is awarded since 2005 by the Council of Europe and the European Commission as part of the celebration of the European Day of Civil Justice (http://www.coe.int/t/dg1/legalcooperation/cepej/events/edcj/cristal/default_EN.asp). The prize rewards innovative and efficient practices contributing to the quality of civil justice for European courts organization or for the conduct of civil proceedings in order to improve the services received by the users.

Quality awards like this can have a positive impact on quality of justice services:

- to promote general awareness
- to spread successful best practices
- to acknowledge efforts undertaken
- to facilitate exchange of information
- to draw attention of policy-makers

With Communication (2008)38 on 4.2.2008 the Comision announced the establishment of a Justice Forum⁹⁷ that will have two main objectives: (a) to provide the Commission with expert views on E.U. justice policy and legislation; and (b) to promote mutual trust between E.U. justice systems. While the first objective focuses on reviewing and evaluating the application of European legal instruments on the national level, the second is intended to be a dialogue on quality of justice of the different systems in the EU. The communication mentions different working methods for exchanging and evaluating information: (i) best practices; (ii) statistical issues; and (iii) cost-benefit-analysis. The Forum will also be involved in selecting the winner for the biannual “Crystal Scales of Justice” Prize by the Commission and the Council of Europe (see Box 2). The Prize is awarded for innovative practices in civil justice organization and procedures in the courts of Europe, so as to improve operational performance. The Commission plans to institute a prize for a transnational project designed to improve mutual knowledge and exchange of best practices in the area of criminal justice.⁹⁸

97 COM (2008) 38 final of 4.2.2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0038:EN:NOT>. For more information on the Justice Forum see http://ec.europa.eu/justice_home/news/information_dossiers/justice_forum/index_en.htm

98 No. 41 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0038:EN:NOT>

The Forum may develop into a body that contributes effectively and sustainably--from an EU perspective --to the discussion of quality of justice services in European countries.

73. **The recently launched Stockholm Program is likely to lead to more justice sector performance measurement instruments.** The Lisbon Treaty provides for objective and impartial evaluations to be undertaken in order to determine any obstacles to the proper functioning of the European judicial arena. The European Union's Stockholm Program focuses on judicial cooperation in criminal matters as a first area for evaluation, but an expansion towards civil justice is envisioned.⁹⁹ It provides a framework for E.U. action from 2009 to 2014 in the area of justice.
74. **The Council of Europe is specifically responsible for the promotion of the quality of justice.** Apart from the EU, the Council of Europe has been actively engaged in the justice field by setting standards, gathering cross-country data, undertaking research and developing tools to improve the functioning of the justice sector. This cross-country role is unique among OECD countries. The Council of Europe has a broad mandate of promotion of democracy and human rights in Europe. Its focus on improving the functioning of the justice sector across its 47 member states is largely due to the fact that the European Court of Human Rights (ECtHR) has received a huge number of cases on violations of the right to a fair trial within reasonable time based on article 6 of the European Convention on Human Rights. Over time, the ECtHR has established detailed case-law with respect to article 6 and found a number of countries in violation of this right.¹⁰⁰ The number of cases exploded in the 1990s and has been increasing ever since. This massive workload is threatening the operations of the ECtHR, and the Council is very actively involved in reducing the number of incoming cases by fundamentally improving the performance of the justice sectors in member states.
75. **The Council of Europe has adopted a number of measures to address quality issues in justice institutions.** The Council's recommendations aim at providing technical and policy tools enabling member states to frame useful common guidelines towards these goals.¹⁰¹ It is also entrusted with facilitating enforcement of judgments of the ECtHR by ensuring payments awarded by the Court are made and that individual compensation measures are implemented. The Committee of Ministers also monitors the implementation of general measures by member states to avoid new violations of the Convention.¹⁰² These measures may comprise constitutional, legislative or regulatory amendments, a change in administrative practice or in cas law, publication and dis-

99 http://ec.europa.eu/justice_home/fsj/intro/fsj_intro_en.htm.

100 Calvez 2007.

101 Jean 2006: 51; Civinini 2008: 16. Helpful listing for recommendations until 2002 at the end of Resolution Res (2002)12 [https://wcd.coe.int/ViewDoc.jsp?Ref=Res\(2002\)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Res(2002)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

102 For more detailed information see Lambert-Abdelgawad 2002.

semination of the Court's judgment, etc.¹⁰³ After the transmission of the Court's final judgment to the Committee of Ministers, the latter invites the respondent state to report about the steps taken to ensure compliance. After establishing that the state concerned has taken all the necessary measures, the Committee adopts a resolution concluding that its supervisory functions have been exercised. If this is not the case, the Committee can adopt interim resolutions setting a calendar for reforms to be undertaken. The Council's supervision of these resolutions is a delicate and politically challenging task.¹⁰⁴ Nonetheless, this mechanism goes to the core of the quality of judicial services delivered to those seeking justice in Europe.

- 76. The Consultative Council of European Judges (CCJE) is an advisory body which addresses issues related to the independence, impartiality and competence of judges.**¹⁰⁵ Technical assistance is provided by other bodies created within the Council of Europe, such as the CCJE which was set up in 2000 and is composed only of judges. Among other tasks, CCJE provides practical assistance to help states comply with standards relating to judges and issue innovative proposals for improving the status of judges and the services provided to users.¹⁰⁶ The CCJE has issued a number of opinions relevant for the efficiency and quality of the judiciary. The most recent one focuses particularly on the quality of judicial decisions.¹⁰⁷
- 77. The European Commission for the Efficiency of Justice (CEPEJ) is a key player in promoting performance improvement.** In 2002, the European Commission for the Efficiency of Justice (CEPEJ) was established¹⁰⁸ to: (i) improve the efficiency and the functioning of the justice system of member states, with a view to ensuring that citizens can enforce their legal rights effectively, thereby generating increased confidence in the justice system; and (ii) to enable better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice. CEPEJ prepares benchmarks, collects and analyzes data, constructs evaluation instruments, produces best practice guides, prepares reports, advice, guidelines, action plans, etc. and creates networks of professionals involved in the justice arena.¹⁰⁹

103 A detailed list of these general measures reported to the Committee of Ministers in its control of execution of the judgments and decisions under the Convention is H/Conf (2000)7 from 3-4 November 2004 available at http://www.coe.int/T/E/Human_Rights/Execution/o2_Documents/H_Conf7.pdf

104 For more detail see Decker et al. 2006.

105 http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/default_en.asp

106 More about the CCJE at http://www.coe.int/t/dg1/legalcooperation/judicialprofessions/ccje/presentation/ccje_en.asp

107 Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2008\)OP11&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)OP11&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3)

108 Resolution Res(2002)12 of 18.09.2002 [https://wcd.coe.int/ViewDoc.jsp?Ref=Res\(2002\)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=Res(2002)12&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

109 For more detailed information see the CEPEJ website at <http://www.coe.int/cepej>

CEPEJ has developed three main types of activities focusing on efficiency, but also increasingly on the quality of justice in the 47 member states of the Council of Europe: (a) generating cross-country comparative data; (b) undertaking in-depth research and analysis; and (c) developing practical tools.

- 78. CEPEJ has created momentum for reforms by generating cross-country comparative data.** When CEPEJ started its work in 2002, there was no comprehensive statistical tool available to generate reliable and comparative data on the functioning of the justice sectors in the Council of Europe's member states.¹¹⁰ National statistics about the justice sectors existed, but oftentimes covered similar, yet not necessarily comparable, data using different definitions and categories as well as different approaches to data generation. CEPEJ's first initiative was therefore to create a single tool. A working group on evaluation of justice sectors developed a comprehensive questionnaire and piloted it. An improved questionnaire was then used to collect data from the Council of Europe member states. Based on 2002 data, and a follow-up report was published in 2006.¹¹¹ A third report was published in 2008.¹¹² It is noteworthy that each edition significantly increased the quality as well as the quantity of the data provided. These cross-country data allowed countries to position themselves vis-à-vis other countries and therefore raised questions in some countries about the functioning of the justice sector and, at times, created impetus for reform.
- 79. Cross-country data has proven essential to facilitate comparisons and benchmarking.** As the cross-country data generated by CEPEJ is fully comparable, this exercise provides interesting benchmarks and facilitates comparisons among countries, for instance on the annual budget allocated to the justice sector as a percentage of GDP (see Figure 21). Similarly, CEPEJ disaggregates the components of the budget by expenditure items (see Figure 25).¹¹³
- 80. The focus of CEPEJ data has been on quantitative aspects of justice institutions performance.** Because justice sector-generated data tends to focus on the supply side of justice, and especially on expenditure and productivity aspects, CEPEJ has complemented this data with other sources. This research has led to the publication of a series of reports on Access to Justice in Europe,¹¹⁴ Monitoring and Evaluation of Court Systems,¹¹⁵ Use of Information Technologies in European Court Systems,¹¹⁶ and Enforcement of Court Decisions in European States.¹¹⁷

110 EUROSTAT the EU agency for statistics as well OECD collect data on social and economic figures and the functioning of the public sector, but no specific information on judicial systems, see Albers 2003: 6.

111 CEPEJ 2006.

112 CEPEJ 2008.

113 CEPEJ 2008: 38, 28.

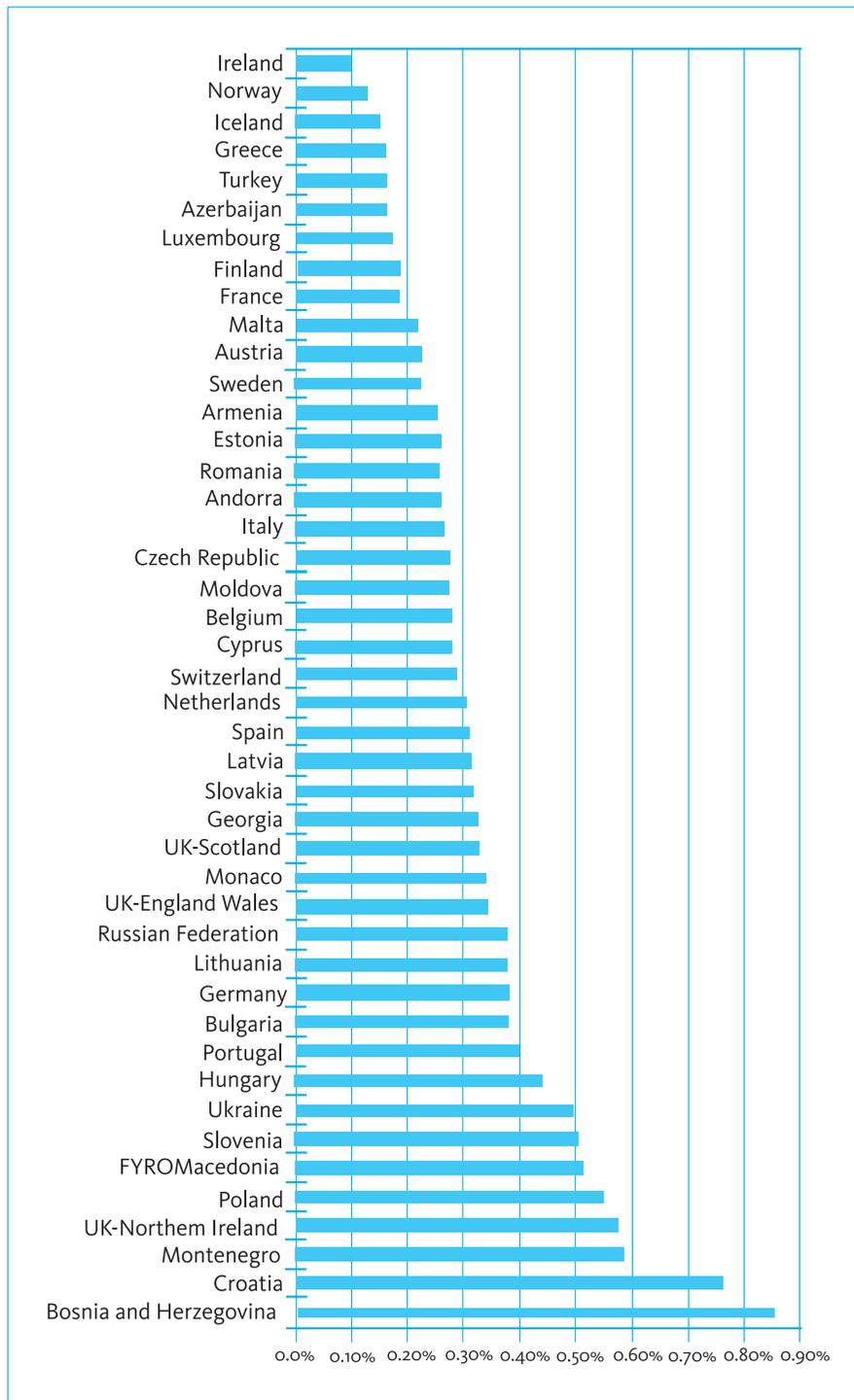
114 Lhuiller et al. 2008.

115 Ng et al. 2008a.

116 Velicogna 2008.

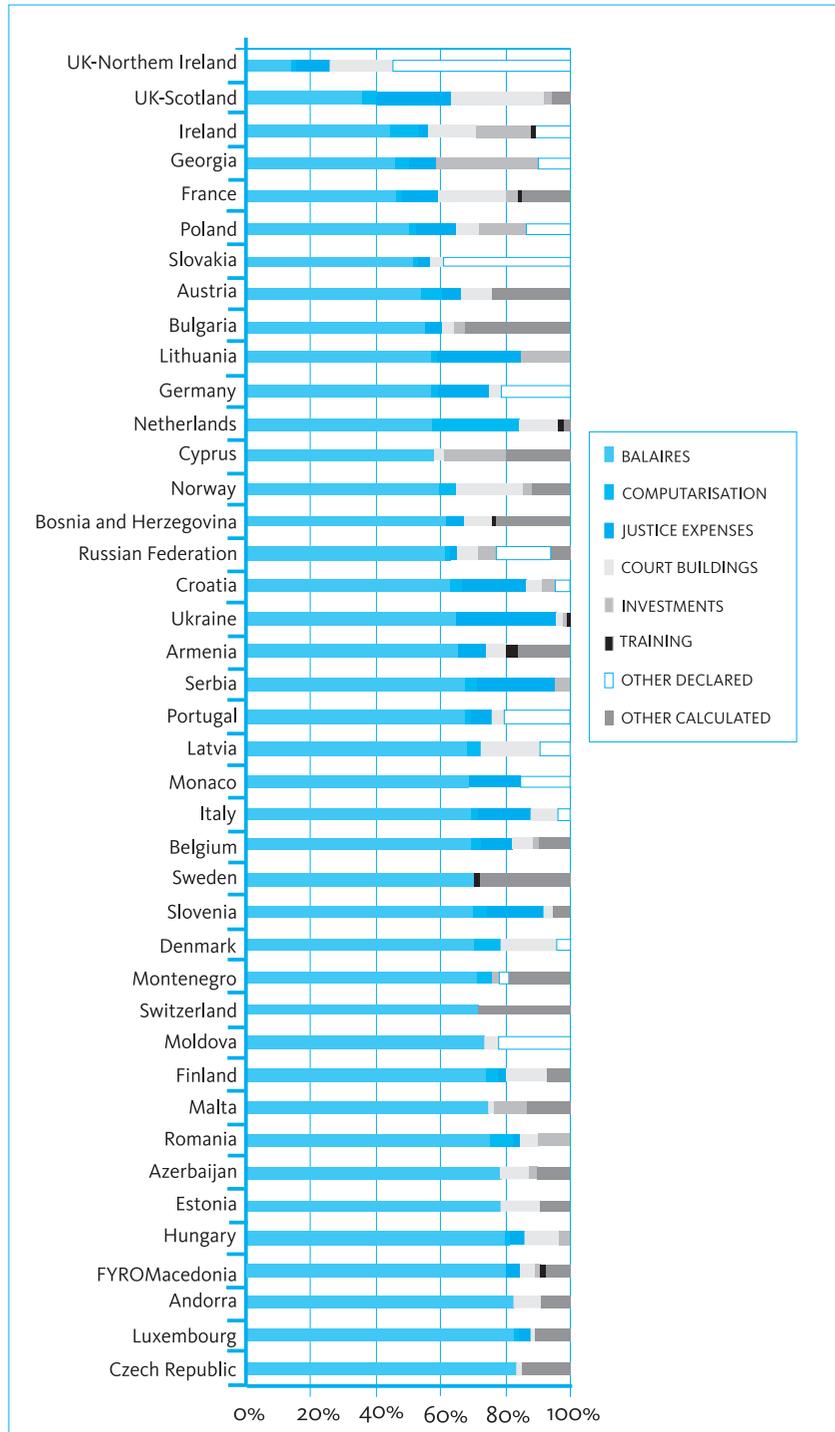
117 Lhuiller et al. 2008a.

Figure 25. Justice sector budget as percentage of GDP



Source: CEPEJ, 2008

Figure 26. Justice sector budgets (Main expenditure items)



Source: CEPEJ, 2008

- 81. CEPEJ data on court delays led to the establishment of SATURN.** The bulk of cases in which the ECtHR finds a violation are those related to the right to a fair trial within reasonable time, which are related to member countries' court delays. As a result of prior undertakings, studies and work carried out by special working groups and a task force, the Center for Judicial Time Management (SATURN)¹¹⁸ was created to focus on procedural timeframes. SATURN gathers and analyzes information from member states linked to judicial timeframes (timeframes per type of cases, waiting times in the proceedings, etc.) and provides the member states with information, analytical tools and guidelines to inform possible reforms. Studies published have dealt with the measures undertaken by Northern European countries to reduce the length of the proceedings¹¹⁹ and abide by time standards set by the ECtHR.¹²⁰
- 82. SATURN has developed practical tools to address delay issues.** In 2005 a Time Management Checklist was published to help collect appropriate information and analyze relevant aspects of the duration of judicial proceedings aimed at reducing undue delays so as to ensure effectiveness of the proceedings and provide necessary transparency and predictability to the users of the justice sectors.¹²¹ Furthermore a compendium of best practices on time management of judicial proceedings was adopted in 2006.¹²² It is based on information from a network of 46 pilot-courts.¹²³ The compendium addresses five topics: (a) setting realistic and measurable timeframes; (b) enforcing the timeframe; (c) monitoring and dissemination of data; (d) procedural and case management policies and practices; and (e) caseload and workload policies. Based on its experience generating comparative data on delays, SATURN developed a detailed questionnaire on common case categories, judicial timeframes and delays in 2007.¹²⁴ This questionnaire collects quantitative and qualitative data on length of proceedings in court and identifies relevant factors and reasons for delays as well as how they are tackled.
- 83. CEPEJ created a special working group to address quality of justice issues.** The mandate of this working group is to develop tools to analyze and evaluate the work done in the courts to improve the quality of the public service delivered by the justice system, with a particular emphasis on justice

118 http://www.coe.int/t/dg1/legalcooperation/cepej/Delais/default_en.asp

119 Smolej et al. 2007.

120 Calvez 2007.

121 CEPEJ 2005a.

122 CEPEJ 2006: 13, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2006\)13&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2006)13&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6)

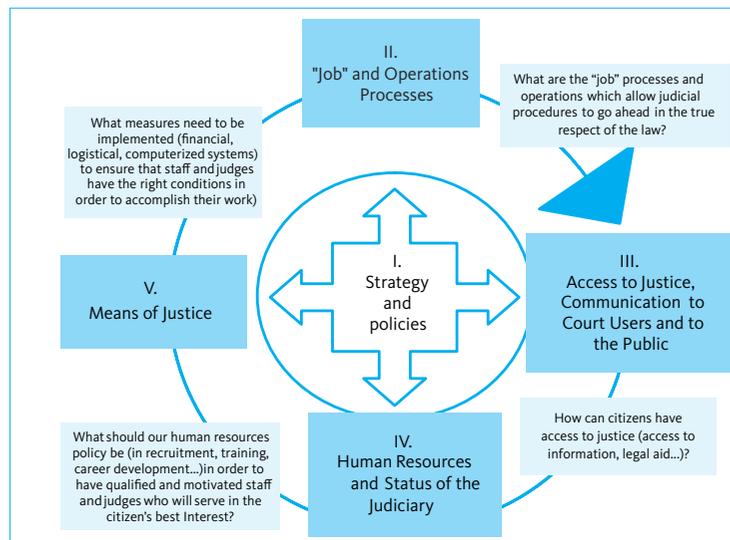
123 For more information on the network of Pilot-courts of the CEPEJ, see http://www.coe.int/t/dg1/legalcooperation/cepej/ReseauTrib/default_en.asp

124 CEPEJ-SATURN(2007)3E of 22.11.2007, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ-SATURN\(2007\)3&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ-SATURN(2007)3&Language=lanEnglish&Ver=original&Site=DGHL-CEPEJ&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6)

practitioners and users. In 2008, the working group published its first practical tool, a “Checklist for promoting the quality of justice and the courts”¹²⁵ designed to help policy makers and practitioners in member countries collect information and analyze relevant topics related to quality. The checklist is structured around five interrelated measurement areas of justice (See Chart 3).

- 84. **CEPEJ quality data is expected to cover the supply of as well as the demand for justice services.** On the supply side, it measures the resources provided by the ministry of justice or judicial council, and on the demand side, it evaluates views of court users. The proposed quality model differs from other quality models in that it addresses all three levels of the judiciary: national level courts, specialized courts and individual judges. The document provides a list of questions for each area of measurement and for each of the three levels, for a total of 265 questions.
- 85. **In a nutshell, the court systems of Europe have developed comprehensive and detailed evaluation measures and methods.** Tools have been developed for all three levels of the justice sector while quality management covers the whole judicial process from the filing a case to the execution of the sentence. Programs now focus on users and foster a change in organizational culture and self-perception of the justice operators towards client orientation. A central aspect of the initiatives is improved data collection systems and performance indicators that can be implemented for practical use and provide information for comparison across courts. While limitations remain, the Council of Europe’s evaluation approach contributes to fact-based comparisons across European judiciaries and has made significant progress in balancing efficiency and quality.

Chart 3. Quality Checklist’s Areas of Measurement



Source: CEPEJ 2008 a Checklist for promoting the quality of justice and the courts.

125 CEPEJ 2008a

86. **Funding arrangements became the basis of nascent monitoring and evaluation systems that can measure court performance.** In sum, it can generally be said that while the changes to the funding arrangements for judiciaries were modest, they were accompanied by more explicit assumptions about the need for performance targets for the justice sector institutions (see Chapter 4 for more detail). This marked an important shift in citizen's and government's relations to the judiciary, as well as the judiciary's recognition of its own accountability regarding performance and use of public funds.
87. **The role and position of the judiciary in the broader political economy of each country also changed.** As detailed throughout the paper, judicial independence plays a critical role in the discussion of performance measurement of the judiciary some cases resulted in performance targets being non-binding at best, or declared unconstitutional at worst (e.g. in Spain as explained in the next chapter). Nevertheless performance targets and the discussions leading up to their design and implementation, had an important reputational effect on the justice sector and represent an important shift in the judiciary's mentality from being a wholly isolated branch to one which was increasingly called upon to account for its resource use and performance. Thus the introduction of stronger internal performance incentives - initially quantitatively and later qualitatively - to achieve improved performance was in and of itself a major achievement in the understanding and implementation of justice sector reforms.

Case Studies Of Performance-Based Reforms In OECD Justice Institutions

CONTROL OF MONEY: REFORMING PUBLIC EXPENDITURE IN THE JUSTICE SECTOR

England and Wales: The use of court fees within hard budget constraints

88. Constitutional conventions governed the relationship between the Government and the Judiciary until the 2004-2005 reforms established a new system.

The close link between the English Judiciary and the Executive was traditionally embodied by the person of the Lord Chancellor. He headed the Judiciary and at the same time was in charge of the Lord Chancellor's Department, which was the Government's department responsible for, among other things, running the court system.¹²⁶ The Concordat of 2004 and the Constitutional Reform Act 2005 changed this situation by formally imposing on the Lord Chancellor and the other ministers the safeguarding of judicial independence and by simultaneously transferring the judiciary-related functions to the Lord Chief Justice as a new head of the Courts. The Supreme Court of the UK was also established by Constitutional Reform Act 2005 and began functioning in 2009. The Lord Chancellor still plays a key role with respect to the provision of justice services; he or she is obligated to "ensure that there is an efficient and effective system to support the carrying on of the business of the Courts of England and Wales and that appropriate services are provided for those courts" (section 1 of the Act). According to the Concordat, he/she is responsible for the provision and allocation of resources the administration of justice. He/she is also accountable to Parliament for decisions related to the allocation of resources, and the effectiveness and efficiency of the system.

¹²⁶ This section on England and Wales is largely based on Dyson 2007 and information provided by the United Kingdom's Ministry of Justice. For more information on the funding of the judiciary within the broader public sector management context, see Webber 2005.

89. **A joint Executive-Judiciary mechanism of resource allocation decisions generated some conflicts.** As the allocation of resources is key for the Judiciary, the Concordat requires putting in place arrangements to ensure that the Judiciary can be effectively involved in resource planning by the Executive. As a consequence, the judges are involved in decisions about what funding the Treasury should be asked for and how the available funds should be prioritized. The Lord Chancellor, however, has the final word. As not all judges agree with the priorities determined by the Lord Chancellor, this can generate some frustration in parts of the Judiciary, for example with the Government's decision to make the civil justice system self-financing.
90. **Safeguards for judicial independence were built into the financial arrangements.** Although judicial salaries and accommodation costs are included in the costs to be recovered by the court fees established in 1992, the stability of judicial salaries is assured against interference by the executive, as judicial salaries may be increased but not reduced.¹²⁷ With respect to other performance targets, the judges are also consulted, but the ultimate decision is made by the Executive. It is not unusual for the judges to take issue with these targets. A general complaint is that at the same time the executive is defining efficiency targets (for example, the time from start of proceedings to the end of trial) it may be making budget cuts that imply reduction of court staff and even closing of court offices making the reaching the targets more difficult.
91. **Nevertheless, parts of the Judiciary felt that the Executive was interfering with Judiciary independence.** As the government, including the Lord Chancellor, is responsible to Parliament, sets the policy objectives and controls the funding, some judges remain particularly sensitive to the fact that the court performance targets are set by the Executive, which are mainly driven by cost-efficiency considerations.
92. **The court fee system may have generated a barrier to access but was an essential element of the cost recovery policy.** According to the Lord Woolf Report, the reformed system would avoid litigation wherever possible, have a shorter and more certain timescale, the cost of litigation would be more affordable, more predictable, and more proportionate to the value and complexity of individual cases, while parties of limited financial means would be able to conduct litigation on a more equal footing.¹²⁸ The general Government policy of total cost recovery now applies to civil court fees, except in cases where fee remission is justified.¹²⁹ This

127 This concept mirrors U.S. constitutional provisions for federal judges, see Article III of the U.S. Constitution.

128 Lord Woolf 1996.

129 In England and Wales all public services charging statutory fees must comply with various general policy and accounting principles, in particular each service must have financial objectives agreed by HM Treasury. The target set is generally to achieve full cost recovery, although ministers may determine lower, but not higher, targets with the Treasury where there is a policy justification for doing so. The intended benefit is to help allocate resources in a rational way and provide greater visibility to the costs and benefits of services.

policy, known as “full-cost pricing,” assumes that civil court services should be largely funded through court fees paid by the litigants. As a consequence, court fees have to be set at a level that will allow the services of a particular court to be self-funded. In 2007/2008, for example, the cost of running the civil and family courts in England and Wales was estimated at £607 million of which almost 78% was to be funded by court fees (£472 million). Some judges have protested that the court fee system poses a serious impediment to access to justice. The Government has argued that since most civil justice is about private rights, and people should only use court services as a last resort, only litigants who can afford to pay the fees should use civil courts. This restriction to access is supposed to ensure that citizens take realistic decisions and initiate only reasonable cases. A fee remission system ensures that people with limited means are not denied access to the courts just because they cannot afford to pay court fees.

93. **The court fees system acted as a powerful counterbalance to the growth in litigation.** In addition to the Lord Woolf reforms, cost reduction in England and Wales has been a major driver for change. The Government has set cost reduction targets, some without previously consulting the Judiciary, which have been accompanied by parallel reductions in the number of civil cases initiated. This suggests that the court fees system may be a major deterrent for frivolous litigation and other forms of misuse of the court system frequent in other jurisdictions at the risk of also discouraging valid claims and impairing the overall fairness of the system in terms of equal access. Nevertheless, in terms of the balance between financial independence and performance accountability the reforms have led to a situation where the Judiciary feels isolated from effective decision-making. As Lord Justice Dyson puts it, “the Executive that is responsible to Parliament, sets the policy objectives and is the paymaster.”¹³⁰
94. **Early evaluations suggested that the reform goals were being achieved.** An evaluation undertaken in 2001 found that litigation was indeed being increasingly avoided. A large drop in claims occurred immediately after the introduction of the revised Civil Procedure Rules. Although numbers of claims rose subsequently, the overall trend remained at a lower level than before (see Figure 27). In terms of trial timeframes, the 1997 reforms also had a positive impact (see Figure 28).¹³¹ In the meantime, a new management culture has developed in the courts of England and Wales. Not only has proportionality become a key guiding principle since Lord Woolf submitted his report in 1996 but the civil justice system has even become self-funding.¹³²
95. **Subsequent research has provided a more nuanced picture of cost reduction, delay and caseload as a result of the Lord Woolf reforms.** Empirical data indicates that the achievement of reducing delay in the settlement of litigated claims

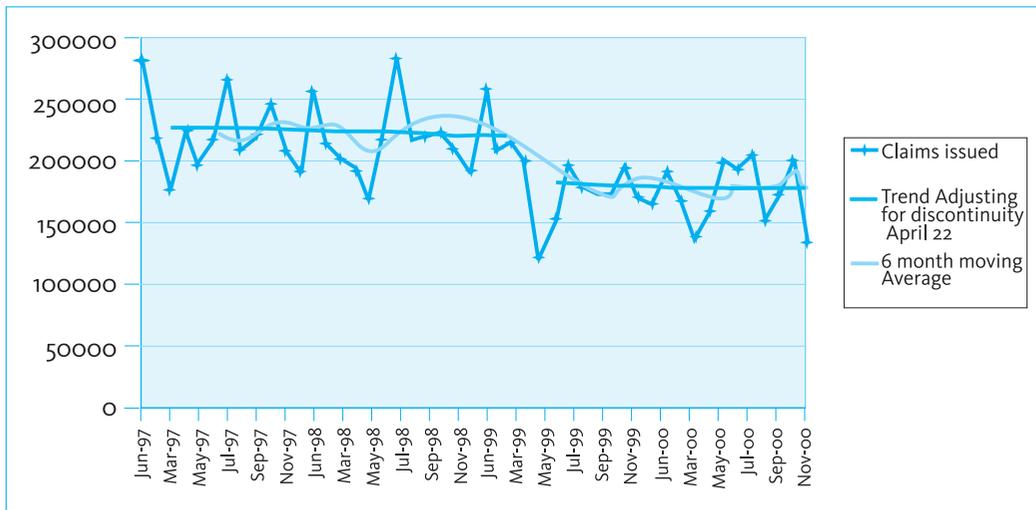
130 Dyson 2007.

131 Department of Constitutional Affairs 2001.

132 If the cost of providing fee concessions is not factored in.

may have been bought at the expense of an increase in the delay in settling claims pre-issue, which constitutes the majority of cases. Also, the empirical data suggests that overall case costs have increased substantially over pre-2000 costs for cases of comparable value.¹³³ The data confirms the achievement of a goal of the Lord Woolf reforms, which was to reduce litigation in the civil courts by channeling cases through ADR mechanisms. Although there has always been a high rate of out-of-court settlement in the shadow of the law, this trend has accelerated over the last decade as a result of a deliberate policy. The impact was such that it has generated a debate about the phenomenon of the “vanishing trial.” The move towards full price costing was based on the assumption that civil dispute resolution is in the private interest and should therefore be paid for by court fees. Critics state that this may not have sufficiently taken into consideration the public interest in having a minimum of regular trials to sustain the civil justice system through the creation of new precedents and citizens experiencing the justice system, which may justify the use of public resources.

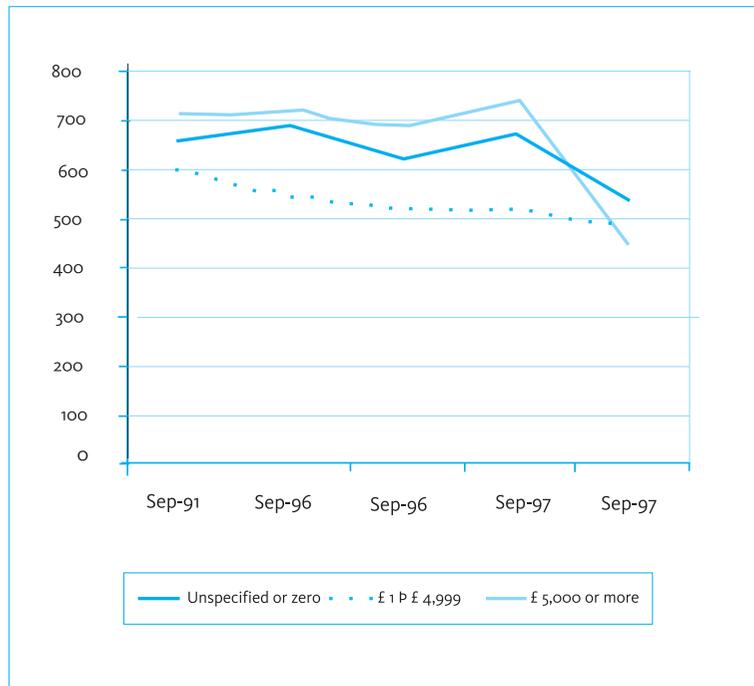
Figure 27. Litigation reduction in England and Wales



Source: Department of Constitutional Affairs 2001.

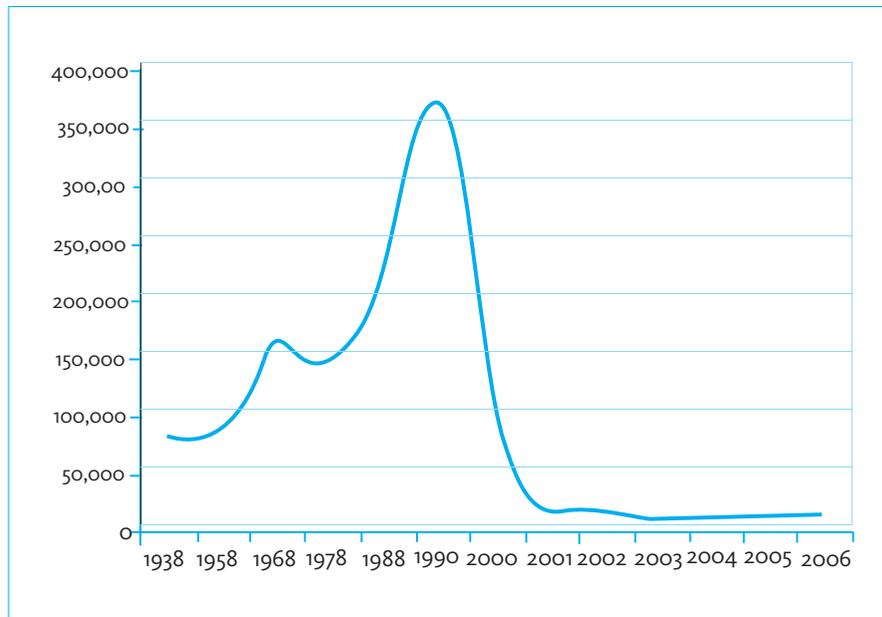
133 Fenn et al. 2009: 33, Lord Justice Jackson 2009.

Figure 28. Delay reduction in England and Wales



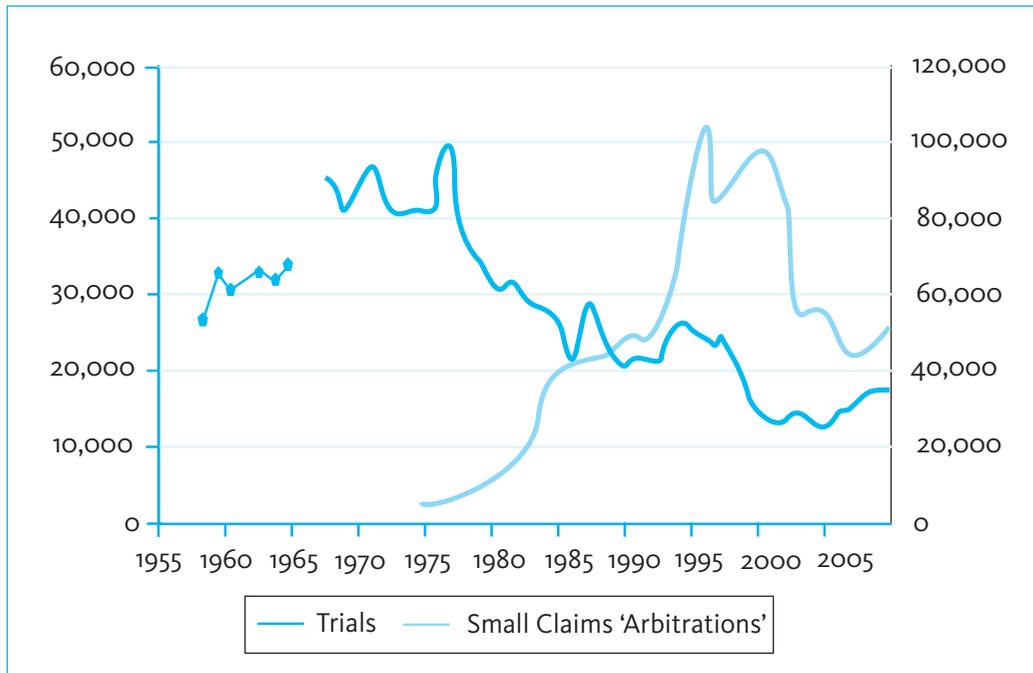
Source: Department of Constitutional Affairs 2001.

Figure 29. Writs issued in Queen's Bench division



Source: Genn 2010: 34.

Figure 30. County Court Trials



Source: Genn 2010: 36.

France: Moving from supply-side responses to performance-based budgeting

96. Prior to NPM-based reforms French justice institutions had begun some changes focusing on management and leadership roles. The delicate balance between financial judicial independence and performance accountability had to be modified in order for France to be able to pursue NPM reforms.¹³⁴ The French justice sector pursued a shift towards a more managerial culture, and part of that cultural change was initiated from within. The French National Judicial Academy (*Ecole Nationale de la Magistrature*, or ENM), for example, introduced training of judicial decision-makers in partnership with the French National Court Clerk Academy (*Ecole Nationale des Greffes*) with a focus on management and the implementation of public policies as early as the first half of the 1990s.¹³⁵

97. Uncontrolled growth in litigation was the main trigger for reform initiatives centered on a supply side response. A sense of crisis had taken hold of the French justice sector since the 1990s, due mostly to a rapidly increasing caseload. Between 1982 and 1991, for example, the civil caseload alone increased by 50%.

¹³⁴ Ng et al. 2008: 62.

¹³⁵ Jean et al. 2008: 6.

The number of incoming cases continued increasing by more than 30% between 1990 and 1995. Despite improvements in productivity of staff and the increased use of ICT, backlog and delay continued to deteriorate. After some relief between 1995 and 2000, due to efforts at the appellate court level (target agreements), and increased recruitment, the number of incoming civil cases went up again between 2000 and 2004— this time by 17%.

- 98. However, substantial growth in budget and staff was not accompanied by reductions in backlog or delays.** In view of the worrying dysfunctions of the court system, pressure mounted for a review of the French justice sector's budget. The executive and the legislative branches finally agreed to begin increasing the budget in 1995; between 2002 and 2007 total sector budget went up by 28%. The share of the justice budget in the overall state budget increased from 1.51% in 1997 to 1.74% in 2002 and then to 2.4% in 2008. Although most of this increase went into penitentiary systems, the number of judges and prosecutors also went up by 33.8% and the number of administrative staff by 18.8% between 1993 and 2007. Construction and renovation of court buildings and offices as well as the introduction of ICT contributed to improving the working environment, but increased funding and recruitment of more judges did not have the impact expected in terms of reduction in backlog and delay.¹³⁶
- 99. A re-centralization process of judicial administration required a new organizational setup.** Organizational changes, including the transfer of responsibility over the budget to the appellate courts, paved the way for more in-depth structural reforms. Until the 1980s, the court budgets had been managed in a decentralized fashion; the transfer of this responsibility to the central offices of the Judiciary became effective in 1987 but did not have a judicial administration apparatus to rely on other than the administrative staff of the courts. This administrative staff operated under the dual authority of the co-chairs of the appellate courts (First President and Prosecutor General) and the co-chairs in the lower courts (court president and prosecutor). In 1992, the appellate court level was selected as the cornerstone for the deconcentration of judicial services at the expense of the lower courts. In 1996, in each appellate court, regional management services (*services d'administration régionaux*, or SAR) were established. They were put in charge of human, financial, budgetary, ICT and training management. Out of 35 SAR directors in 2008 only two were judges. The others had pursued a court staff career.¹³⁷
- 100. A dual administrative system proved problematic from the point of view of judicial independence.** Organizational complexity and unclear distribution of responsibilities have affected the implementation of the reforms. While the First President is appointed by the Judicial Council, the Prosecutor General is appointed by the Cabinet and not surprisingly they have different priorities. Also,

136 Jean 2008: 9, 10, 11, 12.

137 Jean 2008: 11, 12.

the First Presidents have tended to consider the dual management arrangement as an encroachment on judicial independence. Some also wonder why the Court of Accounts and the administrative jurisdictions are placed under the budget program “State Council and Control”, which is under the egis of the Prime Minister whereas the budget of the ordinary courts is under the Minister of Justice, jointly with that of the prosecutors, who are not independent.¹³⁸

101. **Performance-based budgeting was introduced in 2006 in spite of the resistance of some justice sector staff.** Program budgeting was introduced in 2006 and may fundamentally change the way the French justice sector approaches the delivery of judicial services. When the Organic Law on Financial Laws (Loi Organique relative aux Lois de Finances, or LOLF) introducing a new budget architecture was passed in 2001, few experts in the justice sector showed any interest in questions of public finance. This changed as the implications for the justice sector became increasingly apparent. Many judges were suspicious of the law which took full effect in January 2006 because it imposed a remuneration system based on efficiency in a context where workload had reached unprecedented levels. Administrative staff in the courts also suspected that the new law would cut down the number of their positions. Many in the justice sector considered the LOLF to be a technocratic model of the justice sector developed by outsiders whose only goal was to reduce judicial budgets. In this challenging context, the justice budget programs were put together by the Government and performance indicators debated and defined by Parliament.
102. **The definition of performance indicators was the most challenging aspect of the new system and the one that justice operators most opposed.** The LOLF was a shift from traditional input-based to output-oriented budgeting. This change towards a focus on deliverables is epitomized by the fact that the budget is organized in missions and programs. The “Justice Mission” is subdivided in five programs: ordinary justice, prison administration, judicial protection of minors, access to justice, and the conduct and piloting of justice policies. The performance of each program is measured by indicators developed by the Ministry of Justice. The performance logic underlying the new budgetary approach was received by justice sector actors with a mix of helplessness and hostility. Measuring performance required indicators, and their definition turned out to be challenging because the only measures available were statistics generated as by-products of case-management software measuring incoming cases and cases disposed of.
103. **While measuring court productivity was relatively straight-forward, quality assessments proved substantially more complex.** As the mission of the courts is to deliver quality judicial services within a reasonable time, the question was soon posed as to how to measure differing aspects of the same product (i.e. case disposition). In the beginning, measuring the quality of justice was found to be difficult and indicators focusing on productivity were preferred. Because other countries’ experiences had shown that the development and testing of quality indicators

¹³⁸ Jean 2008: 12.

was a mid and long-term undertaking (for example, the Netherlands), the Ministry of Justice settled for indicators that focused on easily quantifiable aspects of productivity. It was acknowledged that developing quality indicators would take more time. Quality was more than timeliness and the proxy of the ratio of first instance decisions overturned on appeal turned out to be of limited value.

104. **Some French courts started to test the quality of decisions with the assistance of a roster of external experts but user feedback was not sought.** Some courts started independent initiatives to find out how best to measure the quality of their work. For instance, the appellate court in Paris undertook a pilot evaluation of the quality of its decisions. This initiative, launched in 2003, appointed an external roster of experts to analyze the quality of decisions based on: (a) the process of writing the decision; (b) the dates of the major milestones in the process; and (c) the content of the decision itself. This roster of experts conducted a case-file analysis of 1,500 judgments in 2006 that focused primarily on the supply side of justice and did not use court user satisfaction surveys to gather the views of court users, lawyers, or administrative staff.¹³⁹
105. **The application of performance-based budgeting to services provided by third parties to the Judiciary had an immediate positive impact in terms of cost-control.** One of the explicit goals of the LOLF had been to reduce the cost of services provided by third parties for the functioning of the court. Typically, the bulk of these expenditures include towing services, phone bills, and medical exams provided by external companies or public utilities. Keeping these expenditures under control had been one of the goals of the LOLF and it was indeed achieved. The LOLF had an almost immediate impact of keeping certain judicial expenditures under control.¹⁴⁰
106. **The strong centralization required at the inception of the process was crucial to achieve some initial results but not to pursue deeper reforms.** During the first two years of implementation, the LOLF generated a highly centralized management system, which did not leave room for initiatives by individual courts and kept tremendous pressure on the regional management services. It was understandable that at the initial stage the central administration of the Ministry of Justice kept a tight rein on the process, as the reform was difficult and faced strong internal opposition from the Judiciary. The fact that judges, prosecutors and court staff were able to keep expenditures under control indicates that they were able to adapt their behaviors. However, the spirit of the LOLF goes further and some promises of the new system such as autonomy in management and the allocation of resources based on projects and performance have not yet been implemented.¹⁴¹

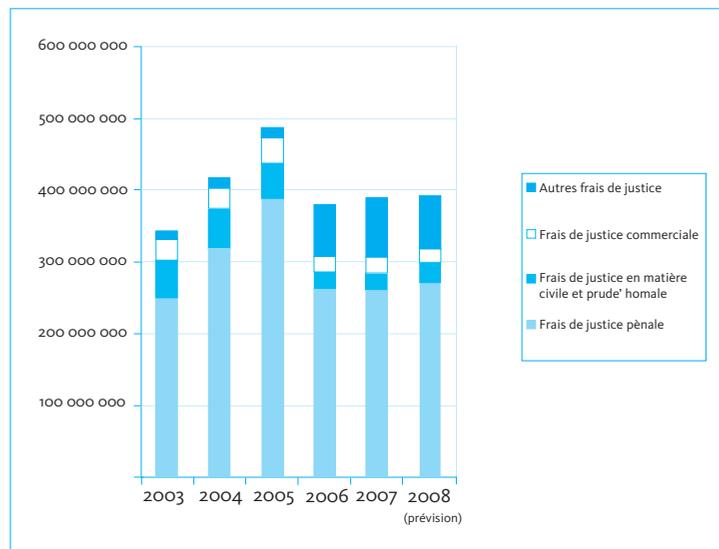
139 Marshall 2008: 124, 125.

140 Marshall 2008: 127.

141 Marshall 2008: 130.

107. **The balance seems mixed and further reforms will be needed to achieve the ambitious objectives set by French reformers.** Although the initial experience with the LOLF has generated more positive impacts than many in the court system had expected, it has not reached its full potential. The work on qualitative indicators continues with an aim of building meaningful tools to evaluate the work of judges, prosecutors, and other staff. The allocation of human resources remains a pending issue, as well as loosening the overly centralized control mechanism by entrusting individual courts with more autonomy that may yield even higher returns in terms of service delivery.¹⁴²
108. **Cost control is a clear initial benefit of the performance-based budgeting instituted in French justice institutions.** The implementation of program budgeting in the French justice sector is still recent yet a new management culture is taking hold. Cost control of the external expenditures (*frais de justice*) for the services required for the functioning of the court system has been very effective. Between 2003 and 2005, these had increased by 42.7%; by 2006 these costs decreased by 22.3% and then remained stable in 2007 and 2008 (see Figure 31).¹⁴³

Figure 31. Evolution of expenditures related to justice services provided by third parties



Source: Sénat 2008: 21

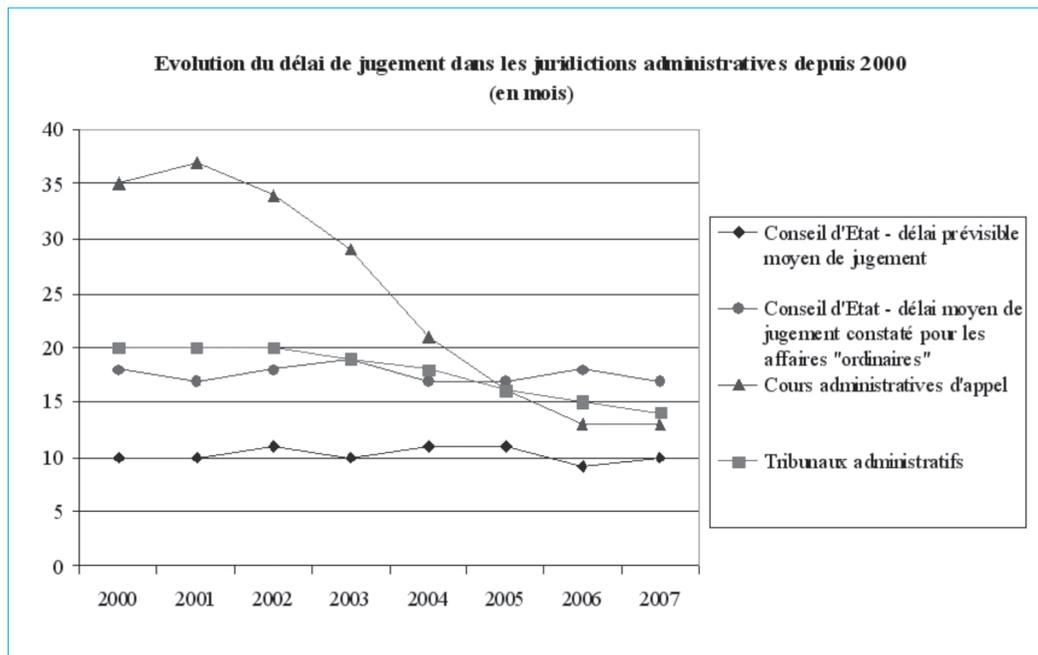
109. **The French administrative courts have pioneered performance contracts resulting in substantial delay reductions.** The Council of State (*Conseil d'Etat*, the Supreme Administrative Court in France) and other administrative jurisdictions developed NPM-based approaches earlier than other courts and had been implementing performance-based logic since 2002, which the LOLF subsequently

142 Marshall 2008: 131.

143 Sénat 2008: 21.

endorsed. One of the tools used was contract management between the administrative appellate courts and the Council, i.e. agreements on performance and resource targets (*contrats d'objectifs et de moyens*). The overall work program of this jurisdiction was broken down at the Appellate Court level and the specific objectives were agreed between these courts and the Council of State.¹⁴⁴ With minimal increases in the number of judges and staff, the objectives of reducing delay and controlling the caseload have been largely achieved; together with clear efficiency gains (see Figure 32). After 2000 the French administrative jurisdiction has reduced the average delay; down to more than thirteen months in 2007 in the case of the Appellate Courts and slightly more for First Instance Courts.

Figure 32. Delays in the French administrative jurisdiction (months)



Source: Sénat 2008: 81

110. **Performance contracts in the French administrative courts have also reduced backlogs.** The agreed backlog targets were reached in 2007, while the structure of the backlog also improved. Indeed, the number of cases pending for two or more years decreased from 44% in 2002 to 10% at the end of 2007. Also, the productivity per judge has increased. The baseline was 88 cases disposed of per judge in 2002. The objective for 2007 was 98 and the actual result was 106. Between 2002 and 2006, the Appellate Courts have been able to dispose of more cases than new cases coming in. In 2007, the First Instance Courts reached the same target. However, the issue of disposing of incoming workload has not

144 Sénat 2008: 79, 80.

been completely resolved and in 2007 the Appellate Courts once again received more incoming cases than they were able to dispose of,¹⁴⁵ showing the significant challenge posed by a 50% caseload increase between 2002 and 2007 in incoming caseload at the level of the Administrative First Instance Courts, which was mostly transferred to the Appellate Courts via regular appeals.¹⁴⁶

111. **As measurement is critical to NPM approaches to justice reform, indicators have to be carefully chosen and constantly refined.** While performance measurement around quality remains challenging, the incentive systems put in place by choosing some indicators rather than others may provide a distorted view of performance. Various indicators were chosen in France to measure quality, such as the number of user requests to interpret a decision, to correct clerical errors and to correct refusals to decide on a case (*requêtes en interprétation, en rectification d'erreurs matérielles et en omission de statuer*) and according to these indicators the quality of the French Courts deteriorated slightly between 2006 and 2007. Another indicator was the ratio of successful cassation decisions in civil cases against the number of cassation requests, later refined as the ratio of successful cassations in civil cases against the number of civil cases handled by the appellate courts.¹⁴⁷ In the case of the quality of the services provided by *maisons de justice et du droit*, designed as one-stop shops for those in need of justice services, user satisfaction surveys have provided useful data and shown high satisfaction rate with the services provided (95% in 2007).¹⁴⁸

OVERSIGHT OF PEOPLE: REFORMING HUMAN RESOURCES MANAGEMENT IN THE JUSTICE SECTOR

Spain: A complex individual performance measurement system is declared unconstitutional

112. **Instead of broader performance measurements, the Judiciary simply wanted to establish a measurable connection between budget allocations and the performance of judicial staff.** The Spanish case offers some insights about the tension between performance-based remuneration of judges and judicial independence.¹⁴⁹ In 1989 the Spanish Judicial Council (*Consejo General del Poder Judicial* – CGPJ) introduced a series of workload modules (“output measures” or *módulos*

145 Sénat 2008: 81,83, 84.

146 Sénat 2008: 79, 85.

147 Sénat 2008: 15. The Law Commission has recommended further improving this indicator by taking into consideration only those cassations based on a factual or legal error and not those simple determining a jurisprudential interpretation.

148 Sénat 2008: 18.

149 This section is based on Contini et al. 2007, Moreno-Catena et al. 2005, Samaniego 1999, Spanish Judicial Council 1999, Signifredi 2006, Strecker 1998, World Bank 2001.

de dedicación) to measure the workload of courts, designed to serve as the basis for budget allocations and ultimately to establish the right numbers of judges and personnel per court. Initially, the modules were structured around the simple principle that a reasonable workload for the courts has to be solely measured by the total number of decisions rendered.

113. **After a simplistic measurement was rejected a revised system was developed to explore the interplay of a number of variables influencing judicial staff performance.** This first approach was heavily criticized because it did not measure in detail the many diverse tasks courts perform. The *módulos* did not take into account the significant differences between the services rendered by the courts at different levels and in different jurisdictions. Moreover, it did not make allowances for the differing complexity of cases. After CGPJ collected the objections raised in a “white book” in 1997, with the help of a group of expert judges it proposed a newly designed set of workload modules based on qualitative and quantitative data. Whereas the old output measures evaluated only case completion rates per court, the revised *módulos de dedicación* introduced a new system based on the workload of each individual judge. The new performance measurement was based on the connection between two criteria: (a) the working hours of each judge per individual task; and (b) the average duration of each proceeding. The *módulos* further differentiated two levels and set specific standards depending on: (a) panel courts or single-judge courts, due to the difference in the court proceedings; and (b) cases according to the type of applicable procedural rules or degree of complexity of the subject matter.
114. **The allocation of an average duration to each court task was the key element of the revised performance measurement system.** As different proceedings take different lengths of time, the module mechanism set a standard value for each type of proceeding at court. The numerical value, which essentially was the average time needed, included all activities a judge must carry out --from reading the written pleading, to being present while taking evidence and eventually drafting the judgment. Different values were applied to reflect the different ways a proceeding could be completed (i.e. settlement or trial, evidentiary hearings or no hearings needed, etc.). This chosen value was cross-referenced with statistical data on proceedings to assure that the average time selected was realistic, by comparing the defined average standard duration with the data on actual cases docketed in a sample of courts in recent years.
115. **In an effort to better reflect the reality of day-to-day courtroom activities the standard modules grew increasingly complex.** The average duration system was subject to further refinements: one assumption was that the time required was based on normal working conditions, and not, for example, on extremely positive or negative circumstances, such as a judge working with more staff than needed or a judge who works with inexperienced staff or faces constant unfilled vacancies. For exceptional cases, the module had special provisions that allowed for extra time. For instance, if a lawsuit was particularly complex (in facts or in law) such

case could not be measured by normal standards. The decision on whether a case was to be qualified as an exceptional one was not in the discretion of individual judges. Upon the request of a judge or the court president, a special procedure could be initiated. The Permanent Commission of the CGPJ would decide if a case was exceptional and deserved a different standard. The modules also reserved a percentage of working hours for unspecified tasks in recognition that certain duties of a judge are not closely linked to the resolution of particular cases and/or are difficult to quantify (conferences with attorneys or parties, letters rogatory, execution of judgments, time between trials and hearings). The percentage of unspecified tasks varied among courts. *Módulos* were later further refined based upon the work of a consultancy firm that turned them into an even more detailed tool for the evaluation of judges that was based on more complex indicators covering five areas: efficacy, quality, commitment and professional development.

116. **The result was a very complex evaluation system that linked standard timesheets with particular tasks in various types of courts.** Although Spanish law does not regulate the allocation of judges' working hours to particular tasks, *módulos* were developed on the basis of 37.5 work week per judge, the legally established work week for court staff. After subtracting holidays, vacation and training, the *módulos* are structured around 44 working weeks per year, for a total 1,650 hours annual working hours per judge (see Table 7). According to this table a judge working in a first instance civil court should dispose of between 750 to 850 civil actions per year depending on the complexity of the proceedings. The proposed point system was cross-referenced with the case disposition rate from 1997.¹⁵⁰ The system also proposed a continuous revision of the time values to ensure more accuracy of the figures and to adapt *módulos* to changes in procedural laws that would affect the average time standard (e.g. expansion of simplified procedures).

¹⁵⁰ It showed that the 1,320 points would have been exceeded in a vast majority of cases.

Table 7 – Workload module for first instance civil courts¹⁵¹

WORKLOAD MODULES (based on the number of cases concluded)	
Concluded Civil Actions	Points / Hours
Proceedings for Large Claims	12
Proceedings for Lesser Claims	3.25
Declaratory Proceedings	2
Oral Proceedings	1.4
Summary Executory Proceedings	1.25
Mortgage Proceedings	1
Eviction Proceedings	1.25
Bankruptcy Proceedings	12
Other Civil Actions	1
Cases Requiring an Exceptional Amount of Time	Up to 130
Total annual hours	1,650 hours*
Time subtracted for activities not reflected (20% of the annual work hours, or -7.5 hours per week)	330 hours
MODULE FOR CIVIL COURTS OF FIRST INSTANCE	1,320 hours/ points

*1650¹⁵²

117. An incentive-based system was short-lived because of union opposition and constitutionality issues. The *modulo* system was approved in 2000 and applied between 2003 and 2006 including the second and arguably the most radical step of the performance-based reform, which was to establish a connection between the *módulos* and remuneration as an incentive-based system that would link individual performance and salaries. The salary plan provided a fixed amount (base salary) plus a variable amount (based on productivity). Judges that exceeded the minimal *módulos* standard set for that year by more than 20% would receive an additional remuneration of 5% to 10% of their salary. There was also a provision

151 The numbers presented henceforth are based on the system as presented in CGPJ (1999), Memoria, Vol. 1, Madrid 1999.

152 point = 1 hour.

for sanctioning less productive judges. The base salary of judges that would perform less than 80% of the applicable *módulo* could be cut by 5% but the CGPJ never applied this provision probably because of strong union pressure. Even though Spanish judges' associations acknowledged the need for evaluation, they strongly opposed the Judicial Council's decision to implement the performance-based remuneration scheme and eventually filed a constitutional challenge. The *Tribunal Supremo* ruled that the *módulos* system violated the principle of financial independence of the judiciary and the variable remuneration scheme was not based on sufficiently objective, equitable and transparent principles.

118. **Although the performance evaluation system was suspended, the design and implementation process provided valuable lessons learned.** The Spanish case shows the challenges posed by introducing performance management systems to the judiciary. It is an example of a managerial approach to court administration blocked by union opposition and insufficient analysis of its consistency with the broader legal framework. Nevertheless, the development of *módulos* still had a positive effect as an exercise in evaluation methods over several years. The process of collecting relevant data for judicial services evolved from a simple and easy to handle measurement of case completion rates utilized for budget allocation to a comprehensive model focused on judges' performance. The improved system was more equitable because it differentiated between proceedings and types of courts, while producing more detailed data not only on courtroom performance but also of the performance of individual judges. Utilizing the data obtained through *módulos* directly to an incentive-based remuneration scheme was unsuccessful mainly because the scheme was largely rejected within the judiciary. Judges perceived the system as too productivity-focused and a threat to the values of the judicial process that emphasizes the achievement of the abstract values of justice on an individual case-to-case basis.

CONTROL OF ORGANIZATIONS: RESTRUCTURING THE JUSTICE SECTOR FOR BETTER SERVICE DELIVERY

The Netherlands: Effective court evaluation and quality control

119. **The Dutch judiciary embraced NPM approaches earlier than other European countries by linking court budgets with justice services.** Starting in the mid-1980s, the first wave of reforms restructured the financing of the Dutch courts and reformed the organization for judicial administration.¹⁵³ Under the old structure of judicial administration, the Ministry of Justice carried out all administrative tasks for every judicial entity and paid the courts' bills and those of the public prosecu-

¹⁵³ Background information available online at <http://siteresources.worldbank.org/INTLAWJUSTINST/Images/LinkPDF.gif>. See also Albers 2008; Committee for the Evaluation of the Modernisation of the Dutch Judiciary 2006; Langbroek 2008, Ng 2005; Ng 2007.

tion service. A new budgeting system with a planning and oversight cycle was introduced to give a greater degree of freedom and individual responsibility to the courts. The budget allocation was based on the workload and nature of services that each court provided. However, determining the evaluation criteria and a calculation formula for workload and the exact amount of required funds for the services remained controversial, as different services needed differing amounts of time and resources, e.g. rulings, interim legal measures, settlement etc. The lack of definite, objective criteria (i.e. timelines etc.) and benchmarks for those services generated broad political discussions and resulted in periodic redefinitions.

120. **The establishment of a dual system of judicial administration proved to be problematic and had to be reversed.** In order to implement a new budgeting system a dual administrative system was implemented by splitting tasks between the court president and a newly introduced court manager. A court manager (*Directeur Gerechtelijke Ondersteuning*) was appointed for each of the nineteen Dutch circuits (*arrondissementen*). Most circuits cover several local courts and one regional court, with the exception of the five largest courts which include two regional courts each. The court manager became responsible for the administration of funds under the supervision of the Ministry of Justice. S/he would be responsible for collecting data and drafting the budget according to the new system. The court manager was in charge of all of the non-judge court staff but, in order to protect judicial independence, s/he was not given any authority over the judges. The dual structure turned out to be quite problematic as judges felt excluded from the operational aspects of the courts while the non-judge staff continued to report to the judges rather than to administrative supervisors, following traditional practices. As a consequence, the outcome of court managers' work depended predominantly on her/his personal relationship to the court presidents and other judges. The negative overall experience of the dual judicial administrative system resulted in its repeal in the late 1990s.
121. **The launching of "The Judiciary in the 21st Century" program signaled a new stage in the reform process.** A second wave of reforms was initiated between 1998 and 2002. "The Judiciary in the 21st Century" (*Rechtspraak in de 21e eeuw*) covered a number of small initiatives, pilot projects and experiments, including structural analysis, initiated and financed by the Dutch state. This process was sparked by the NPM-in-the-judiciary debate. Its overall objectives were twofold: (1) to undertake an in-depth assessment of where the Dutch courts stood; and (2) to stimulate change in the judicial culture and generate readiness and openness for further reforms among the judges. Two principles were steering the process: (i) safeguarding judicial independence; and (ii) assuring judicial quality. The strategies included focus on knowledge management, training programs, improvement of internal and external communications and application of the latest ICT technologies. The reform process aimed at changing all levels of the judiciary through the introduction of a performance-oriented funding system and the redesign of the organizational structure of the Dutch judicial administration.

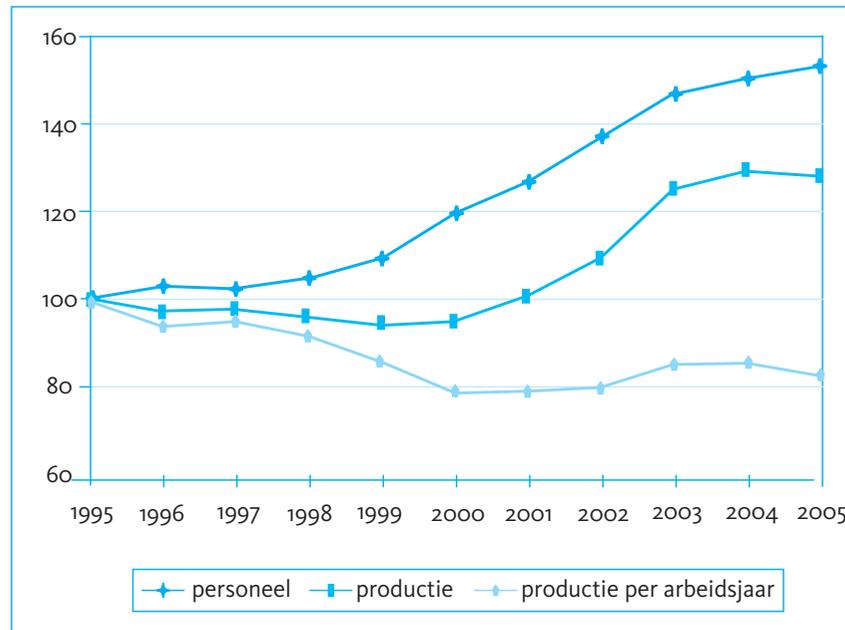
122. **A new Judicial Council was crucial to separating administrative and judicial functions without impairing judicial independence.** By 2002, the reform process had resulted in a major system overhaul. Two important Acts went into effect: the Dutch Judiciary Organization and Management Act (*Wet organisatie en bestuur gerechten*) and the Act on the Judicial Council (*Wet Raad voor de rechtspraak*). Similar to some of the most powerful Judicial Councils of LAC (e.g. Colombia), the Dutch Council of the Judiciary was created as part of the court system, with no administrative responsibilities over justice. Instead the Council took over responsibility for a number of tasks from the Minister of Justice, mainly preparing, implementing, allocating and accounting for the court system's budget. Furthermore, the Council became responsible for the recruitment, selection and training of judicial and court officials and the procurement of ICT. Finally, the Council also was entrusted with promoting the quality of the court system; advising on new legislation concerning the administration of justice, and acting as a spokesperson for the judiciary in public and political debates. The courts became accountable to the Council for the utilization of their resources but not for judicial decisions, while the Council reports to the Minister of Justice for the management of the judicial budget. The Ministry retains political responsibility for the functioning of the court system as a whole.
123. **A comprehensive court evaluation system started to operate in 2002 based on quality control standards.** The Council initiated reforms on legal quality and began to develop a comprehensive quality control system for all courts in the Netherlands, *RechtspraakQ*, an innovative methodology located between conventional production-related benchmarks and measurements of actual quality. The system is designed to outline the judicial functions at the court and circuit level and can be used for comparing quality between various courts and circuits. Every other year each court is required to conduct a court-wide review based upon the INK (*Instituut Nederlandse Kwaliteit*) procedure, the Dutch equivalent of the European Foundation for Quality Management (EFQM). The court's management team analyzes the progress of improvements based on the INK-standards. Once every four years, the courts are also obliged to conduct a survey on how users perceive the court's services. Clients/users are litigants, lawyers, public prosecutors and other "repeat-players". Within the same four-year cycle, the courts must evaluate staff satisfaction with their workplace which includes their jobs, the court's organization and the management team. Also every four years, the courts are visited by an independent evaluation committee (including outside parties) that renders a report on the current state of the quality of the Dutch judiciary to the public and the Ministry of Justice.
124. **Innovative peer review and complaint systems complemented the quality control mechanisms.** Ground-breaking elements of this system are peer reviews and a nationwide complaint procedure. Peer-review, a professional consultation among colleagues, is designed for individuals and intended to create a more open culture of exchange within the court system. Judges can use this instrument to

evaluate, discuss and improve their own performances. It focuses on the judge's interactions with the parties to the procedures, behavioral aspects and the quality of the judge's decisions. Also, in 2002 a uniform complaint procedure for judges, support staff and the court as a whole was set up, aimed at streamlining the treatment of complaints and providing and improving the overall quality of the courts.

125. **A special organizational structure was established to support the operation of the quality control system.** The implementation of *RechtspraakQ* and its application by the courts is supported through two agencies: The Quality Bureau of the Council and Prisma. The Quality Bureau is the central entity responsible for validating and maintaining the overall system at the national level, serving as central contact point. Prisma is an independent service provider that assists individual courts implement *RechtspraakQ* at their request.
126. **Hard data and perception data have confirmed the success of the first five years of the Dutch justice reform process.** Five years after these reforms started, a Committee for the Evaluation of the Modernization of the Dutch Judiciary carried out the first nation-wide, comprehensive evaluation of the reform process and published a report in 2006. It concluded that the reform process led to a halt of a long period of decline in judicial productivity and slightly reversed the trend between 2002 and 2005 (See Figure 33). While nationwide polls had showed a decline in confidence in the judicial system in the 1990's, data for 2000 to 2005 indicate the decline had stopped and Dutch public opinion was positive regarding the quality of the judiciary, which remained stable at around 60%. User opinion is even better: customer appreciation surveys (including legal professionals) conducted by the courts in 2003-2005 as part of *RechtspraakQ* show an increase in satisfaction between 2001 and 2004. By contrast, the judges' perception suggests that the performance-oriented funding system may cause a decrease in quality in the long term because of the high production pressures.¹⁵⁴ The different results in the quality of judicial services' polls have been explained by an obvious difference in the perceptions between insiders and outsiders, as they are based on diverse assumptions and values of users and judges.

¹⁵⁴ Similarly Langbroek 2008.

Figure 33. Productivity of Dutch courts -Production per year of work of the Judiciary (Indices 1995 = 100)



127. **In spite of the tangible achievements, ensuring the sustainability of the productivity gains may prove challenging.** Notwithstanding the overall success of the Dutch approach, concerns have been raised by the Committee and the judges regarding the need to continuously rebalance the values of efficiency, quality and independence while reforming the Dutch judiciary. The Committee noted that quality is under great pressure and recent gains may not be sustained because *RechtspraakQ* measures the pre-requisites for quality of the justice services but does not actually advance improvements in quality. A key feature of the Dutch system is that it adopted a mixed approach and developed a normative framework which ensures the autonomy of the judicial branch while increasing performance accountability through mechanisms inspired by NPM.¹⁵⁵ *RechtspraakQ* seems to be the key element of this successful initiative in improving the work of the courts and evolving towards a more client-oriented culture within the judiciary. The Dutch case suggests that quality management is an ongoing process rather than a one-time quick-fix change, and the reform process has to be periodically evaluated and adjusted.
128. **The reforms have resulted in improvements in productivity and cost effectiveness by the Dutch courts.**¹⁵⁶ The evaluation published in 2007 was wide-ranging and used a variety of evaluation instruments such as

155 Ng et al. 2008: 62.

156 Boone et al. 2007.

web questionnaires, self-assessments, interviews, etc. It found that, overall, the productivity of the Dutch courts increased by 8% between 2002 and 2005.¹⁵⁷ As courts settle cases faster, the average cost per case has fallen.¹⁵⁸

As recognition of improved performance and incentive for further reforms, the justice sector budget was one of the few areas in the public sector which was not decreased in the same period. While the other branches of Government have fulfilled their budget commitments to the Judiciary, the Dutch reform process has also shown that it is extremely useful for the Judiciary to provide solid data during budget negotiations.

129. **There were also some unexpected side-effects of NPM-based justice reform initiatives resulting from priorities and sequencing.** The evaluation¹⁵⁹ has shown that at the initial stages of reform the staff of the court system can get so excited about the new approach that they focus on easy wins such as increased productivity and cost savings, while more challenging aspects such as quality management are left to be addressed at later stages. For example, the Dutch judiciary quality management system was put in place a year later than the establishment of the new financing system, as the first priority for the Judicial Council and the Management Committees was to demonstrate to the political branches of Government that they had sufficient capacity to handle public money efficiently. Moreover, between 2002 and 2005, reformers engaged in a race for improved productivity, while a new performance measurement system was still being put in place.¹⁶⁰
130. **Critical voices maintain that the pressure on judges and court administrators to deliver is too high.** Critics are concerned that judges and court administrators may have to work far beyond the call of duty for the reform to happen,¹⁶¹ and there is a real threat to judicial independence. 25% of judges interviewed during the evaluation say that they have been summoned by their peers or the court president for failing to comply with the guidelines on the content of judgments. Although 74% of judges considered themselves free not to follow these guidelines, 60% indicated that only in rare cases they do not follow them. Nonetheless, a survey among users indicates that there remains significant room for improvement in the area of consistency of judgments. Judges reportedly complain that this is due to the high pressure to deliver which does not give them sufficient time to fully consider the facts and the law before they are required to make a judgment.¹⁶²

157 Langbroek 2008: 77.

158 Boone et al. 2007: 264.

159 The evaluation methodology relied on 2,900 questionnaires with a return rate of 63 %, self-evaluation of 25 management committees, meetings and roundtables with almost 200 judges and court administrators.

160 Langbroek 2008: 76.

161 Langbroek 2008: 77.

162 Langbroek 2008: 77.

131. **Evaluations have also shown that the Dutch courts are concerned about the decreasing quality of their work.** Although the outcomes of the survey show that this may be less serious than it appears from the interviews, there are reasons for concern. In order to address this issue, the Judicial Council and the court administrators agreed on targets in 2006 to improve the judicial quality. The 2007 evaluation found that the effects of this intervention were still limited in the day-to-day practice, but anticipated that this would probably change in the short term.¹⁶³

Box 3 - Six Reasons to Evaluate Court Performance

Performance data
 enables verification of assumptions, perceptions and beliefs of court insiders
 permits courts to respond to the concerns of individuals and groups being served
standardizes and set the outcomes and ends rather than the means and, thus, help staff
 to better understand their individual contributions
 are central prerequisites for evidence-based demands for new court initiatives, additional resources and the budget
 provide the means for courts to demonstrate how the public resources are spent and thus fulfill their duty of public accountability

Adapted from Brian Ostrom (2005) *Why Measure? Five Reasons to Assess Court Performance*.

The United States: Court performance standards models

132. **The development of court performance standards was crucial for NPM-inspired justice reforms to advance in the U.S.** As part of the general efforts in the U.S. during the 1980s and early 90s to outsource, reduce and reorganize the public sector, the discussion about performance-based public institutions was carried over to the judicial sector. According to Richard Schauffler, the move towards performance measurement in the judiciary was further stimulated by the following factors:¹⁶⁴ (a) steep increases in cases prosecuted as part of the national ‘war on drugs’; (b) more attention to court delays and costs of judicial services; (c) economic recession at the beginning of 1990s and corresponding cuts in state budgets; and (d) a lower level of public trust and confidence in the judiciary in comparison to other institutions.¹⁶⁵

163 Boone et al. 2007: 264, 265.

164 Schauffler 2007: 118.

165 NCSC 1999: 12. Nonetheless, the confidence in the U.S. courts by the public has increased as a comparison between a survey in 1978 and 1999 show. This study came to the conclusion that there is a strong support of the American Justice System, see American Bar Association (1999) Perceptions of the US Justice System, <http://www.abanet.org/media/perception/perceptions.pdf>

133. **The U.S. Trial Court Performance Standards represented the first comprehensive framework to introduce performance measurement.** In 1987 the National Center for State Courts (NCSC)¹⁶⁶ and the Bureau of Justice Assistance (BJA) initiated a project to develop and introduce standards to describe, classify and measure the performance of trial courts. As a result in 1990 the Commission on Trial Court Performance Standards published the U.S. Trial Court Performance Standards (TCPS).¹⁶⁷ The TCPS system emphasized the improvement of court services to the public and focused on the users of the court system. The Standards were designed to evaluate the performance of the court as an organization (court performance) and not the performance of a single judge (judicial performance). TCPS was intended for internal use and evaluation, not for cross-court comparison.¹⁶⁸ It identified five broader performance areas¹⁶⁹ to be covered through twenty-two standards or guiding principles and used sixty-eight measures.¹⁷⁰
134. **TCPS changed attitudes and perceptions about the value of data related to court services, but was too complex for day-to-day use.** TCPS used a variety of methods for data collection, such as: (a) surveys of clients and focus groups; (b) review of case and administrative records; (c) observations and simulations; and (d) internal working group techniques, such as brainstorming and focus groups. These methods helped to raise the awareness of practitioners, and advance their understanding and knowledge of performance measures in court houses. Given the novelty of this approach, TCPS encountered a number of challenges during the implementation stage, the main one being its complexity, which prevented successful implementation into the day-to-day work of the U.S. state court system. It was this complexity that ultimately led to the failure of TCPS.
135. **The challenges surrounding the implementation of the TCPS recently led to the development of a new reform tool.** Responding to criticism that TCPS had too many measurements and taking into account the popularity of the balanced scorecard, the NCSC developed CourTools,¹⁷¹ a new set of performance measurement tools based on TCPS but with a narrower focus. Measurements focused on ten core performance indicators that were supposed to be easier to implement in practice (see Table 8).

166 Among its many roles, the NCSC serves as a: (a) national think tank to anticipate new developments, identify best practices, promote experimentation, establish performance standards and measures, evaluate program performance, and foster adaptation to change; (b) a national forum for discussion of issues affecting the administration of justice; (c) a national leadership agenda for improving the administration of justice; and (d) a national voice for the needs and interests of the state courts. NCSC also promotes collaboration among national court associations, and related national organizations, as well as international work. For more information see their website at <http://www.ncsconline.org/>.

167 NCSC et al. 1990. For more information see the NCSC website on this topic at http://www.ncsconline.org/D_Research/tcps/.

168 Schauffler 2007: 119; Casey 1998: 28.

169 Casey 1998: 25.

170 Albers 2008: 4, 5.

171 http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm

Table 8 – CourTools

1. Access and Fairness	2. Clearance Rate
Ratings of court users on the court’s accessibility and its treatment of customers in terms of fairness, equality, and respect.	The number of outgoing cases as a percentage of the number of incoming cases.
3. Time to Disposition	4. Age of Active Pending Caseload
The percentage of cases disposed or otherwise resolved within established time frames.	The age of active cases pending before the courts, measured as the number of days from filing until the time of measurement.
5. Trial Date Certainty	6. Reliability and Integrity of Case Files
The number of times cases disposed by trial are scheduled for trial.	The percentage of files that can be retrieved within established time standards, and that meet established standards for completeness and accuracy of contents.
7. Collection of Monetary Penalties	8. Effective Use of Jurors
Payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases.	Measurement of juror yield (the number of citizens who report for jury duty as a percentage of those summoned) and juror utilization (the number of prospective jurors actually used as a percentage of those who reported for jury duty).
9. Employee Satisfaction	10. Cost per Case
Ratings of court employees assessing the quality of the work environment and relations between staff and management.	The average cost of processing a single case, by case type.

Source: National Center for State Courts, 2007

136. **CourTools were designed to ensure a consistent focus on internal and external variables affecting court operation.** NCSC prepared a sample template data spreadsheet for each measure with built-in graphs¹⁷² and practical guides for each of the ten measures including on its implementation and how to monitor the results.¹⁷³ CourTools is governed by three interrelated criteria:¹⁷⁴ (a) fundamental court values,¹⁷⁵ such as independence, impartiality, fairness, access, and equality are the key elements when determining performance measurement. The organizational design of the institution and the entire work process of the courts are based on these values and, therefore, have to be developed around them; (b) a balanced perspective of court’s work processes and outcomes that takes into account the perspectives

172 See the NCSC website at http://www.ncsconline.org/D_Research/CourTools/ctTemplates.htm

173 http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm

174 Ostrom 2005: 4.

175 For more details on core values and court administration see Keilitz et al. 1998.

of various players involved in the tasks; and (c) feasibility and sustainability which allow a stronger focus on the implementation of the system into the courts' actual work processes.

137. **CourTools were designed to be practical and fit into daily work.** Design takes into account the possible legal restrictions and costs linked to performance measurement. CourTools should enable the courts to embark on a short to long-term reform process. As a result CourTools can measure: (i) court deliverables to customers; and (ii) cost-effectiveness in the allocation of court resources.¹⁷⁶ CourTools should generate the data required to measure the value-added by the justice services provided by each court, thus making the courts accountable while facilitating cross-court comparisons.¹⁷⁷ At least four States have started to implement CourTools measures on a state wide level¹⁷⁸ but most are still in a pilot test phase. CourTools have also been implemented by individual courts throughout the United States.¹⁷⁹ The evaluation of the results is pending.

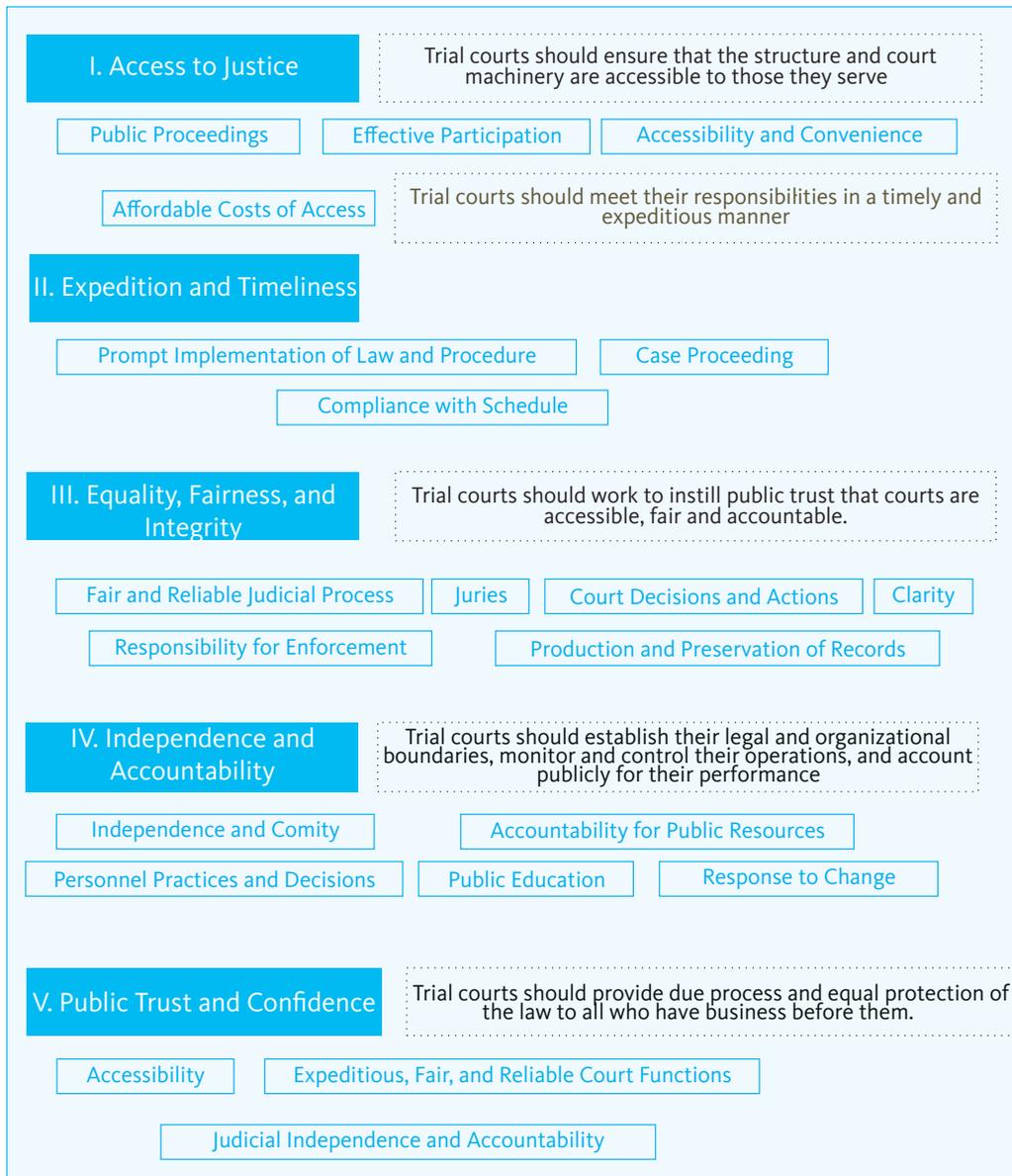
176 Ostrom 2005: 3.

177 2007: 121, 122.

178 Arizona: <http://www.supreme.state.az.us/goodtogreat/default.htm>; <http://azjudges.info/home/index.cfm>
California: <http://www.courtinfo.ca.gov/reference/devperf.htm>
North Carolina: <http://www.nccourts.org/Citizens/SRPlanning/Performance/Default.asp>;
Utah: <http://www.utcourts.gov/courtools/>

179 For an overview, see Schauffler 2007: 122.

Chart 4. TCPS Performance Areas and Standards



Source: National Center for State Courts, 2007

SHARING APPROACHES WITH THE PRIVATE SECTOR: MEASURING AND MANAGING QUALITY OF JUSTICE SERVICES

QUALITY MANAGEMENT MODELS BASED ON THE EXPERIENCE OF THE PRIVATE SECTOR

138. Quality management methods originated in the private sector and subsequently adapted to the public sector can also be applied to justice services.

Recent justice reform programs have been tailored around quality as a key value of justice institutions. They focus not only on performance and effectiveness but also include quality improvement and assurance concepts. Various quality models have been developed around the central elements of quality management: setting quality standards, quality control, quality assurance, quality improvement, and client feedback. Originally, management tools were designed to set quality standards for products. As a key aspect is client needs and satisfaction, generating client feedback and utilizing it for management purposes is also central to any model. The quality models are quite comprehensive as they do not simply focus on the final product or service, but are designed to take the overall production process into account in order to ensure continuous improvement.¹⁸⁰

139. Various quality improvement methods and systems have been developed in OECD countries.

In the U.S. Total Quality Management (TQM)¹⁸¹ is an organization-wide business management approach to long-term success by improving products, processes, services and company culture developed since the early 50s.¹⁸² A similar model was developed in Europe by the European Foundation of Quality Management (EFQM)¹⁸³ whose Excellence Model¹⁸⁴ is an organizational framework of management systems based on nine criteria: (a) five 'enabler' criteria (leadership, people, policy & strategy, partnerships and resources); and (b) four 'results' criteria (people results, customer results, societal results and key perfor-

¹⁸⁰ Albers 2008: 1.

¹⁸¹ Dale 2003: 3, 4.

¹⁸² Feigenbaum 1951.

¹⁸³ Albers 2008: 1.

¹⁸⁴ <http://www.efqm.org/>

mance results). ‘Enablers’ apply to what the organization does, while ‘results’ criteria cover the organizational achievements. ‘Results’ are caused by ‘enablers’ and ‘enablers’ are improved using feedback from ‘results’. This model can be used not only as a Management System, but also as a practical tool for self-assessment/benchmarking, or as a guide for improvement or creation of a common vocabulary.

140. **International quality management models have also become very popular in both OECD countries and in Latin America.** Another approach was developed by the International Organization for Standardization (ISO) which published the revised version of the ISO 9000 standards in 2000, a set of standards on good quality management for organizations. ISO 9001:2000 provides standardized requirements for a quality management system against which organizations can be certified. The other standards from the ISO 9000 family cover further fundamentals and vocabulary (ISO 9000:2000), performance improvements (ISO 9004:2000), documentation, training, and financial and economic aspects. This management system is based on eight quality principles that should lead towards improved performance: (a) customer focus; (b) leadership; (c) staff involvement; (d) process approach; (e) system approach to management; (f) continuous improvement; (g) fact-based approach to decision making; and (h) mutually beneficial supplier relationships.¹⁸⁵ Finally, the quality management philosophy of 6 (Six Sigma)¹⁸⁶ was developed around the idea of defect prevention to gain competitive advantage. It assumes a standard deviation within a statistical universe of no more than 3.4 defective parts per million meaning that for practical purposes no items should fail to meet the set of standards selected. One central aspect of Six Sigma is the DMAIC approach to identify problems and solutions (**D**efine, **M**easure, **A**nalyze, **I**mprove, **C**ontrol).
141. **Some OECD justice institutions have pioneered the implementation of quality management standards originally designed for private companies.** In France, for example, the international management standards ISO 9000 and ISO 9001 were explored in the late 1990’s and early 2000s.¹⁸⁷ Justice reformers in the Netherlands and Portugal have worked with systems developed around EFQM standards. Outside Europe, the justice reform process for the subordinate courts of Singapore successfully applied Balanced (Justice) Scorecard and Six Sigma.¹⁸⁸ The introduction of these managerial approaches into the justice sectors can create tensions among various stakeholders, especially between judges and the Executive and has to be carefully designed and implemented.¹⁸⁹

185 http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso_14000/qmp.htm

186 <http://www.asq.org/learn-about-quality/six-sigma/overview/overview.html>

187 Deffigier et al. 2005, Fortier 2002.

188 Subordinate Courts Singapore 2007. The German State of Hesse is another example where pilot projects using Balanced Score Card as a tool for improving the administration have been implemented (e.g. youth prisons): http://www.hmdf.hessen.de/irj/HMDF_Internet?cid=3f71f334fe8813863214f1252f46ffa7.

189 Contini et al. 2007.

QUALITY OF JUSTICE STANDARDS DESIGNED SPECIFICALLY FOR THE JUSTICE SECTOR

142. **Justice services stakeholders have to agree on the meaning of quality.** While Governments tend to focus more on efficiency and cost-effectiveness than on “quality”, judges and other sector operators emphasize this attribute of a justice service. Specifically “quality of justice” for judges means the “legal quality” of judicial decisions.¹⁹⁰ Broadly speaking the “quality of the justice sector” for them means judicial independence. Complaints about decreasing “quality of justice” are linked to real or perceived pressures from the Executive for higher productivity and efficiency.
143. **The quality of judicial decisions is a critical element of advanced justice reforms.** In 2008, the Consultative Council of European Judges issued an opinion on the quality of judicial decisions¹⁹¹ that requires clear reasoning and analysis in judicial decisions for the benefit of citizens. However, the opinion acknowledges that “it is not only the legal quality *stricto sensu* of the actual decision that matters; attention has also to be paid to other aspects such as the length, transparency and conduct of the proceedings, the way in which the judge communicates with the parties and the way in which the judiciary accounts for its functioning to society.”
144. **The users’ views of the court system are a critical test for the quality of justice.** Although the quality of the judicial decisions may be supported by management models, the public’s understanding of “quality” incorporates additional elements: fairness, accessibility, timeliness, affordability, treatment. It is therefore essential that the quality management system put in place not be limited to efficiency aspects but also take into account the expectations of the community and users about services delivered by the justice sector agencies.¹⁹² This more holistic approach to quality based on the needs and priorities of those who receive justice services thus combines data about the supply side (statistics, case-file analysis etc.) with data generated through user feedback and surveys. This type of data has proven useful to validate or question justice operators’ own perceptions and were used, for example, by the Dutch Rechtspraak system.
145. **CEPEJ is conducting a research study on quality models implemented by European countries.** CEPEJ researchers are examining the quality of the courts work by distinguishing between: (a) legal quality, or the standards, controls and policies to ensure the quality of justice services; (b) managerial quality, or standards, controls and policies to improve court effectiveness and efficiency; and (c) public

190 Albers 2008: 2.

191 Opinion no.11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions. HTTP. Available online [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2008\)OP11&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)OP11&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

192 Albers 2008: 3.

service quality, or the standards, controls and policies to develop and maintain core-values, such as fairness, timeliness, independence, etc. in connection with court users (see Table 9). This methodology will be used to assess the quality control systems in the courts of a sample of eight countries.¹⁹³

Box 4. Paris Court of Appeals – Quality of judicial decisions evaluation questionnaire

Evaluation criteria of the decision-making process of judicial decisions:

- Has a report been written during the hearing?
- What type of hearing was?
- What kind of decision was?
- The dates of the hearing, the decision and the handing out of the judgment

Evaluation criteria of the judicial decisions:

- Are the facts stated in a way that is sufficiently clear?
- Are the claims of the parties mentioned?
- Is the decision motivated?
- Is the legal foundation mentioned? Is the judgment qualified?
- Does the decision deal with the costs?
- Are the start dates for interests and fines specified?
- Are the enforcement mechanisms clearly specified?

France: Measuring the quality of judicial decisions

146. The Paris Court of Appeals took the lead in developing its own quality evaluation mechanism for judicial decisions. In 2003 the Paris Court of Appeals adopted a system to measure the quality of decisions in civil cases.¹⁹⁴ It assumed that litigants in civil cases always expect a decision that recognize their right to: (a) be informed about the process until the decision is finalized; (b) check whether their arguments have been taken in consideration; (c) be informed about the legal basis of the decision; (d) understand a clear, complete and easily enforceable decision. In addition to the formal legal control exercised by the appellate court, a roster was established to evaluate the quality of a sample of civil judgments on the basis of a one-page questionnaire that required simple answers (yes/no, clearly, partially, not at all) to a set of key questions (see Box 4).

147. Regular evaluation of decision quality of a representative sample may be a very valuable learning exercise. This roster mechanism was initially applied to a small sample of judgments in 2004. Two years later, the roster was extended to a more representative sample of 1,500 civil judgments issued by all the *Tribunaux de Grande Instance* of the Paris Court of Appeals. The analysis provided good insights about the process and the decisions: 80% of the judgments were rendered by a

¹⁹³ Albers 2008: 9, 10.

¹⁹⁴ Marshall 2008: 125.

single judge and had a clear basis. By contrast, in 31% of the judgments, the legal basis was not specified. This was a learning exercise not intended to stigmatize a judge or a jurisdiction, but left valuable lessons and showed that Judiciaries can learn from experience about how to improve the quality of judicial decisions. If practiced on a regular basis, the analysis of representative samples would allow regular measuring of subsequent changes in quality.

Germany: Benchmarking circles generate a sustained change management process

148. **A voluntary benchmarking “circle” system has started to operate in the German state court system.** Performance measurement and sophisticated court statistics systems have a long tradition in Germany that resulted in PEBB§Y, a remodeled and detailed workload measurement tool that is used across the states. The benchmarking circle of the *Oberlandesgerichte* (higher regional courts of appeal) is a cross-state initiative to improve the quality of the judiciary by combining hard statistical data with open and confidential approaches for self-assessment in the German courts. The circle is an ongoing example of voluntary cooperation between judicial players that shape quality management from within the judiciaries.
149. **In 2005 the conference of the state ministers of justice agreed on a uniform justice quality management based on benchmarking.** The Benchmarking Circle of *Oberlandesgerichte* is one of the latest quality management approaches in Germany. The courts of general jurisdiction (civil, family, commercial and criminal) are administrated by the states. Although the courts are largely structured along identical patterns, the administration of the judicial system is separate for each state. The State ministers of justice adopted a system of “benchmarking circles” for the first instance courts of general jurisdiction (local and district courts [*Amts- and Landgerichte*]). The benchmarking is used for comparison within each State and ¹⁹⁵ is based on three data sources: (a) caseload statistics; (b) judicial administration statistics; and (c) staff and client satisfaction surveys. The caseload and judicial administration statistics are available to the courts through PEBB§Y – a tracking system for court personnel requirements.¹⁹⁶

¹⁹⁵ Benchmarking cannot be applied to so-called “solitaires,” i.e. courts without appropriate equivalents within a State, such as the *Oberlandesgerichte* or courts that are in charge for the centralized judicial order for payment procedures (*Mahngerichte*) since in most States there is only one court of this type. In order to make the quality management approach useful for solitaires, a voluntary group of various *Oberlandesgerichte* decided to create their own benchmarking circle designed for an inter-State comparison. This benchmarking circle measures rests upon the same structure already used for the intra-State benchmarking at the first instance level in the State of Lower Saxony but was adapted to the specific nature of these courts of appeal.

¹⁹⁶ PEBB§Y is a nation-wide system to calculate the personnel requirement for the ordinary courts (civil and criminal jurisdiction) and the public prosecution service. PEBB§Y defines average time standards for different types of tasks and proceedings handled within courts/public prosecution. This system forms the basis for allocation/hiring of staff and shows court performance. The data can also be used for budget allocations and judicial policy making.

150. **Staff and lawyer satisfaction surveys are another key source for performance feedback.** Staff and client satisfaction surveys are specifically designed for this benchmarking exercise. Each survey area is assessed on a scale from 1 to 7 (ranging from completely unsatisfactory to completely satisfied). The staff survey has 124 questions from 16 areas used to assess satisfaction (See Table 10). Another key source for performance feedback is lawyer satisfaction surveys, the so-called “User I Surveys” designed to assess the satisfaction of lawyers that frequently use the courts of appeal. The lawyers’ survey covers 49 questions from 9 areas of measurement (see Table 11) The Lower Courts Satisfaction Survey (“User II Surveys”) also provides valuable performance information and is based on 58 questions from 9 different areas of measurement (see Table 12).
151. **Data from the various user surveys are then used for benchmarking purposes.** After the satisfaction surveys are filled out and returned to the respective courts, data are electronically filed and prepared for benchmarking by a single coordinating body. Each court of appeal will receive a copy of the results in an anonymous format. To allow internal self-assessments each court receives only its own scores in each evaluation area together with the average for all State courts and the aggregate figures of the best performing court (see Figure 34).
152. **Each court decides whether or not to share the outcome of the benchmarking process.** By making the outcome of the surveys only available to each court, the benchmarking system seeks to ensure honest answers and avoid public pressure for competition among different courts. Instead, the system is designed to establish an open internal evaluation process and generate trust among the people involved in order to move from pure data collection to a culture of change and performance improvement. Some courts have agreed to share all their data freely among themselves to allow a better exchange of information and have a broader discussion on the relevant areas.

Table 9. CEPEJ evaluation criteria of quality models

Quality Management				
Quality Areas	Values	Q. Standard	Q. Controls	Q. Development
Legal Q.	Consistency, procedural fairness	Judgments & legal reasoning	Judges meetings at chamber and unit level, training for new laws, appeals?	Improvement of judgments (e.g. legal reasoning, readability)
Managerial Q.	Efficiency, timeliness of proceed, cost per case	Time Management	Statistics on performance	Active case management program
“Public” Q.	Satisfaction of the public for the service delivery	75% of users satisfied with... compartment,	Regular users' surveys	Quality of service meetings with key users, focus groups, etc.

Source: Albers, 2008.

Table 10. Staff satisfaction survey areas

1. Overall Satisfaction	7. Prognosis	13. Decisions
2. IT / Online Services	8. Affiliation	14. Personnel Review
3. Training	9. Section / Working Group	15. Information and Internal Communication
4. Direct Superior	10. Court President	16. Organization
5. Court Management	11. Internal Coordination	
6. Department Management	12. Work	

Source: Albers, 2008.

Table 11. Lawyers' satisfaction survey areas (Appeals Courts)

1. Overall Satisfaction	4. Daily Work	7. Quality of Work
2. Staff	5. Work Space	8. Availability
3. Organization	6. Timeframes and Deadlines	9. Service

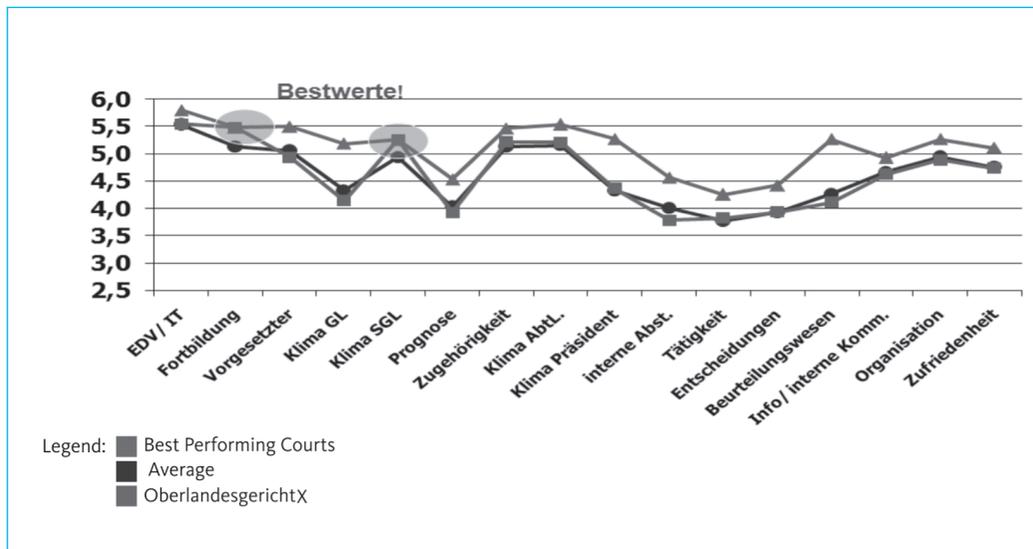
Source: Albers, 2008.

Table 12. Lawyers' satisfaction survey areas (Lower Courts)

Overall Satisfaction	Transparency	7. Reliability
Administrative Decisions	Cooperation and Communication	8. Auditing
Daily Work	Innovation and Changes	9. Reporting System

Source: Albers, 2008.

Figure 34. Sample overview for performance in staff satisfaction survey



153. **An effective information-sharing process is required for the benchmarking approach to succeed.** The collection of data is only the first step in this quality management approach; the second step includes analysis, information exchange, and identifying weaknesses. Each *Oberlandesgericht* holds a presentation on the findings of the surveys for their staff. Depending on the size of the court, this can be done in an all-in-one presentation or more detailed presentations on specific issues for the staff concerned (criminal cases, civil cases, family cases, administration, etc.). A detailed analysis down to the outcome of each question is made available to interested staff members. Then a series of staff workshops (including judicial and non-judicial staff) takes place within each court. These meetings are moderated by peers from other courts that received a three day training to ensure that they also have the same set of standards and are familiar with the issues to be discussed. At this working level an information exchange between two courts is established. The staff-workshops are a forum to discuss the findings in details. Participants may come up with a series of ideas and suggestions for improvement and workshop findings will ultimately be sent to the courts president/management. Separate workshops for the users (lawyers and first instance courts) are held to receive comments and suggestions.
154. **The final evaluation phase involves conferences on administrative issues and case law aimed at developing action plans for addressing weaknesses.** The third phase of broader information exchange is a series of two conferences; one for the administrative issues and one for case law. Each conference brings together the relevant staff from all participating *Oberlandesgerichte* that will exchange information on different sub-topics. Both the surveys and information from the States' electronic information management system provide input for the confer-

ences. The management system contains all relevant hard-core performance data on case load figures and administrative figures collected for PEBBŞY. Once the catalogue of action plans for improvement is complete, a new survey cycle is programmed to enable periodic comparisons of staff and user satisfaction as well as the case and administration statistics submitted.

Sweden: Internal and external dialogue processes sustains the reforms

155. **The development of quality control was initially linked to the change of the budgetary allocation system.** In Sweden, court managers decided to start systematic work on quality issues in 2004. A quality group composed of judges and other staff issued a handbook suggesting methods and a strategy for quality management in courts.¹⁹⁷ Subsequently, proposals have been developed to establish a modified resource distribution model to take into account the quality enhancement initiatives carried out by the courts. The goal was to confirm the Judiciary's commitment to quality and to modify the old system of distribution of funds among courts that relied heavily on quantitative variables.¹⁹⁸ The new system would set strong incentives for courts to start conducting systematic work on quality-enhancement issues. In the meantime, numerous courts in Sweden have already started implementing quality management approaches.
156. **A continuous process of internal and external dialogue created the basis for successful reforms.** Although court managers had shown strong interest in systematic quality work, they struggled to implement this approach because at their core courts are organizations with independently-minded judges who were reluctant to believe that court managers are more knowledgeable about how to produce high quality work. Court administrators found it challenging to tell judges what to do, and both felt ambiguous about the ability of consultants to improve court functioning. Some courts overcame the initial challenges by establishing an internal dialogue process engaging all judges and other court staff with the court manager about how to improve court operations. The court managers and their teams then selected the measures to be implemented from the proposals received and substantiated their decision by explaining the reasons in communications to dialogue participants. Subsequently, the measures were also implemented and evaluated through participatory processes that allow staff to express their opinion on what has worked and what has not, and to make suggestions for changes (see Chart 5).¹⁹⁹
157. **The internal and external dialogue system is time consuming but generates lasting results.** The dialogue has been widened to include lawyers, prosecutors

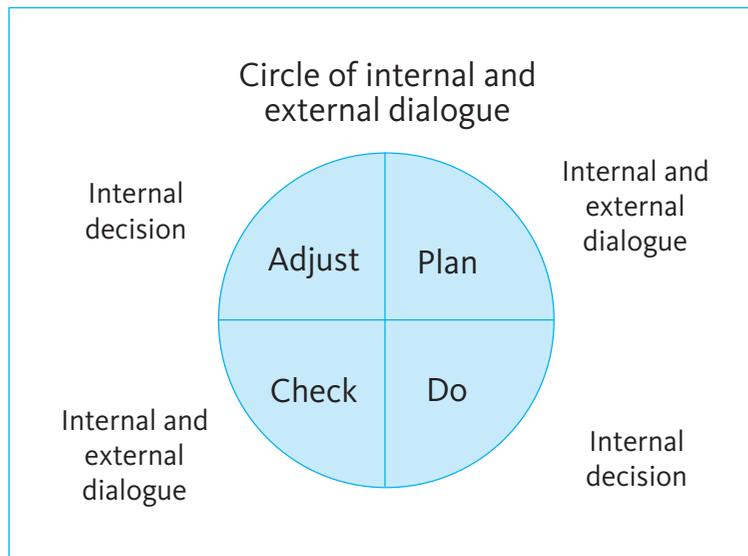
197 Domstolsväsendet 2005.

198 Statens Offentliga Utredningar 2008: 26.

199 Hagsgård 2008: 10.

and court users, external stakeholders that provide additional suggestions on how to improve the courts. This external feedback is discussed internally among judges, court staff and court manager, and once a decision is made the reasons are communicated externally. After implementation and evaluation, lawyers, prosecutors and users are approached again to provide feedback on the results and make suggestions for further improvements so as to make a continuous circle of internal and external dialogue (See Chart 5). Experience in Sweden has shown that the courts that underwent this dialogue process were better at reducing delays. Job satisfaction also increased, and the improvements were sustained over time. An additional advantage of this process is the lasting commitment by those working in the courts to new areas of quality, such information to and treatment of court users, which they have now internalized as main responsibility.²⁰⁰

Chart 5. Sweden: Circle of internal and external dialogue



Source: Hagsgård 2008: 10

The Netherlands and Finland: Similar participatory process lead to tailor-made quality control systems

158. **The Netherlands and Finland have developed their own quality monitoring systems through participatory mechanisms.** Experience in Europe shows that a common understanding of quality will ultimately determine the commitment to, and the success of, quality enhancement efforts. In order to reach such a common understanding by judges, court staff, and court managers, an inclusive process has to be followed that engages all relevant stakeholders. The details of

200 Hagsgård 2008: 11, 17.

the agreements reached may be different, but the successful implementation of quality management approaches requires passing through this process, as it has happened in the Netherlands and Finland.²⁰¹ In the Netherlands, the agreed upon areas of quality measurement were: (a) independence and integrity; (b) timeliness of proceedings; (c) consistency of case law; (d) expertise; and (e) services to the users. For each of these areas, several indicators were defined, as well as specific measurement tools such as statistics, staff and user surveys, and audits to generate and collect the relevant data.²⁰² In the Rovaniemi Court of Appeal in Finland, a quality project was launched in 1999. By 2003, a set of six quality benchmarks for adjudication was agreed to analyze the quality of court activities. Each of these benchmarks comprises between four and nine quality criteria: (a) the process; (b) the decision; (c) services to users and the public; (d) speed of the proceedings; (e) competence and professional skills; and (f) organization and management of adjudication. Each quality criterion is evaluated on a six-point scale, and the total points for each benchmark are the result of adding the points obtained under each criterion. The maximum score is 210. The assessment based on these benchmarks is undertaken every 3 to 5 years, but some aspects are monitored constantly.²⁰³

The United Kingdom: A Balanced Scorecard approach

159. **The court system in the United Kingdom has embraced quality management approaches based on a Balanced Scorecard approach.** More than a decade after the Lord Woolf report, the strategic quality goal of Her Majesty's Courts Services (HMCS) is to provide access to justice as quickly and at the lowest cost possible thereby increasing respect and confidence in the court system. The HMCS business strategy published in 2006 sets quantifiable targets, details the initiatives to achieve these targets and explains the indicators measuring the progress towards achieving the goals.²⁰⁴
160. **Public Service Agreements help achieving key performance results.** Realizing that the focus on productivity alone is not enough to adequately address services provided by the courts, HMCS has developed a tool that integrates the courts' achievements in building a good reputation with users and the community, as well as in investments in staff development (see Chart 6). The Department's aims and objectives are also set out in public service agreements that explain how targets will be achieved and how performance against the targets will be measured. The example in Chart 7 shows how customer satisfaction surveys are integrated into the agreements.²⁰⁵

201 Savela 2006.

202 Albers 2008: 11.

203 Albers 2008: 14; Savela 2006.

204 Her Majesty's Court Service 2007: 22.

205 Her Majesty's Courts Service 2009: 14, 22, 26.

THE INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE

161. **Building on a rich variety of approaches, an International Framework for Court Excellence was launched in 2008.** Experts from North America, Europe, Australia and Singapore reviewed the court quality models used in a number of countries, and analyzed the processes, models and lessons learned with these approaches. The underlying idea was not that “one size fits all” but, rather, that there are common aspects and useful tools which courts worldwide can take as a starting point to develop their own approaches to court excellence, independent of their legal culture, location, size, resource level and degree of institutional maturity. The purpose of the framework is to inform and inspire such initiatives.²⁰⁶ The International Framework for Court Excellence is an evolving tool. Courts across different jurisdictions have started to use it because it is adaptable to their own needs and priorities. While it is still too early to assess the impact of the Framework, the Consortium is committed to regularly amend and adapt it to reflect new systems and initiatives directed at improving how courts deliver services.²⁰⁷
162. **The Framework allows assessing court performance against seven detailed areas of court excellence.** It provides a model methodology for continuous evaluation and improvement specifically designed for courts. Its approach is holistic and is, therefore, different from reform initiatives focusing on a limited range of performance measures targeted to a number of aspects of court activity.

²⁰⁶ International Consortium for Court Excellence 2008.

²⁰⁷ For more information on ongoing initiatives see the Consortium's website at <http://www.courtexcellence.com>.

Chart 6. HMCS's balanced scorecard

HMCS Balanced Scorecard	
<p>Key Performance Results</p> <p>We will maintain performance against the PSA targets set in 2004 and where required work with LCJBs to achieve this:</p> <ul style="list-style-type: none"> Increasing the number of crimes for which and offender is brought to justice Building confidence in the criminal justice System Increasing the proportion of care cases being completed in the courts within 40 weeks by 10% by 2009-10 Achieving earlier and more proportionate resolution of legal problems and disputes Reducing the proportion of disputed claims in the courts that are resolved by a hearing to 38.5% Increasing the proportion of small claims hearings that take place within target time to 81.5% <p>We are developing plans within HMCS to deliver up to 750 job reductions in 2007-08, aligned to the deployment of our strategic enabling change projects.</p> <p>We will continue the Estates Integration Programme (up to 10 integrations).</p> <p>We will further reduce our operating costs in order to remain within our budget allocation and meet efficiency targets.</p>	<p>Customers and the community</p> <p>We will extend the community justice principles to 10 new areas to deliver a service more connected to the community.</p> <p>We will deliver a more personalised service for victims and witnesses.</p> <p>We will evaluate the Victims' Advocate Scheme.</p> <p>We will improve the way that family courts deal with victims of domestic violence by strengthening the links between family and criminal courts.</p> <p>We will carry out National Courts - User Survey across our full range of customers and use the results to inform national and local policy.</p> <p>We will continue to develop the corporate evidence for Charter Mark in readiness for the corporate application.</p> <p>We will promote knowledge of rights and responsibilities and how to protect and exercise them through leaflets, website, partnership, with the voluntary sector and targeted information campaigns.</p> <p>We will ensure that HMCS service provision in Wales is available through the medium of Welsh or English, according to personal choice.</p> <p>We will publicise monthly information on local courts' performance.</p>
<p>Improving the way we work</p> <p>Through the HMCS Change Programme we will ensure that all project and change work is aligned with and directed towards delivery of the HMCS Business Strategy through the Blueprint, roadmap and coordinated deployment of projects into the courts and administrative areas.</p> <p>We will deliver CJSSS in the magistrates' courts and Crow courts.</p> <p>We will continue to develop plan to roll out specialist courts.</p> <p>We will commence national rollout of elements of the National Enforcement Service to ensure improved performance.</p> <p>We will work with LSC to deliver effective and efficient processes or legal aid decisions.</p> <p>We will extend in house mediation services for people with small claims; and facilitate the effective, early resolution of higher value and commercial disputes</p>	<p>People and learning</p> <p>We will successfully implement a new pay and grading structure.</p> <p>We will work towards reducing sick absence to an average of 7.5 days or less per annum.</p> <p>We will deliver the HMCS contribution to the DCA diversity objectives, including the representation of women, people from minority ethnic groups and people with disabilities in senior roles within the organisation.</p> <p>We will ensure all staff have objectives in the line with the organisation's performance management system.</p> <p>We will respond to the key action areas identified in the 2006 staff opinion survey.</p> <p>We will ensure that staff are given adequate training to support the business change and equip them to deliver a more efficient service to our customers</p>

Source: HMCS, 2009

It assumes that measurement and management are the key concepts for a quality approach to succeed. Proactive management and leadership are required at all levels, not only at the top. Sound decision-making to promote quality, however, requires reliable information on relevant performance areas including court management and leadership, which become also an area for measurement (see Chart 8).²⁰⁸

163. **Courts share a range of core values that give meaning and provide direction to the organization.** In order to approach quality holistically, the Framework integrates these values into considerations on quality management, which also serves to avoid undermining the values underlying the system and distorting the system as a whole. For the same reason, the areas of measurement or the indicators are selected to prevent perverse incentives. Taking the Framework as a starting point, courts could agree on their own set of values, their own indicators, and their own areas of measurement. Once shared values are agreed upon and priorities are determined, a judiciary committed to court excellence has to build a consensus

208 International Consortium for Court Excellence 2008: 12.

around how to apply those values. This is critical for the actors of the system to take ownership of the reform agenda (see Chart 9).

164. **An assessment of current court performance is a key first step.** The International Framework for Court Excellence provides a self-assessment questionnaire based on experiences in different countries.²⁰⁹ In an open and participatory process involving judges, administrators, and other staff as well as the bar, law enforcement agencies and civil society organizations, the judiciary should lead the effort in order to identify areas that work well and issues that can be addressed. The self-assessment questionnaire enables the courts to put in place and lead a change process.

Chart 7. User satisfaction surveys in public service agreements

Business area	High level target Key Performance Indicator (KPI)	Other targets and measures Supporting Indicator (SI)	Target
Customer Service	KPI 10 - The 'very satisfied' element of the HMCS court user survey to be maintained at or above the year 2 (2007-08) survey baseline of 41%		41%
		Area Measure - each area to maintain their 'very satisfied' survey results at or above their 2008-09 area baseline	Local area baseline targets
		Customer Service Unit (CSU) - proportion of complaints responded to in 15 working days	90%
		Area offices - proportion of complaints responded to in 10 working days	90%
		Courts - proportion of complaints responded to in 10 working days	90%

Source: HMCS, 2008

165. **Development and implementation of an improvement strategy follow the initial assessment.** Once the court has identified its strengths and weaknesses, it can develop a strategy identifying short-term, mid-term, and long-term goals as well as the interventions through which these goals can be achieved. The Framework provides guidance on both process and content to make sure key performance areas are adequately defined and quality addressed in a holistic way. Periodic follow-up assessments during implementation allow the court to monitor improvements, readjust goals, and refine improvement interventions.

²⁰⁹ International Consortium for Court Excellence 2008: 41.

- 166. The Framework also measures the extent to which courts have developed or implemented an effective approach with respect to key performance areas.** It helps courts to reflect on their performance and determine whether a comprehensive strategy or area-specific strategies have been developed, whether these approaches are consistent and support key performance areas and to what extent these approaches are innovative. In the case of courts that have developed a strategy document but have not implemented it in whole or in part, the Framework provides the tools to understand where the court really stand, how to look at these issues openly and find out why the strategy was not effectively translated into action and how this can be addressed.²¹⁰
- 167. Finally, the Framework helps courts to look at the results of the quality improvement approaches.** Measuring the outcomes of improvement initiatives is critical to a court's understanding of whether it is directing its resources to the right targets. To evaluate the results, the Framework suggests looking at aspects such as the current performance levels relative to the targets set, performance levels compared to appropriate benchmarks, and the rate, breadth, and relevance of performance improvements.²¹¹
- 168. The Framework uses a balanced scorecard to facilitate self-assessments.** A balanced scorecard based on experiences with similar approaches across different jurisdictions has been developed by the International Consortium for Court Excellence. It enables courts to give scores and to quantify the findings by establishing a matrix built on the performance areas, on the one hand, and the degree of development, implementation and effectiveness of the court's existing initiatives on the other. The court looks at each performance area to assess how well designed and considered an approach is, how well it has been deployed, and to what extent it has generated results (see Chart 10).²¹²
- 169. The balanced scorecard is a helpful tool only if it is fully owned by the Court.** The total score provides an overall indication of the court's performance based on a maximum score of 1,000 points. Since measurement is not part of the traditional court culture, most numerical scoring systems are generally received by courts with distrust. If, however, the courts develop ownership of these systems, they can use them as a particularly valuable tool to track their own performance, measure their relative progress over time, and gain momentum by energizing everyone involved in the reform process. If the balanced scorecard is imposed from the outside, for example by the executive, the distrust may grow. Courts should take the lead in the assessment process, while pursuing a participatory approach involving all relevant stakeholders. The Framework provides guidance on how to organize the assessment process in order to reach a consensus on the scores through this participatory process.

²¹⁰ International Consortium for Court Excellence 2008: 26, 27.

²¹¹ International Consortium for Court Excellence 2008: 28.

²¹² International Consortium for Court Excellence 2008: 29, 31.

170. **The Framework helps to identify areas for further improvement in conjunction with external actors.** Once the self-assessment is completed, the courts can use the findings to develop an improvement strategy by focusing on areas where it is relatively under-performing. It is important that while the process is led by the courts, at the same time it needs to involve a variety of internal stakeholders such as judicial officers, court employees as well as external stakeholders such as the court's professional partners (bar, agencies of the justice sector, etc.) and civil society.²¹³
171. **The effective implementation of improvement initiatives requires the collection of data measuring both quantity and quality of justice services provided.** While the Framework emphasizes that courts must collect and use information on the duration of proceedings and other quantitative data, it recognizes the need to shift the focus from simple inputs and outputs to court user satisfaction and quality of service. In addition to the data obtained through case management systems, courts may use surveys of staff, professional partners such as lawyers, and other court users. The decision on who will generate, collect, and analyze this information is crucial. As courts may not have staff trained in research methods and analysis, and consultants may be useful but hiring them requires resources, thus, the Framework suggests teaming up with social scientists from local universities or other institutions.²¹⁴
172. **Courts should be open to communicate evaluations and improvement plans to all stakeholders.** The Framework acknowledges that courts may initially be reluctant to communicate their findings. When looking to establish an appropriate balance between transparency, on the one hand, and a sufficient autonomy for courts to identify and discuss deficiencies without potential outside criticism and pressure, on the other hand, courts have a tendency to favor the latter. However, the Framework notes that open communication, especially if combined with a court strategy for improving performance and a willingness to lead and monitor this effort, is key for building public trust and confidence. This is particularly important if the starting point of court performance is less than stellar.
173. **Striving for court excellence is a gradual process.** The various justice reform experiences in OECD countries have provided a wealth of lessons about how to approach reforms as well as which pitfalls to avoid. They certainly show that striving for court excellence is not about a one-time solution or quick fix. It is a process of constant learning and improvement. Cross-country learning is an invaluable resource on the journey towards court excellence, but tailor-made approaches based on international standards are essential for the process to have good chances of success.

213 International Consortium for Court Excellence 2008: 31.

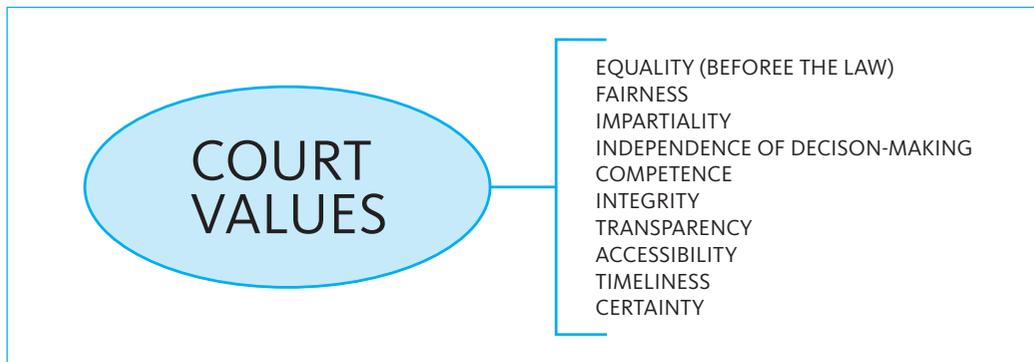
214 International Consortium for Court Excellence 2008: 33.

Chart 8. Areas for Court Excellence (drivers, systems and enablers, and results)



Source: International Consortium for Court Excellence 2008: 12.

Chart 9. Values underlying the International Framework for Court Excellence²¹⁵



Source: International Consortium for Court Excellence 2008: 12.

²¹⁵ International Consortium for Court Excellence 2008: 8.

Chart 10. Balanced Scorecard

WEIGHTS

AREAS	SCORE	APPROACH	DEPLOYMENT	RESULTS
1. Court leadership & Management	170	40	40	40
2. Court Planning & Policies	100	33	33	33
3. Court Processes & Proceedings	100	33	33	33
4. Public Trust and Confidence	220	73	73	73
5. User Satisfaction	180	60	60	60
6. Court Resources -Human Resources -Material Resources -Financial Resources	100	33	33	33
7. Affordable & Accessible Court Service	180	60	60	60
TOTAL SCORE	1000			

SCORE	APPROACH	DEPLOYMENT	RESULTS
0	None - There is no the approach at all. The criteria is not addressed at all.	None - There is no deployment at all.	None - There are no results or the results show no improvement trends and have not met targets.
1	Reactive - Some for of approach exists, but it is reactive and not systematic.	Some Areas - The approach is deployed in a few areas of the organisation.	Limited - Poor results; or good performance and/or improvement trends in a few key indicators; or results are not reported for most key indicators.
2	Defined - The direction for a planned and prevention - bases approach is set.	Some Key Areas - The approach is deployed in se key areas of the organisation.	Fair - Good performance and/ or improvement trends in some key indicators; or early stages of obtaining comparative information ; or results are reported for some key indicators.
3	Integrated - A sound effective approach is in place with evidence of prevention activities. The approach is aligned with basic organisational needs identified in other categories.	Most Key Areas - The approach is deployed in most key areas of the organisation.	Good - Good performance levels and/ or improvement trends in most key indicators; or there are favourable comparisons and/or bench-marks in some areas; or results are reported for most key indicators.
4	Refined - A proven and well-defined approach with evidence of refinement through learning and improvement which is we integrated with organisational needs identified in other categories.	All Key Areas - The approach is deployed in all key areas of the organisation. Practiced consistently by all levels.	Very Good - Current performance levels is god to excellent in most key indicators and/or improvement trends are sustained in most areas; or there are favourable comparisons or benchmarks in most areas; or results are reported for all key indicators.
5	Innovative - An Exceptionally-defined innovative approach, which is fully integrated with organisational needs identified in other categories.	All Areas - The approach is deployed in all areas within and outside the organisation and is practiced consistently by all levels.	Excellent - Performance levels are excellent in most key indicators and/or there exceptional improvement trends in most areas; or there are exceptional comparisons and benchmarks in most areas; or results are reported for all indicators.

Source: International Consortium for Court Excellence 2008: 31.

Conclusion

INITIAL LESSONS LEARNED FROM OECD JUSTICE INSTITUTIONS PERFORMANCE-BASED REFORM EXPERIENCES

174. **The success of justice sector reforms depends on cooperation of a range of institutional stakeholders that only strong reform leaders can build.** A variety of institutions are generally involved in the governance of the justice sector, and improvement initiatives can be negatively (or positively) affected by any of them. At the same time, the service delivery chain is only as good as its weakest link yet it may be difficult for one part of the chain to influence another, as they have different incentive and governance structures (e.g. police performance affecting court cases). It is therefore key to generate a minimal level of consensus around a strong reform leadership for reform initiatives so as not to be doomed from the outset.
175. **Ownership of, and support for, the reform process are essential to avoid deadlock, generate initial success stories, and sustain the reforms in the long-term.** Although justice reform programs are tailored for each particular country case, certain general conclusions emerge from the experiences outlined above. The first is that continuously involving the main stakeholders affected by the changes at an early stage in the reform process significantly enhances its chances for success. The Dutch reforms were initiated partly from within the judiciary itself and followed an inclusive bottom-up approach that was essential to build trust. This trust was critical to ensure the reforms' success. A sustainable process that effectively raises the quality of the justice services will need the support from court staff at all stages. Strong opposition among key institutional players (e.g. Judges vs. Ministry of Justice) diminishes the chances of success. During a participatory reform process each institutional player will have to acknowledge that the values pursued by the other are equally valid (e.g. Judges: fairness, Government: efficiency).
176. **An effective communications strategy is also critical to manage sensitive relationships between the executive and the judiciary, and to engage citizens.** Not only is the relationship between the judges and the Executive especially sensitive and needs to be tackled with care but cultural and professional backgrounds have a significant impact on the process and outcome of reforms. Most judicial staff, not only judges, are trained in law but are not prepared to be managers or administrators of a courtroom. They are not sensitive to the impact of orga-

nizational development issues in their day-to-day work. However, it is essential to ensure that these stakeholders learn to understand the fundamentals of an organizational change process and find a common language with the reformers, as exemplified by the Dutch case. This has to be a two-way process: (a) lawyers and judges have to understand organizational reform and quality management terminology and need training to assume new roles as court managers or operators responsible for non-legal areas in order to implement the reforms successfully; and (b) non-lawyer reformers need to learn about the particular values and characteristics of the legal staff. In the Netherlands, a continuous exchange of information and better understanding between senior judges and court administrators allowed them to move to the subsequent outreach phase. The Council of the Judiciary took on the responsibility of community outreach by developing a media strategy ensuring that the judiciary speaks with one voice.

177. **Redesigning courtroom processes to favor teamwork helps mitigate the risk of bureaucratization and isolation of individual judges.** The justice reform program in the Netherlands also involved the construction of new court buildings and/or refurbishment of old court offices complemented by up-to-date ICT technology that helped creating an environment more conducive to teamwork among all actors involved in delivering justice services. Teamwork also mitigates the risks associated with a highly bureaucratized system in which the highest levels of the organization are disconnected from the day-to-day work of individual judges. *RechtspraakQ*, for example, focuses on managing court operations and productivity but does not review the substance of the judges' work due to concerns about judicial independence. Teamwork may promote exchanges of information and opinions that serve as an internal "checks and balances" for the decision-making process of a group of judges without impairing judicial independence.
178. **Performance evaluation remains a complex area of justice reform, permanently exposed to politicization.** In Spain, data from performance measurement systems was supposed to serve as basis for debate on how to improve judicial services but quickly transformed into politically-charged debates about linkages to court outcomes/budget allocations. Linking the measurement system to remuneration generated protracted discussions on the value-added and complexity of certain judicial procedures, which were hard to tackle in technical terms but became unmanageable in political terms. The entrenched views of the executive and the judiciary changed the focus of the discussion and, in the end, the measurement system's inherent value was reduced by political discourse into a bone of contention. What was supposed to be a debate on a transparent source of became an argument on the values and ends of justice services (public trust, quality etc). Spain's case also shows that measurement systems for the judiciary have to be designed in such a way that the data collected is sufficiently detailed and differentiated to lead to meaningful results, but at the same time needs to be cost-efficient and easy to apply. Reformers have to strike the right balance between the degree of detail and the limits set by practicality.

179. **Automatic linkages between performance and remuneration may be perceived as infringing on judicial independence.** Linking data from measuring individual judge's performance automatically to judge's salaries led to even more complex debates on judicial independence in Spain. The Spanish High Court agreed with the judges' complaints. In countries where remuneration based on performance cannot be established because of similar constitutional concerns, it is possible to look into variable remuneration mechanisms that do not rely on an evaluation system.
180. **A sound and balanced set of indicators is crucial when linking budget and performance information.** If it is true that things that get measured get done better, there are three additional aspects to consider: (a) the negative is also true: things that do not get measured may not get done at all; (b) not everything that is measurable is relevant; and (c) not everything relevant is easily measurable. As a consequence, in order for performance-based budgeting to function well, it is critical to generate performance information based on a balanced and sound set of indicators. The choice of indicators sets incentives that affect the behavior of those working in the organization.²¹⁶ The OECD found that "while the existence of output measures may lead staff to strive for improved performance, it may also lead to the neglect of non-measured dimensions or to 'gaming' the system, in which either the output itself is adjusted or the measurements are distorted in order to achieve the appearance (rather than the reality) of 'good' performance."²¹⁷
181. **The impact of the reforms inspired by NPM approaches is still relatively recent, but has been significant in terms of efficiency gains and savings of public monies.** NPM has initiated a change of court culture. Obviously, this has not happened without hesitation and sometimes open resistance from parts of the Judiciary. Consensus building in particular has turned out to be a key factor in determining success or failure of reform efforts. While some objections were legitimately based on considerations of judicial independence, others may have been based on vested interests. Although the politicization of the discussion in many countries may have exaggerated both the benefits and the risks of the reforms, in France, the Netherlands, and the United Kingdom reform initiatives based on NPM approaches have shown clear benefits in terms of efficiency gains and public monies saved.

REVISING THE FRAMEWORK FOR LATIN AMERICAN JUSTICE SECTOR REFORMS AROUND CONCEPTS OF PERFORMANCE

182. **New approaches aimed at achieving performance improvements are being developed based on a revised appraisal of reform objectives and instruments.** Although it is generally acknowledged that the results of justice sector reforms

216 Decker 2009: 49

217 OECD 2009: 16

only materialize in the medium to long-term, after more than 20 years of reforms in Latin America a number of stakeholders have grown disillusioned with traditional reform programs and have started to search for different approaches that provide for more rapid changes in outputs and impacts. On the basis of lessons learned from experience and recent research suggesting that earlier diagnostics and treatments were not adequate, it is time to revise some of the traditional assumptions as to the nature of the sector's illnesses and their remedies. Some of the new approaches are inspired by the experience of OECD countries, very often at the suggestion of OECD donors active in Latin America. They do not imply radical departures from the objectives or structure of the reform programs but aim at tightening the links between sector inputs-outputs (see Table 13).

Table 13. Alternative approaches to justice sector reform objectives

Justice sector reform objectives	Traditional	Performance-based
Court productivity increases	Justice sector problems will be solved by increasing court productivity	Certain justice sector issues (e.g. criminal justice, property rights, secured transactions) can only be solved through a functional approach, i.e. by addressing the full set of agencies and activities that together deliver a service to the public. This will entail engaging agencies outside the court system but part of the justice sector that are responsible for key service delivery activities (police, prosecutors, property registries, credit bureaus) and have to be reformed/modernized in tandem with the court system.
Court workloads reduction	Courts workloads must be reduced	Although court workloads are a valid indicator of court performance, they have to be fine-tuned. Aggregate statistics and case file analysis should determine whether courts are overloaded. Screening of court dockets is critical to ascertain real workloads and propose effective backlog reduction/elimination strategies. Workload analysis should be combined with others (e.g. users' perceptions about quality).
Court delays reduction	Court delays must be reduced	Although court delays are a valid indicator of court performance, they have to be fine-tuned. Case file analysis should determine the level of delays. Screening of court dockets and internal processes are critical to identify bottlenecks and propose re-engineering. Delays analysis should be combined with others (e.g. users' perceptions about quality).

Table 14. Alternative approaches to justice sector reform instruments

Justice sector reform instruments	Traditional	Performance-based
Legal reforms	New laws will generate new behaviors	New laws may signal a desired change, but organizational capacities and incentive systems will determine whether change happens or not. The implementation of the new laws should be fully funded and closely monitored.
Financial resources	Increased justice sector budgets and salaries will improve performance	Increases in court budgets and salaries not always are associated to improved court performance. Budget and salary increases should be linked to productivity increases that result (among other improvements) in workload and delay reduction. Cost-effective use of all court resources (in particular, staff) should be closely monitored.
Case management	Automation and modernization of courtroom processing will reduce backlogs and delays	Although automation and modernization can help, most backlogs and delays derive from procedural and attitudinal factors – excessive opportunities for dilatory practices and judges' reluctance to curb them. These procedural and attitudinal issues should be tackled in advance for case management reforms to be effective.
Impact measurement	Speed and number of judgments are the best indicators of court efficacy	Speed and number of judgments are valid indicators, but court performance has to be measured also by quality aspects (including user perceptions).
Service supply and demand	Increasing courts' processing capability will make room for new users	Demand growth does not depend of supply growth but is subject to economic cycles that require appropriate prevention/reaction strategies (i.e. population growth, economic growth, financial crisis). The increasing role of the state in economic/social activities is a major source of justice demand that cannot be matched by court supply increases (e.g. pension systems). Administrative agencies should complement/substitute the courts.
Human resources	Transparent and competitive appointment systems will increase judicial independence thereby reducing corruption and improving performance	Transparent and competitive appointment systems may reinforce independence, reduce corruption or enhance performance provided that accountability mechanisms are established (including periodic evaluation of individual and court performance).
Capacity building	Capacity building will help to improve justice sector performance	Capacity building can be useful but should be accompanied by changes in judicial culture and incentive systems that ensure improved performance. Cost-effectiveness of capacity building should be closely monitored and evaluated.

TOWARDS PERFORMANCE-BASED JUSTICE REFORM PROGRAMS: NEW FOCI, NEW EMPHASIS, NEW MIXES

183. **With the support of OECD donors a second generation of justice reforms is ready to begin which are based on the lessons learned from the first generation.** A major shift in justice sector reform programs in Latin America towards a second generation of reforms is now happening. The new approaches would reposition these programs as long-term institutional development efforts with potential quick gains in the short-term. Some elements of these new approaches have already been incorporated into on-going programs at the experimental level and can now be mainstreamed to accelerate progress. The new approaches promote a wide focus in which country needs and priorities will take precedence and the learning process will continue. Reference to the experience of OECD countries will continue to inspire a number of reform efforts.
184. **Broader developmental objectives and strategies may still inform justice programs but should avoid over-promising.** Holistic strategies in the first generation reforms did not accomplish their ambitious goals; prioritization of more modest objectives is critical for the success of the second generation. While strengthening of institutional capacities continues, second generation programs have to be embedded into the broader national development goals. Not only because of the high level ends of justice reforms (economic growth, poverty reduction, political stability) but also because some objectives crucial for the justice sector's principal mandate (e.g. crime control, conflict reduction, contract enforcement) cannot be pursued without a broader policy framework, and the cooperation of other agencies. However, the broader the program, the more critical the identification of institutional responsibilities becomes. Crime prevention and law enforcement, for instance, includes prevention and rehabilitation aspects that fall outside the scope of the justice sector but should be coordinated with the actions of the police, prosecutors, courts and public defenders. The experience of OECD countries in this area confirms that these reforms face formidable obstacles that cannot be tackled through short-term initiatives.
185. **Justice reform programs have to be more modest in their objectives and more realistic in the appraisal of likely impacts.** Middle Income Countries (MICs) in Latin America's now have the basic capacity required to provide better justice services to citizens and enhance their value-added for society at large. Stakeholders have a better understanding of the sector issues, and the areas most critical for performance improvement. As in the OECD countries, justice reform is not seen as a short term initiative but rather a continuous effort to match institutional performance with societal needs. Latin American MICs and donors (mostly OECD) are now more modest in their promises as to how much a better functioning justice sector can provide services to citizens. A more realistic appraisal of the likely impacts of reform efforts also provides a better basis for achieving results and for assessing the feasibility of reform programs. Lessons learned from

past initiatives should allow the countries and the donors to design performance-based programs, while evaluation and testing remain key elements of the new approaches (see Box 5).

POTENTIAL CONTRIBUTION OF OECD EXPERIENCE TO PERFORMANCE-BASED JUSTICE REFORMS IN LATIN AMERICA

186. The experience of well-functioning OECD justice sectors may serve to develop organizational models for the same sectors in Latin America. As the justice sector is a central to any system of governance, the first goal of reform programs should be enhancing the sector's contribution to the whole system. Reforms should ensure that it functions effectively and efficiently through operational models that include modern structures and procedures. Institutional development programs have to address specific complaints about sector operations (delays, costs, unequal or limited access to services) voiced by citizens. The experience of well-functioning OECD countries may help the Middle Income Countries (MICs) of Latin America select their own model based on tested organizational practices. Nevertheless, these countries should also take into account that the OECD countries launched the last wave of reforms from a high baseline which included: (a) reasonable levels of institutional independence; (b) merit-based selection and management of professional and administrative employees; and (c) effective inter-institutional coordination. If the Latin American countries do not work in parallel in these fundamental areas, the results of the performance improvement programs may be quite limited.

Box 5. Designing performance-based justice sector reforms

Identify the real causes of poor performance. Only the issues originated in poor organizational management and internal practices can be solved through performance management tools. Other issues typical of some Latin American countries (like traditional or customary justice, access for the poor) should be tackled through different mechanisms (political decisions, constitutional and legal reforms, government subsidies)

Identify the political impediments for reforms. Political decisions influence the levels of institutional independence or accountability for performance. Political impediments for reform may be posed by multiple vested interests with no interest in change, outside the justice sector or within. These political obstacles also determine the level of difficulty to implement technically sound reform proposals. Early identification of these impediments will facilitate decision-making processes on the reform path selected, and most likely narrow down the scope of the interventions and societal expectations.

Select a strategic mix of broader lessons learned and country-specific knowledge. Latin American justice sectors share many common issues, but an effective performance-based reform program also requires recognizing country differences. Diagnostics in the early stages of program design remain essential and should lead to a results framework that connects inputs (especially budget with outputs (backlog/delay reductions) and outcomes (user satisfaction, citizen trust).

Develop a functional approach to the sector. The court system remains the backbone of the justice sector but programs to improve performance must encompass other agencies, seeking to eliminate dysfunctions/externalities in the delivery of specific services (civil, family, labor dispute-resolution; criminal law enforcement). Reform programs should target specific functions/services instead of trying to cover the whole sector or individual institutions.

Select tangible/measurable results. For reforms to improve performance, benchmarks/indicators must be selected at the inception to ensure investments accomplish specific targets/impacts. These indicators must be relatively simple to measure (business processes or single results) until institutions are ready for the more complex (ratio measures). (*)

Privilege cost-effectiveness. Improved performance should ensure not only that sector organizations operate faster and produce more outputs, but also that they generate the greatest value-added at the lowest cost for the public budget and for the users.

Develop robust monitoring and evaluation mechanisms. A solid M&E system will help track performance improvement and take corrective actions as needed. M&E should be closely linked to the budget cycle.

Ensure coordination with reforms in other sectors. Other governance/rule of law programs have a large potential impact in the justice sector. Reformers must ensure consistency of the interventions and take advantage of potential synergies.

(*)²¹⁸

187. **OECD experiences may be particularly useful for Latin American justice reforms as references for the design of country-specific programs.** No fixed OECD model exists to target justice sector issues, however, more than 15 years of NPM-based experiences can provide a useful basis for the design of country-spe-

218 Manning 2009: 52.

cific programs. In OECD countries these reforms were aimed at: (a) programming and tracking resource use; (b) establishing transparent and efficient procedures; (c) monitoring individual and collective performance; and (d) promoting external and internal accountability. Once these performance improvement tools were in place initiatives to reduce delays in processing court cases, facilitate enforcement of judgments, or to provide practical training were successfully tested. Diagnostic and performance measurement were also developed to identify weak points in sector operations or improve patterns of service provision. While avoiding prescriptions, these experiences are useful reference points that Latin American countries can use while taking into account local resource constraints and implementation capacity.

- 188. While overall objectives may be similar, the particular sequencing and depth of the reforms has to be tailor-made for each country.** The overall objectives of most justice reform programs in Latin America may be similar: to ensure that the justice sector fulfills its basic functions in a reasonably efficient and effective way, while overcoming specific weaknesses identified in user complaints. However, the sequencing of reforms and the depth of the changes will be country-specific as they depend on local needs, priorities and resource endowments. Despite the similar cultural background and convergence of development levels within Latin America, the reform strategies for Haiti or Mexico, for Argentina or Panama, necessarily have to be different. For most MICs the experience of OECD countries will be more relevant in that they should have already reached the basic conditions to begin organizational re-engineering (independence, merit-based selection of judicial staff, inter-institutional coordination). Otherwise, countries may need to first work on these basic conditions before they embark into full-fledged performance-based reforms (resource programming and tracking, performance monitoring, external accountability).²¹⁹
- 189. OECD experience shows that performance-based reforms generally do not require legal reforms unless the legal framework is clearly not conducive to improved performance.** The OECD justice reforms discussed in this paper looked primarily at internal operational issues of sector agencies: organization, management, and control. Most of the reforms involved promoting changes in the internal culture and functioning of the sector agencies to move them toward the most efficient delivery of the services provided. However, certain legal changes were also required, as in the case of the Lord Woolf reforms. In Latin America the legal framework will have to be reformed to avoid encouraging inefficiencies or facilitating unreasonable interferences. Some of these reforms will have to be approved by Congress (in particular for procedural codes) while others can be handled through internal administrative ordinances of governance bodies of sector

²¹⁹ The distinction between upper-middle income/lower middle income countries and reformed/unreformed bureaucracies in Manning 2009: 114 may be particularly relevant to select the entry points for reforms with higher chances of success. Performance-based reforms would remain limited to a few countries (Chile, Brazil).

agencies (judicial councils in most countries). While improving the performance of the justice sector agencies, countries may also launch programs to reduce the level of conflict or campaigns to spread the acceptance of, and compliance with, new social or economic norms particularly in cases of transition in the constitutional or legal frameworks. To start building public trust in the reformed sector institutions, citizens have to be informed from the beginning of the process and be allowed to provide feedback on both the process and the results.

190. **Basic efficiency and integrity standards must be reached before moving into complex quality enhancement programs.** Satisfactory levels of efficiency and integrity are pre-conditions to initiate more complex and ambitious programs. In absence of acceptable institutional performance in these areas, moving forward into more demanding territories may be difficult. Agencies must exercise a reasonable control over their own resources and operations before they engage in the technical complexities of certain OECD programs like *RechtspraakQ*. Courts, prosecutors, and police must be able to monitor staff performance, and to manage their own resources before they engage into sophisticated programs to enhance quality.

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