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Resource Guide on Strengthening Judicial Integrity and Capacity

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Resource Guide on Strengthening Judicial Integrity and Capacity

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UNODC wishes to thank the participants in the Intergovernmental Expert Group Meeting held in Vienna on 1-2 March 2007, inter alia, to provide guidance on the desired content of the guide. The expert group was attended by representatives of Algeria, Azerbaijan, the Dominican Republic, Finland, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Latvia, the Libyan Arab Jamahiriya, Morocco, Namibia, the Netherlands, Nigeria, Pakistan, Panama, the Republic of Korea, Republic of Moldova, Romania, the Russian Federation, Saudi Arabia, Serbia, Spain, Sri Lanka, the Syrian Arab Republic, Turkey and the United States of America. The meeting was also attended by members of the Judicial Group on Strengthening Judicial Integrity, as well as representatives of the American Bar Association, the Consultative Council of European Judges, the German Agency for Technical Cooperation, the National Judicial Institute of Nigeria, the Research Institute on Judicial Systems of the Italian National Research Council, the International Institute of Higher Studies in Criminal Sciences and the Programme on Governance in the Arab Region of the United Nations Development Programme.

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INTRODUCTION

The establishment of an independent and effective justice system that safeguards human rights, facilitates access to all and provides transparent and objective recourse is a core value held the world over. The centrality of a strong justice mechanism lies in its essential contribution to fostering economic stability and growth, and to enabling all manner of disputes to be resolved within a structured and orderly framework. As a result, judicial and legal reform is consistently a priority on the agendas of countries regardless of their state of development. Yet the complex and multifaceted nature of achieving the ends of justice has challenged efforts to identify a coherent set of issues warranting the time and attention of reformers, and slowed the subsequent formulation of specific prescriptions and guidelines on what can be done to improve the quality of justice delivery across the system.

The purpose of this *Guide* is to support and inform those who are tasked with reforming and strengthening the justice systems of their countries, as well as development partners, international organizations and other providers of technical assistance who provide support to this process.

Work on this *Guide* began following ECOSOC Resolution 23/2006, which endorsed the Bangalore Principles on Judicial Conduct and requested the United Nations Office on Drugs and Crime (UNODC) to convene an open-ended intergovernmental expert group, in cooperation with the Judicial Group on Strengthening Judicial Integrity and other international and regional judicial forums, to develop a technical guide on approaches to the provision of technical assistance aimed at strengthening judicial integrity and capacity.

Thereafter, UNODC convened an Intergovernmental Expert Group Meeting on 1-2 March 2007 in Vienna, Austria, to provide, inter alia, guidance concerning the content of the *Guide*. The expert group was attended by representatives of Algeria, Azerbaijan, the Dominican Republic, Finland, France, Germany, Hungary, Indonesia, Iran (Islamic Republic of), Latvia, the Libyan Arab Jamahiriya, Morocco, Namibia, the Netherlands, Nigeria, Pakistan, Panama, the Republic of Korea, Republic of Moldova, Romania, the Russian Federation, Saudi Arabia, Serbia, Spain, Sri Lanka, the Syrian Arab Republic, Turkey and the United States of America. The meeting was also attended by members of the Judicial Group on Strengthening Judicial Integrity, as well as representatives of the American Bar Association, the Consultative Council of European Judges, the German Agency for Technical Cooperation, the National Judicial Institute of Nigeria, the Research Institute on Judicial Systems of the Italian National Research Council, the International Institute of Higher Studies in Criminal Sciences and the Programme on Governance in the Arab Region of the United Nations Development Programme.

In summary, participants recommended that the *Guide* should address the following core themes: *(a)* judicial recruitment, selection and evaluation; *(b)* judicial ethics and discipline; *(c)* assessment and evaluation of court performance; *(d)* case management; *(e)* consistency, coherence and equality in judicial decision-making; *(f)* access to justice; *(g)* function and management of court personnel; *(h)* judicial resources and remuneration; and *(i)* the promotion of public trust in the judiciary. They proposed that, in developing the *Guide*, UNODC should collect and draw from existing best practices in strengthening judicial

integrity and capacity. Participants were also of the opinion that the guide should not exclusively address the needs of the providers of technical assistance, but should rather present information that would benefit all stakeholders in the justice system, in particular judges and other justice-sector officials in managerial positions.

Following these recommendations, the mandate for the development of the *Guide* was further specified in ECOSOC Res. 22/2007, which requested UNODC to continue its work to develop a guide on strengthening judicial integrity and capacity, leading to this final product.

UNODC, in cooperation with the American Bar Association Rule of Law Initiative and the Research Institute on Judicial Systems (IRSIG-CNR), prepared a first draft of the *Guide*. This draft was further enriched and improved upon by a group of experts on justice sector reform who gathered on 8-10 November 2009 in Bologna, Italy, at the offices of the IRSIG-CNR.

This *Guide* draws together ideas, recommendations and strategies developed by contemporary experts on judicial and legal reform, and includes reference to successful measures taken in a range of countries to address particular challenges in strengthening the justice system. Applied researchers and seasoned practitioners have contributed to a large and growing literature addressing judicial reform efforts. Similarly, there are many valuable experiences and good practices from countries operating within a variety of legal contexts that are worthy of consideration across borders. As a result, this *Guide* brings together a comprehensive set of topics for discussion and strategic thinking in a single volume.

At the same time, this *Guide* does not seek to cover every aspect related to the reform and strengthening of a country's justice system, nor does it intend to replace the vast array of complementary literature, research and reports that already exist, including those addressing specialized issues such as juvenile justice, pre-trial detention and human rights. To cover every issue that arises in the transformation of a justice system would be an impossible task. Rather, this *Guide* intends to contribute to the existing literature by providing a guide to target the core areas identified by the expert group as priorities in justice sector reform, and offer recommendations, core ideas and case studies for consideration in the development and implementation of national justice sector actions plans, strategies and reform programmes.

While the *Guide* seeks to provide a holistic approach to judicial reform, it allows readers to select what parts of a larger agenda are most relevant to them and, at the same time, to see how similar aims have been achieved in other jurisdictions. In so doing, this *Guide* aspires to avoid a doctrinaire or monolithic approach to justice sector reform based on a single "best" model. Instead, the goal is to contribute to the literature on justice sector reform a targeted and economic focus on the administration of justice from a systemic standpoint, rather then a focus on the quality of legal decisions themselves. An administration of justice led primarily by the courts affects all participants in the legal process, including members of the public and policymakers, through the application of various practices and procedures. These applications touch on a broad set of issues ranging from judicial recruitment and selection practices, to the timeliness of decisions, to the openness and transparency of the process, to the accessibility of these systems for those seeking justice and the protection of their rights. Ultimately, the *Guide* aims to provide practical information on how to build and maintain an independent, impartial, transparent, effective, efficient and service-oriented justice system that enjoys the confidence of the public and lives up to the expectations contained in relevant international legal instruments, standards and norms.

The *Guide* is structured by topics identified by the intergovernmental expert group, including: recruitment, professional evaluation and training of judges (chapter 1); function and management of court personnel (chapter 2); case and court management (chapter 3); access to justice and legal services (chapter 4); court transparency (chapter 5); assessment and evaluation of courts and court performance (chapter 6); and judicial codes of conduct and disciplinary mechanisms (chapter 7). To allow for flexibility and to reflect experiences from different legal systems and regions, emphasis was placed on good practices and lessons learnt from a wide range of countries and legal contexts. Each chapter also contains conclusions and recommendations for the development and implementation of the proposed reform measures.

I. RECRUITMENT, PROFESSIONAL EVALUATION AND TRAINING OF JUDGES

1. Introduction

In most nations, judges have an increasingly important role in the definition of the rights of citizens in areas that are crucial for their well-being (such as health, work, industrial relations, social security, human rights, consumer rights, family relations, environmental rights, civil rights and so on).[1] As a consequence, citizens frequently turn to the judiciary for the protection of their rights. Furthermore, the dangerous evolution of criminal activities (including corruption, organized crime and terrorism, both national and international), has made the criminal justice system ever more important for the citizens and the community as a whole. For these and other reasons, the workload of the courts has increased considerably and the work of the judge has become far more complex. Moreover, it has become quite evident that the professional qualifications now required for the proper exercise of the judicial role go far beyond the basic legal knowledge and skills of legal interpretation that once were sufficient.

The evolution of the judicial role has led to its increased importance in political, social and economic spheres. It has spurred reforms in many countries that are intended to meet these new challenges through innovations in areas of the judicial system that are crucial for the quality and efficiency of its performance: recruitment, initial and continuing education, professional evaluations and discipline of judges, as well as in other areas that are functionally connected to the proper and expeditious performance of the judicial function, such as the managing and monitoring of court work by means of organizational and technological innovations.

Naturally, reforms or reform initiatives in these areas have to be carried out with a view to striking a proper balance between the values of judicial independence and judicial accountability, both being equally crucial for the proper working of the judicial system in a democratic society and for an adequate service to citizens seeking justice.

This chapter will address basic legal education, recruitment, professional evaluation, career, continuing education, as well as with the terms and conditions of judicial service.

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[1]On the increasing importance of the judicial role and its causes see, for example, Friedman L.M. (1994), *Total justice*, Russel Sage, New York; Irschl R. (2004), *Juristocracy—Political not Juridical*, in *The Good Society*, vol 13, n.3, 6-11; Tate C.N. and T. Vallinder (eds), *The Global Expansion of Judicial Power*, New York University Press, New York.

Box 1. Criteria for the choice of country (national) experiences.

Empirically-based knowledge on the governance of the judicial corps exists only for a limited number of Member States and research on that topic clearly shows that the exclusive reference to the formal provisions of the law might misrepresent what actually happens. Therefore, in the following chapter, preference will be given to the experiences of those countries for which a minimum of reliable empirical knowledge is available. Furthermore, reference will be made only to "ordinary courts," i.e. courts competent for civil and criminal cases from first instance to final disposition. No specific reference will be made to "specialized courts" that often have a circumscribed, exclusive jurisdiction to address specific types of controversies such as Constitutional Courts, administrative courts and others.

2. Basic legal education

Periodic reviews on the use and application of international standards and norms in crime prevention and criminal justice, involving the question of the independence of judiciary, show that in most Member States a law degree is a prerequisite for entry into the judicial profession. In some Member States, however, a law degree is not required for judges, in particular for those who operate in courts of limited jurisdiction (minor crimes, civil cases of limited value). In countries where such limited jurisdiction handles a large number of cases (such as England and Wales for criminal matters), lay judges are assisted by law-trained clerks. Moreover, in a number of least developed countries and post-conflict countries, judges, in particular of the lower bench, often do not have law degrees.

Formal legal education varies widely in terms of duration, teaching methods and also with regard to their educational mission. In some countries, the legal education has as its main institutional goal that of providing a specific professional education for those who intend to enter the legal profession, and who may, after years of legal practice, be elected or appointed as judges. This is the case in common law countries and of some other countries having an Anglo-Saxon legal tradition.

In other countries, mostly civil law countries, higher legal education has a much wider institutional goal. In fact, only a limited number of those who graduate in law enter the legal profession. For most of them, a law degree is a useful means or a necessary prerequisite to qualify for a large number of jobs in the public or private sector.

Box 2. Duration of university legal education

Most Member States require that legal training last from three to five years. It must be added, however, that in some countries, notably in the United States, one of the prerequisites for admission to law school is a university degree. Such undergraduate study often covers areas of knowledge that, mostly in recent years, are considered to be of value both for the exercise of the judicial function and for the proper management of courts (such as economics, psychology, sociology, history, management and other branches of the human sciences). In some other countries, the increase in complexity of the legal curricula which has developed over recent decades has added an additional year to receipt of a degree in law (for example, in Finland, Germany, Italy and Japan).

Box 3. Teaching methods in legal education

In some Member States, university legal education is based on textbooks and lectures which provide the students with a formalistic, systematic analysis of the various branches of the existing law, both substantial and procedural. The analysis of judicial decisions plays an ancillary role. Such is the case in most, but not all, civil law countries (exceptions can be found in a few countries of northern Europe). However, a partial evolution toward the teaching of case law is now emerging in the law schools of civil law countries of Continental Europe for the teaching of European Union law which is, to a large extent, judge-made law.

In some other countries, mostly common law countries where judicial decisions may be based on judicial precedents, the study of the law concentrates, to a large extent, on the analysis of judicial decisions. In the last decades some law schools have introduced in their curricula opportunities for law students to acquire practical legal experience by participating in the work of "legal clinics" intended to provide representation to lower-middle income members of the community. Students draft pleadings and discovery documents, negotiate settlements and actually try cases under the supervision of university professors.[a]

[a] For example, see www.law.uchicago.edu/academics/clinics.html; www.uottawa.ca/associations/clinic/eng/main.htm.

3. Models of judicial recruitment

In some Member States, judges are chosen from among practising lawyers or experienced jurists, i.e. from among people that already have consolidated experience in the interpretation and application of the law (so-called "professional recruitment"). In other Member States, judges are chosen, prevalently or exclusively, from among young law graduates without previous professional experience (so-called "bureaucratic recruitment" or "civil service recruitment"). In these countries, the need arises to provide an effective educational "bridge" between the theoretical knowledge provided by the law faculties and the "applied" knowledge needed to perform judicial functions. The solutions provided for such a functional need vary from country to country and are inextricably intertwined with their different procedures of recruitment.

In addition, professional evaluation and the judicial career have quite different characteristics depending on whether the system of recruitment is of a professional or bureaucratic (civil service) nature. It is therefore appropriate to consider these two systems separately with regard to recruitment, professional evaluation and career and at the same time discuss their differences. It must be added, however, that that there are quite a few judicial systems in which the features and functional needs of both professional and bureaucratic (civil service) judiciaries are in various ways mixed. For those countries, the information provided in the presentation of the features, functional needs and solutions adopted in countries of the two types of judiciaries is particularly useful. For example, in Member States with a professional system of recruitment where the number of years of experience as a lawyer required for entering the judiciary is very limited (as in some countries of Latin America and Africa), the need for a prolonged period of initial training and of recurrent professional evaluation while in service tend to be quite similar to those of countries having a bureaucratic (civil service) system of recruitment.

Professional model

Judges are generally appointed or elected from among the corps of lawyers. Judges therefore belong to the same professional corps as lawyers and share the same processes of professional socialization, along with mutual professional values and a common understanding of the nature and substance of their respective roles in the judicial process. As a rule, each judge is recruited to fill a vacancy and serve in a specific court, be it a trial court, an appellate court or a supreme court. Formal career systems are not provided; in other words, judges cannot formally apply to be promoted to a higher court and have a legitimate expectation to be evaluated in competition with other candidate judges. Judges of a lower court may become members of a higher court only through an entirely new procedure of recruitment.

Box 4. Selection of judges by means of election: the United States experience

The appointment of judges by popular election for a fixed number of years is practised in some regions of the United States. Such a system of appointment is based on the belief that citizens should have the right to choose their own judges and also choose someone else in the next election if they are not satisfied with their performance during their term in office. Critics of this system of judicial selection maintain that it does not guarantee a selection based on merit, and that it does not protect judicial independence adequately and the image of impartiality of the judicial function. The remedies adopted in some states have been to create commissions, variously composed of representatives of the lawyers, jurists, and ordinary members of the community, who submit to the governor of the state a list of qualified lawyers. The governor then appoints one of them as judge and after a term of some years in office the judge stands for uncontested "retention election." Yet even those remedies leave unanswered another criticism levied against the election of the judges, i.e., that the voters do not have reliable information to make a qualified choice.

In some states (such as Alaska, Arizona, Colorado and Utah), special agencies have been created to evaluate the professional performance of judges who stand for re-election by holding opinion polls among qualified lawyers, jurists and citizens having a direct knowledge of their judicial conduct (integrity, legal ability, communication skills, ability to work effectively with court personnel and other judges, punctuality and administrative skills). The results of those inquiries are then made available in various forms to the voters prior to the election, and research has shown that citizens do take such information into account in casting their vote.[a]

[a]Esterling K. M. (1999), *Judicial Accountability the Right Way: official performance evaluations help the electorate as well as the bench,* in Judicature, Vol. 82, no. 5, pp. 2006-215.

It is a shared tradition of common law countries that choose their judges from among experienced lawyers or jurists to assign to the executive branch substantive decision-making powers in judicial appointments. Such is the case also for other countries, including, for example, some Latin American countries. In recent decades, tendencies have emerged to render the process of judicial appointment more transparent and/or more participative, or even to severely limit the power of judicial appointment of the executive.

Box 5. Development and trends in judicial appointment: England and Wales, the United States and Australia

For about 900 years and until 2005, in England and Wales the Lord Chancellor had legislative, judicial and executive functions, including that of heading a government department with responsibility for the courts and for judicial appointments. The Constitutional Reform Act of 2005 replaced this system with the establishment of a Judicial Appointment Commission (composed prevalently of high-ranking judges) which limits the role of the Lord Chancellor to one of accepting or exceptionally rejecting with cause its recommendations.[a]

In the United States, federal judges are nominated by the President and confirmed by a vote of the Senate. The Senate has increased its role in scrutinizing the nominations of the President especially with regard to initial appointments and appellate federal judges (i.e. district and circuit judges).[b]

In Australia, the powers of the executive in the appointment of judges are still formally unrestricted but requests to introduce greater transparency in the process of appointment have been the subject of recurrent debates.[c]

[a]Judicial Appointments in England and Wales: Policies and Procedures, www.dca.gov.uk/judicial/appointments/jappinfr.htm#contact.

[b] See Roger E. Hartley, Lisa M. Holmes (2002), *The Increasing Senate Scrutiny of Lower Federal Court Nominees,* in Political Science Quarterly, Vol. 117, No. 2, pp. 259-278.

[c]See for example, Simon Evans and John Williams, Appointing Australian Judges: A New Model, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938650#.

Bureaucratic model

Judges (as well as prosecutors) are recruited by means of recurrent public competitions based on exams, written and/or oral, in which the theoretical knowledge of various branches of the law is verified. As a rule, participants in such competitions are young graduates in law, of good moral standing[2] without any professional experience, who enter the judiciary rather young (normally between 25 and 30 years of age). They generally remain in service for their entire working life following a career which in various ways formally combines seniority and evaluations of professional merit. Compulsory retirement age varies from country to country: for example in Austria, France and Germany it is 65; in Spain 70 and in Italy 75.

Box 6. Psychological tests

In some Member States, the selection of new judges includes psychological testing, including in Austria, Hungary and the Netherlands. The adoption of this practice is now being considered in France. Psychological tests include tests of intelligence, ability to work in teams, capacity to decide under stress and other issues.

[2]In most countries, the prerequisite of "good moral standing" means that the candidate should have a clear criminal record.

Box 7. Psychological tests in Austria

After the first year of training (common to all legal professions), law graduates who intend to enter the additional three years of training needed to apply for judicial positions have to undertake not only written and oral exams but also a set of psychological tests. Such tests are administered by a specialized private firm to groups of 6 or 7 candidates at a time and last for an entire day. In addition to tests concerning personal skills such as intelligence, personality, and capacity to concentrate, candidates are interviewed individually. Furthermore, there are group discussions under observation that list predefined items on topics such as the qualities needed to be a "good" judge or a "good" manager. Individual interviews and group discussions are videotaped.

The results of the tests, the individual interviews, and the observation of the candidates in a group discussion conducted and evaluated by psychologists do not lead per se to an evaluation of pass or fail. The entire documentation (including the videotapes) is made available to the Court of Appeal that will take it into account in the framework of a global assessment, including the results of the oral and written exams, the professional evaluation of the candidates formulated during the first year of training.[a]

[a]The information concerning psychological tests in Austria was collected in a lengthy interview conducted at the Austrian Ministry of Justice.

The bureaucratic (civil service) model of recruitment is based on the assumption that the processes of professional socialization, and the maturing and development of the professional skills of the judges will take place and be governed prevalently from within the judicial system. It implies, therefore, a division of the processes of professional socialization and of the development of professional skills on the part of the various legal professions (lawyers, judges and prosecutors) immediately or soon after the period of higher education, a division that does not occur in Member States where judges are recruited from among experienced lawyers.

The need to conduct periodic and substantial professional evaluations of judges and prosecutors is closely tied to the bureaucratic (civil service) model of recruitment. As judges are recruited, exclusively or prevalently, without previous professional experience, and as they remain in service for 30 to 40 years or more, recurrent evaluations are provided for in order to satisfy a plurality of functional needs: in the first place to verify that the young judges (and prosecutors) have actually acquired the necessary professional competence; thereafter to choose among them those that are most qualified to fill the vacancies at the higher levels of jurisdiction; and further to ensure that judges and prosecutors maintain their professional qualifications throughout their decades of service until compulsory retirement. Another important and often overlooked function of an effective evaluation system is that of providing information which will permit the assignment of magistrates to specific functions that they are best suited to perform.

While these are the main features of bureaucratic recruitment, there are, however, some differences worth mentioning in the selection processes adopted by the various countries for recruitment, initial education and professional evaluation while in service, which will be discussed below.

4. Initial education

In some Member States, all young law graduates that intend to enter one of the legal professions must undergo and successfully complete a period of common training (which includes periods of practical work in courts of justice) before applying to enter the judiciary. In some other countries, young law graduates are allowed to apply to be recruited into the judiciary soon after graduation and the division among legal professions takes place immediately after law school, as in France, Italy and Spain.[3] Reform commissions and debates in the latter countries have proposed that after law school there should be periods of common practical training for all future members of the legal professions. In this view, such an innovation would promote shared professional values and a better understanding of the functional characteristics of the different professional roles of judges and lawyers. By the same token, it would also eliminate or at least ease the recurrent tensions and conflicts that characterize the relations between judges and lawyers in those countries.

The processes of initial education and the evaluation of the performance of trainees are more centralized in some countries than in others. In some countries special schools have been created to provide initial professional training to law graduates that have already passed a set of exams for admission into the judicial corps. Such is the case, for example, in France and Spain.

Box 8. Initial training in France and Spain

In France and Spain, the initial training of newly recruited judges lasts, respectively, 31 and 24 months. In both countries the training is organized by schools that operate at the national level. Part of the training takes place at the central level (including both legal topics and practical aspects of judicial activities, mock trials, and non-legal subjects such as the use of ICT in the justice setting). A substantial part of the initial education consists of "on the job training" in courts of justice (in France also in prosecutor's offices) under the supervision of experienced judges. The trainees may also spend limited periods of time in various public agencies and in lawyers' offices. The trainees who at the end of the training period receive a positive evaluation are assigned to courts of first instance and acquire the full status of judges. Those who do not can undergo a further period of training, but if they fail again they are dismissed (an extremely rare event indeed).[a]

[a] Esterling K. M. (1999), *Judicial Accountability the Right Way: official performance evaluations help the electorate as well as the bench,* in Judicature, Vol. 82, no. 5, pp. 2006-215.

Box 9. Initial training in Austria and Germany

In Austria, the detailed planning of the training and evaluations of candidates (four years including a first year of training in common for all the legal professions) takes place within one of the four districts of the courts of appeal. It is there that the candidates are evaluated not only by way of written and oral exams. In addition they are evaluated both with regard to the legal skills shown in the prolonged periods of on-the-job training in courts working under the supervision of experienced judges, as

[3] See Di Federico Giuseppe (ed., 2005), *Recruitment, Professional Evaluations and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain,* Lo Scarabeo, Bologna. The content of this book can be found at www.irsig.cnr.it and represents contributions from several authors.

Box 9. *(continued)*

well as with regard to their character and behaviour. At the end of the four years of training, for each of the vacancies in the courts of first instance the Minister of Justice appoints as judge one of the two or three candidates chosen and suggested to him by the presidents of the courts of appeal to fill the vacancies in their respective districts. To a certain extent it seems to be a system of recruitment by cooptation, where higher ranking judges do play an important role in the process of recruitment of candidates to the bench.

In Germany, after the two years of post-graduate training common to the legal professions, the successful candidates may apply to be appointed as "judges on probation" in one of the vacancies that exist in the courts of first instance. Only those with the highest grades in post-graduate training have a real chance to be appointed. In the various states *(Länder)* of the Federal Republic of Germany, the evaluation and appointment procedures do vary to a certain extent. Usually the candidates have to appear for a lengthy structured interview in front of a ministerial commission that also takes into account the evaluations obtained so far by the candidate. In some states the final decision to appoint judges on probation is made by the Minister, in others by the president of the regional court, and in others by a concurrent decision of the Minister and a commission appointed by the state parliament.[a]

The period of probation lasts from three to five years. At the end of this period, if their performances are evaluated positively, the judges on probation are appointed as "judges for life" (i.e. until compulsory retirement at 65) by the same authorities that had decided on their appointment as judges on probation.[b]

The judges on probation perform the same judicial functions as the other judges in first instance courts and attend training programmes on topics such as court organization, how to deal with litigants, psychological aspects of communicating with litigants and lawyers, ascertaining facts, weighing evidence, examining witnesses, work flow management, techniques of speech, and others. The responsibility for the professional evaluation rests with the president of the regional court and it is quite normal that the president of the court (or the vice president) sits as a spectator in a trial conducted by the judges on probation to be evaluated. The main criteria for the evaluation include: professional competence (e.g. knowledge of substantive and procedural law, ability to conduct trials); personal competence (e.g. ability to cope with the work load, ability to decide, use of information and communication technologies); social competence (e.g. ability to lead a constructive discussion, ability to mediate, respect for concerns of parties); and competence to lead (e.g. administrative experience, ability to instruct others). The same criteria are thereafter used for professional evaluations of the judges while in service.

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[a]Esterling K. M. (1999), *Judicial Accountability the Right Way: official performance evaluations help the electorate as well as the bench,* in Judicature, Vol. 82, no. 5, pp. 2006-215.

[b]Ibid.

5. Professional evaluation

The professional evaluation of judges varies from country to country with regard to methods and timing, the rigour with which reviews are conducted, and the agents that conduct the evaluations. In some Member States, evaluations take place only at the time judges are scrutinized for promotion. In other Member States, all judges are periodically evaluated at regular intervals (for example, in Austria, France, and the 16 states of the German Federation where periodic evaluations take place at intervals that vary from two to five years). Such evaluations are thereafter taken into account when the need arises to choose among them the more qualified ones for promotion to higher levels and to fill the vacancies in those levels of jurisdiction.

In some Member States, periodic evaluations are integrated by other forms of more specific assessment of professional performance when promotions have to be decided. In Germany, for example, first instance judges who apply to be promoted to the Higher Regional Court are requested to serve as judges of that court for a trial period of 8 to 12 months, and their performance is evaluated by the president of the higher court, i.e. the same court in which they would serve if promoted.

In most States, evaluations take into account legal competence and professional skills; however, the criteria used in the evaluation process may be more or less analytically stated and/or may include criteria of a different nature.

Box 10. Criteria of professional evaluation in European civil law countries: the examples of Austria, France, Germany, Italy and Spain

In France, the evaluation form provides four categories (general professional ability, such as capacity to decide, to listen and exchange views with others, to adapt to new situations; legal and technical skills, such as the capacity to use one's own knowledge, capacity to preside; organizational skills, such as the capacity to lead a team, to manage a court; and working capacity, professional relations with other institutions).

In the 16 states of the German Federal Republic, the criteria are the same as those indicated above for the evaluations of judges on probation; not only are they analytically stated but they also include criteria that go well beyond those concerning legal knowledge, legal skills and diligence.

In general, the last decades have seen the criteria for the evaluation of judges become (in some countries more than in others) on the one hand more analytical in assessing legal knowledge, judicial skills and diligence, and on the other hand taking into account "qualities" other than those strictly related to *jus dicere* (organizational skills, social skills, knowledge of the techniques and technologies that make more functional the work of the judge and of the court as a whole, etc.).

Variations worthy of note do occur with regard to the rigour with which professional evaluations are made. In some countries analytical evaluations are summed up in a scale of grades. In one of the German states for example it has been estimated that only 5 to 10 per cent of the judges receive the highest grade of "excellent;" the same in Austria, where judges who receive the lower grades may suffer financial losses, or be asked to retire. In other countries professional evaluation is far from being selective. In Italy, for example, the laws and regulations on professional evaluations have been interpreted in an extremely indulgent manner by the Superior Council of the Magistracy, so much so that in the last 40 years all the judges have been promoted to the highest level of the career and salary, short of very grave disciplinary or criminal sanctions. In Spain, promotion from the first to the second level of the career, i.e. from "judge" to "magistrate," can be obtained simply on the basis of seniority of service.[a]

[a]Esterling K. M. (1999), *Judicial Accountability the Right Way: official performance evaluations help the electorate as well as the bench,* in Judicature, Vol. 82, no. 5, pp. 2006-215. The term "magistrate" has a different meaning in different countries. In Italy, as well as in France, it is used to include both judges and public prosecutors. In Spain, instead, the term "magistrate" is used to indicate a specific level of the career of judges. In the United Kingdom and in the United States it is used to indicate judges having specific functions.

The periodic evaluation of judges in Member States with a bureaucratic system of recruitment touches upon the relation between independence and accountability. On the one hand such evaluations are necessary to ensure judicial accountability (and with it the quality of the judicial service). At the same time measures must be taken to avoid the risk that professional evaluations be used to indirectly influence judicial decisions.

Therefore, in civil law countries, judges have a right to appeal in various ways against unfavourable decisions concerning their status, i.e. those concerning professional evaluations, career, transfers, and role assignments (discipline will be discussed later on). In most continental European countries, judges (just as any other public employee) can appeal against those decisions on matters of fact and law in front of the administrative judge. As a rule judges can also request that their complaints be heard and answered by the same authorities that made the unfavourable decision. In the states of the German federation, the judge who deems that the professional evaluation violates his independence (for example, because the evaluation takes into account the substance of his/her judicial decisions) he/she can appeal against it before a special court called the "judicial service court" composed exclusively of judges.

The more visible reform trends in the area of governance of judicial personnel, which in the last decades have tried to combine at the operational level the values of both independence and accountability, have included:

- Increasing the guarantees of the professional qualification of judges and to promoting accountability for their performance (through reforms in the area of recruitment, initial and continuing education, professional evaluation, career, role assignments and discipline), and/or
- Promoting, in various forms, the participation of judges in the management of other more junior judges as a way to protect judicial independence.

In some states, such as Austria, Belgium, France and Germany, the responsibility to make decisions on the status of judges from recruitment to retirement is, in various ways and degrees, a shared responsibility of the heads of courts, of judicial councils or ad hoc agencies that include representatives of the judges (usually higher ranking judges are over-represented), ministers of justice and in some states of the German Federation also parliamentary commissions.[4]

In other states, such as Italy and Spain, the overriding role in managing judicial personnel from recruitment to retirement is played by centralized judicial councils usually composed in various proportions by representatives of the judges and of "lay" people, usually practising lawyers or university professors.[5]

Box 11. Judicial independence and judicial councils

In recent decades the number of centralized judicial councils has greatly increased in Europe,[a] Latin America,[b] Africa[c] and the Middle East.[d] Most of them, but not all, have been created with the primary goal to promote and protect judicial independence; such is the case for countries where councils have certainly played a major role in the promotion of judicial independence. The councils, however, are rather different from one another with regard to the range of their decisional powers on the status of judges, their composition and the ways in which their members are elected or appointed. Such differences reveal rather different views on the institutional means needed to protect judicial independence or to promote a better balance between independence and accountability. However, there is no evidence that such centralized councils are a necessary prerequisite to protect judicial independence. It would certainly be difficult to argue that the judges of countries without those councils (such as Austria and Germany)

[4]Esterling K. M. (1999), *Judicial Accountability the Right Way: official performance evaluations help the electorate as well as the bench,* in Judicature, Vol. 82, no. 5, pp. 2006-215.

[5]Ibid.

are less independent than those of Argentina, Belgium, Bulgaria, France, Georgia, Italy, the Netherlands, Romania, Spain, and so on. On the other hand, worries have been expressed in some countries (such as France, Italy and Spain) that in national councils where the majority of their members is composed of judges elected by their colleagues, the corporate interests of the judiciary might prevail over the protection of other important values for the proper working of the judicial system such as that of judicial accountability.[e]

[a]For a presentation of the composition and functions of judicial councils adopted by most of the 47 nations of the Council of Europe, see www.coe.int/t/dghl/cooperation/ccje/textes/Travaux10_en.asp.

[b]See V. Autheman and S. Elena, "Global Best Practices: Judicial Councils. Lessons learned from Europe and Latin America", IFES Rule of Law White Paper Series (2004); www.ifes.org/~/media/Files/Publications/White%20PaperReport/2004/22/WhitePaper_2_FINAL.pdf.

[c]See, for example, the National Judiciary Council of Nigeria in www.njc.gov.ng/index.php.

[d]See "Judicial Council Reforms for an Independent Judiciary. Examples from Egypt, Jordan, Lebanon, Morocco and Palestine", International Federation for Human Rights, May 2009, www.unhcr.org/refworld/pdfid/4a83c4420.pdf.

[e]For this very reason the French Parliament has recently approved a constitutional reform for which the representatives of the magistrate will not be any more a majority in the two sections of French Superior Council of the Magistracy (LOI constitutionelle nº 2008-724 du 23 juillet 2008, art. 31). For an example of corporate leanings of a Judicial Council, see G. Di Federico, "Recruitment, Professional Evaluation, Career and Discipline of Judges and Prosecutors in Italy" (quoted above in note 9); see also, G. Di Federico, "Independence and Accountability of the Italian Judiciary: the Experience of a Former Transitional Country in a Comparative Perspective," in A. Sajo (ed.), *Judicial Integrity,* Martinus Nijhoff, Publishers, Leiden/Boston, 2004, pp. 181-206.

6. Continuing education

Throughout the first half of the twentieth century, the very idea that judges already in service might need further training was considered almost offensive. The first institutions specifically dedicated to this function are less than 50 years old: the French *École Nationale de la Magistrature* and the United States Federal Judicial Center were established, respectively, in 1958 and 1967. Since then, initiatives to provide programmes of continuing education for judges as well as specialized institutions to plan and manage those programmes have spread in various forms throughout the world, in Member States of North and South America, Africa, Australia,[6] the Near and Far East. Most of those schools that provide programmes for continuing education also provide programmes of initial education.

The main goal of continuing education has been that of providing programmes to discuss legislative developments and to provide judges with a forum to discuss problems connected to the interpretation of those amendments and/or of specific, complex areas of the existing legislation. In several Member States, continuing education for judges has been expanded to include judicial ethics; leadership and management skills, docket management; the use of technology to facilitate and expedite judicial activities; and developments in international or supranational laws that may affect the work of the judges. Teaching programmes include in-person presentations at the location of the central school or at the court level where they are usually taught by personnel trained by the central school.

In some Member States the schools in charge of continuing education for judges also provide continuing education for non-judicial court staff personnel (for example, the United States Federal Judicial Center and the Judicial schools that operate in some of

[6]See the National Judicial College of Australia, http://njca.anu.edu.au/.

the States of the Federal Republic of Germany, Jordan, Ghana,[7] India,[8] and Australia[9]). The idea behind this is that some of the programmes of continuing education for both judicial and non-judicial personnel are more effective if planned and managed in close connection with each other (for example those that deal with organizational and technological innovations in court work). In some other countries (such as France, Italy, Spain), the continuing education of judges and non-judicial personnel is separated and provided for by different institutions.

Box 12. Judicial Institute of Jordan

Established in 1988, the Judicial Institute of Jordan provides courses and seminars not only in specific areas of the law but also on other subjects which are relevant for the legal professions, such as forensic medicine and computer science.

Courses and seminars are attended not only by judges and other members of the legal professions, but also by court clerical staff.

The Institute's objectives include that of "building bridges of judicial cooperation" with neighboring countries, and most of its seminars are actually attended by judges of other Arab states.[a]

[a]For more on the Judicial Institute of Jordan, see http://images.jordan.gov.jo/wps/wcm/connect/gov/eGov/Government+Ministries+_+Entities/Judicial+Institute+of+Jordan/.

Box 13. Judicial Training Institute of Ghana

The Judicial Training Institute in Ghana is responsible for training judges and magistrates, as well as court and administrative personnel of the Judicial Service. The Institute's training programmes are developed and administered with the objective of achieving high standards of judicial performance, and include both initial orientation sessions for new judges and magistrates as well as ongoing professional development programmes for emerging issues and career training for administrative staff.

Before the Institute was established, judges in Ghana received no formal training following appointment to the bench. The Judicial Service Act of 1960 included provisions for the establishment of a training school for registrars and other judicial staff. In addition, the Act paved the way for judicial education to begin in 1965 with the creation of the Judicial Service Training School, which had the mandate to provide training and education for staff of the Judicial Service of Ghana. At that time, training consisted primarily of ad hoc seminars and mentoring by senior judges. In the mid-1970s, training was extended to magistrates, and by the late 1980s included continuing education for judges and magistrates.

In 1995, the Training School became the Institute of Continuing Judicial Education of Ghana to reflect its expanded mandate, and in 2004, it became the Judicial Training Institute with the appointment of a full-time Director. According to its website, at

[7]See www.jtighana.org/.

[8]See the Institute of Judicial Training ad Research of the Uttar Pradesh Government, at http://ijtr.nic.in/about_us.htm.

[9]See The Australasian Institute of Judicial Administration, www.aija.org.au/conferences-and-seminars/past-aija-programmes.html.

www.jtighana.org, the Institute "recognizes the fact that individuals with prior experience and expertise at the Bar require additional training in order to make the transition to the Bench. In addition, the JTI acknowledges that social and technical norms in Ghana are constantly evolving, creating an ever-changing set of demands on the judiciary. Supplementary education and training programmes are needed to enable the judiciary to meet these demands and function efficiently and effectively in Ghanaian society."

On the Institute's website, it is also possible to find numerous legal resources and educational materials, including the code of conduct and relevant legislation.

An accurate idea of the amplitude and variety of judicial educational activities and teaching techniques can be acquired, for example, by consulting the website of the United States Federal Judicial Center.[10]

7. Recruitment, dismissal and remuneration

In countries of common-law legal tradition, where the executive and legislative branches still play a predominant role in the appointment of judges, a clear tendency is emerging to make the appointment process more transparent by introducing, formally or informally, various forms of participation of actors professionally qualified for the evaluation of the candidates/appointees. By the same token, the discretionary power of the appointing agencies better guarantees non-partisan and professionally qualified selection. The same trend can be observed in countries where judges are elected.

In countries of civil law legal traditions, the recruitment of judges takes place by means of competitive exams in which, one way or another, judges already in service play a decisive or significant role. In most of those countries, the crucial decisions taken in the process of recruitment can be challenged by the candidates in front of an administrative judge. More generally, in those countries, judges have the right to appeal against all decisions that are taken regarding their status (professional evaluations, career, transfers, discipline and so on) by means of judicial or quasi-judicial procedures entrusted to agencies (courts, councils or committees) composed exclusively or prevalently by judges.

In countries of both civil and common-law traditions, judges can be dismissed before the expiration of their fixed term of office only through quasi-judicial proceedings entrusted to panels that, as a rule, are composed exclusively or prevalently of judges (judges are in any case largely represented). The right of appeal against such decisions is always provided (the only exception being in the very rare cases of dismissal by impeachment).

[10]See www.fjc.gov. The Center also operates a satellite broadcasting network, the "Federal Judicial Television Network", which has viewing sites in more that 300 federal courts. Some of the programmes are broadcast live from the Center-operated studios, allowing judges and staff at courthouses around the country to interact directly with the faculty.

Box 14. Judicial independence, salaries and pensions: Canada, Italy and the United States

In some Member States, financial security is included among the terms and conditions of judicial service. The United States Constitution, for example, provides that the salaries of federal judges cannot be diminished during their years of service. In recent years, some Member States have adopted more flexible solutions in order to avoid negotiations between judges and the government as well as to assure that there can be no manipulation of the judiciary by the government, or appearance thereof, through the process of establishing terms of remuneration and other employment benefits for judges. Such is the case, for example, in Italy and Canada. In Italy, a law enacted in 1984 provides an automatic mechanism to increase the salaries and pensions of judges every three years in a way that maintains their remuneration, well above that of other state employees. In Canada, since 1997, judicial salary commissions or tribunals have been established, for both federal and provincial judges, by constitutional fiat. Their task is to periodically reconsider the financial terms of judicial service (salaries, pensions, per diems, etc.) on the basis of various statutory parameters, which include the cost of living. Such "arbitration" commissions are composed of representatives of both the association of judges and the government, and are generally chaired by a professionally qualified person agreed upon by the two sides who is appointed by the Minister of Justice. In most of the jurisdictions, the recommendations of these commissions are addressed to the executive and have an advisory nature. In some, the recommendations are binding upon the executive (for example, in Nova Scotia). Where the recommendations are advisory, a limited judicial review is allowed, in the sense that the reviewing court cannot decide on the financial aspects of the controversy, but can only refer the case back to the government or to the commission indicating what the court has ascertained to be untenable.

8. Conclusions and recommendations

- When recruitment takes place by means of written exams, the exams should be organized by the state in order to establish common standards and transparent procedures which guarantee impartial assessments of the individual performance of the candidates. Candidates should participate anonymously in the exams. If representatives of other legal professions are members of the examining board they should not prevail over the representatives of the judges.
- The evaluation of the judges' work should not interfere with their decision making in single cases. The number of successful appeals against the decisions/judgments of a single judge should not be the criteria for the assessment of the quality of his work.
- When recruitment takes place by nominal appointment, the procedure through which the nominations and appointments are decided should be fully transparent, to guarantee both the professional qualifications and the non-political nature of the choice.
- In case that the judges are elected, the election should be prepared by collecting enough information on all candidates concerning their professional behaviour in order to ensure that the elections will not be of a purely political nature.
- Measures should be adopted in the recruitment process to make the judicial corps representative of the social structure of the country, and avoid discrimination on the basis of race or gender.
- The legal education of judges and lawyers should include case studies, practical and methodical training, skills needed to organize one's work effectively (such as principles of docket and case management), and social skills.

- After university training, there should be practical training programmes designed for the preparation of professional work (special subjects of material law, procedural law and practical and methodical skills).
- Initial training should be followed by regular continuing education. The further training of practising judges should be considered to be obligatory or, at least, effectively encouraged.
- The continued professional training of judges must be accessible for all judges, regardless of their position and place of work.
- The activities of initial and continuing education can effectively be conducted by the establishment of judicial training institutes. Such institutes should serve the educational needs of both judges and court staff.
- The judicial training institutes should have research facilities that allow for both educational programmes that meet the functional needs of the courts and the evaluation of their effectiveness at the operational level.
- The judicial training institutes should adopt a variety of educational programmes and techniques in order to maximize effectiveness and reach all the stakeholders, including: in-person programmes, self-taught programmes, and interactive programmes supported by adequate technological equipment. Special attention should be given to the activation of educational programmes for judges and court staff intended to promote organizational and technological modernization of courts.
- Salaries of judges should be such as to relieve them from economic hardship. Salary increases should be anchored to objective criteria and decided in a fully transparent manner.

II. COURT PERSONNEL: FUNCTION AND MANAGEMENT

1. Introduction

Judicial integrity and capacity do not emerge in isolation. They are qualifications that are refined over time in the institutional frameworks of courts of law and the agencies with which courts interact. Through their interactions with other actors in the processes of administration of justice—litigants, advocates, witnesses, prosecutors, and court personnel—judges build and strengthen these qualifications. Those with whom they interact most closely on a day-to-day basis are the court employees who support them in their work. Although judges oversee and direct the activities of court support staff, they also are influenced by them in the course of their daily interactions and develop ongoing working relationships with them. From an institutional perspective, it is important that the judiciary devotes attention and resources to these court employees to ensure that the support they provide to judges is maximized in terms of both quality and quantity. Equally important, care must be taken to ensure that the working relationships on the basis of which such support is provided are strong, positively-oriented, and built on mutual trust and confidence. This includes shifting from the inefficient traditional judge/court employee relationship model of the judge as leader and decision maker and the employee as subordinate who mechanically performs assigned tasks to the more progressive model where judges and court employees are teamed together to collaboratively address how the machinery of justice might best be focused to respond to the public.

Although most of the discussion on judicial competency and ethics focus on the role of judges, there is a growing recognition of the importance of the role of court personnel. Non-judicial court support personnel, who frequently make up the bulk of judiciary's employees, are crucial to any reform programme that aims at strengthening integrity and capacity of the justice system. Courts cannot carry out their functions without these personnel. They are responsible for administrative and technical tasks that contribute to the outcome of cases and the efficiency of the judiciary.[11] Perhaps most importantly, these officials typically serve as the initial contact point and the dispenser of information to nearly all who come into contact with the judicial system. This initial contact forms citizens' impressions of the system and shapes the confidence that they place in the courts. This role places court employees in an ideal position to promote innovation and help improve services to the public, thereby raising the stature of the court in the public eye.

Another aspect that underscores the importance of court personnel is the potentially overwhelming effect that the division of tasks between support staff and judges can have on improving the efficiency and fairness in the administration of justice. Non-judicial court personnel support the primary function of courts (resolving disputes) and the

[11]Among other functions, court personnel manage court facilities, assist with case management, protect evidence, facilitate the appearance of prisoners and witnesses, and perform a variety of other functions that help avoid postponements and ensure a professional and timely adjudication process; help judges conduct thorough legal research and draft decisions, and ensure that decisions are properly announced and published, thus supporting consistency in decision-making; process and maintain case files to preserve the record for appeal; and promote judicial independence through competent budget and finance controls, and by fostering strong public relations and transparency in court proceedings.

secondary function of courts (managing court tasks that support case resolution). While a judge assigned to a small courthouse must be able to assume all tasks necessary for the court to carry out its business, performing such a role in larger and more complex courts would be impossible due to time and workload constraints, as well as the lack of skills needed to perform certain managerial tasks that complex courts require. Consequently, judges overburdened with administrative tasks that should be performed by support staff may lose interest in their job and become susceptible to unprofessional behaviour. By contrast, judges who recognize that they can diminish their own administrative burdens by shifting them to qualified and capable staff who demonstrate the requisite capacity and integrity, can focus on their core task of adjudicating the disputes, resulting in the improved overall efficiency of the judiciary.

The role that non-judicial court personnel play in supporting the work of the courts means that efforts to strengthen judicial integrity and capacity should include measures to ensure and sustain the quality, motivation, and continuity of skilled court personnel. Personnel management initiatives, which address issues such as transparent and merit-based selection and appointment systems, remuneration, career development and continuing training programmes, routine staff performance evaluations, merit or rewards systems, discipline and removal, tenure, and accountability and performance management, can help achieve these goals, as better managed court personnel can reinforce judiciary's overall managerial effectiveness. Another reform mechanism, and a growing trend underscored in part by the increasing professional status and level of responsibility of court support staff, is the development of codes of conduct that set forth specific ethical standards for court personnel. This professionalization, in turn, stems from the introduction in a number of developing court systems of professional managers, court administrators, or chief executives who are taking over responsibility for many administrative functions previously assigned to court presidents and their deputies.

2. Selection and appointment process

There are multiple approaches to designing selection and appointment procedures that can ensure the hiring of high-quality staff to fill court support personnel positions. A common feature that can be seen in the majority of good models is that such systems aim to make procedures transparent to all court personnel and the public while also maintaining high standards of merit-based hiring and promotion. In order for this to happen, court personnel positions at all levels should be publicly advertised to attract the best applicants, and the final selection should be based on the merits of the applicants rather than on nepotism or other inappropriate personal or political considerations. One method of ensuring this is by setting strict standards on educational and vocational requirements for each position; another method involves regularly holding placement tests for applicants to test on the skills needed for each position, with the highest scoring candidates earning a position with the court. Regardless of the method used, information on the positions and the process itself should be made widely available to the public. Doing so increases the transparency of the system and limits opportunities for corruption in selecting and hiring court personnel, thereby helping to ensure that the best applicants succeed on their merits.

Another important consideration is deciding who is best positioned to review applications and select new court support staff, or promote the existing staff to new positions. Again, there are different models a court system can use. A number of judiciaries have introduced professional court administrators for each individual court to oversee administrative tasks,

including the selection of new court personnel.[12] This not only helps take the administrative burden off judges and allows them to focus on judicial matters, but also gives court personnel the opportunity to participate in the formation of the courts and a sense of ownership over their departments and staff. While this responsibility places added burdens on the court administrators, including the duty to train and orient the employees they hire, a key benefit is that employees view the administrator, rather than someone within a centralized agency, as the boss.

Another approach envisions the establishment of a centralized hiring system, where a single agency or department (frequently, the MoJ or a civil service department) is in charge of administering placement tests and hiring all non-judicial personnel for the courts. The centralized recruitment system has the advantage of being streamlined and ensuring that the hiring processes are uniform throughout the entire court system. The major drawback of this system, however, is that where the central agency hires the court employee, the agency retains some supervisory power over that person, which limits the supervisory (and therefore disciplinary) authority of judges and/or court managers. This arrangement essentially creates reporting relationships that are plagues with two masters—the court and the ministry. Additionally, the centralized system has been criticized in that it does not consider the specific needs of the courts and the fitness of a particular candidate to adequately perform his/her role within the court. It is therefore crucial for the judiciary to retain input into recruitment of applicants who meet the requisite performance criteria of integrity and capacity, regardless of which agency is ultimately charged with recruitment. For example, where those functions are performed by a central agency, judges should meet with human resources officers to convey their views as to the qualifications of prospective court personnel.

The following case study from France illustrates how a centralized selection and appointment system can be successfully structured.

Box 15. Centralized system for selecting court aupport personnel in France

The hiring and appointment of court personnel throughout France is overseen by the MoJ, which utilizes a uniform selection and appointment system. All court personnel positions are advertised nationally on a customized website, which includes position descriptions, education and experience requirements for candidates, and information on the applicable skills tests that are required. Potential applicants can then download a standardized application form and submit it to reserve their place in the next testing cycle.

The type of test offered varies with the positions advertised. Some positions, such as information technology officers or official court translators, require specialized skills, and applicants therefore must take a special skills test that helps demonstrate their proficiency in relevant areas. However, most court support staff positions are primarily administrative in nature and, as such, do not involve specialized skills. Applicants for these positions take a general exam offered once a year, which consists of both a written and an oral component to test writing skills and general legal knowledge. Applicants who score highly on both exams are then admitted to a specialized school, where they undergo an 18-month training programme.[a] At the end of this training, applicants are given their choice of placement with the vacant court personnel positions based on their grades in the training programme and final class rank.

[12] In the federal courts in the United States, for example, the court administrator has full authority and the budget to hire new staff on his/her own, without the central apparatus.

Box 15. *(continued)*

The benefit of France's approach to selecting and appointing court personnel is that it is largely merit-based. An applicant's ultimate posting is based on his/her exam score and class rank within the intense training programme hosted by the MoJ. This centralized framework is designed to reward highly skilled and dedicated applicants, thus ensuring that only the most qualified candidates will fill the court personnel positions. The hiring of highly qualified court personnel means that judges and other judicial officers can focus on their duties while being ably supported by their non-judicial colleagues. The graduated system of applying, training, and then appointment also builds an institutional culture that instills ownership by the new court employees over their positions. This sense of ownership helps keep standards and quality within the courts high, as court personnel take pride in their work and their workplace.

[a] See the following section in this chapter for a detailed description on the structure of professional training programmes for court personnel.

3. Professional training

Professional trainings and the development of court personnel is frequently one of the major components of many judicial reform programmes around the world. Well-trained court personnel create the realization—and the perception among court users—of judicial integrity and transparency of court operations. There are four main benefits to well-trained court personnel. First, effective training can improve trust in the court system through improved customer service and transparency. Second, training is essential for procedural efficiency and court management, which are directly tied to the competence of court personnel. Without well-trained personnel, judges spend an unnecessary amount of time on administrative tasks, slowing down the judicial process and making enforcement of orders difficult, if not impossible. Third, training programmes can be tailored in a way that helps reduce incidences of unethical and unprofessional behaviour. Finally, by increasing professionalism and creating competencies in other areas, trainings have an effect beyond court personnel's core tasks, thereby raising the court's capacity and flexibility.

These benefits are jeopardized when court personnel training programmes suffer from insufficient funding or the streamlined training of employees with diverse job profiles and therefore diverse training needs. Training programmes also fail where court personnel are not well-educated or lack resources, return to poor working conditions where they are unable to use their new skills, or are subject to poorly selected training design or methodology. Furthermore, because training can be easier to implement than other activities, such as strategic reform or operational changes, it is often seen as a panacea for all judicial ailments and therefore substituted for more difficult activities.

In this context, it is crucial to approach any training programme for court support staff by first conducting a training needs assessment and analysing the functional infrastructure of the courts and their operational practices, in order to determine what improvements and changes, including any training, are needed. A formal and comprehensive training needs assessment can be based on a variety of sources, such as court personnel and court user surveys, training committees, observations of court operations, review of training requests, and secondary sources such as complaints and overturned cases. Such assessment can help correctly identify the target recipients; design a training of a complexity level appropriate for trainees' knowledge and abilities; establish and justify clear training goals and match them with the court's business priorities; and evaluate the potential success and risks involved in a proposed training programme. Most importantly, it can reveal

whether the problem is indeed related to training or would be best addressed by other interventions. Unless the former is the case, even the most sophisticated and expensive training programme will fail to result in improvements in judicial system.

Traditionally, models for training court personnel have been decentralized and ad hoc. Such methods prevent the implementation of system-wide initiatives and often result in no training at all or dearth of training in areas where it is most needed. While one-time trainings can be useful for specialized fields or to respond to a specific need or problem, more often than not ad hoc trainings thwart efforts to ensure training for all court personnel and achieve the necessary depth to create change. In essence, decentralized and ad hoc trainings are likely to be less efficient and therefore fail to maximize the potential of both the training itself and the court personnel who could have benefited from it.

It is also important to ensure that training programmes are not only relevant to court personnel, but can also be adjusted to fit the learning style of the trainees. While all programmes should utilize adult education techniques to ensure that training is interactive and appeals to the adult learner, specific methods can vary. For example, court personnel who have limited education and are less accustomed to organized instruction may benefit from on-the-job mentoring and learning under a supervisor's guidance, whereas those staff who are used to the classroom environment may gain additional benefits from seminar training sessions on topics related to their specific tasks. Computer-based training software can be effectively used to deliver training on computer skills and applications. Finally, developing procedure manuals for specific tasks can support formal training and be a useful reference resource throughout an employee's career.

Although no single best model for training court personnel exists, recent reform experiences from around the world have seen the emergence of three principal, non-exclusive trends in this area. One trend is towards a centralized school for training incoming court personnel, much like judicial schools that are growing increasingly popular in many countries and prepare judicial candidates and new judges. This approach places the emphasis on attracting higher quality applicants and creating a learning environment where students' skills are applied through clinics and externships. The second trend is continuing professional education for existing support staff, where trainings are conducted at satellite centres around a region or a country. The final trend is intensive trainings focusing on a specific subject, designed to supplement a broader reform initiative, such as anti-corruption legislation or the implementation of a new case management system. The following case study describes the successes and challenges faced during the establishment of a centralized school that provides both initial and continuing professional training to all court personnel in Romania.

Box 16. Romania's National School of Clerks

For well over a decade after the start of democratic reforms in 1989, court personnel in Romania received training predominantly at a county level, if at all, which understandably resulted in poor qualifications for most staff. In 2004, the country created the National School of Clerks [hereinafter NSC], a centralized institution charged with providing initial training for candidates to court personnel positions and continuing programmes to raise the competence of existing staff.

NSC's initial training programme trains courts' legal secretaries, statisticians, archivists, IT specialists, and stenographers. Admission is competitive, with 100 applicants accepted annually from a pool of around 300. An entrance exam tests applicants on their

Box 16. *(continued)*

knowledge of criminal and civil codes and the structure of the judiciary.[a] There are two training tracks: a six-month programme for those with relevant college degrees and a one-year programme for those with only a high school degree. The curriculum focuses on civil and criminal procedure, supplemented by legal theory and practical skills, as well as administrative, commercial and human rights law. The programme is practice-oriented, focusing on the application of theory and involving trainees' placement with the courts. While NSC's goal is to educate all incoming court staff, there are exceptions for hiring court personnel without training when there are too few graduates to fill vacant positions. Courts may also hire individuals who have not graduated from NSC if they have at least 10 years of relevant experience. Nevertheless, NSC provides a mechanism for increasing the number of highly educated court personnel in the Romanian judiciary.

As part of NSC's robust continuing education programme, Romania's court personnel also receive in-service training. Continuing training sessions cover current court personnel, new recruits who did not graduate from NSC, and NSC graduates. As of October 2007, NSC had conducted 100 such training courses for 2,500 staff in four different cities. Sessions are organized by employers and conducted alongside training for government attorneys and judges. Curricula include classes specifically designed for court personnel on computer skills, civil and criminal procedure, communications and marketing, human rights law, statistics and court management.

Financial constraints prevent NSC from further expanding its curriculum and enrolling enough new students to fill all court vacancies. Furthermore, nearly half of all 2007 graduates took positions in the capital, Bucharest, evidence that a need to reach out to other counties in Romania persists. Also, it remains to be seen what effect NSC will have on customer service, public perception of the judiciary and court efficiency. Nonetheless, the School continues to grow, having nearly doubled its number of graduates in three years, and plans curriculum development and expansion.

[a]Besides the entrance exam, criteria for employment are loose: Romanian language skills, Romanian citizenship, no prior criminal record, medical clearance, and either a high school or a college diploma. Part of the goal of increased training is to attract higher qualified candidates. Prior to 2005, those holding court personnel positions tended to have only high school education and no job-specific training.

4. Remuneration, benefits and incentive awards programmes

As is the case with judges, the salaries of court support personnel must be commensurate with their responsibilities. A judicial reform programme that will result in new personnel structure or increased professionalization of court personnel needs to be supported by appropriate budgetary adjustments that provide for adequate salaries, enabling the judiciary to attract qualified candidates and offering them incentives to perform their duties. Consideration should also be given to raising court personnel salaries in parallel with those of judges, so as to ensure equity throughout the system.

The establishment of a compensation and incentives system to help prevent ethical violations and other disciplinary infractions from occurring is a necessary support mechanism for existing standards of conduct, disciplinary structures, and performance evaluations for court personnel. One of the most useful ways of avoiding ethical and disciplinary problems is to ensure that court personnel are adequately compensated for their work, through both remuneration and benefits.[13] Although low salaries are not the only cause of corruption

[13]Similarly to performance indicators and disciplinary procedures, having salary and benefit guidelines clearly established and published for court personnel helps increase the transparency of the process, which, in turn, increases employee confidence.

and thus raising salaries alone is not the only remedy, court personnel are likely to be less prone to serious dishonourable acts such as bribery and embezzlement when they receive sufficient compensation and do not have to rely on finding illicit sources of income. Likewise, providing benefits, such as health and life insurance or a retirement plan, allows court staff to focus on their work rather than having to worry about how to provide for their families. Even in settings where bribery or embezzlement by court personnel is not common, there are advantages to granting adequate remuneration; doing so helps raise employee morale and overall job satisfaction, which generally leads to a more productive workplace and a willingness on the part of court personnel to work proactively towards maintaining high standards of conduct. This, too, can help reduce the number and severity of ethical problems and allows the graduated disciplinary process (described later in this chapter) to be more effective.[14]

Similarly, performance evaluation tools can be effectively coupled with remuneration mechanisms, such as salary increases within their grade, helping motivate court personnel to perform better in order to achieve a higher salary or salary growth rate. In this setting, remuneration and other incentives prevent misconduct by court personnel by creating a system where employees directly benefit from following the prescribed code or standards of conduct and can be financially harmed if they engage in unethical or unprofessional practices. By the same token, a system of strict consequences, which may include salary reductions, or a series of final reports that affect employment have can be highly effective in helping enforce the standard practices set up to be performance indicators for court personnel, as these sanctions are severe enough to act both as an incentive to complying with standards and as a disincentive against corruption.

Salary-related incentives are not the only mechanism that judiciaries can use to reward court personnel's compliance with standards of conduct. In fact, individual courts or court systems have successfully introduced incentive awards programmes, which rely on a variety of monetary bonuses and non-monetary rewards (such as paid time-off awards or recognition certificates) to encourage extraordinary performance by their employees, reward dedication and innovation in the provision of court services to the public, and help increase the level of job satisfaction among the staff. Programmes of this type are quite common in courts throughout the United States, and in many jurisdictions, they are promulgated under the mandates for general incentive awards systems for public service employees. Examples of behaviour that can be encouraged or rewarded through such incentives include: *(a)* extraordinary service or achievement in the public interest that goes beyond the call of duty (such as an act or achievement that particularly enhances public perception of a court or an innovative success or improvement where other efforts have failed); *(b)* employees' suggestions or ideas that are implemented by a court and result in significant cost, efficiency, or procedural improvements; *(c)* skills development (e.g., in the form of one-time payments to attract a prospective employee with particularly desirable skills or to reward an existing employee for learning new, critically needed employment skills); or *(d)* exceptional performance by employees who meet or exceed certain predetermined and objectively measurable productivity standards that enhance court efficiency or surpass performance expectations.[15]

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[14]The connection between remuneration and disciplinary procedures is displayed in several court personnel codes in the United States. For example, personnel policies in Nebraska discuss salary and promotion guidelines before addressing disciplinary procedures. In addition, salary raise freezes and suspension without pay are included in the later stages of their graduated discipline steps, effectively connecting the financial benefit of employment to discipline.

[15]These examples of reward-worthy conduct are drawn from an overview of Employees' Suggestions and Meritorious Awards Program for the State of Georgia, which authorizes incentive bonus payments under three classifications: meritorious awards programmes, incentive compensation plans, and goal-based plans. See Department of Audits and Accounts, Special Report on State Employee Incentive Payments, Fiscal Year 2008 at 3-4 (Apr. 2009), available at www.audits.ga.gov/rsaAudits/viewMain.aud.

In order to be credible, an incentives system for court employees must be governed by a clear and transparent set of rules. Existing literature on public management topics identifies the following key components of such rules: *(a)* how the programme will operate; *(b)* employees' eligibility to participate in the programme; *(c)* documentation of goal-based plan criteria and evaluation metrics; *(d)* method and schedule of incentive payments; *(e)* types of eligible suggestions or extraordinary service; *(f)* method of submission of nominations or applications; *(g)* procedure for review and approvals; *(h)* procedure for verifying qualifications; and *(i)* procedure for determining award types and amounts.[16] There also are a number of good practices that have evolved over time in incentives programmes design. For instance, in 1998-2000, the United States Office of Personnel Management (OPM) conducted a review of federal executive branch agencies' incentive and recognition programmes and recommended a number of improvement strategies,[17] including: *(a)* linking performance recognition to an organization's strategic plans, goals, and results; *(b)* establishing flexible award programmes with a variety of group and individual awards; *(c)* increasing the use of honorary awards, with provision for peer nomination;[18] *(d)* improving publicity on awards programme activity; *(e)* allocating a designated award budget; *(f)* taking into account employee concerns when establishing award programmes and policies; and *(g)* establishing accountability systems to monitor compliance with award policies and improve award programmes.[19]

The Court Employee Incentive Awards Program in the United States District Court for the District of Utah implements many of the OPM's recommendations listed above.

Box 17. Enhancing job satisfaction: Court Employee Incentive Awards in Utah Federal District Court

The Court Employee Incentive Awards Program in the United States District Court in Utah is exemplary in a number of ways. Unlike typical recognition programmes in other courts which focus on one or two types of awards presented annually,[a] the Utah programme involves a variety of awards that can be presented throughout the year. With a few exceptions, award eligibility extends to all permanent employees of the Office of the Clerk of Court. Detailed standards, criteria and procedures for awards are set forth in the Office of the Clerk Human Resources Manual, thus ensuring transparency in programme administration.

The incentive programme includes the following types of awards:

- *Clerk of Court's Sacred Cow Award,* presented quarterly to a staff member who identifies a court practice or process whose function and relevance may once have been useful but is marginal, documents the impact of eliminating it, and suggests a replacement of necessary. An employee whose recommendation entails the greatest savings in staff time, effort, and aggravation receives a crystal paperweight engraved with the court seal, a variable cash award and a recognition certificate.
- *Employee of the Quarter Award,* which recognizes extraordinary service by an individual or team demonstrated consistently during the quarter and beyond

[16] Ibid., art. 4.

[17] United States Office of Personnel Management, Office of Merit Systems Oversight and Effectiveness, Incentive Awards: The Changing Face of Performance Recognition, Follow-up Report of a Special Study at 11 (Mar. 2000) [hereinafter OPM, Incentive Awards: The Changing Face of Performance Recognition], available at www.opm.gov/studies/incent00.pdf.

[18] In fact, lack of peer involvement in the award process was one of the main factors contributing to employees' widespread scepticism towards the utility of incentive awards as a stimulus to do good work. To address this low level of confidence in the awards system, a number of agencies introduced peer involvement in their redesigned programmes. Despite this, supervisors and managers expressed mixed reactions to peer involvement in awards nomination process, and some felt left out of the decision-making. See OPM, Incentive Awards: The Changing Face of Performance Recognition art. 8-9.

[19] This can be accomplished, for instance, by administering periodic surveys to court employees (as is the case in Colorado), which monitor programme implementation to guarantee that it truly rewards outstanding service and creative and innovative ideas.

the call of duty. The award consists of a US$500 bonus (this amount increases annually for inflation), 8 hours of leave, certificate, individual gift, and publication of employee's name on brass tab on a large publicly displayed plaque.

- *Employee of the Year Award,* which recognizes extraordinary service by an individual or team demonstrated consistently during the year and beyond the call of duty. The award consists of a US$1,000 bonus, 16 hours of leave, certificate, individual gift and employee's name on a public plaque.
- *Special Act Cash Award,* presented for special effort in an unusual assignment or situation, which may be linked with public interest service. This special-occasion award involves variable cash bonuses and leave hours, along with a certificate.
- *Bright Light Award,* which recognizes employees who have gone out of their way to assist others; the assistance need not be job-related. Under this award, any employee of the Clerk of Court's Office, including temporary and part-time employees, may receive two hours of paid leave annually.
- *Bravo Award,* presented for a positive contribution to the court or a court-related project. Any employee of the court (including employees of judicial chambers) is eligible and, if awarded, would receive a gift certificate of approximately US$15 for gasoline, movie tickets, groceries or related service or product.
- *Charitable Work Leave,* under which any permanent full-time employee can receive up to eight hours of leave each year to engage in charitable work for any legitimate organization or cause. To receive their leave, employees complete a form describing the work and the amount of leave requested.

Perhaps the greatest key to the success of Utah's programme is that it is peer-based, rather than managed by a supervisor or court administrator.[b] Some award decisions are made jointly by the Clerk of Court and Awards Committee, comprised of seven line-level employees of the Clerk's Office who serve two-year terms and the court's human resources manager who votes only in case of a tie. Recipients are selected among nominees submitted by staff and management of the Clerk's Office and judges of the court, or, in the case of Sacred Cow Award, among individual employees' applications. The Committee's decisions may be overturned by the Clerk of Court only in rare and exceptional circumstances. For other awards, selection of recipients and justification is left to individual employees of the Clerk's Office. For example, each employee receives 30 Bright Light Award stickers each year to award to their fellow colleagues; award is presented to each employee who collects 8 stickers from his/her colleagues. Similarly, all employees receive 3 Bravo Award cards to award; they record recipient's name and reason and submit the card to the supervisor, who awards it.

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[a]Rewards are often limited to recognition of suggestions that promote efficiency and economy in court operations, including ideas that provide cost savings or increase revenue (e.g., North Carolina's Judicial Branch Employee Incentive Program) or that would be significantly effective in eliminating safety hazards, reducing operational costs, or streamlining procedures (e.g., New York's Unified Court System Employee Suggestion Incentive Program). Awards can be presented in both non-monetary form (e.g., time-off awards in North Carolina; certificates of merit signed by the Chief Judge of the State of New York) and as cash bonuses, based on actual or projected savings resulting from the implementation of suggestion (e.g., up to US$1,000 for a single employee or US$5,000 divided equally among a team of employees in North Carolina; US$25 up to 10 per cent of savings derived during the first year following suggestion's implementation in New York).

[b]By way of illustration, in North Carolina, a Review Committee under Administrative Office of the Courts evaluates submitted suggestions for efficiency, cost-effectiveness, quality of service, and may solicit expert or technical evaluations, and then makes award recommendations for those suggestions recommended for implementation. In New York, the incentive programme is administered by a Program Coordinator, who receives and screens suggestions for eligibility, solicits comments from administrative and supervisory authorities, and then forwards suggestions to a Program Committee that consists of the Deputy Chief Administrative Judges and the Deputy Chief Administrator for Management Support. The Committee periodically reviews suggestions and makes award recommendations to the Chief Administrator, who has final authority on award decisions. Colorado Judicial Branch Employee Recognition and Incentive Program does allow for nominations to be made by any employee who works in the same judicial district as the nominee and has direct and firsthand knowledge of the nominee's work accomplishment. However, the final decision is left to the State Court Administrator, who acts upon a recommendation of the Branch Employee Recognition and Incentive Awards Committee, which is appointed to one-year terms by the State Court Administrator and consists of one district administrator, one clerk of court, one probation employee, one at-large designee and the Human Resources Director.

5. Codes of conduct and ethics training

Ethical standards for court personnel are equally as important to the administration of justice as ethical standards for judges. The realization of the need for specific standards of conduct for non-judicial court employees has increased with the growing professionalization and level of responsibility of these officials. The importance of ethical non-judicial staff is recognized by the Bangalore Principles of Judicial Conduct, which charge the judge with overseeing the conduct of court staff with regard to propriety, equality, and competence and diligence.[20] In systems where ethics is not emphasized, court personnel can undermine the equality of parties, slow court processes and destroy efficiency, and may be an avenue for corruption in the courts. Setting specific ethical standards for court personnel in the form of a code of conduct is a relatively new, but growing, trend in judiciaries across the world. While court personnel codes of conduct have existed in some countries for several decades, their history is still very short in comparison with the judicial codes of conduct.[21] The adoption of Principles of Conduct for Court Personnel by the UNODC Judicial Integrity Group in 2005[22] is arguably at least partly responsible for renewed international interest in such codes.[23] The document sets forth detailed standards of conduct for current and some former court personnel in the areas of fidelity to duty, confidentiality, conflict of interest and performance of duties.

Developing a specific code of conduct for court personnel can help to reinforce ethical standards and to create a culture of integrity in the court system. A separate code of conduct can unify standards spread out across various laws, establish rules that are clearly applicable to court staff, and inform the public of the behaviour they can expect when interacting with court employees. Although it is possible for court personnel conduct to be effectively regulated through general anti-corruption laws, the ethical codes applicable to judges, lawyers or public servants, or internal personnel rules, in most contexts including court personnel under such general rules should be done with extreme caution, in light of the specific nature of their functions. In such instances, it is also advisable to produce handbooks for court personnel that would include specific interpretations of general rules as they apply to court personnel.

Certain general ethical considerations repeatedly arise in codes of conduct in various countries. These considerations include conflicts of interest, impartiality, appearance of

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[20] *See* Bangalore Principles of Judicial Conduct, Value 4: Propriety, Application 4.15 (control with respect to accepting gifts or favors); Value 5: Equality, Application 5.4 (control with respect to ensuring equal treatment and non-discrimination); Value 6: Competence and Diligence, Application 6.6 (control with respect to maintaining order and decorum in proceedings).

[21] For example, in the United States, the American Judicature Society's Model Code of Conduct for Nonjudicial Court Employees, available at www.ajs.org/ethics/eth_non-judic-employ.asp, the National Association of Court Management's (NACM) Model Code of Conduct for Court Professionals, available at www.nacmnet.org/codeofconduct.html, have served as guides for state courts since, respectively, 1988 and 1990, while the Judicial Conference's Code of Conduct for Judicial Employees, available at www.uscourts.gov/guide/vol2/ch2a.html, has governed behaviour of court personnel at the federal level since 1995. It should be noted that the NACM's Model Code was fully revised and reissued in 2007. For a detailed survey of court personnel codes of ethics throughout the United States, including overview of their structures, content, placement, format and enforcement mechanisms, see Karl E. Thoennes III, A National Inventory and Review of Ethics Codes for Court Managers and Staff (Institute for Court Management, 2007), available at www.ncsconline.org/D_Icm/programmes/cedp/papers/Research_Papers_2007/Thoennes_NACM-Code.pdf.

[22] See United Nations Office on Drugs and Crime, *Report of the Fourth Meeting of the Judicial Group on Strengthening Judicial Integrity* (Vienna, 27-28 October 2005) at 18-21, available at www.unodc.org/pdf/corruption/publication_jig4.pdf.

[23] Some of the countries that promulgated codes of conduct for non-judicial staff over the past several years are Bulgaria in 2003, Philippines (2004, available at philja.judiciary.gov.ph/alerts/2004/e-alerts_jun04.htm), Romania (2006, available at www.csm1909.ro/csm/linkuri/02_06_2006__4521_en.doc), Russia (2006, available at www.nacmnet.org/ethics/Ethics%20101208/Russian%20Fed%20Rules%20of%20Conduct0106Eng.doc), Serbia (2009), Ukraine (2009), and Kosovo (2010, available at www.kgjk-ks.org/repository/docs/Kodi_Etikes_Stafi_Gjyqesor_Eng.pdf). Specific court personnel codes of conduct also exist in countries as diverse as Morocco, Palau, Singapore and Tasmania.

impropriety, the acceptance of gifts, confidentiality, *ex parte* communications, diligent performance of official duties, abuse of position, and protecting the prestige and independence of the judiciary. These values reflect the desire to create a fair, efficient and impartial judicial service that assists the public and is loyal to the judiciary. Other issues are less common, but may still be important. Such issues may include post-employment restrictions, particularly on the disclosure of confidential information, personal financial disclosures for court employees with the authority to enter contracts on behalf of the court, outside employment, the proper use of public resources, the duty to report ethical violations, the provision of legal advice or attorney referrals, and the dress and manners of court staff while interacting with the public. In addition, many state codes of conduct in the United States, for example, include provisions regulating the political activities of court employees while at work and on public property; such regulations are often necessary where state court judges are elected on a partisan basis.

The code of conduct for court personnel should reflect the needs of the judiciary. While comparative study of codes from other jurisdictions will help provide ideas and develop understanding, simply adopting a model code or importing a code from another county is unlikely to be successful in creating an ethical court service. In order to ensure that a code of conduct is relevant to court employees and effectively addresses issues they actually face, court staff and other stakeholders should be included in the drafting of the code. In Romania, for example, the Code of Ethics for Administrative Staff of Courts and Prosecutors Offices was developed by a working group that included representatives of NSC (see discussion in an earlier section), the Ministry of Justice, the Bucharest Bar, the union of court clerks, and the Court of Appeal of Bucharest, among others. Before being promulgated, the draft code produced by the working group was used in NSC's trainings, in which participants were given an opportunity to debate and discuss the draft, and their feedback was incorporated into the draft in order to make it more useful to the clerks. In Bulgaria, the Code of Conduct for Court Clerks was promulgated by the National Association of Court Clerks, which remains responsible for its implementation and enforcement.

The ultimate goal of a code of conduct for court personnel is not simply the creation of new rules, but rather an ethical court staff that supports the judiciary in efficiently and impartially administering justice. Thus, before introducing a new code of ethics, its drafters should also consider what type of enforcement mechanism is most appropriate. Potentially, an ethics commission could be created to oversee and review ethics complaints against court personnel, or complaints against court personnel could be adjudicated by a judicial ethics commission. However, less extreme enforcement mechanisms, from simple administrative reprimands for minor infractions to discharging an employee who repeatedly or egregiously violates the code of conduct, are likely to be successful in most cases.

More importantly, if court personnel are aware of their ethical obligations and understand how to apply the code of conduct in practice, such a document can be successful even if it simply provides guidance to court employees. Training court employees in a new code is an essential method of informing them of their ethical obligations and ensuring the code is useful to them. Although lecturing court personnel can inform them of the contents of the code, to be effective, the training should provide employees the opportunity to understand how the code works in practice. This can be accomplished by utilizing interactive adult learning methodologies and providing realistic case scenarios that allow trainees to discuss practical application of the code.

The following case study demonstrates how a new code of conduct was created and put into practice through training in the Philippines.

Box 18. Developing and training Philippines court personnel on a new code of conduct

After assuming the position of Chief Justice of the Supreme Court of the Philippines in 1998, Hilario G. Davide, Jr. issued a policy statement on judicial reform which, in part, recognized the importance of upgrading administrative and management skills, strengthening ethical principles and moral values, and boosting the morale of court personnel. Chief Justice Davide also participated in the Judicial Integrity Group in 2003, when it first discussed a draft code of conduct for court personnel. Using that draft as a starting point, several revisions were introduced to tailor the code to the needs of the Philippine judiciary. The Supreme Court promulgated the Code of Conduct for Court Personnel in April 2004, and it took effect in June 2004. The Code applies to all court employees who are not justices or judges, and is divided into four canons: Fidelity to Duty, Confidentiality, Conflict of Interest, and Performance of Duties.

Shortly after adoption of the Code, the Philippine Judicial Academy (hereafter PhilJA) and the Supreme Court's Office of Court Administration partnered with the American Bar Association's Rule of Law Initiative to design a new training programme.[a] The trainings lasted two days, during which participants were first instructed in the content and rationale of the Code and then broken into small groups. The groups received a series of prepared case studies and were asked to identify any violations of the Code. This was followed by a discussion about the application of the Code to the case studies and more broadly, their jobs. Participants found the training informative and useful. Notably, some participants were unfamiliar with the concepts of impropriety and the appearance of impropriety before going through the training.

Overall, during 2005, the training sessions on the new Code reached out to over 10,000 court employees throughout the Philippines—nearly half of all personnel employed by the judiciary. Similar training continued throughout 2006-2007, and were supplemented by educational brochures and posters produced by PhilJA. The brochure[b] reprints the text of the Code and was distributed to all court employees and also made accessible to the public. The poster[c] shows three simple scenarios illustrating appropriate behaviour for court staff. They were distributed to courthouses throughout the country and hung in prominent locations so that the public could see them. Both the brochures and the posters were intended to remind court staff of their ethical obligations and to increase public awareness of what behaviour they should expect from court employees. In order to increase the judiciary's understanding of ethical principles, PhilJA is currently working on an annotated version of the Code. When completed, this document will be distributed to all court personnel in the Philippines.

[a]A sample training agenda, including an overview of session objectives and teaching strategy, is available at http://philja.judiciary.gov.ph/attachments/1_Judicial_Reform_Adocacy_Orientation_Workshop.pdf.

[b]Available at www.abanet.org/rol/publications/philippines_code_of_conduct_brochure.pdf.

[c]Available at www.abanet.org/rol/publications/philippines_code_of_conduct_poster.pdf.

6. Performance indicators and evaluation

Routine performance evaluations for court support personnel serve to set the standard practices established for administrative tasks and an individual employee's performance, in an effort to evaluate where the employee's services fall with regard to standards of efficiency, consistency, fairness and integrity. Evaluations can cover a broad range of issues, such as attendance, avoiding conflict of interest, respectful employee relations and effective work practices. Therefore, evaluations are important both for enforcing standard practices and for ensuring court personnel's awareness of and adherence to the established standards.

Important principles to consider in assessing the performance of court personnel include efficiency, consistency and honesty. These goals can be achieved through setting forth clear guidelines and standards for key processes germane to the performance of court personnel's functions. Standardization of administrative processes is also crucial, since it can help create a more capable administrative staff. For instance, establishment of standard practices for receipt, processing and communication of important court documents and procedures allows staff to become better informed on how to do the daily tasks of their job. Ultimately, this can contribute to greater consistency in the administration of justice, because all cases and tasks of one type are treated identically. Further, increased staff familiarity with clear and reliable standards can result in greater efficiency in the performance of their duties. Finally, standardization of processes can help highlight any deviations that may be due to dishonesty or corrupt practices. By establishing clear practices, time limits and rules regarding a court's administrative procedures, corrupt and unethical practices would eventually become more difficult to hide, especially at the more vulnerable lower administrative levels.

A good performance evaluation system for court personnel should be tied to remuneration or other incentive mechanisms, creating an avenue for rewarding positive behaviour and providing incentives for employees to correct problematic conduct before it comes harmful and requires disciplinary action. Some jurisdictions, for example, are utilizing the practice of having regular performance evaluations reviewed jointly by a supervisor and a court employee, so that an employee can be recognized for good work and can have full knowledge of what areas need improvement.

An informative example of a court system that has used various performance evaluation techniques to improve efficiency and consistency comes from a pilot court project in Colombia's Itagüí district, located outside the country's second largest city, Medellin.

Box 19. Evaluation, performance indicators and court personnel in Colombia

The courts in the Itagüí district (Colombia) provide an example of efficient and standardized administration of justice. The Itagüí programme began in 1989, when the local business association partnered with the judiciary to set up a programme of administration that would model the efficiency and client-oriented service techniques of business management practices. By 1995, new performance standards were set up to review and improve the initial goals and progress.

The courts divided tasks to improve efficiency, separating nearly all of the administrative support staff from the judges and centering them in a single Judicial Support Office (hereafter JSO). Within this office, new performance standards and goals were established for court personnel, and new training programmes emphasized these standards. Court personnel in the JSO manage all Itagüí courts, and all personnel must conform to the same standards. The system advocates setting clearly defined goals and standards and ensuring they are met through continuing training and periodic evaluations. The indicators are comprised of specified time limits for services grouped by type, such as document collection, filing, response and communication with court personnel. Evaluations are conducted both externally and internally by the courts, by means of document auditing and final reports. Evaluations allowed courts and judges to determine when administrative staff members were not performing their duties properly, as well as to gather data on staff efficiency and productivity. Further, the court system was computerized, enabling judges and JSO personnel to monitor and analyse current trends in case management at every stage of the proceedings. Subsequent surveys conducted among court personnel throughout Colombia revealed that the Itagüí court personnel were far better acquainted with their own performance standards and tasks than their counterparts in other parts of the country.

Box 19. ***(continued)***

By using standard indicators to assess performance of administrative tasks, the high degree of standardization and efficiency reached by Itagüí programme has received international recognition, having been awarded the ISO 9001 certification for standardization. These achievements were also acknowledged by the Supreme Court, which awarded the Itagüí system with its "Excellence in Justice" prize. The Supreme Court and other regional courts plan to implement the same methods of standardization and performance indicators used in the Itagüí courts in the next phase of the ongoing judicial reform in Colombia, scheduled to have been completed by 2010.[a]

[a]While the reform efforts were successful in decreasing the backlog and inefficiency of the courts, as well as improving public confidence in and awareness of court services, there has been some criticism that the system will not be applicable to all areas of the country, especially those lagging in economic development, which may be unable to support the unique cooperation between the private and public sectors seen in Itagüí.

7. Disciplinary action

Codes of conduct and performance evaluations for court personnel lose their purpose without corresponding disciplinary structures to address violations of these standards. Thus, developing a system where court personnel can be held accountable for violation of court rules, policies, codes of conduct or general unprofessional behaviour is an important element in creating accountability and encouraging professionalism within court administration, as well as improving court efficiency and capacity.

While there is no one correct way to institute disciplinary policies, good disciplinary procedures do have common elements. For example, a graduated system of progressive discipline is often used in order to ensure that any penalty that is imposed is proportional to the gravity of misconduct. This helps to create a disciplinary system that is fair and supports the larger goals of the organization. Along with written rules provided to court personnel that clearly state for what and how they can be punished, progressive discipline systems also provides due process protections from unfair practices, since the level of sanctions is already established and supervisors must follow a series of steps before the ultimate punishment of dismissal can be imposed. Court personnel should have the same due process rights as those who appear before the courts, and the disciplinary system should be fair and transparent to the employee. Once proceedings are instituted, the employee must be informed at every stage what the consequence will be if he/she fails to address the problem, and any disciplinary action must be based on fact and not arbitrarily meted out.

Other common elements of disciplinary systems include: *(a)* regular review and revision of the existing rules; *(b)* incorporating mechanisms that allow court personnel to appeal disciplinary measures if they feel that the sanctions are inappropriate or unwarranted; *(c)* providing training to supervisors on disciplinary procedures to ensure that the procedures are properly used; and *(d)* instituting grievance procedures to allow for resolution of employee-supervisor disputes and to hold supervisors accountable for violations of personnel rules. The case study below illustrates how these key elements are incorporated in court personnel disciplinary procedures that exist in various state court systems throughout the United States.

Box 20. Court employee discipline in the United States

Most state court systems in the United States utilize some variation of a graduated system of progressive discipline to hold non-judicial court employees accountable for unethical or unprofessional behaviour. Such systems differ in details; nonetheless, there have emerged a number of common approaches and principles, which are being increasingly incorporated into the disciplinary systems of different states. These themes can be summarized as follows:

Providing court personnel access to written disciplinary rules minimizes ambiguity and reduces chances of misunderstanding. For example, the Supreme Court of Nebraska adopted an official set of personnel policies and procedures that apply to all courts in the state and established the process for taking disciplinary action against court personnel. In California, there is no single set of procedures; instead, each county's superior court developed a court personnel plan based on general state guidelines that established the rules for court personnel and created procedures for discipline and removal from office. Some courts develop employee handbooks that clearly detail the standards court personnel are held to, the steps involved in the progressive disciplinary process, and the rights they have as employees at each of these steps. Poster campaigns, bulletin board notices and simple rule books are also used, the overall goal being that the rules are in written form and court personnel are well informed of the disciplinary process.

Regular review and revision/updating of disciplinary rules should involve staff at all levels of the judiciary, in order to ensure that the rules are reasonable and accessible to all court personnel. For example, Oregon's Judicial Department has created a system where all judicial employees have the ability to comment on proposed changes to the rules, and their feedback is then incorporated into the actual updates that occur every few years.

Good disciplinary procedures establish specific consequences for each type of misconduct, including what the first form of discipline will be. The first step in the process is typically an oral warning to the employee by the supervisor. If behaviour does not improve, the next step is a written warning that becomes part of the employee's personnel file. Some form of probation or possibly a limited suspension usually follows. Some courts then graduate to demotion or salary reduction, while others move directly to the final step—permanent dismissal from employment. Generally speaking, minor infractions such as tardiness will start at step one with an oral warning, while more serious infractions such as fraud or abusive behaviour will start at a higher step.

Incorporating appeal mechanisms as part of disciplinary policies helps enhance fairness. For example, Oregon's Judicial Department created an Appeals Board specifically for this purpose, which is made up of a trial court judge, a court administrator, a supervisory employee, and three non-supervisory court employees appointed by the Chief Justice for three-year terms. If an employee has appealed the sanction to the Appeals Board, the supervisor will bear the burden of showing that the employee engaged in improper conduct and the disciplinary action taken was justified and reasonable. If the Board disagrees with the supervisor after all the evidence has been presented, the disciplinary measure is overturned, and employee's personnel file is corrected to reflect this finding. Similarly, a grievance process, which covers rules violations by supervisors, can also serve as an appeals mechanism. This is the approach used in Nebraska, where employees have the ability to appeal disciplinary measures and rule violations or unfair treatment by supervisors through the grievance process. While not all issues are grievance matters, such as performance evaluations and salary rates, this mechanism serves as a possible disciplinary measure for supervisors and holds them accountable to the same standards as other court staff.

Box 20. ***(continued)***

Training of supervisors on disciplinary procedures is as important as educating court personnel on the standards they are being held to. Training should occur as new supervisors are hired or promoted, as well as periodically for all supervisors in order to ensure that the policies and procedures are well understood and implemented. For example, the Administrative Office of the Courts in New Mexico hosts training for all new supervisors, as well as seminars held throughout the year for all levels of the judiciary on personnel issues, including extensive review of the disciplinary procedures. This is essential when rules and policies are updated or revised, but is important even without revisions as it helps create a culture of professionalism and high standards among supervisors.

8. Professional associations

One means of building collegiality and esprit de corps among court support staff is to foster the creation of national associations of court administrators or court clerks. Such professional associations can play a key role in changing the perception court support staff have of themselves from an army of low-level and subordinate clerks to a group of professionals and quasi-professionals who promote the effective administration of justice. They also serve to raise the public perception and the judicial perception of the status of court support staff. Such associations provide their members with visibility and opportunities for service in supporting the mission and work of the court systems they represent. The oldest of these associations is the Federal Court Clerks Association in the United States,[24] which was established in 1922. Others include the Federal Probation and Pretrial Services Officers Association[25] and the National Conference of Bankruptcy Clerks.[26] Since that time, a variety of similar types of associations have been created on the federal, state and local levels in the United States. Associations also have been created in Canada[27] and in Australia and play a key role in strengthening and unifying the ranks of court personnel across their broad geography. Court support staff in Bulgaria formed their association in 2000, and its membership now numbers in the thousands. The newest is in Ukraine, where key support staff leaders from a number of courts located throughout the country, working with an international expert, obtained official government approval for and founded their association in 2009. Associations have also been created at the international and regional levels, such as International Association for Court Administration[28] founded in 2005 or the European Union of Rechtspfleger[29] founded in 1965. Such associations plan and conduct national and regional conferences designed to provide continuing professional education, to facilitate networking between staff from different courts, to exchange ideas and best practices, and to build strong national frameworks within which they create forums and interest groups to further their professional goals and objectives. Associations also serve as an organizational framework through which court staff collectively lobby for and promote their special needs and interests.

[24] See www.fcca.ws.
[25] See www.fppoa.org.
[26] See www.ncbcimpact.org.
[27] See Association of Canadian Court Administrators, www.acca-aajc.ca.
[28] See www.iaca.ws.
[29] See www.rechtspfleger.org. *Rechtspfleger* are high-level judicial civil servants who have been delegated to perform certain judicial functions independently, such as handling non-contentious matters, supervising the enforcement of judgments, or performing court administration functions.

9. Conclusions and recommendations

The importance of establishing and fostering a high-functioning, professional cadre of court personnel cannot be understated. In a way, court personnel represent the glue that holds the justice system together, and are critical in their interactions between the judiciary and the rest of the actors in the justice system, including attorneys, witnesses and—perhaps most importantly—the general public. It is therefore vital that adequate resources be allocated to the recruitment, training and retention of qualified professional staff to support the judicial institutions.

From this chapter, a few recommendations can be made:

- Efforts to strengthen judicial integrity and capacity should include measures to ensure and sustain the quality, motivation and continuity of skilled court personnel.
- Personnel management initiatives should be adopted to address issues such as transparent and merit-based selection and appointment systems, remuneration, career development and continuing training programmes, routine staff performance evaluations, merit systems and codes of conduct.
- Ensure that training programmes are developed in the context of the conduct of a training needs assessment and an operational analysis of the infrastructure of the court system.
- It is important that training programmes are not only relevant to court personnel, but can also be adjusted to fit the learning style of the trainees.
- A judicial reform programme that will result in new personnel or increased professionalization of court personnel needs to be supported by budgetary allocations that provide adequate salaries, benefits and workplace resources.
- In order to be credible, any incentives system for judicial personnel and court employees must be governed by a clear and transparent set of rules.
- Developing a specific code of conduct for court personnel can help to reinforce ethical standards and to create a culture of integrity in the court system.
- Any code of conduct for court personnel should reflect the needs of the judiciary, and not consist simply of a set of new rules, but rather the fostering and development of an ethical, efficient and impartial court staff.
- Developing a system where court personnel can be held accountable for violation of court rules, policies, codes of conduct or general unprofessional behaviour is an important element in creating accountability and encouraging professionalism.
- The creation of national professional associations of court administrators or court clerks can be one means of building collegiality among court staff.

III. CASE AND COURT MANAGEMENT

1. Introduction

The institutional framework within which courts historically operated placed little emphasis on sound management and administration. For a number of reasons, the past three decades have witnessed the introduction into court systems of a variety of management principles and practices oriented toward achieving increased productivity, improved case processing and reduced costs. This chapter highlights some of the more significant initiatives that have been undertaken in this regard and offers guidance and resources to court systems—and to judges and staff in those systems—which may have initiated such efforts more recently than others.

Indeed, justice systems may gain an important advantage by adopting such approaches. This chapter is organized in four sections: the first is on case filing, record keeping and, more generally, on information management. The second section deals with case assignment systems, critical for managerial and judicial perspectives. Section three discusses case management principles and procedures. Lastly, section four provides an overview of what information technology can do for improving the functioning of justice system paying attention to the many risks and difficulties related with this challenge.

In performing their tasks, judges, court administrators, clerks, police officers, litigants, lawyers and other key participants involved in the administration of justice require a variety of data and information. In court offices, information management has traditionally been supported by two basic tools: paper dockets and case folders. Typically, paper dockets are books containing the basic information of all the cases handled by a court. Case folders, instead, are usually paper folders collecting all documents related to a specific case, including records of hearings and transcripts. Such tools provide key information for both judicial and managerial decision-making. These tools also provide basic data required to enable court operations and parties' actions; they help ensure accountability, appropriate documentation, compliance with the law, and fairness of proceedings and of court decisions. Such judicial information systems, whether electronic or paper-based, are organizational and institutional tools that are critical to make the basic principles of due process of law effective. They must, therefore, be well organized and adequately secured by court officials to preserve and ensure their accessibility. The organization, resources and efforts that are required to keep all this material up-to-date, complete, consistent, secure and swiftly accessible to those who are entitled to it cannot be discounted.

Judicial information management entails also the publication of judgments through law reports and via the Internet. Such publication plays an important role in the functioning of the justice system. It is vital to proper case management and the development of jurisprudence that judicial officers should have ready access to judgments either in physical or electronic form both at the national and international levels.

Recently, the growing deployment of information and communication technologies (ICT) in justice systems has had a strong impact on information management. As a consequence, information management is becoming more and more technologically supported and

enabled.[30] Nevertheless, the availability of such technologies is not a prerequisite for an effective management of cases and courts. Indeed, the main rules and guidelines for case and court management are the same with both traditional and electronic enhanced systems. Therefore, this chapter will begin by discussing general issues (case assignment and case-flow management—section 3 and 4) while those specifically related to ICT will be considered in a further stage (section 5).

Court managers

One of the consequences of an increased resort to the formal judicial system is the corresponding change to the role of the judge as well as the head of judicial administration, often called a "court manager" or "registrar." Case management, performance evaluation and technological developments increase the organizational complexity of courts and require new professional skills and abilities that do not necessarily fit the traditional professional profile or job description of judges. This led to the increased prominence of the position of court administrator that in many jurisdictions has authority over all non-judicial court management and administration functions. More specifically, functions that are typically assigned to such court executives or managers include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, emergency preparedness planning, and employee discipline in addition to the ministerial and judicial support functions. These new court professionals liberate the chief judges of the courts from having to invest considerable time and energy on non-judicial functions for which they have not been trained. As a consequence, chief judges of the courts can focus on the judicial functions for which they have been trained and can work to implement more far-reaching strategies aimed at guaranteeing a high quality of judicial decisions and dispute resolution. Finally, since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office.

2. Case assignment procedures

Court systems vary in the procedures they utilize to assign cases to judges. Some countries task the court president, or the head of the court section with the responsibility for determining the distribution of cases. In other courts, case assignment is a function managed by court administrators or court clerks rather than judges. Another option is the random assignment of cases. Random systems may be either manual or automated. Finally, case assignment can be based on informal criteria, such as long-established court practices or more formal rules and laws governing the court. Whichever method is chosen, the procedure to assign cases to judges is strictly related to key values such as independence and impartiality, transparency, efficiency, flexibility, equal distribution of the caseload, and quality in judicial decision-making.

[30]Velicogna, M. (2008). *Use of Information and Communication Technologies in European Judicial Systems.* Strasburg: CEPEJ.

The use of a model based on judicial specialization may result in efficiencies, but may also result in an unbalanced caseload among judges or reduce the flexibility of the court.[31] A random case assignment procedure can fulfill transparency and avoid the risk of "judge shopping"[32] and therefore increase the integrity of the system. It is therefore advisable in judiciaries that are affected by problems of corruption and a low level of public trust. At the same time, it may imply a low degree of specialization of judges, resulting in a reduction of efficiency. As a consequence, the tensions among these values must be balanced in the light of the specific features (and problems) of each judicial system.

Thus, case assignment systems are designed in accordance with the relative importance given to any of the above judicial values. Case assignment systems can, therefore, be:

- Random or deliberate,
- Performed by a computerized system or by organizational actors (the head of court, the court clerk, etc.)
- Informal or formal (using pre-established criteria)
- Rigid or flexible

The specialization of judges in various subject matters, and mechanisms to guarantee adaptations and flexibility to deal with changes in court caseload are other design criteria to be considered. In any case, it is of paramount importance to achieve a high degree of internal and external transparency. This is the baseline to identify and correct possible wrongdoing and sustain the legitimacy of the courts. The involvement of lawyers, bar associations and public prosecutor offices can help in the design and monitoring of such critical systems.

Whatever case assignment model is adopted by a court system, criteria and procedures for the recusal or disqualification of a judge from a case based on a code of conduct and related considerations should be institutionalized by law or regulation.

Case assignment is one of the core issues of court management and it can directly affect the length of proceedings. A flexible case assignment system helps the court to better adapt to unforeseen changes in the caseload. In this respect, a judicial "task force" or a "flying brigade" may be used (see the Dutch case in the box below). Also, in countries in which the allocation of cases to judges must be based on rules fixed in advance, it is possible to create some flexibility in order to face unexpected changes in caseload or heavy caseloads. For example, a court might adopt more flexible standards regarding territorial jurisdiction, or subject matter and value criteria, to achieve a more effective allocation of cases among different courts. Flexibility in the allocation of cases can also help to avoid unreasonable delays caused by the transfer of judges from one court to another.[33]

[31] Langbroek, P., and Fabri, M. (2007). Internal case assignment and judicial impartiality: comparative analysis. In P. Langbroek and M. Fabri (Eds.), *The right judge for each case. A study of case assignment and impartiality in six European judiciaries.* Antwerp: Intersentia.

[32] Judge shopping has been defined as "an effort by a lawyer or litigant to influence a court's assignment of a case so that it will be directed to a particular judge or away from a particular judge." Steelman, D. C. (2003), *Judge shopping and random assignment of cases to judges.* Williamsburg, Va.: The National Center for State Courts.

[33] European Commission for the Efficiency of Justice (CEPEJ) (2006), *Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights,* Strasbourg: European Commission for the Efficiency of Justice.

Box 21. Case assignment in European jurisdictions

Different case assignment procedures entail peculiar balances between different and sometimes contrasting organizational needs and institutional values. Rather than presenting a full case study, it is therefore advisable to briefly consider a range of case assignment procedures adopted by selected European countries.

England and Wales—England and Wales have a very informal and peer-based (horizontal) system for assigning cases to judges. Case listing is in the responsibility of the judges to avoid external and governmental influences that would also reduce the strength of protection afforded by habeas corpus. Case assignment is performed by the same judges. The judges allocate cases lodged at their court among themselves, while the head of the court does not play any role in the process.

A "weighted caseload system" is used to balance the caseload. In both civil and criminal matters, advocates are asked to estimate the time required for hearings and trials of the case they file. In general, in all courts the assignment of an individual judge to a case is dependent on two factors:

- His/her specialization or skills and expertise, and
- His/her availability and commitment to other cases.

Thus, for example, every criminal case involving a serious sexual crime can only be assigned to a judge who is trained and authorized for such cases. The heaviest criminal and civil cases are tried by high court judges, who go out from London into the country to hear them.

The Netherlands—The assignment of cases to the different sectors of the court is a task of the management board of the court. Cases are assigned to judges within a sector on the basis of: kind of procedure (summary/normal), specialization, judicial continuity and randomness (using the alphabet, postal code, etc.) in that order of priority. This procedure is automated, but in each sector a coordinating judge is responsible for the management of the distribution of cases among judges.

Some flexibility in court operation is granted by a special task force called the "flying brigade." The flying brigade was introduced to help the courts to reduce their stock cases in civil law and municipal sections. The courts instead send their cases to a centrally located unit in the Netherlands. In this unit, judges and court staff prepare draft-decisions. After finalization of the draft-decisions, the documents are sent back to the courts. Following the introduction of the flying brigade, nearly 8,000 draft-decisions were made by this unit in 2000. The unit itself is composed of 6 judges and 30 court staff employees.

Italy—In Italy the case assignment system is highly formalized and based on formal criteria, approved and enforced by the judicial council.

The role of the chief of the court is very limited. The chief proposes a written plan for the allocation of judges to the different units and the criteria for assigning cases to sections and individual judges. As a rule, the criteria for the assignment of a case to a particular judge are random (initial letter from the claimant/defendant, day of filing). The court's judges are involved in the process of definition of the plan and can propose amendments, different case assignment criteria, etc. The Judicial Council, after a long decision-making process, amends and approves it, and then supervises its application.

This complex process has been established to guarantee pre-established rules for assigning cases to judges in order to avoid judge-shopping and to guarantee a fair distribution of cases among judges. However, it generates strong rigidities affecting court effectiveness and the pace of litigation.

Sources:

Langbroek, P., and Fabri, M. (Eds.). (2004). *Case assignment to courts and within courts.* Maastricht: Shaker Publishing.

Langbroek, P., and Fabri, M. (Eds.). (2007). *The right judge for each case.* Antwerp: Intersentia.

Another key element strictly linked with case assignment is the calendar system. In court parlance, a calendar system refers to the manner in which responsibility for processing the case is handled.

Courts primarily make use of three main calendar systems: individual, master or hybrid.

- *Individual calendar system*: A judge is solely responsible for each case assigned to him or her from filing to disposition.
- *Master calendar system*: The responsibility for processing each case is apportioned among several judges, each of whom handles a portion of the processing task. For example, one judge might handle the preliminary proceedings and planning. Once that task is completed, responsibility for the next stage of the proceedings in the case is handled by a second judge. When that second judge has completed that stage, the case is passed on to a third judge for yet another stage of the proceedings, and so on until a judgment has been issued and the case is closed.
- *Hybrid calendar:* this model relies on elements of both the individual and master calendar systems in various combinations applied during one or more steps of the proceeding.[34]

The rationale for an individual calendar system is that where a judge is singularly responsible for adjudicating the case from start to finish, that judge will assume a more proactive role in ensuring that it does not languish, resulting in delays for which he or she will be held accountable. The master calendar system is based on the assumption that, because of functional specialization and the increasing complexity of the law, it is necessary to have judges specialized in a portion of the proceeding. At the same time, coordination costs and organizational complexity increases compared to the individual system. Some empirical research has shown that an individual calendar results in faster handling of proceedings, especially for civil cases (see the case study about the Individual Docket System).[35]

3. Case management systems

Traditionally, many court systems have let the parties to a case control the pace of the litigation process. The assumption is that the parties can thereby take the time they need to adequately prepare and present their respective positions. The role of the judge is to supervise the interactions between the parties and to assess the evidence and arguments the parties provide in support of their claims.

In the last 30 years, this approach has been challenged. In many jurisdictions judges have started to play a more active role in case management. Indeed, with the increasing workload, the traditional approach does not seem to be adequate anymore. To support this stance, a wide variety of case-flow management tools and approaches has been developed.

Case management has been defined as "the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work, to make sure that justice

[34]Solomon, M., and Somerlot, D. K. (1987), *Caseflow Management in the Trial Court: Now and for the future,* Chicago: American Bar Association.

[35]Thomas Church, J., Carlson, A., Lee, J.-L., and Tan, T. (1978). *Justice Delayed. the pace of litigation in urban trial courts.* Willamsburg, Va.: National Center for State Courts.

is done promptly."[36] In sum, it requires the control and active management by the court of the case progress. Therefore, it is a means to pursue the institutional mission of resolving disputes with due process and in a due time. Case management is relevant also for those courts that are not currently experiencing delays or backlogs. The effective use of case management techniques and practices improves the efficiency in the use of justice system resources, hence reducing the costs of justice operation. By reducing the time required for resolving disputes, the appropriate use of case management may also help build public confidence in the effectiveness of the courts and the accountability of judges.

Case management entails a set of principles and techniques developed largely in the United States in the last thirty years, and adopted successfully in a growing number of countries of both common and civil law tradition. These principles emphasize the active role of judges and court staff in managing the flow of judicial proceedings. However, case management is not just a question of adopting new rules and techniques. In countries where there is a strong tradition of control over proceedings exercised by lawyers (and public prosecutors), the successful adoption of such techniques requires more profound and difficult changes related to the professional identity of judges and lawyers. Therefore they require long-term stakeholder engagement and articulated change management strategies that will not be addressed in this section. Selected case management techniques are highlighted below and illustrated in the case study.

The court's control over cases entails the implementation of two different principles: early court intervention and continuous court control of case progress.

- *Early court intervention* requires that judges familiarize themselves and impose management controls immediately after the case is assigned to them. This can involve giving directions to the parties as soon as possible, case conferences to set up the case calendar and summary hearings.
- *Continuous court control of case progress* means that judges continue to exercise such controls and monitor case progress and activity throughout the life of the case.

The burden of continuous monitoring can be eased where courts have in place effective case information management systems, either manual or electronic, and where judges can rely on the assistance of key staff. An effective case information system, for example, will provide details on the status of the case, including deadlines imposed by the court and whether the litigants are complying with them. Having qualified staff to assist the judge in the case administration and monitoring process relieves judges of those administrative responsibilities and enables them to focus on their judicial functions.

ICT can certainly help with the automated controls handled by case management systems. In this way, it is the same filing that triggers control procedures such as the identification of the next procedural steps and sends messages if the expected action is not undertaken. However, active court control can also be performed with more traditional instruments. The implementation of these principles has been shown to speed up litigation, to increase the number of cases resolved before trial, and to reduce the number of inactive pending cases as shown by the case study from Australia reported below (see box 24).

The case of Tonga (box 22) illustrates a number of simple measures addressed at improving the physical management of files, the implementation of basic principles of judicial administration and case management, and appropriate training programmes that can lead to a concrete improvement.

[36] Steelman, D. C. (2000). *Caseflow Management. The Heart of Court Management in the New Millennium.* Williamsburg, Va.: National Center for State Courts.

Box 22. Case management in Tonga[a]

In late 2004, the Chief Justice of the Supreme Court of Tonga made a commitment to expedite the disposition of cases and implement a more efficient system for managing cases. At the time, the Court suffered a relatively large backlog of cases.

The process began in 2005 with an external review of the Court's case management system which found a number of inefficiencies in the process. Recognizing the significant financial and human resource constraints the Court is required to work within, it was necessary to develop and implement reforms that were inexpensive and easy to use. Based on a commitment to six principles of judicial administration, which were regarded as important to the Court, the reform plan was developed. These principles were:

- Judicial commitment to proactive caseflow management
- Establishment of time limits within which cases will be determined
- Court control of the pace of litigation
- Minimization of adjournments
- Trial date certainty
- The establishment of a system to measure performance and avoid delay

The first step in the process was an audit of the case backlog which identified the types of cases that were taking longer and why. The Court then developed a strategic plan to tackle the backlog commencing with a call-over of all cases to determine which cases were still active and required determination. All active cases were listed for hearing, trial or mediation.

Following this, the Court considered the reasons why cases were not disposed of within a reasonable timeframe. The primary reasons they found were:

- Trial and/or next hearing dates not being fixed or being easily adjourned without good cause,
- Inconsistent and incomplete collection of case data,
- A lack of regular reporting on the age and status of cases, and
- Files being misplaced and missing essential information such as court orders.

To address this, the following measures were taken:

- Judges refrained from permitting adjournments unless proceeding as scheduled would unreasonably disadvantage one party or otherwise cause injustice.
- A simple computer-based case management system was developed using an Excel spreadsheet to record case information.
- Registry staff received training on the collection and input of case data along with how and when to update the electronic files.
- A secure file room was built to maintain the integrity of the files and to prevent them being misplaced. The file room was equipped with two computers which were networked to the other computers within the registry. This enabled all registry staff to view the Excel spreadsheet and to therefore have access to updated information about the status of any case.

In the first six months following installation of the new case management system, the Court's backlog was reduced significantly. The World Bank's *Doing Business 2008* Report further shows that the duration of contract dispute processes has fallen to 350 days (32 per cent), and the cost of the proceedings has fallen to 30 per cent of the claim (17 per cent). The 2008 report places Tonga as the number one reformer globally as measured by the "Enforcing Contracts" *Doing Business* indicator—its ranking rising 26 places to 58th in the world. This improvement was largely attributed to the case management reforms instituted by the Court.

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[a]This case study was provided by Ms. Helen Burrows, Director, International Programmes, Federal Court of Australia.

4. Differentiated case management (DCM)

DCM changes the chronological concept of handling the cases in the courts. The traditional system of handling cases is based on one procedural track and "first-in, first-out." Judges would deploy the same general processing tools and protocols for all cases, regardless of their relative complexity and the amount of judicial time required to attend to them. More recently, a new approach has been developed to have different procedural tracks based on the complexity of the case and the amount of judicial attention required. This led to the creation of alternative procedural tracks. Each track is organized in different events and timeframes to reflect the range of case processing characteristics and requirements presented by the caseload. In this way, a small claim and a more complex civil case follow different procedures suitable to their different complexities.

A typical DCM system comprises three processing tracks: small claims, fast track, and complex or multi-track.[37] Each case is classified on the bases of its complexity (amount of attention it needs from judges and lawyers, value of the case, characteristics of the procedure, legal issues involved), and assigned to one of the tracks. In this way, simple cases following the small claims or the fast track can be disposed of quickly, with minimal judicial attention. Complex cases with multiple legal issues, complex fact situations and multiple parties are instead processed via the complex track where they receive the more intensive and sustained judicial review their adjudication requires.

If a court elects to implement a DCM programme, one of the key features that should be included is an early court review of each case shortly after it has been filed. The screening criteria to assign each case to the correct track should involve the parties and be based on fixed criteria. Lawyers and public prosecutors may be called to play an active role in supporting a DCM system by contributing to the screening of the cases. For example, in many jurisdictions, lawyers must indicate the weight of each case at the filing stage in order to inform the court and the other parties about the expected complexity. In any case, the final assignment to a track is made by the court.

Since there are different ways to process each case in each track, the judicial workload and calendars can be better managed. The courts have substantive information about cases earlier in the process. Court personnel can be better allocated on the basis of the caseload for each track.

5. Pretrial and trial management

The manner in which courts manage the scheduling of formal case events may differ between and even within judicial systems. From a very general perspective, trials can be clustered in two types:

- "Concentrated", with a continuous sequence of hearings. This type of trial tends to be more oral than paper-based.
- "Piecemeal," based on a sequence of separate hearings, each of which may deal with one or more elements. This second kind tends to be more paper-based than oral.

Both models can be improved through the use of pretrial and trial management techniques. The trial process, whether concentrated or piecemeal, absorbs significant quantities of

[37] www.dca.gov.uk/civil/cmpaper/cmchap2.htm.

judicial and court staff time. To the extent that management techniques and practices are introduced into the trial process, a variety of efficiencies can be achieved. The American Bar Association adopted trial management standards in 1992 which advise judges "to be prepared to preside and take appropriate actions to ensure that all parties are prepared to proceed, the trial commences as scheduled, all parties have a fair opportunity to present evidence and the trial proceeds to conclusions without unnecessary interruptions."[38] Since then, a number of judiciaries around the world have adopted similar guidelines.

As an example, The Practical Guide to Court and Case Flow Management in the Lower Judiciary in South Africa provides indications for judges and all the other institutional actors involved in criminal justice administration. The guide include a number of principles and practical guidance specifically tailored to the different actors involved in criminal proceedings (judges, prosecutors, lawyers, staff, etc.) to foster the application of an integrated case flow management system, and the efficient operation of criminal justice.[39]

Box 23. Pretrial management practices

Judges can utilize a variety of pretrial management practices and procedures to facilitate effective case processing. Such practices and procedures are most valuable for the more complex and technically challenging cases, but also can be used for general caseflow management. They include, but are not limited to, the following:

Require the parties to meet and confer:

After the case has been assigned and reviewed, the presiding judge may require the parties to meet and confer in advance of the planning and scheduling conference. In such instances, the judge should provide the parties with an outline of what they should discuss, what conclusions they should reach, what commitments they are willing to make with regard to scheduling, what issues they agree comprise the core of the dispute, and the extent to which they believe settlement discussions may be fruitful. The parties are required to jointly prepare a report for the court outlining their discussions and their responses and to submit such report to the court prior to the planning and scheduling conference.

Schedule and conduct a planning and scheduling conference:

Shortly after a new case has been filed, the assigned judge schedules a pretrial conference in which an authorized representative for each party is required to participate. At that meeting, the judge will discuss with the representatives the major legal issues, the amount of time each party will require to present its case, the number of witnesses each party anticipates, how much time each party will require to prepare for the trial, and so forth. During this conference, an experienced judge will be able to narrow the number and complexity of the dispute to the core legal issues, eliminate repetitious witnesses, and reduce the amount of time required both to prepare for and to execute the trial process, whether one continuous hearing or a number of hearings. If the parties have previously been required to meet and confer, the judge will review their report with them.

Review the potential for settlement of the dispute:

During the planning and scheduling conference and thereafter until the trial process commences, the judge will advise the parties to seriously explore settlement of the dispute. Where the parties indicate interest in pursuing settlement negotiations but request the assistance of the court, the presiding judge or another representative of the court is available to facilitate settlement.

[38]National Conference of State Trial Judges (U.S.) (1992). Trial management standards recommended by [the] National Conference of State Trial Judges. Chicago: American Bar Association.

[39]www.justiceforum.co.za/practical_guide.pdf.

Box 23. *(continued)*

Establish a firm and credible trial date:

During the planning conference or otherwise, the judge will engage the parties in a discussion to establish a firm date on which trial proceedings or hearing will commence. The parties will understand that *(a)* the date will not be modified or postponed except in very rare circumstances, and *(b)* the trial process will commence on that date whether or not they are fully prepared.

A recent product of the Commission for the Efficiency of Justice of the Council of Europe (CEPEJ) focuses on the management of timeframes: inter-organizational and operational tools, established to set measurable targets and practices for timely case proceedings.[40] Inter-organizational means that since the length of judicial proceedings and the actual management of cases are the result of the interplay between different stakeholders in information chain: (judges, administrative personnel, lawyers, expert witnesses, prosecutors, police, etc.), timeframes have to be goals shared and pursued by all of them. Operational tools means that there are targets to measure to what extent each court, and more generally the administration of justice, meets the timeliness of case processing, fulfilling the principle of fair trial within a reasonable time as stated by the European Convention on Human Rights. Therefore, the setting of timeframes is a necessary condition to start measuring and comparing case processing delays, which will be the difference between the actual situation and the expected timeframes, and to assess the policies implemented to reduce the lengths of case processing. Policies and practices are then classified into five main groups:

1. *Setting realistic and measurable timeframes:* In consultation with all stakeholders, realistic timeframes need to be set for key procedures at the levels of the justice system, the court and individual judge.

2. *Enforcing timeframes:* A notification system should inform managers and judges when pending cases pass the timeframe; external pressures need to be established with a view to ensuring compliance within and across justice sector institutions. Compliance with timeframes needs to be understood as a shared responsibility between court and stakeholders. Strong commitment and leadership promoting compliance with timeframes at the court level and a clear distinction and integration of organizational functions between heads of court and court managers are essential.

3. *Monitoring and dissemination of data:* Closely linked to the above is the issue of collecting data and monitoring overall court performance with a particular focus on "standstill" times due to inactivity of the parties and/or the courts.

4. *Procedural case management policies:* Where monitoring detects recurrent sources for procedural delays, changes in case management policies need to be taken into consideration. Such policies may help to enhance the active case management role of the judge, impose strict limitations on adjournments, encourage early meeting of the parties with a view to facilitate amicable settlement or prepare cases for trial and allow differentiated case-management in accordance with the complexity of cases.

5. *Caseload and workload policies:* Such policies range from the forecast and monitoring of caseload and workload capacity of the courts to initiatives addressed to encourage alternative dispute resolution and an early settlement between the parties, to set up filtering and deflective tools to limit the number of cases to be filed in courts (diversion techniques), and to increase the use of a single judge instead of a panel.

[40] CEPEJ (2006), Compendium of "best practices" on time management of judicial proceedings.

In many jurisdictions, case management is still new (or unknown) not just in terms of practice, but also in terms of basic knowledge about its principles. The assessment of training needs for both judges and staff is the first step to addressing this knowledge gap. Following this, specific education and training programmes must be designed to develop case management programmes and bring the key concepts into the courts.

6. Justice chain: coordination of institutions

Case management principles and techniques introduced above are also fully applicable to criminal procedures. However, the specificities of the criminal justice sector have to be considered because they generate additional layers of complexities to be managed. In the criminal justice sector, successful case-flow management requires the interplay between different institutions: court, public prosecutor office, bar association and to a different extent the police, and the prison and probation services. Each one of these institutions is typically quite autonomous (in many cases independent) from the others and has different priorities and institutional goals to achieve.

If a court can develop its own policies (at judicial or administrative level) without the collaboration of the different agencies, it is clear that a practice of collaboration and the capacity to work for solutions shared among the different agencies and stakeholders, especially at the case management level, can be useful for improving the quality of justice and the timeliness of proceedings in both civil and criminal proceedings. As noticed by CEPEJ, the involvement of stakeholders in timeframe and case management policies has several positive consequences: it helps to build the commitment among all the key players, it creates a proper environment for the development of innovative policies, and it points out that the responsibility for timely case processing is not just in the court operations but also includes other players.

On the other hand, there is a need to maintain the independence of many of these institutions from each other as well as from the Government (to protect the rights of the defendant and the interests of justice). Therefore, coordination cannot be promoted through the centralization of control. It is therefore paramount to develop strategies to foster cooperation through other means. The use of liaison groups and round tables with the participation of key representatives of the various institutions to discuss specific topic and propose concerted solutions has been one of the more successful approaches to avoid zero-sum strategies.

Box 24. The individual docket system of the Federal Court of Australia

The individual docket system (IDS) was adopted in all Federal Court registries on 1 September 1997 to improve the pace of litigation and reduce delay. A common problem was that cases were slow and expensive because interlocutory hearings were fixed before different judges and each judge had to be educated on the facts and issues in the case. In addition, each interlocutory hearing offered lawyers a chance to re-open matters already ruled on in favor of the other side.

The new system managed to make gains in time and cost resulting from the docket judge's familiarity with the case. In particular, the system seeks to eliminate the necessity to explain the case afresh each time it comes before a judge.

Box 24. *(continued)*

The new system calls for:

- Consistency of approach throughout the case's history.
- Reducing of the number of hearings and other events requiring appearances before the Court.
- Discouragement of interlocutory disputes or, alternatively, swift resolution of those disputes.
- Better identification of cases suitable for mediation.
- Earlier settlement of disputes.
- Early fixing of trial dates and maintenance of those dates.

The case management approach—The new system is based on several case management techniques described above and is designed to encourage the just, orderly and expeditious resolution of disputes as well as to enhance the transparency of judicial proceedings.

The general principle underlying the individual docket system is that each case commenced in the Court is to be randomly allocated to a judge, who is then responsible for managing the case until final disposition. Cases in specific areas such as intellectual property, taxation, trade practices, human rights, admiralty and industrial law are randomly allocated to a judge on a specialist panel.

Early court intervention and continuous court control of case progress with a strong role for judges allows them to deal effectively with the critical areas of litigation, such as defective pleadings, excessive discovery of documents and other tactics frequently applied by lawyers to delay the case or frustrate legitimate claims.

IDS identifies key events of court proceedings such as hearings, case management conferences, evaluation conferences, trial management conferences, hearings and timeframes in which each of these procedural events must occur.

The key features of a docket system therefore involve:

- The handling of the case by the same judge from beginning to end;
- The early fixing of a near-immutable trial date;
- Case management by the judge himself fixing the timetable and giving relevant directions in the pre-trial period;
- The judge trying the case if it goes to trial.

In addition, IDS helps to identify individually tailored directions, procedures and listings for each case and monitoring of compliance with orders. The "docket judge" monitors compliance with directions, deals with interlocutory issues and ensures that hearing dates are maintained.

Judges allocate hearing dates for matters in their own dockets. If a party has a concern about a delay in either obtaining a hearing date or in the proposed date allocated, they should raise the concern with the docket judge.

Results and fine tuning—The Federal Court and lawyers report improvements in case processing times since the introduction of IDS. The Commission consulted with several hundred practitioners from around Australia, experienced in Federal Court litigation, with expert witnesses, some litigants and judges and administrative staff from the Court. Submissions and consultations were overwhelmingly supportive and complimentary of IDS, "discouraging unnecessary court appearances, making interlocutory hearings more productive, allowing the early exchange of information, and narrowing issues in dispute; and helping to make case resolution more efficient and effective, including appropriate referral of cases to mediation."

Also two problems were identified for "fine-tuning": the occasional difficulty in getting a hearing before a busy docket judge, and the variable case management practices evolving as individual judges develop their own management styles and practices.

To face this problem, the Australian Legal Reform Commission proposed interventions to reduce the registry differences (regular revision of the Federal Court's procedural guides) and better listing practices.

Sources:

www.alrc.gov.au/about

www.austlii.edu.au/au/other/alrc/publications/reports/89/ch7.html#Heading4

www.lawfoundation.net.au/ljf/app/&id=FC6F58E7087776C0CA257043001BC12A

Sage, C., Wright, T., and Morris, C. (2002). *Case management reform: a study of the Federal Court's individual docket system.* Sydney: Law and Justice Foundation of NSW.

7. The emergence of electronic information systems

In the last 30 years, information and communication technologies have played an increasing role in justice service delivery. In too many cases, the attitude toward ICT has been characterized by one of two opposite viewpoints: on the one hand, scepticism and resistance, and on the other hand, an unquestioned faith in the capacity of technology to automatically solve problems of many different natures. Technology is neither a threat nor a universal remedy. Rather, technology offers opportunities for reconfiguring the functioning of justice that cannot be grasped without complex changes at the procedural, organizational and often cultural levels. The experiences of first movers show that the road toward ICT is long and difficult. In the federal system of the United States, for example, the transition from a paper-based to the fully electronic case information management system, including electronic filing and noticing, occurred progressively over a period of roughly 25 years.

Typical limitations still affecting running technology systems in many developed countries after years of investment include the following:

- ICT focuses primarily on registry (dockets automation) and administrative functions and does not provide the tools to assist the judges in managing and hearing cases;
- Required data need to be re-entered multiple times across multiple systems;
- Case tracking and management systems developed on a range of different databases and software platforms;
- ICT applications require users to log-in multiple times to multiple systems;
- ICT applications do not present a consistent interface and feel across the different software programmes used by the Court;
- Information is retained in silos with no functional or information link and data exchange between systems.

More generally, the introduction of ICT bears the risk of large investments with little impact; as a consequence, ICT policies should assess these serious risks of failure:

Technology areas—Whether electronic or paper based, court information systems must be able to provide large amount of information, rapidly and economically, to a broad range of users. Information and court records must be kept up to date, accurate, prompt

and easily accessible. While these prescriptions are quite obvious, their fulfillment on a daily basis is always difficult to reach. The following case of technological developments in Finnish courts highlights how successful strategies entails also a sound ICT governance structure, robust technological infrastructure and focused legal and procedural changes.

Box 25. Information and communication technology in Finnish courts

Governance—The Judicial Administration Department of the Ministry of Justice of Finland is in charge of ICT infrastructures, networks, protocols, standards, applications development and management within the agencies of the administration of justice (i.e. prosecutor's offices, courts, prisons, and enforcement agencies). ICT governance is centralized, with two goals: standardizing the information provided by the courts and integrating the different ICT systems in the justice system; and enabling the exchange of data within the public sector and between the judiciary and the general public.

The strategies of data administration are decided in the steering committee of the Judicial Administration Department, and then reported to the Minister for the final decision. When the matter is technical, the Department is assisted by the Data Administration Bureau of the Ministry, which is a semi-independent service unit. Some technical activities are usually outsourced to private companies.

Infrastructures—The basic ICT infrastructure services of each justice office include a local area network, personal computers for all personnel, office software (OpenOffice), intranet services (e.g. a legal information data base, rules of civil and criminal procedure), a case management system, e-mail, Internet access, and access to the so-called basic registries. These registries collect various data such as: information on natural persons (Population Register System), companies and associations (Business Register System), property (Real Estate Information System), buildings and houses (Building Register System), physical communication networks (roads and railways), and the natural environment. These registers are the backbone of the public administration ICT system. The core of the basic registers is the standardized code system, i.e. the personal identity number, which is created for every Finnish citizen at birth, and the real estate ID code, which is used for all real estate transactions. On the one hand, this allows effective communication and exchange of data between the systems; on the other hand, it presents a challenge to the protection of privacy.

ICT developments enabled by procedural changes—In the 1990s, during the planning of the new civil procedure in Finland, it was realized that the most numerous cases would be simple, undisputed money claim/debt-recovery cases. If the claim was contested, the procedure could continue in a preliminary hearing but most of them were undisputed or the evidence submitted was so clear that the decision could be taken summarily based on the available written evidence (it was estimated that this covered about 90 per cent of them). Therefore it was clear that this highly repetitive bulk of cases could easily be managed by, and would benefit from, an automated case management system. During the planning stage it was noticed that information systems in banking and commerce contained basically the same information as the data required by the courts, so this information, which was already in electronic form, could be used in the case management system. In order to use an automated tool, there were two obstacles in the legislation: the requirement of an original signature and the submission of paper documents, both of which were overcome with legislative changes. In the new civil procedure, it was decided to change the previous rules so that the plaintiff in a money claim is not required to submit the written evidence (i.e. an invoice) to the court as long as it is specified in the written application. This meant that the original document did not have to be sent to the courts, and the documents transmitted did not need to be signed in the traditional way. Therefore the application could be transmitted to the courts electronically by fax or e-mail, starting a multi-channel system to lodge cases in the courts.

Thanks to the new civil procedure rule the ICT application received a boost and two applications were implemented. The key point was that the new legislation made it possible to use electronic data extensively, and software was introduced immediately after the rules were changed: Tuomas, a robust new case management system, and Santra, the electronic file transfer system, took full advantage of this opportunity.

The Tuomas system, which was originally designed for summary proceedings, is now used for all types of civil cases and about 200 standard documents used by the courts have been integrated in the system. It is also used to notify the Population Register System of various data relating to divorce, child custody and adoption cases electronically, saving about 30,000 forms a year, and saving the Population Register Centre from having to update its systems manually. A similar positive situation has been developed with regard to the Bankruptcy Register, which is also used by credit companies. The updated and automatic sending of relevant information to this registry has eliminated the cumbersome need for the courts to provide this information by telephone.

Sources:

Karjalainen, M. (2007). *Migrating a Ministry to OpenOffice.org.* Helsinki: Ministry of Justice, Finland.

Kujanen, K., and Sarvilinna, S. (2001). Approaching Integration: ICT in the Finnish Judicial System. In M. Fabri and F. Contini (Eds.), *Justice and Technology in Europe: How ICT is Changing Judicial Business.* The Hague, The Netherlands: Kluwer Law International.

Kujanen, K. (2008). The Positive Interplay between Information and Communication Technologies and the Finnish Public Prosecutor's Offices. In M. Fabri (Ed.), *Information and Communication Technology for the Public Prosecutor's Offices.* Bologna: Clueb.

At present, a number of technologies can support different areas of court operation. On the one hand, such technologies have been used for the automation of administrative tasks (case tracking, case management system, office automation). On the other hand, ICT has been designed to support the judges' operation, in particular their judicial decision-making and to offer to lawyers and citizens access to statutes, regulations and case law to increase transparency of court decisions and access to key legal information (legal informatics).[41]

More recently, a convergence can be observed of these different areas into "full business case management systems" that automate the administrative tasks, support judges' decision-making, and the publication of the sentence on the web. Judicial electronic data interchange between different agencies or between courts and the parties (usually called e-justice or e-filing) is the last and most ambitious and risky technological challenge faced by many justice systems.[42]

Hearing room technologies is another area rich in remarkable applications such as the use of computerized stenotype or of audio and video-recording to take records. Also, video conferences have been successfully used for video-depositions in several countries.[43] Finally, it must be noted that ICT has given great support to jury management.[44]

Technology development—The transition from a paper-based to a fully electronic information system is complex, expensive, and requires an enduring commitment and long-term

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[41]The website of the Australasian Legal Information Institute has a comprehensive catalogue of links to courts and caselaw of about 150 countries around the world www.austlii.edu.au/catalog/215.html, as well as links to sources and data bases about legislation and other legal subjects of about 200 countries. Other examples of web-based repositories are: www.commonlii.org (Commonwealth Legal Information Institute) and www.bailii.org (British and Irish Legal Information Institute).

[42]For an updated analysis of technology in court, see Reiling D. 2009. *Technology for Justice. How Information Technology Can Support Judicial Reform.* Leiden University Press. 310 pp.

[43]Fabri, M., and Contini, F. (Eds.). (2001). *Justice and Technology in Europe: How ICT is Changing Judicial Business.* The Hague, The Netherlands: Kluwer Law International.

[44]www.ncsconline.org/wc/CourTopics/ResourceGuide.asp?topic=JurMan.

investment by the funding bodies. Judicial officials who contemplate making such a transition are advised to engage in a careful feasibility and cost/benefit analysis with the assistance and guidance of judicial, technical and administrative experts. From local case tracking system to e-justice, there is a steep increase in complexity from legal, technological, administrative and institutional perspectives. Therefore, the development should be planned from an incremental approach, based on a number of successive stages, each one tested and integrated into the operating environment of the courts before embarking on the next stage.

When developing ICT, a number of common problems affecting the development of ICT must be kept in mind. In particular, research has identified:[45]

- The limited compatibility between complexity of procedural codes and technological constraints. The design of judicial information systems is always a challenge that requires normative simplification and not only technological and organizational changes.
- Service and technology providers lack specific knowledge of the peculiarities of justice operations.
- Too many small-scale projects are difficult to integrate and—conversely—projects that are too big are difficult to develop and manage.
- Difficulties and lack of experience of court and judicial leaders in managing projects and contact with technology and service providers.
- Bias against technological innovation among legal professionals: sometimes judges have used their independence to resist the adoption of technological innovation.
- Lack of strong judicial leadership at the highest levels required to demonstrate the support for and endorsement of the project and to minimize the influence of those who may resist or even seek to derail the adoption of technological innovation.

In developing information systems, the key questions involve who needs what type of information, when, and for what purposes. The problem is that information needs evolve over the time due to procedural reforms, growing managerial information needs or case management implementation just to mention a few typical causes. Moreover, the tools and the technologies available or required for managing information are quickly evolving: from paper dockets and cards, which were developed for specific purposes, up to more and more ubiquitous electronic information systems. Thus, design, development and implementation of court information systems may be better understood as a continuous process.

Although the initial development effort requires significant funding and resource support for planning, design, testing and implementation, the long-term success of the effort requires the ongoing commitment of resources for regular maintenance, updates and cyclical replacement of hardware and software. Initial and continuous training is another issue to be carefully considered both when new applications are introduced in courts, and when new judges and staff are hired. Last but not least, particular care must be paid to the quality of the data entered into the system, which in many cases is so poor that it undermines the functioning of the system. Care and consistency in data entry, supported by tools like shared data dictionaries, are necessary for building reliable and effective databases. Generally speaking, an increased amount of resources should be dedicated to these tasks.

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[45] Contini, F., and Lanzara, G. F. (Eds.). (November 2008). *ICT and Innovation in the Public Sector. European Studies in the Making of E-Government:* Palgrave Macmillan.

Box 26. Suggestions for a long-term ICT development strategy

Court systems contemplating the introduction of electronic tools into their information management systems are advised to proceed slowly and deliberately. The initial stage involves reviewing the process by which the manual case information system operates and initiating appropriate changes to make that process efficient and functionally simplified so to be more easily automated. This would be followed by working with technical experts to design and test a case tracking model in which statistical and other data normally entered into a variety of paper-based court registries are instead entered into a single, integrated case information database. Once the system has been designed, installed and refined, the technical unit responsible for it can begin to add enhancements that expand its capacity and render it more useful both to internal and external users.

Once an automated case-tracking application has been fully implemented, a court can move to the next phase of a multi-stage automation effort which might call for automated case management. Here, additional categories of case information are entered into the system to provide judges and staff with more detail on case progress and case events. The next stage may entail scanning court judgments and entering them into a well-organized and searchable database. This stage might be followed by one in which court staff scan all documents in each case to create an electronic case file. The next stage may involve experimentation with electronic service of process whereby notices from the court, rather than having to be delivered in person by court notice servers or via registered mail, are transmitted electronically by email or by text messaging. Depending on how quickly a court system wishes to proceed, some of these stages may be consolidated. The key to success is to ensure that each stage is carefully planned and designed, that government funding sources necessary for completing the stage have been committed, and that judges and staff are appropriately oriented and trained.

8. Conclusions and recommendations

As a consequence of increased judicial activity throughout the world, new public management ideas, globalization, budget constraints and increased debate over justice efficiency and effectiveness, case and court management topics have grown in importance in judicial policymaking. This has challenged the traditional representation of the overall organization of courts and judicial proceedings, in which case and court management appear as minor tasks performed by clerks to support judges' decisions. A number of case management techniques are increasingly supporting justice service provision. From filing to disposition, case management techniques are becoming strategic tools employed to pursue effectiveness and efficiency of justice, respect of judicial timeframes, as well as to collect and make available case-related information to court users, and thereby improve the transparency of courts operations. Finally, case management has changed the role of both administrative personnel and judges, since the active involvement of the latter is required for effective management of court proceedings.[46]

At the same time, ICT offers to judiciaries multiple chances to reconfigure and improve court operation and key judicial values such as transparency, accountability, timelines, access to justice and information. But ICT is not an easy shortcut. It is a difficult endeavour that should be carefully planned and sustained in the long term by top judicial leaders.

[46]Solomon, M., and Somerlot, D. (1987). Caseflow Management in the Trial Court: Now and for the Future. Chicago: American Bar Association. Mahoney, B. (1988). Changing Times in Trial Courts. Williamsburg, VA.: NCSC. CEPEJ. (2006). Compendium of "best practices" on time management of judicial proceedings. euromed-justice.eu/files/repository/20090706165605_Coe.CompendiumofBstpracticesontimemanagementofjudicialproceeding.doc.pdf; https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2006)13&Sector=secDG1&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.

Given the broad dislocation of the changes, the implementation of ICT as well as case and court management is risky and problematic. Nevertheless, they are strategic challenges that well-run judiciaries must successfully face.

- Justice systems may gain an important advantage by adopting case and court management principles and techniques.
- Judicial information systems (such as dockets, files, case tracking and management systems) must be:
  - *(a)* Well organized,
  - *(b)* Adequately secured by court officials,
  - *(c)* Accessible by those who have the right to do it, and
  - *(d)* Able to collect consistent, standardized and up-to-date data.
- All judicial officers should have ready access to judgments (case-law) either in manual or electronic form both at national and international level.
- The main rules and guidelines for case and court management are the same with both traditional and electronic enhanced systems.
- Case assignment systems can be:
  - *(a)* Random or deliberate,
  - *(b)* Automated or managed by operators,
  - *(c)* Informal or formal, or
  - *(d)* Rigid or flexible.
- A random case assignment system is advisable in judiciaries affected by problems of corruption and low level of public trust.
- A flexible case assignment system helps the court to better adapt to unforeseen changes in the caseload.
- In any case it is important to achieve a high degree of internal and external transparency in case assignment.
- The involvement of lawyers, bar associations and public prosecutor offices can help the design and the monitoring of case assignment systems.
- Strategies should be designed to face unforeseen changes in the caseload (consider flying brigades, or flexible territorial jurisdiction).
- Courts should actively monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work.
- The effective use of case management techniques and practices improves the efficiency in the use of justice systems resources, hence reducing the costs of justice operation.
- Judges and court staff should play an active role in managing the flow of judicial proceedings.
- The successful adoption of case management techniques requires difficult changes related with the professional identity of judges and lawyers and thus articulated change management strategies.
- The court control over cases entails the implementation of two basic principles: early court intervention and continuous court control of case progress.
- ICT can support case management systems techniques, but case management can be performed also with more traditional instruments.

- Courts should consider to adopt differentiated case management systems so as to have several procedural tracks based on criteria such as:
  - *(a)* Amount of attention they need from judges and lawyers,
  - *(b)* Value of the case,
  - *(c)* Characteristics of the procedure, and
  - *(d)* Legal issues involved.
- When adopting a case management approach, judges must be prepared to preside and take appropriate actions to ensure that:
  - *(a)* All parties are prepared to proceed,
  - *(b)* The trial commences as scheduled,
  - *(c)* All parties have a fair opportunity to present evidence, and
  - *(d)* The trial proceeds to conclusions without unnecessary interruptions.
- The setting of timeframes of proceedings is a necessary condition to start measuring and comparing case processing delays.
- Case management systems have to be supported by well-designed training programmes.
- A practice of collaboration among the different agencies and stakeholders is useful for designing and implementing case management because:
  - *(a)* It helps to build commitment among all the key players,
  - *(b)* It creates a proper environment for the development of innovative policies, and
  - *(c)* It points out that the responsibility for timely case processing is not just in the court operations but also includes other players.
- Technology offers opportunities for reconfiguring the functioning of justice that cannot be grasped without complex changes at the procedural, organizational and cultural levels.
- The introduction of ICT in courts bears the risks of large investments with little impact.
- Judicial officials who contemplate ICT programmes are advised to engage in a careful feasibility and cost/benefit analysis with the assistance of experts.
- Court information systems must provide large amount of information, rapidly and economically, to a broad range of users.
- Information and court records must be kept up to date, accurate, prompt and easily accessible.
- ICT development requires:
  - *(a)* A sound ICT governance structure,
  - *(b)* Robust technological infrastructure,
  - *(c)* Focused legal and procedural changes,
  - *(d)* Enduring commitment and long-term investment,
  - *(e)* Strong judicial leadership,
  - *(f)* Maintenance, updates and cyclical replacement of hardware and software,
  - *(g)* Initial and continuous training,

(h) Normative simplification as well as organizational changes, reviewing the process by which the manual case information system operates,

(i) Care and consistency in data management, and

(j) Long-term commitment by the funding bodies.

- ICT developments should be planned considering an incremental and continuous approach.

IV. ACCESS TO JUSTICE AND LEGAL SERVICES

1. Introduction

The right to legal representation, especially for defendants in criminal proceedings, is widely recognized as a fundamental component of the right to fair trial. Legislative guarantees of this right can be found in international human rights instruments, as well as national constitutions and laws. Despite these guarantees, the provision of legal aid and access to justice to the underprivileged faces a number of organizational and structural obstacles, in particular in many developing countries.

Access to justice is often beyond the reach of the underprivileged because of cost and distance. Free, state-provided legal aid is often not available, and many countries have few practising lawyers. Even where there are legal aid offices and lawyers, the vast majority tend to be located in the capital and other major cities, and often fail to reach rural populations. Moreover, citizens based in remote areas lack the resources to travel to a city to access formal legal and judicial institutions, and must overcome other costs such as filing fees associated with using the formal justice system. In addition to these obstacles, citizens may also choose not to use the formal justice system because courts are inefficient or procedures are cumbersome, requiring multiple court appearances to resolve minor disputes, or citizens may simply perceive the courts as corrupt or biased. Thus, for one reason or another, significant portions of populations in developing countries are unable or unwilling to use the formal court system to resolve their grievances.

At the same time, while traditional and community-based dispute resolution mechanisms may provide easily available and affordable access to justice, such informal justice institutions are also not without flaws. They sometimes tend to unduly pressurize amicable solutions even in criminal cases, and, because of their close links within the community, they tend to benefit the party that is more socially and economically powerful.

Although problems abound, a plethora of solutions exist, including strengthening informal and traditional justice systems and Alternative Dispute Resolution (ADR) centres and the introduction of court-annexed or court-connected ADR mechanisms. From a court user's perspective, access to justice also involves administration of justice in a language that a litigant is able to understand, placing on the state a corresponding duty to provide interpretation services. Furthermore, because public perceptions of the justice system are predetermined, to a large extent, by personal experiences of court users, courts need to become more open, transparent and client-oriented in order to not only improve access but enhance both the image and efficiency of the judiciary.[47]

Effective access to justice also encompasses access to legal services, which necessitates reformers' focus on such efforts as ensuring the provision of legal aid for criminal, civil, and administrative cases and efforts to develop pro bono legal assistance, university legal

[47] It is important to remember, however, that opinions of those who have not had a direct personal experience with the court system are shaped by external factors, such as media reports, political debates, or conversations with relatives or friends with such personal experiences.

clinics, and paralegal programmes.[48] These mechanisms play a crucial role in ensuring access to justice—that is, the ability to seek and obtain a remedy through both formal and informal justice institutions, in conformity with human rights standards[49]—for all citizens, particularly the poor and disadvantaged groups.

2. Traditional and informal justice systems

Traditional mechanisms for resolving disputes are widely used at the local level throughout much of the developing world. Geographically, such traditional justice systems appear to be concentrated primarily in Africa, the Middle East, East and South Asia, the Pacific, and South America; and in many countries in these regions, traditional justice systems resolve up to 80 to 90 percent of all disputes.[50] In some instances, traditional justice systems may be the only available method of dispute resolution, especially in many post-conflict societies or countries with significant rural populations, which, in the short run, could make reforms focusing on the formal judiciary less relevant to addressing the immediate needs of providing access to fair and efficient justice. In other contexts, informal and traditional systems are utilized in conjunction with, rather than as an alternative to, formal dispute resolution mechanisms, often as a prerequisite to bringing an action in the formal court of law.[51]

The prevalence of traditional justice mechanisms suggests that, as compared to formal judiciaries, traditional justice systems offer a variety of benefits that often make them more appealing to the local communities. In particular, these systems: *(a)* are more physically and financially accessible than formal courts that are far removed from the local area; *(b)* allow for dispute resolution at an early stage, before turning into major conflicts; *(c)* are often based on familiar local customs and use the local language; *(d)* rely on decisions issued by trusted individuals from within the community, which focus on finding reconciliation and consensus among disputants rather than on inflicting punishment; and *(e)* avoid much of the procedural complexities and formalities that characterize the formal justice system. Furthermore, attempting to remove numerous local disputes into nascent, overburdened or under-resourced court systems could lead to case backlogs and delays that inhibit the promotion of justice. In turn, traditional justice systems, where they are available, can assist in saving budgetary resources and decongesting the formal judiciary, by addressing minor civil disputes and less egregious offenses. Indeed, formal procedural rules in a number of countries impose minimum monetary values on civil claims or minimum penalties on offences that can be heard by regular courts. Finally, traditional dispute resolution systems are frequently preferred to official courts simply as a result of general distrust of the formal legal process among large segments of the population, which

[48]While these efforts are not directly related to judicial reform, the courts are certainly among ultimate beneficiaries, as litigants who come before them would be better informed of their legal rights and remedies, thus resulting in greater judicial efficiency and improved public perception of fairness of the court system.

[49]UNDP, Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice 5 (2005).

[50]UNDP, Doing Justice: How Informal Justice Systems Can Contribute 5, 15 (2006).

[51]In the United Arab Emirates, for example, litigants in virtually all non-family civil cases, except those where the government is a party, are required prior to filing the case with the court to submit their disputes to the local reconciliation and settlement committee. These committees, comprising a judge and two Arabic tribal leaders, will schedule a mediation session with the litigants in an effort to settle the dispute and avoid the need to seek resolution in a formal court. The use of tribal elders continues a long and respected tradition in Arabic communities of seeking first to settle disputes through informal mediation proceedings designed to help the parties reach a settlement agreement. Only if the effort to mediate a settlement fails are the litigants permitted to register the case with the court. The law does permit the litigants to request that the mediation requirement be waived where the parties already have concluded that the case is not suited for mediation. A similar provision exists in the Saudi Arabian court system.

may be due to lack of understanding of complex legal procedures, perceptions of judicial corruption and bias towards the poor and minorities, and beliefs that the formal judiciary only services the interests of the rich.

Although traditional and informal dispute resolution mechanisms are useful for effecting justice more broadly, these systems are not without faults. Indeed, they sometimes suffer from the same weaknesses as their formal counterparts, including lack of accountability mechanisms and resulting corruption, bias, favouritism, and nepotism; low or lacking public awareness of their procedures; poor training of traditional systems' adjudicators; and occasional delays. Traditional justice systems are also vulnerable to other significant problems, such as lack of sensitivity, gender and class discrimination, and the resulting unfair treatment of women and the poor; and imposing punishments that violate international human rights standards and the country's formal legal provisions. Finally, given the often limited nature of their jurisdiction, informal forums are unsuitable for certain disputes that would need to be enforced through formal venues.

In light of these potential deficiencies, it is crucial that any efforts to strengthen the integrity and capacity of the judiciary are complemented by corresponding measures that involve the traditional and informal justice system. Recent successful interventions to strengthen traditional justice systems in different parts of the world have focused on issues such as institutional strengthening, raising awareness, gender sensitization and promoting accountability, although this is not an exhaustive list of possible entry points for such reform. Efforts to strengthen the integrity and capacity of traditional justice systems have proven particularly effective in countries with challenging political environments or lack of support for reforms from the key government stakeholders,[52] as well as in post-conflict environments. Lessons learned from these efforts suggest that these reforms may be easier to launch or sustain and may yield more quantifiable effects in the short term. A recent example from Guatemala appears to be particularly informative in this context.

Box 27. Community alternative dispute resolution centres in Guatemala

After the end of Guatemala's civil war in 1996, the country sought to bolster public confidence in the judicial system by introducing programmes that considered the values and goals of the diverse ethnic and cultural groups within the country. One effort aims to strengthen the Justice Centres throughout the country in order to help make the justice system function at the local level.

Since their inception in 1999, Justice Centres have served as a viable tool for bringing the rule of law back to the country. The first Justice Centres concentrated on implementing case tracking systems, training and administrative reorganization. These efforts were subsequently expanded, with a goal to increase use of customary law and informal dispute resolution techniques. Since 2001, 16 Community ADR centres (CACs) were established by the Executive Secretariat for Justice Sector Coordination in eight departments to help consolidate and increase the use of indigenous dispute resolution methods. While participation is voluntary, the CACs facilitate and encourage the mediation of a wide range of cases involving criminal, civil, family and labour issues, providing free access to justice for the underprivileged, women, children and indigenous people across seven different linguistic and ethnic groups. Given the varying types of conflict

[52]Some of the most successful examples of programming related to informal justice systems include the *Barangay* Justice System in the Philippines and NGO modification of indigenous *shalish* systems in Bangladesh. While NGO-implemented efforts are most likely to be fruitful in countries with a vibrant NGO community, their success can help generate the momentum for future actions by the government. For instance, the Philippines' Action Programme for Judicial Reform now includes institutional strengthening of the *Barangay* system as one of its six components.

Box 27. *(continued)*

and customary methods of dispute resolution within the various departments of Guatemala, each Justice Centre is encouraged to create a CAC model that reflects the unique cultural identity of the community it serves. However, accountability is ensured through regular reports to the Secretariat, which also conducts assessment visits to each CAC.

To ensure the programme's success, its implementers pursued initiatives to increase acceptance of a CAC within the community and with political leadership. In addition to carrying out extensive information and media campaigns to raise community awareness, CAC organizers encouraged community participation in CAC planning, trained local leaders in CAC services, and allowed community members to participate in the selection of CAC mediators. This resulted in greater involvement by local authorities and institutions in the resolution and referral of cases. By networking with other community mediation groups, CAC mediators established vital lines of communication and information exchange with local mediators, and engaged them in joint training programmes. Regional coordinators who monitor CAC services further expanded this network to help consolidate local mediation services. As a result, officers and directors of other mediation groups joined forces with CAC mediators to establish a governing board for area mediators and to promote the eventual institutionalization of CACs throughout the country.

Currently, CACs are located in 12 villages and one municipality, covering 178 communities and benefiting over 100,000 individuals. They have been able to resolve disputes through agreements by the parties in about 80 per cent of all cases they have handled, and 80 per cent of these agreements have been enforced.[a] CACs have also proved their sustainability, as most continue to function even after foreign funding for the programme ended.[b]

[a]Checchi & Co. Consulting, Inc., Guatemala Justice Program 1999-2004: Final Report 29-31 (2004).

[b]The success of Guatemala's Justice Centre model had prompted USAID to incorporate this concept into its rule of law and justice reform programming in other countries in the region, such as Colombia, El Salvador and Bolivia.

Informal methods of dispute resolution do not necessarily involve traditional and community-level mechanisms. Formal or state-sanctioned ADR processes, which are set up by the government and can be affiliated with courts or with other government entities,[53] can be a highly effective complement (but not a substitute) to formal court procedures. Similar to traditional justice systems discussed earlier in this section, formal ADR mechanisms suffer from a number of problems, such as frequent unpredictability of ADR decisions, lack of impartiality among ADR mediators, lack of clear procedural guidelines and standards of conduct for mediators, and difficulties with enforcement of ADR decisions. Nevertheless, these mechanisms are more time- and cost-efficient in comparison to formal litigation and have been used as an effective backlog reduction strategy in a number of

[53]Formal basic ADR models include negotiation, conciliation, mediation and arbitration. Court-connected or court-annexed ADR refers to ADR processes that are linked formally to the governmental justice system; such ADR activities are authorized, offered, used, referred by or based in the court system. This term includes court-based programmes and court referrals to private ADR services. Decisions issued through court-connected ADR mechanisms may be enforceable as court orders. In one of the most common forms of court-connected ADR, court-annexed arbitration, one or more arbitrators, usually lawyers, issue a non-binding judgment on the merits after an expedited, adversarial hearing. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the non-binding ruling and proceed to trial; sometimes, cost sanctions may be imposed in the event the appellant does not improve his/her position in court. See United States Agency for International Development, Alternative Dispute Resolution Practitioners' Guide, appendix A at 2-3 (March 1998).

contexts.[54] They are often less intimidating to the public than formal courts and can enjoy greater public confidence and respect. They also allow for greater access to justice by disadvantaged groups, allowing them to bypass inefficient and discredited formal venues.

Box 28. Court-annexed mediation in the South Pacific[a]

Before much of the South Pacific was colonized, all disputes were resolved using a broad range of informal techniques and mechanisms. Following colonization and the introduction of formal systems of justice, there emerged a multiplicity of parallel systems for the resolution of disputes. Both systems remain pervasive and have positive and negative elements in their ability to provide access to justice. Formal courts across the South Pacific acknowledge that, relative to their informal counterparts, their systems are expensive and protracted. They also accept that the procedures are rigid, complex and far removed from the flexibility of informal techniques they are traditionally used to. At the same time, South Pacific courts recognize that the formal system is deeply entrenched, if only in the recent legal culture, and is there to stay.

Thus, in an attempt to bridge the gap between tradition and modernity and to bring familiarity to formal justice processes, many courts across the region have implemented, or are in the process of implementing, systems of court-annexed mediation. The Supreme Courts of Tonga, Samoa and Kosrae in the Federated States of Micronesia have formally made court-annexed mediation available as an alternative to litigation, with the High Court of the Solomon Islands, the Supreme and National Court of Papua New Guinea and the Supreme Courts of Vanuatu and the Marshall Islands all in the process of formalizing their systems.

In the three jurisdictions that have implemented formal mediation systems, the process involved: development of court rules, court orders, and administrative systems and processes; securing adequate budget allocation; selecting appropriate people and training them in contemporary mediation skills and processes to an internationally recognized accredited standard; creating public awareness and understanding; and conducting and evaluating a pilot. Legislation, court rules and orders establish: the referral process and when a matter can be referred during the judicial process; the types of cases that can be referred; costs; who can mediate; the non-prejudicial nature of the mediation; confidentiality requirements; immunity for mediators; how data is to be collected; how settlements will bind the parties and how the judicial process will continue or end depending on the outcome of each mediation. There are also separate judicial and administrative processes which comprise the mediation process. The judicial process involves a request for or referral to mediation and fixing a date by which mediation is to occur. The administrative process involves assigning a mediator, corresponding with the parties about the mediation date and venue, liaising with the assigned mediator, and notifying the judge of the outcome. If the matter is settled, the judge will usually issue a binding court order dismissing the case pursuant to the (confidential) mediated outcome. Where no settlement is reached, judges are to be informed, letters sent to parties and a new trial date set.

Thus far, most of the cases referred to mediation in Tonga have involved debt collection, employment disputes, unlawful dismissals, and custody and other family disputes. Of the 34 cases referred in 2008, 21 were settled during the mediation, 8 were not, and 5 were discontinued before they reached the mediator. Court-annexed mediation has been so successful that pre-litigation has also been introduced, mediators have been trained in some of the small outer islands, and the programme is being extended to matters filed with the Magistrates Court. There are three (all expatriate) judges on

[54]In the United States, for example, the 1990 Civil Justice Reform Act required all federal district courts to develop a plan to reduce cost and delay in civil litigation, prompting most courts to authorize or establish some form of ADR. In Nepal, UNDP helped district courts organize "Settlement Fairs," in which multiple pending court cases were settled simultaneously through trained mediators. The success of these events has led to the establishment of permanent mediation centres and amendment of court rules to allow referral of cases for mediation.

Box 28. *(continued)*

the Supreme Court, all of whom have reported that their caseload has reduced significantly, allowing them more time to deal with more complex issues. Both Samoa and Kosrae have experienced similarly positive results in the uptake of mediation and its ability to quickly, cheaply and easily resolve disputes.

Parties in all three countries have reported that the process is easy to understand, participatory, and more closely aligned with how they are used to resolving disputes—while also providing confidence that the rule of law and human rights are respected.

[a]This case study was provided by Ms Helen Burrows, Director, International Programmes, Federal Court of Australia.

3. Language access and court interpretation

In the vast majority of the countries, individuals who do not speak the official or administrative language will, at some point, come before the courts. In many African states, for example, courts use French while citizens speak a multitude of languages from the Bantu family. South Africa has 11 official languages—nine African languages, as well as English and Afrikaans, reflecting its history. In Kenya, in addition to English and Kiswahili used by the courts in their official business, there are over 40 indigenous African languages. Latin America faces similar problems, with most countries using Spanish or Portuguese as official languages but still needing to accommodate indigenous languages such as Mayan and Quechan, which in some jurisdictions are spoken by the majority of rural residents. In the United States, there are nearly 25 million people over the age of 5 (almost 10 per cent of the population) with limited proficiency in English—up from 6.7 million (2.9 per cent) in 1990. At least 13 million of these individuals live in states that do not require their judiciaries to provide interpreters in most types of civil cases, and an additional 6 million reside in states that charge litigants for interpreter services.[55] Although Spanish remains the most common non-English language spoken at home, the 2000 Census found that nearly 380 languages or language families are spoken in the United States.[56] Even many European states have significant linguistic minorities and groups that use different dialects of official languages.

The inability of a litigant to understand the language used in court can create significant barriers to justice. Thus, a number of international treaties recognize the right of individuals to be informed of charges against them in a language they understand and the right to an interpreter if they cannot understand the language used in court.[57] However, interpretation is necessary not just to ensure that criminal defendants are capable of understanding a trial or hearing. Without court interpretation and translation, some witnesses may not be able to testify or some documents may not be introduced as evidence. This is problematic to the extent that material evidence, whether it is exculpatory or incriminating, may be excluded from the trial because the court simply does not understand the language in which it is presented.

[55]Brennan Center for Justice, Language Access in State Courts at 1 (2009); Conference of State Court Administrators, White Paper on Court Interpretation: Fundamental to Access to Justice art. 4 (Nov. 2007).

[56]Conference of State Court Administrators, White Paper on Court Interpretation: Fundamental to Access to Justice art. 4 (Nov. 2007).

[57]See, e.g., ICCPR arts. 14(3)*(a)*, *(f)*; ECHR arts. 5(2), 6(3)*(a)*, *(e)*; American Convention on Human Rights art. 8(2)*(a)*; European Charter for Regional or Minority Languages art. 9(1).

Thus, in-court interpretation and translation of court documents are essential to ensuring equal protection of the laws to linguistic minorities. In order to address this problem, courts first need to be aware of the needs of the community that they are serving. In regions where a significant proportion of the population speaks a minority language, the best solution may be to hold some court proceedings in the minority language. And, where it is inappropriate to hold proceedings in the minority language or otherwise necessary for proceedings to occur in an official language, court interpreters will be required. Some court systems, such as the Singapore case study analysed below, have the ability to employ interpreters directly and to train them and oversee their work. More commonly, however, interpreters are likely to need to be employed on a contract or freelance basis. Another, significantly cheaper alternative to deploying live interpreters in each court location consists of pooling groups of interpreters in central or regional locations and utilizing telephone-based interpreting to both serve smaller courts and larger courts with occasional requirements for exotic languages for which demand is limited.[58]

Ideally, interpreters should be paid by the court, because forcing litigants to pay the interpreter may create a significant barrier to justice, particularly for indigent parties. If paying for interpretation is beyond the resources of the court, some form of means testing should be introduced so that litigants who are incapable of paying are still guaranteed access to justice.

Even if interpreters are available and paid for by the court, the quality of interpretation can still be an issue. Court interpretation requires a high degree of proficiency in both the official and the minority language, and demands that the interpreter be able to render interpretations quickly, accurately, and so as to reflect the same intent and degree of formality as the person he/she is interpreting. Furthermore, court interpretation is frequently complicated by the need to translate unusual legal jargon and terminology.

One way to control quality is to institute a certification process, including a proficiency exam for skilled interpreters. This is the solution employed in the United States, where 41 of the 50 state judiciaries participate in the Consortium for Language Access in the Courts (until recently—Consortium for State Court Interpreter Certification).[59] By pooling resources, the Consortium is able to provide written and oral proficiency tests in 19 languages, with five more in development. Testing and certification of court interpreters allows court systems to institute minimum standards of competency and knowledge while reducing judges' uncertainty about the ability of individual interpreters to handle the challenges of the job. Without some form of certification process, judges still need to ensure that an individual has the proficiency necessary to interpret in a courtroom setting.

A recent United States study identified a number of best practices for organizing a court interpreter programme, which are based on the states' legal obligations, as well as guidelines issued by the United States Department of Justice, recommendations of the Conference of State Court Administrators, and a model statute developed by the National Center for State Courts.[60] While these recommendations are geared towards providing

[58]Telephone interpreting is utilized with considerable success in some of the larger federal districts and in some of the state court systems of the United States at considerable savings in court resources. In 2007, 48 federal district courts were using the telephone interpreting programme to provide services for more than 3,600 events in 38 languages. By the end of fiscal year 2008, the programme had reportedly saved $6.8 million in travel and contract costs. See National Association of Judiciary Interpreters and Translators, *Position Paper: Telephone Interpreting in Legal Settings* art. 1 (Feb. 2009), available at: www.najit.org/publications/Telephone%20 Interpreting.pdf.

[59]See www.ncsconline.org/D_Research/CourtInterp/CICourtConsort.html. In addition, the website of the National Association of Judiciary Interpreters and Translators, available at www.najit.org, provides a wealth of useful resources on setting up a court interpretation programme.

[60]Brennan Center for Justice, Language Access in State Courts arts. 11-33 (2009).

interpretation services in civil cases, they can be adjusted by developing countries' judiciaries contemplating the establishment of comprehensive interpretation programmes:

- Providing interpreters to all litigants and witnesses who do not speak the official court language, which encompasses: having a written mandate to provide interpretation; having clear eligibility standards; having a clear procedure for appealing denial of interpreters; denying interpreter waivers that are not made knowingly and voluntarily; and informing all litigants, witnesses, and others of their right to an interpreter during their first contact with a judge or a court clerk.
- Providing interpreters free of charge to the litigants and witnesses.
- Ensuring that interpreters are competent and act appropriately, which encompasses: assessing their ability prior to appointment, including the use of properly certified interpreters; ensuring that interpreters remain competent; adopting and requiring adherence to a code of ethics;[61] ensuring an adequate supply of competent interpreters in the languages needed; allowing litigants and court personnel to challenge the appointment of interpreters on ethical grounds; implement a disciplinary procedure; and charge a single office or official within the court system within the judiciary with responsibility for implementing and overseeing the court interpreter programme.
- Ensuring that judges and court personnel who come into contact with litigants or witnesses who do not speak the official language act appropriately and professionally.
- Ensuring, to the extent possible, that individuals who do not speak the official language receive the same treatment as other court participants.

Box 29. Court interpretation services in Singapore

The island of Singapore is centrally located in a region with a significant diversity of languages. Since its modern founding as a free port in 1819, Singapore has attracted traders and immigrants from Malaysia, Indonesia, China and India. As an British colony, however, courts in Singapore used English in their proceedings. After Singapore gained independence in 1965, English, Malay, Mandarin, and Tamil were designated as official languages, but English still serves as the primary administrative language and continues to be used in courts. Although English has been promoted by the government and is used in schools, only 23 per cent of Singapore residents use English as their primary language at home. Mandarin is used by 35 per cent of residents, while Malay is used by 14 per cent, Tamil by 3.2 per cent, and other Chinese dialects (such as Hokkien, Cantonese and Teochew) are spoken by 21.6 per cent. This diversity can create significant barriers to access by non-English speaking residents, especially during court proceedings where complex legal terminology can be difficult to understand and translate.

In order to address this problem, the judiciary instituted interpretation and translation services for both the Supreme Court and the Subordinate Courts. At the Supreme Court, an Interpreters Section was created under the Corporate Planning Directorate. It now employs 22 interpreters who provide in-court interpretation free of charge for litigants who speak Mandarin, Hokkien, Teochew, Cantonese, Hainanese, Hakka, Hockchew, Shanghainese, Malay, Javanese, Boyanese, Tamil and Malayam. Additionally, the

[61]For a sample code of ethics, see National Association of Judiciary Interpreters and Translators, Code of Ethics and Professional Responsibilities, available at: http://ethics.iit.edu/indexOfCodes-2.php?key=15_403_707. The Code is binding on all NAJIT members and consists of 8 brief canons: accuracy; impartiality and conflicts of interest; confidentiality; limitations of practice; protocol and demeanour; maintenance and improvement of skills and knowledge; accurate representation of credentials; and impediments to compliance.

Interpreters Section translates documents between English and Chinese, Malay, Tamil and Malayalam for a fee. Interpreters are made available to everyone, regardless of the ability to pay. Requests for interpreters and translation can be submitted online through the Supreme Court's website.

Interpretation is also provided at the Subordinate Courts for Mandarin, Hokkien, Cantonese, Teochew, Hakka, Hainanese, Hockchew, Malay, Tamil, Malayalam, Punjabi, Hindustani and Urdu. Furthermore, the Subordinate Courts interpreters have compiled glossaries of commonly used legal terms and appropriate translations in Malay and Mandarin, and these glossaries have been made available to the public through the Subordinate Courts' website.

Since Singapore remains a hub for international business and shipping, the court interpretation service by itself is not always able to provide interpretation for all litigants. When interpretation is necessary for other languages, court personnel assist litigants in finding approved third-party interpreters. Through this combination of an internal interpreter service and working with third-party organizations, Singapore's courts are making their court proceedings accessible to their own diverse citizenry and the rest of the world.

4. Client orientation

The notion of client orientation depicts three interconnected dimensions of customer satisfaction: effective access to courts, quality customer service and accountability for not meeting service performance standards.

Access to court begins before a visitor reaches a court lobby and encompasses scheduling with expanded or non-traditional hours to reduce adverse economic impact on customers; the ease of finding an appropriate service, which can be accomplished by properly listing courts in phone directories or online and by wide dissemination of court directories or nationwide roadmaps to courts; and proper accommodation for individuals with disabilities. Countries that engage in the construction of new courthouses should be urged to consider locating these facilities near public transportation hubs, to ease the burden of the less fortunate in traveling to and from court. Some courts take the accessibility principle to the next level by implementing such innovations as "justice on wheels" or travelling night court programmes, telephone and videoconferencing,[62] or conducting pre-trial hearings in online chat rooms.

Court facilities should be designed and operated from the customers' perspective. Thus, upon entering a courthouse, a court customer should immediately come across assistance in finding his/her way around the building. This can be achieved by centralized and easily readable signage; publicly displayed courthouse orientation guides, court schedules, dockets, and room assignments; and instant availability of court personnel to answer questions from daily court users, provide guidance to litigants, and serve as the official interface with the media. Courts should also endeavour to set up concierge and public relations desks in close proximity to the entrances and to establish formal customer service and resource centers providing single-window services delivery. Another alternative is to introduce volunteer in-service programmes, which rely on local community members to serve

[62]For example, video conferencing used in Singapore's Subordinate Courts allows domestic violence victims who seek counselling at participating community family service centres to apply for protective orders without having to go to court. Video conferencing is also used to improve the efficiency of criminal and juvenile justice divisions, through video bail processing, pretrial conferences and conferences with probation officers.

as initial contacts for the public entering the courthouses.[63] Such programmes offer a dual benefit of enhancing customer service and fostering community involvement in the administration of justice. Furthermore, court buildings themselves ought to be safe, clean and convenient to use by offering comfortable waiting areas, adequate public space to complete forms and conduct negotiations, and amenities for special types of users, such as children, witnesses and victims, the disabled and *pro se* litigants.

Access to courts is effectively denied if court patrons do not know how to use the system. Accordingly, it is critical for courts to provide their clients with standard, customer-friendly forms and instructions; furnish clear and accurate information about the types of cases heard, operating policies and procedures, and filing fees (e.g., via the Internet or automated telephone systems); and maintain an efficient system for handling common requests (e.g., by establishing emails for customer inquiries and listing frequently asked questions online). Singapore, for example, instituted the Multi-Door Courthouse (hereafter MDC) in 1998. The MDC concept recognizes that there are several different "doors" to justice, of which litigation is only one door; that a lack of information can create barriers to justice; that going to court can be stressful for litigants who are not familiar with the court system. Consequently, MDC acts as an information centre, responsible for informing court users and the general public about the services provided by the Subordinate Courts, including information about alternative dispute prevention and resolution methods; a desk providing individuals with additional information in the form of pamphlets and brochures, as well as forms; explaining court procedures and costs associated with different forms of dispute resolution; and helping with legal aid applications and referrals to the Legal Aid Bureau. In 2006, MDC went one step further, with the introduction of court concierges, who walk throughout the courthouse and actively approach people to offer information and assistance.

High-quality customer service means that courts must strive to provide seamless, timely and convenient service in an atmosphere of mutual respect and courtesy. Correspondingly, court employees must demonstrate appearance and attitude that reflect positively on the courts. There are several important considerations in this regard. First, it is of paramount importance that court services exemplify the highest standards of ethical conduct, professionalism and accountability. Second, court services should be based on the ideals of procedural fairness, equality and diversity. Third, court services should be timely and efficient. Finally, courts should endeavour to enhance their telephone and correspondence services by instructing staff to take calls without undue delays; identify themselves and their offices; reduce busy phone lines; limit transferring callers by ensuring better routing to appropriate personnel; return messages and reply to letters or emails within a set period of time; and acknowledge the receipt of documents and court correspondence.

Accountability for not meeting service performance standards can be achieved by identifying clients' expectations and evaluating customer satisfaction, monitoring progress toward meeting service performance goals, and incorporating service quality responsibilities into existing court personnel performance management systems. It may also be helpful to appoint customer service liaisons or system-wide ombudsmen to provide the public with a valuable avenue for articulating concerns, proposing improvements and complaining of ill-treatment.

[63]Utilizing volunteers, however, entails some risks; it has been the experience of a number of courts that volunteers, in a well-intended effort to be helpful, often seek to provide advice. Unless such volunteers have been carefully vetted and trained, they have the potential to create problems for court managers by providing quasi-legal advice, which may simply be wrong or which the recipients misinterpret. Thus, volunteers' functions should be strictly limited to relatively simple matters, such as responding to inquiries about court calendars and schedules or providing directions to courtrooms, administrative offices, etc.

Improving customer service is one of the most effective ways of enhancing public trust in the justice system. Consequently, closing the service gap should be incorporated into the judiciary's systemic priorities and strategic plans. Courts should also endeavour to adopt, publish and disseminate customer service charters that outline core client-sensitive performance standards and available complaint procedures. Trainings for court personnel should incorporate sessions emphasizing the judiciary's public service philosophy, techniques for providing good customer service, methods of dealing with difficult clients, and external communications. Court staff should be also equipped with employee handbooks that exemplify the ideals of public service. Finally, the complexity of the justice system can be significantly simplified for court customers through the use of modern technology. Specific solutions include extensive electronic service delivery through automated telephone and email answering systems; accessibility of forms and instructions online; e-filing; interactive courthouse kiosks and terminals designed to provide instant legal and procedural information, retrieve forms, schedule certain court appearances, and pay fines; and online citizens forums to gauge public perception of the court system.

Box 30. Enhancing customer service in Albanian courts

In the early 2000s, thanks to support from international donors, four pilot courts (including two largest district courts in the country, Tirana and Shkoder) laid groundwork for enhancing public convenience within the Albanian court system in terms of physical access to courts, their operational efficiency and customer service delivery.

The most visible achievements resulted in dramatic improvements in the pilot courts' physical infrastructure, which involved renovating and rearranging existing public spaces to create an adequate public interface with the courts. The modernization of the Shkoder District Court, which hears almost 2,000 cases per year, is an excellent example of how client-oriented courthouse design can help open doors to a transparent judicial system. The court consolidated its administrative functions by grouping administrative offices together in an easily accessible and secure location. This substantially reduced the need for court staff and judges to walk around the building to communicate with each other and with their customers. The court also relocated its intake offices to ground floor locations, fronted them by large glass public service windows, which placed court personnel within constant public view, and extended service window office hours. New archive and file maintenance facilities were installed nearby to improve efficiency and public convenience. Further, the court created a comfortable seating area near the public entrance, which eliminated the need for court users to wait outside of the courthouse until being called. Finally, new uniform signage was installed to help direct customers to their destinations. The new one-stop-shop layout of the rehabilitated ground floor proved to have the dual benefit of enhancing access to the courthouse and reducing unnecessary traffic inside the building, thus contributing to a more secure court environment.

In addition to infrastructure modernization, the project pushed for enhanced customer service in Albanian courts. Two vital instruments embracing the idea of user-friendly justice were developed: a Customer Service Manual outlining principles of good public service and a corresponding training module. Both documents were used as training tools in a series of public service delivery workshops and training of trainers courses conducted for court system leaders and the pilot courts' administrative staff. Another initiative involved designing a Customer Service Bill of Rights and Responsibilities that spells out the improved level of customer service court users can expect, which was posted in each pilot court's intake area. As a result of a similar but more far-reaching effort, all Albanian district courts and courts of appeal, as well as the School of Magistrates and the MoJ were equipped with public information poster sets, which provide information to facilitate the public use of the courts. The posters contain extracts and summaries of relevant laws, regulations and procedures; description of

Box 30. *(continued)*

institutions comprising the Albanian justice system; and ethical standards governing the administration of justice. Finally, the project addressed the issue of accountability for failure to meet customer service performance standards, by publishing a Public Service Delivery Survey Report on the Tirana District Court. The survey was circulated throughout Albania's legal community.

In January 2008, the MoJ, the High Council of Justice and national judicial authorities signed a memorandum of understanding with USAID to implement a new justice reform project encompassing ten pilot courts. The project was intended to not only improve transparency, accessibility, openness, efficiency, timeliness, fairness, competence, accountability and public trust in the pilot courts, but also to illustrate high standards and principles of court performance to other courts throughout Albania. By executing the memorandum of understanding, the Albanian government signaled its commitment to continue client-oriented modernization of the national justice system.

5. Legal aid in criminal cases: the public defender

International human rights instruments require governments to provide criminal defendants with legal assistance throughout all phases of the proceedings, if doing so is in the interests of justice.[64] The constitutions and laws of most countries similarly guarantee the right to state-provided counsel in criminal cases, although the extent of this protection varies by jurisdiction. In some countries, the availability of legal defence depends on the severity of the potential sentence for the crime the defendant is charged with, and is frequently required only if the defendant faces the threat of imprisonment or capital punishment; in other cases, a court may exercise discretion to grant legal assistance upon a defendant's request. Additionally, a defendant's eligibility for state-provided counsel is often dependent on meeting income criteria, and the defendant may be required to make a financial contribution towards his or her defence.[65] Countries' legislation and practices also vary regarding at which stage in a criminal proceeding a defendant should be granted counsel.

In practice, the systems of criminal legal aid delivery that exist in many countries face numerous systemic problems, often resulting in sub-par quality of assistance received by indigent defendants. Lack of adequate government funding is perhaps the most severe of these issues which, coupled with lack of motivation by attorneys and their fear of not being paid by the government, severely limits the number of lawyers willing to participate in the legal aid system.[66] The scope of assistance is likewise limited, as advice and representation are typically available only during in-court proceedings but are rarely offered

[64]See, e.g., ICCPR art. 14(3)*(d)*; ECHR art. 6(3)*(c)*; American Convention on Human Rights art. 8(2); African Charter on Human and Peoples Rights (Banjul Charter) art. 7.

[65]One notable exception is Chile's principle of "unlimited eligibility," which places no income restrictions on eligibility for legal aid, based on the assumption that any defendants who have the means to hire their own attorneys will do so. See Penal Reform International, Index of Good Practices in Providing Legal Services in the Criminal Justice System 15 (Version 2, Feb. 2006).

[66]It is important to emphasize, however, that an effective legal aid system can be maintained even at a relatively low cost. For example, South Africa and the United Kingdom both have effective criminal legal aid systems at very different per capita costs: US$1.6 in South Africa and €30 in the United Kingdom. See Public Interest Law Initiative and Open Society Justice Initiative, *2nd European Forum on Access to Justice (Budapest, Hungary, Feb. 24-26, 2005): Preliminary Forum Report 26 (2005)*. One possible strategy for identifying the most suitable legal aid model for a given country could involve establishing a small pilot project (most likely, NGO-supported), to help assess and better understand the demand for legal aid services in a particular setting and estimate its costs. Where introduction of a full-fledged legal aid system is prohibitive due to financial or capacity constraints, a potential solution could involve development of a highly flexible legal aid management system, allowing for experimentation and adjustments to reflect any emerging constraints.

during pretrial phases. In addition, quality control mechanisms and oversight of legal aid systems are practically non-existent. The brunt of these shortcomings is disproportionately born by the economically or otherwise disadvantaged groups.

In many countries, legal aid is being provided in accordance with the judicare model—also referred to as *ex officio* or appointed counsel—under which a court or a law enforcement agency (i.e., investigating officer or prosecutor) assigns and compensates private attorneys for handling legal aid cases. While such a system can be fairly comprehensive even without establishment of a separate legal aid body, it is also one of the most expensive and has some functional problems, such as perceptions of conflicts of interest that result from appointment of defence counsel by the prosecution. There are also difficulties in controlling and monitoring the quality of services provided by judicare attorneys; since there is no direct link between attorney's performance and payment, this works as a disincentive for some lawyers to provide representation of the same quality as for paying clients. In addition, judicare may be more susceptible to corruption, as there is little direct budgetary supervision over funds paid to the private providers.

Alternatively, governments may retain public defenders, who provide their services as part of a larger public defender office staffed with a team of salaried criminal defence attorneys. Although such models may incur high start-up costs and may fail to attract the most qualified lawyers, it is frequently less expensive than offering aid through judicare, especially if assistance is being provided to a large number of defendants. Public defender offices are also better suited to handling larger caseloads and allow for easier performance monitoring flowing from greater control and oversight over the actions of salaried defence attorneys. Further, greater commitment of public defenders to their duties means they are generally better prepared during trials and are more likely to appear at all required stages of the proceedings, which contributes to increased overall efficiency of the criminal justice system.[67] The advantages offered by public defender systems have meant that many recent efforts have seen a shift towards greater utilization of government-financed public defender services as a preferred model for the delivery of legal aid in criminal matters. The case study below examines advantages seen in Costa Rica's public defender programme.

Box 31. Costa Rica's Public Defender's Office[a]

First established in the 1960s, Costa Rica's Public Defender's Office, with a staff of over 250 defenders and a network of 40 offices, has long been recognized as a model of success, in terms of both the quantity and quality of defence services provided. In fact, there have been instances when defendants who were able to hire their own counsel have chosen to use the public defenders' services because of their superior quality. The basic elements of its public defender model can be summarized as follows:

- It is a government-funded programme of full-time salaried defenders, who are prohibited from charging fees and taking any outside work. Although the Office is placed within the judiciary and funded from its budget, defenders are able to directly challenge Supreme Court's opinions, and the latter does not interfere with defenders' functions. Heads of individual public defender offices have autonomy and control over matters such as appointment, placement, supervision, evaluation, promotion and discipline.

[67]Regardless of which criminal legal aid delivery model is chosen, special attention should be paid to the design and implementation of quality control measures, which may include increased supervision and monitoring of providers, court inspection visits, introduction of mandatory reporting on the progress of assigned cases, and increased availability of training and technical support.

Box 31. *(continued)*

- Appointment is competitive and merit-based, with preference given to young lawyers who then attend brief courses in the judicial school and receive extensive on-the-job training. All defenders receive fixed tenures with an option of renewal based on individual performance.
- Public defenders' salaries and other conditions of service are commensurate with those of judges and prosecutors. Their placement within the judiciary creates opportunities for career advancement and movement among the three career tracks, which increases the attractiveness of the profession and creates performance incentives.
- Internal organization of each office is structured in a way to encourage collaboration between defenders and team work. More experienced defenders are charged with supervising and training groups of less experienced defenders. Supervisors regularly meet with defenders to discuss pending cases and any problems encountered, and they are also actively engaged in the provision of legal assistance.
- Defenders do not select their own cases, as all case assignment is done by the office supervisors, and the same defender is responsible for handling the case from the moment of defendant's detention throughout the entire trial and appeals process.
- There are clearly established internal workload criteria and performance standards, which are used in evaluation, promotion and retention decisions. Public defenders who do not meet these standards, as well as those who perform "adequately" but fail to demonstrate commitment, are not recommended for retention.

Costa Rica's model for providing quality public defence services has been adopted, inter alia, in Bolivia (Plurinational State of), the Dominican Republic, El Salvador, Panama and Honduras, albeit with varying degrees of success. Among factors that hampered replication were "inadequate government financing [and therefore commitment], consequently inadequate salaries, non-merit based recruitment, pre-existing organization, organizational placement, and leadership styles and interests."[b]

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[a]This case study draws largely from Linn Hammergren, *Institutional Strengthening and Justice Reform* 16-21 (USAID Center for Democracy and Governance Paper No. PN-ACD-020, Aug. 1998).

[b] *Ibid.* art. 21.

6. Legal aid services in civil cases

Unlike with criminal cases, international human rights documents impose at best a limited duty on governments to provide legal assistance to indigent civil parties; and few legal systems mandate the provision of state-sponsored civil legal aid. As a result, the scope of available assistance and the government's financial support for civil legal aid programming, compared to criminal cases, is even more limited. While the available government resources are understandably scarce in developing countries, even some of the world's most affluent nations have recently enacted cuts in government funding of civil legal aid. Thus, the task of providing legal aid in civil cases falls, in many cases, to NGOs or private attorneys, which frequently supplement the limited efforts of governments in this arena. Even in countries where civil legal aid is funded in part or entirely by the government, limits are placed as to categories of recipients or types of cases that qualify for government-financed

assistance.[68] As with criminal legal aid, income criteria are a significant factor limiting a recipient's eligibility for state-funded legal assistance in civil disputes. All of these restrictions suggest that most of the existing efforts to provide legal assistance to parties in civil cases fail to meet the existing demand for services.[69] In practical terms, this means that significant numbers of disadvantaged individuals are not receiving legal advice and representation on issues of vital importance to them, such as housing and property disputes, basic government benefits, child support, employment issues, consumer rights, and asylum and refugee status.

As with criminal legal aid, there is no single best model for providing legal aid to the poor in civil cases. The traditional approaches to the provision of civil legal aid have included judicare programmes and cooperation agreements with NGOs, which face a number of functional problems, as discussed above. Alternatively, governments may rely on pro bono service agreements, although there are often difficulties in securing a sufficient number of pro bono attorneys, and quality control is hard to achieve in this model.

In light of the rising cost of legal representation and the functional difficulties of providing assistance, legal aid providers have discovered several alternative methods to inexpensively and effectively provide legal aid. Frequently, these methods rely on paralegals, law student interns and university law clinics to help clients navigate the court system and prepare court documents. To enable access to legal aid on a larger scale, legal aid providers have also established telephone hotlines and websites, to provide potential clients with basic information on the court system and social services and to offer general legal advice that enables clients to make preliminary decisions about whether they have a justiciable cause of action and to receive *pro se* litigation assistance.

A number of countries have also attempted a more comprehensive approach to civil legal aid provision, the "one-stop shop" legal aid centre, which, despite the high start-up costs, has been successfully implemented in various regions around the world to provide a range

[68] In the United States, for example, in order to be eligible to receive funding from the Legal Services Corporation (a government-chartered private non-profit corporation that funds and monitors free civil legal aid), legal aid providers may not engage in certain activities, including political activities (such as voter registration and voter assistance); habeas corpus actions challenging criminal convictions; proceedings involving desegregation of public schools and military service; abortion-related litigation of any kind; and most activities related to welfare reform. Additionally, these providers may not represent certain categories of recipients, including parties in class action suits, prisoners, people who are being evicted from public housing due to facing drugs-related criminal charges, and most people who are not United States citizens (with limited exceptions, such as green card holders or non-citizen victims of domestic violence, sexual assault, and trafficking in persons). It should be emphasized that LSC-funded providers are banned from financing these restricted activities with funds from all sources (government and private). See generally Legal Services Corporation, Fact Sheet: Statutory Restrictions on LSC-Funded Programmes, available at: www.lsc.gov/pdfs/Restrictions.pdf. Similarly, in South Africa, civil legal aid may not be provided, for instance, in bankruptcy cases, certain personal injury cases, small claims court cases, claims against the Road Accident Fund, as well as in civil appeals. See Legal Aid Board, Legal Aid Guide 2009 at 48-52, available at www.legal-aid.co.za/images/legal-services/Guide/laguide.pdf. In Hong Kong, civil legal aid is not available in defamation cases, matters before Small Claims and Labor Tribunals, securities cases, and, with certain exceptions, election petitions. See Legal Aid Department, Guide to Legal Aid Services in Hong Kong at 6, available at: www.lad.gov.hk/eng/documents/ppr/publication/guide_to_legal_aid_services_in_hongkong%28e%29_lowr.pdf.

[69] For example, in 2002, there were a total of 6,581 attorneys working for various legal aid programmes in the United States, which translated to 6,681 potential clients per each such attorney—compared to one lawyer providing personal civil legal services for every 525 people in the general population. See Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans at 15 (2nd ed.; June 2007), available at: www.lsc.gov/justicegap.pdf. It has been estimated that 50 per cent of eligible client who actually sought civil legal aid in the United States are routinely turned away because providers lack the resources to help them; and these statistics do not account for those potential litigants who are eligible for legal aid but do not seek it due to lack of awareness. Ibid. art. 4. Legal aid needs assessments conducted earlier this decade in nine separate states paint an even grimmer picture; on average, less than 20 per cent of the legal problems experienced by low-income individuals are addressed with legal assistance of any kind. Ibid. art. 9, 12. Other recent data show that 99 per cent of defendants in housing eviction cases in New Jersey and Washington, D.C., are not represented by a lawyer during the court hearing.

of services. These have improved access to justice for the poor and socially marginalized, and have also proved to be a cost-effective means of delivering legal services.[70]

Many countries have also experimented with non-governmental funding models, such as legal expense insurance (which works similarly to medical insurance) and prepaid legal service plans. These systems increase the availability of services for a greater number of individuals by spreading the costs over a large pool of insured persons. Another model worth exploring is to generate funding for civil legal aid delivery by accumulating interest on short-term escrow accounts held by attorneys on behalf of their clients; the funding is then distributed as grants to legal aid providers.[71]

The case study below examines the expanding role of Justice Centres in South Africa, as it provides an instructive example of how civil legal aid may be efficiently provided.

Box 32. South Africa's Justice Centres

The South African Constitution does not require that legal aid be provided to indigent persons in civil cases; however, in 1969, the government established the Legal Aid Board [hereinafter LAB], charged with providing both criminal and civil legal aid. Initially, LAB relied mainly on a judicare model, but it now provides legal services through a variety of models, such as university law clinics and paralegal advice offices.

In an effort to offer comprehensive legal services to more clients for less cost to the government, LAB implemented Justice Centres in 1999, which now serve as the primary legal aid providers for both civil and criminal cases.[a] Justice Centres present significant cost savings in comparison to judicare, with costs per finished case approximately twice lower under the Justice Centre model. Effectively, each Centre is a "one-stop shop" for legal assistance, and only refers cases to judicare when a conflict of interest arises or the Centre lacks the capacity to address the case. Staff of a typical Justice Centre consists of an executive director, a group of newly admitted attorneys who assist on both civil and criminal cases, several not yet admitted law school graduates, a paralegal (who supervises intake), a case investigator and support staff. When possible, local legal professionals are employed. If a Centre determines that a particular case should not be pursued, the client may appeal to the Centre's executive director and then to LAB.

As of March 2010, there were a total of 127 delivery points (including 64 Justice Centres and 63 satellite offices), operating in both rural and urban areas and providing nearly 90 per cent of all government-sponsored legal aid services.[b] The Centres are monitored by 6 regional offices and overseen by a national Access to Justice director. The constantly expanding network of satellite offices serves more rural areas using a "circuit system." However, given the range of people it employs and the diversity of specialized services it provides, the Justice Centre model is only sustainable if the volume of cases is high; thus, some rural areas are still served primarily through judicare and cooperative agreements with public interest law firms and legal clinics.

[70]In addition to the South Africa's Justice Centres discussed in box 32 above (www.legal-aid.co.za), see also, e.g., Legal Aid Center in Belize (www.belizelaw.org/legal_aid.html); Legal Aid Department in Hong Kong (www.lad.gov.hk/eng/documents/ppr/publication/guide_to_legal_aid_services_in_hongkong%28e%29_lowr.pdf); Legal Assistance Centre in Namibia (www.lac.org.na); Legal Aid Bureau in Singapore (http://app2.lab.gov.sg/); and Community Legal Advice Centres in England (www.lawcentres.org.uk).

[71]For example, mandatory Interest of Lawyers' Trust Accounts (IOLTA) programmes, which can be run by state courts, legislatures, bar associations or foundations, exist in the majority of the United States states and, together with opt-out and voluntary programmes in the remaining jurisdictions, generate average annual revenue of nearly US$100 million, which is used to provide civil legal services to the poor.

Delivery of legal aid services through Justice Centres has enabled LAB to introduce enhanced quality assurance mechanisms. These include increased numbers of supervisory staff at the Centres, availability of training and professional development opportunities, and provision of mentorship. There are also quarterly quality monitoring and reviews, which draw upon examination of assigned case files, court observations, self-reviews, peer and management reviews, electronic case status reports, and client satisfaction surveys. Finally, LAB implements a number of client-relationship programmes, such as complaint registers, suggestion boxes, client satisfaction surveys, independently managed ethics hotlines, Client Services Charter, client focus of legal and non-legal staff training, and feedback to clients by legal staff during the case.

[a]Although civil cases comprise only about 10 per cent of the Centres' caseloads, LAB aims to increase this ratio to approximately 30 per cent in the future. Because of limited availability of resources for the provision of civil legal aid, priority is given to assistance to women and children in such cases. Non-legal matters, such as questions regarding welfare, pensions, or banking, are referred to other assistance providers.

[b]The remainder of cases are handled via judicare (11 per cent) and cooperation agreements with NGOs (2 per cent). Overall, the South African system provided access to legal services to over 350,000 impoverished citizens during the 2006-2007 reporting period. Legal Aid Board of South Africa, Annual Report 2009-2010 at 2.

7. Pro bono legal service programmes

Even the most generously funded, best staffed, and widespread government legal aid systems would be unable to meet the full spectrum of demands for legal services. Pro bono service by private attorneys can be a supplement to government-sponsored system, having a critical contribution in addressing some of the most pressing societal legal needs. Pro bono services can be provided on an ad hoc basis or through institutionalized arrangements, which are highly effective in coordinating pro bono work of a large number of private attorneys. However, private pro bono programmes should not be expected to replace the national legal aid system or take over the government's responsibility for ensuring equal access to justice for all citizens.

Traditionally, lawyers bear an aspirational ethical duty to make their legal knowledge and skills available to those most in need, even though this duty is rarely mandatory.[72] Lawyers may be motivated to provide pro bono services by practical incentives, religious traditions, or a sense of professional duty.[73] However, efforts to establish pro bono programmes face a number of obstacles, the most severe of which include difficulties in attracting attorneys

[72]Even in countries such as the United States, where the legal community is highly supportive of voluntary pro bono legal practice, past attempts to introduce mandatory pro bono requirements have been strongly criticized by the organized bar on the basis that such requirements could have a negative impact on the quality of pro bono representation (flowing from attorneys' indifference to the needs of their clients), as well as potentially reduce government resources allocated to the official legal aid system, thus limiting the availability of free legal assistance.

[73]For example, a survey of attorneys in the United States conducted in 2008 by the American Bar Association found that the following factors play the greatest role in encouraging pro bono services (listed in the order or importance): offers of free training and continuing legal education (CLE) credit for services provided, ability to define the scope of engagement (e.g., handling a specific task as opposed to total representation of a client), being encouraged by a judge or a colleague to take on a case, provision of free malpractice insurance, availability of research and administrative support, the range of pro bono opportunities to select from, and mentoring by an attorney specializing in the particular subject matter. See American Bar Association Standing Committee on Pro Bono and Public Service, Supporting Justice II: A Report on the Pro Bono Work of America's Lawyers at 19-21 (Feb. 2009), available at www.abanet.org/legalservices/probono/report2.pdf. By contrast, key factors that discourage participation in pro bono activities include: lack of time, employer-related issues (e.g., competing billable hours or outright employer discouragement), a perception of a lack of expertise in the particular area needed by pro bono clients, lack of information about pro bono opportunities, and the cost of doing pro bono. Ibid. art. 22-23.

to donate their services and ensuring pro bono clients receive legal services of the same quality as those provided to paying clients. Bar associations and governments offer no incentives for public interest service and lawyers practicing in new and emerging market economies may also view pro bono work as contradicting the basic principles of the free market system. Those who do end up providing pro bono representation may not approach these matters with the necessary diligence and zealousness, leading to the provision of ineffective assistance. Additional disincentives to attorney participation in pro bono work may include lack of time to volunteer, lack of specific expertise or skills in the particular area, and employer discouragement of or restrictions on pro bono work.

A number of institutional models have been successfully utilized in attracting private attorneys to engage in pro bono service. Of these, pro bono programmes organized through private bar associations are perhaps the most sustainable. Given their status, organizational structure, and resources, bar associations are uniquely suited to lead the efforts to coordinate and advance institutionalized pro bono programmes. Smaller and emerging associations can begin with simpler assistance models (e.g., legal hotlines or publications), which would have the added benefit of enhancing their institutional capacity and societal recognition. In addition, bar association leaders can serve as role models for other attorneys by engaging in pro bono services themselves.

Another major innovation is the establishment of organized pro bono programmes at private law firms and, to a lesser extent, at corporate legal departments and government offices. In fact, employer encouragement of pro bono work and clear pro bono policies have been shown to significantly increase the likelihood of lawyers' engagement in pro bono activities. A successful strategy typically involves some or all of the following components:[74] *(a)* providing visible top-level partnership support to the programme;[75] *(b)* avoiding negative signaling by partners; *(c)* creating a credible coordination mechanism, and undertaking effective coordinating activities; *(d)* creative use of law student interns and paralegals; *(e)* encouraging potential sources of pro bono projects (e.g., public services NGOs) to enhance the firm's efforts; *(f)* providing funding for hiring of full-time lawyers in public interest law organizations; and *(g)* publicizing the firm's pro bono accomplishments through periodic newsletters or annual reports. Other mechanisms have included: assigning an experienced attorney to coordinate the firm's pro bono programme; establishing a pro bono department staffed with a partner and several associates on a rotating basis; public interest externship, through which the firm's attorneys are assigned on a rotating basis to a legal aid NGO for a substantial period while remaining on the firm's payroll; and offering associates the option to spend a substantial percentage of time on pro bono projects in exchange for somewhat lower salary.

Last but not least, the judiciary can play a crucial role in encouraging the public interest spirit and increasing acceptance of pro bono programmes among the legal professionals. It is generally considered improper for judges to give legal advice to members of the public. However, there a number of things courts can do in this regard.[76] These can range

[74]The following checklists draw upon the experience of the New York-based firm of Skadden, Arps, Slate, Meagher and Flom LLP and is detailed in: Ronald J. Tabak, *How Law Firms Can Act to Increase Pro Bono Representation* (2003), available at www.probonocentrum.cz/_files/file/podklady%20pro%20kulat%C3%BD%20st%C5%AFl/Tabak_How%20law%20firms%20can%20act%20to%20increase%20pro%20bono%20representation.pdf.

[75]This may include, for example, use of high-level partner's name on memoranda concerning pro bono opportunities, participation in meetings where associates are encouraged to do pro bono work, discussing the pro bono program at partnership meetings and firm events for associates, or interventions when other partners violate pro bono policies.

[76]Before embarking on any of these initiatives, the courts must ascertain that they do not contradict the principle of judicial impartiality. In fact, in some of the most impartial judiciaries in the world, a number of these efforts would be considered inappropriate for the courts and judges to engage in.

from a simple posting of the list of cases that require pro bono services on a court's website, to requiring attorneys to join a pro bono panel as a condition of membership in a court-associated bar, and supervising the pro bono efforts within a particular court district. Judges should also encourage legal court personnel to engage in pro bono work.

Box 33. Promoting pro bono legal services: national and local efforts in the United States

For many years, pro bono efforts in the United States existed largely on an ad hoc basis and received little institutional support from the organized bar. Over the last few decades, however, the American Bar Association [hereinafter ABA], as well as most state and local bar associations have increasingly recognized the value of an integrated system of pro bono legal aid delivery. As a result of these efforts, the number of institutionalized pro bono programmes, which service increasingly diverse legal needs, grew from 83 in 1980 to over 900 in 2005.[a]

On the nationwide level, the ABA's Standing Committee on Pro Bono and Public Service[b] is charged with fostering the development or pro bono activities by law firms, bar associations, corporate legal departments, law schools, and government attorney offices; analysing the effectiveness of pro bono programmes; and proposing legal measures that affect lawyers' ability to provide pro bono services. The Committee has been instrumental in establishing the professional ethics rule encouraging attorneys to provide voluntary pro bono service of at least 50 hours per year to indigent persons and organizations servicing their needs. It also publishes manuals outlining successful strategies in setting up and expanding pro bono programmes, operates a peer consulting project and maintains a national clearinghouse of materials on pro bono topics.

On the local level, one of the many success stories in the organized delivery of pro bono legal assistance is the City Bar Justice Center, the pro bono affiliate of the Association of the Bar of the City of New York. By utilizing its relationships with the government, NGOs and law schools, corporations and private law firms, and other bar associations, the Center provides direct legal representation, information, and advocacy to nearly 25,000 indigent and low-income New Yorkers annually. It catalyses lawyers to serve the public and their profession by providing means and opportunities to work on pro bono projects for the homeless, immigrant women and children, victims of domestic violence, asylum seekers, the elderly, consumers filing for bankruptcy, struggling small businesses, cancer patients and survivors, and others who cannot otherwise obtain meaningful access to legal resources.

The Center implements a number of projects, some of which have existed for well over a decade. For example, in the area of immigration law, it assists victims of domestic violence and human trafficking in legalizing their immigration status, and represent political asylum seekers who suffered torture or other forms of persecution. In the family law field, the Center runs *pro se* divorce clinics, assisting clients with completing and filing court paperwork in uncontested divorce proceedings, and providing consultations and legal advice in contested divorce cases. Other projects provide clients with advice and information on enforcing their economic and social rights. In addition to provision of advice and direct representation on individual cases, many projects utilize legal clinics staffed by volunteer attorneys, which educate specially targeted groups about their rights and obligations under the law. Finally, the Center operates the SHIELD (Self-Help, Information, Education, and Legal Defense) Hotline, which offers free legal information, advice, and referral services to nearly 1,000 eligible callers a month on a wide range of civil legal issues.

[a]American Bar Association, Standing Committee on Pro Bono and Public Service, Supporting Justice: A Report on the Pro Bono Work of America's Lawyers 6.

[b]See the Committee's website, available at www.abanet.org/legalservices/probono/home.html, for additional information on the Committee's activities, including its publications.

8. University legal clinics

Law schools clinics have been successfully used across the world to provide access to justice for disadvantaged groups. Clinical methodology can be applied to any area of the law which can serve the public interest.

Traditional pedagogical goals of the clinical method include: teaching practical skills and professional responsibility aimed at improving lawyer competence and ethics, and consequently, the quality of the practising bar; providing students with client interaction opportunities; and exposing students to real-life situations and legal institutions. Some countries grant students limited licence to practise law under the supervision of clinical faculty; however, such practice is prohibited in many jurisdiction. Nonetheless, even in the latter instances, students can provide other services, such as interviewing and counseling clients, drafting legal documents, conducting legal research, providing mediation services and civic legal education. Some clinics employ practising attorneys as consultants who appear in courts on behalf of clinics' clients utilizing litigation documents prepared by students.

In addition to educational benefits, clinics contribute to enhancing access to justice for disadvantaged, marginalized and vulnerable sectors of the society. They contribute to this goal in a number of ways, including: supplementing legal services by providing direct pro bono counseling and representation; exposing students to the spirit of public service and sensitizing them to key social justice needs; and engaging in class action suits, impact litigation, and advocacy on behalf of their clients, thus raising awareness about social justice issues among legal professionals and the public. In some countries (e.g., South Africa), advances in clinical education have led to the creation of new legal institutions, such as legal aid programmes or ADR centres.

Benefits of clinical legal education for the judiciary are also pivotal. Indisputably, a well-documented case prepared by a properly trained law student as opposed to an underprivileged *pro se* litigant will be processed and adjudicated more efficiently. Additionally, a cadre of ethically engaged clinic graduates will ultimately enter the judicial profession, bringing the clinic-inspired ethos of public service and rule of law to the courthouses.

While university-based clinics are part of the educational and legal landscape in most parts of the world, they do face considerable challenges. The primary difficulty is lack of sufficient financial, administrative and human resources. In addition, many clinics, particularly in developing countries, operate in complex circumstances of changing laws and legal procedures, as well as in contexts of long-standing legal nihilism among the public. Another challenge arises from the pressure on instructors to supervise and teach students and, at the same time, manage a very demanding caseload. The inconsistency brought to a client's case due to student turnover makes this tension even more acute. Other challenges include: lukewarm reception from the faculty in law schools dominated by tradition and highly theoretical methods of teaching; resistance on the part of local bar associations to the involvement of unlicensed individuals in the process of client representation, exacerbated by fear that clinics will undermine the market for professional legal services by providing assistance free of charge; and lack of regulations granting students limited licence to practise law and make supervised court appearances.

The following case study of Polish legal clinics presents a number of remedies and solutions to many of these challenges, along with the best practices for clinical legal education.

Box 34. Clinical legal education movement in Poland

Since the inception of the clinical legal education movement and establishment of the law clinic at the Jagiellonian University Faculty of Law and Administration in 1997, 24 law clinics have sprung up in 15 cities throughout Poland, engaging more than 1,300 students and accepting over 9,000 pro bono cases per year.[a] The concept behind the creation of clinical programmes stemmed from the need to improve the system of legal aid delivery unprepared to handle a massive increase of cases filed with Polish courts following the collapse of the socialist rule in 1989.

The clinics realize their educational objectives by providing free legal advice to the poor. Low financial status of clinics' clients is an indispensable condition justifying provision of legal aid. In addition to certifying their indigent status, the applicants must also state in writing that they are not represented by a legal advisor or an attorney, and that they agree to the rules of delivery of legal assistance by the clinic.

While students are not permitted to obtain a limited licence to practise law and to appear in courts under faculty supervision, they may represent individuals in administrative proceedings. Clinics also provide legal advice and issue written legal opinions, draft pleadings and *pro se* court briefs, write legal motions, review and explain court records and other court documents, and accompany clients during their visits to the courts. To address the inability of students to appear in courts (as well as the shortage of quality instructors), many clinics call upon assistance from private practitioners and returning clinical students who act as intermediate supervisors.

To ensure protection of civil and human rights, most Polish law clinics also closely cooperate with the Ombudsman's Office. To this end, the clinics supply information about pending cases to the Ombudsman and may request his/her intervention if students can no longer be of assistance; and draft informational and educational booklets subsequently published by the Ombudsman's Office. The Ombudsman, in turn, monitors issues pertaining to human and civil rights that emerge in cases handled by the clinics, provides clinics with materials relevant to his/her activities and offers externships for selected clinics' graduates.

In 2002, representatives of the growing clinical movement established the Polish Legal Clinics Foundation, tasked with providing financial and professional support to the clinics and increasing their transparency, efficiency and quality of service. The Foundation adopted harmonized operational standards and developed an accreditation process for clinics. It also maintains a website and a discussion list, publishes clinical education textbooks and the Polish Legal Clinics Journal, and organizes numerous conferences and trainings.

The clinics have also succeeded in building a core of public interest-minded attorneys. The most tangible example of this trend comes from the Jagiellonian University Human Rights Clinic, whose graduates established The Halina Niec Legal Aid Centre, which provides legal assistance to the indigent in the areas of civil, family and asylum law.

[a]Foundation of University Legal Clinics, Annual Report on Activity of Student Legal Clinics 2006/07, available at www.fupp.org.pl/down/prezentacja_2006-2007.ppt *(in Polish)*. There are both generalist clinics organized into sections corresponding with various areas of the law and specialized clinics handling cases in the fields of human rights, refugee law, women's rights, and pretrial detention.

9. Community-based paralegal programmes

In recent years, there has been growing realization, especially in developing countries, that trained non-lawyers can provide highly effective and much less costly legal assistance to the poor. One delivery mechanism that has been successfully utilized involves the use of

community-based paralegal programmes, variations of which exist in every part of the world.[77] Yet, it should be kept in mind is that paralegals providing justice services are not lawyers, and although some of them may have attended law schools but are not licensed to practise law, most have only secondary education and had no prior exposure to the legal system. They are typically employed by NGOs or legal services delivery organizations, although in some instances they are NGO-trained community volunteers. In some countries (particularly in southern Africa), they are generalists or traditional leaders who provide assistance on any substantive issues brought to them by the community members. In other cases, paralegal programmes are specialized in particular substantive tasks or issues, or in a particular methodology (e.g., ADR). In all of these instances, paralegals perform a variety of important functions, such as providing primary legal aid (through helping clients assess their problems and advising of potential solutions), mediating disputes, and engaging in community legal education and outreach. If a particular case involves severe consequences or excessively complicated legal issues, or requires other legal skills beyond those that paralegals possess, paralegals would refer the client to an attorney but continue assisting with litigation (e.g., by gathering evidence or identifying and interviewing witnesses).

Paralegal programmes are an essential supplement to formal legal aid and offer a number of benefits. Most importantly, they help fill the enormous gaps in the delivery of legal services to the poor, which are caused by the scarcity of lawyers and government resources, in particular in rural and remote areas. They are much less expensive than lawyers to train and field into the communities. In addition, they are often culturally and socially closer to the communities they work in, making them more effective than lawyers in contributing to community development and empowerment. They also have a wider and more flexible set of tools at their disposal, reaching beyond formalistic legal solutions; hence, they are not limited to adversarial approach and rely on voluntary mediation as one of their most powerful tools.

Opposition to the establishment of paralegal programmes typically comes from the bar or the government, who argue that paralegals are not qualified to provide competent legal aid and "unfairly condemn the poor to 'second-class' legal services."[78] Such arguments, however, fail to recognize that well-trained paralegals are intended merely as a cost-effective and accessible complement, rather than a substitute, for lawyers. Even where both lawyers and paralegals are available, paralegals' local knowledge may result in equal or better service. Paralegals do not lure clients away from lawyers; however, they can be helpful in locations that are beyond the reach of governments and private lawyers, and make at least some legal assistance accessible for the rural poor. They can also facilitate contact and communication between city-based lawyers and their rural clients. Paralegals, in turn, must rely on lawyers to obtain training and supervision, and to handle issues that require in-depth legal expertise. A functional approach bridges the gap between paralegals and lawyers, identifying which situations paralegals are best able to handle and which charges necessitate a lawyer.

In order for paralegal programmes in developing countries to continue to be effective and expand their influence, minimum quality standards ought to be in place. These can be accomplished through standardized training programmes, monitoring and evaluation of

[77]Foundation of University Legal Clinics, Annual Report on Activity of Student Legal Clinics 2006/07, available at www.fupp.org.pl; Stephen Golub, *Nonlawyers as Legal Resources for Their Communities,* in Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World 297, 303 (Mary McClymont & Stephen Golub eds., 2000).

[78]The term paralegal is used mostly to describe non-lawyers who hold a basic legal education and who assist lawyers and/or provide basic legal services in particular to less privileged persons. Paralegals exist in many jurisdictions, including Australia, Bangladesh, Canada, Malawi, Sierra Leone, South Africa, the United Kingdom and the United States of America.

paralegal work, a paralegal code of conduct, established effective referral mechanisms to lawyers, legislative recognition of the role of paralegals, and continued expansion of paralegals into police stations.[79]

The following case study from Malawi is an informative example of strategic advantages, challenges and accomplishments of paralegal programmes in enhancing access to justice.

Box 35. Paralegal advisory service in Malawi

To address prison overcrowding, insufficient legal representation, and miscarriages of justice, the new Paralegal Advisory Service [hereinafter PAS] placed 8 paralegals—lay workers with elementary legal training—in Malawi's four main prisons in 2000. Paralegals' main activity centres around daily paralegal clinics [hereinafter PLCs] to educate prisoners about the process of criminal prosecution and teach them how to apply the law to help their own situation. PLCs apply forum theatre techniques adapted to suit the prison environment, which allows prisoners to participate in procedural dramatizations and to learn in action. Paralegals also provide basic legal assistance to individual detainees, handling bail claims and assisting convicted prisoners with appeals (all using standard forms approved by the police and the judiciary), as well as work closely with formal criminal justice system actors to trace witnesses or relatives of detainees.

In 2003, the programme expanded to cover police stations and courts. Court-based paralegals offer general advice and assistance to the accused and their relatives, defence witnesses and members of the public to orient them on where to go in the court and on court procedures; however, they do not to advise anyone on the merits of their case. They follow up on cases from prison, by facilitating processing of bail forms and meeting with court clerks, magistrates and prosecutors. Paralegals have also encouraged magistrates to conduct "camp courts"—i.e., visit prisons and screen detainee lists to identify and release those detained unlawfully and unnecessarily.

The Court Users' Committees operate at the local, regional and national levels, meeting monthly, quarterly, and annually (respectively) with prison officials, police chiefs and judicial officers to monitor progress, identify problems, address complaints and come up with local solutions. These committees opened the lines of communication and improved efficiency by enabling relevant cases to be referred to traditional authorities for settlement. This collaborative relationship allowed paralegals to provide a check on administrative procedures, perform docket reviews and facilitate interagency accountability. There is also a supervisory committee, composed of senior members of the judiciary, prisons, police and law society, to advise and support the programme's development.

The programme has not been without challenges. For example, paralegals receive access to prisons on a condition that they may not publicly comment about prison conditions; while they may discuss these issues with prison authorities, they are often reluctant to do so in order to maintain good working relationships with the prison authorities. There also remains resentment on the part of the Malawi Law Society, although PAS is attempting to show that paralegals create work for lawyers as they facilitate case preparation. Nevertheless, strict codes of conduct and clear memoranda of understanding signed between the PAS and criminal justice actors, coupled with joint trainings and a daily presence, have been crucial in promoting the trust and confidence towards paralegals on the part of magistrates, police officers, prison staff and even prisoners.

[79]These standards are detailed, for example, in the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, which was adopted by Conference on Legal Aid in Criminal Justice: The Role of Lawyers, Non-Lawyers, and Other Service Providers in Africa held in Malawi in November 2004.

Box 35. *(continued)*

By 2007, PAS employed 38 paralegals in 24 prisons, 5 courts and 5 police stations. Initially seen as outsiders, paralegals are now widely recognized as a credible and indispensable actor in Malawi's formal criminal justice system.[a] In 2002-2007, they enabled over 100,000 prisoners to represent themselves, and the percentage of prison population on remand dropped from 35 per cent to 17 per cent. With a monthly cost of fielding one paralegal at under US$450, PAS has also proven itself a highly cost-effective solution to improving access to justice.[b]

[a]In addition to police, prison and court-based paralegals, some paralegals in Malawi also work with community-based NGOs dealing with a variety of crime prevention initiatives, encouraging ADR, providing diversion for juveniles, and working with crime victims. They also work in close connection with actors within the formal criminal justice system to trace witness or relatives and to reduce delays.

[b]PAS's success has spawned similar initiatives in Malawi (in the form of community-based paralegals to mediate disputes at village level) and pilot programs across Africa (e.g., in Benin, Kenya, Niger, Uganda and United Republic of Tanzania).

10. Conclusions and recommendations

Access to justice concerns the realization of legal and human rights by those who are unable to do this on their own and cannot afford to at their own expense.

The access to justice approach opens the discussion about reforming the judicial mechanisms for providing legal aid and support to the citizens, especially the poor and the underprivileged, so that all persons might be treated according to the law and receive legal protection.

Access to justice is linked to the increasing importance of the human rights-based approach to international development assistance. The focus shifts from the traditional state system, with its often overcharged judiciary, to the various institutions of civil society. In fact, their services often represent the only accessible active support for the poor.

With regard to the problems of states to provide for a capable state system of the judiciary, the new approaches involve the participation of both lawyers and non-lawyers, professionals and non-professionals alike, on a local or national level, financed by the state, by the local communities or by private means.

There exists a great variety of solutions and instruments to support in one way or the other the access of the poor to justice. Their feasibility often depends on financial aspects. Most of them can work alongside the formal judiciary, and therefore the state should support their formation and existence:

- Traditional, community-based courts of the people,
- Alternative dispute resolution (ADR) centres,
- Paralegal programmes with non-jurists, or "one-stop shop" legal aid centres,
- University-based legal clinics or legal clinics sponsored by the advocacy,
- Pro-bono legal assistance by private lawyers or law firms.

A comprehensive approach to justice and the rule of law should not overlook the possible forms of complementarity to the existing judiciaries of the states. It should also not allow state courts and ministries of justice to impede the creation of new institutions of civil society or hinder the development of the private sector offering services to the poor and underprivileged.

Therefore, as access to justice remains a challenge, the following approaches to a fully-fledged legal assistance system could be considered:

- Full disclosure of information to the public as to the official ways to access the legal system that are offered by the state;
- Client orientation and quality customer service by the state courts, transparency and open doors to the public, press service and access to judicial decisions;
- Public defenders in criminal cases and government-financed public defender services;
- State support of advocacy and financial aid services for citizens in order to enable them to choose the private defender of their choice;
- Recognition of (national and international) arbitration procedures and assistance in the enforcement of their decisions;
- State-funded interpreters to resolve language barriers.

V. COURT TRANSPARENCY

1. Introduction

Judicial transparency is an important value often summarized as "[j]ustice must not merely be done, but must also be seen to be done."[80] Judicial transparency is also recognized as an important principle under international human rights instruments, which identify the right to a public trial and the public announcement of judgments as one of the cornerstones of the right to a fair trial.[81] Even more broadly, the United Nations Convention against Corruption recognizes public participation in government as an important ingredient of democratic governance and suggests increasing the transparency of public decision-making and providing effective access to information as ways of strengthening public participation.[82]

As important as the norms of transparency are, those norms are supported by the practical benefits that can be expected from increased transparency. Specifically, greater transparency allows for enhanced public oversight of the judiciary. The concepts of judicial review and court accountability inherently rely on the fact that statutory texts and court judgment decisions are readily available to judges, court personnel, legislators, public officials, lawyers and the public. Thus, making sure that judicial and legal information is transparent and accessible should be an important aspect of any judicial reform initiative.

To be transparent, courts need to ensure that the public and the media can attend court proceedings, but equally important is providing the public with ready access to court documents, especially judgments and other decisions, as well as court-related administrative information, such as data on the judiciary's caseloads and clearance rates, collection of court fees, and the use of budgetary allocations. Inconsistent application of the law, which results in part from the absence of mechanisms for members of the legal profession and the public at large to obtain copies of court decisions, makes it difficult for individuals and businesses to conform their conduct to the law. Another side of the same coin is the dissemination of general legal information to judges and legal practitioners. Without reliable access to laws, regulations, jurisprudence and other primary legal sources, judges, lawyers and court users are left without clear guidance on how the law should operate in any particular case. Luckily, attainment of these objectives should become easier in light of the constantly growing trend towards the computerization of justice systems throughout the world.

It must also be stressed that transparency involves more than simply providing access to court proceedings and information. To achieve transparency, information must also be disseminated in a format that is easily accessible for the intended audience—especially for journalists and court users who do not have a legal background and may often have limited literacy. Publicizing information about court operations and judicial efforts to

[80] See, e.g., Bangalore Principles of Judicial Conduct, Value 3: Integrity, Application 3.2.

[81] See, e.g., Universal Declaration of Human Rights art. 10; ICCPR art. 14(1); ECHR art. 6(1); American Convention on Human Rights art. 8(5).

[82] United Nations Convention against Corruption art. 13(1).

increase the efficiency and quality of justice also has beneficial effects on public trust in the judiciary. In fact, programmes of judicial outreach and education concerning court services and procedures are useful from the perspective of both the judiciary and the court users. They help to actively engage a court in a relationship with the community and to demystify many of the complexities surrounding the operation of a legal system and the conduct of court proceedings. Thus, by educating and involving the public in the court's work through proactive judicial outreach and communication strategies, courts can increase public confidence and strengthen respect for the rule of law in their communities.

2. Public and media access to court proceedings

Ideally, court proceedings should be open to the public and media, which requires both formal legal protections for open trials and follow-through to put these protections into practice. National constitution, procedural legislation and court rules in most countries include formal protections guaranteeing public trials, and typically envision only those exceptions that can be narrowly codified so as to avoid abuse. More often than not, however, they fail to successfully implement these provisions, for reasons as diverse as limited number of courtrooms or courtrooms that are too small to accommodate the public, judges who are unaware of the law, rules allowing excessive judicial discretion in closing court proceedings, and prevalence of written as opposed to oral court proceedings.

There is a general presumption in international human rights treaties in favour of allowing the public and the media to attend court proceedings; however, these instruments recognize a number of common exceptions, such as the potential need to close court proceedings for reasons of morality, to protect public order, for national security purposes, to protect the private lives of parties or the interests of juveniles, or when publicity may damage the interests of justice.[83] National legal systems in many countries recognize additional reasons for barring the public and the media from proceedings, which are widely seen as acceptable grounds. These include maintaining state secrets, trade or commercial secrets, and protecting witnesses or victims from retribution. However, even specific standards for closing court proceedings can be problematic if judges use legitimate reasons as a pretext for otherwise improper closures. Therefore, requiring that the hearing regarding closure be open to the public or that judges issue written orders explaining their reasons for closing the proceedings can help reduce abuse of the closure rules.

From a practical standpoint, public and media access requires not just sufficient courtrooms to accommodate members of the media and the public who wish to attend trials, but also case management and administrative techniques that make judicial information easily accessible. However, the reality in many developing countries stands in stark contrast to these requirements. As a result, judges are frequently forced to hold hearings in their offices due to a lack of available courtrooms.[84] This practice not only makes it extremely

[83]See, e.g., ICCPR art. 14(1); ECHR art. 6(1).

[84]In many developing civil law countries, courthouses have traditionally been designed in a way where judges' offices are positioned along publicly accessible corridors, and the court practices permit, or even encourage, individual parties to stop by the judges' offices during so-called "office hours," most often in order to discuss a particular case. This violates a key principle of judicial conduct—prohibition against ex parte communications or communication with one party in the absence and typically without the knowledge of the other. Some countries are beginning to address this issue through major court infrastructure reform initiatives, which involve construction of new or redesign of existing courthouses both to include additional courtroom and to locate judges' office in secured corridors, essentially making it impossible for any party to walk into an office to discuss a case. The challenge for court systems in revenue-poor developing nations is that no funding is available to support such projects. Therefore, in this context raising the judges' and the public's awareness of the need to avoid ex parte communications becomes even more crucial.

difficult for members of the public to attend the trials, but also can lead to a breakdown in decorum, the disregard of established procedures, and the potential for security problems in small quarters.

Therefore, physically opening up court proceedings in many instances requires renovating existing courtrooms or constructing new courtrooms. As a shorter-term solution, physical access issues may be partially alleviated through effective court management that assigns cases of public interest to larger courtrooms where public and media access is possible. Courts should also be encouraged to introduce continuous trial rules that provide for holding proceedings at one sitting instead of spreading them out over different hearings. Short and incomplete hearings can further delay court proceedings when a lack of available courtrooms makes scheduling difficult.

At the same time, media access should not be a matter of simply opening doors to the courtroom and providing seats to journalists. Courts are not well served by inaccurate and sensationalist coverage of court proceedings. In fact, poor or biased media coverage can undermine public trust in the judiciary and raise concerns with regard to judicial independence, impartiality, and integrity. Journalist training organized by or in cooperation with the courts can help reduce ineffective reporting by providing them with basic knowledge about court procedures and legal issues, improving journalistic skills and ethics, and building trust between judges and journalists.

Engaging the media may also require that courts actively reach out to journalists. A successful approach in many countries has involved establishing press or public affairs offices within individual courts, in order to facilitate media coverage of the courts. These offices are commonly charged with liaising with media representatives, responding to and managing requests from journalists, issuing press releases and otherwise providing accurate information about judicial decisions and legal issues, providing schedules of upcoming cases, monitoring the media for accurate reporting, and designing media campaigns that promote public understanding of the judiciary.

Overall, ensuring public and media access to the courts requires a comprehensive approach that targets various access issues at once, as illustrated by the following example from Mongolia.

Box 36. Media access reform in Mongolia

As Mongolia transitioned to democracy in 1990, it retained a "culture of secrecy" marked by strict secrecy laws that inhibited the free access to information and made independent media oversight difficult. In the judicial sector, access to information about court cases was complicated by restrictive rules for journalists attending hearings, public misunderstanding of legal issues, and physically inaccessible case files. During 2001-2006, Mongolia Judicial Reform Project [hereinafter JRP] sought to remedy problems with media access to courts through four interrelated reforms: court infrastructure, rules changes, public affairs officer training and journalist training.

Infrastructure reforms focused initially on providing access to case information. As case files were kept by judges in their offices, journalists could only read the files by convincing the judge to grant them access to the physical documents. With the introduction of automated case management and court administration, and as case files were included in the new systems, public and media access became easier to provide. By 2005, computer terminals to provide direct public access to electronic court records were established in every courthouse in Mongolia.

Box 36. *(continued)*

Even as access to records became easier, access to hearings and trials remained difficult. Mongolia's courtrooms were not built with public and media access in mind. JRP assisted the Ulaan Bataar District Courts in redesigning courtrooms to provide sufficient seating for public and media observers; 17 courtrooms had been reconfigured and refurbished. In conjunction with courtroom redesign, Mongolia's General Council on Courts changed the rules regarding media access to trials and hearings. Under the prior rules, journalists had to receive written permission from the court's chief judge before they were allowed into the courtroom. Resolution 59, adopted in October 2005, provided for free courtroom access by the media and required only verbal permission for taking photographs.

In addition to the infrastructure and rules changes, JRP trained public affairs officers for the courts. Topics covered included how to write press releases, organize press conferences, and develop a public relations master plan, building strong judiciary-media relationships, and development of public relations campaigns. Overall, trainings were designed to teach public affairs officers how to provide accurate and relevant information to journalists and to ensure that public affairs officers were working with journalists to provide that information to the public.

Finally, JRP also provided training for journalists. Focused on covering the court system, the training sessions included some lessons on basic journalistic techniques such as interviewing sources and media ethics, and emphasized transparency, judicial independence and the presumption of innocence. With access to both court files and hearings, and with public affairs officers providing useful information, Mongolia's courts are becoming more transparent while its journalists are becoming more capable of using and ensuring that transparency.

3. Access to judgments and other court-related information

A variety of formal and practical limitations in judiciaries throughout the world restrict public access to court decisions and other court-related information. In some countries, strict procedural rules allow judgments to be released only to the parties in a case and their attorneys, or upon the permission of the court president.[85] In other jurisdictions, especially throughout Europe and the Middle East, expansive privacy laws (which stem from the traditional reluctance to provide open access to court information) limit access. In fact, policies of this type exist in many civil law jurisdictions, regardless of the countries' resource base.[86] Potentially worse, some countries have no policy at all on the publication of judgments or the dissemination of court information. As a practical matter, access to information is often limited by inadequate resources for copies or publication, lack of indexing of cases, long delays between the announcement of a judgment and its publication, and, in the case of superior court judgments, a failure to distribute decisions to lower courts. Moreover, the current cultural framework in which many of the world's judiciaries operate means that any suggestions that the bar, the media and the public be provided with access to court judgments are typically rebuffed in the interests of preserving personal privacy and confidentiality, with some expectation that if they were made generally accessible, public confidence in and use of the courts would diminish.

[85]International human rights norms do not require publication of court judgments per se; what is required is that final court judgments, with a few exceptions, be announced publicly—even in those cases where actual proceedings were closed to the public. Permissible exceptions to public announcement of judgments include cases involving the interests of juveniles, matrimonial disputes, or child custody issues. See, e.g., ICCPR art. 14(1); ECHR art. 6(1).

[86]This mentality is often so entrenched that judicial leaders in civil law jurisdictions are often astonished to learn, for example, that the federal courts of the United States make available to the public not only the judgment but the contents of the entire case file via remote Internet access, without modifying or redacting the identity of the parties.

Enabling public access to court-related information is associated with numerous benefits for the integrity and efficiency of the justice system. Publication of judgments allows the public, the press, civil society organizations, lawyers, judges and legal scholars to scrutinize the actions of judges. Submitting judgments to public scrutiny through publication also regularizes the application of the law and makes judicial decisions more predictable and consistent, thus improving the quality of justice.[87] For example, requiring a statement of facts and an analysis explaining the application of the law ensures that judges cannot hide decisions that are contrary to law.

In judiciaries where higher court decisions are binding precedent, publication and distribution of appellate and Supreme Court decisions is crucial in ensuring that lower court judges are following the law. However, even in countries where higher court decisions are persuasive or otherwise nonbinding, it is still important to ensure that judges are interpreting the applicable statutes and codes in a consistent manner. While superior court decisions should be published in official gazettes or collected in court bulletins, distributing decisions on CD-ROMs or through the Internet can reduce the costs associated with publishing hard copies and provide lower court judges and other interested parties with quick access to new jurisprudence. Similarly, other courts can quickly disseminate important decisions by printing extra copies for distribution to the public when the judgment is announced.

Access to court documents should not be limited to judgments. Pleadings, motions, court schedules and court files should also be accessible by the lawyers and litigants in the case, as well as by the public when consistent with privacy laws. Unscrupulous court staff can take advantage of systems that do not allow access to court filings and pleadings by taking bribes for altering documents or losing case files. Posting printed hearing schedules is one simple way of providing access to that information; and many countries are even establishing kiosks in courthouse lobbies so that litigants and lawyers can check case status information and schedules in the court databases. Furthermore, transparency of court-related information also involves dissemination of administrative information concerning the business of the courts. This includes publication of statistics on the judiciary's caseloads, case clearance rates and appellate practice, as well as budget-related data (e.g., collection of court fees, use of budgetary allocations, etc.). One of the most frequently utilized methods includes periodic reporting by the judiciary's leadership to other institutions. For instance, in many countries it is common for the chief justice or the head of judicial administration department to deliver to parliament an annual report on the state of judiciary.

Many courts have taken advantage of the Internet to create websites that post the latest judicial decisions, information on court rules, and court-related administrative and statistical information. Although there is a broad trend towards computerizing court records, public access to court documents and other court-related information can be provided even in paper-based systems through effective and efficient records management techniques. Courts should keep case files and documents in joint records offices that establish uniform methods for identifying, tracking and updating the files. Databases that index

[87]At the same time, reformers must be mindful of the fact that providing open access to court judgments in itself is unlikely to bring around consistency in judicial practice. Inconsistent application of the law has multiple contributing factors in addition to public access to judgments, such as judges' lack of training and experience in the practical application of the law; lack of judges' access to the key judgments of the intermediate and final appellate courts; judges' isolation in their own localities with little opportunity for interaction with their colleagues; the civil law or Islamic Sharia traditions, which traditionally eschew reliance on precedent as established by the higher courts and instead requires judges to review, interpret and apply the relevant law (or Sharia principles) to the circumstances of the case; and lack of consistent and internally cohesive jurisprudence of higher courts in new judicial systems.

cases by party name, date, court and case number can significantly improve access to court files. Furthermore, well-managed records offices that freely provide access to judgments can allow private court reporting companies or legal periodicals to distribute important cases. However, even when private entities or periodicals help fill the information gap, high courts should endeavour to provide judgments to lower court judges free of charge and in a timely manner.

The achievements in and ongoing challenges with providing unimpeded public access to all court decisions through an electronic database are discussed in the following case study from Ukraine.

Box 37. Changing laws on access to court decisions in Ukraine

Prior to 2006, Ukraine had strong legal restrictions on access to judgments. While litigants had access to judgments, procedural codes prohibited non-parties from receiving copies of court decisions without the permission of court president. Since it was in the judges' discretion to grant such requests, practice varied among the courts, with some judges freely granting access and others regularly denying the requests. The country also lacked an official reporting mechanism for judgments from lower courts. Although many decisions of the highest courts were published in official court bulletins, trial and appellate courts did not have any practical method for making their judgments broadly available to the public. While a few legal periodicals published a small number of these decisions, the public, media, and, more importantly, other judges did not have regular access to court judgments. As a result, judges were frequently unaware how other courts were ruling in similar cases, and decisions issued by different courts often failed to reach the same conclusion when applying the same law to similar sets of facts. The lack of public and media scrutiny also decreased the quality of judicial decisions.

Recognizing these problems, in late 2005, Ukraine's Parliament passed a law mandating greater access to court documents. Under the new law, complete texts of all judicial decisions from courts of general jurisdiction are to be made available to the public through the judiciary's official website, maintained and funded by the State Court Administration. There is no cost associated with using the Unified Register of Court Decisions,[a] which can be readily accessed from any computer with Internet connection. There is only one restriction, operating to protect the privacy of litigants: information that can be used to identify a private individual and information provided in closed court sessions must be encrypted, so that only judges and parties are authorized to access such data. The law also contains provisions for print publication and dissemination of court decisions, and allows anyone to reproduce, fully or partially, texts of court decisions in any format or media.

To date, nearly 3 million final judgments and interlocutory court orders have been uploaded into the Register. The Register is fully searchable by multiple criteria, such as names of parties;[b] phrases from the text of decision; name and location of the court; name of the judge; case file number or filing date; and properties of the decision (e.g., date of issuance, registration number, type of proceedings and type of decision).

At the same time, a number of challenges remain. Many more decisions, particularly those issued by the lowest courts, remain unpublished, since many judges on those courts lack access to computers or computer skills. Uploading of decisions is also delayed because many courts choose to provide paper copies of judgments to the Register's administrator, who then must convert those judgments into electronic format. The other major problem is the requirement that the Register include all court judgments, which has been interpreted literally to require that the database incorporate judgments in hundreds of thousands of petty and misdemeanour cases of minimal importance, the

content of which the search engine must process. Thus, a simple search request frequently results in the system retrieving large numbers of cases, each of which has to be reviewed. The Register's functionality could also be enhanced by introducing additional search criteria, inserting hyperlinks to related decisions, developing a multi-level subject-matter index, and adding an information card as to each decision's current status.

[a] See www.reyestr.court.gov.ua.

[b] However, search functionality under this criterion is limited by virtue of privacy protections described above, since names or other identifying information is redacted and replaced with substitute names. In practice, therefore, only judges have access to a special secured database which lists the parties and cases by name and permits searches based on them.

4. Collection, accessibility and dissemination of legal information

The lack of access to primary legal texts may force judges to decide cases without direct knowledge of the relevant statutes or case law, which can lead to decisions being unpredictable because they are not based on the law, but rather a judge's limited working knowledge of the law. It also often leaves members of the public in the dark on whether their conduct violates the law or whether the government or private parties are treating them fairly and in accordance with the law. Knowledge and access to the law becomes increasingly important as economic and social transactions grow in complexity, as parties need assurances that property and contract rights will be upheld and decided predictably under the law. Similarly, criminal defendants will only enjoy the rights they are entitled to if courts know of them and are held accountable for properly applying criminal procedure codes.

Due to changes in technology, approaches to learning, and the growing needs and expectations of the legal community, the dissemination of legal information is a constantly evolving practice. Many developed countries have created electronic databases that store the texts of court decisions, statutes, legislative acts and histories, as well as scholarly articles from law reviews and legal journals. While these databases constitute a significant step in consolidating the relevant legal information necessary for a judge to make an informed decision or for lawyers to present a well-researched argument for their clients, they are not a finished product, but rather are constantly evolving to meet the new needs of the legal community and the public at large.

During the last decade, the importance of accessibility and dissemination of legal information has garnered international recognition. In October 2002, a group of representatives of university-based Legal Information Institutes (LIIs) gathered in Montreal to adopt a Declaration on Free Access to Law, giving rise to the global Free Access to Law Movement.[88] One of the outcomes of the Declaration has been the establishment of the World Legal Information Institute (WorldLII), as a free, independent and non-profit legal research facility that strives to provide consistent access to high-quality legal databases

[88] See www.worldlii.org/worldlii/declaration/montreal_en.html.

from participating LIIs.[89] In addition to domestic partner databases, WorldLII itself hosts several databases that provide access to legal information from a number of Asian countries (Cambodia, the Philippines, Timor-Leste and Viet Nam) and South Africa (via the University of the Witwatersrand). Overall, WorldLII enables searching over 270 databases from 48 jurisdictions in 20 countries (mainly those with a common law tradition), including databases of case law, legislation, treaties, law reform reports, law journals, and specialist subject matter databases. WorldLII also includes a WorldLII Catalog and Websearch facility, which provides systematic and comprehensive access and links to over 15,000 law-related websites from around the world, making it the Internet's largest law-specific catalog that covers every country in the world and over 100 legal subjects.

The creation of an electronic legal database is obviously a massive undertaking, requiring resources that many developing countries do not have. It is important, then, for these countries to develop models of judicial dissemination that can continue to expand and grow once in place. The most basic of these models is the creation of collections of relevant legal materials in an easy to access form, followed by the creation of law libraries to house these collections and make them available for the legal community and the courts. This can be followed by developing an electronic legal database. Judiciaries should approach this task in an incremental, piecemeal fashion, spread out over time as resources dictate. It can begin, for instance, with providing electronic access to key laws and codes; recent key decisions of the superior court as selected by a committee of its justices could come next. This, in turn, might be followed by automating historically significant decisions that define the jurisprudence of the superior court, and by recent key decisions of the intermediate courts of appeal—decisions that were upheld by the superior court. The task is neither impossible nor cost-prohibitive when pursued in this manner. The bottom line is that a judicial system cannot avoid the eventuality of having to automate its legal resources. The increasing costs of publishing and purchasing law books makes them suitable only as a short- to medium-term solution; in the long run, the recurring costs associated with equipping each judge with access to a centralized electronic database will be less expensive than providing each with a mini-library of law books and successive volumes of published decisions.

Some nations have created legal publications that keep judges and attorneys informed of new developments in the law, and can keep the public informed as well by sales of these journals and newsletters through bar associations and private vendors. Development and dissemination of benchbooks and manuals for judges has also established itself as a relatively cost-effective remedy to enhance judges' access to information and improve their knowledge of both substantive law and court procedures. Legislatures and non-judicial government entities are becoming increasingly reliant on the Internet to post new laws and regulations on their official websites, or to create stand-alone websites to fulfill this purpose. Similarly to electronic databases, these developments are not an end unto

[89]WorldLII (www.worldlii.org) is a joint initiative of Australasian Legal Information Institute (AustLII, www.austlii.org, which provides overall operational support to the project), British and Irish Legal Information Institute (BAILII, www.bailii.org), Canadian Legal Information Institute (CanLII, www.canlii.org), Hong Kong Legal Information Institute (HKLII, www.hklii.org/), Legal Information Institute at Cornell Law School (LII, law.cornell.edu), and Pacific Islands Legal Information Institute (PacLII, www.paclii.org). The Free Access to Law Movement is not limited to WorldLII and its partners; members also include, among others, Asian Legal Information Institute (AsianLII, www.asianlii.org), Commonwealth Legal Information Institute (CommonLII, www.commonlii.org), the Cyprus Source of Legal Information (CyLaw, www.cylaw.org/index-en.html), L'Institut Français d'Information Juridique (www.droit.org), Global Legal Information Network (GLIN, www.glin.gov), Irish Legal Information Initiative (IRLII, www.ucc.ie/law/irlii/index.php), Juristisches Internetprojekt Saarbrücken (JIPS, www.jura.uni-saarland.de), JuriBurkina (www.juriburkina.org), JuriNiger (http://juriniger.lexum.umontreal.ca), Kenya Law Reports (www.kenyalaw.org), Philippine Law and Jurisprudence Databank (LAWPHIL, www.lawphil.net), New Zealand Legal Information Institute (NZLII, www.nzlii.org), Southern Africa Legal Information Institute (SAFLII, www.saflii.org), Thailand Law Reform Commission (TLRC, http://lawreform.go.th), and Uganda Legal Information Institute (ULII, www.ulii.org).

themselves, but rather create a solid foundation that governments can continue to expand in order to increase access to legal information.

As illustrated by the case study presented in this section, it is possible to improve access to legal information, at least as a short-term solution, even in such a challenging environment as the West Bank and Gaza.

Box 38. Distribution of legal information in the West Bank and Gaza

The West Bank and Gaza present a potentially unique situation regarding their legal system based on the variety of outside influences on the territories. The current laws operating in the region are mainly left over from Ottoman, British, Jordanian and Egyptian rule, supplemented by Israeli military orders. Until recently, there were no unified laws or a common collection of legal materials for judicial or public reference.

One component of the World Bank's Legal Development Program aimed to create law libraries in the West Bank and Gaza while also creating a system for the compilation of court decisions for publication and dissemination. To this end, specialized libraries were established in six courthouses and within the prosecutors' office in Gaza and Ramallah. These specialized libraries consisted of furniture, equipment and an average of over 750 legal reference books each. Two more specialized libraries were created in the offices for the Council of Legal Advisory and Legislation under the MoJ. These libraries hold approximately 1,000 legal reference books and other reference materials. While only judges and court staff have access to the court libraries, all members of the legal community have access to the MoJ libraries. Relevant personnel also attended training sessions on managing and maintaining the libraries so as to continue the operation and support for the new libraries after completion of the programme. In addition to the specialized libraries, judicial libraries were created, consisting of approximately 100 books each located in the chambers of 26 judges throughout the region. This allows judges to have legal references readily available and encourages greater adherence to the law.

The programme also focused on dissemination of new law. The quarterly *Journal of Law and the Judiciary* now publishes new legislation, judicial decisions and legal research. The journal is distributed to subscribers, judges, legislators and public institutions, and is available for sale, allowing to cover the cost of printing future issues. Such an approach has made the journal self-sustaining from a financial point of view, and again increases knowledge about the law and the transparency of court decisions.

The final aspect of the programme involved publication of a six-volume set of all legislation and decrees adopted by the Palestinian Authority. The set was distributed to all judges in the West Bank and Gaza, members of the Palestinian Legislative Council, MoJ staff, legal departments of other Palestinian Authority ministries, and all libraries of Palestinian universities. The MoJ further supported this endeavour by setting up a website that covers information on various legal offices in the West Bank and Gaza, as well as the Palestinian Authority Official Gazette and all legislation enacted by the Palestinian Authority.

While an electronic database has not yet been established, the consolidation of current legal references created a foundation that the West Bank and Gaza can continue to build on. It also established a basis for reacquainting legal practitioners and researchers with the law and gave them access to vital information that supports the judicial decision-making process.

To supplement the dissemination of primary legal information, judicial benchbooks on a variety of substantive and procedural topics, as well as general subject-matter benchbooks can serve as comprehensive yet quick practical guides to help judges deal with the day-to-day situations they are likely to experience during the exercise of their duties.[90] In addition, benchbooks can be used during continuing legal education trainings for judges, thus helping them develop professional and practical skills, and ultimately contributing to the establishment of a more transparent, fair, effective and accountable system of justice. The case study that follows describes the experience of Vietnamese judiciary in developing the country's first official benchbook.

Box 39. Developing a judicial benchbook, Supreme People's Court of Viet Nam[a]

Viet Nam's first official benchbook was launched in 2006, following a decision by the Chief Justice of the Supreme People's Court (SPC). The benchbook was written mainly by senior Vietnamese judges and is a task-based practice manual providing information about laws and procedure. It consists of six parts: *(a)* People's Courts, Judges, and Assessors; *(b)* Hearing of Criminal Cases; *(c)* Hearing of Civil Lawsuits; *(d)* Resolving Administrative Cases; *(e)* Bankruptcy Procedures; and *(f)* Arrest at Sea/Maritime Claims. As the benchbook is designed to be easily updated over time, it was published in loose-leaf format. The initial version was distributed across the country to over 5,000 judges and 300 members of the bar (primarily those responsible for the provision of legal aid), as well as published on the Internet.[b] Many of the sources contained in the benchbook are not otherwise readily available to judges, court users and others interested in the Vietnamese legal and judicial system both within Viet Nam and internationally. Following the benchbook's publication, a series of workshops were conducted across Viet Nam, enabling a judge from each of the 64 city and provincial courts and 657 district courts to attend training on the use of the benchbook.

During 2006-2007, a significant legislative reform programme, including the revision of criminal and civil procedure codes, was undertaken in Viet Nam, following which the SPC decided to update the benchbook. Using the opportunity, the SPC also refined a number of the benchbook's chapters and included a series of case studies to further assist judges in applying law and procedure. The revised benchbook was launched in September 2009, with several thousand copies published in both hard-copy and CD-ROM format and distributed to courts and legal professionals across the country. This has enabled access to the benchbook by judges and others who do not have Internet facilities within their courts.

The Internet and CD-ROM versions of the benchbook include hyperlinks to a wide range of legal sources, including the SPC's Judicial Council resolutions and decisions. The revised online version also includes a keyword search facility and enables the user to provide feedback and, with the approval of the SPC, add additional material, which will further elucidate the interpretation and application of laws and assist with judicial practice in a broad range of areas. Additionally, the SPC can advise judges in courts with Internet access (currently all provincial courts and district and city courts in Hanoi and Ho Chi Minh City) by email of any changes to the benchbook and email them the new parts to be inserted in the loose-leaf version.

[90] Many courts in the United States, for example, have issued benchbooks for their judges. These benchbooks can be of general nature, providing guidance on various procedural actions that need to be taken during different stages of court proceedings (see, e.g., Federal Judicial Center, Benchbook for United States District Court Judges (4th ed., with March 2000 revisions), available at www.fjc.gov/public/pdf.nsf/lookup/Benchbk.pdf/$file/Benchbk.pdf); or they can provide guidance on more narrow technical areas of the law (such as juvenile justice, drug-related offenses, domestic violence, family law, immigration, or consumer protection).

The benchbook has become a key resource for the SPC's Judicial Training Centre and the MoJ's Judicial Academy to train newly recruited judges. Both training facilities have recently conducted train-the-trainer workshops, so that trainers can continue to provide training to other judges on the content and use of the benchbook. As with the previous edition, the SPC is currently conducting workshops throughout the country to enable judges from all city, provincial and district courts to receive training in how to use all three formats of the benchbook. The SPC is also in the process of appointing a committee to periodically update the benchbook, as the first and revised versions of the benchbook were produced with assistance from international consultants.

[a]This case study was provided by Ms. Helen Burrows, Director, International Programmes, Federal Court of Australia.

[b]See www.toaan.gov.vn/portal/page/portal/ebb.

5. Public awareness-raising and outreach

Over the past decade, courts have increasingly recognized the value of conducting judicial outreach programmes in order to address misconceptions about the justice system and educate the population on laws and reform initiatives. This is a significant change from traditional judicial policies that isolated judges from the public as a method of ensuring independence and impartiality. Instead, judicial outreach today often involves proactive measures by judges and direct interaction with the communities they serve. In some jurisdictions, judicial outreach activities are now considered to be official functions of the court, evidencing the growing recognition of the importance of judicial outreach measures for the promotion of justice.

There are many benefits to judicial public outreach, both for the public at large and the courts themselves. Public outreach can educate people not just on legal processes and the role of the judiciary in society, but also on their rights and how to access the justice system. Increased public knowledge about the law and court processes may increase public confidence and judicial transparency. This, in turn, can help solidify judicial independence because there is less popular support for political interference in the judiciary when public confidence levels are high.

A key function of public outreach is to provide useful and easily understandable information about what courts are, how they function, and what services they offer to the public. In addition to helping increase public confidence in the courts, these efforts also provide judges with an opportunity to contribute to the development of their communities. Many judges entered the legal field in part because they wanted to serve their communities and believed that administering justice is a positive way to do so. Yet, the realities of the bench often mean that judges are distanced from their communities and do not have many opportunities to directly interact with the people they have sworn to serve. Judicial outreach programmes provide an avenue where judges can promote justice through popular interaction. Doing so allows judges to become more in touch with the people.

There is no singular approach to judicial outreach and public education about the courts. Different audiences have different needs, and must be addressed separately based on these considerations. Since the intended audience can vary significantly, programmes tailored to specific audiences are more likely to achieve their goals than general programmes that do not relate to the audience at hand. Educational outreach programmes that address

school-based audiences have emerged as one popular type of programme,[91] as have town-hall meetings for the general interested population. The general public also benefits significantly from the publication and dissemination of court user guides on a variety of procedural subjects or targeting a variety of audiences.[92] Outreach programmes geared towards the media have also emerged as a valuable means of educating journalists and giving the media an opportunity to accurately educate the public through their reporting. Thus, judicial outreach programmes are often actually a collection of smaller programmes focused on specific groups within the society that, when put together, form a wider campaign of public sensitization.

Recognizing the needs of different groups is especially important in developing countries, where there can be major disparities in terms of education or wealth among the targeted groups. Such disparities affect what type of media access people have due to literacy or cost, as well as their initial understanding and opinions of the courts. As a result, there is a greater need to employ a variety of methods to reach the public, such as picture posters for those with limited reading skills alongside written material, and to utilize many different media forms (e.g., television or radio campaigns, creating court websites that include copies of court forms, filing and other procedural guidelines, and other relevant information for prospective court users and the public at large) in order to reach the widest possible audience.

The case study below illustrates how Nigeria is approaching the issue of judicial public outreach through multiple initiatives that target all major community and legal actors.

Box 40. Public awareness-raising and outreach in Nigeria

Following the end of military rule in Nigeria in 1998, the low level of public confidence in the courts posed serious challenges to establishing the rule of law and justice for all in the country. In collaboration with various international partners, such as DFID, EU, UNODC, and USAID, the Nigerian judiciary embarked on several public outreach initiatives, aimed at educating and empowering the people within the reform process and strengthening public confidence in justice.

Several approaches have been undertaken in this effort. The outreach methods varied from state to state, based on available resources and the audience they target. Examples of outreach initiatives have included the production of radio and TV programmes, town-hall meetings, and the design and dissemination of awareness-raising materials (e.g., in-house newsletters and magazines, posters, flyers, leaflets, stickers), both for the legal community and for the public at large. Court user guides in the form of short pamphlets have been produced, providing basic information on arrest, detention and bail, basic criminal and civil procedures, as well as tips and useful contacts for crime

[91] Court Service of Ireland, for example, includes a special "Schools" section on its website (see www.courts.ie/courts.ie/Library3.nsf/PageCurrentWebLookUpTopNav/Schools), which provides an expansive array of learning opportunities that range from court system visits to participation in mock trials to understanding the various players in a court proceedings and their roles. It also makes available a superb teaching resource packet entitled "Let's Look at the Law," which includes a teachers' manual, posters and other supplemental teaching aids, and an educational DVD and is designed for teachers at second-level schools and is available free of charge. The teaching module provides a dynamic and highly interactive series of lessons that requires no prior legal knowledge on the part of the teacher. Another concept, piloted in the federal trial court in Utah, involves a special course of instruction offered to teachers through the University of Utah College of Law. Working with the law school officials, the Court designed a special semester-long evening course and invited interested teachers from school districts in the greater Salt Lake City area to apply for admission to the course that would be offered free of charge to those who were accepted. While the Court hoped for a minimum of 20 applicants, the level of interest in and enthusiasm for the course turned out to be substantially higher. Teachers who completed the pilot course expressed strong enthusiasm for it and commented on how much more capable they felt teaching students about the law and the courts as a result of having enrolled.

[92] For examples of court user guides see: http://fcthighcourt.gov.ng/index.php?option=com_content&view=article&id=259&Itemid=124.

victims, witnesses and other users). As these initiatives progressed, state judiciaries decided to institutionalize public outreach mechanisms as one of the functions to be carried out by the courts on an ongoing basis. For instance, media units have been established in the High Courts, which are responsible for production of awareness-raising materials and communications with the media.

Judicial outreach in Nigeria is not a stand-alone project, but rather part of a systemic reform of the justice sector that helps capitalize on other reform developments. One sign of its value came with an unpublished survey conducted by UNODC in 2007, which showed a marked improvement in public confidence in the judiciary since 2002. Among others, the survey found that the number of court users who had not used the courts during the last two years despite the need to do so decreased from 42 per cent to 36 per cent between 2002 and 2007, while the number of court users who would use the courts again based on their experience increased from 58 per cent to 69 per cent.

6. Achieving and maintaining public trust

A critical feature of a functioning judicial system is the confidence of the public as to the fairness and quality of justice administered by that system. In other words, in order for courts to be effective in delivering justice, the public must have confidence in their ability to do so. Efforts to promote public trust and confidence in the judiciary should, ideally, form a part of a comprehensive, system-wide strategy aimed at correcting negative public perceptions and eliminating inefficiencies that lead to such perceptions in the first place. Public perceptions of the justice system are predetermined, to a large extent, by personal experiences of court users.[93] Therefore, in order to enhance both the image and efficiency of the judiciary, courts and court procedures need to become more accessible, open, transparent and client-oriented.

Because public perception is paramount to support and effective functioning of the judiciary, it is important to consider the public's opinion of the courts. Clearly, the better informed the courts are about public needs and desires, the more capable they are to respond to complaints with more beneficial changes in policy. There are a variety of tools for measuring the level of public satisfaction with the court system. These range from encouraging client feedback, implementing an effective and impartial complaint system, and conducting extensive public opinion and court user surveys. While each of these approaches can be beneficial, surveying a broad range of citizens who have used the courts and collecting information on all courts in the system plays an important role in assessing public trust in the judiciary.[94] Periodic user surveys designed to gauge public opinion about court services can be a crucial starting point in developing such strategy. When administered impartially and accurately, surveys can be an informative way of assessing public confidence in the judicial system. They can identify weak points in court administration and services and instigate policy changes to correct them. Surveys can track

[93]It is important to remember, however, that opinions of those who have not had a direct personal experience with the court system are shaped by external factors, such as media reports, political debates or conversations with relatives or friends with such personal experiences.

[94]In addition, periodic surveys of the lawyers, who practise in the courts on a day-to-day basis, are an important source of useful information. Indeed, the experience of some courts suggests that attorneys often provide much more useful and informed feedback that the typical layperson end-user. Lawyers are also much more capable of commenting on the relative effectiveness of a court's judges from the perspective of having represented clients before them over time and in different types of cases.

trends in opinion over a broad base and thus serve as benchmarks for improvements in public opinion and confidence in the courts.[95]

Opinion surveys and other methods for assessing public trust in the judiciary, however, are meaningless if judicial system actors are unable to extract lessons from such assessments and follow them with policy changes and concrete actions. Reforms and policy changes based on survey results can help foster public confidence in the judiciary, because they demonstrate that the judiciary has listened to public complaints and has made reactive changes. Because procedural fairness is one of the most important factors in contributing to public confidence, policy changes to improve efficiency and consistency of court processes used in courts can make an important contribution to increased public confidence. Reforms may involve changing courtroom policies to allow for greater transparency, which is a common way to give the public a sense of participation in the procedures of justice services delivery.[96] Similarly, improvements in infrastructure, staff training and access to courts can help to foster a greater sense of legitimacy and public trust in the judicial system. Finally, in countries with diverse ethnic and racial populations, policy changes that increase inclusiveness for all members of society can enhance public trust in and support for the judicial system.

The following example from the United Kingdom shows how data obtained from regular court user surveys can be successfully utilized to effect changes in the quality of court services.

Box 41. The United Kingdom and Her Majesty's Court Services user survey

In 2007, the Ministry of Justice concluded a comprehensive year-long survey of user satisfaction in English and Welsh courts. It attempted to more accurately gauge user satisfaction by conducting in-person surveys of randomly selected court users as they exited the courthouse. These surveys were conducted at every courthouse in the entire lower court system of England and Wales, with a total of around 5,000 users surveyed. The MoJ decided that in-person surveys would be more effective in fixing a number of methodological problems and achieving a broader survey pool than the previous postal and handout surveys that had returned less diverse results. The new surveys were uniform in content, making the information more easily comparable and useful for analysis. Also, the number of interviewees could be controlled, whereas postal and handout surveys had poor turnout from local populations.

The survey queried users as to their level of satisfaction with various aspects of court services, staff, proceedings and public awareness. The data was analysed to determine user satisfaction with both individual courts and groups of courts located in a certain region or for a certain type of proceedings, and to determine what factors contributed the most to satisfaction or dissatisfaction of court users. This information was particularly useful in identifying weaknesses among courts and types of proceedings. Respondents' demographic information was also analysed to determine if any particular races, genders or other groups were experiencing lower satisfaction than others with the courts.

[95]For examples of comprehensive court user surveys, see generally, e.g., United Nations Office on Drugs and Crime, Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States: Technical Assessment Report (Jan. 2006), available at www.unodc.org/pdf/corruption/publications_nigeria_assessment.pdf; United Nations Office on Drugs and Crime, Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces: Technical Assessment Report (Mar. 2006), available at www.unodc.org/pdf/corruption/publications_indonesia_e_assessment.pdf.

[96]For instance, courts in the Chihuahua region of Mexico have recently instituted public oral trials in reaction to criticism over corruption in the high-profile drug cartel cases in the region. The previous closed trials led most of the public to believe that powerful drug cartel members were not being held accountable for their crimes by bribing their way out of the trial, and the new system therefore aims at strengthening public confidence in the judicial system.

Surveys results were used to analyse weaknesses in the administration of court services, as they relate to how court users are treated before and during their interaction with the courts. Many users described their desire to have more information about the impending procedures before they arrived at the courthouse. Results were specific as to the stage of court proceedings and user complaints, thus allowing the courts to analyze and react to the complaints on a specific level. By assessing user satisfaction through these surveys, the courts were able to assess public confidence in the courts, and to adjust their procedures, information services and amenities according to survey data.

The MoJ has already begun the process of policy reform that takes into consideration the results of the survey. Specifically, it intends to use survey data to ensure that policies are not unfair to minorities and that all citizens are receiving the same quality of justice. The Ministry has already used the information gathered in surveys to determine if courthouse locations are convenient and assess courthouse crowding.

Public perceptions of judicial reform and fairness of the court system are uniquely important to strengthening public confidence in the judiciary. Arguably, perceived fairness of the judicial process has even greater impact on the degree of public confidence than fairness in the outcome of the trial. Significantly, promoting, achieving and maintaining public confidence is the ultimate goal of any judicial reform effort, and a theme that cuts across all of the possible interventions discussed throughout this Guide. Simply put, none of these measures are going to be perceived as accomplishing their desired results if the public believes that the courts are not impartial or corrupt.

7. Conclusions and recommendations

The transparency of the courts is a precondition for the growing acceptance of their work among the population. Transparent court procedures are also a precondition for the access to justice (see chapter 5). Transparency serves the legal protection of the citizens. It is necessary to know the legal remedies for defence and recovery, to know about the right to appeal against a judgment, to be familiar with the basic procedural rights of the parties. Taking into account the frequent absence of lawyers and attorneys, the court system should be accessible and understandable to the common people.

More importantly, transparent decision-making is a precondition for the development of the legal system and the judiciary itself. Be it in a country of common law or civil law, be it a binding precedent or an example for the legal practice and the point of view of the higher courts, the judgments are as important as the law they apply, since they substantiate the law in the books. Therefore, a reasonable number of judgments should regularly be published. They can be published anonymously in order to make sure that the privacy of the parties will not be violated. But they should be commented and collected in a way that they can be searched for in similar cases.

Main participants of the information process:

Legal professions ⇐ Parties—Lawyers ⇐ **Court/Judges** ⇒ Press/Mass Media ⇒ Public/ Civil society organizations

Thus, the transparency of the courts means that the system will be accessible and comprehensible, that it will be open to the legal professions working on behalf of the citizens,

and that it will be open to the public by accommodating journalists, offering press releases and informing about ongoing trials in a professional way.

Transparency of the courts arises from a set of preconditions, traditions and customs which, if absent, can only be developed step by step. The following elements of publicity are crucial for the development of transparency (and authority) of the courts:

- Granting physical access to court sessions;
- Offering full and understandable information about court procedures and their availability and distribution to all citizens;
- Assistance in starting proceedings, standard forms and blanks which are easy to use, booklets and brochures, etc.;
- Communication with the lawyers and attorneys, granting the inspection of the records, protocols of court sessions, etc.;
- Regular publication of court decisions for the legal professions and for the public (newspaper articles, court bulletins, websites, databases, volumes with collections of judgments, legal commentaries, etc.);
- Inviting journalists to press conferences and press releases, preparing press speakers of the courts; and
- Organizing conferences and seminars of judges, inviting representatives of society, of the business community, journalists and experts on the discussed subjects.

VI. ASSESSMENT AND EVALUATION OF COURTS AND COURT PERFORMANCE

1. Introduction

A comprehensive evaluation of judicial systems is becoming a new strategic challenge for judiciaries around the world. Budget constraints, new managerial techniques, competition for resources with other public bodies, international pressures and sometimes erosion of legitimacy are pushing judiciaries to innovate the practices of judicial evaluation. In the last thirty years, a growing number of policies have been implemented to evaluate court performance from a managerial perspective. Considering values such as efficiency, productivity and timeliness, indicators such as cost per case and time to disposition, and supporting systems of management by objective, managerial performance evaluation has gained growing popularity. Sometimes, the popularity of this new approach to performance evaluation has even eclipsed the fact that judicial systems have a long and well-established tradition of performance evaluation from a legal perspective. Indeed, the landscape of court performance evaluation include mechanisms such as appeal and supreme court decisions, inspections, disciplinary judgments.[97] These mechanisms have been developed to evaluate what can be considered as the legal performance of a court and of relevant judicial actors (judges, clerks, etc.).

More generally, justice systems are a hybrid of judicial and administrative operations, with a key public dimension. Consequently, performance evaluation must be assessed not only with legal and managerial methods, but also by creating channels to listen to court users and more generally public expectations.[98] Even though this chapter will focus mainly on managerial methods to assess performance, there will be some discussion of the other two perspectives as well.

Performance is usually understood as the difference between a goal (or a standard) and the actual result reached by an individual (judge, clerk, court administrator), an organization (a court) or by the justice system as a whole.[99] Its evaluation (or measure or assessment) is based on techniques, methods and indicators capable of measuring the various goals (see figure 1). In general, at the beginning of the evaluation process, goals are set up by some authority: parliament, ministry, judicial council, etc. (see section 2). Then a list of performance indicators is identified (section 3). Following this, the data is collected and used to confront the actual results against the goals (section 4). Finally, the evaluation must have consequence or it will be just a ritual without practical implications (section 5). This process is typically created as a part of a system of management by objective (MBO). The functioning of court inspectorates and audit offices is dealt with in section 6, while section 7 deals with the role of court evaluation in judicial reform.

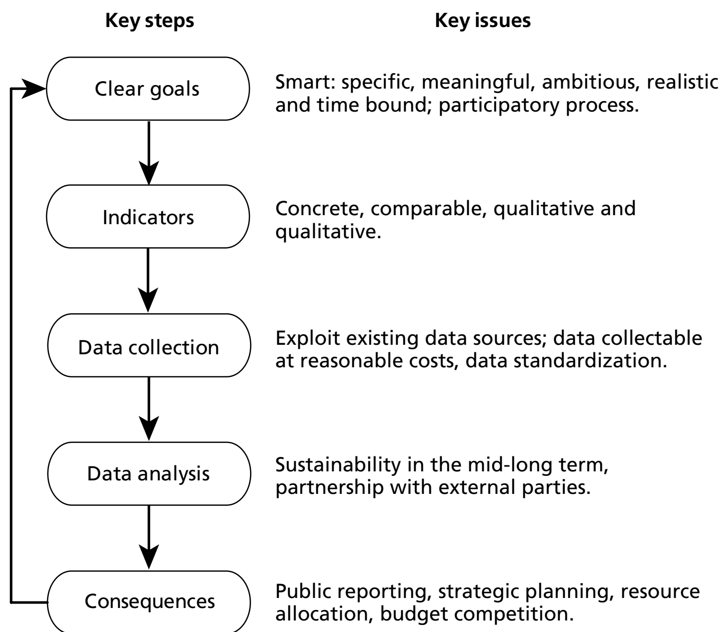
[97] See for instance European Network of Councils for the Judiciary (ENCJ) Working Group on Quality Management. 2008. Report ENCJ Working Group Quality Management, European Network of Councils for the Judiciary, Budapest.

[98] Contini F, Mohr R. 2008. *Judicial Evaluation. Traditions, innovations and proposals for measuring the quality of court performance*. Saarbrücken: VDM. 120 pp.

[99] See "performance measurement" *A Dictionary of Business and Management.* Ed. Jonathan Law. Oxford University Press, 2006. *Oxford Reference Online.* Oxford University Press. www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t18.e4763

Performance evaluation systems, inspectorate and audit may have effects on judicial independence. Such effects must be carefully assessed when systems are developed and put in place.

Figure 1. Key steps and issues in performance evaluation in judicial systems



2. Defining the goals

Management by objective (MBO) was introduced in the 1960s in the private sector (by Drucker), and in the last 20 years in the public sector, including justice administration. The evaluation of its results in public sector and courts is not univocal;[100] however, MBO is the most widespread approach to performance evaluation and performance management.

The rationale of MBO is simple: to align the organizational mission (of the court system) with tangible and clear goals. There is a growing consensus that goals, measures and indicators should be SMART: Specific, Meaningful, Ambitious, Realistic and Time bound. Other important requirements include:

- Participative decision-making;
- Reliability and validity of the evaluation methods and of the data (collected and used);
- Independence from personal judgments;
- Employee acceptance of the evaluation system; and
- Leadership's commitment.

Even though all these criteria are rational, their fulfillment is not easily achieved in practice where problems often arise.

[100] See for instance Rodgers and Hunter arguing for its effectiveness and Dinesh and Palmer describing the failures of MBO Rodgers R, Hunter J. H. 1992. A foundation of good managment practice in Government: management by objectives. *Public Administration Review* 52; David Dinesh, Palmer E. 1998 Management by objectives and the Balanced Scorecard: will Rome fall again? *Management Decision* 36 363-9.

In particular, the definition of the goals to be fulfilled by the courts and by the public sector in general is not as easy as it may look. As several studies on the functioning of public administration show,[101] in many cases the goals of public organizations are not only multiple but also contradictory. For example, there can be tension between timely case disposition and careful fact-finding. In addition, in the public sector it is difficult to have clear operational goals such as the "increase of the market share" or of profits for a private enterprise. Therefore, the definition of the goals of a court may be problematic.[102] More than suggesting specific goals, it is therefore advisable to look at the processes through which goals are identified. In many jurisdictions, tensions, conflicts or simply misunderstandings often happened when a legitimate authority tried to impose goals. On the contrary, the definition of the goals with a negotiation between courts and governance authorities, or even with the involvement of the different stakeholders, including prosecutors and lawyers, have produced positive results.[103] Indeed, setting up goals through a participatory process eases the identification and the balancing of the multiple goals of a court. This participatory approach emphasizes also that the delivery of justice is the outcome of the collaboration between different independent organizations: courts, bar, prosecutors, police, governance authorities, etc.

The "quality project" of the Rovaniemi Court of Appeal (Finland) can illustrate this participatory approach to goal definitions and an original way to evaluate and improve the quality of justice of the courts of the district based on yearly quality cycles.

Box 42. The quality project of the Rovaniemi Court of Appeal

The quality project of the Rovaniemi Court of Appeal in Finland, (which includes nine first instance district courts) is an initiative promoted and conducted since 1999 by the judges of the district. From the beginning, the project has been based on a new practice of communication between all the judges in the jurisdiction, and on forums supporting these communications including an Annual Quality Conference of the judicial district. This conference, opening and closing a year-long quality cycle, provides a space where quality issues are discussed and where judges select the "quality themes"[a] to be addressed in the forthcoming year. Themes have been chosen for their social relevance and salience, and they have addressed important legal, judicial and managerial issues arising in both the court administration and the legal proceedings. Then quality teams are set up to work on each theme in order to analyse the current practices and propose improvements. The results achieved are then discussed and assessed at the next Annual Quality conference. In the same conference, after a debate, a new quality cycle begins, as the judges develop their views on the themes to be set for the following year. The results of the Rovaniemi quality project are also discussed with the representatives of the Ministry of Justice in the annual negotiation through which the court budget is determined.

Over the years, this quality cycle has been improved in different ways, through the involvement of judicial actors other than judges (lawyers, prosecutors, etc.), the development of more complex quality themes, and a new project called "Quality benchmark for adjudication," that has been rolled out as a means to evaluate and improve the court activities. Quality themes initially included increased consistency in sentencing

[101] Cohen, M. D., March, J. G., and Olsen, J. P. (1972). A Garbage Can Model of Organizational Choice. *Administrative Science Quarterly,* 17(1), 1-25. March, J. G., and Olsen, J. P. (1979). *Ambiguity and Choice in Organizations.* Bergen.

[102] DiIulio, J. J., Alpert, G. P., Moore, M. H., Cole, G. F., Petersilia, J., Logan, C. H., et al. (1993). *Performance Measures for the Criminal Justice System. Discussion Papers from the BJS-Princeton Project:* Bureau of Justice Statistics—Princeton University Study Group on Criminal Justice Performance Measures.

[103] Stakeholders are the individual or groups who have an interest, in the functioning of courts such as judges, prosecutors, court users, victims and suspects of crimes, business communities, etc.

Box 42. *(continued)*

(initially in theft, drink driving and assault, and expanded to narcotics cases the following year) and judicial involvement in the preparation of civil cases. The following involvement of lawyers and of other judicial actors in the quality project allowed consideration of issues such as overcoming impediments to the preparation of civil cases (2004 and 2006) or the procedures and proofs in matters of imprisonment and travel bans (2006). In addition, the project has addressed case allocation based on judges' specialized skills, and monitoring the progress of individual cases through intermediate hearings to final determination.

Within the framework of the Quality Project, a Quality Benchmarks Working Group was established in 2003 to draw up a set of benchmarks on the quality of adjudication. After a draft was discussed at the Annual Quality Conference in 2004, quality benchmarks were published in 2006 and successfully tested in a pilot project in 2007. Their goal is to measure the quality standard of the adjudication of all the courts of the district from the point of view of the parties and the other persons participating in a trial. The quality benchmarks take into account six areas: the process, the decision, treatment of the parties and the public, the promptness of proceedings, competence and professional skills of the judge, and organization and management of the adjudication. For each area, quality indicators have been identified.

The pilot project was evaluated by the judges, the parties, the stakeholders (prosecutors, attorneys, etc.) and a panel of experts. In addition, lay judges and representatives of the media were invited to reply to a short questionnaire. The project has been considered successful by the participants.

Data collected from operating the quality benchmark project proved helpful in the identification of relevant quality themes, and as tools for training and self-improvement also at the individual level. Each judge can analyse the data and discuss outcomes with colleagues to improve the quality of adjudication. In addition, the feedback from the participants in trials can be used to direct the improvement of quality so that the requirements and expectations of the court users can be continually taken into account.

Sources:

www.oikeus.fi/27670.htm

Savela, A. (2006). *Evaluation of the quality of adjudication in courts of law principles and proposed Quality Benchmarks Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi.* Oulu: Painotalo Suomenmaa. (2005)

[a]The use of this term in official reports (instead of goal of objective) points out the emphasis on improvements rather than to reaching specific goals, as in the classical approach.

3. Selection of indicators

Once goals have been identified, it is necessary to identify performance indicators: a set of variables to measure changes in a phenomena and the achievement of the goal.[104]

One of the problems faced in the past is that the number and complexity of these indicators as well as the costs for their application through data collection and elaboration quickly become very high. Trial court performance standards (developed in the United States), for example, consist of 22 standards (or goals) and 68 indicators. Their collection on a regular basis may become difficult to sustain.[105]

[104]Similar definitions are provided by OECD (DAC Glossary of Key Terms in Evaluation, May 2002), www.oecd.org/dataoecd/29/21/2754804.pdf and USAID. See also The United Nations Rule of Law Indicators, Implementation Guide and Project Tools (2011), at www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf.

[105]Schauffler, R. Y. (2007). Judicial accountability in the United States state courts measuring court performance. 3(1), 112-128.

Facing this problem, the prevailing view is that indicators should be selected on the basis of three criteria: feasibility and sustainability of the measurement; correspondence to the performances they represent; and balanced and comprehensive in the performances they measure.[106] However, the choice of appropriate indicators must be the result of a process undertaken in each judiciary. Indeed the selection of indicators should also be carried out considering the data available or collectable in specific contexts (see section 4).

In the trade-off between scientific rigour and practical relevance, a decision has to be made taking into account the goals of the court (or the justice institution), and the fact that data collection is instrumental to the achievement of those goals (and not an end in itself).[107]

In most cases, indicators are proxies of the variables they measure. Therefore, if resources and data are available, it is advisable to use "baskets" of indicators to get a better measure.[108] For instance, the goal of Equal Access to Justice can be effectively measured by examination of the following list of indicators:

1. Percentage of citizens who say that they have access to court systems to resolve disputes, disaggregated by gender, ethnicity, region and level of urbanization;
2. Percentage of accused persons legally represented at one or more court appearances in their cases, disaggregated as above;
3. Percentage of citizens who say that the police will respond to them without requiring a bribe if called to resolve a dispute, disaggregated as above;
4. Ratio of prosecution caseloads in courts serving wealthier communities to those in courts serving marginalized communities.

Inevitably, the richness of indicators increases the complexity and the costs of the performance evaluation, discouraging its implementation and its sustainability in the mid-long term. CourTools is a successful attempt to balance these competing needs, providing a set of indicators clearly linked with the key institutional goals of courts. Designed by the National Center for State Courts, CourTools offers a set of ten court performance measures and a balanced perspective on court operations. They provide a detailed view of the different areas of court performance and an appropriate set of indicators (called measures) together with evaluation techniques proved to be effective in assessing court functioning.[109]

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[106] See Vera Institute of Justice, 2003. *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector.* New York, Vera Institute of Justice. Available at www.vera.org/download?file=9/207_404.pdf.

[107] The Judicial Integrity Group, with the support of UNODC, DFID and Transparency International identified a number of basic principles and guidelines which should be adopted when developing indicators and respective assessment tools. www.unodc.org/pdf/crime/corruption/judicial_group/Third_Judicial_Group_report.pdf

[108] Vera Institute of Justice, 2003. *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector.* New York: Vera Institute of Justice p. 5.

[109] UNODC, in cooperation with the judiciaries of several countries, identified six basic results areas of court operations. These include Access to Justice, Timeliness and Quality of Justice Delivery, Independence, Fairness and Impartiality of the Courts, Integrity, Accountability and Transparency of the Judiciary, and Coordination and Cooperation across Justice Sector Stakeholders (courts, police, prosecution, legal aid/public defender and prisons).

Box 43. The CourTools system

In designing *CourTools,* the National Center for State Courts integrated the major performance areas defined by the Trial Court Performance Standards with relevant concepts from successful performance measurement systems used in the public and private sectors. The link between evaluation and consequences is open. The measures provide key information that courts' governance bodies should consider in their institutional activities to identify how well a court is performing, discover emerging problems and indicate where improvements can be made. *CourTools* are not linked with specific goals, since the establishment of such goals belongs to court leaders.

The ten performance measures are:

1. *Access and Fairness* to measure the ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect. This measure provides a tool for surveying all court users about their experience in the courthouse. Comparison of results by location, division, type of customer, and across courts can inform court management practices.

2. *Clearance Rates* is the number of outgoing cases as a percentage of the number of incoming cases. Clearance rate measures whether the court is keeping up with its incoming caseload. This measure is a single number that can be compared within the court or between one court and another.

3. *Time to Disposition* is the percentage of cases disposed or otherwise resolved within established time frames. This measure, used in conjunction with Clearance Rates (measure 2) and Age of Active Pending Caseload (measure 4), is a fundamental management tool that assesses the length of time it takes a court to process cases.

4. *Age of Active Pending Caseload* quantifies the age of the active cases pending before the court, measured as the number of days from filing until the time of measurement. Knowing the age of the active cases pending before the court is most useful for identifying backlog, problematic cases (outliers) and trends.

5. *Trial Date Certainty* is defined as the number of times cases disposed by trial are scheduled for trial. This measure provides a tool to evaluate the effectiveness of calendaring and continuance practices (see the case management chapter).

6. *Reliability and Integrity of Case Files* provides the percentage of files that can be retrieved within established time standards, and that meet established standards for completeness and accuracy of contents. This measure provides information regarding *(a)* how long it takes to locate a file, *(b)* whether the file's contents and case summary information match up, and *(c)* the organization and completeness of the file (see the case management chapter).

7. *Collection of Monetary Penalties* measures payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases. The focus of this measure is on the extent to which a court takes responsibility for the enforcement of orders requiring payment of monetary penalties.

8. *Effective Use of Jurors* is measured through two indicators: Juror yield and Juror utilization. Juror yield is the number of citizens selected for jury duty who are qualified and report to serve, expressed as a percentage of the total number of prospective jurors available.

9. *Court Employee Satisfaction* measures the ratings of court employees assessing the quality of the work environment and relations between staff and management. This measure surveys the employee opinion on whether staff members have the materials, motivation, direction, sense of mission, and commitment to do quality work.

10. *Cost Per Case* measures the average cost of processing a single case, by case type. Cost per case forges a direct connection between how much is spent and what is accomplished. This measure can be used to assess return on investment in new technologies, reengineering of business practices, staff training, or the adoption of "best practices."

Sources:

www.ncsconline.org/d_research/CourTools/ctTemplates.htm.

Ostrom, B. J., Hall, D. J., Schauffler, R. Y., and Kauder, N. B. (2005). *CourTools: Trial Court Performance Measures.* Williamsburg, Va.: National Center for State Courts.

Ostrom, B. J., and Hanson, R. A. (2007). Implement and use court performance measures *Criminology and Public Policy,* 6(4), 799—805.

4. Data sources and methods of analysis

A relatively simple system like *CourTools* requires access to multiple data sources and the use of different methods and evaluation techniques. Therefore, indicators must be developed keeping in mind the data already available, the data that can be collected and the cost of data collection and analysis. More specifically, the indicators should be based on data that is:

- Concrete;
- Collectable at reasonable cost;
- Comparable between courts of the same kind;
- Comparable over time for each court; and
- Not only quantitative, but also qualitative.

Some data, such as that which is required for assessing public opinions or users and stakeholder satisfaction, requires the establishment of specific operations such as surveys or focus groups. At the same time, courts produce and collect a large amount of data through their daily operations such as case filing. Such data are the first resource to be exploited for building meaningful indicators. In every case, data must be converted into information and knowledge that can contribute to improve the functioning of the court. The choice of appropriate method of analysis is therefore joined up with the choice of data collection.

It is at the stage of data collection and analysis that performance evaluation can become extremely complex, expensive and difficult to sustain in the medium or long term. For this reason, the complexity of the performance evaluation system must be kept as low as possible and strictly related with the capacity (know-how and financial availability) of each judicial system. Therefore, it is advisable to develop an incremental strategy that begins with a simple system, based on data available and on basic techniques of data analysis. Such performance assessment systems can always be integrated with new more sophisticated components in further stages. In this endeavour, it can be useful to develop partnerships with research institutions, universities and consultants who possess the required expertise and know-how.

Last but not least, the quality of the data must always be verified. This is true both for data collected from paper-based dockets, and for data collected from automated case

management systems. Efforts have to be made to keep the data entry as consistent as possible to avoid misleading comparison between courts collecting data with different criteria. In this effort, the establishment of a data dictionary is advised as well as the involvement of inspectorate bodies in the control of the quality of the data.

Extraction and analysis of existing data sources

This section introduces a list of the different data sources that may be available to courts or governance bodies and some of the techniques used for their analysis. The data can pertain to the operation of the court, e.g. case management data and other administrative data, but it can also pertain to the resources that are available and their use, e.g. financial and personnel data.

Case management data

Case management data are very useful to develop indicators assessing court performance, and data collected with traditional court dockets can be used to set up meaningful performance evaluation systems. Therefore, the lack of automated case management systems does not justify the lack of performance assessment. Indeed, several statistical indicators can be calculated just with basic data such as the number of cases filed, decided and pending at the end of a given period (per type of case).

Box 44. CEPEJ key caseflow indicators

This box describes three key indicators widely used to monitor the caseflow and the timeliness of judicial proceedings. The formulation used is the one suggested by the Commission for the Efficiency of Justice of the Council of Europe (CEPEJ).

1. **Clearance rate (CR indicator):** Relationship between the new cases and completed cases within a period, in percentage.

$$\text{Clearance rate (\%)} = \frac{\text{resolved cases}}{\text{incoming cases}} \times 100$$

2. **Case turnover ratio:** Relationship between the number of resolved cases and the number of unresolved cases at the end. This requires a calculation of the number of times during the year (or other observed period) that the standardized case types are turned over or resolved.

$$\text{Case turnover ratio} = \frac{\text{Number of resolved cases}}{\text{Number of unresolved cases at the end}}$$

3. **Disposition time (DT indicator):** It compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period. 365 is divided by the number of resolved cases divided by the number of unresolved cases at the end, so as to be able to express it in number of days. The ratio measures how quickly the judicial system turns over received cases—that is, how long it takes for a type of case to be resolved. This indicator provides further insight into how a judicial system manages its flow of cases.

$$\textit{Disposition time} = \frac{365}{\textit{Case turnover ration}}$$

Source:

CEPEJ. 2008. SATURN guidelines for judicial time management CEPEJ, Strasbourg p. 10-11.

The availability of case tracking systems and, more recently, of automated case management systems, may improve the availability of data and then the possibility of developing indicators of court performance. This data can be extracted, elaborated and analysed to evaluate performance and productivity at the individual or organizational levels in a comparative way. However, the use of such systems does not provide an automatic solution to the problems of performance evaluation. The extraction of data for statistical purposes can be difficult. The reliability of data can be low. When using the data for comparisons among different courts, problems related to data consistency and standardization typical of paper-based data collection may persist. In any case, the exploitation of case management data (does not matter if they come from paper or electronic system) is a necessary step for the development of effective and sustainable performance evaluation systems. Some of their concrete uses are described in section 5.

Other administrative data

Various basic forms of data collection are ingrained in traditional court activities. The request for a copy of a sentencing order, which may be collected in a specific folder by the staff and dutifully recorded on a paper docket, is but one example of this. Such data can be collected, organized and elaborated for monitoring and evaluation purposes especially at the court level. Its use at the national level is problematic, unless data collection follows national standards. Measures have been taken in several countries to standardize this data and adapt it for national monitoring and evaluation; however, as the empirical studies shows,[110] such efforts have been quite cumbersome, requiring normative and institutional developments and not always producing reliable data.

Financial data

In their operation, courts generate a significant volume of financial transactions including fines, bails, fees, etc. Furthermore, courts have a budget to acquire goods and services and in some cases also hire personnel. Such data can be collected and analysed to provide information on the court's "financial performance," but also to improve the court's spending. In several countries, software applications have been developed or are under development to help processing and accounting for such transactions. In addition, financial data—in particular measuring the resources used by each court (inputs)—must be related with case-flow data (outputs) to evaluate productivity or efficiency of courts.

Personnel data

Personnel data concerns not only the number, working hours and position of administrative personnel and judges, but also their skills, competencies and performance. This data, which in many cases exists only in a dispersed format, can be particularly relevant when assessing the productivity of the office or designing and implementing changes in the court organization.

Other evaluation techniques

The collection of data on users' satisfaction requires tools such as surveys or focus groups. To elicit precise and reliable information from the respondents with scientific methods

[110]Ng, G.Y., Velicogna, M., and Dallara, C. (2008). *Monitoring and Evaluation of Court System: A Comparative Study.* Strasbourg: European Commission for the Efficiency of Justice.

requires specific skills and competences that courts often do not possess. This know-how has to be acquired from the outside. If this is not possible, basic information from users can be collected with very simple systems such as survey cards distributed to users at the counter.

Surveys

Quantitative and qualitative data can be collected through surveys aimed at internal (judges, administrative personnel, etc.) and/or external users (litigants, victims, witnesses, attorneys, etc.) to evaluate the services offered by the court. Their correct use requires specific know-how for the drafting of the questions, for the administration of the questionnaire or for conducting the interview, and finally for the statistical analysis and interpretation of the data collected.[111] The use of a survey can be very fruitful. Indeed, the voice of citizens and court users emerging from surveys can push policymakers to implement judicial reforms as illustrated in the following Indonesian case study on access to the Religious Courts in family law cases.

Box 45. Case study: Improving access to Indonesia's family law courts for the poor and those living in remote communities

Background: In the world's most populous Islamic country, divorce cases constitute over half of all court cases and 84 per cent of all civil cases heard each year. Divorce through the courts is mandatory for all Indonesian citizens. The Religious Courts hear divorce cases for Muslims (98 per cent of all divorce cases) and the General Courts hear divorce cases for non-Muslims (2 per cent). On average the total cost for a legal divorce in Indonesia is US$50 to US$110 (court fee and transportation costs). However, the very low income of a large part of the population makes the prospect of a legal divorce impossible for many Indonesians. A cycle of non-legal marriage and divorce has implications for children obtaining birth certificates required for school enrolment, women accessing poverty alleviation programmes and reducing the incidence of underage marriage and human trafficking.

Goals: The study was undertaken in Indonesia during 2007-2009. The goal of the access and equity study research was to assess the above mentioned issues from a court user perspective, to identify any barriers to access to justice in family law matters and finally to identify policies to enable all Indonesian citizens with family law and birth certificate cases to be able to access the courts, regardless of income or proximity to a court. One of the key goals was to provide the Supreme Court of Indonesia with data on the views of court users on the quality of service provided by the General and Religious Courts in the area of family law to identify policy responses that the Supreme Court should consider in order to provide universal access to the Religious and General Courts for people living below the poverty line or in remote communities.

Methodology:

- Approximately 2,500 Indonesians were surveyed, including more than 1,650 court users and 750 women living under the Indonesian poverty line. Both the courts and the clients were each selected randomly from cases that were heard in the previous year. The court users or potential court users agreed to be interviewed by researchers from the two research institutes that undertook the fieldwork and filled in a questionnaire based on the respondent's answers.

[111] UNODC (2002), *Assessment of the Integrity and Capacity of the Justice System in Three Nigerian States, Technical Assessment Report,* January 2006, www.unodc.org/pdf/corruption/publications_nigeria_assessment.pdf. UNODC (2004), *Assessment of Justice Sector Integrity and Capacity in Two Indonesian Provinces, Vienna, Jakarta 2004,* www.unodc.org/pdf/corruption/publications_indonesia_e_assessment.pdf.

- 1,200 divorce and birth certificate case files were reviewed and analysed to obtain the following data in relation to family law and birth certificate cases: *(a)* the number of court attendances by parties; *(b)* the time it takes to resolve a case; and *(c)* court costs borne by the parties for the case.
- Focus group discussions with the legal profession (individuals from private law firms, legal aid organizations, legal NGOs and university legal aid clinics) enabled information to be gathered about the level of service provided by the General Courts in family law matters. The focus group discussions also enabled the legal profession to suggest ways in which the General Courts could improve services to the poor and those living in remote locations. After the focus group discussion, a survey questionnaire was completed by each lawyer.
- Over 70 courts were included in the study, 10 per cent of the 695 first instance General and Religious Courts.

Findings: This study found that the poorest sections of Indonesian society face significant barriers in bringing family law cases to the courts. 9 out of 10 female heads of household living under the Indonesian poverty line surveyed were unable to access the courts for their divorce cases. The main barriers were financial and related to court fees and transportation costs to travel to the court.

Impact: As a result of the findings from this study:

- The Supreme Court of Indonesia increased significantly the Religious Courts' budget to waive court fees for the poor (prodeo cases) and agreed to hold more circuit courts. The new budget represents an average annual 18-fold increase in the Religious Courts' budget for prodeo cases and circuit courts.
- Initial data suggests that over the last two years the number of poor people accessing the Religious Courts as a result of court fees being waived has increased by a factor of 10 times.
- The number of cases heard in a Religious Courts' circuit court has increased by a factor of five.

Sources:

Sumner C. 2008. *Providing Justice to the Justice Seeker: A Report on the Access and Equity Study in the Indonesian Religious Courts 2007:* Mahkamah Agung and AusAID.

Sumner C. 2009. *Providing Justice to the Justice Seeker: A Report on the Access and Equity Study in the Indonesian General and Religious Courts 2007-2009:* Mahkamah Agung and AusAID.

Focus groups

A focus group is a form of qualitative research in which a group of people (internal or external users of the court or a mix of them) is asked about their opinion towards an issue. The participants are free to discuss the subject with other group members. This tool may be used to identify specific problems, to listen to the people, to identify improvements, etc. Also in this case, specific skills are required, especially as interactional contingencies and observation capabilities highly influence the data collection endeavour. The Swedish courts developed a challenging method for the evaluation and the improvement of the quality of justice based on dialogue and meetings between judges, court employees and court users.[112]

[112]Hagsgård M. B. 2008. Internal and External Dialogue: A Method for Quality Court Management. *International Journal For Court Administration* 1:13-8.

5. The consequences of evaluation

Performance assessment and evaluation of justice are expensive endeavours. Empirical research has shown that many performance evaluations mechanisms developed by courts and judiciaries remain ritualistic exercises without practical consequences.[113] Many jurisdictions spend resources to collect statistical data. Nevertheless, the practical use of this data to support key court functions as court management, budgeting allocation or for policymaking often remains unclear. The same lack of clear consequences may affect surveys about the functioning of judiciary as well as any other forms of assessment. Therefore, given the costs and the efforts required to set up these mechanisms, performance evaluation should entail some practical consequences. This is not just a responsibility of the governance authority of the judiciary, but it could also be seen as a duty of the institutions and NGOs in charge of judicial reform programmes.

The evaluation can serve a very broad set of governance and strategic functions. Below is a table with a non-exhaustive list of possible results of performance evaluation in courts.

Table 1. Performance evaluation results

Public reporting	To make more transparent the amount and the quality of work done by each single court, and to increase transparency of court operations. This can be done via web, newsletter, press releases, annual reports or taking advantage of any other means available to each given system.
Improve user orientation	The knowledge gained through user surveys can improve the user orientation of courts and thus their degree of satisfaction.
Identification and promotion of good practices	Identify the better performing courts, investigate the reasons of better performances, and search for good practices. Once good practices have been identified, guidelines and recommendations can be issued.
Organizational learning	The information provided by performance assessment should be exploited also to carry out joint enquiries within courts and between courts and stakeholder to investigate the different areas of operations and identify possible improvements.
Identification of training needs	A performance assessment should offer also focused information to identify training needs and to set up training programmes.
Reward organizational performance	Disseminate the ranking of all of the courts (clustered in homogeneous categories) in accordance to their performance (such as productivity statistics) so to stimulate friendly competition between courts and reward better performing courts.
Reward individual performance	Having data at individual level can be useful to evaluate individual productivity of judges and employees, as well as the results reached by heads of courts and court administrators.
Resources allocation	Caseflow and resource data are needed to set up effective methods for calculating human resources and judgeship needs and to allocate an appropriate budget to each single court.
Strategic planning	A regular evaluation of the judiciary is the milestone of any reasonable strategic plan. The knowledge produced with evaluation is indeed required for addressing capacity building, improve the key values inspiring the functioning of justice and finally increasing legitimacy.
Resource competition	Judiciaries are in competition with other branches of the public sector for attracting public funds. A good performance evaluation is an asset in such competition.

[113] Fabri, M., Jean, J.-P., Langbroek, P., and Pauliat, H. (Eds.) (2005). *L'administration de la justice en Europe et l'évaluation de sa qualité.* Paris: Montchrestien.

Good performance evaluation of courts should increase the amount and the quality of information about the functioning of justice available to the people. Making the data available to the public, including the analysis and the conclusions of the evaluation, will improve courts' accountability and transparency. It is the baseline for the introduction of any system of court evaluation.

The Dutch case set forth below is an example of how performance evaluation can have consequences, and can even be used to run a system of management by objective in which the allocation of funds to a court is linked with the results reached. We discuss here the system developed for the evaluation of workload and productivity of Dutch courts, but it must be underlined that this is just one of the systems used by the Judicial Council to evaluate court performance. In addition to the Dutch case, also the Rovaniemi case study discussed above shows a way of linking performance evaluation with meaningful consequences in terms of improvements of the quality of justice.

Box 46. The Dutch case and the Lamicie model

Until the introduction of the Judicial Organization Act in 2002, the Ministry of Justice was responsible for centrally distributing money to the courts. The courts' service organizations, clerical staff included, were part of the Ministry of Justice. Starting from the 1990s, The Netherlands had begun a process of innovation of the judicial organization. The objective was to allow the courts to administer themselves and therefore be more independent from the Ministry of Justice. This greater independence was to be coupled with the need for the courts to follow a certain standard or level of efficiency. The Judicial Organization Act of 2002 reorganized the system and its governance.

At the national level, a Council for the Judiciary was established, while the courts throughout the country were given the responsibility for running their own organization. The Council for the Judiciary is part of the judicial system, but does not administer justice itself. The Council's tasks relate to operational matters. The tasks include the allocation of budgets, supervision of financial management, personnel policy, ICT and accommodation. At the local level, each court has its own collegial council (or court board), chaired by the court president. The court council is charged with the general management and day-to-day running of the court.

To sum up, the Government is still responsible for submitting the budget bill to the Parliament, and budgeting for the judiciary remains a part of the budget for the Ministry of Justice. At the same time, the Ministry of Justice negotiates the budget for the Judiciary with the Council. In its turn, the Council for the Judiciary negotiates the budget with each court, and distributes the funds considering both the budget plans (requests) submitted by each court and the court performance. In this framework, it was necessary to develop a workload-measurement system to set up the budget on the basis of the expected workload of the court, and to evaluate the managerial performance (productivity) of each court.

The workload system (Lamicie-model) differentiates between 48 case categories. The system is intended as a tool of accountability for the court as a whole and not for the evaluation of the performance of the individual judge. For each category an estimation of the time that is needed for a judge or the court staff to prepare and finalize cases (in minutes) is given. The estimations are made for each year based on a study of the time requirement conducted in the courts by external researchers (e.g. in the Lamicie-model 2005, an employment dismissal case with defence requires 303 minutes of judge time and 205 minutes of staff time for a first instance court while, for the same court, a rent case requires 110 minutes of judge time and 161 minutes of staff time. Furthermore, a productivity target for each judge—defined in working hours—is established each year by the Council for the judiciary (e.g. 1,137 hours in 2003, 1,151 hours in

Box 46. *(continued)*

2004). The system attempts to calculate the amount of time and resources needed per case category and hence for the workload that a given court is supposed to deal with in the year.

The Lamicie model is used to measure performance and hence set up the court's budget. More specifically, the court boards determine an annual plan of activity which includes productivity targets and a budget proposal based on the Lamicie model. Both plan and budget proposal must then be sent to the Council for the Judiciary which has to agree with them. At this time targets and budget proposals are negotiated and agreed. This approach and the workload measures have been developed within the judiciary and with the support of the judges, resulting in relatively little criticism.

Evaluation—Afterwards, the courts submit an annual report to the Council on how far the plan has actually been realized. This report includes a calculation and accountability for the financial administration of the court for the previous budget year, the way in which the necessary activities taken from the budget were carried out and an audit of spending. The Council then evaluates how well the courts have followed the budget based on the previous year's plan. If the court productivity has been up to 5 per cent greater than the established target, the court funding for the following year is increased by 70 per cent of the value of the overproduction. If productivity has been lower than the target, other measures could be taken. In its turn, the Council reports to the Minister of Justice and parliament on the way in which resources are utilized.

Consequences—As data shows, the use of the Lamicie model has resulted in an increase in court productivity. At the same time, concern for the effects of the system on the quality of judgments has been expressed by several judges. For this reason, a debate is ongoing about the possibility of also using the more comprehensive measures of quality provided by RechtspraakQ (the quality-management system of the Dutch judiciary) to allocate the budget to the courts.

Sources:

http://english.justitie.nl/

www.rechtspraak.nl/

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Albers, P. (2004). Combating delays in judicial proceedings in the Netherlands. In AA.VV. (Ed.), *Practical ways of combating delays in the justice system, excessive workloads of judges and case backlogs.* Strasbourg: European Commission for the Efficiency of Justice.

Ng, G. Y. (2007). *Quality of judicial organization and checks and balances.* Utrecht: Intersentia.

Rechtspraak D. 2008. Quality of the judicial system in the Netherlands, Netherlands Council for the Judiciary, The Hague: www.rechtspraak.nl/English/Publications/Documents/BrochKwaliteit_GBFR.pdf.

6. Supervisory mechanisms over the work of courts

In most jurisdictions, supervisory mechanisms over the work of courts also entail inspections, accounts or financial controls, and auditing. These mechanisms have been developed to guarantee an external check of legality in specific areas of court activities, as well as a control of the way in which courts are using the funds received by the state. In addition, they are means used to offer some transparency and accountability for court operation. Indeed, results of supervision activities are usually made public for transparency purposes.

The concrete organizational arrangements of the institutions in charge of these supervisory functions vary from country to country. It is quite common, however, to have inspectorates (operating for ministry of justice, for the judicial council or for the superior courts), courts of accounts (with an independent financial jurisdiction) and auditing offices. In some countries, the ombudsman supervises some administrative activities of the courts. The specific tasks assigned to each agency vary from case to case and cannot be systematically discussed in this section.

Regular checks by these supervising bodies are needed to control the correct functioning of courts and to support regular improvements in the administration of justice. In relation to the resources available intervals may vary from yearly activities to one every two or even four years. At the same time, the consistency over time of the evaluation and the regularity of its schedule are quite important in order to be able to compare the data diachronically and discover meaningful trends.

Inspectorates are usually specialized units working for the governance bodies of the judiciary (Supreme Courts, Ministries of Justice and Judicial Councils). Inspections on courts and other judicial agencies are set up to check the regularity of the activities and to discover the possibility of misconduct of judges or court staff. Inspections can be made on a periodical basis (yearly, etc.) as a standard form of control of the functioning of courts. In other cases, inspections are triggered by external events such as criminal investigations or media reports that may push the governance authority to order an inspection. Inspections are also used to provide to the governance body data and information required for assessing the functioning of justice.

Traditionally, inspectorates have the duty to collect information, assess the functioning of courts from a legal perspective and report to the governance bodies or to the public. The General Inspectorate of the Italian Ministry of Justice, for instance, has the duty of checking the respect for relevant regulations concerning the administrative and accounting tasks of courts with a typical formalistic approach, stressing the observance of proper procedures. The main goal is therefore to discover and correct formal irregularities. Even broader are the functions carried out by the Inspection Directorate of the Jordan Ministry of Justice who is also in charge of the evaluation of judges.

Box 47. Inspection Directorate of the Jordan Ministry of Justice

Since 1994, the Jordanian Ministry of Justice carries out judicial inspection through an Inspection Directorate. To protect judicial independence, the inspectors are selected from a pool of senior judges working in different courts, jurisdictions, departments and divisions. To further guarantee independence, reports regarding judges are submitted not only to the Minister, but also to the Chief Justice of the Court of Cassation.

According to the current regulation, the Inspectorate evaluates the performance of all First Instance Court judges, Execution judges, Appeals Court judges, Attorneys General and Prosecuting judges. The inspections consider indicators of legal performance (the proper application of the law and procedure in the cases, fulfilling the litigation and evidence rights the grounds for the judgment, the soundness of the decision, reasons for postponements) as well as managerial performance (the time period needed for

Box 47. *(continued)*

issuing a judgment, and the percentage of cases decided during the year). In the evaluation of a judge, an inspector randomly chooses 40 closed cases, examines each file evaluating a list of factors, and then averages the scores of the cases for a final grade. Each judge is evaluated by two different inspectors who then meet to reconcile their findings. A narrative report is then prepared which highlights important findings in each category and states the judge's final score. Each judge is rated on a 100-point scale ranging from excellent (91-100) to weak (under 50). Then the Inspectorate submits the report to the Minister of Justice and the Chief Justice of the Court of Cassation. A copy is provided to the judge. Critics have noted that the evaluation does not consider in any way the courtroom behaviour of the judges.

In theory, this evaluation should be carried out at least once a year. However, this tight evaluation schedule cannot be fulfilled due to the limited resources available and the other tasks of the Inspection Directorate. In fact, the Directorate also investigates complaints made against judges. If the complaint concerns a postponement of a case, the inspector "may study the file from this point of view and write a report;" if it involves personal behaviour, the inspector may write a report that is sent to both the Minister and the Chief Justice. The Inspector has the power to issue subpoenas, review all materials relevant to the accusation, and "use all investigation methods" to conduct the investigation. Furthermore, the Inspection Directorate plays a role in the promotion of judges to higher levels. Promotions are based on the assessment of the service made by the Judicial Council, according to the reports of inspectors that describe their functions taking into account any disciplinary penalties. Finally, the Directorate evaluates the performance of staff working at various court departments and divisions.

Recently, a new practice has been developed, which consists of internal inspections carried out by the Chief Judges. For this task, the Chief Judges use a specialized set of criteria and a special form to evaluate the performance of their subordinates on a monthly basis.

Sources:

http://eng.moj.gov.jo/JudicialInspection/Briefing/tabid/76/Default.aspx

Bellipanni J. 2005. *Report and Recommendations concerning the Judicial Inspection Department of Jordan,* USAID Rule of Law Project (MASAQ), Amman.

A recent trend shows an expansion of the mission of Court Inspectorates to include also assessment of outcomes, of performance as well as of the treatment of court users. The case of Her Majesty's Inspectorate of Court Administration of England and Wales illustrates this point. Given their traditional role and the positive results achieved where the expansion of competences has taken place, existing inspectorates should be considered for a growing role in the performance evaluation system. In this case, particular attention to possible effects on judicial independence and impartiality has to be kept under strict scrutiny.

Box 48. Her Majesty's Inspectorate of Court Administration (HMICA)

HMICA is an independent body created by the Courts Act 2003 to "inspect and report to the Lord Chancellor on the system that supports the carrying on of the business of the courts (the Crown Court, county courts and magistrates' courts) and the services provided for those courts." While performing this mission, the HMICA is not empowered to inspect persons making judicial decisions or exercising any judicial discretion. It is worth mentioning that in several cases the HMICA carries out joint inspections in collaboration with other inspectorates such as Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) or Her Majesty's Inspectorate of Probation (HMIP).

As many other justice inspectorates, the HMICA has the goal of assuring the governance bodies and the public about the safe and proper delivery of the services provided by courts, to improve those services and to report in public. The peculiarity is that the evaluation is not only focused on administrative or accounting irregularities as seen above, but on a much broader set of criteria. The business of the courts is evaluated considering the outcomes, taking a user perspective and trying to build the whole inspective process as a learning experience. Also self-assessment by managers is encouraged.

Inspection method—Each inspection involves on-site activity (interviews, observations and document collection), and employ self-assessments based on questionnaires. Evidence collected is used by HMICA when making "judgments." Then, the Inspectorate drafts recommendations to address areas for improvement, and also highlights existing good practices. As a rule, once the inspection is over, the Court Service drafts an action plan to implement the recommendations. In some ways, the HMICA seems to work more as a consultant recommending ways to improve court performance, than a traditional inspector in charge of checking the proper application of relevant regulations.

Annual reports—The Annual Report of 2008 offers useful information to understand the work done by HMICA. In the area of "joint inspections" the HMICA carried out an "assessment on leadership and governance arrangements [...], how they delivered successful justice with particular regard to domestic violence cases, and how they engaged with the community." Also the result of the assessment is instructive: "Dorset [one of the courts considered] was found to have a clear vision for the future, robust service delivery, effective Domestic Violence provision and collaborative working with all agencies involved with Domestic Violence work, and were successfully engaging community groups at danger of exclusion." It is clear, therefore, that the assessment is not only based on legal criteria. Rather, it looks at the court as an organization delivering services to the community. Other inspections, as "the major thematic review of Performance Management, which has led to significant changes in HMCS's approach to performance management" confirm such a new approach to court inspections.

Sometimes inspections result in serious critiques as in the case of the joint inspection (HMICA and HMI Prisons) of court cell accommodation in West London Magistrates' Court. The inspection identified serious concerns about the safe and decent treatment of prisoners and underlined the necessity for all the agencies responsible to ensure that systems and procedures are in place to provide the maximum support to prisoners in such situations.

Sources:

www.hmica.gov.uk/

HM Inspectorate of Court Administration (2008) *Strategic Plan 2009—2012.* Available at www.hmica.gov.uk/files/HMICA_strategic_plan_0912_web.pdf

Her Majesty's Chief Inspector of Court Administration (2008), *Annual report of Her Majesty's Chief Inspector of Court Administration (2007–2008).* Available at: www.hmica.gov.uk/files/HMICA_Annual_Report_2007-2008_web_version_%28422995_HMICA_AR08_Web%29.pdf.

Financial controls can be undertaken by courts of accounts and/or auditing offices. Both institutions are typically independent bodies, charged with inspecting and evaluating public agencies, including, in some countries, courts or court administrations. Traditionally they check the accuracy, the reliability and the completeness of the entries in the financial statements of the courts, or of the governance bodies in charge of court administration. They perform also the audit on the public expenditures. Therefore, the main goal pursued through these checks is still the lawfulness of the expenditure (e.g. if expenditures were made following the procedure established by law and relevant rules). In some countries, however, audit offices are charged with more comprehensive assessments on court operations.

The auditing activity conducted by an external body can be (or can be perceived as) a threat to the independence of the judiciary. As illustrated by the case of the National Audit Office of the United Kingdom, an appropriate governance of the audit body, clearly independent from the executive power, is the first issue to consider in reducing such a threat. Also the adoption of International Standards on Auditing, and the foundation of the audit operations on the principles of independence, transparency and integrity help in reducing the risks. Another important strategy is to treat the outcomes of the auditing not as judgments with direct consequences on court operations but as recommendations aimed at strengthening the service provided, as in the case of the Australian National Audit Office described below. Audits therefore do not result in sanctions, but rather, they offer an opportunity to improve the services delivered by the court. Furthermore, in some cases the assessment is based on targets established by the courts themselves. Therefore the audit investigates whether courts are meeting their own designated targets, for example in terms of the timeliness and quality of services provided.

Box 49. National audit office of the United Kingdom: governance setting and judicial independence

In the United Kingdom, the role of the National Audit Office (NAO) is to audit the financial statements of all government departments and agencies, and many other public bodies. NAO also report to Parliament on the value for money with which these bodies have spent public money. Since 1983, the National Audit Office can examine and report on the economy, efficiency and effectiveness of public spending. NAO is also carrying out assessments related to the functioning of justice system. In this case, the question of protecting judicial independence is addressed through several means. First of all, the Inspectorate of Court Administration (HMICA) acts as a gatekeeper authorizing the work of the NAO. Secondly, the governance framework in which NAO operates as a further guarantee for the protection of judicial independence by pressures exercised by the executive power.

The Comptroller and Auditor General (C and AG) is an Officer of the House of Commons, appointed by the Queen on an address proposed by the Prime Minister with the agreement of the Chairman of the Committee of Public Accounts and approved by the House of Commons. The C and AG appoints the professional staff (about 850 units) of the NAO who are not civil servants and therefore independent of government. The NAO budget is set by Parliament and not by the government. Finally, NAO performance is scrutinized by external auditors appointed by a Parliamentary commission. In this framework, a breach of judicial independence carried out by NAO while performing its activities should be clearly identified.

Box 50. The Australian National Audit Office: recommendations and dialogue with courts

In Australia, the purpose of the Australian National Audit Office (ANAO) is to provide Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability. ANAO does this primarily by conducting performance and financial statement audits. As part of its role, though, ANAO also seeks to identify and promulgate, for the benefit of the public sector generally, broad messages and lessons identified through our audit activities.

In the justice sector, ANAO has recently published a report on the economy, efficiency and effectiveness of the courts' client service arrangements of the Family Court of Australia. The audit also assessed the effectiveness of the coordination mechanisms and some administrative issues. For example, a performance audit in the Family Court of Australia and the Federal Magistrates Court was undertaken by the Australian National Audit Office in 2003-2004 (Report No.46 2003–04). The objective of the audit was to examine and report on the economy, efficiency and effectiveness of the courts' client service arrangements for family law clients. The audit also assessed the effectiveness of the coordination between the two courts, and of their administration of Primary Dispute Resolution services. As a result of the audit, ANAO provided 11 recommendations on issues that should have been addressed by the courts in seeking to improve their service and performance. Space was provided to the responses of the courts to the audit reports. The use of recommendations instead of binding opinions and sanctions, and the space given to the responses of the two courts, can be considered a way of increasing external transparency and accountability without the risk of jeopardizing the independence of the courts.

Sources:
www.nao.org.uk/
www.anao.gov.au/

7. Court evaluation and judicial reform

Until now, we have discussed the assessment and evaluation of courts and court performance in the context of the normal functioning of justice systems. However, the approaches and the methods described in the previous sections proved to be also appropriate to the design, implementation and deployment of large-scale judicial reforms. The following case illustrates how the cycle of goal setting, selection of indicators, evaluation and consequences proved to be an effective methodology to support institutional innovation and the strengthening of judicial integrity and capacity in Nigerian Judiciary.

Box 51. Improving integrity and capacity of the justice system: the Nigerian case

Over the past decade the Nigerian Judiciary, with the help of several international partners, has been pursuing a series of judicial reform initiatives both at the Federal and State levels. Within this framework, UNODC has been supporting the development and implementation of a performance evaluation cycle guided by action-learning principles. The strategy is developed around four actions: assess, decide, act and reflect.

Box 51. *(continued)*

Goal definition—In a first Federal Integrity Meeting for Nigerian Chief Judges that took place in Abuja in October 2001, it was decided that the judicial reform effort in Nigeria should focus on *(a)* enhancing access to justice; *(b)* improving timeliness and quality of justice delivery; *(c)* strengthening integrity, independence, and impartiality of the courts; *(d)* facilitating coordination across the criminal justice system; and *(e)* increasing public trust in the justice system.

Selection of indicators—For each of the objectives, a set of indicators was identified by the participating judges. These measures and related indicators were developed to assess the achievement of the objectives. As there was insufficient data that would guide meaningful policy formulation and implementation, an assessment was needed to determine the current status of integrity and capacity in the justice system, initially in three states. The assessment focused on perceptions and experiences of justice sector stake-holders, including judges, lawyers, prosecutors, business people, prisoners awaiting trial and court users.

Evaluation techniques—Subsequently, State Integrity Meetings were conducted for the justice sector in the three pilot states. The purpose of the meetings was to discuss the results of the assessments and develop action plans informed by the findings. Participants were invited to comment on the preliminary analysis of the findings of the survey, help to explain the causes for some of the identified shortcomings and determine effective and realistic actions which would allow the addressing of the weaknesses.

Consequences—Action plans were then developed with measures selected and prioritized. The meetings also established an institutional framework consisting of several committees to support the implementation of the identified reform measures. These committees were staffed by judges and other stakeholders of the justice system, including court users and given the responsibility of designing, conducting and monitoring the implementation of specific reform measures. The plans were implemented over the following years drawing primarily on resources available in-country.

Closing the performance evaluation circle—Further surveys were conducted to measure the impact of the reforms. The circle was completed bringing the chief judges and the stakeholders back together to learn from what had worked and what had not. Action plans were then refined accordingly. The system also identified measures that produced positive results and diffused them throughout all 36 states in Nigeria. As a consequence, additional States decided to join the pilot programme. In 2008, 10 States participated in the programme.

Impact—Significant improvements were registered in all areas of reform. For example, access to justice for prisoners awaiting trial had improved significantly with prisoners being in remand on average 11 months by the time of the interview, compared to 30 months in 2002. Adjournments were reduced from an average of 7-8 per case to 6-5. Also, in 2007 only 7 per cent of the judges felt that judicial appointments had been influenced by politics, compared to 18 per cent in 2002. The quality of recordkeeping had been improved, with only 5 per cent of the judges considering the recordkeeping inefficient or very inefficient, compared to 37 per cent in 2002. Certainly most impressive was the reduced vulnerability of the system to corruption. While in 2002, 42 per cent of the court users interviewed claimed that they had been approached for the payment of a bribe to expedite the court procedure, in 2007 on average it was only 8 per cent. These improvements have resulted in increased public trust in the judicial system, with only about 25 per cent claiming that they would not use the courts again in the future based on their current experience, while in 2002, 44 per cent held that view.

Sources

UNODC (2006), *Assessment of the Integrity and Capacity of the Justice System in three Nigerian States,* available at www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf

UNODC (2003), *Strengthening Judicial Integrity and Capacity in Nigeria, Progress Report;* Dec 02-Mar 03, available at www.unodc.org/pdf/crime/corruption/nigeria/Progress_Report_1.pdf

UNODC (2003), *Strengthening Judicial Integrity and Capacity in Nigeria, Progress Report;* Mar 03-July03, available at www.unodc.org/pdf/crime/corruption/nigeria/Progress_Report_2.pdf

8. International guidelines to establish performance assessment systems

Performance indicators

While measuring the performance of justice systems, careful consideration must be given to the selection of appropriate indicators. In doing this, a look at past experiences, lessons and guidelines can be helpful. During the course of the years, several sets of indicators have been developed by both national and international organizations to evaluate judicial reform project, or measure the performance of the justice systems. While some of them have been designed to carry out specific investigations, or to investigate specific justice services, others have been designed to be just reference tools, easily customizable and adaptable according to the needs.

Specific examples

UNODC Nigeria

UNODC conducted an integrity and capacity assessment of the justice sector in the Federal Capital Territory and in eight Nigerian States with the aim at producing a clear and coherent picture of a country's justice system conditions. The assessment has been designed to investigate seven justice system areas, and more in detail:

- Access to justice;
- Timeliness and quality of justice delivery;
- Independence, impartiality and fairness of the judiciary;
- Levels, locations, types and costs of corruption within the justice sector;
- Coordination and cooperation across the justice sector institutions;
- The public's trust in the justice system;
- The functioning of the integrity safeguards.

www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf

UNODC Project (FS/NIR/04/NIR/R81) on strengthening judicial integrity and capacity, Global Programme against Corruption, United Nations Office on Drugs and Crime.

IPP Romania

For the evaluation of the Romanian judicial system, the Institute for Public Policy (IPP) in partnership with the National Institute of Magistracy (NIM), financed by the European Commission, has developed a set of performance indicators divided in several areas such as celerity; human resources management; transparency and trust in the quality of the judicial act; quality of the judicial act; and system predictability, for a total of 13 indicators specific for courts and 11 for public prosecutor offices.

http://medel.bugiweb.com/usr/INM_IPP_Benchmarking%20%20for%20the%20Judiciary_2008%20eng.pdf

General, regional and customizable approaches

UNODC Criminal Justice Assessment Toolkit

The Criminal Justice Assessment Toolkit, designed by the United Nations, provides a standardized set of tools designed to enable agencies, government officials engaged in criminal justice reform, as well as other organizations and individuals to:

- To conduct comprehensive assessments of criminal justice systems;
- To identify areas of technical assistance;
- To assist agencies in the design of interventions that integrate United Nations standards and norms on crime prevention and criminal justice; and
- To assist in training on these issues.

The Criminal Justice Assessment Toolkit is designed to be a practical guide, organized as a dynamic set of documents that continue to meet assessment needs as they evolve. The Tools have been grouped according to four broad areas: Policing; Access to Justice; Custodial and Non-Custodial Measures; and Cross-Cutting Issues. The Tools are organized thematically, both to ensure ease of use and to assist the assessor in understanding the key issues confronting the system being assessed.

www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html?ref=menuside

The Vera Institute: global guide to the design of performance indicators across the justice sector

The Vera Institute in its guide on "Measuring Progress toward Safety and Justice" provides guidance on how to design indicators introducing a distinction between strategic, institutional and activity indicators. It suggests principles for constructing small baskets of indicators to measure progress toward specific policy outcomes. It discusses the variety of data sources that can be used and the process of turning data into indicators. The guide also provides a set of 60 potential indicators and corresponding data sources, divided between Institutional Indicators (Indicators for Policing; Indicators for Prosecution and Defence; Indicators for Judicial Performance; Indicators for Non-Custodial Sentencing; Indicators for Prisons; Indicators for Accountability Mechanisms) and Indicators for Non-State Institutions (Importance and Challenges of Measuring; Outcomes in this Part of the Justice Sector; Potential Indicators for Non-State Institutions).

www.altus.org/pdf/mptsj_en.pdf

The World Bank: diagnosing judicial performance

The World Bank in its "Diagnosing Judicial Performance: Towards a Tool to Help Guide Judicial Reform" provides a checklist for evaluating the transparency and related aspects of judicial performance. The guide suggests how it might be applied, and discusses its use to promote judicial reform. The checklist, developed on a matrix of three goals to be fulfilled (institutional integrity, independence, transparency/accountability) by assessing and improving six different areas of justice operation: selection of judges; management of the judicial "career"; internal administration; resources; judicial processes; and legal profession.

http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/hammergrenJudicialPerf.pdf

World Justice Project: Rule of Law Index

The World Justice Project has developed an index to measure the extent to which countries around the world adhere to the rule of law. The Index provides detailed information regarding a variety of dimensions to enable policymakers and other users to assess a nation's adherence to the rule of law in practice, identify a nation's strengths and weaknesses in comparison to similarly situated countries, and track changes over time. In 2009, the Index covered 35 countries.

The Index consists of 16 factors and 68 subfactors (indicators), organized in four broad areas:

- The accountability of the government and its officials and agents under the law;
- Clear, publicized, stable and fair laws for the protection of fundamental rights;
- Accessible, fair and efficient process for enact, administer and enforce the law;
- Access to justice.

The Index is based on two sources of data: *(a)* a general population poll, conducted by local polling companies using a representative sample of 1,000 respondents in the three largest cities of each country; *(b)* an experts' questionnaire consisting of questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labour law, and public health.

www.worldjusticeproject.org/rule-of-law-index/

Justice Studies Center of the Americas: manual to generate and standardize the region's judicial statistics

This document provides a model for collecting, processing, and disseminating indicators and statistics on justice in Latin America and the Caribbean and allows for the comparison of regional data. The Manual contains institutional organizational criteria for data collection, a glossary to standardize terminology at the regional level (for later data comparison), specifications on the contents of the data to be collected, collection methodologies, instruments for analysing data (indicators), and strategies for publicizing the information and general transparency.

www.cejamericas.org/portal/

9. Conclusions and recommendations

As discussed above, the traditional way of evaluating court performance is essentially based on the control of legality in the processing of single cases. In this framework, a court is performing well if it follows the prescribed rules. The new managerial approaches to performance evaluation introduced a radically different mechanism for performance evaluation. Such approaches, as we have seen, are mainly based on statistical, economic or financial methods and the evaluation is conceived as the measure of the gap between the measured results and the goals. As clearly shown by the cases we have considered, consequences are relevant at the organizational level (budget, human resource allocation, etc.) or at the policy level (implementation of new projects, etc.). The process of analysis is based on aggregate data, often of a quantitative nature and hence based on statistical and mathematical elaborations.

Given the distance between the managerial approaches to evaluation, and the traditional ones, it should not be surprising that judges and staff may have problems in understanding and accepting as valid these new approaches and the information they provide. As a result, the evaluation of court performance is a difficult challenge. Sometimes the implementation of court performance evaluation may raise problems related to a perceived reduction of judicial independence, or generate doubts concerning the capacity of the system to measure the real complexity of court operation. As empirical studies show,[114] these and other problems must be assessed on a case-by-case basis and cannot find clear and valid recommendations.

In this framework, and on the basis of the positive experiences documented in this chapter, it seems advisable to treat the data produced by the managerial systems as a "foundation for discussion in a collaborative process," rather than a "final judgment." This approach is reasonable, also considering the difficulty of correctly interpreting the meaning of specific data or of all the information collected by these systems. Once the legitimacy and the usefulness of managerial methods for the evaluation of court performance are recognized, it becomes appropriate to open a forum in which to discuss the results of the performance evaluation. What is clear, indeed, is that court performance should be assessed and improved from multiple perspectives, and that the legitimacy of courts will take advantage of these assessments. This approach also offers opportunities of avoiding the risk that a given value (whether of a managerial or legal nature) may prevail to the neglect of the other values which must be protected in the judicial process. In addition, it must be emphasized that while a lot can be learned from other jurisdictions, it is important for each jurisdiction to determine its own goals and appropriate mechanisms for performance evaluation also adopting participatory processes. These include:

- Performance assessments must serve the fulfillment of the justice system mission.
- Performance assessments must be designed to support and not hamper key judicial values such as judicial independence and impartiality.
- Institutional and organizational goals should be set up, and actual performance measured against such goals.
- Set up performance indicators as simply as possible and keep the complexity of the performance assessment system related to the capacity (know-how and financial availability) of the courts.
- Performance assessment systems should be developed through an incremental strategy.
- Goals should be SMART (and more):
    - *(a)* Specific
    - *(b)* Meaningful
    - *(c)* Ambitious
    - *(d)* Realistic
    - *(e)* Time bound
    - *(f)* Defined through a participative process
    - *(g)* Independent from personal judgments
    - *(h)* Accepted from employees
    - *(i)* Supported by a strong leadership's commitment

[114] Fabri, M., Jean, J.-P., Langbroek, P., and Pauliat, H. (Eds.). (2005). *L'administration de la justice en Europe et l'évaluation de sa qualité.* Paris: Montchrestien.

- Indicators should be:
  - *(a)* Feasible
  - *(b)* Sustainable in the mid-long term
  - *(c)* Valid and reliable (e.g. correspond to the performances they represent)
  - *(d)* Balanced and comprehensive
- Keep the richness and precision of indicators balanced with their complexity and the costs so to assure the long-term sustainability of the performance evaluation.
- Indicators must be developed considering the available data, the data that can be collected and the cost of data collection.
- Data should be:
  - *(a)* Concrete
  - *(b)* Collectable at reasonable cost
  - *(c)* Comparable between courts of the same kind
  - *(d)* Comparable over time for each court
  - *(e)* Both quantitative and qualitative
- The quality of the data must always be verified and data dictionaries should be endorsed so to improve data consistency.
- Try to develop partnerships with research institutions and consultants to improve the available know-how required for performance evaluation.
- ICT and automated case management may increase data availability and data collection, but it is not a prerequisite for setting up a performance assessment system.
- Exploit the data already collected by courts.
- The voice of citizens and court users should be listed to improve the quality of the services delivered by the court.
- Court users' surveys should be carried out with the support of specialized competences. If this is not possible, opinions can be collected with simple cards self-completed by court users.
- Performance evaluation is not an end in itself and must have consequences at individual, organizational or policymaking level, such as:
  - *(a)* Public reporting
  - *(b)* Improved accountability
  - *(c)* Improved users' orientation
  - *(d)* Identification and promotion of good practices
  - *(e)* Organizational learning
  - *(f)* Identification of training needs
  - *(g)* Reward organizational performance
  - *(h)* Reward individual performance
  - *(i)* Resources allocation
  - *(j)* Strategic planning
  - *(k)* Resource competition

- Judicial inspectorates and other supervisory bodies such as court of accounts and court services should be regularly involved in different areas of performance evaluation.
- Supervisory bodies should be empowered to give advice to courts about how to improve their performances.
- Performance evaluation of justice is a prerequisite to any judicial reform initiative.

VII. CODES OF CONDUCT AND DISCIPLINARY MECHANISMS

1. Introduction

The role of judges is inextricably tied to a set of characteristics and values that are essential for the very legitimacy of the judicial function. Prominent among those are that judges should perform their functions with integrity, impartiality and independence as well as diligence (insofar as justice delayed is justice denied). Judges are expected to perform their work with competence and treat the litigants, witnesses and attorneys with courtesy and respect. They are furthermore expected to behave with honesty and propriety both on the bench and in their private lives so as to inspire trust and confidence in the community, avoiding with care behaviour that demeans their high office.[115]

Judicial discipline has long existed in various forms. However, the increasing political, social and economic relevance of the judicial function has prompted initiatives, both at the international and state levels, intended to articulate in detail the specific behavioural implications of those values and promote their actual implementation.

Box 52. International codes: The "Bangalore principles of judicial conduct"[a]

At the international level, the most comprehensive and well known document on the topic is the "Bangalore Principles of Judicial Conduct."[b] In 2000, UNODC in collaboration with Transparency International convened a first meeting for chief justices and senior judges from eight Asian and African States with the purpose of considering ways of strengthening judicial institutions and procedures in the participating states and beyond. Through a series of meetings since then, the group developed the Bangalore Principles of Judicial Conduct,[c] a code of conduct for court employees,[d] a Commentary on the Bangalore Principles of Judicial Conduct, as well as a training manual on judicial ethics. Other forthcoming tools include an e-learning tool on judicial ethics and a technical guide for the strengthening of judicial ethics and capacities.[e] Initially, the Bangalore Principles were developed drawing from 24 different codes of judicial conduct as well as eight documents elaborated at the international level, prevalently on the concept of judicial independence. Subsequently, the document underwent extensive consultations involving chief justices and senior judges from over 75 Member States.

The Bangalore Principles are articulated around six basic values: "independence," "impartiality," "integrity," "propriety," "equality," and "competence and diligence." A short definition of the meaning of each of those values for the judiciary is also provided, as well as a list of the expected behaviour on the part of the judges in application of each of the six basic values. The Bangalore Principles are explicitly addressed to the national judiciaries that do not as yet have codes of judicial conduct, for the purpose of adoption and implementation.

The behavioural implications of the values and expected judicial conduct which have been officially included in the Bangalore Principles have been further elaborated in an extended commentary.[f] Both the text of the Bangalore Principles and the commentary

[115]See J. M. Shaman, S. Lubert and J. J. Alfini, *Judicial Conduct and Ethics*. Michie Law Publications, Charlottesville Virginia, 1995. pp.1-28.

Box 52. *(continued)*

have been discussed by judges representing numerous nations and by experts on various occasions. More recently, UNODC has also sponsored a training manual on judicial ethics,[g] as well as a computer-based training programme, which is currently under development.

[a]www.unodc.org/pdf/corruption/corruption_judicial_res_e.pdf.

[b]Another supra-national code has been developed for Latin American countries. The English version of this document can be found in Internet by writing "Latin American code of judicial ethics".

[c]Third Meeting of the Judicial Group on Strengthening Judicial Integrity, Colombo, January 2003. Available at www.unodc.org/pdf/crime/corruption/judicial_group/Third_Judicial_Group_report.pdf.

[d]Fourth Meeting of the Judicial Group on Strengthening Judicial Integrity, Vienna, 27-28 October 2005. Available at www.unodc.org/pdf/corruption/publication_jig4.pdf.

[e]For further information on the work of the judicial group on strengthening judicial integrity and capacity, www.unodc.org/pdf/corruption/publication_jig4.pdf.

[f]www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

[g]www.unodc.org/documents/corruption/publications_unodc_judicial_training.pdf.

2. Codes of judicial conduct

Codes of judicial conduct (variously labeled "Principles" or "Guide") at the state level are a rather recent phenomenon. Prior to the 1970s, detailed codes of judicial conduct existed only in the United States. Thereafter, codes of judicial conduct were developed in some Member States, mostly of common law. In recent years, however, numerous Member States have issued or are preparing codes of judicial conduct either by adopting the Bangalore Principles, or by taking inspiration from them: the Philippines, Serbia, Jordan, Afghanistan, Belarus, Bolivia, Bulgaria, Burkina Faso, England and Wales, Ecuador, Germany, Greece, Hungary, Iraq, Latvia, Lithuania, the Marshall Islands, Mauritius, Mexico, Namibia, The Netherlands, Nigeria, Slovenia, Uzbekistan, Venezuela and several countries of East Africa.

In most Member States, the codes of judicial conduct have been adopted following the initiatives and with the participation of prominent members of the judiciary, including, for example, in the United States,[116] Nigeria[117] and Romania.[118] Codes of judicial conduct have also been issued for court personnel in various countries, such as the United States,[119] Romania,[120] Serbia and Russia.

In some Member States, violations of the code may result in sanctions, including in Italy and in the United States (both at the federal and state levels). In other Member States, the codes of judicial conduct are not conceived as a set of enforceable rules, but rather as an ideal guide of judicial behaviour, for example those adopted in Canada, Australia and in England and Wales. In these countries, binding instructions to judges even in the area of judicial conduct is considered to be in contrast with the value of judicial independence.[121]

[116]The first Canons of Judicial Ethics of the United States was drafted by a committee of judges and lawyers headed by the Chief Justice of the United States Supreme Court, W. H. Taft.

[117]The text of the Code of Conduct for Judicial Officers of Nigeria was prepared by the Hon. M. L. Uwais, Chief Justice of Nigeria and it was discussed by a committee of high-level judges chaired by the Chief Justice himself. The clean copy was then presented to and approved by the Conference of All Nigerian Judges. For the Nigerian Code of Conduct for Judicial Officers see www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm.

[118]The Romanian Code of Ethics for Magistrates was adopted by The Supreme Council of the Magistrates.

[119]www.uscourts.gov/RulesAndPolicies/CodesOfConduct.aspx.

[120]This code can be consulted in internet by writing "Romanian code of ethics for court clerks."

[121]See pp. 3-4 of the Canadian "Ethical Principles for Judges" in www.cjc-ccm.gc.ca. See also the Foreword to the "Guide to Judicial Conduct of England and Wales" in www.judiciary.gov.uk/Resources/JCO/Documents/guidance_guide_to_judicial_conduct_update_2008.pdf.

In most of the Member States that have adopted a code of judicial conduct, the code is considered a living document because "the responsibilities and the public's perception of the standards to which judges should adhere are continuously evolving."[122] Furthermore, national codes of judicial conduct differ both with regard to their internal structure and with regard to their application. The main differences may be illustrated along the hazy lines of distinction between common law and civil law countries.

Box 53. Codes of judicial conduct in common law countries.

In countries of Anglo-Saxon legal traditions, codes of judicial conduct have the same type of structure as that described with reference to the Bangalore Principles of Judicial Conduct. They state a set of general principles of judicial ethics (usually labeled "canons") that should inspire judicial behaviour also with regard to the need to uphold public confidence in the judiciary. The principles (or canons) illustrate in general terms the implications of the basic value of the judicial role, such as: independence, integrity, impartiality, competence and diligence. Such principles are thereafter followed by a list of rules concerning what judges can and cannot do in application of those principles, both on and off the bench, with particular attention to extrajudicial and political activities. Although such rules are binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline: factors such as the seriousness of the transgression, previous disciplinary transgressions, the negative consequences for the image of justice as well as other aspects have to be taken into account.

As is the case with all written statements, rules of conduct leave room for interpretation. In order to minimize the scope of improper interpretation, one or more of the following three instruments are adopted:

(a) A terminology section is attached to the code in order to further specify the meaning of the expressions used in the rules of conduct.

(b) Each set of rules in the code is followed by a commentary that discusses their implication and provides examples of "proper" or "improper" behaviour. Commentaries do not have, and are not intended to have, a binding nature, but simply provide guidance regarding the purpose, meaning and proper application of the rules.

(c) In many states, judges who are in doubt as to the meaning of the rules are entitled to ask and receive an advisory opinion from an authoritative and qualified agency. Worth noting is that doubts have been expressed on whether advisory opinions should be issued at all, mainly when the advising agency is also vested with disciplinary powers. Especially in such a case, it is feared that the issuing of opinions may bind the same agency to a disciplinary conduct outcome that it may not want to take at a later date when all the relevant facts have been developed. Though advisory opinions are not, by their very nature, binding, some of those agencies add a proviso indicating the tentative nature of the opinion and specifying that the issuing authority may take a different view in the future if additional facts are presented.

The proactive effects of such measures are further reinforced by the fact that the nature, content and interpretations of numerous codes of judicial conduct (values, principles, commentaries and advisory opinions) are easily accessible in full text on the Internet.[a] The ready accessibility of such material might also be of assistance both to the citizens and to those that might have an interest in the promotion of judicial ethics.

[a]www.justlawlinks.com/REFERENCE/cethics.htm.

[122]Quoted from the Foreword to the "Guide to Judicial Conduct of England and Wales;" for the web site see the preceding note.

If on the one hand there are countries that have either exhortative or enforceable codes of judicial conduct, there are also many countries where judicial discipline is enforced without a code of judicial conduct. Such is the case, for example, in most of the countries of civil law tradition, as shown by a recent survey of the European Network of the Councils for the Judiciary with regard to judicial conduct in 17 European countries.[123] In most of these countries, disciplinary decisions are pronounced to a large extent in applications of principles expressed in rather vague terms (as in Austria, France, Belgium, Denmark, Finland, Sweden and, until 2006, Italy). In some of the countries, for example in Germany, reference is made to the laws regulating the discipline of public servants, with the exclusion of those norms that are incompatible with the judicial role (such as those that require obedience to the instructions of the heads of office). As a consequence, in those countries knowledge of what is improper and punishable judicial conduct can be deduced only by analysing the body of previous disciplinary rulings, which, furthermore, is not easily accessible to the public or even to scholars. Such a disciplinary system has been the object of criticism for two quite different reasons: *(a)* because the extremely wide discretion of disciplinary authorities could be a threat to independence, insofar as it could be abused to sanction judges for their judicial orientations; and *(b)* because an extremely wide discretion placed in the hands of disciplinary authorities, often composed exclusively or prevalently of judges, could render the disciplinary system ineffective, insofar as the members of those authorities would use their disciplinary powers with excessive leniency when judging the improper behaviour of colleague-judges. It must be added, however, that recently codes of judicial conduct have been enacted or are in the process of being adopted in civil law countries as well.

Box 54. Trends in the adoption of codes of judicial conduct in civil law countries

Some countries of civil law tradition have enacted, or are preparing, codes of judicial conduct. Spain has included in the statute of the judiciary *(Ley organica del poder judicial)* a list of 39 disciplinary violations classified under three different headings (very grave, grave, minor); Romania has a code comprising 33 basic rules; France and the Netherlands are in the process of elaborating a detailed, enforceable code of judicial conduct; Italy enacted a law in 2006 comprising not only a detailed list of disciplinary violations on and off the bench but also indicating the kind of sanctions to be imposed for each of those violations. In Poland, Slovakia and Hungary, rules of judicial conduct have been prepared by the national association of judges and/or adopted by the respective National Judicial Councils. Though not legally binding, they certainly influence disciplinary decisions, and are in any case a clear indication that the tendency to adopt a body of rules to regulate judicial conduct as an essential component of the working of the judicial system is spreading to an increasing number of civil law countries.

While the adoption of codes of judicial conduct is still limited among countries of civil law tradition, the configuration of those already adopted as well as those in the making is structurally different from those of common law countries in regulating judicial behaviour on and off the bench. No commentaries or terminologies are provided nor are advisory opinions offered. The list of disciplinary violations has the same structure as a penal code. A similar structure has been adopted also by the Chinese code of judicial conduct which includes 50 disciplinary provisions.[124] In some countries, such as Italy, it is also provided that the procedure to be followed in disciplinary proceedings should be the same as that of a criminal proceeding “to the extent in which it is applicable.”

[123]www.csm.it/ENCJ/pdf/RelazioneFinaleWGJudicialConduct-EN.pdf.
[124]www.accci.com.au/code.htm.

In most Member States, the codes of judicial conduct have been adopted following the initiatives and with the participation of prominent members of the judiciary, such as, for example, in the United States,[125] in Romania,[126] in England and Wales.[127] In some Member States, the preparation of the codes of conduct for either judges or court clerks has witnessed the wide participation of the stakeholders of the justice system, for example in Nigeria, Romania and Serbia. Participation specifically intended to pursue two major goals: on the one hand, to make sure that the code would reflect the ethical standards, content and challenges provided by the environment; on the other hand, that compliance with the code can be better achieved through widespread consultations with the stakeholders.

Box 55. The development of the code of judicial conduct of Nigeria

In 1995, the All Nigeria Judges Conference requested that a written code of judicial conduct be prepared. The President of the Supreme Court appointed a drafting committee composed by high-ranking judges. The draft copy prepared by the committee was first discussed by a board presided over by the Chief Judge of Nigeria and composed of all the Chief Justices of the 36 states of the country. Thereafter the document was distributed for comments and observations to the judges at all levels of jurisdiction. The observations obtained were subjected again to the deliberation of the Board of Chief Justices. The revised copy of the Code was submitted for further consideration to the Bi-Annual Conference of all Nigerian Judges of the Lower Courts and to the All Nigerian Conference of Superior Courts which finally approved the official "Code of Conduct for Judicial Officers of the Federal Republic of Nigeria" in 1997.a

[a]The information regarding the development of the Nigerian Code of Conduct for Judicial Officers (here summarized) has been provided by the President of the Supreme Court of Nigeria, The On. M. L. Uwais. For the text of the code, see www.nigeria-law.org/CodeOfConductForJudicialOfficers.htm.

Box 56. The development of the Romanian Code of Ethics for Court Clerks

The initiative to develop a code of ethics for court clerks was taken by the National School of Clerks (NSC) in collaboration with the American Bar Association Central Europe and Eurasia Law Initiative (CEELI). In order to insure credibility and get insights from all the major players in the field of the judiciary, the drafting committee included representatives of the Ministry of Justice, NSC leadership, the union of the clerks, representatives of the Bucharest Court of Appeal, the Bucharest Bar, the National Agency for Public Servants, the Prosecutor's Office of the High Court of Cassation and representatives of CEELI. The draft copy of the code was posted on the NSC website and was sent for comments to the courts nationwide, to the Ministry of Justice, to the National Institute for Magistrates and to other public agencies. The Superior Council of the Magistracy, in charge of the final approval of the code, formed a working group that took into consideration the suggestions received and finally approved the Romanian "Code of Ethics for Court Clerks" in April 2005.50

[a]For further and more precise details of the procedure adopted for the development and approval of the code, see www.abanet.org/rol/publications/romania_clerks_ethics_06.2005.pdf.

[125]The first Canons of Judicial Ethics of the United States was drafted by a committee of judges and lawyers headed by the Chief Justice of the United States Supreme Court, W. H. Taft.

[126]The Romanian Code of Ethics for Magistrates was adopted by The Supreme Council of the Magistrates.

[127]www.judiciary.gov.uk/publications-and-reports/guidance/guide-to-judicial-conduct.

3. Disciplinary mechanisms and sanctions

In some common law countries, the only sanctions for judicial misconduct consist in the removal of judges from office. Such is the case, for example, in Australia and Canada. The Canadian Judicial Council (composed only of judges) is empowered to investigate complaints and allegations of judicial misconduct on the part of federal judges. If it finds evidence of very serious misconduct it may recommend to the Minister of Justice that the judge be removed. The Minister in turn must get the approval of both the House of Commons and the Senate. Also, in Australia, the only remedy for judicial misconduct is the removal of the judge and the procedure is similar to that adopted in Canada.

Until the second part of the last century, the United States had such an "all or nothing" approach, appropriate only for dealing with cases of extreme misbehaviour. Federal judges could be removed by impeachment (formal charges drawn by the House of Representatives and thereafter tried by the Senate). State judges could be removed by impeachment and/or by the equally cumbersome procedures of recall or address. Those extreme and ineffective remedies are still standing, but starting from the 1960s, codes of judicial conduct have been progressively enforced in all 50 states as well as at the federal level.

Box 57. Disciplinary initiative, procedure and sanctions in the United States

(a) At the state level, the adoption of codes of judicial conduct, similar to one another, are applied by judicial conduct organizations composed entirely of judges, attorneys and private citizens of good standing, in proportions that vary from state to state.[a] Such judicial conduct organizations are empowered to carry out investigations following complaints presented by citizens, or even *ex officio*. The procedure is quasi-judicial and the judicial conduct organizations can, depending on the state, impose or recommend to a higher body a variety of sanctions for judicial misbehaviour such as reprimand, admonishment, censure, fine, suspension, involuntary retirement, or removal. The disciplinary decisions of the judicial conduct organizations are always appealable to a higher court of the state. In various states, the disciplinary activities of the judicial conduct organizations are made public at different stages of the disciplinary proceedings (in the course of investigations, or when the charges are filed, or when the sanctions are imposed).

(b) At the federal level, impeachment remains the only remedy available for removing a judge. Since 1980, a federal law, the Judicial Conduct and Disability Act, authorizes any citizen to file a complaint at the competent court of appeal alleging that a federal judge has engaged in conduct prejudicial for the proper functioning of justice (including possible cases of mental or physical disability). The chief judge of the competent court reviews the complaint and either dismisses it or, if there is sufficient cause, appoints a committee of judges to investigate the case and prepare a report for the judicial council of the court which, in turn, may dismiss the complaint or proceed to judge the case and even impose sanctions such as censure, or reprimand the judge either by private communication or by public announcement. In case of very grave misconduct, the judicial council may ask the Judicial Conference of the United States (presided over by the Chief Justice of the Supreme Court and composed of judges representing all the judicial districts) to refer the case to the House of Representatives for possible impeachment. Complainants or judges aggrieved by council action may petition the Judicial Conference of the United States for review.

It is worth noting is that:

- The complaint, short of impeachment, is evaluated and disposed of at all levels of the disciplinary (or disability) proceeding only by judges (Chief judge of the

courts of appeals, investigating committees and judicial councils of the courts of appeals and the Judicial Conference of the United States).

- The complainant must be kept informed of the disciplinary proceeding and of its outcome, and is entitled to petition for review.
- In 2004, the Chief Justice of the United States Supreme Court appointed a commission to evaluate the efficiency of the disciplinary system. The commission reviewed the complaints that had been dismissed and conducted numerous interviews. Though satisfied with the results of the inquiry, in 2006 the commission made several recommendations.[b] Among them, that the district courts should better publicize to citizens their right to file complaints and how to do it, and that special orientation programmes should be established for newly appointed chief judges in order to avoid the undue dismissal of complaints.

Both at the state level and at the federal level, complaints regarding judicial conduct must be dismissed if directly related to the merits of judicial decisions or procedural rulings.

[a]www.ajs.org/ethics/eth_jud_conduct.asp.
[b]www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf.

Box 58. Disciplinary initiative, procedures and sanctions in civil law countries

In civil law countries, there are substantial variations with regard to disciplinary initiative, composition of the authorities in charge of discipline, and disciplinary sanctions. Some of the more relevant are the following:

(a) In some countries, disciplinary initiative is in the hands of the Minister of Justice who shares such power with other authorities: in Italy with the Prosecutor General at the Court of Cassation and in France with the heads of the courts of appeals. In Austria, it is the same collegiate authority that has the powers to initiate disciplinary proceedings, to conduct investigations and to judge (those who conduct the investigation do not participate in the judging panel).

(b) In some countries, disciplinary powers are vested exclusively in collegiate authorities that operate at the national level (in Italy, for example, the first level of disciplinary jurisdiction is concentrated in the hands of the Superior Council of the Magistracy, while the appellate level is assigned to the Court of Cassation). In some other countries, such as Germany and Austria, the first level of disciplinary jurisdiction is handled by bodies that operate at the level of the various courts of appeal.

(c) In some countries, the panels are composed exclusively of judges (for example in Austria and Germany). Elsewhere, the judging panels include a majority of judges and a minority of "lay" members (such as lawyers, law professors, and others) as in Italy and France. However, the appellate disciplinary level is assigned to bodies composed only of judges. Worth noting is that at the first level of disciplinary pronouncements, the judging panels in Italy and France also include public prosecutors due to the circumstance that both judges and prosecutors belong to the same corps (i.e., they are jointly recruited and can move from one function to the other in the course of their career). In Italy, the code of conduct, the disciplinary procedure and the judging panels are the same for both judges and prosecutors. In some countries, such as France, Germany and Belgium, heads of courts are empowered to punish judges of their courts directly with minor sanctions such as admonishment.

(d) In most civil law countries, the types and number of disciplinary sanctions vary. They range from admonishment to dismissal (in some cases with reduced or no pension). Some sanctions are of a financial nature, such as reduction of salary (as in Austria, Belgium, France, Germany, Hungary and Slovakia) or fines (as in Denmark, Germany and Spain). Some other sanctions have financial implications such

Box 58. ***(continued)***

as the lowering of the career rank (e.g., in France) or of seniority of service (e.g., in Italy). In most countries, transfer to another court is also included among disciplinary sanctions. In all countries, judges can be suspended from their functions if accused of very grave disciplinary misconduct or criminal violations.

(e) Just as it is in common law countries, guarantees are provided for the judge suspected of, or disciplined for, misconduct. From the very beginning of the disciplinary proceeding, the judge has the right to be heard, and he/she is entitled to be assisted by an attorney (de facto almost invariably another judge) at all stages of the disciplinary proceedings. In all countries, furthermore, the judge who is sentenced for misconduct is entitled to ask for a review of the verdict either through an administrative or judicial procedure or both (e.g., in Germany).

(f) In civil law countries, the role of citizens in disciplinary proceedings is very limited. In most countries, there is no formal procedure to file a complaint on the part of citizens. Certainly they may address their complaints of judicial misconduct to the authorities that are empowered to initiate disciplinary proceedings, but usually do not even have the right to be told the outcome of their complaints. In any case, they cannot stand as a party in disciplinary proceedings as is possible in some common law countries.[a]

[a]A recent reform of the French constitution, however, requires that the law should allow the citizens to address their complaints at the Superior Council of the judiciary and be informed of the decisions of the Council (art. 34 Loi constitutinnelle no. 2008-724).

4. Conclusions and recommendations

- The development of codes of conduct should be pursued with a participatory approach, taking into account that the principles of ethical conduct need to reflect the ethical standards, content and challenges provided by the environment. Compliance and ownership of the code are closely interrelated, thus the more ownership through consultation can be achieved, the more likely compliance with the code will be achieved as well.
- Participatory approach in the development process of the codes of conduct should also include external stakeholders so as to ensure that ethical principles reflect the "clients' perspective" (e.g. bar, academia, relevant civil society, police and business associations).
- Initial content guidance for the judicial code can primarily be drawn from the Bangalore Principles of Judicial Conduct as well as similar regional standards.
- The code should be considered as a living document and be reviewed from time to time in light of ethical challenges that have been emerging and the efficacy of the codes in addressing those challenges.
- Establish a system of dissemination of the code and ensure that all judicial officers obtain a copy.
- Establish a professional ethics programme for the judiciary.
- Establish an advisory function where judges can obtain concrete behavioural guidance.
- Communicate the principles to the court users at large.
- Create a public feedback system to ensure that those who feel that a judge in his/her conduct did not comply with the requirements can readily bring forward their complaints to a competent authority. In addition, ensure that the complainants are informed as to the final outcome of their complaints.

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