

Judicial Evaluation in Context:
Principles, Practices and Promise in Nine European Countries

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I. The institutional context of the research

The evaluation of judges' performance takes place in many ways. Traditionally, there are avenues of appeal and legal accountability mechanisms. More recently, ministries of justice and judicial councils across Europe have introduced a range of complaints mechanisms, quality assessment procedures and other managerial methods of judging judges and the courts within which they operate. This paper reports on a study of these mechanisms in nine member countries of the European Union. Our purpose is to survey the possible ways in which the judiciary can be evaluated, with a view to improving those practices and, ultimately, contributing to a better functioning of the courts.

The study focuses on judges within the institutional context of courts. The staffs of courts are commonly employed by a ministry of justice or some other executive body. A ministry is responsible for allocating funds and accounting to parliament for their expenditure. In many European countries (including six of the nine discussed here) the status of judges (discipline, promotion, transfer, appointment), and in Denmark and the Netherlands also the management of courts, is under the direct responsibility of a judicial council which has substantial judicial representation and a degree of independence from the executive government.¹

With these intertwined responsibilities for staffing and personnel matters and for funding and accountability, relationships between judiciaries and ministries are of particular relevance to the efficacy and quality of judicial work. Interposing judicial councils has raised

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¹ The only countries without judicial councils at the time the study was carried out were Austria and Finland. In Belgium, a council was established during our research. While these councils have various names in their original languages, all are councils and all refer to judicial power. We use the generic term 'judicial council' to

other questions, or more precisely the old questions of judicial accountability² in new forms. The various ways of approaching these issues are at the heart of this inquiry into the forms of evaluation and quality assessment.

We discovered a great variety of approaches to the evaluation of judicial performance, some of which are based on the traditional activities of quality control that are already built into the institutional practices of courts and justice ministries. The most established and effective means of accountability or quality control in justice systems conform to the evaluative activities associated with particular institutional bases: the legal base of the judiciary and the public administration base of the executive. Our discussion of evaluation methods begins with those traditions, while pointing out the limitations of these exercises at the systemic level: judges predominantly deal with individual cases, and ministries have a limited view of accountability with a focus on finance and efficiency. The apparent barriers to reform have prompted us to analyse the theoretical and political foundations of the judicial role in its institutional context before describing some of the national experiences.

Evaluation of judges and courts is an aspect of the normal functioning of justice systems. Justice ministries account for their use of funds, traditionally simply by monitoring the legality of the expenditure.³ Judicial systems have traditionally been characterised almost exclusively by legal forms of accountability.⁴ Courts of appeal are effective in reviewing the decisions of lower courts. It appears that difficulties arise at the points of intersection between administrative and legal systems. As will become apparent, administrative responses to legal demands, and judicial responses to fiscal demands quickly become confused in clashes over values such as independence, accountability and justice. More adventurous approaches to reform and evaluation can easily be wrecked on these rocks as soon as they are launched. In this article we identify opportunities for ministries as well as judiciaries to reinforce their legitimacy by using a broader repertoire of evaluation methods, going beyond a purely traditional framework.

apply to all those organisations distinct from the ministries which are specifically responsible for the judiciary. **T. RENOUX**, *Les Conseils supérieurs de la magistrature en Europe*, Paris, La Documentation Française, 1999.

² **J.L. WALTMAN and H.M. HOLLAND**, *The Political Role of Law Courts in Modern Democracies*, London, Macmillan, 1988.

³ The origins of public administration are in the inspecting and accounting procedures mainly oriented to determining whether public money is spent by courts according to proper procedures.

⁴ **G. STURGESS and P. CHUBB**, *Judging the World: Law and Politics in the World's Leading Courts*, Richmond, Butterworths, 1988, p. 184.

The research we report here has demonstrated the growth of new forms of accountability developed to protect and promote other interests and values. On the one hand there have been increasing numbers of instances of ministries or judicial councils developing measures to promote values such as efficiency or cost control. Program budgeting and management by objectives have been introduced to monitor responsiveness to government policy initiatives. On the other hand, we find the public has also entered the scene in direct or indirect ways. As will be seen in the following pages, there is some evidence that the courts and justice systems have begun to listen to public demands, ranging from broad and unspecific reforms demanded of the Belgian justice system by the huge protests over the *Dutroux* affair, to the specific proposals for transparent impartiality of the lobby group Court Watch in the Netherlands.

The judges and managers are already so attuned to the principles underlying their traditional forms of evaluation, and are so deeply associated with the institutions and the roles they play in them, that their very expertise can stand in the way of a more systemic or global evaluation. By presenting selected cases from nine countries we will demonstrate some of the difficulties that have arisen from the tensions between the approaches of the judiciary, the executive and the public. However, since the traditional principles, institutions and roles are central to the whole system of justice, it will only be possible to find new approaches by building upon them. Applying a new discipline, such as total quality management or some other discipline imported from private enterprise or the academy, is no substitute for the hard work of understanding the foundations of the justice system as the basis for its improvement. In France, the international management standards ISO 9000 and ISO 9001 were explored in the late 1990s,⁵ with ephemeral impact. In other cases, generic quality assurance schemes sometimes laid the groundwork for more specific elaboration. Portugal and the Netherlands both used the model of the European Foundation for Quality Management (EFQM) from which to elaborate a set of quality standards.⁶ The experience of the Netherlands, the country having taken this approach furthest, is discussed in more detail below.

⁵ C. DEFFIGIER *et al.*, "Qualité et Justice en France", in M. FABRI, P. LANGBROEK and H. PAULIAT, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, p. 236; M.-L. CAVROIS, H. DALLE and J.-P. JEAN, *La qualité de la justice*, Paris, La Documentation Française, 2002, p. 197.

⁶ EFQM Excellence Model, <http://www.efqm.org/Default.aspx?tabid=35> [accessed 27 September 2005].

To understand and evaluate judicial work within its institutional context, it must be assessed in accordance with judicial, executive and public expectations. Given the diverse traditions which have led to each of their institutional evaluative methods, it is important to find common denominators which relate these systems to each other and which underpin their legitimacy and acceptability. The following sections do this by exploring the principles of authority and accountability in their traditional application as well as seeking new developments in each of these areas. The analysis then considers the legal, managerial, and public methods of assessing and directing performance, again in their traditional forms before looking for new forms which have developed in the interactions between the various institutions and players. Such examples demonstrate the potential development of newer forms of accountability and assessment, which might be described as mixed (because they embody diverse interests) and cooperative (involving more than one of the institutional players working together). These examples are analysed in order to understand ways in which the conflicts between the institutional interests have been worked through and accommodations have been found. We conclude by analysing the barriers to and conditions for the success of innovative forms within the institutional and political context of the courts and justice systems.

This discussion draws on the findings of several research projects financed by different institutions.⁷ The projects focussed a common group of researchers and methods on the broad research objects of discovering the state of quality evaluation of justice systems in Europe. The projects were designed to stimulate a dialogue among the participating researchers, who were selected by the project leaders⁸ through formal and informal networks of scholars and practitioners working in this field. This led to the involvement of academics, policy makers, public managers and judges with different perspectives on the issues at stake.

NG, G.Y., "Nederland", in M. FABRI *et al.*, *L'administration de la justice en Europe et l'évaluation de sa qualité*, Paris, Montchrestien, 2005, pp. 305 and 328 [see bibliographical note].

⁷ The projects were: "The administration of justice in Europe and the evaluation of its quality", financed by the Agis programme of the European Union; "Case Assignment to courts and within courts", financed by the Dutch Ministry of Justice; and "Internal case allocation in courts", financed by the Dutch Judicial Council. The preparation of this article has been supported by a fourth research project: "The quality of justice in Europe: policies, results and institutional settings", funded by the Italian Ministry of Research and by an International Strategic Links Grant from the University of Wollongong, Australia.

⁸ The Research Institute on Judicial Systems of the Italian National Research Council (IRSIG-CNR), Bologna, and the Institute of Constitutional and Administrative Law at Utrecht University. Project leaders of the project

To ensure comparability of the data produced by researchers from such diverse backgrounds, a first draft framework for analysis was prepared, and the researchers met to discuss it. Once adapted into a final framework, each national team⁹ prepared a first draft report which, after comment and discussion among the researchers, was transformed into the final report.¹⁰

II. Principles

A. Authority

It is necessary to review the key concepts on which justice systems are based before considering specific modes of monitoring and assessment. We argue that accountability and authority are the key guiding principles of a justice system. While these may be seen as embodying the foundations of the legitimacy of the executive and the judiciary respectively, neither of these principles stands alone or is an end in itself. Ministries have authority as well as judges, and judges too must be accountable. To appreciate their broader context it is necessary to consider by what authority a justice system can function, and to whom it is accountable. This requires a careful analysis of the notions of accountability and authority, which highlights the role of the public. In later discussion we consider how the people authorise judicial power and demand accountability of the courts in these European democracies. These are fundamental political questions which underpin the evaluation of judges.

We begin this analysis by considering the roles played by the judiciary, the executive and the public in the traditional methods of evaluating the performance of judges and the courts. Existing side by side with the long-standing political and legal principles of authority and accountability, there are also well-established methods of assessment embedded in the respective systems of the institutional players. The legal system of evaluation used by judges focuses on the individual case, applying the law to the facts (to refer to a classic, if oversimplified formulation). Executive government traditionally evaluates its performance

“The administration of Justice in Europe and the Evaluation of its quality” were the *Mission Droit et Justice* of the French Ministry of Justice along with the other two Institutes already mentioned.

⁹ The researchers were not formal representatives of their countries, or their justice systems. However, we will, for reasons of convenience, refer to their reports in brief by the names of the countries concerned.

and that of its agencies through the principle and practices of accounting and fiscal responsibility: resources are allocated to administrative units which must justify their use, either by adhering to spending and accounting procedures or through increasingly sophisticated methods for relating outcomes to particular policy areas and funding inputs. The public, finally, has its say on how well these systems are functioning, and in promoting directions for their future actions, by various structured and unstructured measures, ranging from opinion surveys and elections to campaigns, protests and riots.¹¹

These traditional forms of assessment may be broadly mapped onto the three underlying “core values” of fairness, democracy and efficiency¹² that Sanders identified in a critique of an English inquiry into the criminal justice system. There are dangers, however, in too close an identification of the institutional players -the judiciary, the public and the ministry- with a particular core value. Each of these values is too important and too multifaceted to be allocated to a single institutional custodian. If it were, the competition between institutional players might be reduced to a competition between values, amounting to a sterile and familiar zero sum game. We hope to overcome this deadlock by understanding the functioning of the justice system in a broader context.

Justice and the application of the law are based in long-standing traditional principles which have been updated by democratic and managerial demands. The contemporary appeals to judicial, democratic and managerial values may be traced to a common root in the concept of representation. Pitkin explored this notion’s multiple uses in politics starting from its etymological root as “the making present in *some sense* of something which is nevertheless *not* present literally or in fact”.¹³ That is to say, the representative “makes present” an abstraction or a collectivity which cannot itself act or make decisions. The modern theory of the state, itself a significant abstraction, has organs of government representing “the people”. In its pre-democratic form this was a relationship of authority: for Hobbes, for instance, the sovereign is authorised to act in the name of the people.

¹⁰ **M. FABRI et al.**, *L’administration de la justice en Europe et l’évaluation de sa qualité*, supra note 6; **M. FABRI, P.M. LANGBROEK and H. PAULIAT**, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, supra note 5.

¹¹ **A. HIRSCHMAN**, “Exit, Voice and the State”, *World Politics*, 1978, No 31, pp. 90-107.

¹² **A. SANDERS**, “Core Values, the Magistracy, and the Auld Report”, *Journal of Law and Society*, 2002, No 29, pp. 324-341.

¹³ **H.F. PITKIN**, *The Concept of Representation*, Berkeley, University of California Press, 1972, pp. 8-9.

In its later democratic sense representation is based on *accountability*, so that the representatives of the people can be held accountable for their actions. We generally think of representation in this latter sense as the way in which legislatures represent the people. They are *accountable* retrospectively at the next election, while having been *authorised* at the previous election. A representative whose representativeness rests upon accountability is “someone who has to be held to account, someone who will have to answer to another for what he does”.¹⁴ There is a temporal distinction between these two foundations of representation: one must be *authorised* to carry out a particular role before one can do so; one is *accountable* for one’s actions after the event.¹⁵

The concept of representation is generally applied to the executive and legislative powers. Within the framework of representative democracy the authority of elected representatives derives from their election by the people. It is more complex to apply Pitkin’s analysis to the judiciary, where we find that judges preserve a pre-democratic version of representation as authorisation. In the contemporary world, so thoroughly dominated by democratic ideology, this makes them vulnerable to mockery¹⁶ and to an even more severe erosion of their legitimacy. The prospective authorisation of judges as those who may say the law flows from a complex network of processes and sources. While they are selected by various authorities (*i.e.*, those authorised to appoint judges) in different jurisdictions, the explicit source of that authority is some combination of the law and the people.

The judge may only be appointed through a lawful process and once appointed is the authorised interpreter of the law. This is found in a strong form in the common law tradition whereby the judge ‘makes’ law by setting precedent, but is also clear in Montesquieu’s notion of the judge as *bouche de la loi*.¹⁷ Contemporary French discussions of quality measurement

¹⁴ *Ibid.*, p. 55.

¹⁵ *Ibid.*, p. 57.

¹⁶ Latour observes that, of all the disciplines, “the law has least suffered the ravages of modernism [...] If we so often mock the lawyers, it is because they have never really been modern”; B. LATOUR, *La fabrique du droit: Une ethnographie du Conseil d’État*, Paris, La Découverte, 2002, p. 267.

¹⁷ “But the judges [...] are only the mouth that pronounces the words of the law” [“ne sont ... que la bouche qui prononce les paroles de la loi”]; MONTESQUIEU, *De l’esprit des lois*, 1748, http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_2/de_esprit_des_lois_2.html

[accessed 26 May 2006]; MONTESQUIEU, *The Spirit of the Laws*, transl., [A.M. COHLER *et al.*, Cambridge, Cambridge University Press, 1989], p. 163.

continue to see the key function of the judge as being “to pronounce law in an exact and reasoned manner”.¹⁸ The judge has authority as long as he or she pronounces the law as it applies to a specific case. This is ‘legitimate’ in the root meaning of the term, having enormous legal content, but little public appeal.¹⁹

This pre-modern version of authority is challenged and re-worked by democratic regimes, so that before being accountable to the public, judges must be authorised by the public as well as by the law. The authorisation of the law and of the people comes together in the constitutions of a number of countries where legitimate authority flows from the people. This assumption, taken for granted in many democracies, is explicitly written into the constitutions of several Latin countries: “Justice is administered in the name of the people”,²⁰ or “emanates from the people and is administered in the name of the King by judges”.²¹ Judicial power is thus formally representative of the people, even if in different ways and within specific institutional settings.

We may find further insight into the complex role of the people in the authority relations of the courts in another of Pitkin’s distinctions. If the elected representative must be responsible to the represented as people with interests, the ‘people’ that the judges represent are rather the “unattached interests” of the people in whose name the Constitution authorises judges to apply the law.²² As guardian of the law and its proper application, the judiciary can be considered to be a representative institution in the sense that it represents those unattached interests of equality, consistency and other such guiding principles of the constitution and the rule of law.

If both forms of representation persist in the case of the elected representatives, so that they must be authorised while being primarily accountable, the role of the people in the authorisation of the judges brings with it certain contradictions or confusions. In the judicial context the ‘people’ play a dual role. On the one hand they are the authorising source of

¹⁸ **E.E.A. BREEN**, “Mesurer la justice? Elaboration d’indicateurs de la qualité de la justice dans une perspective comparative”, Paris, Ecole Normale Supérieure, Institut des Hautes Etudes sur la Justice, 2001, <http://www.gip-recherche-justice.fr/recherches/rapports-recherche.htm> [accessed 12 October 2005].

¹⁹ **J.L. WALTMAN and H.M. HOLLAND**, *The Political Role of Law Courts in Modern Democracies*, *supra* note 2, p. 1.

²⁰ **Italy**, art 101 § 1; **Portugal**, art. 202 § 1.

²¹ **Spain**, art. 117 § 1.

legitimacy for judicial power, either in the strong legal sense of the Latin constitutions or the weak common law sense that judicial authority derives from “the confidence of the community”.²³ The judge acts in the name of the people, who may be considered as an abstract or unattached interest. On the other hand the people are parties appearing in court before the judge, the very “people with interests” from whom the judge must be aloof to maintain impartiality. Thus, the ‘people’ are present in a dual role, both as actually existing persons before the court, and as that abstraction which authorises the judge to represent them. The judge’s position, at that interface, is identified by Agamben between the ‘people’ as the poor and the “popular” masses on one hand, and the sovereign People of the modern democracy on the other. In their relations with the public the judiciary must continually straddle this fundamental “conceptual pair” of “the original political structure: naked life (*people*) and political existence (*People*)”.²⁴

Judges may thus be authorised by and even accountable to the People as an abstraction, but must be quite detached from actually existing people as parties to the case. When real people come before the judge they are subject to authority; they are bound by the judicial decision.²⁵ Garapon expresses the ambivalence of the judge to “the paradox of publicity, without which there is no justice”, but which at the same time introduces anger and irrationality to the courtroom.²⁶ The judges’ complex relationship to the authority of the People is consequently tinged on the one hand with a dismissive authority based in law which is above “popular opinion” and the interests of the parties before the court, and on the other with recognition that the law itself is the will of the People. The judge maintains authority by “making present” and speaking in the name of a People who would otherwise only be an abstraction.²⁷

²² H.F. PITKIN, *The Concept of Representation*, *supra* note 13, p. 55.

²³ J. Mc GARVIE, quoted in R.D. NICHOLSON, “Judicial Independence and the Conduct of Media Relations by Court”, *Journal of Judicial Administration*, 1993, No 2, pp. 207-221.

²⁴ G. AGAMBEN, *Means Without End: Notes on Politics*, Minneapolis, University of Minnesota Press, 2000, pp. 30-31.

²⁵ Pitkin contrasts this authorisation theory with the accountability theory, which sees “precisely the converse”; *i.e.*, the representative is bound, while the represented is free [*supra* note 15].

²⁶ A. GARAPON, “Il Rituale Giudiziario”, in A. GIASANTI and G.MAGGIONI, *I Diritti Nascosti: Approccio Antropologico e Prospettiva Sociologica*, Milano, Raffaello Cortina, 1995, pp. 289-305.

²⁷ We have followed Agamben, in the discussion above, in distinguishing the ‘sovereign People’ from ‘people with interests’ by use of the capital ‘P’. In the remainder of the article, we will maintain normal use of the lower case ‘p’ throughout, distinguishing between these distinct roles of the people by context or clarification.

To this point we have tried to overcome the unproductive allocation of values among institutional players who claim to represent one or the other: fairness to judges, democracy to the public and efficiency to the administration. We have sought their common sources of authority in a notion of representation by which the people are seen to be represented in different ways by ministries and by the judiciary. This analysis offers a means of understanding the complex and often difficult relations, which we discuss later, between the judiciary, the executive and the public, each one of them vital to the effective operation and assessment of the judiciary. However, since authority alone cannot justify or form the sole basis for this assessment, we must first consider the other form of representation.

B. Accountability

The research carried out in the nine countries identified numerous attempts to introduce ‘managerial’ systems to increase the accountability of judges and the courts. These were often opposed by the judges who responded that the use of such systems would violate the principle of independence. This generates tensions between the divergent values (legality *versus* managerial controls) and conflict among the actors who espouse them (judiciary *versus* executive). In various cases these conflicts led to zero sum games in which a gain by one party, for instance in terms of greater managerial efficacy, was seen as a loss by the other (of independence).

As will be seen in the instances documented in the following sections, in some countries this conflict obstructed processes of reform while in others we have been able to observe constructive feedback and positive sum games. In the latter cases interactions among the various actors promoting different values and interests have led to creative solutions, not only in terms of greater efficiency and improved management of the judicial system, but also in reinforcing certain values specific to that system, such as impartiality. By analysing such cases we try to identify possible approaches to unlock the traditional tensions between independence and accountability.²⁸ Approaching this issue first from the point of view of accountability, we have been forced to reconsider the ways in which debates on quality and

²⁸ **J. DOUGLAS and R. HARTLEY**, “The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?”, *Public Administration Review*, 2003, No 63, pp. 441-453.; **American Bar Association**, “An Independent Judiciary: Report of the ABA Commission on Separation of Powers and Judicial Independence”, 1997, <http://www.abanet.org/govaffairs/judiciary/report.html> [accessed 17 May 2006].

the functioning of the judiciary have conceived of accountability. While traditionally the judiciary has focused on the discretion and political choices involved in judicial decision-making,²⁹ more recently managerial approaches have been introduced, which are seen as instruments of managerial control.³⁰ By distinguishing between the methods of evaluation traditionally associated with the executive and those legal methods associated with the judiciary, we hope to clarify an increasingly “amorphous concept”.³¹

Accountability is the combination of methods, procedures and forces determining which values are to be reflected in administrative decisions.³² If, as is commonly held, public officials acting in the name of or on account of the State are responsible to the citizens for their actions, accountability becomes the instrument which expresses this responsibility.³³ This is characterised by a mass of formal and institutional procedures as well as by various unanticipated intrusions from political and social forces making claims and demanding responses in ways which are both unprogrammed and unprogrammable.

Accountability can thus be characterised on the one hand as those systems which instil the values and interests of the appropriate stakeholders³⁴ within organisational behaviour. On the other hand, accountability can be characterised as the ‘mechanisms’ by which one can analyse or assess whether the organisation builds those values and interests into its own actions and decisions. In this way accountability can be considered as a two way channel of communication. First, it must convey information about the functioning of the organisation to those having the right to know. This information may include its objectives, its fundamental values, and the interests it is dedicated to protecting. Second, it must provide for methods and techniques to ensure that the members of the organisation act consistently with those values

²⁹ **G. STURGESS and P. CHUBB**, *Judging the World: Law and Politics in the World’s Leading Courts*, *supra* note 4, p. 4.

³⁰ **NCSC**, “Trial Court Performance Standard and Measurement System”, 2001, http://www.ncsconline.org/D_Research/tcps/index.html, accessed on 6 June, 2006; **NCSC**, “Court Tools”, 2006, http://www.ncsconline.org/D_Research/CourTools/tcmp_courttools.htm [accessed on 30 May 2006].

³¹ **A. LE SUEUR**, “Developing Mechanisms for Judicial Accountability in the UK”, *Legal Studies*, 2004, No 24.

³² **H.A. SIMON, D.W. SMITHBURG and V.A. THOMSON**, *Public Administration*, New York, Knopf, 1961, p. 513.

³³ *Ibid.*, p. 513.

³⁴ By this, we mean those stakeholders who have legitimate interests in and expectations of the organisation and its actions.

and interests. Thus, accountability is that complex of means which reinforce the responsibility of public actors.

It is evident that the concept of accountability, defined inclusively as above, cannot be limited simply to verifying productivity or efficiency, but includes a broader complex of values which public organisations must adopt based on the fundamental values of democratic regimes. These include legality, equality and impartiality. This inclusive notion of accountability is at a different and perhaps higher level than the individual values specific to a single unit of public administration. Accountability is conceived of in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.

From this point of view neither the judicial system as a whole nor any particular court or individual judge can be seen to be above the demands of accountability. There must be some channels of checking and transparency in order that each may account for their actions. The difficulties arise in understanding which forms or mechanisms of accountability are compatible with and appropriate to the functions of the judges, the courts, the judicial councils and the ministries of justice. To do without them would lead to a judicial system whose absolute independence would be difficult to reconcile with the fundamental values of democratic and representative regimes.

Even those control systems that have been developed throughout the law's long history in order to ensure the legality of judicial procedures represent forms of this broad concept of accountability. Measures such as reasoned decisions, public trials and channels of appeal are available to check whether the judicial processes respect substantive and important values and interests such as impartiality and legality. The role of these measures as foundations of a specifically legal system of evaluation or quality assurance is discussed in the next section. They represent the traditional approach to accountability which has been developed in the legal environment to promote certain important interests and values which should underlie judicial evaluation. There is, however, a broader range of interests and values to be served.

Following a discussion of the traditional forms of legal accountability, we trace the development of other forms of accountability which may be described as managerial and

public. From this point of view the tensions commonly generated by the introduction of any new form of accountability may be seen as unavoidable if justice systems are to incorporate means of assessing their performance based on a broader range of values and interests than those of a narrow legal tradition. It may also be seen that each of these demands for accountability come from specific interests and may itself be one dimensional unless it can be balanced by recognising the others which also promote their own legitimate demands.

III. Practices

A. Judicial

Judges have a long history and experience of internal evaluative mechanisms as means for testing claims and determining rights and wrongs, based on law and the appellate process. Indeed, the very *raison d'être* of the judiciary is assessment, based on particular values associated with justice and the law, such as fairness and the impartial and proper application of established law. In addition to these values, it is important also to consider the institutional context in and through which the judiciary operates.

This environment includes the court registry where files are kept for each case and where the key procedural events are recorded and organised. These practices and files constitute the memory of the proceedings, making it possible to retrace the steps, the acts and events and so providing the means to check that proper procedure and law have been applied in every case.³⁵

The institutional context also includes legal and conventional principles which are so strongly institutionalised that they are taken for granted without necessarily being codified. These include giving reasons for decisions, and the principle of the public trial which brings the public and the media (excluding cameras and microphones in some jurisdictions) into the heart of the judicial process.³⁶ These too are means of checking that the judicial process has been fair and just. The reasoned decision records the law and the facts relevant to the case and

³⁵ The law “protects all the traces of disengagement to tirelessly reattach, by the perilous tracks of the signature, the archive, the text, the file, the statements to their speakers” [*les énoncés à leurs énonciateurs*]; **B. LATOUR**, *La fabrique du droit: Une ethnographie du Conseil d'État*, *supra* note 16, p. 297.

how these led to the result.³⁷ As to the records of events and decisions, these assume a particular significance in the context of the appellate system which is the most important evaluation mechanism within the juridical framework.

The assessment of cases according to procedural law applies not only to the court's assessment of the specific case but, through the appellate process, may also be seen to reflect back on the courts themselves. In other words, each court must assess the cases before it, but since every decision is potentially open to appellate challenge, the court itself is liable to assessment. However, deliberations at each stage of the process are directed to specific cases and have few repercussions at the systemic level; *i.e.*, decisions overturned on appeal are only that: decisions in specific cases, and not evaluations of the judge making the original decision.

The nine countries considered here had implemented a variety of other measures for the assessment of individual judges and courts. These included internal complaints mechanisms, criminal and/or civil liability, and some versions of an ombudsman system. Without assessing the efficacy of these systems, which are of course only as good as the procedures and practices for implementing them, we simply comment here on some of the complex interactions between the legal and other principles and systems at work in judging the judges. Complaints mechanisms in France and Spain have received some 2,000 and 1,000 complaints per year (respectively), but limited evaluative data suggests that very rarely have these resulted in action against a judge. What is of particular interest here is that the complaints are overwhelming about unjustifiable delay (France) and the only two cases of sanctions against judges in Spain were in response to very serious delay.³⁸ This is an area which is susceptible to both legal and administrative assessment, as will be seen in more detail below, but which is fundamentally a quantitative measure of time lapse. The very limited number of cases resulting in sanctions suggests that it is difficult for citizens to take action against judges through a disciplinary system controlled (as in both these cases) by the judiciary. That successes have been limited to matters involving delay suggests that this is the

³⁶ A. LE SUEUR, "Developing Mechanisms for Judicial Accountability in the UK", *Legal Studies*, *supra* note 31, pp. 80-81.

³⁷ We will deal in more detail with the principles underlying publicity and transparency when we come to the topic of public means of assessment and accountability.

³⁸ C. DEFFIGIER *et al.*, "France", in M. FABRI, *L'administration de la justice en Europe et l'évaluation de sa qualité*, Paris, Montchrestien, 2005, p. 268; C. DEFFIGER *et al.*, *supra* note 5, pp. 152-153.

major concern of court users (for which there is some corroborating evidence)³⁹ and also that it is one of the few areas in which disciplinary committees can or will find against judges.

The experience of introducing an ombudsman in the Netherlands and in Austria has been particularly interesting with regard to the line between legal and administrative or publicly-driven procedures. In the Netherlands complaints may only go to the ombudsman after they have been dealt with internally by the courts. Even this involvement of an ombudsman is intended as a temporary solution only while more internal checks are implemented by the courts themselves. In order to preserve the independence of the judicial procedure, on-going proceedings may never be investigated by the ombudsman.⁴⁰ Similar provisions exist in Austria to avoid any possible interference in an on-going matter. These have extended to preclude the ombudsman investigating any judicial proceeding other than administrative cases. Having originally argued that “the scheduling of hearings is a function of court administration”, and thus within his domain, it has been decided that the Austrian ombudsman may not investigate any judicial proceedings.⁴¹

These brief comments on attempts to introduce innovative elements into the assessment procedures of the legal system indicate some of the difficulties involved in relating the assessment process to the performance of the judicial system or the judge rather than to the outcome in an individual case. As some of these instances suggest, insulating the judges from outside influences during the course of a trial is among the most deeply held principles in the legal system. Where this issue may be open to challenge is at that point after a trial where action may be appropriate retrospectively, and at the interface between judicial and administrative matters characterised by delays in decisions and in the scheduling of hearings. In these matters the judiciary closes ranks and insists that due to their being of a judicial nature, any outside involvement would transgress the principle of judicial independence.⁴²

³⁹ This is discussed below in relation to surveys of court users.

⁴⁰ Ng, *supra* note 9, pp. 310-311.

⁴¹ G.E.KODEK and M. STELZER, “Quality and Justice in Austria” in M. FABRI, P.M. LANGBROEK and H. PAULIAT, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, pp. 14-15.

⁴² More could be said about the transparency of these processes and the importance of evaluating them, but that would require more specific investigations than those we are reporting on here.

The legal processes of quality control through judicial and appellate processes are generally so well established and so deeply ingrained in the nation's constitution and laws that they are almost invisible from the point of view of quality assessment in relation to reforms. Where they have been conspicuous is in the jurisprudence that has grown out of decisions of the European Court of Human Rights (ECHR). A number of the countries reported that decisions involving appeals under Article 6 (right to a fair trial) of the European Convention of Human Rights had repercussions for the quality assurance of their justice systems. Article 6(1) includes the provision that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Findings that trials had exceeded "a reasonable time" were more commonly cited than any of the other grounds, reflecting the pattern of complaints reported above. Finland, priding itself on average handling times of 2 to 13 months, was "surprised" by an ECHR finding of excessive delay (3 years) in an appeal case, but this was seen as a statistical "outlier" and no systemic approach was taken to address delay.⁴³ The report from France also notes successful appeals to the ECHR on grounds of exceeding reasonable time, and of the independence and impartiality of the judges (the relations between the prosecutors and the court). In these and other cases the *Cour de cassation* has taken steps to ensure future compliance.⁴⁴ From 2000 to 2005 Finland had among the fewest appeals to the ECHR on the grounds of delay, while France was at the opposite pole.⁴⁵

The capacity of ECHR decisions to go beyond the individual case to influence the overall functioning of the judicial system depends on the particular institutional setting in which it is located. Various agencies of the Council of Europe (COE), notably the Committee of Foreign Ministers of Member States, have responsibility for overseeing compliance with decisions of the Court and monitoring the adequacy of measures taken by national judicial systems to avoid repetition of such violations.⁴⁶

⁴³ A. AARNIO *et al.*, "Quality and Justice in Finland", in M. FABRI, P. LANGBROEK and H. PAULIAT, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, p. 209.

⁴⁴ C. DEFFIGIER, *supra* note 38, pp. 267-268.

⁴⁵ Authors' analysis of cases brought before the ECHR under Article 6 § 1 of the European Convention on Human Rights, from 2000 until 2005.

⁴⁶ F. BUONOMO, "Nuove regole per l'adempimento delle sentenze CEDU", *Diritto e Giustizia*, 2005.

This approach has demonstrated its capacity to produce systemic changes which may not necessarily be desirable. The Italian case illustrates this point. Until 2000 Italy was the country with the highest number of appeals and violations on the grounds of excessive delay in court proceedings, whose sheer number were practically blocking the decision-making capacity of the ECHR. Consequently the Committee of Foreign Ministers asked the Italian government to take steps to speed up judicial proceedings and to reduce the number of appeals to the court. Even if the Italian government was not able to achieve satisfactory results in case processing times, it was able to reduce appeals to the Court, thanks to passage of the so-called ‘Pinto’ legislation.⁴⁷ This placed a judge within the courts of appeal to hear appeals against excessive delay and also provided for compensation. Thus before being able to appeal to the ECHR, a claim must first be screened by the Italian judicial system which may eventually offer compensation. It is clear that this system treats the symptoms rather than the disease, thus it has reduced the number of appeals to Strasbourg but not the length of trials.⁴⁸ The COE and the Council of Foreign Ministers nonetheless keeps the Italian judicial system under observation, requesting annual reports and action plans on the state of justice in order to examine the results in delay reduction.

This follow through on findings of the ECHR to interventions at the systemic level represents a stimulating exception rather than the rule. The legal decision, whether in a first instance court or on appeal, is a prospective order applied to a specific case. The prime goal of the judicial system is to uphold the authority of the law by ensuring the recognition of the judicial decision. It is through this recognition that the law reaches beyond the confines of the legal system itself, to the other branches of government and to the public. However the judges have few opportunities and fewer formal channels through which to gauge the efficacy of their authority. In legal terms it can only be assured through conformity with the procedures and substance of formal law, subject to checking by the mechanism of the appeal. If an appeal points to systemic failures, as in this Italian example, the judges’ interest in maintaining authority suggests prospective legal action. This distinguishes it from accountability which can also act retrospectively.

⁴⁷ 2001 Law No 89.

⁴⁸ D.CARNEVALI, “La violazione della ragionevole durata del processo: Alcuni dati sull’applicazione della Legge Pinto”, in C.GUARNIERI and F. ZANNOTTI, *Giusto Processo?*, Padova, CEDAM, 2006.

More commonly judicial decisions do not have systemic implications. Legal accountability is not limited to the purely procedural aspects we have been discussing above. In every legal system there exists disciplinary responsibility with more or less effective procedures,⁴⁹ which enable them to be checked, and also provide a type of fiscal accountability which is usually limited to ensuring that processes for spending and recording expenditure conform to formal requirements. The legal processes which ensure conformity to the law reflect the importance the judiciary places on protecting and reinforcing the fundamental principles and authority of the rule of law, but tell us little about how they utilise the resources that the State makes available to them. The many attempts to introduce systems of managerial accountability are a response to this need. They include a wider range of checks on the day to day activities of individual judges

B. Managerial

All nine of the countries considered here have tried to introduce systems of managerial accountability into their justice systems. The results have not always been satisfactory.

Rather than try to give a full account of these attempts we will describe only some of them in order to identify the distinctive features of such an approach. We will note certain tensions between these new approaches and the purely legal methods traditionally applied to courts before trying to analyse some of the difficulties.

As organs of executive government answerable to the legislature, ministries are the bearers of a culture and a tradition of accountability and responsible government. As such they must ensure that public funds are spent appropriately, and they also have responsibility for policy implementation. This is also true of those judicial councils (such as the Dutch)⁵⁰, or court services (such as the Danish) that allocate human and financial resources to courts and are answerable to the parliament or to the ministry for this function.⁵¹ Policies implemented

⁴⁹ See the discussion above on the limited effectiveness of judicial discipline; also **G. DI FEDERICO**, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe*, Bologna, Lo Scarabeo, 2005.

⁵⁰ **P. LANGBROEK**, "Changing the Judiciary and Judicial Administration: The Netherlands and Guatemala", in *Empowerment, Security and Opportunity through Law and Justice*, Saint Petersburg, World Bank, 2001.

⁵¹ This is not the case for the Latin judicial councils -Italy, France, Spain, and Portugal-, that are only in charge of recruitment, appointment, promotion, training and discipline of judges.

by these organisations in relation to courts range from those areas close to judicial decision-making, such as the establishment of time standards for handing down decisions, to areas involving administrative and support services (*e.g.*, those which are increasingly provided to victims of crime). The line between judicial decisions and managerial responsibility is well understood in theory, but in practice there are numerous points of contact and, potentially, conflict.

Before considering examples of this contested territory, it is worth commenting on an important difference in perspective. While judges, as noted above, deal in decisions in specific cases, managers deal in aggregates. Even those conscientious managers who understand and measure case processing times with care and attention can be surprised, as were the Finnish team, when an individual case is overturned for excessive delay by the ECHR. To the manager or the statistician, this is an ‘outlier’, an extraordinary piece of data which simply disrupts normal calculations. To the court, this is an injustice which must be remedied in the specific case. The gulf between the judicial and the managerial cultures may be illustrated by further examples from the study.

Following the wave of interest in the “new public management”,⁵² recent approaches initiated by government agencies such as ministries and judicial councils seek to understand and evaluate the judicial system in terms of outputs (such as the number of cases resolved). They can even be designed to put pressure on judges and staff to achieve specific objectives, in the style of management by objectives (MBO).

For instance in Finland the Ministry of Justice⁵³ has collaborated with the court offices to introduce systems of MBO that apply both to the individual judge (still being trialled) as well as at the national level, following the introduction of this approach across the whole national public administration⁵⁴ in 1995. The system assesses the courts’ performance using indicators of their productivity, economy and efficacy. Productivity is calculated in terms of the number of decisions per judge or per unit of administrative staff. The principal indicator of the economy or efficiency of the courts is the cost per decision, calculated by dividing the

⁵² **H. WOLLMANN**, *Evaluation in Public Sector Reforms: Concept and Practices in International Perspective*, Cheltenham, Elgar, 2003.

⁵³ Finland does not have a judicial council or equivalent body.

annual budget of a particular court by the number of decisions made by its judges. The calculation of efficacy is more complex. It is based on the assumption that the length of proceedings is fundamental to the judicial process and the rights of the citizens. Consequently case processing times are taken as the key measure of efficacy.⁵⁵

Even though these indicators were developed in order to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation of the budget of each individual court. They are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met. Although this soft approach should allow even handed negotiation between competing values, it has been criticised by the judiciary. Some have argued that the definition of objectives by officials of the Ministry would violate judicial independence which is protected by the Constitution. Others maintain that with the introduction of the system of management by results the judge's attention would shift to the number of cases and their processing times, thus reducing the quality of the decisions.⁵⁶ It was also suggested that the system of measurable objectives could not be implemented by the courts. The Ministry of Justice replied:

“The judiciary through its management by results system may not interfere with the objective and subjective independence of the courts in their decision making and other application of the law, which is the real essence of the independent judicial power safeguarded in the constitution. The fact that general information about handling times, [...] is written in documents of courts dealing with management by results does not in itself lessen or endanger the independence of the court in reaching a decision in individual court cases”.⁵⁷

The Finnish Ministry of Justice's gentle and collaborative approach, while avoiding open conflict between the judiciary and the executive, may nonetheless provoke a judicial reaction. The executive's introduction of a system of management by results that emphasises the courts' productivity and efficiency promotes values and interests identified as managerial.

⁵⁴ P. UUSIKYLÄ and P. VIRTANEN, “Public Sector Performance Contracting in Finland”, Paris, OECD, 1999.

⁵⁵ A. AARNIO *et al.*, “Finland”, in M. FABRI *et al.*, *L'administration de la justice en Europe et l'évaluation de sa qualité*, Paris, Montchrestien, 2005, pp. 231-232.

⁵⁶ Aarnio *supra* note 43., pp. 176.

This has the potential to create equal and opposite reactions from the judiciary who for their part emphasise the legal and normative values of the judicial process. In this situation zero sum games may arise between the judiciary and the executive so that the final outcome depends almost exclusively on the relative strengths of the main players.

The introduction of management by objectives in Italy has led directly to the realisation of this concern. In this case, instead of starting with instruments to evaluate the functioning of the judicial system, or of the individual office, the new system set out to evaluate the results achieved by the managers of each court office, with consequences for their remuneration and career prospects. These did not cover the work of the court's chief judge. In practice, each office manager must, after a 'frank discussion' with the chief judge, define the organisational objectives to be met.⁵⁸ It is taken for granted that these objectives do not include the outputs of the whole court, for example the number of civil cases to be dealt with in the current year, on the grounds that this would violate judicial independence. Instead the objectives are exclusively those of the individual managers and their limited areas of responsibility. In contrast, the chief judge, who has the broader responsibility for the whole court's performance, is completely excluded from the evaluation process. Consequently the objectives defined by the manager are strictly limited to administrative tasks such as reducing filing backlogs and are marginal to the legal and managerial objectives, like reducing the cost per judicial decision. Clearly responsibility for objectives of this type must fall squarely on both the heads of the individual court: the judicial and the administrative managers. In order to evaluate the court's management, the results achieved by both managers must be considered together as in the Dutch case.⁵⁹

The Italian Ministry's decision to limit its MBO-driven evaluation to the administrative managers could be interpreted as a strategy of stealth which first attacks the point of least resistance (the administrators). After that position was consolidated one could extend it to the judiciary. However, we have seen no trace of any argument which would support that interpretation. The Ministry's official explanation seems instead to rely on the necessity of developing an adequate information system to allow monitoring of the objectives

⁵⁷ *Ibid.*, pp. 177.

⁵⁸ **M. FABRI et al.**, "Quality and Justice in Italy", in **M. FABRI, P. LANGBROEK and H. PAULIAT**, *The Administration of Justice in Europe: Toward the Development of Quality Standards*, Bologna, 2003, p. 278.

⁵⁹ **NG, G.Y.**, *Quality of judicial organisation and checks and balances*, Utrecht, Intersentia, 2007, p. 110.

of each court office before extending the system of MBO. More precisely, the system should “provide in real time an up to date picture of the on-going progress in order to permit timely intervention to minimise the divergence between the stated [objectives] and the current situation”.⁶⁰ Maintaining that this statistical information system is a prerequisite to further extension of the evaluation appears to be little more than a technocratic excuse.

As we saw in the Finnish experience, a system of MBO can be based on a small amount of essential data. This need not be considered as an objective representation of the ‘true’ functioning of the court office, but as base line information from which to negotiate budgets and objectives. Instead the one-sided Italian solution clearly reflects the logic and the power relations of the particular historic moment. The Ministry of Justice has not yet seen fit to extend this system to the chief judges because this would have led to a battle they could not have won. This is why the system has focused purely upon the weakest link in the chain: the administrative managers of the court office.

Instead of opening a broad discussion among the various institutional, social and political interests, the Ministry used technocratic means to tackle the problem internally. This involved a search for “informatic solutions” deemed indispensable to the development of the system, which simply put off the need to define its essential elements: its legitimate objectives, who was to identify them, and the link between outcomes and financial allocations. This may take into account not only allocations to court offices as a whole, but also the remuneration and selection of the heads of those offices. These crucial questions must be confronted to avoid a purely ritualistic use⁶¹ of this management tool.

Austria and Spain have developed ways of measuring output relating cases to numbers of judges. The Austrian approach is based in the Ministry’s computerised personnel information system and can be used to calculate the number of judges needed in particular courts.⁶² The Spanish measures were developed by the Judicial Council and are intended as a

⁶⁰ **F. PIANTELLI**, “La programmazione strategica e gli strumenti di gestione: Esperienze a confronto”, 2005, <http://www.giustizia.it/newsonline/data/multimedia/685.pdf> [accessed on 30 may 2006], p. 2.

⁶¹ **J.MEYER and B. ROWAN**, “Institutionalized Organisations: Formal Structures as Myth and Ceremony”, *American Journal of Sociology*, 1977, pp. 340-363.

⁶² **G.E. KODEK and M. STELZER**, “Quality and Justice in Austria”, in **M.FABRI, P.M.LANGBROEK and H. PAULIAT**, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, p. 15; **P. BAUER**, “A Show Case for the Future: e-Justice in Austria”, in

means of rewarding judges according to their productivity, offering bonuses or penalties of up to 10% of salary.⁶³ Unsurprisingly there has been substantial resistance to the principle of paying judges according to the number of cases they process.

As far as we know this is one of the few such systems to have been applied to the judiciary. As in the Austrian case, the Spanish system has been used originally to establish the number of judges and staff needed in different courts. The system, based on so-called ‘output measures’ (*módulos de dedicación*) was quite rough and gave only a broad indication of the number of cases that each office could realistically process. The system was criticised by the judiciary on the grounds that the measures did not take into account weightings for different types of cases.⁶⁴

In 1997 the Spanish Judicial Council⁶⁵ collected the various critiques in a ‘white paper’ which also proposed means of refining the output measures. Groups of expert judges developed new measures calculating the average times it took judges to dispose of various types of cases. In 2000 new output measures were approved that, since 2003, have been used to determine the judges’ needs and also affect their remuneration. In practice, those judges who deal with at least 20% more cases than the module anticipates receive additional remuneration (from 5 to 10% of their salary). The Judicial Council has decided that for now it will not use the modular system also to sanction the less productive judges by reducing their salaries.⁶⁶ Not surprisingly, the introduction of this remuneration system has drawn strong criticism from the Spanish judges. Two of the judges’ associations, even though they accept the need to evaluate the judiciary, consider the system insufficiently reliable to form a basis for remuneration. A third association has been far more radical in its critique, calling the system “productivity-focussed and mean” and incompatible with judicial activity. Despite these strong criticisms, the Judicial Council continues to apply the measures to determine a performance based salary, and is working to improve the methodology. Recently, a consultancy firm has produced a new system to record the productivity of judges which

M.FABRI and F. CONTINI, *Justice and Technology in Europe: How ICT is Changing Judicial Business*, The Hague, Kluwer, 2001.

⁶³ **H.S. MUÑOZ**, “Qualité et Justice en Espagne”, in **M.FABRI et al.**, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, p. 157.

⁶⁴ **P. SIGNIFREDI**, “Misurare la produttività dei giudici: Il caso Spagnolo”, Bologna, IRSIG-CNR, 2006.

⁶⁵ Consejo General del Poder Judicial (CGPJ).

⁶⁶ **P. SIGNIFREDI**, “Misurare la produttività dei giudici: Il caso Spagnolo”, *supra* note 64, p. 8.

should permit a more comprehensive evaluation of their work. The new system is much more complex. It is based on several clusters of indicators covering five areas of judicial activity: efficacy, quality, timeliness, commitment and professional development.⁶⁷

In 2006 the *Tribunal Supremo* decided that the law which established the *módulos* (15/2003) contravened articles 402 and 403 of the *Ley Orgánica del Poder Judicial* requiring the state to guarantee the economic independence of the judiciary, and to base judicial remuneration on objective, equitable and transparent principles.⁶⁸ Consequently the *módulos* are no longer applied.

France has embarked upon a far more ambitious programme to link budgets to results. The *Loi organique relative aux lois de finances* (1 August 2001) was a national initiative of the legislature which applied to all ministries: they were required to submit budgets according to missions and programmes, whose objectives and results were to be examined by Parliament as part of the financial allocation process. The Justice Ministry responded with ten objectives, each with indicators of the courts' success in achieving them, under the headings of socio-economic efficacy (*e.g.*, access, involvement with victims), quality of service (*e.g.*, delay reduction, sentencing options) and effective management (case listing).⁶⁹ The debate in France now concerns the appropriateness of the objectives and indicators, rather than the principle of budgetary accountability on which the law is based.⁷⁰ However, since the objectives and indicators were developed by the Ministry without any transparent process or the involvement of the judiciary, it has been suggested that opposition to the law may focus on concerns over independence.⁷¹

In the Netherlands the process of developing measures of quality was developed in conjunction with the establishment of a Judicial Council. On its establishment in 2002 the Council was made responsible for distributing resources within the judicial system. A “program to strengthen the organisation of the judiciary” was established as a judicial

⁶⁷ *Ibid.*, p. 9.

⁶⁸ *Tribunal Supremo, Sala de lo contencioso-administrativo, pleno, sentencia, Votación*, 21 Feb. 2006.

⁶⁹ C. DEFFIGIER, *supra* note 38, p. 269; NG, G.Y., *Quality of Judicial Organisation and Checks and Balances*, Utrecht, Intersentia, 2007, p. 235.

⁷⁰ J.-P. JEAN and H. PAULIAT, “An Evaluation of the Quality of Justice in Europe and its Developments in France”, *Utrecht Law Review*, 2006, No 2, pp. 44-60.

initiative, and it was this group which developed quantitative measures of cases, personnel and time, originally based on the EFQM model (mentioned at the outset) and updated through regular research. These measures, together with planning proposals from the courts responsible for their implementation, now form the basis of annual resource allocation.⁷² While the Justice Ministry had been reluctant to impose accountability on the courts, to avoid perceptions of interference with judicial independence, the accountability has been devolved to the link between the judicial council and the judges even though the Minister is still responsible to Parliament under the Constitution.⁷³ According to the documents made available to the quality of justice project there seems to be little substantive difference between the measures used by the French and the Dutch systems. Indeed, with their emphasis on policy areas as diverse as victim support and alternatives to custodial sentencing, the French measures may be less rigid, technocratic and econometric than those developed in the Netherlands. The difference, according to the judicial critique, derives from the source of the values that are embodied in the measures: the ministry or the judiciary. Judicial reactions have had more to do with process than results.

The Dutch, Austrian, Italian and Spanish measures considered here are internal management systems which do not achieve external transparency and which were criticised (in the Spanish case) for confounding cases of different degrees of complexity. Whether developed by a judicial council or a justice ministry, to the extent that they have been successfully introduced, they signal the growing force of a managerial approach to the administration of the courts.

The systems of managerial accountability in the participating countries include a number of more or less rigorous mechanisms for evaluating the functioning of the judicial system. These organisational management evaluations have consequences, either at the level of the allocation of resources to various courts and court offices (Austria, France, the Netherlands and Spain) or in some cases for the remuneration of personnel (administrative managers in Italy, judges in Spain). These instances highlight some of the differences between legal and managerial forms of accountability. Evaluations deriving from models of managerial

⁷¹ **J.-P. JEAN and D. MARSHALL**, “Francia: Un controverso progetto per migliorare il servizio giustizia”, *Questione Giustizai*, 2005, pp. 591-610, at pp. 594-595.

⁷² **NG**, *supra* note 6, pp. 310-311.

⁷³ *Ibid.*, p. 308.

accountability conceive the relevant unit of analysis as aggregated data rather than the individual case. Their methodologies are thus statistical or economic and their evaluation criteria are no longer established by the norms of the legal system but by the authority with overall responsibility for managing the justice system: a justice ministry or a judicial council. Judicial councils, as organisations of the judges themselves, have been more ambitious (in Spain) and more successful (in the Netherlands) in introducing managerial measures of the judicial process. In either case, the values and interests which are protected and supported are principally those of efficiency and efficacy in achieving internally defined objectives.

We can draw some tentative conclusions from the managerial forms of evaluation considered above. The first point to note is that the cost of using these systems is directly related to their complexity. The Italian and Spanish cases indicate, albeit in different ways, a worrying tendency to make the means of monitoring activity ever more complex and fragmented and, therefore, costly.⁷⁴ This may be due to the technical difficulty involved in measuring such complex and multi-faceted tasks as those of the judge. It may also derive to some extent from the judges' dissatisfaction with the type of knowledge which is produced by these systems. As we noted above, managerial systems operate at the level of aggregated and general data, rather than those individual cases on which the judge must focus.

In the face of the conflicting approaches to professional practice of the manager and the judge, monitoring systems acquire more and more layers of analysis, each one adding to the complexity and fragmentation of the one before. As long as these fundamentally different approaches are treated in a technocratic manner, the diverse underlying means of understanding the job of the courts are unlikely to be reconciled. Rather, the problem becomes more acute as the economic and statistical knowledge produced diverges ever further from the way in which judges' usually understand their role, as arbiters in the individual case.

The above discussion has nonetheless shown at least one way in which the problem may be rendered less acute. The Finnish case shows the potential benefit of treating the data produced by the managerial systems as a foundation for discussion in a collaborative process,

⁷⁴ United States experience indicates how quickly such measurement systems can become so complex and onerous that they become almost impossible to use, promoting calls for a return to simpler systems; **B. OSTROM**, "Court Tools: A Court Performance Framework", Williamsburg, National Centre for State Courts, 2006.

rather than as absolute data to be applied automatically. This approach seems more reasonable in part due to the difficulty of correctly interpreting the meaning of particular data or of all the information collected by these systems. It also offers opportunities of avoiding the risk that “managerial” values may prevail to the neglect of the other values which must be protected in the judicial processes. It is of particular importance, where one institutional value may be seen to trump the others, that the data be interpreted and the outcomes evaluated from the points of view of all the relevant interests and values.

C. Public

The public forms the rhetorical apex of the dual systems of accountability and authority. Both the judiciary and the other branches of government appeal to their position *vis à vis* the public, either as citizens authorising and respecting their authority or as the voters and taxpayers to whom they are accountable. If the ministry justifies the introduction of managerial accountability to show the taxpayers they are getting value for money (as in Austria), the judges protect their authority by appeals to judicial independence (as in Spain or France). That these appeals so often result in the zero sum games discussed above may be related to a paucity of reliable information about the wishes and beliefs of the public.

A fundamental difficulty here is the vague meaning of the term public, including the ‘people’ or the ‘People’, those manifestations of interested parties and sovereign will that we discussed previously. A great deal may ride on whether we view ‘the people’ as taxpayers, citizens, ‘clients’ of the court or ‘parties to an action’ before the court. It is possible to map some of these distinctions and thus to see the derivation of particular viewpoints, as we will have occasion to do shortly. The next step however is to review the traditional forms of public scrutiny of the courts and justice systems, as we have done with the traditional legal and managerial forms.

The public gaze is a fundamental guarantee of the fairness of the trial and a ‘condition of justice’.⁷⁵ The demand for public scrutiny of the judicial function was elucidated in the

⁷⁵ A. GARAPON, “Il Rituale Giudiziario”, *supra* note 26, pp. 289-305, at p. 302.

Le Sueur refers to judges who appeal to these forms of accountability as ‘re-conceptualists’, since they are reconceiving traditional legal values and principles under the new demand for accountability; LE SUEUR, *supra* note 31, p. 76.

years immediately after the French Revolution when Mirabeau insisted to the Constituent Assembly that even the most corrupt judge could be trusted *à la face du public*.⁷⁶ It was again defended in response to the crisis in the United States following the publicity of the O.J. Simpson trial, by the director of the American Judicature Society: “if the rule of law, and the independent judiciary that is required for it, are to be maintained, the public must support the legitimacy of these institutions [...] we believe that openness and public access is [sic] the ultimate guardian of fairness in our justice system”.⁷⁷ This approach to public scrutiny is on the one hand a legal version of accountability: the public must see justice as being done. On the other hand it is a guarantee of judicial authority, so that “the public [...] support the legitimacy” of the courts.

A third possible way to guarantee the openness of courts is through the direct involvement of the people in judicial decision making. In the countries considered in this research,⁷⁸ this operates to improve the capacity of the court system to decide cases in specific matters (*e.g.*, lay members of commercial or labour tribunals) or to improve the legitimacy of the decision in the most serious crimes (*e.g.*, juries in the courts of assize), rather than to make judiciaries accountable to the people.

Crises of legitimacy of justice systems may be almost endemic, as appears to be the case in Latin Europe, or they may be prompted by specific events. The most spectacular of these which our research encompasses was the public outcry over the *Dutroux affair* in Belgium. The bungled prosecution of *Dutroux* for child sex offences led in October 1996 to the massive demonstration known as the ‘*marche blanche*’, considered to be Belgium’s “most important protest march since the second World War”.⁷⁹ The government and the justice

⁷⁶ “*Donnez-moi le juge que voudrez, partial, corrupt, mon ennemi même, si vous voulez: peu m’importe pourvu qu’il ne puisse rien faire qu’à la face du public*”; quoted in **R.W. MILLAR**, “The Formative Principles of Civil Procedure”, *Illinois Law Review*, 1923-24, pp. 1-36, 94-117 and 150-168.

⁷⁷ **F.K. ZEMANS**, “Public Access: Ultimate Guardian of Fairness in Our Justice System”, *Judicature*, 1996, pp. 173-175.

⁷⁸ The role of lay judges and jurors varies considerably across the countries considered. As a general trend, juries are used mainly in panels with professional judges to try the most serious cases. But the involvement of lay people in judicial decision making also includes the appointment to labour and commercial courts of people who usually have some degree of knowledge on the subject to be decided, as in France and Austria, and the district court in Finland. Finally semi-professional judges, usually with some qualifications or experience in law, decide minor cases in countries such as Italy and Spain (justices of the peace). Portugal and the Netherlands have no lay judges.

⁷⁹ **R. DEPPE** and **J. PLESSER**, “Belgique”, in **M. FABRI et al.**, *L’administration de la justice en Europe et l’évaluation de sa qualité*, Paris, Montchrestien, 2005; **R. DEPPE** and **J. PLESSER**, “Belgium”, 2005, p. 138.

system were obliged to respond to this political and legal crisis: a parliamentary commission as well as a number of internal inquiries were charged with investigating the sources of public discontent and recommending reforms. The diagnosis appears to have been summed up as “*mal connu, mal aimé*”, leading to attempts to bridge the perceived gulf between the courts and the public. While a considerable programme of reforms has been discussed in Belgium, the tangible results during the study period appear to have been limited to policies aimed at improving of the position of victims of crime and providing more information and better orientation to the courts and their processes for both victims and offenders.

While critical events like the *marche blanche* can prompt urgent and unusual responses, the normal functioning of justice systems are oriented on one hand to fiscal accountability and on the other to “soft forms of accountability”,⁸⁰ such as transparency measures which often amount to little more than leaving the courtroom door unlocked. In the absence of any genuine involvement by or reliable information from the public, the various mechanisms for ensuring internal accountability and the passive public gaze are deemed to guarantee adequate measures for reporting back to the people. As institutional checks on the authority of the people and accountability to the public, these legal and fiscal mechanisms operate with few means to register any dissenting views or take any action as a consequence. Parliamentary processes offer occasional channels for active scrutiny or public direction of the justice system. These have differing levels of access to the judges, the courts and the policies of the ministries or judicial councils, as will be seen in later examples.

The experiences of the nine nations in the study provide useful examples of the need to gain information on the views of the public as a real, and not simply abstract, collectivity, and to see what consequences this information may have. In contrast to the well established techniques of evaluation embedded in the legal and the managerial traditions, those involving the public are indeterminate in both their origins and their outcomes. The uses of public opinion polls in evaluations of justice are common examples of research without consequences. Courts and justice ministries solicit opinions from the public and also use opinion polls which may be independent of the ministries. Many of the national reports referred to surveys of citizen confidence in the justice system, such as those of the regular

⁸⁰ W. VOERMANS, “Judicial Transparency Furthering Public Accountability for New Judiciaries”, *Utrecht Law Review*, 2007, p. 3.

‘Eurobarometer’ surveys of public opinion carried out by the European Union.⁸¹ These were most often cited by the Latin countries, where public appraisal puts the courts at the lowest end of the scale of public institutions. France and Italy rate their justice systems at or near the bottom of the scale of public satisfaction. The Spanish report notes that only in those two countries and Portugal do citizens rank their judiciary lower than they do in Spain, where only the politicians and their parties are lower on the scale of satisfaction than the courts.⁸² These broad public opinion surveys, though disturbing for the countries at the bottom of the scale and, no doubt, reassuring for those at the top, give little indication of where the problems lie, let alone what to do about them.

Surveys of court users provide more detailed and potentially more useful information. Surveys in Finland indicate that court users are less satisfied with the courts than are citizens in general, while the converse is true of Spain.⁸³ Since court users form their opinions from experience rather than by the public image or media representation of the courts, we would also expect them to be better informed. Well structured surveys of court users indicate in more detail just where the problems may lie. Themes emerging from surveys in France, Denmark, Portugal, Spain and Finland point variously to accessibility (cost and complexity), delay, fairness and judicial competence as issues of importance or concern to users.

Of greater interest are some of the findings on fairness and competence of judges, in part because they begin to give us some insight into how the users evaluate these qualities. In Portugal court users were concerned at ‘favouritism’,⁸⁴ while French users referred to ‘inequality’ in the administration of justice (*‘inégalité devant la justice’*).⁸⁵ These comments flag somewhat different public perceptions of judicial impartiality than the independence from executive government to which the judges traditionally refer. We return to this issue in more detail below.

⁸¹ http://europa.eu.int/comm/public_opinion/index_en.htm

⁸² **H.S. MUNOZ**, “Qualité et Justice en Espagne”, in **H. PAULIAT**, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, *supra* note 63, p. 158.

⁸³ *Ibid.*, p. 162; **AARNIO**, *supra* note 43, p. 208.

⁸⁴ **B. SOUSA-SANTOS, C. GOMES and J. PEDROSO**, “Portugal”, in **M.FABRI et al.**, *L’administration de la justice en Europe et l’évaluation de sa qualité*, Paris, Montchrestien, 2005, p. 335.

⁸⁵ **DEFFIGIER**, *supra* note 38, p.266.

Respondents in France and Portugal questioned the competence of judges in regard to the comprehensibility of their written decisions.⁸⁶ In Spain there was concern that judges did not adequately understand the case before them.⁸⁷ Data available from detailed surveys in Denmark proved to be useful in a controversy following a law professor's criticisms of the inadequate reasoning of appeal court judgements. The critique focused on, but was not limited to, a particular case in which no reason was given for reducing a five year sentence to four years. A financial newspaper reported interviews with lawyers who said they were "shocked by badly written and incomprehensible explanatory statements" from one of the courts particularly criticised in the law professor's article. The President of that court responded by quoting survey data which indicated 82% user satisfaction with court services, but only 59% satisfaction with judges' explanatory statements.⁸⁸ Here the data was relevant and available on a court by court basis, so it was actually available to address a particular controversy. The end result of that affair has been that the Judicial Council prepared "a new language policy [that] aims at establishing general guidelines for explanatory statements, which will make them more concise and comprehensible".⁸⁹

Other instances in which informed public opinion has led to changed practices are seen in the Netherlands and again in Denmark. Both cases involved public concern over possible conflicts of interest among judges who were engaged in other employment, either as a sideline job (Denmark) or who were selected as part time "substitute" judges from among practising lawyers (Netherlands). In Denmark public reporting of sideline jobs in 2001 indicated that judges were earning average additional incomes of €1,000 - €8,000 per annum (depending on the court), most of which came from private arbitration. Concern was based on whether such judges are deprived of adequate time for court work (which was denied by court presidents) or whether there were conflicts with impartiality.⁹⁰ Impartiality was at the heart of

⁸⁶ *Ibid.*, p. 266; SOUSA-SANTOS, *supra* note 84, p. 335.

⁸⁷ MUÑOZ, *supra* note 63, p. 162.

⁸⁸ The President also invited dissatisfied lawyers to lodge formal complaints with the court. Complaints, and the mechanisms for handling them, form another means of evaluating justice systems, which fall between legal (including disciplinary) measures and administrative ones. They are also a means of gaining direct information from the public and lawyers using the courts.

⁸⁹ J. WITTRUP and P. SØRENSEN, "Quality and Justice in Denmark", in M.FABRI, P. LANGBROEK and H. PAULIAT, *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Bologna, Lo Scarabeo, 2003, p. 144.

⁹⁰ *Ibid.*, pp. 131-132. An ironic aspect of this controversy is found in the remarks of the Director of the Council of the Judiciary who in 2000 told regional seminars of judges and clerical staff that one of the reasons for courts

public concerns in the Netherlands where a pressure group, Court Watch, investigated possible conflicts of interest, notably where a substitute judge may be hearing a case involving a colleague from the law firm in which they normally work. “Court Watch has forced the courts to publish the secondary functions of all their judges on the website for the judiciary”.⁹¹

The ambivalence in judicial attitudes to public opinion, seen in Garapon’s characterisation of the public as both “guarantee and menace”⁹² is illustrated in confrontations between judicial decisions and public opinion. Controversies over inadequately harsh sentences for crimes, highlighted in the media, seem almost to be a ubiquitous, if not perennial phenomenon. National reports from France and Denmark reflect similar patterns of events and reactions in the two countries. In France this debate followed a reorganisation in 2000 of the responsibilities of the *juges d’instruction* and the *juges des libertés et de la détention* (who deal with applications for alternatives to detention) which saw a marked decline in incarceration rates. Public reaction highlighted issues of security as a result of this decline, and, as the national report puts it, “the jurisprudence changed: the number of committals to provisional detention increased significantly, independent of any legislative change”.⁹³ In Denmark the debate over sentencing for violent crime was heated, with judges accused of being “flabby humanitarians” by a member of Parliament. With the judges and the government resisting pressure for legislated mandatory minimum sentences, it was found that average sentences for violent crimes had increased from 87 days imprisonment in 1995 to 119 in 2000. This data tracks changes following a 1994 legislative change which allowed harsher sentences.⁹⁴ It is unclear how much of this change is attributable to legislation and how much to judicial responses to public opinion, as in France. The apparent accommodation of the judges to public opinion in these instances suggests that while it may be denigrated as “irrational” and formally discounted as a source of judicial decision-making, public opinion may operate in unacknowledged and unofficial ways.

to improve their performance was that they were in competition with private sector providers of dispute resolution services [p. 140]. These are the competitors for whom the judges are working in their spare time.

⁹¹ NG, *supra* note 6, p. 313.

⁹² A. GARAPON, *supra* note 25, pp. 289-305, at p. 302.

⁹³ C. DEFFIGIER, *supra* note 38, p. 274.

⁹⁴ J. WITTRUP, *supra* note 76, p. 144-145.

We may draw some tentative conclusions from this brief summary of the role of the public in assessing and directing the justice systems under discussion. The public, in its various guises as citizens, voters, taxpayers and users of court services, has a legitimate interest in the quality of justice. Up to this point we have identified few initiatives which bring together that interest with any effective mechanisms for assessment and reform. Public opinion is often solicited in forms which have little relevance to policy implications and therefore few consequences for the reform of justice systems. When there are perceptions of a crisis of legitimacy or of deep-seated public criticisms of the justice system, responses are inconsistent. While often purporting to better inform the citizens as to the processes of justice, the nexus between information and outcomes remains tenuous. Judges pride themselves on their aloofness from public opinion while apparently accommodating it almost surreptitiously. The judiciary may well be as poorly informed about public opinion as the public is held to be about judicial processes. The information available to most justice systems (ministries, judges and judicial councils alike) is based on media reporting of crime, justice and public responses (through editorials or sound grabs) of dubious validity, and opinion polls of equally dubious relevance to key policy issues.

The various forms of public input to the justice systems we have been reporting do, however, suggest some common themes and possible directions. When they are able to express views about substantive issues of justice, through well directed surveys or well informed pressure groups, public perceptions are more sophisticated than the “irrational” or “archaic and uncontrollable” mechanisms feared by the judges as the other face of the public guarantee of justice.⁹⁵ Evidence from Portugal, France and Denmark shows that people truly desire to be better informed about the processes of justice through comprehensibly argued judicial decisions. This is clearly important to individual litigants, but also relevant on a broader scale to sentencing decisions. In addition we have seen that the users of the justice systems of the Netherlands, France, Portugal and Denmark consider the impartiality of judges to be important and threatened. Of particular and perhaps surprising interest is the nature of that impartiality and the source of its vulnerability. In contrast to the frequently expressed concern that the judiciary must maintain its independence from ministries or the interference of governments, the impartiality envisaged by the users has more to do with equality between the parties. This is threatened when judges have second jobs, which might mean working with

⁹⁵ A. GARAPON, *supra* note 26, pp. 301-302.

other lawyers who may appear before them, or when prosecutors are perceived to be working out of the same office as the judge. This is a simple and fundamental conception of impartiality which serves as a reminder that the separation of powers was never more than a necessary but not sufficient condition for the more basic principle of fair judgment.

IV. Promise

The foregoing discussion of some current European practices employed in evaluating the quality of judicial activity within the context of the justice system has highlighted a number of difficulties. In conclusion we try to analyse certain factors underlying such problems in practice, and relate these to any indications of a possible way forward by reference to the earlier consideration of the principles upon which justice systems are based. A couple of the more promising examples arising from the research will again introduce a practical element to the discussion before we sum up with some tentative general proposals.

The distinctive power bases of the key players involved in the delivery of justice are explicitly enshrined in the principle of the separation of powers. According to that doctrine, judges are to remain independent of the executive power and, a related issue, aloof from popular influences. As a principle of long official and even constitutional standing it underpins many of the institutional arrangements, as well as the habits of thought, obtaining in justice systems. Indeed, with the proliferation of judicial councils as a bulwark between the judiciary and the executive, the doctrine appears to be enjoying a period of particular influence. While powers should perhaps be separated through institutional internal divisions, evaluative mechanisms do not thrive on them. The research found many instances of unilateralism and entrenched opposition based precisely in these divisions of power. We have on many occasions referred to the zero sum games that result.

The evaluation of quality and other means for ensuring accountability and conformity to standards of law and good practice are widely understood to be desirable and even essential to public management and to justice alike. Whether the pressures come from adverse findings of the ECHR, from parliaments demanding more formal and specific accountability, or from cash-strapped ministries, it often becomes obvious that new evaluative mechanisms must be implemented. When these have failed we have commonly noted one or two underlying factors: either a ritualistic adherence to some tenets of evaluative practice, or a more or less

cynical justification of the means by the ends. In the former case the mechanisms and processes take on a life of their own, so that increasingly elaborate data collection protocols (or measures, or information technology) are understood as the solution to problems which really arise in the very conception of the process. Losing sight of the goals of the evaluation system, as of the justice system itself, attention shifts to the minutiae of the data and away from the purpose for which it was required in the first place.

If ritualism mistakes means for ends, a narrow focus on the quick fix makes the converse error. With sufficient will, power and cunning, a technological solution may be imposed on many different problems. The Italian Pinto legislation is illustrative: through a combination of domestic legal devices and the promise of compensation, appeals to the ECHR on the grounds of delay were reduced *without reducing the delay itself*. Less spectacular examples of technical solutions to juridical, managerial and political problems were seen in the automatic connections made by some justice ministries (Austria) and judicial councils (Spain) between evaluative devices and financial allocation. The Spanish system of output measures as a basis for judicial remuneration illustrates both ritualism and technologism: on the one hand, the measuring system becomes an end in itself, losing sight of the purposes for which it exists. On the other hand, the results of that measurement are applied mathematically to financial outputs. By focussing the attention of the judges on their salaries, of the ministry on the measures, and of both interest groups on the nexus between the two, any broader interests or ends are effectively eclipsed.

Some potential solutions to these problems can be illustrated by some practical examples from the research. Before turning to those we briefly revisit our earlier analysis of the principles underlying justice systems to see what guidance they may offer. We saw that both authority and accountability are means of representing interests which cannot literally be present in a practical setting such as a court or a ministry. The ministries and courts represent the traditional sources of authority of the state and of law. Modern democracies also base the legitimate authority of the state and the judiciary in the will and confidence of the people, who are also represented as an abstraction, or in a few cases as a jury or citizen judge. The representation of law, state and a sovereign people prospectively authorises courts to pass judgment on those real persons before the court who stand to lose property or liberty as a consequence. The authority of the entire system must stand above the interests of the parties, including the victims of crime, while being based in the represented abstraction, the people.

This paradoxical relationship between justice and the public leads to various devices for keeping popular interests at arms length. Continually represented only as an abstraction, the will of the people can be formally canvassed in opinion polls, or informally (and unreliably) deduced from the media. In keeping a distance between themselves and actual people with interests, judges and justice systems may lose sight of the legitimate interests of people as users of the courts. Where those interests have been able to communicate effectively we have seen demands for timely justice, competent and communicative judges, and transparent judicial impartiality. We discovered more vocal citizen concern over judges' connections with the private interests of parties (through their other appointments, as in the Netherlands and Denmark) than with those of public authorities.

Accountability is a retrospective check on the representativeness of the justice system. This does not imply that it should be any less broad in its conception of the interests to which it must answer. Substantive issues of timeliness, competence, communication and impartiality are as central to the system of accountability as to that of authority. Courts are only accountable to the executive as a means to the end of accounting to the citizens. And as we see in this overview of citizens' concerns, they are accountable for a great deal more than money.

This brief overview of the principles which underlie the evaluation of judges in context bear out the issues we identified in practice: the balkanisation of interests within the justice systems; the ritualism of seeking evaluative mechanisms for their own sake; and the search for a quick technological fix which will have assured or automatic outcomes. This syndrome is collectively characterised by an approach blinkered by partial interests and a hiatus between means and ends, so losing sight of the underlying aims and principles of the justice system. Evaluative mechanisms must take into account a complex of interests and values, not losing sight of their diverse sources in the judges, office and ministry personnel, citizens, lawyers, victims of crime and other court users. As long as many of these interests are represented as abstractions, the views and interests of real persons can only be adduced from the media or as a by-product of technical data collection. That these interests often enter into the debate only as representations of overarching demands for accountability *versus* independence stifles broader debate. If it were possible to find ways for citizens, lawyers, politicians, judges and public servants to work together to define the goals and priorities of the justice system, this may help to reattach the ends of the justice with the means of evaluation.

If that suggestion seems utopian, it may be opportune to return to some practical examples arising out of the research which, we believe, point in some positive directions. We must explore the extent to which various institutional actors may be involved in assessing and implementing proposals that have a broader base than their own immediate institutional environment. We see progress in those areas where the demands of the public are heard, and when judges and managers work together to respond to those demands as well as to understand each others' values, interests and modes of representation.

In addition to the Finnish experience of national management by results considered above, it is worth drawing attention to a local pilot scheme. This was begun in 1999 in the district of the Rovaniemi Court of Appeal (which includes nine first instance district courts) where quality targets were set by a Development Committee of the Quality Project whose members are judges, practising lawyers and prosecutors. The committee worked through a process that involved frequent communications among the judges, and between the judges and the various stakeholder groups. These communications included an increased dialogue among judges on court practices, the formation of working groups, annual quality conferences and the preparation of quality benchmarks.⁹⁶ One of the results is the development of a new culture of communication between all the actors involved in the judicial process.

The targets dealt with substantive legal and judicial management issues, and were able to be assessed by fairly straightforward measures. They included increased consistency in sentencing (initially in theft, drink driving and assault, expanded to narcotics cases the following year), overcoming impediments to the preparation of civil cases (in consultation with lawyers), leadership skills in the admission of evidence, improvement in the quality of written judgements and increasing participation in judicial training (to 100%) with some expansion of postgraduate study. Not only was this an innovative local quality assurance pilot scheme, but it was itself evaluated,⁹⁷ with such positive results that it was recommended for

⁹⁶ "Quality Project in the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland", 2005. <http://www.oikeus.fi/uploads/wz1uke8tvs.pdf> [accessed on 6 March 2006].

⁹⁷ This is a notable exception to the project's general observation of the remarkably low rate of evaluation of specific reforms; **A.SAVELA**, *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, 2006.

nationwide adoption and was awarded a European prize for “innovative practice contributing to the quality of civil justice”.⁹⁸

In contrast to the various arrangements, noted throughout this article, by which the judiciary, the ministry and, occasionally, the parliament act unilaterally and without regard to each others’ interests and values, recent developments in Denmark have been dynamic and exemplary. With the introduction into Parliament of the bill to establish a Judicial Council there was extensive debate between the Ministry, the Parliament and the General Public Auditor on the allocation of funds and the responsibility of the Council. The Parliamentary opposition and the Auditor (who is independent but reports to Parliament) considered that the Auditor’s office should have the same powers and responsibilities in relation to the courts and the Judicial Council as apply to any public agency. This being conceded, the stumbling block became the sanctions that could be imposed upon an independent judicial council in the event that there were irregularities in its accounting for resources. The Council was established in 1999 on the basis that the Auditor can criticise and instruct the Council to take any measures agreed with the Minister, who can dismiss the entire Council if it does not comply with such instructions.⁹⁹ These arrangements were put to the test soon enough when, in 2000, the Auditor and the Ministry of Finance criticised the productivity of certain district courts. In response to these concerns the Judicial Council developed goals and introduced and evaluated a new district court reporting regime including productivity measures and targets which led to a 10% productivity increase. The process implemented by the Council includes qualitative comment back from the courts, which has allowed improvements in the data collection. This has consequences in decisions to fill vacancies, models for court staffing, and flow-through to non-salary expenses. The Auditor is now satisfied with the arrangements put in place by the Council.¹⁰⁰

Key issues emerging from these examples revolve around what is to be measured, who is to decide what those measures should be, and how to negotiate what consequences should flow from the outcomes. Local initiatives, as in the case of the Finnish Rovaniemi district, have the advantage that the objectives are set by the same personnel who are to implement

⁹⁸ AARNIO, *supra* note 39, pp. 181-182, http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Finalists%20E.asp#TopOfPage [accessed in March 2006].

⁹⁹ J. WITTRUP, *supra* note 76, p. 125.

¹⁰⁰ *Ibid.*, pp. 128-129.

them. While this makes for optimum levels of commitment and responsiveness, it does not necessarily ensure accountability. At the other extreme, then, objectives are set by the Ministry (as in the case of the French performance measures discussed above) or by Parliament (Finnish national system) and the courts are required to meet them to maintain their flow of resources. Between these two systems we find various means of negotiating objectives between the courts and auditors, ministries or parliaments. Where these objectives are purely related to managerial accountability, as in the case of the Danish Auditor, they are limited to quantitative productivity measures. They may also be used as tools of policy which again brings us back to the question of who is to determine the policy directions to be pursued by the courts.

The traditional lines of responsibility of judges and managers have been challenged in many of the instances of evaluation considered by the research projects. This may derive from the application of new public management principles to the operation of courts. It has also been stimulated by institutional reforms such as the establishment of judicial councils (as in the Netherlands and Denmark). These innovative approaches, in which judges are expected to respond to managerial criteria, or managers to public criteria (to suggest two of the possible combinations) are more interesting but also riskier than some of the one dimensional procedures we discussed earlier. The most successful modes of evaluation which this research identified were those combining the methods or claims coming from different institutional positions. A common element in successful evaluation regimes with positive outcomes has been the communication between players and the respect for a wider range of values and interests. The involvement of the parliament or court users has helped to overcome the stalemate between a judiciary relying on authority and a narrowly conceived independence, confronting a ministry or judicial council claiming the supreme importance of accountability conceived in a narrow fiscal and managerial sense. The role of the public has been most effective when it is represented by a well informed lobby group (e.g. Court Watch in the Netherlands). Across the various Danish examples we have mentioned, effective public participation has included lawyers and a legal academic, the media and the parliament. Public participation is least effective when the demands are vague and there is little or no follow through (as in Belgium). The public can act as a circuit-breaker to the usual zero-sum games.

Analysing the quality of justice from the different points of view of the institutional and public interests, it is clear that courts cannot be evaluated according to a single dimension.

The criteria to be applied must recognise the distinctive approaches to representation which we found underlying both authority and accountability, and need to be negotiated among these diverse and possibly competing interests. While each of the criteria or interests has legitimate, and in many cases established, means of evaluating justice from its specific point of view, we have discovered the most promising examples to be those in which the stakeholders represent their own and respect each others' overlapping interests. They negotiate the assessment criteria and the uses to which they are put, and each has a stake in achieving successful outcomes.