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A discipline of judicial governance?

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1. Introduction

1.1. Context of court problems

In the introduction to a book published on Judicial Case Management and Efficiency in Civil litigation, van Rhee states that:

‘Since the second half of the twentieth century, the case load of the courts has risen dramatically in almost all jurisdictions and is still on the rise. At the same time, many governments are unwilling to invest the necessary sums of money in the court system. Consequently, there is a risk that the quality of the administration of justice suffers under the increasing workload. As a result of the shortage of funding, the dockets of many courts are overloaded and in some countries the backlog of cases has caused alarm. (...) In order to counter these problems, various ways of handling cases differently have been proposed and implemented.’¹

This statement reflects a traditional political approach to judicial governance and expresses a very typical attitude towards the courts: when in trouble, give them more money, otherwise there will be problems with access to justice. This tells us something of the nature of judicial governance. Firstly, court activities are not merely in the sphere of judicial competence, nor purely of

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The term 'judicial governance' has been chosen out of a range of terms that have been inconsistently and interchangeably used and applied throughout the research history of this field across different disciplines, including judicial administration (to some that means the way judges adjudicate and organise their hearings in the context of their court organisation); court management (organisation management of courts in the context of a justice system); justice administration (of the whole gamut of organisations involved in the justice field, PPO, courts, prisons, fines collection, notaries, bailiffs, judicial training, regulations in the field etc.). I settled on this one as an amalgamation of different activities required and studied in and out of courts by various actors. (Definition of governance: The process of collective decision-making and policy implementation, used distinctly from government to reflect broader concern with norms and processes relating to the delivery of public goods; I. McLean & A. McMillan (eds.), *The Concise Oxford Dictionary of Politics*, 2009).

1 C.H. Van Rhee, 'Introduction', in C.H. Van Rhee (ed.), *Judicial Case Management and Efficiency in Civil litigation*, 2008, p. 1.

legal interest, but they fit also within the responsibility of government, ergo politics. It is important when discussing judicial governance to realise the traditional interplay between the two. Research has shown that the independent judiciary does its job in terms of deciding upon cases coming before them (and maybe responsible for case assignment within that decision-making process),² and the administration does its job in trying to ensure that the court organisation supports the judges' role, without interfering with it.³

However, some experiences of judicial governance within modern democracies are changing.⁴ There is an increased debate on the 'politicisation' of the judicial function. This is a fancy way of saying that judges are being asked to become further involved in court and judicial organisation and management affairs; and in some cases being responsible or accountable for effective management towards the public.⁵ One of the effects of this process is a change in the way judges are held accountable within their function.⁶

I will first expand on the legal theme and give a critical appraisal of why it is insufficient to rely solely upon legal standards today. I will then continue by outlining the growth over the years in research on and literature about the courts organisations. Another important perspective is that of policy makers, which will be discussed in light of recent trends in management developments in several jurisdictions across Europe, including the use of quality management and management by objectives. Following on from this, I shall explore why court organisations are deemed to be so difficult to examine and to change from an organisation perspective. Afterwards, I shall examine the current trends in managerial thinking, especially at the implementation of quality management and the shift in responsibility for management of the courts in various countries. The conclusions will emphasise the need for an inter-disciplinary approach to judicial governance.

I am going to reintroduce the principle of accountability from a different perspective than the traditional constitutional and legal perspective that focuses mainly upon judicial independence, procedural law and human rights. My theory is that there should be an inter-disciplinary approach to judicial governance. As research has shown, legal standards are insufficient by themselves to hold the judicial office to account, given the requirements for increased accountability by politicians (for the functioning of courts); the public (for unpopular and seemingly unjust outcomes of judgments); and internally to their peers, both judicial and administrative (for the functioning of individual organisations and judges).⁷

What is also interesting is that economists and sociologists are also sharing a piece of the pie. For economists there is increasing research into measuring the effectiveness of the rule of law (including the efficiency of courts and judicial independence) and its consequences for economic growth or sustainability.⁸ From a sociological point of view, courts have been viewed

2 G.Y. Ng, *The quality of judicial organisation and checks and balances*, 2007, pp. 359-366.

3 *Ibid.*, pp. 362-364.

4 *Ibid.*; see also P. Langbroek (ed.), *Quality Management In Courts And In The Judicial Organisations in 8 Council Of Europe Member States: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03, <<https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1716655&SecMode=1&DocId=1666264&Usage=2>> (last visited 2 December 2010).

5 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balance*, 2007, chapter 20.

6 *Ibid.*, p. 391.

7 F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008.

8 S. Haggard et al., 'The Rule of Law and Economic Development', 2008 *Annual Review of Political Science* 11, pp. 205-234 ; J.M. Ramseyer & E.B. Rasmusen, 'The Case For Managed Judges: Learning From Japan After The Political Upheaval Of 1993', 2006 *University of Pennsylvania Law Review* 154, pp.1879-1930; H. Fix-Fiern, *Courts, justice and efficiency: A socio-legal study of economic rationality in adjudication*, 2003.

in light of alternative dispute resolution mechanisms for many years,⁹ as well as from the approach of legal pluralism.¹⁰

The question this article ultimately seeks to answer is the following: If legal standards are insufficient to support the needs of judicial governance in Europe (i.e. in terms of efficiency, public accountability and modernisation (in terms of technology)) in interfacing with and meeting public needs, what approach should be taken instead? This article posits that an inter-disciplinary approach, taking in law, politics, economics and management, should be taken: i.e. a discipline of judicial governance.

1.2. Growing issues

1.2.1. Law

Traditionally (and simply) speaking, constitutions in democratic countries have stated two fundamental principles that can be said to set the standard of conduct in the courts: Judicial independence and judicial accountability.¹¹ Judicial independence requires that judges be impartial and unbiased when judging upon individual cases to maintain trust in the decisions they make. From a separation of powers point of view, they must also appear to be institutionally separate from the legislature and executive. Judges are set apart as impartial and independent in constitutional theory to offset unjust laws being passed or unjust actions by government and administration. Their independence is protected through status, especially with regard to appointment (merit based), dismissal (impeachment) and salary.¹² Furthermore, in order to maintain the legitimacy of the judiciary in modern democracy, increasingly one sees that appointment systems for judges also take into account the need for the judicial body to be representative of society, so it should not be seen to be dominated by one group in society over another.¹³ This maybe the focus of reform simply because dismissal is already very rarely used.¹⁴

The general public role set out for them in theory is to protect the citizen from arbitrary state action. To that end, some judicial accountability is also set out in constitutional theory.¹⁵ Such accountability finds its forms classically in public hearings and the publication of judgments.¹⁶ This does not mean, however, that there are no controls at all. Judges are traditionally held to account for their decisions through their transparency of reasoning (traditionally sentences and reasoned decisions are public) and the possibility to appeal against the decision at a higher instance.¹⁷ Judges may also be challenged if one party believes that bias is present, or a judge may recuse himself from a case, if he believes himself to be biased or does not believe that he will be able to do justice to a case.¹⁸

Next to this traditional aspect, judges and courts are also expected to follow procedural law set out by the legislature. Procedural law is very bureaucratic in its approach. Litigants must

9 See e.g. R. Moorhead & P. Pleasance (eds.), *After universalism: Re-engineering access to justice*, 2003.

10 See e.g. R.A. Macdonald, 'Metaphors of multiplicity: civil society, regimes and legal pluralism', 1998 *Arizona Journal of International and Comparative Law* 15, pp. 69-88.

11 K. Maleson, *The New Judiciary*, 1999, pp. 38-45.

12 C. Guanieri & P. Pederzoli, *The power of judges: A comparative study of Courts and Democracy*, 2002.

13 K. Maleson, *The New Judiciary*, 1999, pp. 106-123; K Maleson, 'Introduction', in K. Maleson & P.H. Russel (eds.), *Appointing judges in an age of judicial power: critical perspectives from around the world*, 2006, pp. 3-10, G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 19-22.

14 K. Maleson, *The New Judiciary*, 1999, p. 39.

15 P. Gerangelos, *The separation of powers and legislative interference in Judicial process: constitutional principles and limitations*, 2009, p. 37.

16 M. Fabri et al. (eds), *The administration of justice in Europe: Towards the development of quality standards*, 2003, p. 406.

17 M.C.J. Vile, *Constitutionalism and the separation of powers*, 1998, pp. 19-20.

18 P. Langbroek & M. Fabri (eds), *Case assignment to courts and within courts: a comparative study in seven countries*, 2004, p. 10.

follow certain steps to file a case in court (criminal, civil or administrative). The case itself, when in court, must also follow certain steps from administrative case management to publishing the case itself. In that way, if anything goes wrong, the case transcript is on file and can be examined (docket). Procedural law is the way by which the courts are accessed and following them should give a certain assurance that litigants will be treated fairly and equally by the court.¹⁹

The last legal element I will describe here is the right to a fair trial according to Article 6(1) European Convention on Human Rights. A concern since the late 1980s for many countries has been achieving 'reasonable time' expectations of parties and the European Convention on Human Rights. In determining and enforcing the right to a hearing within a reasonable time, one must define what is a reasonable, or if easier, what is an unreasonable delay.²⁰

In a preliminary draft report to the Council of Europe's Committee on the Efficiency of Justice, Langbroek and Fabri attempt to define court delay as is practised across various jurisdictions in Europe, then to further define reasonable delays as set out in the jurisprudence of the European Court of Human Rights (ECtHR) on this clause.

'There has to be an end to every dispute, so that everybody's life can go on. On the other hand, parties should also be given enough time to prepare their defence (...)'²¹

This statement reflects the courts' responsibilities towards the litigants: peaceful, fair and timely delivery of justice. Nevertheless, this looks at delays only from a societal point of view. From the courts' point of view delay

'(...) means that a case does not move as fast as it could, because of problems that generally are recognized as court problems - this does involve judges, public prosecutors and their administrative organisations, as well as lawyers and their offices.'²²

This in itself directly links the ability to decide cases without delay to factors other than an independent judge, such as the courts' organisation and external actors. However, according to this report, delay is very difficult to define. On the one hand,

'Usually delay deals with expectations and subjective perceptions of the 'local legal culture', which is different in every environment. A delay that could be acceptable in one community could be unacceptable in another one.'²³

19 G. Teubner, 'Substantive and Reflexive Elements in Modern Law', *Law and Society Review* 1983, pp. 239-285, pp. 233-234; G.Y. Ng et al., 'Monitoring and Evaluation of Courts Activities and Performance', 2008 *International Journal for Court Administration* 1, no. 1, pp. 58-64.

20 P.M. Langbroek & M. Fabri, *Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*, Council of Europe, Committee on the Efficiency of Justice, 2003

21 *Ibid.*, p. 4.

22 *Ibid.*, p.2, see also C.H. van Rhee, 'The Law's Delay: An Introduction', in C.H. van Rhee (ed.), *The Law's Delay: Essays on Undue Delay in Civil Litigation*, 2004, p. 5.

23 P.M. Langbroek & M. Fabri, *Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*, Council of Europe, Committee on the Efficiency of Justice, 2003, p. 2; see also C.H. van Rhee, 'The Law's Delay: An Introduction', in C.H. van Rhee (ed.), *The Law's Delay: Essays on Undue Delay in Civil Litigation*, 2004, p. 1.

Due to this difficulty in defining unreasonable delay therefore,

‘(...) the framework of the court does not contain any fixed time limits (...) [it] depends on external boundaries of applicability of the “reasonable time” clause and on case-related criteria.’²⁴

Therefore, the ECtHR has offered up no real solutions to the problem of guaranteeing the right to a case to be heard without an unreasonable delay. It offers only the possibility to redress and order damages to be paid to parties deemed to have suffered an unreasonable delay in court proceedings.

The fact of delays and backlogs has been of growing concern to public law academics everywhere.²⁵ Trends in modernization over the last 20 years have tended to focus upon simplifying procedures to increase access, reducing the costs to access to justice by providing more comprehensive legal aid schemes and breaking down the monopolies on services held by lawyers, whilst maintaining the idea that law should still provide the basic principles by which to organise justice.²⁶

1.2.2. Organisation

Sporadically, over the last 30 years, researchers have paid some attention to the organisational aspect of courts organisations, especially delays. They have examined the way in which courts (especially case management) has been organised. This movement started in the 1970s in the US,²⁷ and in the 1980s-1990s in Europe,²⁸ with some academics expressing frustration at the lack of data or of access to the courts. It is only in the late 1990s to early 2000s that one sees an increasing focus on the courts as organisations, looking at how to achieve efficiency, timeliness and managerial effectiveness and beginning to measure the activities of the courts.²⁹ This is to do with a growing perception that courts, though traditionally held accountable based on the rule of law, could be held to account for the results they achieve from an organisation perspective.

Economists are a key to this development. Increasingly, from the beginning of the 21st century, there have been publications with an economic analysis of court performance, of the effects of judicial independence and the rule of law on economic growth; of the effect of a change of government policy on judicial independence; and sometimes simply of the strength of judicial

24 P.M. Langbroek & M. Fabri, *Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*, Council of Europe, Committee on the Efficiency of Justice, 2003, p. 4.

25 H.E. Chodosh, *Global Justice Reform: A comparative methodology*, 2005, pp.73-76.

26 R. Moorhead & P. Pleasance (eds), *After universalism: Re-engineering access to justice*, 2003, see also H.E. Chodosh, *Global Justice Reform: A comparative methodology*, 2005, pp.77-78.

27 See for example: S. Cox, ‘Court Scheduling made easy’, 1976 *Judicature: The Journal of the American Judicature Society* 59, pp. 353-355; the National Center for State Courts was started in 1978 (<www.nscsonline.org>) to start dealing with these concerns. See also, J. Resnik, ‘Managerial Judges’, 1982 *Harvard law Review* 96, P. 374; T. Church, ‘The Old and the New Conventional Wisdom of Court Delay’, 1982 *The Justice System Journal* 7, pp. 395-408. G. Gallas, ‘The conventional wisdom of state court administration: a critical assessment and an alternative approach’, 1976 *The Justice System Journal* 2, pp. 35-55.

28 See for example: J.W. Raine & M.J. Willson, ‘Organizational Culture and the Scheduling of Court Appearances’, 1993 *Journal of law and society* 20, pp. 237-252; J.W. Raine & M.J. Willson, ‘The court, consumerism and the defendant’, 1996 *British Journal of Criminology* 36, pp. 498-509; A.W. Koers et al. (eds.), *De ZM op de weg, ZM 2000*, 1997; see the work of K.F. Röhl, e.g. *Vom Gerichtsmanagement zur Selbstverwaltung der Justiz*, 1998, pp. 241-254.

29 For example see M. Fabri et al. (eds), *The administration of justice in Europe: Towards the development of quality standards*, 2003; G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007; B.J. Ostrom et al., *Trial Courts as Organizations*, 2007.

independence and trust in the judiciary and the courts.³⁰ This is due to a dual (consecutive) development: Firstly, there has been an increase in statistical data being produced within the courts (and being sent to the ministries of justice). Secondly, because of this increase in data collection, there has been an increase in the development of monitoring and evaluation systems for the courts.³¹ This has opened up the courts to research by different disciplines (law, politics, organisation and economics) like never before. This type of transparency is extremely important for organisational accountability for judicial governance.³²

Now, I will go on to explore why court organisations are deemed so difficult to examine and to change from an organisation perspective, before looking at current trends³³ in managerial thinking.

2. Bureaucracy

2.1. Professional bureaucracy³⁴

Courts can be classified as ‘professional bureaucracies’.³⁵ According to Mintzberg, a professional bureaucracy is composed of people who have received intensive training to become experts in their field.³⁶ These experts or ‘professionals’ are deemed to be the ‘operating core’ of the organisation. In the case of the courts, these are the judges. He says that

‘(...) the complex work of the operating professionals cannot easily be formalized, or its outputs standardized by action planning and performance control systems.’³⁷

On the one hand, quality is assured through extensive educational programmes, which provide the potential professionals with the skills and knowledge needed and then ‘(...) stability ensures that these skills settle down to become the standard operating procedures of the organisation.’³⁸ We have seen a trend across Europe that this is becoming less true, simply because the field of law has expanded in terms of human rights and European Union law. Instability in the environment has created extra demand for expertise, beyond the initial training of many judges. Therefore in some countries, like the Netherlands and France, one sees some sort of training programme developing either in-house³⁹ or in a school to keep judges up to date on the law. However, even with this trend, Mintzberg would seem to suggest that trying to measure the outputs in courts (as professional bureaucracies) is difficult and expensive.

30 See e.g. L.P. Feld & S. Voigt, ‘Economic growth and Judicial Independence: Cross country evidence using a new set of indicators’, in *CESifo Working paper no. 906*, 2003; S. Haggard et al., ‘The Rule of Law and Economic Development’, *2008 Annual Review of Political Science* 11, pp. 205-234. See also H. Fix-Fierro, *Courts, justice, and efficiency: a socio-legal study of economic rationality in adjudication*, 2003.

31 F. Contini (ed.), ‘European Data Base on Judicial Systems’, *Working papers* 2000; G.Y. Ng et al., ‘Monitoring and Evaluation of Courts Activities and Performance’, *2008 International Journal for Court Administration*, no. 1, pp.58-64.

32 K. Malleson, *The new judiciary: the effects of expansion and activism*, 1999, G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007.

33 At the time of this research, quality management was being developed in several countries across Europe, alongside management by objectives, see P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member states: A qualitative inventory to hypothesise factors for success or failure* Council of Europe, CEPEJ (2010)03.

34 This section has been adapted from: G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, pp.3-5.

35 J.B.J.M. ten Berge, ‘Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)’, in J.B.J.M. ten Berge & A. Hol (eds.), *De Onafhankelijkheid van de individuele rechter*, 2006, pp. 6-9.

36 H. Mintzberg, ‘Structure in 5’s: A synthesis of the Research on Organization Design’, *1980 Management Science* 26, pp. 322-341, at p. 333.

37 *Ibid.*, p. 334.

38 *Ibid.*, p. 334.

39 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 98; pp. 261 and 325.

What can be concluded is that quality control (including monitoring and evaluation) is a growing issue in the courts.⁴⁰ However, what is also being said is that judges can be difficult to manage and access to justice cannot be so easily programmed around them because of their nature as professionals and because of their control over productivity.⁴¹

Therefore, judges are traditionally seen as independent both in their decision-making and within the court organisation.⁴² In fact, a first instance courthouse can be considered to be only a building where they work and not as part of the institution of justice (a concept that may be reserved to describe judges only), especially as many judges, e.g. in France, prefer to work from home.⁴³ However, because they are judges, they do operate within a certain legal framework, even though it is usually their own expertise that is required to interpret that framework.

Furthermore, according to Mintzberg, such an organisation has a small administration department to take care of everyday management issues in terms of finances and personnel, but it is small and with limited technocratic capabilities, with little or nothing to do with the operating core of the organisation. In 2003, in the UK at least, Susskind described the position of judges in the courts with regard to management:

‘Many judges consider management to be anathema to the business of judging. Management (...) imposes constraints, procedures and standards to which independent and impartial arbiters should not be subject. At the same time, the jargon of management often gives rise to judicial intolerance - many judges have little truck with terms such as total quality management (...)’⁴⁴

2.2. *Mechanical bureaucracy*

A court is also more than its judges and administration. It is, in a mechanical sense, a factory that produces decisions on cases with a specific procedure to come to a quality (i.e. legal) product (decision). This process starts with the entrance point of a case at a court, to case management, hearing management and ending with the publication of a decision.

This seems simple enough. However, if a court is not responsible for its organisation or unable to adapt itself, e.g. by hiring extra staff or purchasing technologies to create further efficiencies in working methods, there may be a problem when the demand for services increases above a court’s technical ability at the time to supply. This issue deals with Thompson’s ‘economic and instrumental technical rationality’ in an organisation.⁴⁵

‘(...) the instrumental question is whether the specified actions do in fact produce the desired outcome, and the instrumentally perfect technology is one which inevitably achieves such results (...) The economic (...) is whether the results are obtained [by] the least necessary expenditure of resources (...) for this there is no absolute standard.’⁴⁶

40 G.Y. Ng et al., ‘Monitoring and evaluation of courts activities and performance’, 2008 *International Journal of Court Administration* 1, no. 1, pp. 58-64.

41 H. Mintzberg, *Structure in Fives: Designing Effective Organisations*, 1983, p. 189.

42 J.B.J.M. ten Berge, ‘Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)’, in J.B.J.M. ten Berge & A. Hol (eds.), *De Onafhankelijkheid van de individuele rechter*, 2006, p. 1.

43 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 101.

44 R. Susskind, ‘Management and Judges’, in M. Saville & R. Susskind (eds.), *Essays in Honour of Sir Brian Neill: The Quintessential Judge*, 2003, p. 53.

45 J.D. Thompson, *Organizations in Action*, 1967 chapter 2.

46 *Ibid.*, p. 14.

In order to obtain this rationality, there needs to be what Thompson calls ‘organisational rationality’, which is composed of analysing and maintaining 3 areas: ‘input activities, technological activities, and output activities.’ He goes on to argue that given their mutually supporting nature, they need to be appropriately in tune with one another. This is not only internal but also external.⁴⁷ In this sense it is illogical to separate the judges from the administration, if there is to be ‘organisational rationality’.

If one considers this theory in light of a court organisation, one can see, indeed, that flexibility in terms of input activities, i.e. the hiring and training of staff (including judges) and investment in technologies – especially for case management – is important if a court is to be able to react to an increase in demand. However, the appointment of judges is not within the purview of individual courts. There is always a very cumbersome appointments process involving all three branches of power in the state.⁴⁸ Furthermore, the budget of a court is also often not in the control of the court itself (especially not the amounts received), making it difficult to make new appointments for administrative staff or invest in new technologies to deal with increasing demands.⁴⁹

Technological activities of the courts are centred on procedures: a procedure to file a case, procedures to manage and hear cases and procedures to pronounce judgments. This is of course a simplified overview, but the general idea is that if input activities are insufficient, the technical activities will also be affected.

Output activities are disposal activities. The problem is that courts are not the only ones which control the production process in terms of disposing of cases. There are too many external actors for that to be possible. Courts must wait on lawyers, the prosecution, the defence, witnesses, evidence, the litigants themselves to present their case to the court. New rules of procedure in England & Wales, for example, have given judges much more power to manage the pace of litigation and enforce deadlines, rather than granting extensions and disposing of cases as quickly as possible.⁵⁰ This is where the fine-tuning between activities in organisational rationality is important: to direct all resources to the final product internally as well as ‘buffering’ against external hindrances. This requires a court to recognise its role in the broader justice system landscape.

2.3. Necessary changes

Why is it necessary to change the approach to the organisation of courts? Is it not possible simply to alter procedural law, or to keep pumping in taxpayers’ money? In answering the second question, you answer the first. It is not possible to keep pumping in taxpayers’ money. The majority of people in society will not use the courts, and those who do enter the system, do not always emerge with a judgment, but have settled in some way.⁵¹ Procedural law is constantly changing, often too quickly for the courts to keep pace.⁵² Therefore it is necessary to change the approach to organisation to meet the changing demands of the users and a changing and increasingly technological society. More and more, the courts have to face competing demands. Ostrom et al. very nicely sum it up:

47 Ibid., p.19.

48 K. Malleson & P. H. Russel (eds.), *Appointing judges in an age of judicial power: critical perspectives from around the world*, 2006.

49 P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member states: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ(2010)03.

50 G.Y. Ng, ‘England & Wales’, in Langbroek, supra note 49, pp. 23-43.

51 R. Moorhead & P. Pleasance (eds), *After universalism: Re-engineering access to justice*, 2003, pp. 2-6.

52 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 273.

‘Courts should be timely, but also judges should devote sufficient time and attention to ensure justice is done. Courts should be more accommodating and less intimidating to the public, but they should also give priority to caring for the people in the organisation. Efficient documented procedures are desired, but flexibility in adapting to particular circumstances also is valued.’⁵³

In *Quality of Judicial Organisation and Checks and Balances*, the issue was considered whether it would be possible, within the legal framework of checks and balances, to change the courts from a professional bureaucracy (that qualifies structure and process that transforms input into output) to an organisation that operates quality management techniques (which monitors and evaluates the results of structures and processes and their incumbent results), with a view to improving the quality of the results produced. Why choose quality management? This book was written in the Netherlands, which at the time was going through a process of adopting quality management methods and techniques. What was interesting, from an academic point of view, was to observe this change and the effects it had on judicial independence and accountability. The Netherlands has been a leader in this field, and now the Council of Europe is also conducting studies in this field.

3. Current trends in managerial thinking for the courts

3.1. Quality theories

The focus of quality theories is to create organisations in which responsibility is shared democratically as well as hierarchically. Hierarchy in organisations is inevitable, if only to know who is ultimately responsible for an organisation. Democracy in an organisation emphasises that all participants share responsibility for the quality of services and products of an organisation (including consumers).⁵⁴ Organisations should, theoretically, continuously learn, and therefore grow based on constant developments in technology, and changing quality perceptions from participators, thereby inducing satisfaction in services and a possible certain amount of loyalty.⁵⁵ These theories, throughout the 1980s and 1990s, have been in turn developed for public institutions and organisations, which have been perceived by the public as having a democratic deficit, through New Public Management. The judiciary somehow escaped from most of these new initiatives in New Public Management, possibly because of professional autonomy (as described above) and institutional independence.

Quality theories have come in various shapes and sizes, starting with a list of attainable goals. These lists should help organisations not only to increase efficiency and productivity, but also to improve the quality of the service or product to the satisfaction of clients and customers.⁵⁶ The usefulness of such criteria can only be realised if there is quality control and assurance. Picard makes a distinction in the introduction of his work, which is fundamental:

‘[Quality control] relies on inspectors performing both in-process and final inspections to ensure a quality product.’⁵⁷

53 B.J. Ostrom et al., *Trial Courts as Organizations*, 2007, p. 20.

54 W.A. Lindsay & J.A. Petrick, *Total Quality and organisation development*, 1997, p. 20; S. Murgatroyd & C. Morgan, *Total quality management and the school*, 1994, pp. 4-8; P. Senge, *The fifth discipline: the art and practice of the learning organisation*, 1990, p. 277.

55 G. Bouckaert & S. van de Walle, *Government and trust in government*, at EGPA Conference Finland, September 5-8 2001.

56 See for example W.A. Lindsay & J.A. Petrick, *Total Quality and organisation development*, 1997, p. 55.

57 L.G. Picard, Sr., *The Fundamentals of quality control*, 1992, p. xvii (Introduction).

Whereas

‘(...) quality assurance refers to a quality program built around a manufacturing process or processes that, when properly controlled by the production work force, will produce a quality product.’⁵⁸

When an organisation gives product control to one part of the organisation and the administration to another part, it therefore compromises the quality of the product of that organisation. The idea behind this concept is that a whole organisation must partake in the quality of its service or product as well as its administration. This goes back to Thompson’s organisation rationality discussed above.

However, creating a set of attainable goals, and giving responsibility to the organisation for overall quality, means very little unless motivated leadership is installed.⁵⁹ There is also the idea that a quality of organisation:

‘(...) can only come about from a concerted, integrated and dynamic effort’⁶⁰

This ideology requires constant training and learning within an organisation.⁶¹ The learning culture is the most important, and yet the most difficult part of changing an organisation into an organisation that uses quality management and standards, as it challenges set structures and mind-sets.⁶² It therefore requires monitoring and evaluation as part of a feedback loop. It is no good saying that they must learn if there is no quantitative way of showing that mistakes have been made, or how things actually proceeded to produce the results that came about.⁶³

Next to quality organisation theories and learning organisation theories, there also exist models of quality, both nationally and internationally. These models, such as the EFQM (European Foundation for Quality) model for quality and excellence, the ISO norm and other agencies for standards, provide a practical resource (mostly information) and methods to achieve a certain standard, giving a minimum standard of excellence to be reached. ISO gives a relatively straightforward definition of standards:

‘Standards are documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines, or definitions of characteristics, to ensure that materials, products, processes and services are fit for their purpose.’⁶⁴

One may argue that there is not a vast difference between standards and procedural rules. Procedural rules also contain criteria to be used and applied consistently to ensure that they are

58 Ibid., p. xvii (Introduction); see also: P.M Langbroek, ‘De publieke verantwoordelijkheid voor rechtspraak’, 1994 *Trema*, p. 407.

59 W.A. Lindsay & J.A. Petrick, *Total Quality and organisation development*, 1997, p. 54 reference to J. Rampey & H. Roberts, *Perspectives in total quality*, at Total Quality Forum IV Cincinnati, OH 1992.

60 Ibid., p. 188.

61 W.A. Lindsay & J.A. Petrick, *Total Quality and organisation development*, 1997, p. 9; L.G. Picard, Sr., *The Fundamentals of quality control*, 1992, pp. xiii-xiv; S. Murgatroyd & C. Morgan, *Total quality management and the school*, 1994.

62 Lindsay & Petrick, supra note 59, pp. 8-9; see: N. Woolsey Biggart, ‘The creative-destructive process of Organizational Change: The case of the Post Office’, in J. van Maanen (ed.), *Qualitative studies of organizations*, 1998.

63 F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008, pp. 85-86; G.Y. Ng et al., *Monitoring and Evaluation of Court System: A Comparative Study*, Council of Europe, CEPEJ(2008)07, <http://www.coe.int/t/dg1/legalcooperation/cepej/series/Etudes6Suivi_en.pdf> (last visited 6 December 2010).

64 ISO: <www.iso.org> (last visited 21 October 2009).

fit for maintaining transparency and fairness of treatment throughout the whole process.⁶⁵ What separates the two may be a matter of scope of application. Procedural rules are an essential part of due process, whereas the application of quality standards are not part of the final product per se, and are not grounds for challenging the outcomes of cases (though they may be used as part of a learning process to see how results that came about were achieved).

3.2. Quality management in the courts

There has been a recent trend across Europe to implement quality management and management by objectives. Management by objectives is simply where an organisation sets certain targets for itself, or has certain targets set for it. The difference between the two is that there is not necessarily a learning loop attached to the latter, but accountability only. However, quality management sets targets in order to create a learning loop and in order to increase transparency of organisation resulting in accountability.⁶⁶

In the Netherlands, quality standards have been adapted for the judiciary: time and timeliness are measured as speed and timeliness (the definitions were still under debate at the time of the research); completeness, accuracy and consistency have been dealt with under expertise and the uniformity of the law; responsiveness has been dealt with under comportment (attitude of the judges towards the parties). Accessibility and convenience fall within the remit of government to create new courts and court buildings (and somewhat under customer service care). However, it was also decided to measure the quality of justice by including the impartiality and integrity of judges, which extends to access to a fair trial – a legal rather than organisational quality standard. These standards are constantly under development, and activities are being added to the list to monitor and evaluate.⁶⁷

Other examples include Denmark, which has created a feedback or learning loop outside of the courts between the Judicial Council, the Auditor Office and the Government. This is a system that allows the Auditor to examine the performance of individual courts, to give constructive criticism and to order the Council to follow recommendations (along with the Government). As a result the Council set goals and started to evaluate courts for performance. This has created communication channels between courts, the Council, the Auditor and the Ministry, allowing the free flow of data on court performance.⁶⁸

England & Wales have also implemented quality standards based on the Customer Service Improvement Tool.⁶⁹ This tool is used to gain an insight into users' opinions and experiences with the court. Based on information gathered by the tool, the court creates new policies towards the customer. This applies officially to the administration of the courts, but naturally, judges are also affected in terms of comportment (i.e. not falling asleep at the bench) or creating more efficiency in case management.⁷⁰

65 D.J. Galligan, *Due Process and Fair procedures*, 1996, pp. 52-62.

66 F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008, pp. 36-42.

67 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 133.

68 J. Wittrup & P. Sørensen, 'Quality and Justice in Denmark', in M. Fabri et al. (eds), *The administration of justice in Europe: Towards the development of quality standards*, 2003, p. 125, see also F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008, p. 87 for further analysis and comparison with other initiatives.

69 G.Y. Ng, 'England and Wales', in P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member States: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03, pp.23-43.

70 C. Menzies, 'Assignment of cases to the courts in England and Wales', in P. Langbroek & M. Fabri (eds.), *Case assignment to courts and within courts: a comparative study in seven countries*, 2004.

These performance standards are measured by looking at key activities of the courts, using statistical data where possible and questionnaires for the staff and ‘consumers’ at other times to highlight problem areas before making plans to improve. This should lead to a cycle of implementation, monitoring and evaluating activities and planning for new improvements. So far, research has indicated in the Netherlands, Denmark and England & Wales that, where applied, quality management can function quite effectively for organisation improvement. Furthermore, research has shown that the idea behind it is also to improve accountability mechanisms towards the public rather than being a political mechanism to control the courts.⁷¹

Something that is consistent with all research and activities conducted in the courts is that each court is a unique organisation, unique in the challenges it faces, its composition and its work processes. The flexibility of quality management and its quality cycle makes it a unique management tool for the courts. It is not like procedural law that has absolute legal requirements to guarantee justice. It is for each court to adapt its own legal procedures, culture and methods to improve. As it is systematic at each stage of the cycle, it is possible to measure the effects and outcomes of such a management tool.⁷²

Is it possible to change the courts as professional bureaucracies into professional (or quality) organisations? The indications so far are positive. Not all judges are concerned about organisation. However, some research has indicated that judges are conformist in nature and many are concerned to ensure that justice is properly served, and therefore as well organised as possible.⁷³

An important insight from research experience is that judges are being asked to become managers, and to deal with issues of finance and hence politicians directly. This does not necessarily indicate quality management in the organisation but it does indicate a shift in the relationship within the checks and balances of the constitutions within some democracies, and consequently a ‘politicisation’ of their function. ‘Politicisation’ reflects a growing trend of judges being responsible for their organisation, e.g. for case management, (human) resource management, and finance (reporting and planning). This means being transparent about how their organisations operate to the citizens and to the political branches.⁷⁴

3.3. The politics of judicial governance

The politics of judicial governance asks the question of who should be managing what? Furthermore, how should this responsibility be formulated? These questions inevitably deal with financial issues, as well as the separation of powers.

On the question of whom, the choices are generally limited: government through the ministry of justice;⁷⁵ the judiciary, through a Council or Management Commission/body of some sort,⁷⁶ or a mixed model.⁷⁷ These choices are dictated, on the one hand, by the constitutional

71 F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008, pp. 95-97.

72 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, Section 20.3.

73 G.Y. Ng, ‘England & Wales’, in P. Langbroek (ed), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member states: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03, pp.23-43.

74 F. Contini & R. Mohr, ‘Reconciling independence and accountability in judicial systems’, 2007 *Utrecht Law Review* 3, no. 2, p. 30.

75 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 232 (France).

76 *Ibid*, pp. 78-79 (the Netherlands).

77 P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member states: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03 (see especially G.Y. Ng, ‘England & Wales’, pp. 23-43).

position of judges and the perception of the role and position of courts, and, on the other, by political choices. The following paragraph presents representatives of each.

In France, research has shown that whilst the ministry of justice has a centralized body to manage finances and infrastructure, certain tasks were delegated to regional bodies to assist local courts with resource management. Furthermore, judges in France work on secondment to the ministry of justice with their management team to prepare bills that affect the organisation of justice.⁷⁸ In the Netherlands, it was decided to set up an independent Council for the Judiciary. This body deals mainly with management issues of the courts and the relationship with the political branches. It is in charge of financing and resources to the courts and, to that end, must create plans and reports for the courts to the Ministry. Another example of the tasks they are given is responsibility for the organisation and technology development. The check against this new-found managerial power is that they need money from the Ministry of Justice and Parliament; therefore, they must be transparent and work according to political standards.⁷⁹ In England & Wales, when faced with choices of how to govern the courts, the Ministry of Justice decided to centralize the administration of the courts, on the one hand, through Her Majesty's Courts Service and ensure full cooperation with the independent judiciary, headed by the Lord Chief Justice on the other.⁸⁰ In this model, they continue to cooperate in matters of management, where cooperation is needed (case listings and scheduling are examples given).⁸¹

These choices also impact on what is managed. In each model, judges are responsible for various management issues to varying degrees. This may either reflect certain distrust of judges to deal with issues of finance and management independently, or reflect a need to cooperate to get the best possible outcome. These are matters for future research.

Furthermore, the way responsibilities are organised can also be seen to impact upon the way that responsibility is shaped. For instance, in both France and England & Wales there is an inspectorate body to examine and report on the performance of the courts.⁸² In the Netherlands, users of the courts may complain to the Ombudsman in cases of maladministration, but not against judges and not whilst cases are ongoing.⁸³ This then leads to the question of how to hold judges to account in managerial positions. This is an interesting question, also for future research, as this would touch far more upon the independence and accountability of the judiciary, something not easily balanced and decided in the political sphere.

The subject of judicial governance is not only a matter of implementing new theories and techniques of management (which by itself is not easy). Judicial independence is the core value of the separation of powers, and judges must be seen to conduct the affairs of justice independently. Changes to managing the courts, even if they are to improve productivity and the results, will affect the way judges work. Changes of this nature inevitably pull judges into managerial issues, and become answerable for productivity and results as part of the courts' accountability.

78 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, pp. 232-233.

79 *Ibid.*, p. 78.

80 G.Y. Ng, 'England & Wales', in P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council of Europe Member states: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03, pp. 23-43.

81 *Ibid.*, p. 34.

82 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 210; G.Y. Ng, 'England & Wales', in P. Langbroek (ed.), *Quality Management in courts and in the judicial organisations in 8 Council Of Europe Member states: A qualitative inventory to hypothesise factors for success or failure*, Council of Europe, CEPEJ (2010)03, pp. 23-43 at pp. 36-37.

83 G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 60.

4. Conclusions

The majority of writers could fit within a socio-legal tradition, but there have not been many, in comparison to discussions e.g. in constitutional, private, or criminal law. There were not many legal empirical studies before the 1990s. Political scientists or management academics lack knowledge of the legal language, which is what the judges and even court administrators speak. In Europe, we have only in the last 15 years started to research this field. The Commission for the Efficiency of Justice was set up in 2003 to monitor and evaluate the quality of justice in the member states of the Council of Europe.⁸⁴ A series of studies was started in 2006, where they asked experts and academics in the field to write reports on certain themes. In 2008, they commissioned a study to be conducted on the Quality Projects in courts across Europe (published in June 2010). International organisations are also very concerned for the quality of justice in Europe. There is, in comparison to other government performance data, relatively little data in courts around Europe on performance, mostly because of the autonomous and independent nature of judges and the political use of such data for accountability purposes.⁸⁵

There is still much to study and develop in this field, from a legal, organisation, economic and political point of view. Where any moves are made in the organisation of the courts, lawyers will always ask, is it constitutional to do so? Will it affect judicial independence? Why is this process of ‘politicisation’ taking place? Do judges want this? If not, then why is it happening anyway? Can it be prevented, and if so, what are the consequences? For the organisation experts, the question will focus on what happens when the Ministry of Justice or government body charged with administration in the courts no longer functions effectively alongside an independent judiciary to deliver efficient and effective justice, whilst trying to quantify what exactly efficient and effective justice is. The economists ask: at what point of productivity will court performance be efficient? But also, what measurable effects are there for society of efficient judicial governance? The politicians will ask: why is efficient and effective justice not an aim for the judiciary? Is the ‘politicisation’ of the judicial function an effective answer?

The introduction to this article asked the question: If legal standards are insufficient to support the needs of judicial governance in Europe (i.e. in terms of efficiency, public accountability and modernisation (in terms of technology)) in interfacing with and meeting public needs, what approach should be taken instead? To answer this, an inter-disciplinary approach, taking into account law, politics, economics and management disciplines, was described in light of recent trends and practices in a few case studies. From this, it can be said that a discipline of judicial governance should be developed, based on an inter-disciplinary approach, to give one integrated picture of judicial governance.

However, there is a need to foster research in the field, to ensure that a consistent and common body of knowledge and language is developed based on shared (and unique) experiences. The opportunity for inter-disciplinary discourse may not require a discipline, but simply a common research objective, or a common inter-connected research field. Either way, it is a fruitful discussion to give a context for political scientists, legal academics, economists, management experts, sociologists, judges and practitioners a practical forum in which to debate this change, to find new balances within the constitutional, political, managerial, social and economic framework and to decide on a direction in which to go. This is especially so, because these

84 Council of Europe, http://www.coe.int/t/dgh/cooperation/cepej/default_en.asp 2003 (last date visited 3.12.2010).

85 F. Contini & R. Mohr, *Judicial Evaluation: traditions, innovations and proposals for measuring the quality of court performance*, 2008, p. 59-61.

different disciplines have a different starting point and perspective of the judiciary. Such a knowledge base is useful to support the processes of the politicisation and professionalisation of court organisations in well developed democracies, as well as to support courts in democracies-in-transition.

Whichever research approach is chosen, in the end it is important to keep asking these questions, as courts' integrity and independence must be safeguarded to maintain their institutional status in the democratic and constitutional make-up, rather than simply becoming another government statistic.