



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Judicial Reform in Europe

Report 2011-2012



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1. INTRODUCTION

Reform of the judiciary is a matter of special interest for the ENCJ. This report examines the reform measures implemented or planned in the countries which participated in the works of the Project Team “Judicial reform in Europe”, providing the ENCJ view and identifying recommendations.

Many of the judicial reforms underway are efforts to improve the functioning of judiciaries. Other reforms are brought about by the economic crisis that affects most of the countries in Europe. The impact of the economic crisis on the Judiciary is significant in many European countries: the number of cases increases and budgets decrease. In some countries the poor performance of the Judiciary, for instance with respect to timeliness, is one factor that hinders economic development. The awareness of the importance of an effective functioning judiciary offers opportunities not only for reform, but also to respond to the economic crisis.

It is difficult to give a precise overview of the budget cuts for the judiciary in European countries, partly because the crisis arose at different points in time in the various countries. Some judiciaries have already absorbed budget reductions of up to 20%. Also, in a number of countries the salaries of judges have been lowered. In other countries budget cuts still need to be absorbed. In addition to emergency measures such as salary reductions, reform measures have been taken to reduce expenditure. These reforms go along with or take over reforms that were already put in motion for reasons other than the economic crisis. It is often not possible to make a sharp distinction between budget-driven reform and reforms in general. In this report judicial reform is addressed, irrespective of its background.

Judicial organizations and judicial and legal systems in Europe are different, due to differences in constitutional systems and legal traditions. However, there is a common element for all European judicial systems: *justice is the cornerstone of the rule of law and consequently the independence of the judiciary is vital in any democratic society.* The Vilnius declaration stresses that cost cutting can not be allowed to undermine judicial independence. At the same time the declaration calls for measures to improve the efficiency of the courts. Recommendation 3 of the declaration states:

“The new landscape necessitates taking the opportunity to undertake measures aimed at improving the efficiency of the Courts, a situation not necessarily perceived and dealt with in better times to rethink the judicial map, to introduce and reform the procedures and the internal organization of the courts and the integration of the innovative information and communication technologies which are essential features to increase the efficiency of the court system.”

This Report builds on these ideas by examining the diverse reforms being undertaken. It hopes to provide the relevant stakeholders in Europe with the perspective of the Judicial Councils on judicial reform in Europe. It takes into account the diversity of legal systems, including the different place of the public prosecution services in Europe, and identifies the common denominator and best practices for the reform of the judiciary.

This Report takes into account other activities of the ENCJ in this matter, especially the work on “Standards” and “Timeliness”. Its aim is to further contribute to the strengthening of the ENCJ’s capacity in providing solutions for a sustainable judicial reform process.

It was unanimously agreed that **the objective of a judicial reform process should be to improve the quality of justice and the efficacy of the judiciary, while strengthening and protecting the independence of the judiciary, accompanied by measures to make more effective its responsibility and accountability.** It was also stressed that justice has to be close to the citizens. To this end, access to justice, including in cross border judicial proceedings, has to be facilitated.

The report will not attempt to solve system problems in individual Member States, but to propose to the Member States the ENCJ view on judiciary reform and best practices in facing the challenges for the judiciary.

Structure of the report

Chapter 2 sets out the methodology of the report. The substantive chapters are 3 and 4. Chapter 3 deals with the content of judicial reform in Europe; it focuses on five major areas of reform. It describes and evaluates current developments and for each area of reform provides recommendations. Chapter 4 deals with the process of reform. Reform of the judiciary requires the maintenance of a careful balance between access to justice, effectiveness and efficiency of the administration of justice. At all times fundamental rights must be guaranteed, despite adverse economic conditions. Recommendations are given. Chapter 5 summarizes the recommendations.

The responses to the questionnaire and the additional documentation provided have been collected in a questionnaire annex (where the information and the additional documents provided are classified by topics and countries in alphabetical order).

2. METHODOLOGY

Definitions

For the purpose of this Report, courts and public prosecution services are referred to as “judicial”. The judiciary is defined here as the ensemble of judges, their legal staff and all administrative staff as well as governing bodies of courts and councils of the judiciary. Public prosecutor offices are defined likewise.

Method

For the achievement of the proposed result, the methodology and activities undertaken involved:

- collection of information on justice reform from the Judicial Councils represented in the working group and from other members and observers;
- drafting of the documents by the Project team and support staff;
- analysis of the draft documents in the steering committee;
- working meetings;
- approval or adoption by the General Assembly.

This Report is based on the answers to a questionnaire agreed in The Hague meeting (15-16 September 2011) and on the discussions and conclusions of the working meetings held in Brussels (19-20 December 2011), Bucharest (20-21 February 2012) and Rome (22 March 2012). Most of the countries who responded to the questionnaire carried out reforms or reorganizations of the courts / prosecutors' offices with the general aim of better serving the population and/or reducing costs of courts / prosecutors' offices.

The questionnaire focused on the content of judicial reform. However, some of the answers indicate that judiciaries are not sufficiently involved in devising a development strategy for the units involved (courts, prosecutors offices, judicial council with all the personnel and logistics involved) but rather the important decisions are drafted and adopted by the executive branch and subsequently enforced. Therefore, not only the content of reform was examined, but also the process of reform.

3. CONTENT OF JUDICIAL REFORM IN EUROPE

The report focuses on **5 major areas of reform**:

1. Rationalization and (re)organization of courts and public prosecutor offices;
2. Reduction in the volume of court cases;
3. Simplification of judicial proceedings, improvement in case management and introduction of new technologies;
4. Financing of the judicial system (courts and public prosecution offices);
5. Court management and allocation of cases within and between courts and within and between public prosecution offices.

These five areas of reform will be discussed in this chapter. For each topic, first, a factual description is given of current developments in Europe, based on the responses to the questionnaire and subsequent discussions in the working group. Then, the advantages and disadvantages associated with the reform in each area are reviewed. Each section concludes with recommendations.

In all of these areas a lot of activities are underway. The actual impact of these reforms is hard to evaluate, as most are very recent or still in the process of being implemented. It is, however, re-assuring that developments are highly consistent across most countries¹. All over Europe Judiciaries seem to share largely the same vision about the administration of justice in modern society.

¹ It is noted that the agreements of Portugal and Greece with IMF, ECB and EC to deal with the economic crisis in these countries also include judicial reform. The agreed reforms cover the five areas listed above. See: the letter of the minister of Finance and the governor of the Central Bank of Greece to the IMF, <http://www.imf.org/external/np/loi/2011/grc/070411.pdf>. Same with respect to Portugal, <http://www.imf.org/external/np/loi/2011/prt/051711.pdf>.

3.1 RATIONALIZATION AND (RE)ORGANIZATION OF COURTS AND PUBLIC PROSECUTION OFFICES

3.1.1 Description of current developments

Redrawing judicial maps

Most European countries are geographically concentrating judiciary functions, thereby reducing the number of courts. The reasons for this vary. Some countries do this to enhance the quality of justice. This is the case in Denmark, Norway and the Netherlands. These countries have not reached net savings or do not expect to achieve net savings by reducing the number of courts. In Denmark, opportunities are seen for cost reduction through specialization, independent of the reorganization.

In other countries it is expected that, besides higher quality, cost reductions can be reached by closing underused and sometimes even run-down courts and shifting the cases to nearby courts. This is the case in Portugal and Greece, but also in countries as diverse as Austria, Ireland, UK, Poland, Romania and Turkey. Like the Netherlands, Poland and Turkey is also aiming at bringing several small courts under one umbrella to reduce the costs of management and overhead in general. In yet other countries, like Belgium (320 courts) and Italy (1289 courts), the revision of the map is considered necessary, but consensus on specific measures has not yet been reached, although in Italy the legal conditions have been created for reorganization.

Besides savings and quality in general, specialization, minimum necessary number of judges, new technology and timeliness are mentioned as motives for up scaling. These reorganizations all lead to larger travel distances for parties, and thus to the deterioration of geographical access to justice. It seems, however, that many Judiciaries do not attach much weight to this problem anymore. Part of the explanation is that the physical presence of parties and other trial participants such as witnesses is becoming less important. The application of information technology, particularly video conferencing, is becoming normal in large countries, and participation in a hearing at a distance is not seen as a serious obstacle.

In some countries, such as the UK, the desirability of visible presence of the judiciary in local communities is an important consideration, especially in local criminal cases, but should not be not decisive factor. This argument is comparable to the occasional discussion on community courts in the Netherlands.

Finally, it is striking that many countries expect cost reductions and some others do not. Obviously, local circumstances differ, but the risk also exists that the potential for cost reduction is overrated and/or the time needed to realize these reductions is underestimated.

The criteria actually used to decide the number and location of the courts largely coincide with the aspects mentioned above that motivate concentration, where the overall aim is to guarantee a fair trial within a reasonable time (article 6 ECHR). These are

- population distribution;
- geographic distances and accessibility of public transportation;
- existence and (digital) accessibility of support services and/or infrastructure;
- sufficient number of cases to allow efficient utilization of courts and prosecutor offices;
- adequate numbers of judges and prosecutors and their support staff to guarantee continuity in case of illness or other absence of judges, and to allow for specialization deemed necessary in each court and prosecutor office (quality aspect).

Increasing lay participation

Increasing lay participation can also be seen as a positive form of reorganization. Unlike concentration of courts, (increased) lay participation may be a controversial issue, due to very different legal traditions. In many countries this is just a theoretical possibility. As a result, there are very different ideas about whether increased lay participation will or will not lead to cost reduction, probably because practices vary widely. In the UK consideration is being given to reducing delays in trials by having more of the less serious cases heard in the magistrates' courts. In these courts the bench consists of three lay judges, who do not receive any remuneration for the work undertaken. In Latvia however lay participation has recently been abolished by law. No difference of opinion seems to exist about the high costs of trial by jury, but the abolition of jury trial as a spending cut goes against long traditions, and is usually not even considered.

3.1.2 Advantages and disadvantages

Concentration of courts and prosecutor offices has advantages from the perspective of quality of justice (specialization) and timeliness (less delay due to absence of judges and others). The higher quality of justice, related to new judicial maps, also means focusing on the geographical balance of these maps in order to guarantee the delivery of justice equally to all citizens. Whether cost savings can be reached depends on the local situation. In all cases costs will precede savings by many years. Disadvantages concern the physical access to justice and presence in local communities. As the saying goes: "Justice must be seen to be done".

As to increase lay participation, the advantage would be that less professional judges are needed and, therefore, costs are saved. A disadvantage is, of course, that this measure is only feasible in countries with a tradition of lay judges. To introduce such a system in other countries will require much effort and time, and will be costly. The

impact on the quality of justice is a matter for debate, and a discussion of the arguments goes well beyond the scope of this report.

3.1.3 Recommendations

- 1) Concentration of courts and administration must be motivated by the need to provide high quality justice and more effectively use available resources.
- 2) Judiciaries should evaluate carefully whether net cost savings can be reached by concentrating courts, and must take into account that it could be many years before the desired savings can be effectively achieved.
- 3) Concentration of courts should be accompanied by increased utilization of the ICT (information and communication technologies) to reduce the frequency of necessary visits by parties in person to the courts. Also, ICT should be used to increase the visibility of court proceedings

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3.2 REDUCING THE VOLUME OF CASES

3.2.1 Description of current developments

Reduction in the number of cases is an important issue in many countries. The Judiciaries of most countries are struggling with large case loads and budgets that have not adapted to ensure reduced waiting times (see below). There is also the belief that there are too many unmeritorious cases and in-case applications primarily motivated by delay tactics.

Increase of court fees

To reduce the volume of cases, but also to generate more income court fees have been raised in a lot of countries. The decision to increase fees is commonly taken by the legislature rather than the judiciary. Often the increase is intended to reduce the number of unmeritorious cases or applications that are chiefly designed to delay proceedings and even to get them shelved indeterminately (Portugal, Greece, and Italy). Other countries introduce such measures mainly to produce a greater yield (Latvia). Nowhere are rates considered that even come close to the rates that have been proposed in the current bill for the increase of court fees in the Netherlands. If this proposal is adopted, the fees for civil cases will be higher than the actual cost price of proceedings. Disadvantages of increasing court fees are deterioration of access to justice and consequent adverse effects on the economy. However, in many countries this will be not a big issue, because even after substantial increase of court fees, these are still a small fraction of the actual costs of a case. It is noted that in some countries the courts themselves determine the acceptability of increases, either by their role in checking the consistency of laws with the constitution or by interpreting European law.

Reducing the volume of (appeal) cases by law

Another way to achieve a reduction of caseloads is to limit access to justice by law, for instance by setting a financial minimum for civil cases, such as in Germany. This approach seems to focus primarily on reducing the amount of appeals. In several countries, measures have been taken to simplify the appeal procedures and thereby reduce the number of the unnecessary appeal hearings. Norway and Austria provide examples. In the European Judiciaries there seems to be a preference for various forms of leave arrangements, which allow judges to determine themselves which cases merit appeal, instead of mechanically applying legal provisions. There are many cases in which it is immediately clear that the decision of the court of first instance will hold. In those cases appeal hearings are a waste of time. It is striking that, unlike in the Netherlands, there is no tendency to have one judge handle appeal cases. In most countries there seems to exist a strong resistance against appeal cases being heard by a single judge.

Expanding Alternative Dispute Resolution

Finally, in many countries Alternative Dispute Resolution (ADR) is promoted. Its success varies a lot. In several Eastern European countries, mediation is not working: parties insist on a court decision. On the other hand, in the UK and Ireland pre-procedures are mandatory, at least in the sense that in court decisions it is taken into account whether a party has or has not seriously attempted mediation. Obviously, in these countries there is popular and parliamentary support for this approach. The Netherlands occupies an intermediate position. In the Netherlands, most disputes are traditionally settled out of court: mediation is not mandatory, it is also not controversial, but it is not used much. Surprisingly, ADR is often not evaluated from the perspective of the litigant. In general, evaluation is confined to the question whether ADR leads to less court cases. The issue whether litigants are better off, in particular, in terms of time, costs and quality of the outcome, is generally not addressed. One of the few exceptions is a study for the Netherlands. In this study it was found that, despite high success rates of mediation, it took more time and was more expensive on average, taking into account the adjudication of cases in which mediation failed. Reportedly, in Austria mediation leads to lower costs, taking all these factors into account. Apparently, the question whether litigants are better off by using ADR, has no general answer, and depends on local conditions.

3.2.2 Advantages and disadvantages

Reduction of caseloads saves costs and/or, dependant on the budgetary system, may help to reduce court delay. It can also lead to the allocation of scarce resources to meritorious cases and not to frivolous cases. Extra revenue is raised when court fees are increased.

The main disadvantage is that such measures diminish access to justice: an increase in fees infringes the fundamental right of access to an independent and impartial tribunal established by law (art. 6 ECHR). Also, when substantial numbers of cases cannot be brought before the courts anymore, the protection of rights is not enforced in full, and this will result in damage to, for instance, the economy.

Increased use of ADR may contribute to a reduction of case load, but it is not guaranteed that litigants are better off.

3.2.3 Recommendations

- 4) All reforming programmes, including reduction of case loads and increases of court fees, must leave access to justice, as guaranteed by art. 6 ECHR, intact. Measures aimed at discouraging unmeritorious cases are useful, providing such measures do not impede meritorious cases going to court.
- 5) If court fees are increased, the financial circumstances of the parties have to take into consideration, either by differentiating tariffs or by legal aid.
- 6) Regulating access to appeal should preferably be done by the judiciary, taking the merits of cases into account, and not by mechanical legal rules.

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3.3. SIMPLIFICATION OF JUDICIAL PROCEEDINGS, IMPROVING CASE MANAGEMENT AND INTRODUCTION OF NEW TECHNOLOGIES

3.3.1 Description of current development

Almost all countries are working on simplifying and digitalizing procedures, more often with the prime aim of shortening lead times and improving other aspects of quality than to reduce costs. The introduction of strict case management is an intervention which not only improves timeliness but also reduces the cost per case as a side effect.

Simplifying procedures

Another aspect is the reduction of the number of types of procedures, as is happening in Italy and is contemplated in the Netherlands. Such a step towards simplification of the procedures themselves and towards simplifying supporting IT-systems can be effective in delivering better quality justice as well as reducing costs. Concerning the procedures themselves, the common denominator is the introduction of simple and fast procedures, which allow the judge tight control. In such procedures the repeated exchange of documents and the postponement of cases become the exception. Also greater use is made of oral sentencing to avoid long written sentences. Italy opted for the alternative of a short written decision, in which the judge does not have to respond to all arguments of the lawyers. This approach is a response to the lengthy way lawyers present cases. In some other countries attempts are made to prevent dysfunctional adversarial tactics by lawyers, for instance by punishing lawyers (financially) who cause unnecessary delay or who register frivolous cases.

Particularly interesting is the radical redesign of procedures, as happened in Ireland in its commercial court which serves as a pilot court. The length of civil proceedings is thereby reduced to 9-12 weeks. In the Netherlands experiments are under way that pursue a similar result. Also, a new procedure has been introduced in administrative law to speed up proceedings: within 13 weeks a hearing has to take place. Immediately after this hearing the judge reaches his decision. Only in very complicated cases further hearings will be allowed. It is expected that the number of settlements will increase and the lead time will be reduced to five months on average. In several countries small claims procedures have been developed. These procedures have simplicity of procedure, strict format and low cost in common, and lend themselves for digitalization.

Digitalizing procedures

These changes are often implemented in combination with the digitization of procedures. Filing cases electronically and digital exchange of documents with digital signatures are rapidly becoming common. The already mentioned commercial court in Ireland is an example of an integrated approach towards simplification and digitization. The term "e-court" is spreading. Often this refers to small claim procedures such as in

the UK, Poland and Ireland (see for example www.courts.ie), but the use goes much further. Another promising area is case tracking, which refers to the possibility of following the progression of cases on the Internet. In the Netherlands and Austria, such a system exists for lawyers who can monitor their cases on line, but not yet for litigants. In other countries, it does not seem that much progress has been made yet, with the exception of the High Court of Ireland. There it is possible for every person to examine the status of cases. In Romania, everyone can find on the Internet information on parties, procedural delay and judgments.

Now, we turn to the use of IT in courtrooms. In many countries written record has been or is replaced by audio and, as in Sweden, video recording. In this country, the appeal procedure is based upon the continuation of the procedure in first instance. Therefore the appeal hearing uses the footage of the hearing in first instance. Duplication of the hearing of witnesses is not allowed unless important questions were not adequately addressed at the first instance trial. New or supplemental witness evidence is always allowed. Video conferencing is used in many countries, although the nature of use differs. In all countries, video conferencing is used to hear parties and others such as witnesses abroad and to protect vulnerable or anonymous witnesses. In several countries, it is only used for these purposes. But in countries with large travel distances, video conferencing is used more intensively, and leads to large efficiency gains for the parties. In Sweden, witnesses hardly ever physically appear at appeal hearings. There is still a lot of debate about whether much information is lost when people are not physically present. Experience seems to play an important role. In Latvia the Judiciary has experimented carefully with both audio recording and video conferencing, and both techniques are now being introduced nation wide². In Turkey audio and video technology is used to avoid having to bring defendants in criminal cases from prisons to the courts.

Use of better IT systems can reduce the costs of the courts. The maintenance of a variety of IT-applications can be very costly, but integration can be much more cost-effective. One of the examples is the integrated court IT system that has been put in place in Turkey. This system incorporates documents to be sent in electronically and the use of electronic signatures as well as the registration of cases.

Stricter case management

Case management is an important tool to increase the efficiency of court proceedings. In several countries (among others, the UK and Norway) pre-trial conferences are held to plan proceedings. In the UK training has been provided through the use of case scenarios on a DVD to develop more effective case management in the lower criminal courts. Early guilty plea procedures have reduced the delays in the second tier courts. In Ireland, Austria, Norway and UK lawyers are obliged to identify in advance the witnesses they want to have heard. In other countries conferences have a more

² The identified benefits are set out in the response of Latvia to the questionnaire (see the Appendix).
ENCJ Project 2011-2012 Judicial Reform in Europe

voluntary character. Another possibility is to have a first hearing of a case at a very early stage (in the Netherlands in administrative law). In this hearing the case is either decided immediately or, in more complicated cases, the further proceedings are planned on the basis of the issues that need to be clarified before verdict can be given.

3.3.2 Advantages and disadvantages

These measures in themselves, but in particular in combination reduce the duration of court procedures and increase the efficiency of these proceedings. The efficiency gains that have been achieved or are envisaged by these developments have – to our knowledge - not systematically been calculated, but according to most observers these gains are very large, and offer the possibility of substantial and structural cost savings.

As access to services in society in general has already largely been redefined as digital access, Judiciaries have to keep pace with this trend in society. Digital access to justice is a necessity. It should be realized, however, that digitalization is a large, time consuming operation, of which the costs precede the benefits. Substantial capital investment is needed.

The question that can be asked is whether the demands of a fair trial are still fully met by these simplified and digitalized procedures. In practice the Judiciaries do not perceive this to be a significant problem. Most judges welcome these developments wholeheartedly.

3.3.3 Recommendations

- 7) Simplification of judicial proceedings, improvement of case management and introduction of new technologies offer the chance to modernize the administration of justice, thereby improving access to justice, quality of justice as well as efficiency. All judiciaries need to adopt innovative programs to reach these goals.
- 8) As these innovations require the modernization of procedural law and these programs require the close cooperation of all stakeholders especially judicial organizations, lawyers and government agencies responsible for the relevant legislation. Judges and prosecutors should proactively engage in developing and implementing new procedures, processes and technologies within the judiciary.

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3.4 FINANCING OF THE JUDICIAL SYSTEM (COURTS AND PUBLIC PROSECUTION OFFICES)

3.4.1 Description of current developments

Reduction of budgets

As noted in the introduction, many of the European Judiciaries have to deal with major budget cuts. All sorts of measures have been taken to reduce expenditure in the short run. In several countries the salaries of judges and staff have been reduced (see below). Also, the recruitment of judges and staff has come to a standstill, and, for instance, in Belgium, the appointment of new judges has been delayed. In some cases, no repair works are carried out in courts and no equipment is purchased or replaced. This situation is expected to continue in many countries. Judges and court employees fulfill their duties at their best even though budgets have been reduced. These measures cannot be considered as reforms. On the contrary, such measures are a threat to the performance of judiciaries, for instance, by worsening court delay. Below, the reduction of salaries of judges is discussed in more detail, as this type of cost reducing measure is part of public sector reform programs in several countries, and governments have been keen to include the judiciary. Improving the funding system of judiciaries is then discussed, as a fundamental reform needed to regulate the relationship between government and judiciary.

Reduction of salaries

In several countries, notably in Portugal, Spain, Lithuania, Latvia, Romania and Ireland the salaries of judges and other employees of the courts have been reduced, sometimes even more than 20%. Other costs, for example the contribution to pension build-up have been charged to them more than before. In most instances constitutional courts have considered or are considering the acceptability of these measures. In Ireland a referendum was needed to amend the Irish constitution so that the salaries of judges could be reduced. This referendum took place in October and a large majority agreed with the proposal that the salaries of judges can be reduced in step with the salaries of civil servants. In fact, salary reductions are emergency measures which, unlike the reforms discussed in this report, have the characteristic that they yield quickly, but in no way contribute to the performance of the judiciary. Even more countries have frozen salaries, such as Poland and the UK.

These measures are generally part of a pay cut or freeze for all civil servants, from which judges are not exempted, but usually they are not more adversely affected. However, in Portugal and Slovakia salaries of judges were more reduced than those of civil servants.

A problem of the interference with the salaries of judges is that these interventions may threaten the independence of the Judiciary. Salaries can be used as individual or collective punishment. Another issue is that excessive reduction of salaries of judges could make the Judiciary vulnerable to undue interference. It can also affect the quality of justice in that judicial bodies become less attractive as employer. It is known that some judges have resigned following the salary cuts.

Improving the funding system

In the Judiciaries of most countries, there is no explicit link between the number and complexity of cases and budgets, with the result that both can easily diverge, and workload, leading times and inventories get out of control. In this situation austerity targets can be imposed, ignoring the consequences. This has happened in various countries. A diffuse relationship between the number of cases and budgets is usually accompanied by the absence of clearly stated expectations with regard to what can be considered as a “regular production of judges”. In many countries, this state of affairs is viewed as no longer tenable, and workload measurement systems and forms of performance budgeting are set up. While several countries such as the UK put these methods already into practice, The Netherlands budgetary system is often seen as an example. It should be recognized, however, that many judges in the Netherlands feel that the system is too technocratic and constricting. Efforts are underway to simplify the system. The prevailing opinion, however, is that a more businesslike approach to management and finance promotes, on the one hand, the functioning of courts, and gives stronger incentives for the efficient use of public funds. On the other hand, it promotes the independence of the Judiciary by making one of the vulnerable links between the Judiciary and the other state powers much more transparent: more cases means more budget; otherwise court delay will increase.

In some countries measurement tools have been used to create norms for case load and processing times. These norms are merely averages and should not be applied to individual cases. If judges have to explain to management why a case took longer than the norm each time this happens, judicial independence is compromised. Also, great care must be taken, when using such data to compare the performance of judges. Whether this businesslike approach could undermine the quality of justice and what measures can be taken to mitigate any such effect has hardly been debated, because the current diffuse situation in most countries certainly does affect the quality of justice negatively.

Apart from the determination of the budget, an issue is who allocates budgets to the courts and who oversees the way budgets are spent. Often, ministries of justice or court service organizations that hierarchically fall under ministries of justice have these responsibilities. Often, courts must have the approval of government agencies even for small expenditures. In some countries, the president of a court is only responsible for

the judges and judicial issues, while the administration of the court is handled by the ministry of justice. In Poland this system has been re-instituted. Other countries take a radically different approach. All responsibilities rest with the judiciary itself. Again, the Netherlands is an example. In this country the Council for the judiciary is given the total budget for the judiciary. It allocates the total budget over the courts. It also oversees whether courts remain within their budgets. The courts themselves determine how they spent their budgets within objectives and quality standards set by Council and courts together. In its annual report the Council accounts for the way the overall budget has been spent. As the majority of the board members of the courts are judges, the judges are 'in the driver seat'.

3.4.2 Advantages and disadvantages

With regard to the reduction of salaries, it was already noted that the only advantage of salary reductions lies in the immediate reduction of expenditure, which in times of acute economic problems can be relevant. Disadvantages are the potential threat to independence, as salary cuts can be used as punishment, quality of justice, as the judiciary becomes less attractive as employer, and integrity, as vulnerability to undue interference increases.

As to improving the funding system, a system which objectively relates the budget to the number and complexity of the cases promotes the independence of the judiciary as a whole. In this way budget allocations are less arbitrary. Transparency increases: for instance, if for financial reasons a government cannot provide the budget to handle all cases, it has to acknowledge this and make clear to Parliament that court delay will increase. Also such a funding system saves cost by providing strong incentives to adjudicate cases efficiently. A potential disadvantage is the unpredictability in the number and complexity of the incoming cases. Another disadvantage could be that court management becomes more 'technocratic' and too much resource could be expended on work load measurement. It would endanger quality of justice, if efficiency becomes the sole focus. If the system is misused by applying norms for case processing time to individual cases, quality of justice also suffers, and the independence of the judge is interfered with. Reform of the funding system would also give councils for the judiciary and courts themselves the responsibility for how they spend budgets. An obvious advantage is the clear separation of responsibilities of ministries of justice or other agencies and the judiciary. The administration of the courts impacts on the quality of justice, and it is only proper that the courts themselves are fully in control. Also, bureaucracy is avoided.

3.4.3 Recommendations

As to reduction of salaries:

- 9) The remuneration of judges and magistrates must remain commensurate with their professional responsibility and high public duty.
- 10) The remuneration of judges and prosecutors should be constitutionally guaranteed in law, so as to preserve judicial independence and impartiality. All discussions and negotiations on remuneration should involve the judiciary.

As to improving the funding system:

- 11) The funding system of the judiciary should reflect its needs to be able to manage its caseload properly. Only in this way can timely justice be guaranteed.
- 12) While it is recognized that funding based on output requires the measurement of output and processing times (workload measurement), such measurement systems need to remain simple and the outcome should be used with caution to safeguard judicial independence. For instance, workload measurement norms should not be applied mechanically to individual cases.
- 13) To ensure and strengthen the separation of powers, the judiciary should be closely involved at all stages in the budgetary process and should be responsible for the financial management of the courts individually and as a whole, within the budgets allocated to them.

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3.5 COURT MANAGEMENT AND OPTIMIZATION OF THE WORKLOAD OF COURTS AND PUBLIC PROSECUTION OFFICES

3.5.1 Factual description of current developments

Redistribution of tasks

The basic idea of redistributing tasks of judges and support staff to allow judges to concentrate on the core of their judicial tasks has been put into practice by various countries. In countries as diverse as Poland and Spain reorganizations are implemented in which judges shift work to administrative and legal assistants. In many countries there is room for improvement in this area: judges often perform relatively simple, administrative tasks that just as well can be done by staff. They often perceive this as not satisfactory. Also, depending on the legal system legal staff can be utilized to prepare cases and/or drafts of verdicts and/or to preliminary screen cases, for instance, about whether or not cases are eligible for appeal. In Ireland the high court makes successful use of judicial fellows, comparable with the US law clerks. Their salary is a small fraction of the remuneration of judges. Another option is to delegate simple judicial functions to legal staff. This goes, however, against the independence of the judiciary and only appointed judicial office holders – including lay judges – should make judicial decisions. Delegation of tasks to judicial office holders with a brief confined to simple judicial decisions is a distinct possibility. An example of this is the use of *Rechtspfleger* in German and Austrian courts.

The experience in the Netherlands and Spain is that delegation leads to higher efficiency, only if judges trust their legal staff and do not feel compelled to monitor their work intensively or redo much of their work. To ensure this a highly qualified legal staff is needed, but it also requires judges to adjust to working in teams instead of alone. The question whether the use of legal staff in an advisory role opens the door to undue influence on judges and endangers their independence does not seem to be an important issue, at least in as far as professional judges are concerned. It is more of an issue in case of lay judges. In the magistrates' courts of the UK lay judges are supported by legal advisors whose sole role is to advise on the law. All judicial decisions are made by the lay judges alone. In practice, no problems arise, though a recent report raised an issue about the principle of judicial independence question marks have been raised.³

³ Ipsos Mori (2011). The strengths and skills of the judiciary in the magistrates' courts. Ministry of Justice Research Series 9/11, www.justice.gov.uk/publications/research.htm.

Allocation of cases over courts and judges

Optimization of the workloads of courts and judges has been identified as a priority matter for judicial reform in most of the responding countries. Many resources are wasted when courts and judges have not enough cases, especially while other courts and judges have too many cases. A good practice could be the computerized allocation of cases according to objective criteria and taking into account the specialization of judges. In some countries flexibility exists in the allocation of cases across courts to equalize workload. The implication is that parties have to travel further, and in some countries the choice is left to the parties: either wait for their case to be heard in the competent court or have their case immediately heard in a court at further distance. An alternative to this approach is to have judges of other courts work temporarily at the courts that have too many cases, for instance, by secondments of judges. In Romania the national IT system of managing the files provides case management within all courts. It provides a random distribution system to ensure a balance in the distribution of cases between judges.

Reduction of overhead

Reducing bureaucracy in general and centralization of supporting administrative tasks are part of the already discussed reorganizations. It must be noted, however, that currently quite a number of courts still lack the most essential information about processing time and backlogs of cases. Without this information proper and timely justice cannot be guaranteed. Courts need staff to gather and analyze data. Innovation and deployment of IT also require manpower outside the primary processes of dealing with cases. It has to be recognized that courts change from organizations of people to organizations of people and information systems. This leads to a different staffing structure and to IT taking a larger part of the budget. In many countries, reducing overhead is considered possible by closing small courts, yet at the same time more high-quality business and IT knowledge is introduced in the courts.

3.5.2 Advantages and disadvantages

Redistribution of tasks allows judges to focus on their core tasks and enriches their work. It also has the potential to save costs. It should be recognized, however, that the total number of employees of the courts increases and this may be perceived by ministries of justice as undesirable. Also, there are up-front costs. A related issue is that judges must be able and willing to rely on their staff. Else, they will redo much of the work of staff, and cost savings will be small. A potential drawback is the risk of undue influence of legal staff on judges. This risk is small for professional judges.

Flexible allocation of cases over courts and judges to optimize their deployment has clear advantages for the efficiency of the courts. The interests of the courts may

coincide with those of parties, for instance because cases can be heard sooner, but interests may also diverge, as parties may have to travel to another court. Also, the allocation of cases could become less transparent.

Reduction of overhead has also clear advantages, but it must be recognized that the possibilities for such reduction is restricted by the need to have essential information to be able, for instance, to deliver timely justice and to maintain IT-systems.

3.5.3 Recommendations

14) Redistribution of tasks within courts to allow judges to concentrate on their core judicial tasks is an important goal in itself, apart from the cost savings that may be reached this way. To be effective, judges must be provided with all necessary support. They must be able to rely on their staff and this requires highly qualified staff.

15) While maintaining a transparent mechanism, the allocation of cases to courts and judges should be made more flexible in order to utilize the deployment of judges better.

16) Reduction in overheads is desirable, but must be carefully balanced with increasing needs to have adequate information about caseload and processing time.

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4. PROCESS OF REFORM

4.1 Description of current developments

Several answers to the questionnaire indicate that judiciaries (judicial councils, courts, prosecutor's offices, judges) are not sufficiently involved in devising a development strategy for the units involved, but rather the important decisions are drafted and adopted by the executive branch and subsequently enforced. Moreover, decisions about budgets and budget cuts are heavily influenced by the ministers of Finance, especially when budget cuts are part of measures that affect the whole public sector. The reduction or freezes of salaries are a case in point. As the funding systems of the judiciary in many countries are weak in themselves, judiciaries are vulnerable to ill-informed outside interventions. Furthermore, governments and parliaments are not always aware of the importance of a well-functioning, independent judiciary for society in general and the economy in particular. While supranational organizations such as EC, ECB and IMF express such awareness (see i.e. footnote 1), individual governments not always act accordingly.

4.2 Conditions for effective judicial reform

The starting point for any development and reform within the governance of a member state truly representative of its citizens must be the understanding that crucial to effective democratic government is the high principle of separation of powers. It is essential to preserve this principle at all times to ensure good governance for all citizens in a safe and judicial environment.

One of the three branches of governance is the Judiciary – the branch that is responsible for safeguarding the proportionate justice delivered to the citizens through the courts and associated agencies. The effectiveness of any judicial system is based on a number of factors and it is always appropriate to consider developments of any system to include the reform not only of the judiciary but also judicial procedures.

A number of states have already undertaken or are in the process of completing a review of their judicial systems driven in some cases by the current financial situation. Others are considering similar developments. As the Judiciary is one of the three branches of governance it is right that the judiciary should be involved at all stages of reform and development. The judiciary has the responsibility to dispense justice in either criminal or civil jurisdictions and is engaged with the processes and procedures at 'first-hand' as they make the decisions in court and rely on the administration responsible for the system. To allow the judiciary to perform its functions in a proficient manner it is vital that there is a well-organized administration for the courts and judiciary.

The most effective justice systems are those which realistically achieve this aim through communication and partnerships at all relevant stages between administration and judiciary. Such partnerships recognize the specific role of each partner and do not transgress on the operational role of the administration or the independent decisions of the judiciary in the courtroom.

It is not sufficient alone to formulate a development which improves efficiency and/or reduces expenditure if it is at the cost of adversely impacting on judicial decision making. Any reform which impinges on this important aspect might have long term results of reducing judicial recruitment and reversing any gains achieved.

Reform of the judiciary and its functions is a sensitive and difficult issue and must take account of the different cultures, heritage, developments and backgrounds through which current systems have developed in the member states. However it is essential that the judiciary is pro-active in recognizing the need and just criteria for reform.

It therefore follows that any reform process must involve the judiciary, through discussion and consultation, at all stages from the start of the vision through to final implementation and management. It is also appropriate for the judiciary, where it is felt relevant, to initiate discussion on reform and present ideas for development.

The judiciary is most suited to undertaking this role from ‘first-hand’ experience in the courts. Such activity is a role for Judicial Councils and Associations of Judges. Previous ENCJ documents¹ and European resolutions refer to some of these issues.

It is important that any reforms are not driven purely by financial considerations but by longer term factors. For fitting and effective reform and development any proposal must have stated and reasoned Aims and Objectives.

The Aims of reform within justice systems and the judiciary must be predicated on sound principles that will overall improve the quality of justice for the citizens and should include such aspects as:

- Improve the Quality of Access to Justice;
- Increase public confidence in the judicial system;
- Improve the image of the Judiciary
- Provide an efficient system that does not compromise the quality of justice and access to justice.

In proposing any reforms there must be **SMART objectives** which show how the principle **aims** are to be achieved through actual processes. These objectives act as criteria against which the success of a reform can be measured.

- **Specific** Precise definition of what the reform is expected to achieve.
- **Measurable** Quantify the objectives so success can be measured.
- **Achievable** Realistic assessment that the objective can be completed.
- **Realistic** Are there sufficient resources to make the objective happen?
- **Timed** Set timescales by which stages and final completion are achieved.

Each proposed reform should also have a structure which includes the following sections:

- Business Plan/ Action Plan
- Procedures for engagement with and involvement of the Judiciary at all stages
- Pilot projects
- Time Scales – which may vary according to proposal
- Review Dates – based on time scales
- Criteria for Review
- Implementation Dates and procedures
- Requirement that proposal is premised on relevant and current data
- Impact Assessments - quality and quantity
 - Public, Justice Image and Quality, Judicial Job motivation
 - Measure effective impact
- Quality Control at every stage
 - Regular and robust monitoring
 - Evaluation criteria to measure quality impact

4.3 Recommendations

17) It is essential that the judiciary, *judicial councils* and in particular judges and prosecutors be involved at each stage of development and implementation of reform plans. This is to ensure the independence of the judiciary, that reforms are effective and instill confidence.

18) The judiciary, under the lead of Judiciary councils, where these exist, should develop sensible proposals for effective reform. The goal of reform should be improvement of the overall excellence of justice. More effective administration results in improvements in timeliness and quality of delivery.

19) It is recommended that such proposals for reform are informed by the general directions outlined in this report. In particular, the combined simplification of procedures, stricter case management and digitalization offer a perspective for judicial excellence.

5. CONCLUSIONS AND RECOMMENDATIONS

Within the judiciaries of Europe broad consensus exists about the directions judicial reform should take. In nearly all countries judicial maps are being redrawn with the result that the judicial function will be concentrated in fewer courts, and judicial procedures are being redesigned with the aim of simplifying procedures, stricter case management and digitalization. Reduction of the volume of law suits is not in itself a goal, but the incidence of frivolous cases and delay tactics need to be addressed, while maintaining access to justice for all other cases, irrespective of the income of parties. The need is also recognized for better funding systems of the judiciary that guarantee its independence and promotes the efficient adjudication of cases. Finally, in many countries efforts are underway to organize the courts better. Redistribution of tasks, efficient allocation of cases over courts and judges and reduction of overhead are cases in point.

It should be noted that these reforms must be implemented with lower or at the best equal budgets, and that that makes implementation difficult. Fundamental reforms take time, and their costs precede the benefits. Nevertheless, these reforms are the best way forward. Short term cost reductions such as salary cuts do not contribute to necessary reform, and pose a threat to the functioning of judiciaries. Judiciaries should try to convince governments that long term reforms are needed, despite the fact these reforms only gradually deliver cost savings, which furthermore are difficult to calculate in advance, as the frequent absence of cost-benefit analyses illustrates.

This choice is only possible if the starting point is taken, in the words of the Vilnius declaration, that "Every economic measure, however temporarily it is, and which will affect the Judiciary, must maintain the essential role of law in a democratic society. The Judiciary must guarantee, even under stringent economic circumstances, the right to access of justice, effective protection of fundamental rights and timely and qualitative good judgment of disputes."⁴

To guide judicial reform the following recommendations, which were explained in the previous chapters, are made. We first look at the **content of reform**.

ENCJ, Vilnius Declaration on challenges and opportunities for the judiciary in the current economic climate, 2011, p. 2.

Rationalization and (re)organization of courts, public prosecution offices and administration :

- 1) Concentration of courts and administration must be motivated by the need to provide high quality justice and more effectively use available resources.
- 2) Judiciaries should evaluate carefully whether net cost savings can be reached by concentrating courts, and must take into account that it could be many years before the desired savings can be effectively achieved.
- 3) Concentration of courts should be accompanied by increased utilization of the ICT (information and communication technologies) to reduce the frequency of necessary visits by parties in person to the courts. Also, ICT should be used to increase the visibility of court proceedings

Reduction of the number of cases:

- 4) All reforming programmes, including reduction of case loads and increases of court fees, must leave access to justice, as guaranteed by art. 6 ECHR, intact. Measures aimed at discouraging unmeritorious cases are useful, providing such measures do not impede meritorious cases going to court.
- 5) If court fees are increased, the financial circumstances of the parties have to take into consideration, either by differentiating tariffs or by legal aid.
- 6) Regulating access to appeal should preferably be done by the judiciary, taking the merits of cases into account, and not by mechanical legal rules.

Simplification of judicial proceedings, improvement of case management and introduction of new technologies:

- 7) Simplification of judicial proceedings, improvement of case management and introduction of new technologies offer the chance to modernize the administration of justice, thereby improving access to justice, quality of justice as well as efficiency. All judiciaries need to adopt innovative programs to reach these goals
- 8) As these innovations require the modernization of procedural law and these programs require the close cooperation of all stakeholders especially judicial organizations, lawyers and government agencies responsible for the relevant legislation. Judges and prosecutors should proactively engage in developing and implementing new procedures, processes and technologies within the judiciary.

Financing of the judicial system:

As to reduction of salaries:

- 9) The remuneration of judges and magistrates must remain commensurate with their professional responsibility and high public duty.
- 10) The remuneration of judges and prosecutors should be constitutionally guaranteed in law, so as to preserve judicial independence and impartiality. All discussions and negotiations on remuneration should involve the judiciary.

As to improving the funding system:

- 11) The funding system of the judiciary should reflect its needs to be able to manage its caseload properly. Only in this way can timely justice be guaranteed.
- 12) While it is recognized that funding based on output requires the measurement of output and processing times (workload measurement), such measurement systems need to remain simple and the outcome should be used with caution to safeguard judicial independence. For instance, workload measurement norms should not be applied mechanically to individual cases.
- 13) To ensure and strengthen the separation of powers, the judiciary should be closely involved at all stages in the budgetary process and should be responsible for the financial management of the courts individually and as a whole, within the budgets allocated to them.

Court management and optimization of the workload of courts and public prosecution offices:

- 14) Redistribution of tasks within courts to allow judges to concentrate on their core judicial tasks is an important goal in itself, apart from the cost savings that may be reached this way. To be effective, judges must be provided with all necessary support. They must be able to rely on their staff and this requires highly qualified staff.
- 15) While maintaining a transparent mechanism, the allocation of cases to courts and judges should be made more flexible in order to utilize the deployment of judges better.
- 16) Reduction in overheads is desirable, but must be carefully balanced with increasing needs to have adequate information about caseload and processing time.

Turning to the process of reform:

- 17) It is essential that the judiciary, *judicial councils* and in particular judges and prosecutors be involved at each stage of development and implementation of reform plans. This is to ensure the independence of the judiciary, that reforms are effective and instill confidence.
- 18) The judiciary, under the lead of Judiciary councils, where these exist, should develop sensible proposals for effective reform. The goal of reform should be improvement of the overall excellence of justice. More effective administration results in improvements in timeliness and quality of delivery.
- 19) It is recommended that such proposals for reform are informed by the general directions outlined in this report. In particular, the combined simplification of procedures, stricter case management and digitalization offer a perspective for judicial excellence.

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