European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Judicial Reform in Europe - part II

Guidelines for effective justice delivery

2012-2013

With the support of the European Union

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INTRODUCTION

1 In 2012 **European Network of Councils for the Judiciary** (here ENCJ) **adopted** and **published** at the General Assembly in Dublin its report on Judicial Reform in Europe 2011 – 2012[1] (here Part 1). This report sets out a broad consensus about the aims and direction of reforms within justice systems. It refers to a number of developments such as:

i. re-drawing of judicial maps;
ii. redesigning judicial procedures;
iii. stricter case management
iv. digitalisation and IT

2 The report 2011 – 2012 (Part 1) started by considering the impact of the current financial crisis on current procedures and how it constrained developments in justice systems. It highlighted that governments focus on reducing expenditure and that *judiciaries are not sufficiently involved in devising a developmental strategy for the units involved*. It clearly stated in the Introduction *that the objective of judicial reform should be to improve the quality of justice and the efficacy of the judiciary*.

3 At the General Assembly in Dublin 2012, the Councils for the Judiciary decided to further develop the report with a second part (here Part 2). This section, Part 2, of the report on Judicial Reform in Europe (2012 – 2013) builds on recommendations 18 and 19 as agreed at the General Assembly in 2012[2].

4 To develop Part 2 representatives from Judicial Councils from states across Europe met to focus in more detail on a number of the areas considered in Part 1. Part 2 seeks to identify more clearly the role that the Judiciary and Judicial Councils can play in the whole process. That process embraces proposals for, planning, implementation, monitoring and evaluating the effectiveness of those reforms within justice systems in order to provide justice delivery as evidenced through the Judicial Scoreboard of the European Commission.

5 Part 2 of the report expands on this approach and states that the aims of reform should be predicated on these **five** principles:

i. improving ease of access to justice;
ii. maintaining and improving high quality justice delivery;
iii. ensuring consistency of judgements and timeliness
iv. providing an effective service to public
v. protecting judicial independence

6 Part 2 has two principal purposes:

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1 http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_judicial_reform_def.pdf

2 The 18th and 19th recommendations state that:

18. The Judiciary, under the lead of Judiciary councils, where they exist, should develop sensible proposal 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 and

19. It is recommended that such proposals for reforms are informed by the general directions outlined in this report. In particular, the combined simplification of procedures, strict case management and digitalisation offer a perspective for juridical excellence.

i. to stimulate and encourage the Judiciary and Judicial Councils to identify areas for and engage in the process of reform and, where appropriate, initiate and propose such reforms.
ii. to provide the Judiciary and Judicial Councils with Guidelines on specific topics for reform when engaging with governments and particularly Departments of Justice to ensure full involvement at every stage.

7 It emphasises the importance of judicial independence in the context of justice reform and in the current climate of challenge to judicial decisions it is important that any developments or reforms do not compromise the central independence of the Judiciary. It therefore would be right for a central stakeholder, the Judiciary, to be engaged at every stage of planning, development and implementation and to take the lead where appropriate.

8 Part 2 examines in detail the following areas for reform proposing how the Judiciary can and should be involved.

i. Rationalisation / Re-Organisation
ii. Improved Administration and Optimisation of Workloads
iii. Court/Case Procedures
iv. Use of IT
v. Appeals
vi. Alternative Resolutions

9 It secondly considers these six main topics by providing principles of good practice with examples from member states and specific **guidelines** for areas of development, explaining how the Judiciary are central to that process, whilst allowing each state to establish its own details for progress. The Judiciary are integrally involved in dealing with those who come before the courts in whatever capacity and also have significant experience of the administration processes.

10 In this Part 2 the term Judiciary is used to refer specifically to the judges of the civil, administrative and criminal jurisdictions and the term Judicial Councils to refer to the combination of Judges, Councils or alternative agencies that undertake the different roles of Councils as defined in the ENCJ report on Judicial Councils at paragraph 1.6 including those agencies that represent prosecutors where appropriate.

11 In developing Part 2 the methodology and activities undertaken involved:

i. Collection of information from Judicial Councils represented on the working group and from other members and observers;
ii. Drafting of documents by project team members in sub groups;
iii. Analysis of draft documents;
iv. A widespread questionnaire on the topics consider by one of the working groups;
v. Working meetings;
vi. Approval or adoption by the General Assembly 2013

12 Part 2 is based upon the detailed discussions in the working group meetings held in Brussels (17th – 18th September 2012), Vilnius (5th – 6th December 2012), Rome (18th -19th March 2013). Following the meeting in Rome the group leaders met in London (15th April 2013). As a result of the discussion in Vilnius a number of questions were circulated to the group covering the topics of focus. The many responses to the questionnaire contain much detail of how different states have dealt with a number of the issues. The full responses are available on the private area of the ENCJ website.

BACKGROUND

13 Part 2 is set in the context of a number of principles of justice. The Treaty of Lisbon legally binds European Union institutions to comply with the Charter of Fundamental Rights of the European Union which enshrines principles to protect the values of human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Such conventions must be protected and it is the Judiciary that have that critical responsibility in respect of the rule of law[3].

14 The European Commission (EC) has expressed concern for effectiveness in a range of areas and in particular public administration and has devised indicators, by which effectiveness can be assessed. It has included the delivery of Civil and Commercial Justice within the range of areas to be assessed[4]. The EC commissioned the European Commission for the Efficiency of Justice (CEPEJ) to gather useful statistical data which were reported in the document - *CEPEJ 2012 Report on the Evaluation of European Judicial Systems (2010 data)*[5].

15 Following on from the report Vice-President Vivianne Reding announced in September 2012[6] that the Commission would introduce a Justice Scoreboard, as an "*effective mechanism … to enforce respect for the rule of law*." She stated that the Scoreboard would assess and compare the justice systems of the EU 27 member states on the basis of strength, efficiency and reliability and will form part of the European Semester.

16 The European Semester is an EU tool for coordinating and monitoring fiscal policy, economic growth and macroeconomic structural reforms at national level, but the system is not designed to address rule of law issues. The 2013 Scoreboard was published in March 2013[7] and focussed on *the length of judicial proceedings, monitoring and evaluation, alternative methods for resolving disputes, perceptions of the independence of national justice systems.*

17 This report supports the principles enshrined in the 5 key indicators produced by CEPEJ and distinguishes how the Judiciary are central to such reforms and developments.

18 These are very general areas and more detailed indicators are needed. This report examines a number of these topics as defined in Paragraph 8 above to identify how each might be expanded with examples from states and detailed guidelines for such developments. The report focusses not solely on the principles but how they may be delivered in the day to day running of the courts.

JUDICIARY/JUDICIAL COUNCILS AND JUDICIAL REFORM

19 This report recognises that the Judiciary and Judicial Councils have a vital role to play in reform. In Part 1 there was a specific recommendation in regard to the role of the Judiciary and Judicial Councils[8].

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3 TITLE VI – JUSTICE, Article 47 states that every citizen has a Right to an effective remedy and to a fair trial. This principle is also defined in Article 6 of the Convention on Human Rights and Fundamental Freedoms (Convention or ECHR).

4 http://ec.europa.eu/europe2020/pdf/themes/26_public_administration.pdf

5 http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2012/PowerpointJPJ.pdf

6 http://www.mepli.eu/2012/09/a-justice-scoreboard-reding-proposes-to-rank-eu-justice-systems/

7 http://europa.eu/rapid/press-release_IP-13-285_en.htm

8 Recommendation 17 of the Part 1 of the Judicial Reform states that '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 instil confidence.'

20 Across members states there are a range of different structures that manage justice systems. In many there are Judicial Councils independent of the Executive with a full range of responsibilities in managing the courts system and the Judiciary. In some states there are Judicial Councils with different levels of responsibility and power including executive responsibility.

> In some countries (such as Bulgaria and Romania), the judicial councils are permanent functioning authorities, while in other (such as Poland and Slovakia) the councils do not have a permanent activity. Both types of judicial councils have as main mission to safeguard the judicial independence. In some other states some of the responsibilities are executed by a range of independent organisations. In England and Wales the Courts and Tribunals Service is responsible for determining the number of judges, the Judicial Appointments Commission for the appointing of judges, the Lord Chief Justice responsible for the deployment of judges and the Office for Judicial Complaints deals with complaints.

21 The varying nature of these structures means that there is not one single structure for managing justice systems. It also means that there is not one single solution to any issue and that different states will manage the Guidelines for Improving Justice Delivery in different ways according to their experiences and the relative powers of the Judges and/or Judicial Councils.

22 In relation to the maintaining an independent Judiciary, the Judicial Councils have different responsibilities.

> In Lithuania, Art. 119 of the Law on Courts states that the Judicial Council is an executive body in the autonomy of courts ensuring the independence of courts and judges, whereas in the Netherlands the Judicial Council does not have a role, but was specifically created to make sure that judges can perform their task in complete independence. In Portugal any proposal to modify any laws that would interfere with the statutes on Judges or the independence of the Judiciary must be preceded by consultation with the High Judicial Council.

Proactive Role of Judiciary and Judicial Councils

23 As Judges work in the courts on a daily basis they are in a prime position to understand what developments and reforms would assist in achieving the justice aims outlined in paragraph 5 above. They are familiar with the processes and the difficulties of managing them. Therefore judges should be engaged at every stage of the reform process and where relevant lead those reforms.

24 Judges are supported by Judicial Councils with a wide range of different powers. It is essential that Judicial Councils play a pro-active role in the reform process through their various groups and committees. It is also vital that there is full co-operation with those who have the direct responsibility for the daily administration of the courts. In some states there is a separate Courts Service on which the Judiciary have a place as Leaders, Directors or Committee members. It is appropriate that Judges and judicial Councils should be pro-active and where relevant initiate and lead the process of reform.

Guidelines

The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation.

The Judiciary should be engaged with the creation of success criteria and Key Performance Indicators to evaluate effective reform.

The Judiciary and Judicial Councils have a vital pro-active role to play in whole reform process.

Judiciary Education and Training

25 In many countries the Judiciary feel that their role is to hear the parties, make decisions and deliver judgements and sentences. This report is highlighting a developed role for the Judiciary and challenges current cultures and attitudes. There needs to be cultural change and for lead Judiciary to recognise the important role the Judiciary has to play in reform. A programme of education to encourage a shift in attitudes is vital.

26 If the Judiciary are to engage with and even steer the reform process at every stage and if they are to lead the implementation of the process in the courts it will be necessary that relevant training is in place to ensure they are effective in the judicial management issues using basic business principles of reform as outlined in the next section.

Guideline

Judicial Councils should develop education programmes to instil an understanding of the role the Judiciary and Judicial Councils have in the reform process.

Appropriate and pertinent training should be provided for the Judiciary, to allow judges to become fully engaged with the reform process.

PRINCIPLES OF REFORM

27 In examining this aspect of reform development Part 2 builds on the principles set out in Part 1 and in particular recommendations 17, 18 and 19[9].

28 In the current financial climate Governments are looking to reduce expenditure. Many governments and ministries understand reforms as cutting the expenditure on courts. It is suggested that one significant way to respond to the financial climate is by a real reduction in the number of cases before the courts. It has been stated that possible measures to reduce litigations include the following:

i. Filters to appeals (appeal and cassation);
ii. Discouragement of unmeritorious cases;
iii. Alternative dispute resolutions (mediation, internal review, etc.).

29 However for the Judiciary and Judicial Councils the main reasons for reforms are the quality of justice and better access to justice grounded in the principles enshrined in Articles 47 and paragraphs 6[10] which are:

i. improving ease of access to justice for all ordinary citizens;
ii. maintaining and improving high quality justice delivery;
iii. ensuring consistency of judgements and timeliness
iv. providing an effective service to public
v. protecting judicial independence

30 In his presentation to the General Assembly in Dublin the President of Ireland suggested that an effective and positive justice system acts a constant when there is disorder or upheaval of any kind in society. Justice is the cement which binds all aspects of communities together and ensures a balanced, safe and consistent society. The Rule of Law is vital to ensure stability and those who have the responsibility for delivering high quality justice under the Rule of Law must be able to do so without any interference or influence. The principle of separation of powers must be sacrosanct and the independence of the Judiciary must not only be guaranteed under the law but must also be

[9] See 2nd and 9th footnotes above.

[10] See the 4th footnote above.

protected by governments and others involved and there must be processes by which that independence can be assessed and, if threatened, counteractive action taken.

31 The Judiciary have a vital role to play in ensuring that these principles of reform are established and protected in every planned reform. This can only be effectively achieved if the Judiciary remain independent at all times. A more detailed study of this aspect may be considered in another project, but in terms of reform it is important that all reform should **underpin** judicial independence and not **undermine** it. The vital principle of the separation of powers must not be compromised by reform.

32 In Part 1 reference was made in section 4 (pp22-24) to the use of the SMART principle in planning and managing business processes, so that effective monitoring can take place at every stage of development. The SMART principle requires that all developments/reforms should be:

- **Specific** with a precise definition of the aims and objectives of the reform;
- **Measurable** with quantified objectives by which success can be measured;
- **Achievable** in that there is a realistic statement of the viability of completion;
- **Realistic** in terms of available resources to deliver the reform;
- **Time-sensitive** with timescales for implementation and completion.

Part 2 emphasises this approach and adds two steps to create the SMARTER principle. It underpins principles in development and it suggests that all reform must and should be **Evaluated** and **Re-evaluated.** To ensure effective evaluation of any reforms it is vital that criteria are written by which the success of a project can be measured. These criteria are often referred to as Key Performance Indicators (KPIs). It is essential that the Judiciary are fully engaged in creating the relevant Key Performance Indicators. Once set, the KPIs allow the **Evaluation** process to be undertaken. But a single evaluation is not enough as there must be regular **Re-Evaluations** against the KPIs to ensure the continued delivery of effective justice.

33 Any reform process has a number of stages as follows:

i. *Idea;*
ii. *Outline proposal;*
iii. *Planning*;
iv. *Design, Testing;*
v. *Implementation;*
vi. *Monitoring;*
vii. *Evaluation;*

34 Judges sit in the courts daily and see difficulties faced by the ordinary citizen in accessing justice and because of this first-hand experience are in a very special position to understand what changes are needed and how they can be effective in achieving the ultimate aims expressed in paragraph 29 above. In writing this report the focus is on achieving the aims stated above but recognising that in realising them there will also be considerable financial savings. The changes must focus on these aims and not be led solely by financial considerations. Consideration has been given to how and where such principles are implemented in the day to day running of the courts and this report addresses some of the real issues that threaten the effective delivery of justice.

Guidelines

All developments must be driven by the principles of justice outlined in Paragraph 29 of Part 2 and not by financial considerations.

All reforms should follow the SMARTER principle.

RATIONALISATION AND RE-ORGANISATION

35 In considering the rationalisation of courts there must be clear guidelines that the concentration of courts and administration must be motivated by the principles outlined in Paragraph 5 and 29 above.

36 Part 1 recommended that concentration of courts and administration must be motivated by the need to provide high quality justice and more effectively use available resources.

ACCESS TO JUSTICE

37 Part 1 recommended that 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. In this connection, ensuring adequate access to justice is a factor which is relevant to decisions about concentrating courts.

38 In discussing the "redrawing of judicial maps," Part 1 identified common criteria used to decide the number and location of courts (in a way that is compliant with Article 6 of the ECHR). These were: population distribution, geographic distances and (digital) accessibility of public services and/or infrastructure, sufficient numbers of cases to allow efficient utilisation of courts and prosecutor offices, adequate numbers of judges and prosecutors and their support staff to guarantee continuity in cases of illness or other absence of judges, and to allow for specialisation deemed necessary in each court and prosecutor office.

> In at least one jurisdiction (Scotland) the Judiciary have produced a statement of "Principles for Provision of Access to Justice" to guide courts and judicial reform.

39 Part 1 recommended that concentration of courts should be accompanied by increased utilisation of Information and Communication Technology (ICT) to reduce the frequency of necessary visits by parties in person to the courts[11]. In the guideline below the availability of court ICT systems has been included as a factor to be taken into account in any set of principles for provision of access to justice. Elsewhere in this report reference has also been made to digital access as an integral part of access to justice in the guidelines relating to *IT & Digitalisation* at page 33 below. A further point that arises is about how arrangements for the use of ICT, including video conferencing, should operate. There is a need for clear procedures and criteria for using ICT, including video conferencing. There should be judicial involvement in determining appropriate procedures and criteria for the use of ICT (as well as in decisions about its use in individual cases).

40 Questions may arise, for example, about whether such facilities are just to be available for optional use by parties, or whether their use is to be mandatory. In the context of consideration of the access to justice implications of any proposed reform it is important that attention is given to how arrangements for the use of ICT, including video conferencing, should operate.

41 In a democratic society there should be appropriate consultation about proposed reforms with those who may be affected by them. In some jurisdictions there has been consultation about proposed judicial/court reform with the Judiciary (where such proposals have originated from the government, rather than the Judiciary), other stakeholders and the public. Such consultation is useful not only to ensure that there is widespread awareness of proposed changes by those likely to be affected by them, but also to allow the reform process to be properly informed by the

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[11] Part 1 noted, for example, that "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", see: http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_judicial_reform_def.pdf , page 6.

provision of relevant information and comment from interested parties, some of whom may have relevant experience or expertise. The judicial/court reform process should involve such consultation.

42 Part 2 recommends at Paragraph 33 above that all reforms should follow the "SMARTER" principle. This includes the elements of evaluation and re-evaluation. Where reforms may impact on access to justice it is particularly important that the programme for change should include a clear and specified process of evaluation and review, which should be carried out. Proposals for rationalisation and reorganisation should clearly set out the expected benefits and results, financial and other, and therefore the criteria by which the success of the changes may be assessed.

Guidelines

Where access to justice may be adversely affected by concentrating courts, consideration should be given to whether the timescale for savings justifies concentrating courts[12]*.*

In any jurisdiction where judicial/court reform is proposed, involving redrawing the judicial/court map, there should be a set of principles for provision of access to justice to guide the approach to reform.

Any such set of principles should have regard to the general desirability of local delivery of justice and take account of factors such as population distribution, geographical considerations, public transport provision and the availability of court ICT systems.

Attention should be given not only to the availability of ICT systems, but how the arrangements for their use are to operate. There should be judicial involvement in determining appropriate procedures and criteria for the use of ICT.

Any proposed programme of rationalization and reorganisation of courts and public prosecutors' offices should include appropriate consultation with the Judiciary (where such proposals have originated from the government, not than the Judiciary), other stakeholders and citizens.

A reform programme with proposals for rationalisation and reorganisation should include a specified process of evaluation and review and such evaluation and review should be carried out.

QUALITY OF JUSTICE/SERVICE TO THE PUBLIC

43 If the approach to the provision of court/judicial services is to involve judicial specialisation, where needed, it is clearly essential for the delivery of high quality justice to ensure that the Judiciary concerned have the necessary level of expertise and experience to provide a specialised service and, as noted in the Part 1, that there are adequate expert judicial resources and support resources. There is also a need for adequate and appropriate training.

44 Experience suggests that in some circumstances introducing specialisation may restrict the ability of courts to deal with court business in a flexible way, which can impact on the efficient and timely disposal of business. Any process of introducing specialisation should include consideration of any potential loss of flexibility that may result, and whether the benefits outweigh the disadvantages. Consultation may be necessary in this connection.

45 Court user groups involving the Judiciary and other relevant court users have been found useful in some jurisdictions in improving the quality of justice and the efficient operation of courts.

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[12] Recommendation 2 of Part 1 stated "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." , see:
http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_judicial_reform_def.pdf, page 8.

In England and Wales court user groups are comprised of the Judiciary, court administrators and staff (ushers), prosecutors, defence lawyers, probation, representatives of victims and witnesses and members of the public.

Guidelines

If specialisation can ensure that high quality justice is provided, measures must be in place to ensure that the Judiciary involved have the necessary level of expertise, experience and training.

To ensure that high quality justice is provided by specialisation there must be adequate expert judicial resources and support resources.

Any process of introducing specialisation should include consideration of any potential loss of flexibility that may result, and whether the benefits outweigh the disadvantages. Consultation may be necessary in this connection.

There should be court user groups to include Judiciary and all other relevant stakeholders. Such groups should meet regularly to examine relevant data and propose developments.

IMPROVED ADMINISTRATION AND OPTIMIZATION OF WORKLOADS

46 Part 1 recorded that redistribution of tasks within courts is an important goal to allow judges to concentrate on their core judicial tasks and offers the potential for cost savings[13].

47 In Part 1 it also recorded that 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. In support of this approach it would be useful to carry out appropriate analysis of the backlogs of courts in different parts of the country or the court system to identify the need to redistribute work and to assist any such redistribution or to identify other solutions. As well as being transparent, the process should maintain the principles of objectivity and predetermination, for example to prevent opportunities for improper manipulation of case allocation.

48 An issue that was identified in Part 1 and that needs to be addressed is that it appears that a number of courts lack essential information about processing time and backlogs of cases, without which proper and timely justice cannot be guaranteed. The use of IT has been found to be an effective way of collecting (and analysing) such essential information. As noted in Part 1, there is a need for staff for data collection and analysis and for IT systems.

Guidelines

Appropriate analysis of backlogs should be carried out in different parts of the country or the court system to identify the need to redistribute work and to assist any such redistribution or to identify other solutions.

The Judiciary should be involved in the process of analysis, redistribution or identifying other solutions.

Where there is a lack of essential information about processing time and backlogs of cases, this should be addressed - in particular by the use of IT. In assessing the benefits of investment in IT regard should be had to the value of business information collection and analysis to improve the efficient and cost effective planning and management of court business.

13 Part 1 of the Report recommended: "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", http://www.encj.eu/images/stories/pdf/GA/Dublin/encj_report_judicial_reform_def.pdf, p. 21, Recommendation 14.

CASE MANAGEMENT, SIMPLIFICATION AND DIGITALIZATION

INTRODUCTION

49 This section develops practical guidelines for strengthening case management, simplification of procedures, and further digitalisation. These guidelines deal both with content and process. It is of particular importance to think of ways to involve judges, lawyers and other actors to make change a success. It is noted that intended reforms are a departure from legal and judicial traditions requiring further judicial competences and may sometimes go against the direct financial interests of e.g. lawyers and bailiffs. In most countries judges do not find much support in procedural law for strict case management, while simplification and digitalisation of procedures are often not possible without a change of law. Judicial reform requires a broad coalition, based on the needs in society for effective legal remedies.

50 In the next sections we will discuss case management, simplification of procedures and digitalisation.

CASE MANAGEMENT

51 Case management is defined here as the judge taking the lead in resolving a legal conflict in a fair, expeditious and efficient manner. Case management applies to all areas of law. Within the law, the judge determines the procedure in cooperation with the parties and their legal representation, and ensures that this procedure is adhered to. The judge ensures that the procedure is commensurate with the complexity, size and relevance of the conflict. Therefore, it is the responsibility of the judge not only to decide the case, but also to direct it.

52 It is noted that in most legal systems the proper matching of a conflict to a method of conflict resolution is done before the case is allocated to a judge, if this is done at all. Once the case is allocated, the method is fixed. At the intake it should be considered whether mediation or other alternative mechanism is more appropriate. Care should also be taken that in a legal system with differentiated procedures the case is allocated to the right judge. Cases may start as a simple money claim, but end as a complicated anti-trust case. Much time can be lost when this allocation is not done properly and redressing wrong allocations is cumbersome.

Ability to Apply Case Management

53 A key issue is the ability of judges to apply case management. In most legal traditions, the case belongs to the parties, and the judge has a passive role in deciding procedural steps. The judge often cannot force parties to abide to the procedure(s) he deems to be most fitting. This is the situation in the civil law tradition, but also in common law, where the judge often has little or no role until things go wrong between the parties. In practice and irrespective of legal tradition, methods have been found to deal with this, and to promote the timely and efficient adjudication of cases with varying degree of success.

54 It seems that in Scandinavia judges play a more active role than in other European legal traditions, and parties are used to that.

> In Norway the Civil Procedure Act 2005 (in force from 01.01.2008) represented a turning point in many ways. The reform has given the role of the judge a new content in so far as he/she needs to be more active to fulfil the obligations. The Civil Procedure Act para 11-7 also imposes a duty on the court President to see to it that proper case management is applied in all cases, giving him the possibility to transfer a case to another judge, or do it him/herself, if the judge fails to ensure proper case management.

55 In some countries, a central feature of case management is the use of pre-trial conferences.

> In Norway in complex cases this is an effective way of structuring trials and avoiding procedural surprises, although in most countries agreements are not binding. (Telephone) conferences are between the "pre-trial" judge and the lawyers acting for the parties. Issues addressed in the conference are: feasibility of court mediation (see below), listing of evidence for the main hearing, need for experts appointed by the court and, last but not least, setting the date of the main hearing. The court has a general obligation to plan and lead the pre-trial period.
>
> Another good practice is the Commercial Court of Ireland, the only court in which case management is applied. This court builds upon the experience with commercial courts gained in the UK and is an interesting example of very strict case management. Every case has a pre-trial conference. The purpose of the conference is to ensure that proceedings are prepared for trial in a manner that is just, expeditious and likely to minimize the costs of the proceedings. The conference seeks to ensure that issues of fact or law are defined clearly in advance of the trial and that all pleadings and statements of issues are served. At the conference the judge definitively establishes what steps remain to be taken to prepare the case for trial and what arrangements have been made for witnesses and the use of information technology for the trial. In 2009 the average duration after being placed on the so called commercial list, was 21 weeks, 25% of the cases is concluded within 4 weeks, 50% within 15 weeks, 75% in within 32 weeks and 90% in less than 50 weeks[14]. For example, a case that is concluded in four months after being put on the commercial list would have taken two years in the past.[15] The admission procedure to the commercial list is all but immediate.

56 In other countries pre-trial conferences are also used, but with less impact.

> A typical case is Belgium, where pre-trial conferences are short, and the only purpose is to create a more proactive approach and prepare questions for the parties in the final hearing. However this is more an exception, than the rule. Most of the Belgian judges clearly fear to give, by their questions, a statement about their position in the case, which would permit one of the parties to claim that the judge isn't neutral. This is foremost a cultural impediment for a broader application of case management.

57 A useful feature in some other countries (Romania, Italy) is that, after the procedure has been determined, the judge gives an estimation of the time the case will likely take.

58 The few examples given above show that states have different legal systems and have undergone different developments. The introduction and / or strengthening of case management require tailor made arrangements.

Standards for the Duration of Procedures

59 Case management requires a common understanding of what steps are reasonable within a procedure and how much time each step should take and thus how long the whole procedure should last. As cases differ very much, and parties and their lawyers affect the procedure and its duration, standards must allow for this. Standards for the overall length of procedures exist only in

14 P. Kelly (2010). Alternative Dispute Resolution and the Commercial Court, Arbitration and ADR Review, 2, p.95.

15 S. Hayes (2005). The Commercial Court. Irish Law Times 23, 317

a few countries.

In Norway standards are set by law. Pursuant to the Civil Procedure Act a case should be decided within 6 months after writ has been issued or appeal declared. The verdict should be rendered within 4 weeks after main hearing. In the event the time limit is not met, the judge(s) shall notify the delay – and the reason for it – in the verdict. There are similar provisions in the Criminal procedure act paragraph 275: the date of main hearing shall be decided by the court 2 weeks after the case has come to the city court. Where the defendant is in custody or when the defendant is a juvenile, the case shall be heard by the court within 6 (City court) or 8 months (Court of appeal), unless special circumstances would prevent it. There is a similar provision providing for notification of exceeded limits by the presiding judges.

60 In other countries, standards have been set by the Judiciary itself.

In the Netherlands these standards take a different form than those in Norway, as they do not apply to individual cases. The general form is: *x* % of cases must be concluded within *y* months.[16] For instance, 70 % of the commercial cases at the civil divisions of the district courts (claims exceeding 25.000 euros) must be concluded within one year. Also, 90% of cases concerning children must be adjudicated within three months. For criminal and administrative procedures similar standards have been set. For instance, 90% of criminal cases must be finished within five weeks (small crimes) or 6 months (other crimes). The standards are set by the Judiciary, approved by the meeting of the Presidents of the courts and endorsed by the Judicial Council which subsequently holds the boards of the courts accountable. The standards are derived from a careful analysis of the procedures, taking into account the actual performance of the fastest courts. Judges, therefore, know the targets with respect of the time lines within which they should manage their cases. Parties know what they can expect, if they cooperate with the court to conclude cases efficiently. In the Netherlands it has been concluded that in the current standards the possibilities have largely been exhausted to reduce the time procedures take within the laws of procedure as they stand. As further reductions are deemed necessary and possible, these laws have to be amended to allow judges to really direct cases, and set the standards lower. In the eyes of the judges, parties and their lawyers unnecessarily complicate procedures by offers to provide more evidence and requests to hear experts. Currently, it is often impossible for the judge to decline such offers and requests. It is felt to be desirable to give judges more power to direct the trial, in a way commensurate with the importance of the case.

In Bulgaria a similar approach is being developed on an experimental basis.

In England and Wales an early guilty plea process has been introduced in Crown Court (Criminal) to identify those cases where a defendant is likely to plead guilty and to expedite those cases to an early guilty plea hearing. One of the benefits of the scheme is to enable defendants to secure maximum credit on sentence and reducing the number of hearings that they are required to attend. This relieves the stress and anxiety felt by victims, witnesses and defendants whose case is finalised more quickly. Other benefits of the Scheme are: a reduction in the number of hearings, the number of times files must pass through case tracking systems, a reduction in work in preparing for hearings, early service of papers allows for early advice to clients on plea, earlier resolution of proceedings against client, improved dialogue with Prosecution lawyers.

16 Similar standards exist in most states of the US. See: D. Steelman (2010). Time standards as a court management tool: the experience in American state and local trial courts. International Journal for Court Administration, April 2010, 1-11.

61 In many countries overall standards do not exist, but often specific parts of a procedure are regulated, such as the time between the last hearing and the verdict.

Attitude of Judges

62 A common theme is the attitude of the judge. The key competence of judges is their ability to reach practical decisions, also in complex, ambivalent cases. Case management requires also other competences. The extent to which case management works depends very much on the attitude and capabilities of the judge involved. This implies that the introduction or intensification of case management requires a change of culture. For instance, in several countries the parties often only give long explanations about their view of the case, without any dialogue or questions from the judge and then the judge only fixes the date when the judgement will be pronounced. At the end of the hearing, parties have no idea which direction the verdict will take. Very much importance is given to the briefs, but the hearing would be much more interesting for the judges and the parties, if there would be more "discussion" or "dialogue". To bring about this change of culture, broad support among judges is necessary, but also the dissemination of knowledge about how to direct cases.

63 The experience of some countries draws attention to another aspect of effectiveness.

> In Hungary the training of judges much effort has been put into teaching psychological and sociological knowledge, and the development of rhetoric abilities. The purpose of this is the efficient treatment of conflicts in the courtroom and the convincing verbal justification of judgments. The latter might have an effect on the number of requests for judicial remedies.
>
> The Judiciary in England and Wales produced a training DVD of court cases to show how case management could be conducted in different types of cases to improve timeliness, to reduce the number of unnecessary witnesses, to identified specifically the defence case and other considerations.

Guidelines

Every Judiciary should set up a structure to establish methodologies for case management, including the associated standards for the (average) duration of cases, for specific categories of cases/jurisdictions.

These structures should be guided by the judges and should allow for discussion with stake holders such as lawyers.

The methodologies for case management need to establish a balance between the importance of case and the attention the case is given in terms of procedural steps allowed.

In the methodologies an important place should be given to pre-trial conferences to establish the proper method to resolve the case and to sort out differences of opinion about procedure.

The case load of judges and support staff should allow for sufficient time for proper case management. It should be carefully considered whether judges can delegate some administrative aspects of case management to support staff.

Case management requires a change of attitude and culture of many judges, which needs to be promoted by training and/or other tools to disseminate knowledge.

SIMPLIFYING JUDICIAL PROCEDURES

Removal of Out Dated Elements

64 In most legal systems procedural remnants of the past are still present, which are often out of date and inefficient. An area of such cumbersome procedures concerns the way defendants are notified of a claim against them or summoned. Notifications are often still delivered in person by a bailiff who will often find nobody at home; in other instances registered post is used. As electronic communication is taking over from other forms of communication in daily life (many people can be much easier reached by social media than by post), court communication needs to adapt as well. This area requires further analysis to establish whether simple solutions exist. In general: to get rid of such remnants of the past a microscopic analysis of the procedures and associated work processes is necessary. It requires also from all parties involved an open mind and a willingness to let go of longstanding tradition.

Reduction of Procedural Steps

65 Another important way to simplify procedures is to restrict the number of procedural steps in a case. It is entirely reasonable to require parties to supply the court with all relevant information up front, instead of holding back information for strategic reasons (see above on pre-trial conferences). Repeated exchange of arguments on paper could be disallowed, and replaced by a swift hearing, immediately followed by an oral or written verdict. This would be the standard procedure, which then applies by default. When complications arise, more procedural steps need to be allowed. Methods currently used in on line dispute resolution may provide the courts with tools to have parties present and discuss their disputes in a more informal and interactive manner. (*Paragraph 73 viii below explains an experiment in the Netherlands*).

Conciseness

66 Another approach is to put restrictions on the size of presentations in court by defining logical and proportional limits to the length of any written act of the parties. In some countries, fairness in impaired, as economically strong parties that can afford the legal expenses of a 'broad front of legal fire' abuse procedures by an overload of legal issues, arguments and procedural objections in order to prevail over their opponents. In such situations there is a strong need to pinpoint and focus on the real issues at stake. This also helps to speed up procedures and to increase the efficiency of adjudication.

67 In some countries courts experiment with limits of presentations of lawyers to, for example, 10 pages as default. As the bulk of cases are fairly simple, this generally suffices. The Recommendations of the Court of Justice of the European Union may serve as inspiration. The recommendations *to national courts and tribunals in relation to the initiation of preliminary ruling proceedings* (2012/C 338/01), in Official Journal of the European Union 6.11.2012, par. 22, state:

"22. About 10 pages are often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. …"

68 As judges will generally not be able to enforce such standards without being authorised to do so by the law, the law needs to provide such provisions.

69 By the same token, the size of (standard) verdicts could also be regulated. In simple cases oral judgments may suffice. In several countries, the oral presentation of the judgment cannot

currently replace writing down the judgment and providing a written justification. The focus can then be put on shortening verdicts, where this is acceptable. This may require special provisions.

In Hungary there is expanding scope for judgments in a shorter form. In these cases the court has to specify the reason that provides a lawful basis for the court to leave out a detailed justification. This condition fulfilled, the obligation of justification is deemed to be complied with, if the court puts down in writing the laws its decision is based upon.

Guidelines

The feasible reduction in the number of procedural steps depends very much on the legal system of each country. A common and crucial element is that all information/evidence must be presented at the start of the trial: parties must know the case they have to meet and must be able to prepare for it.

A detailed analysis of procedures and associated work processes should be undertaken to remove outdated elements.

Courts should set limits to the length of written and oral presentations of lawyers and self-representing citizens, and require them also to start by setting out the structure of their arguments. Also, the size of (standard) verdicts should be regulated.

ICT & DIGITALISATION

70 In its recent report CEPEJ pays attention to the state of the use of ICT in the courts of Europe.[17] It distinguishes the use of ICT into three categories:

i. computer facilities used for the direct assistance of judges and court clerks;
ii. systems for the registration and management of cases
iii. electronic communication and information exchange between the courts and their environment, including court room technology.

The report shows that ICT is widely used and its use is rapidly expanding. Nearly all countries report that they have systems for category i; category ii is still well covered less, but not as much as 1. However, category iii is not well covered. While the self-reports of the countries involved seem rather optimistic, and the overall situation is likely to be less rosy, this third category is currently the area most in need of development. This is necessary from the perspective of a Judiciary that is in tune with modern society and not out of date, but also from the perspective of economic benefits for society and the Judiciary itself.

71 In all countries electronic exchange of information is gradually taking over from exchange on paper. Laws are passed to make the electronic submission of cases and subsequent electronic communication possible, and ICT-systems are put in place to let this actually happen. An important issue is whether electronic delivery should and will become mandatory for all or categories of litigants and their representatives. Allowing communication on paper to continue leads to two work processes at the courts and that is costly. It also leads to a slower transition from paper to electronic exchange. In several countries in civil and administrative cases the approach is taken to make digital communication mandatory except for individual citizens.

[17] Cepej (2012). European judicial systems, Edition 2012 (data 2010). Council of Europe, p. 110-119.

In Estonia citizens who communicate digitally are rewarded by lower court fees, or quicker decisions

72 In some other countries a distinction is made between parties with and without legal representation, where the former must and the latter may deliver documents electronically. Another approach could be to have everybody deliver documents electronically, but to provide at the courts assistance to citizens who do not have access to the internet. The choice the Judiciary of a country makes has to fit into the general approach to digital (public) services in that country.

73 As IT-applications are expanding, it is of particular interest to know the benefits that are achieved in this way, and how these benefits compare with the costs. These benefits stem from a better performance of the courts, for instance in terms of lead times, and accrue to the parties. The parties benefit also from digital communication that is cheaper than the old ways of communication. There are also benefits for the courts, for instance in terms of higher productivity. The working group conducted a questionnaire among its members, but had to come to the conclusion that benefits and costs are generally not measured. In general, digitalization of the courts proceeds gradually by conducting projects, as the range of services and processes of the courts is large. It seems that projects are seldom evaluated with respect to their results. The risk is that potential benefits and, in particular, cost savings just evaporate. Given this state of affairs, we have to confine ourselves here to a few examples of projects that have or seem to have a large potential.

i. Small claims on-line: already for many years such systems are in use in several countries such as the UK.

In Ireland such a system has recently been deployed to all District Court Offices nationwide. There is a very high uptake of the use of the online system, substantially in excess of what had been originally anticipated. The system enables applicants to lodge their claims online over the Internet. They can pay the fee online. Applicants can access the system over the Internet once they have lodged their application online and can follow the progress of their application as it progresses through the various stages of the process using a unique personal identifier (PIN). The scope of the Small Claims procedure has been widened by providing that in addition to claims by consumers, a claim may be brought by a business against a business in certain circumstances in relation to the purchase of goods or services not exceeding €2,000.

ii. Electronic civil proceedings.

In Italy this is rolled out in most courts: online notifications have more than doubled between 2010 and September 2011 (from less than 400,000 to almost 900,000). Benefits are achieved. For instance, the court of Milan has achieved a reduction of the time involved in order of payments from an average of 45 days to 19 days. There are also major cost savings.

iii. eRegisters.

In the Netherlands registers (i.e. with respect to bankruptcies) are accessible on the internet, resulting in significant cost savings for the Judiciary and, in particular, users.

iv. Criminal justice inter-operability.

This system went live in 2008 In Ireland, and provides for the electronic transfer of summons applications between the police computer system and the Courts Service Criminal Case Management system and also for the transfer of the result of court cases, bail and warrant information. It handles approx. 90% of all summons applications, all court outcomes and bails and all warrants for execution. It handles approximately 2.5million messages annually and has a daily success rate for data exchange of 99.7%. The system has transformed the exchange of information between the Police and the Courts Service and has eliminated duplicate data entry by both agencies. It has eliminated 75% of the administrative process steps and replaced a paper based information exchange with an integrated electronic information exchange. The major benefits accruing from the system include savings of approximately €5million per annum; the freeing up of over 100 members of the police and 5 Court staff for other duties; more efficient and accurate processing of data; the elimination of the summons backlog; improved statistical information and more efficient scheduling of court lists. In this way it has directly contributed to improved efficiency in the administration of justice.

v. Video conferencing is becoming standard technology in many countries. Economic benefits are particularly large when parties/witnesses/experts need to be heard abroad, but also when it is costly to bring defendants to courts or for parties to travel to courts.

vi. Judgments on line.

In countries such as Estonia all judgments are published. In Ireland judgments of the Supreme Court, Court of Criminal Appeal and High Court are available on the Courts Service website. The judgments are posted to the site as they are made available by the judges.

vii. Video/audio recording of proceedings: the use of such technology is spreading for qualitative reasons (e.g., to secure the evidence, as discussed earlier), to radically innovate procedures (e.g., appeal procedures in Sweden, as was also discussed above) and to save personnel costs. However, the necessary capital investment is high, and in at least one country (Ireland) this has become prohibitive for its further introduction. In other countries doubts exist about the wisdom and efficiency of judges having to watch lengthy recorded materials. At least, advanced technology is needed to analyse recordings and retrieve information. It seems fair to conclude that digital recording of proceedings has a large potential, but may not be advanced enough to realize this potential yet.

viii. Use of ODR-techniques: online dispute resolution has grown rapidly with the expansion of internet trade, facilitated by companies such as eBay. The mechanisms used consist of the online articulation by the parties involved in a conflict of their positions and the moderated discussion thereof, followed by mediation and arbitration in case the previous steps fail. The advantage would be that interactively parties do much more preparatory work, and the intervention of the judge can be timely, short and focused. This approach offers a perspective for innovating judicial procedures in a more radical way. A characteristic is that court procedures are combined with techniques of line dispute resolution and mediation.

In the Netherlands an experiment is underway to have parties go through these steps by using the same interactive software under the guidance of the court which, when necessary, takes judicial decisions.

74 The overall impact of IT on the performance of the Judiciary is even more difficult to assess. Most judiciaries agree that substantial cost savings have been achieved or are within reach, but

quantitative assessments are generally not available. The impact on performance will also depend on the degree of integration of the applications that are in use.

Turkey provides a good example of integration. There, the National Judiciary Informatics System which is used by all courts and other related organisations has the following functions: attorneys can file lawsuits and examine case files and the parties in a case can follow the proceedings in the case and get access to the files and get informed by SMS. An integrated system is much more cost-effective than a fragmented system. In the Netherlands an attempt has been made to estimate the cost savings that can still be achieved by fully digitalizing the Judiciary. While IT-systems were introduced thirty years ago, still many administrative tasks involve manual paper work. The potential cost savings for the courts would be in the order of 5% of the total budget, and the savings for parties and their legal representation would be a multiple of that. This is an ex-ante estimation, and it remains to be seen whether these cost savings will materialize.

Guidelines

Digital access to justice is becoming an integral part of access to justice as fundamental right, and its expansion should be a top priority for the judiciaries.

It is an inevitable trend to digitally record court hearings in order to secure the evidence and to make that evidence available, for instance, in appeal; courts should implement such systems as soon as feasible.

Most budget systems of judiciaries cannot easily accommodate the levels of capital investment IT-applications such as digital recording require; this issue should be specifically addressed. Cost-benefit analysis is needed to underpin investment decisions.

Judiciaries should learn from on-line dispute resolution mechanisms and applications that are currently available on the internet.

APPEAL PROCESSES[18]

INTRODUCTION

75 Article 6 of the ECHR does not provide for a right of appeal *per se*. It is to the fairness of the criminal procedure as a whole in the specific case that the Convention looks to determine the overall fairness. These exceptions arise in criminal matters not in civil. It is possible to imagine that in circumstances where the first hearing in a civil case was deficient, a right to appeal might be found in the context of an overall fairness of the proceedings.

76 An appeal is 'Convention relevant' in three contexts:

i. While Article 6 of the ECHR does not require it, if an appeal is provided, the appellate Court procedures are governed by Article 6 although the manner in which it applies depends on the system.
ii. In some cases, an appeal can remedy a deficiency at first instance. In certain contexts (for example, where the appeal covers facts/law and liability/sentencing), the European Court of Human Rights has even described an appeal to be of "capital importance" for an accused facing a severe sentence. This means that an absence of appeal can give rise to a violation although it is still not the case that there is a right to appeal.
iii. For those states which have ratified Protocol No. 7 to the Convention, Article 2 provides that everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence "reviewed" by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

SIMPLIFYING APPEAL PROCEDURES

77 There is concern that unrestricted access to appeal has an adverse effect on the courts and ultimately the quality of justice as the impact of total freedom to appeal runs the risk of extending time taken to deal with appeals and fills the courts with possible unnecessary cases. Courts should focus on ensuring that only meritorious cases are granted access to an appeal. Much thought is being given to reducing the burden of appeal procedures, not only for the courts, but also for the participants including witnesses and victims. Procedures should ensure that superfluous burdens should not be placed on the courts and court time.

78 Many European countries have taken action to reduce the number of appeals and simply the appeal process to ensure higher quality access to justice for those who have a meritorious case. These actions fall under the following headings:

- Use of filters
- Focus on Outstanding Issues
- Reduce number of appeal judges
- Using and restricting paper presentations and use of IT

[18] includes both appeals and cassation

Use of Filters

79 There are a variety of approaches to managing appeals in criminal, civil and administrative jurisdictions through the use of legal processes and court defined **filters**. In some states there are such procedures and/or filters whereas in others there are not. The real issue is whether there should be a mechanism to effectively filter out **unmeritorious cases** so selecting only the **meritorious cases**. Moreover, it is important to establish who decides upon the meritorious cases.

80 Some countries limit appeals to the more **important cases**. This is be achieved by setting thresholds for appeal, for instance, with respect to the sentence in criminal law and the monetary value at stake in civil law.

> In Portugal there are limitations with appeals in criminal cases not allowed from decisions concerning acts unless by the free resolution of the court. In civil jurisdiction value limits are applied as filters – appeals to the 2nd instance are allowed only if the case has a value of € 5.000,00 or more.

81 It can also be achieved by giving judges the discretion to (dis)allow cases to proceed to appeal. Appeals that do not stand a chance of being successful should be filtered out, and only appeals that warrant serious consideration remain.

82 There are different approaches to who decides that a case is meritorious or not and on what criteria that decision should be made. To ensure that such decisions are made solely on the merits of the case such decisions must be taken by those who have the relevant skills and experiences to evaluate the various factors in the case and apply discretion in the final decision – the Judiciary.

> In Ireland filters are limited to cases where leave to appeal must be sought. This can be a weak provision because in most cases it is possible to appeal the refusal to allow the appeal and it then is treated as an appeal itself.
>
> In Scotland and England and Wales in criminal cases there is a general requirement for leave to appeal against conviction and sentence and leave to appeal is also required at some earlier procedural stages. Generally, in civil cases leave to appeal is not required against a judgment, but may be required in relation to decisions at earlier procedural stages of proceedings.
>
> In Italy filters for proceedings in both the Court of Appeal and the Court of Cassation exist. In all the states time limits for appeals are applied as filters in criminal, civil and administrative cases.
>
> The provision for filters varies with the Code of Civil Procedure and Law on Courts in Lithuania ensuring that only certain civil matters are heard in court of cassation, but no limits for cassation in criminal matters.
>
> In Portugal all filters are abstract and regulated in procedure law, thus removing a Court's right to decide if some cases should, or should not, be allowed for appeal. In Scotland legislation governing criminal and civil procedures deal with appeal processes.

Guidelines

The law should state that the decision on meritorious cases is a judicial decision based solely on the merits of the case.

Filters should be defined to reduce the unnecessary use of court time on unmeritorious cases so allowing more timely access to justice for those who have a meritorious appeal.

Filters should be defined to provide criteria by which the Judiciary can evaluate the merits of the appeal in each case and exercise judicial discretion in the final decision.

Outstanding Issues

83 Another solution to reducing the burden of appeal procedures is to focus the appeal procedure on the **outstanding issues**. This also reduces the burden for the participants including witnesses and victims. Being heard again is often seen as an unnecessary burden.

In Norway an important tool for the pre-trial judge in the Courts of Appeal is the active use of pre-trial conferences to discuss the whole structure of the appeal trial – to avoid a repeat of the first instance hearing and unnecessarily adding even more evidence. Other countries, such as the Netherlands, as well require the Appeal Courts to focus on the outstanding issues.

Sweden follows a more radical route by limiting the appeal to reviewing the video/audio recording of the trial in first instance, thus reducing hearing parties in person to a minimum. It is open for debate as to whether this is an effective way of conducting appeals. At the start there was a lot of resistance from judges and it is not clear whether that resistance has abated. In any case, it is a radical departure from current practice, and – possibly in less extreme form – may well be the way forward, as it integrates IT procedures in a logical way. Use of video/recording is also important to secure the evidence given in the first instance.

Guideline

Procedures should be in place to avoid repetition and a re-hearing of the first instance trial and to require applications for appeal to focus on the outstanding issues.

Reduction in the Number of Judges

84 It has also been suggested that another approach to reduce the burden of appeal procedures could be by a reduction of the **number of appeal judges**, for instance from three to one. It is suggested that there is no need for three judges to hear simple clear cut cases. However, this approach has definite drawbacks, as a team of three judges make better decisions than individuals and the moral authority of the court is weakened. Such an approach may well compromise effective justice.

Guideline

To limit the number of appeal judges is not recommended, as more effective measures are available to reduce the burden of appeal and court time.

Using and Restricting Paper Presentations and Use of ICT

85 Some countries make use of IT and out of court procedures to prepare and submit the application for an appeal.

86 In other countries there are introduced in appeal the paper process in some circumstances.

In Lithuania a paper process is introduced in appeal process in civil procedure. After proving some advantages in civil cases (more expeditious process and greater cost effectiveness) it was

introduced also in administrative procedure. The parties of the case may submit a reasoned request for the hearing the case under the oral procedure. The Judiciary has discretion to allow the application although it is not obligatory to do so.

87 Another approach is for the court to set limits to the length of written and oral presentations of parties, and require them also to start by setting out the structure of their arguments, as argued earlier.

Guidelines

Decisions on meritorious cases should normally and primarily be taken through a paper exercise rather than any court hearing.

The appeal procedure could be simplified by setting limits to the length of written and oral presentations of parties.

ALTERNATIVE DISPUTE RESOLUTION

EFFECTIVENESS OF ALTERNATIVE DISPUTE RESOLUTION

88 Mediation as a form of Alternative Dispute Resolution (ADR) is spreading with a number of states using this approach while other states have not yet considered it.

89 There is little clear evidence to show if the wider use of ADR has reduced the number of cases in the courts.

> In the Netherlands the courts have been reporting that mediation that was conducted through referral by a judge has not lead to a substantial reduction in the number of court cases or a decrease in capacity needed to handle the regular caseload of the courts.

90 There is also conflicting evidence on the value of ADR.

> In the Netherlands a customer satisfaction survey shows that in 2012, only a small majority was satisfied or very satisfied with the results of the mediation procedure (58.6%) but a large majority was very satisfied with the performance of the mediator (71%). In Norway it is felt to be an effective tool for the district courts, although there are no reliable statistics available. It is felt in Poland that in the opinion of the public, mediation is not an effective tool for settling disputes.

91 There should be appropriate procedures for mediation in the courts.

> In Ireland, mediation has been a feature of the Commercial Court since its inception in 2004. The time for the judge to intervene to suggest mediation has been found to be a very significant factor. After the close of pleadings, and prior to the discovery, has been found in most cases to be the optimal time. In commercial cases where close colleagues or family are involved, the earliest possible guideline of mediation has been found to be best. It helps to avoid the destruction of personal relationships which makes on-going business impossible. The Commercial Court's experience has been that in the early days parties were slow to avail of mediation. With the passage of time, however, it has become more popular. In the Commercial Court a very large number of cases are now disposed of in this way.
>
> In Hungary judicial mediation is initiated on the basis of the mutual agreement of the parties. The mediator − distinct from the judge − conducts the mediation under the obligation of secrecy, while the judge controls the mediation procedure in the sense that the content of the mutual agreement must be suitable for the approval of the court.

92 There is a wide belief that the general public and the parties have insufficient information about the aims and processes of ADR. It also has to be realised that if parties are not willing to find common ground then mediation will not work especially if they have already tried to reach a compromise. Some countries believe that mediation would be used more if a legal aid would be provided and the costs reduced. Also a court decision on the legal aspects of a case is principled and public which may militate against some parties' willingness to go to mediation.

> Hungary and Latvia expressed the view that there needs to be a culture change in society to appreciate that ADR can be effective, more timely and cheaper for the resolution of some types of disputes.

93 Mediation is applied to disputes in many areas. The spheres of law where mediation is applied more frequently and successful are family, labour, commercial, employment disputes, administrative law and criminal law.

In the Netherland mediation in general is possible in all areas of law, though not yet common in criminal law with pilots being conducted to investigate the possibilities. There is some discussion about finances and moreover, it might make more sense to mediate a criminal case in the investigative phase under auspices of the police and/or the public prosecutor. The data on mediation for 2012 show that 2716 cases were referred by the courts, of which 2508 reached conclusion. Mediation resulted in successful resolution in 48.3% of the completed mediations, with 9.3% ended in partial consensus. In the area of administrative cases concerning taxes 63.4% ended in complete consensus.

Guidelines

There should be available procedures for mediation and other ADR in every country decided through consultation with relevant stakeholders

Relevant data should be collected and analysed to show if ADR reduces case load.

For a successful mediation process it is important to provide legal aid to those most in need or to provide state funded mediation.

To promote the use of mediation information and explanatory materials on mediation should be provided.

Effective customer satisfaction surveys should be conducted.

There needs to be a public engagement programme to educate the public generally on the value of mediation.

COMPULSORY OR NOT?

94 There is much discussion about whether ADT should be compulsory or not, but at present it seems that it is voluntary in most counties of Europe that have a system.

The Irish judges did not think it should be compulsory and in this was supported in a report on a major review of Scottish Civil Courts Review which reported in 2009. The Guidelines concerning mediation and other forms of alternative dispute resolution included the following: *"Alternative Dispute Resolution is a valuable complement to the work of the courts, but the court should not have power to compel parties to enter into ADR. That is contrary to the constitutional right of the citizen to take a dispute to the courts of law."* The report argues that the wider use of pre-action protocols and active judicial case management will allow the court to encourage parties to consider alternatives to litigation first and that the great majority of respondents thought that it was the essence of mediation, and critical to its success, that the parties entered into mediation voluntarily.

95 In some countries mediation may be recommended and refusal to do so may result in implication for costs at a later stage (Ireland), which in other countries is contrary (Scotland).

96 In many countries in most civil matters parties cannot start a proceeding before activating the mediation procedure (Italy, Romania).

97 The judges and practitioners were all agreed on the importance of the voluntary nature of the alternate dispute resolution process arguing that litigants cannot be forced to go to mediation and if they are, it may not achieve the desired result.

Guidelines

ADR should be a voluntary process.

Judges may encourage parties to undertake mediation but should be able to insist.

WHO SHOULD DECIDE ON MEDIATION?

98 There are different approaches to the issue of who should decide on mediation. In some countries it is felt that it is inappropriate or inefficient for judges to conduct mediation. Especially when case loads are high and there are large backlogs, it is often felt that judges should leave the mediation to mediators outside the courts. In many states judges cannot act as mediators but may have the role to encourage parties to use ADR.

In the Netherlands each court has a mediation specialist, who can assess the case and refer the parties to the right mediator.

99 In some countries judges can mediate disputes and this practice is a success.

In Norway a "judge-mediator" would normally not be regarded impartial to continue as trial judge for failed mediation, but may continue if requested by the parties and the judge him/herself regards himself impartial. If the mediation fails and the trial starts with a different judge because of the impartiality arguments, the information given to the judge mediator would not be available for the trial judge(s). In Norway mediation is generally done in court, even though there is established a system for referring cases to outside mediators.

100 In other countries the use of mediation techniques within the court procedures is seen as having a larger impact than mediation as such (the Netherland).

101 In most states mediation is conducted by trained/approved mediators assisting the disputing parties to achieve a settlement.

102 In most states a judge can decide whether a case is suitable for mediation and encourage parties to engage with ADR.

Guidelines

Mediation should be conducted by appropriately trained and accredited mediators.

There should be appropriate procedures for mediation in all relevant courts.

The use of mediation techniques by judges within the procedure can be recommended, as this helps to make procedures less formal.

Pre-action protocols and active judicial case management will allow the court to encourage parties to consider alternatives to litigation.

MEDIATION AND INTERNAL REVIEW BY GOVERNMENT AGENCIES

103 One of the demands on the courts is the readiness of citizens to take legal action to resolve disputes between themselves and government agencies. These actions often place and unnecessary burden on court time and process.

104 In some countries a different approach to resolving such disputes is employed by government agencies such as tax, social security and local planning authorities. There are processes in place that allow a citizen in dispute with such an agency to seek discussion with that agency and resolve the matter in a timely manner without resource to court processes. These processes are often called **Internal Reviews.**

105 Traditionally, government agencies operate in a formal manner, and do not really attempt to explain the rules and their application of the rules to citizens and to resolve disputes.

106 As a result, many disputes, even about minor issues, have to be eventually heard in the courts. To reduce the volume of such cases a change of attitude is required. Active communication, for instance making phone calls to explain decisions, or meeting with representatives of the agencies is key to this change. Government agencies could set targets for the percentage of disputes to be settled.

107 In addition to active communication aimed at clarifying mutual misunderstandings and settling simple disputes, government agencies could use mediation to try to settle (part of) the remaining disputes. This would involve independent mediators or some independent body to conduct mediations to provide a level playing field.

108 As mediators do not take a position in a dispute, a further option is to have an independent body, being part of the executive, review contested decisions of the government agency concerned with respect of the decisions being correct and reasonable. Internal review is a stage of an administrative procedure where another (independent) body is asked to advise whether or not the decision that has been taken is all right. The important thing is that the government is obliged to look at its own decision again, in order to avoid unnecessary procedures in court.

109 A good system of internal dispute resolution and internal review can provide a quick and inexpensive method of resolving many disputes. When citizens are still not satisfied, they can bring the disputes to the courts. It is a mechanism to promote agreements and settlements between a public body and a private party. It is therefore a filter to avoid procedures. Quality is enhanced and the number of procedures will diminish. It is also a mechanism to prevent corruption due to the intervention of another independent body. When citizens are still not satisfied, they can bring the disputes to the courts.

Guideline

Judicial Councils should advise governments to try resolving certain administrative conflicts through the use of active communication, mediation procedures and independent review.

SUMMARY OF GUIDELINES

Proactive Role of Judges and Councils

1 *The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation.*

2 *The Judiciary should be engaged with the creation of success criteria and Key Performance Indicators to evaluate effective reform.*

3 *The Judiciary and Judicial Councils have a vital pro-active role to play in whole reform process.*

Judicial Education and Training

4 *Judicial Councils should develop education programmes to instil an understanding of the role the Judiciary and Judicial Councils have in the reform process.*

5 *Appropriate and pertinent training should be provided for the Judiciary, to allow judges to become fully engaged with the reform process.*

Principles of Reform

6 *All developments must be driven by the principles of justice outlined in Paragraph 28 of Part 2 of this report and not by financial considerations.*

7 *All reforms should follow the SMARTER principle.*

RATIONALISATION AND RE-ORGANISATION

Access to Justice

8 *Where access to justice may be adversely affected by concentrating courts, consideration should be given to whether the timescale for savings justifies concentrating courts.*

9 *In any jurisdiction where judicial/court reform is proposed, involving redrawing the judicial/court map, there should be a set of principles for provision of access to justice to guide the approach to reform.*

10 *Any such set of principles should have regard to the general desirability of local delivery of justice and take account of factors such as population distribution, geographical considerations, public transport provision and the availability of court ICT systems.*

11 *Attention should be given not only to the availability of ICT systems, but how the arrangements for their use are to operate. There should be judicial involvement in determining appropriate procedures and criteria for the use of ICT.*

12 *Any proposed programme of rationalization and reorganisation of courts and public prosecutors' offices should include appropriate consultation with the Judiciary (where such proposals have originated from the government, not than the Judiciary), other stakeholders and citizens.*

13 *A reform programme with proposals for rationalisation and reorganisation should include a specified process of evaluation and review and such evaluation and review should be carried out.*

Quality of justice/service to the public

14 *If specialisation can ensure that high quality justice is provided, measures must be in place to ensure that the Judiciary involved have the necessary level of expertise, experience and training.*

15 *To ensure that high quality justice is provided by specialisation there must be adequate expert judicial resources and support resources.*

16 *Any process of introducing specialisation should include consideration of any potential loss of flexibility that may result, and whether the benefits outweigh the disadvantages. Consultation may be necessary in this connection.*

17 *There should be court user groups to include Judiciary and all other relevant stakeholders. Such groups should meet regularly to examine relevant data and propose developments.*

IMPROVED ADMINISTRATION AND OPTIMIZATION OF WORKLOADS

18 *Appropriate analysis of backlogs should be carried out in different parts of the country or the court system to identify the need to redistribute work and to assist any such redistribution or to identify other solutions.*

19 *The Judiciary should be involved in the process of analysis, redistribution or identifying other solutions.*

20 *Where there is a lack of essential information about processing time and backlogs of cases, this should be addressed - in particular by the use of IT. In assessing the benefits of investment in IT regard should be had to the value of business information collection and analysis to improve the efficient and cost effective planning and management of court business.*

CASE MANAGEMENT, SIMPLIFICATION AND DIGITALIZATION

Case management

21 *Every Judiciary should set up a structure on how to establish methodologies for case management, including the associated standards for the (average) duration of cases, for specific categories of cases/jurisdictions.*

22 *These structures should be guided by the judges and should allow for discussion with stake holders such as lawyers.*

23 *The methodologies for case management need to establish a balance between the importance of case and the attention the case is given in terms of procedural steps allowed.*

24 *In the methodologies an important place should be given to pre-trial conferences to establish the proper method to resolve the case and to sort out differences of opinion about procedure.*

25 *The case load of judges and support staff should allow for sufficient time for proper case management. It should be carefully considered whether judges can delegate some administrative aspects of case management to support staff.*

26 *Case management requires a change of attitude and culture of many judges, which needs to be promoted by training and/or other tools to disseminate knowledge.*

Simplification of Procedures

27 *The feasible reduction of the number of procedural steps depends very much on the legal system of each country. A common and crucial element is that all information/evidence must be presented at the start of the trial: parties must know the case they have to meet and must be able to prepare for it.*

28 *A detailed analysis of procedures and associated work processes should be undertaken to remove outdated elements.*

29 *Courts should set limits to the length of written and oral presentations of lawyers and self-representing citizens, and require them also to start by setting out the structure of their arguments. Also, the size of verdicts should be regulated.*

IT & digitalisation

30 *Digital access to justice is becoming an integral part of access to justice as fundamental right, and its expansion should be a top priority for the judiciaries.*

31 *It is an inevitable trend to digitally record court hearings in order to secure the evidence and to make that evidence available, for instance, in appeal; courts should implement such systems as soon as feasible.*

32 *Most budget systems of judiciaries cannot easily accommodate the levels of capital investment IT-applications such as digital recording require; this issue should be specifically addressed. Cost-benefit analysis is needed to underpin investment decisions.*

33 *Judiciaries should learn from on-line dispute resolution mechanisms and applications that are currently available on the internet.*

APPEAL PROCESSES

Filters for Appeals

34 *The law should state that decision on meritorious cases is a judicial decision based solely on the merits of the case.*

35 *Filters should be defined to reduce the unnecessary use of court time on unmeritorious cases so allowing more timely access to justice for those who have a meritorious appeal.*

36 *Filters should be defined to provide criteria by which the Judiciary can evaluate the merits of the appeal in each case and exercise judicial discretion in the final decision.*

Outstanding Issues

37 *Procedures should be in place to avoid repetition and a re-hearing of the first instance trial and to require applications for appeal to focus on the outstanding issues.*

Number of Appeal Judges

38 *To limit the number of appeal judges is not recommended, as more effective measures are available to reduce the burden of appeals and court time.*

Using and restricting paper presentations and use of IT

39 *Decisions on meritorious cases should normally and primarily be taken through a paper exercise rather than any court hearing.*

40 *The appeal procedure could be simplified by setting limits to the length of written and oral presentations of parties.*

ALTERNATIVE DISPUTE RESOLUTION

Effectiveness of Alternative dispute resolution

41 There should be available procedures for mediation and other ADR in every country decided through consultation with relevant stakeholders

42 Relevant data should be collected and analysed to show if ADR reduces case load.

43 For successful mediation process it is important to provide a legal aid to those most in need or to provide state funded mediation.

44 To promote the use of mediation information and explanatory materials on mediation should be provided.

45 Effective customer satisfaction surveys should be conducted.

46 There needs to be a public engagement programme to educate the public generally on the value of mediation.

Compulsory or Not?

47 ADR should be a voluntary process.

48 Judges may encourage parties to undertake mediation but should not be able to insist.

Who should decide on mediation?

49 Mediation should be conducted by appropriately trained and accredited mediators.

50 There should be appropriate procedures for mediation in all relevant courts.

51 The use of mediation techniques by judges within the procedure can be recommended, as this helps to make procedures less formal.

52 Pre-action protocols and active judicial case management will allow the court to encourage parties to consider alternatives to litigation.

Mediation and internal review by government agencies

53 Judicial Councils should advise governments to try resolving certain administrative conflicts through the use of active communication, mediation procedures and independent review.