

Judicial Reforms ‘Under Pressure’: The New Map/Organisation of the Portuguese Judicial System

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1. Introduction

The main aim of this article is to analyse the reform of the judicial map in Portugal, which took place in a context of outside intervention as part of the Memorandum of Understanding (MoU) signed with the Troika,¹ and to highlight two structural components of the reform: 1) outside imposition in the context of financial assistance; and 2) insufficient consideration of existing diagnostics and internal dynamics. The fact that the reform, which was approved in 2013 and came into effect on 1 September 2014,² was considered by the political authorities to be the major judicial reform of recent decades, despite the circumstances in which it was carried out, underlines that this was a high-intensity project whose terms of reference were generated externally.³ It therefore presented a wide range of challenges, not only for the judicial system as a whole, including the Public Prosecution Service and other legal service providers, such as lawyers, but also in terms of its relationship to individual citizens.⁴

The political concept of the exercise of justice as one of the powers of the state and its distribution to the wider community within the national territory produces different maps of justice. Hence, depending on the political understanding of the functions of courts in society, reforms may either strengthen or weaken their status and social legitimacy.⁵ In the case of the reform of Portugal’s judicial map, the guiding principles reflected the framework of demands defined for public services by the international institutions (the European Union, European Central Bank and International Monetary Fund) that financed the Portuguese state at the height of the financial and economic crisis. This framework focused less on citizens and more on

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1 The MoU was signed by Portugal and the European Central Bank, the European Commission and the International Monetary Fund (i.e. the group of organisations known as the Troika) on 17 May 2011. In exchange for a 78 billion euro loan, the MoU, envisaging stabilisation of the public debt from 2013 onwards (which did not happen), forced the Portuguese state to implement a wide range of austerity measures over a three-year period, which extended to almost every area of governance, from social security to education, health care and justice.

2 The reform was approved by Law No. 62/2013 of 26 August, Law on the Organisation of the Judicial System (*Lei da Organização do Sistema Judiciário* – LOSJ), but only came into effect after Decree-Law No. 49/2014 was passed on 27 March. The latter provided the regulatory framework for the LOSJ and stipulated that the reform was to come into force on 1 September 2014, immediately after the annual judicial vacation (15 July–31 August).

3 S. Santos, ‘Novas reformas, velhos debates: análise das políticas de justiça e dos seus impactos no sistema judicial’, (2014) *Revista Configurações*, no. 13, pp. 11-25.

4 C. Gomes, ‘Deve Reformar-se a Reforma do Mapa Judiciário?’, (2015) *Revista Julgar*, no. 27, pp. 75-91; J.P. Dias, *O Ministério Público no acesso ao direito e à justiça* (2013); see Santos, supra note 3; R. Tavares, ‘Reforma Judiciária e acesso ao Direito’, (2013) *Revista Julgar*, no. 20, pp. 161-162.

5 R. Devlin & A. Dodek (eds.), *Regulating Judges: Beyond Independence and Accountability* (2016); see Gomes, supra note 4.

responding to the needs of the economy more efficiently and, above all, less expensively. The latter premise, requiring cuts to the running costs of the judicial system, imposed court closures, concentration of services and fewer human resources, based on a new model of territorial organisation that reduced citizens' rights of access to the courts.

This article reflects on the reform process in Portugal, which was carried out in a context of outside, international pressure, as well as on the challenges faced by the judicial actors involved. At the same time, it takes into consideration a number of concepts that call into question the reforms and their impact on the justice system.

2. The organisation/map of the Portuguese judiciary: The pre-Troika context

The courts have become a focal point in the serious economic and financial crisis that Portugal has faced since 2010, both in social and political terms. Given that the nature of democracy is reflected more sharply in justice than in any other area of governance, the main challenge currently faced by the courts concerns how to meet society's expectations with regard to efficiency and quality. Although Portugal still needs to develop in this area, it is no exception in Europe or in the rest of the world. According to Santos, a high level of democracy is impossible without a democratic revolution in the justice system, which obviously depends largely on how public policies for justice are defined and implemented.⁶

Reforming the Portuguese justice system has not proved an easy task in the 44 years since the Revolution of 25 April 1974 established a new democratic system after overthrowing the *Estado Novo* dictatorship. The overall pattern of judicial reform can be characterised both by a succession of legal changes in various areas and by their ineffectiveness. This vicious circle was only broken in the previous decade by incorporating other solutions, particularly from the spheres of management and alternative dispute resolution (ADR). An analysis of the changes introduced by successive reforms to the organisation of the judiciary reveals that a concern with satisfying corporate and political demands has often taken precedence over social interests.⁷ To a certain extent, this is symptomatic of the growing weakness of the state, as described by Boaventura de Sousa Santos and João Arriscado Nunes in the book *Reinventing Democracy*, which exposes a system incapable of facing up to the corporate interests and lobbies that bring pressure to bear on it.⁸ Given this framework, the increasingly complex organisation of the judicial system tends to follow a recurring pattern: the main priority is not to serve those who initiate legal proceedings in search of justice, but those who work in the courts. It offers statutory gains but shows little concern with improving the efficiency and transparency of the justice system or making it more accessible. Moreover, reforms to the justice system in Portugal reflect the growing importance of the symbolic effect of praxis within political struggle. Garcia-Villegas aptly describes this issue when he states that

(...) this low level of politicisation ensures permanent faith in the symbolic effect of legal reforms. Political debates are overloaded with legal references; paradoxically, almost all political conflicts need to be 'legalised' in order to be understood in political terms. As a result, legal reforms are the most common outcome of political struggles.⁹

Previous studies on the Portuguese judicial system have shown that, despite aiming to democratise justice and access to the courts, changes to the organisation and geographical distribution of the courts since 1977 have been more concerned with guaranteeing the constitutional prerogatives of the independence

6 B. de Sousa Santos, *Portugal: Ensaio contra a autoflagelação* (2011), p. 111.

7 J.P. Dias, *O mundo dos magistrados: A evolução da organização e do auto-governo judiciário* (2004); see Dias, supra note 4.

8 B. de Sousa Santos & J.A. Nunes (eds.), *Reinventing Democracy: Grassroots Movements in Portugal* (2004).

9 M. Garcia-Villegas, 'Contexts of Law and Justice in Colombia: with some glances at Latin America'. Paper presented at the *Law and Society Annual Meeting*, Miami (2000), p. 12.

and autonomy of the judiciary and other statutory rights than with genuinely ensuring efficient services.¹⁰ The various legal changes tended to leave the structure of the courts, their organisation and territorial distribution intact. Adjustments were made essentially in response to demographic changes and the increasing volume and complexity of cases, whilst preserving the same operational paradigm.

After this adjustment to the new constitutional framework following the 1977 reform, later reforms of the map and organisation of the judiciary have been dominated by two key ideas which have the immediate potential to transform a reform into a non-reform: a) the urgent need for a structural reform of the map and organisation of the judiciary that would reflect demographic, social and economic changes in the country and would represent an authentic break with a judicial architecture designed for 19th century Portugal; b) the lack of financial resources to carry out this reform, meaning that it would therefore have to be postponed.¹¹

The main priority for political and judicial actors since 2000 has been the need to rationalise the volume of work and the management of human resources and working methods in the courts, and to ensure that a diversified formal justice system can coexist effectively with more informal solutions, thus overturning the argument which prevailed until the 1990s and essentially favoured more human and material resources for the courts. Following the international trend,¹² this ‘new’ approach inspired a new set of public policy measures which were not always supported by credible studies on the different political options for the proposed methodologies and systemic perspective. The main exception was the first effective reform of the organisation of the judiciary piloted in 2008,¹³ which was formulated on the basis of preliminary studies and later evaluated in terms of the performance of the pilot districts.¹⁴ However, with the subsequent political changes, this rapidly disappeared due to external pressure, as the following timeline reveals.

The 2008 judicial map was based on the introduction of specialised jurisdictions at national level, involving the creation of new management models and a profound reorganisation of the structure of the courts. The reform had one innovative key feature: it allowed for a trial period before it was phased into the whole of the country. The new management and territorial division models were implemented in three pilot districts – Alentejo Litoral, Baixo Vouga and Grande Lisboa-Noroeste – and judicial sub-districts were created through territorial aggregation, with the aim of scaling up whilst still ensuring accessibility. The experimental component of the reform was a preliminary stage: after evaluation, preparation of the required infrastructures and legislative and regulatory instruments, and amendments based on the results of the monitoring studies,¹⁵ it was due to be extended in phases to the whole country by September 2014. In 2009, the Government approved the new Law on the Organisation and Functioning of Judicial Courts (*Lei de Organização e Funcionamento dos Tribunais Judiciais* – LOFTJ), followed by the regulatory measures for the

10 J.P. Dias, ‘Arquitetura judicial em Portugal: 5 momentos de transição para a democracia’, (2010) 2 *Sistema Penal & Violência*, no. 2, pp. 53-65; see Dias, *supra* notes 4 and 7; J.P. Dias, P. Fernando & T.M. Lima, ‘Ministério Público em Portugal’, in J.P. Dias & R.G. Azevedo (eds.), *O papel do Ministério Público: estudo comparado dos países latino-americanos*, pp. 28-70 (2008); C. Gomes, ‘The transformation of the Portuguese judicial organization. Between efficiency and democracy’, (2007) 3 *Utrecht Law Review*, no. 1, <http://doi.org/10.18352/ulr.39>, pp. 101-111; B. de Sousa Santos & C. Gomes (eds.), *A geografia da justiça – Para um novo mapa judiciário* (2006); B. de Sousa Santos & C. Gomes, ‘Geografia e Democracia para uma Nova Justiça’, (2007) *Revista Julgar*, no. 2, pp. 109-128.

11 C. Gomes, ‘Democracia, tribunais e a reforma do mapa judiciário: contributos para o debate’, (2013) *Revista Julgar*, no. 20, p. 86.

12 R. Bellamy (ed.), *The Rule of Law and the Separation of Powers* (2017); CEPEJ – European Commission for the Efficiency of Justice, Report on ‘European judicial systems – Edition 2016 (2014 data): efficiency and quality of justice’ (2016); A. Lienhard & D. Kettiger, ‘Between Management and the Rule of Law: on the move towards a management model for the judiciary – Results from the project “Basic research into Court Management in Switzerland”’, (2017) 8 *International Journal for Court Administration*, no. 2, pp. 7-19; D. Piana, *Judicial Accountabilities in New Europe: From Rule of Law to Quality of Justice* (2016); G. Vecchi, ‘Systemic or Incremental Path of Reform? The Modernization of the Judicial System in Italy’, (2013) 5 *International Journal for Court Administration*, no. 1, pp. 1-24.

13 Law on the Organisation and Functioning of Judicial Courts (*Lei de Organização e Funcionamento dos Tribunais Judiciais* – LOFTJ) (No. 52/2008 of 28 August).

14 B. de Sousa Santos & C. Gomes (eds.), *A gestão nos tribunais. Um olhar sobre a experiência das comarcas piloto* (2010).

15 This may have been the most closely supervised reform of recent decades, involving various assessment and monitoring studies and working parties. For example, in addition to various preliminary studies – particularly those produced by the Permanent Observatory on Justice at the Centre for Social Studies – after the pilot districts had been set up several reports were produced by the following: High Council of the Judiciary (Conselho Superior da Magistratura – CSM), High Prosecutorial Council (Conselho Superior do Ministério Público – CSM), Portuguese Bar Association (Ordem dos Advogados – OM), Chamber of Solicitors (Câmara dos Solicitadores – CS), and Council of Justice Officials (Conselho dos Oficiais de Justiça COJ). The Assessment Report on the Reform of the Judicial Map, by the Office of the Secretary of State for Justice, and the documents produced by the pilot districts themselves and the Union of Portuguese Judges, together with the Reference Framework for the new judicial map produced in November 2010 by the then Working Commission for the Extension of the Judicial Map, should also be noted.

provisional reform which defined the pilot district regulations for the composition of the district courts, the functioning of the departments and the organisation of emergency services.¹⁶ However, the new 2011 Government and the Memorandum of Understanding signed with the Troika put an end to this process.

Thus, despite numerous reforms, several difficulties remained, making improvements to the justice sector a lengthy and inconsistent process. Among the many reasons for this, the following six factors, which have remained relatively stable in recent decades, should be highlighted:

1. the lack of overall scheduled and properly grounded planning (no studies and/or little use of existing studies);
2. the lack of human, technical and financial resources (including those needed to implement the outlined reforms);
3. negligible (or, in some cases, excessive) support from members of the judiciary and other specialists for the diagnosis, definition and evaluation of the reforms;
4. low investment in training, particularly in-service training for the various members of the judiciary;
5. transitions that were too rapid and poorly consolidated, due to the pressure to 'deliver' using sporadic reforms to tackle structural problems;
6. limited use of pilot schemes (with the exception of the abruptly terminated 2008 reform) to test and evaluate solutions and refine strategies prior to larger investments.

There were improvements in the courts' capacity to respond to demand, but to a large extent the reduced caseload in recent years is more the result of stagnation or a falling demand for judicial services due to external measures (including alternative dispute resolution mechanisms, rising court fees, and restrictions on access to legal aid) rather than any significant improvement in efficiency.

The decades of reforms to the justice system, in particular the reform of the map/organisation of the judicial system, also reflect a number of general trends that call into question the objectives and success of this reformist drive. The upheavals in Portuguese society subjected the justice sector, like other sectors, to extreme pressure to adapt rapidly to many social and political changes. Although this 'short-circuiting' is common in transitional phases in many countries, the growing need for swift resolution of problems and difficulties also demands an equal concern for quality and citizenship and the search for quick solutions should therefore be questioned.

3. The organisation of the judicial system in Portugal: Brief description

In order to develop a firmer conceptual understanding of the ongoing reform of the map/organisation of the judiciary in Portugal, a brief description of the structure of Portuguese courts is required.¹⁷

The Portuguese Constitution and law provide for the following courts: the Constitutional Court, Supreme Court of Justice, judicial courts of first and second instance, Administrative Supreme Court, administrative and fiscal courts of first and second instance, and Court of Auditors. They also allow for the creation of maritime and arbitration courts (either institutional or ad hoc), as well as justices of the peace.

Constitutional jurisdiction is based on the Constitutional Court, whose main function is to review the constitutionality and legality of the norms that make up the Portuguese legal order, meaning that it is essentially a jurisdictional normative control body.¹⁸

The Portuguese legal system contains two major jurisdictions: 1) ordinary; and 2) administrative and fiscal. The judicial courts deal with ordinary criminal and civil matters, whereas administrative and fiscal matters are heard in the separate administrative court system. The judicial hierarchy comprises courts of

16 LOFTJ, under Decree-Law No. 25/2009, of 26 January and the corresponding regulatory framework under Decree-Law No. 28/2009 of 28 February.

17 The European Union e-Justice portal provides simple and accessible information on the Portuguese judicial system: <https://e-justice.europa.eu/content_judicial_systems_in_member_states-16-pt-en.do?init=true&member=1> (last visited 9 July 2018).

18 A.A.V. Cura, *Curso de Organização Judiciária* (2014).

first and second instance and the Supreme Court of Justice. The distinction between courts of first and second instance concerns the appeals system.

The Supreme Court of Justice is the highest entity in the judicial court hierarchy and has jurisdiction over all Portuguese territory. It is possible to appeal to this court for a third hearing of a case, although in some situations an appeal can be submitted directly from the first instance court (appeal *per saltum*).¹⁹ There are currently five second instance or appeal courts, known as *Tribunais da Relação* (in Coimbra, Évora, Guimarães, Lisbon and Oporto).

Although the 2013 reform abolished judicial districts, a decision associated with the organisation of the second instance courts, they have, in fact, remained intact.²⁰ First instance judicial courts are usually district/county courts, although they may have wider territorial jurisdiction. Since the 2013 reform, Portugal has 23 main/county courts, one for each of the district capitals, with residual competence to decide on all cases not submitted by law to another court. They are divided into central sections, with specialised competence sections for different areas (central civil, criminal, criminal investigation, family and juvenile, labour, commercial and judgment execution), local sections, which include general sections (local civil, local criminal and minor crimes), and proximity sections. Essentially, the Portuguese Government opted for a model based on one court per district with various sections functioning in different locations within the district. These sections are not autonomous courts but sections of the same court. Courts with wider territorial jurisdiction are divided according to responsibilities – intellectual property; competition, regulation and supervision; maritime; enforcement of penalties; and central criminal instruction – meaning that they have specialised competence and can hear cases involving specific matters. Their territorial competence is more extensive than the county courts, since they can hear cases in several districts or in specific areas stipulated by law.

The administrative and fiscal jurisdiction comprises courts of first and second instance and the Supreme Administrative Court. The latter, based in Lisbon, has jurisdiction over all Portuguese territory and is divided into two sections: the administrative section and the fiscal section. As a rule, this court decides on appeals based on decisions made by lower courts, but it can also deliver first instance decisions on special cases, such as the decisions of the highest authorities of the state (for example, the President of the Republic and the Prime Minister). There are two second instance administrative courts, one in Lisbon (South Central Administrative Court) and the other in Oporto (North Central Administrative Court), which in general rule on appeals from first instance administrative courts. The first instance courts are the administrative circuit courts and fiscal courts. With the exception of the one in Lisbon, they are interlinked and known as the administrative and fiscal courts.

The Court of Auditors (*Tribunal de Contas*) main task is to verify and control the legality of public expenses and all other expenses specified by law.²¹ Justices of the peace are courts with special characteristics and the authority to hear and assess certain minor civil claims (declarative civil actions involving less than 15,000 euros) more quickly and cheaply.²² They aim to ensure that the parties are involved in the proceedings to encourage fair settlement by mutual agreement. The procedures are guided by the principles of simplicity, adequacy, informality, orality and absolute procedural economy. Arbitration courts are non-state courts which serve as an alternative dispute resolution mechanism. They may be institutional (permanent) or ad hoc (created for a particular case). In recent years, the law has promoted these courts as an alternative way of dealing with litigation, since they offer a faster means of solving conflicts and more flexible and less strict procedures than the ‘normal justice’ system, thus reducing the volume of cases in other courts.²³

19 C. Gomes, ‘Assignment of cases to the courts and within the courts in Portugal’, in P.M. Langbroek & M. Fabri (eds.), *Case assignment to courts and within courts* (2004), pp. 217-238.

20 Before the new reform of the judicial map in 2013, Law No. 3/99 of 13 January and Decree-Law No. 186-A/99 of 31 May divided Portuguese territory into four judicial districts with centres in Lisbon, Oporto, Coimbra and Évora (see Gomes, *supra* note 19). Later, Law No. 52/2008 of 28 August, which established the 2008 reform, divided Portuguese territory into five judicial districts (Alentejo, Algarve, Centre, Lisbon and the Tagus Valley, and North).

21 See Cura, *supra* note 18.

22 The law excludes cases concerning family law, succession law and labour law.

23 See Cura, *supra* note 18.

4. The Memorandum of Understanding and the judicial system: Measures and reforms

The Memorandum of Understanding (MoU) signed on 17 May 2011 marked the beginning of the three-year financial bailout for Portugal. This agreement between the Portuguese state and the European Union, European Central Bank and International Monetary Fund, informally known as the Troika, was signed by the Government led by the (centre-left) Socialist Party, which then resigned. It was therefore implemented by a newly elected Government formed by the (centre-right) Social Democratic Party (PSD) and the (right) Democratic and Social Centre – People's Party (CDS-PP), in the three years that followed. Among the many measures it contemplated, there was a section devoted to the justice system. The 18 measures for improving the functioning of the justice system can be grouped under three main headings: 1) management and organisation of the courts; 2) simplification of procedures and court fees in civil and fiscal cases; and 3) measures to combat the backlog of cases.

As stated in the MoU at the beginning of the section on the judicial system, the main objective was to

(...) improve the functioning of the judicial system, which is essential for the proper and fair functioning of the economy, through: (i) ensuring effective and timely enforcement of contracts and competition rules; (ii) increasing efficiency by restructuring the court system and adopting new court management models; (iii) reducing slowness of the system by eliminating backlog of courts cases and by facilitating out-of-court settlement mechanisms.²⁴

The passage in question clearly points towards improving the functioning of the judicial system by focusing on areas that influence the economy as a whole. In other words, these were measures which would facilitate the recovery of debts by private companies and the state and improve the efficiency of the judicial system, aiming to 'do more with fewer resources', as Pedro Passos Coelho, the Prime Minister and head of the PSD/CDS-PP coalition, argued at the time. In focusing on the need for the system to respond to the economy and the recovery of fiscal debts, the programme took a markedly economic stance, excluding other problems that afflicted the Portuguese justice system. The reform of the judicial map, which the PSD/CDS-PP Government renegotiated with the Troika, effectively annulled the 2008 reform and proposed a very different model, as can be seen in the following section.

5. The 2013 judicial reform map: Territory, management and specialisation

According to the objectives defined by the 19th constitutional Government – an alliance of centre-right and right parties (PSD and CDS-PP) –, the 2013 judicial reform map was based on three fundamental pillars: broadening the geographical reach of the judicial districts; introducing specialised jurisdictions on a national level; and implementing a new management model for the judicial districts/courts.²⁵ Although the guiding principles had the potential to change the performance of the courts, determining actual success and the extent to which these objectives were achieved is a different matter.

Firstly, the reform sought to implement an autonomous, concentrated management system for each of the 23 large courts, following a management-by-objectives model aimed at administering a more efficient and better form of justice (a 'Management Board' was set up, comprising a Presiding Judge, Public Prosecutor Coordinator and Judicial Administrator). Within the area of management, the aim was to streamline distribution and procedural requirements, simplify the allocation and mobility of human resources and provide greater autonomy for the court management structures. The reform promoted management-by-

24 See the full version of the Memorandum of Understanding at: <http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf> (last visited 9 July 2018). The agreement was based on financial support in exchange for a programme of structural reforms, thus ushering in the period of 'austerity' which essentially consisted of the drastic shrinking the size and scope of the state, and cuts in operational costs (reductions in the services and capacity of the welfare state, while seeking to increase revenue through further taxation).

25 LOSJ (Law No. 62/2013, of 26 August), regulated by Decree-Law No. 49/2014, of 27 March. For a detailed description of the objectives of this reform, see <<http://www.portugal.gov.pt/pt/o-governo/arquivo-historico/governos-constitucionais/gc20/os-temas/reforma-judiciaria/novo-mapa-judiciario.aspx>> (last visited 9 July 2018).

objectives practices on the assumption that this would lead to a more efficient and effective service and a better justice system that was more compatible with local conditions.

Secondly, one of the guidelines for the reform was the total reorganisation and redistribution of the courts. The country was divided into 23 districts with 23 main courts based in each district capital, divided into central sections, specialised sections and local sections.²⁶ The central sections heard civil proceedings involving sums of over 50,000 euros and the more serious criminal cases. The local sections had general jurisdiction or were divided into civil and criminal hearings involving sums of less than 50,000 euros in civil cases or crimes subject to sentences of less than five years in criminal cases. A total of 20 courts were closed down and 27 converted into local sections (dealing with procedures such as filing petitions and checking the progress of cases, and judicial proceedings that included examining witnesses by videoconferencing – thus functioning as extensions of the courts – or, on the decision of the judge, trial hearings).

Thirdly, the reform developed the principle of specialised judicial services based on the concentration of courts and resources. Most of the 23 courts were provided with at least five competences in various specialised areas and fourteen of them offered specialisation in all areas: central civil, criminal, criminal investigation, family and juvenile, labour, commercial, judgement execution, local civil, and local criminal.

A fourth guideline focused on the need to bring justice closer to citizens. This idea was based on three main points: 1) enabling citizens and lawyers to apply to any section in the 23 new courts to consult case files, obtain further information or file petitions and deliver documents; 2) enabling the 27 local sections to provide a range of judicial services, including trial hearings if the judge ruled that this was in the interests of all parties; and 3) extending the network of specialised judicial services to cover a greater number of municipalities.

Although in general terms the reform offered positive potential for improving the performance of the judicial system, in practice the problems which emerged severely restricted this potential. In spite of the gains in efficiency and speed, overcoming the constraints on access to the courts created by the new model proved impossible. The concentration of the justice system (with a significant number of cases being heard in the central courts and centralised specialised courts) involved grouping several municipalities together and leaving a number of communities many kilometres away from the nearest courts. Given that many parts of the country are served by a poor public transport system, this has clearly further removed justice from the reach of numerous citizens. Thus, during the process of reforming the judicial map, concentration met with strong opposition led not only by the local authorities – due to the court closures affecting many municipalities – but also by lawyers, since the excessive geographical concentration did not reflect the current distribution of the profession. A wide range of arguments emerged against the reform, citing the harmful effects on the justice system resulting from the model itself and its practical application. The following section lists the main problems and challenges associated with the creation and implementation of the new judicial map.

6. Problems and challenges in the reform of the judicial map: In search of greater citizenship

‘The reform of the justice system and the new judicial map will save the country a lot of money and resources’, stated the then Minister for Justice, Paula Teixeira da Cruz. In the same interview, she went on to say that ‘it is 200 years since a reform on this scale has been undertaken, the cost of which will only amount to 39 million euros’.²⁷ In a sense, by highlighting these statements from the interview rather than the main guidelines, the Ministry of Justice website reveals the main concerns underlying the new reform: cutting costs and resources, as demanded by the Troika. Only later in the same interview did the Minister mention other objectives associated with the new judicial map, specifically that ‘the courts will have objectives

²⁶ Under the previous system, the existing 232 lower courts had already been divided into sections, chambers or civil courts. This created a number of structures which were now slightly simplified and grouped under a single ‘umbrella’ but also extended, reflecting a form of organisation which aimed to convey the idea of a major reduction, when in fact what had taken place was a reorganisation.

²⁷ Excerpts from the interview to the radio station *Antena 1* on 1 September 2014, the day on which the reform of the judicial map came into force, published in the Ministry of Justice website <<https://www.historico.portugal.gov.pt/pt/o-governo/arquivo-historico/governos-constitucionais/gc19/os-ministerios/mj/mantenha-se-actualizado/20140901-mj-novo-mapa-judiciario.aspx>> (last visited 9 July 2018).

and schedules to meet, justice will be more transparent for citizens, and district courts will become more specialised, thus improving the quality of justice'.²⁸ However, at no point did she allude to the importance of facilitating access to law and justice for citizens as a structural element of the judicial system. In fact, the reform can make access to the courts more difficult for citizens in many cases and it may be argued that, for many Portuguese, justice is now more remote and seriously lacking in local interfaces: the claim that the reform created a *judicial desert*, particularly in the interior of the country, is justified.²⁹ We will now look more closely at some of the issues raised by the reform.

6.1 The process of reforming the judicial map

The process of reforming the judicial map in Portugal was elaborated and implemented under external pressure (the Troika effect) in a brief period of time and, in contrast to the earlier phased extension model, was applied to the whole country. This meant that one of the most important and demanding judicial reforms in decades was prepared, approved and implemented in only three years. Considering the justice system in isolation, the reform of the judicial map may have been, as the political authorities repeatedly claimed, the 'reform of the century'. However, neither the model nor its development merit this description. From the outset, the process was based on the presumption that it was necessary to break with the past and start again, ignoring all the knowledge and experience gained from the reform already being trialled. As previously noted, the Socialist Party Government in power when the MoU was signed considered that a reform on this scale should first be trialled to allow for corrections and improvements before it was extended to the rest of the country.³⁰

This discarding of experience gleaned from the earlier reform process also extended to the knowledge available in studies that were ignored at the time. Instead of drawing on research developed using scientific methodologies, the political authorities felt that their options could be adequately supported, specifically the decision not to proceed with the model that was being trialled, on the basis of public reports produced internally by the Ministry of Justice, which were poorly grounded and focused on procedural turnover (and in part on human resources). In fact, the reform process was planned and implemented by the Ministry of Justice without it presenting any credible or relevant information to support its politically motivated options.³¹ The entire reform process indicates that the main concern of the 19th constitutional Government, led by the PSD/CDS-PP coalition between 2011 and 2015, was to respond to one of the points in the Memorandum signed with the Troika, which stipulated that by the end of the parliament's term a reform of this nature and complexity had to be completed.

The decision to abandon the former pilot-experimental model, and its phased extension after monitoring and evaluation, posed serious problems for the implementation of the current reform, which came into effect on 1 September 2014. The problems that emerged were felt on a number of levels, particularly in the following areas: information technology, with the shutdown of the CITIUS³² portal for approximately two months and the ensuing consequences, which have never been properly assessed; the physical condition of the buildings, with many courts offering inadequate facilities for the day-to-day work of the justice system and many premises still undergoing construction work and unfit for proper service; the lack of organised storage space for case files; inadequate training of staff in the new organisational model, which left the new district coordinators responsible for establishing new organisational structures in a short period of time; and

28 Ibid.

29 See Gomes, *supra* note 4.

30 See Santos & Gomes, *supra* note 14.

31 DGAJ – Direção-Geral da Administração da Justiça, 'Ensaio para a reorganização da estrutura judiciária' (2012), available at <http://www.dgpj.mj.pt/sections/DestBanner/seminario-internacional/downloadFile/attachedFile_2_f0/ensaio_reorganizacao_estrutura_judiciaria.pdf?nocache=1332868317.67>; MJ – Ministério da Justiça, 'Linhas estratégicas para a reforma da administração judiciária' (2012). For further information on the judicial map implemented in 2014, see the official Ministry of Justice site at <<https://www.historico.portugal.gov.pt/pt/o-governo/arquivo-historico/governos-constitucionais/gc20/os-temas/reforma-judiciaria/novo-mapa-judiciario.aspx>> and PLMJ, 'O Que Muda Com o Novo Mapa Judiciário' (2014), <http://www.plmj.com/xms/files/newsletters/2014/Setembro/O_QUE_MUDA_COM_O_NOVO_MAPA_JUDICIARIO.pdf> (last visited 5 July 2018).

32 'From the Latin quicker, faster, [CITIUS] is the project for the dematerialisation of judicial proceedings in courts developed by the Ministry of Justice. It includes software applications for the various judicial actors: judges, public prosecutors, court clerks, lawyers and solicitors', available at <<https://www.citius.mj.pt/portal/article.aspx?ArticleId=0>> (last visited 9 July 2018).

insufficient information for the public, which led to difficulties in accessing judicial services.³³ This lack of information for citizens and other institutional and civil society actors regarding the location and territorial and legal competences of the new courts created confusion, with users facing an information ‘blackout’ in terms of where and who to apply to during the transitional period and even for some time after this. The failure to publicise and distribute information and leaflets on time and the lack of sites providing full information on the distribution of the new courts and their contact information led to discontent.

This major upheaval in the functioning of the justice system lasted several months and had consequences that are still evident and affect court professionals and citizens using the justice system today. They are due not only to a lack of planning and the absence of a suitable preparation period for the reform, but also to a lack of short-term financial investment to ensure that the ‘reform of the century’ could be implemented successfully.

6.2 Territorial distribution, social cohesion and physical access to the courts by citizens

Replacing the complex organisation of the judiciary with a system that develops the concept of ‘specialisation’ but maintains or even increases this complexity by grouping jurisdictions together across widely dispersed territories does not help to simplify the model. In addition, the new reform opted to maintain the historic separation between the law courts and the Administrative and Tax Courts, although other studies³⁴ and various legal and political debates had already explored the advantages and disadvantages of this option and identified a number of problems.³⁵

In addition to the concentration of litigation, another problem emerged from the reform, calling into question the criteria for its distribution of judicial services. The geographical distribution of the specialised sections of the new courts, taking advantage of existing court buildings by grouping those sections together, was carried out without any comprehensible criteria, apparently on the basis of making use of existing physical structures. The judicial actors themselves have reported many examples of odd locations and discontented citizens. No known studies justify these options and there have been instances of specialised sections being placed in geographical areas where the caseload is low, while in other areas in the same district there is no section to deal with the existing caseload.

The decision to reform the judicial map by a geographical distribution based on quantitative rather than qualitative criteria immediately raised questions about the failure to consider territorial, social and economic cohesion. The planning of the distribution of state services should aim to reduce differences between regions to provide what is generally known as social cohesion. However, this process clearly showed that it favoured allocating courts and associated services simply on the basis of mathematical calculations, without taking caseloads or physical distance into account. Although Ministry of Justice officials originally guaranteed a maximum distance of 30 kilometres from the nearest justice service across the whole country,³⁶ this has not proved to be the case, not only because there are greater differences in geographical areas, but also because the unequal provision of public transport and accessibility in different regions of the country was not considered. It was also decided that the organisation of the judiciary should not be incorporated into any of the standard territorial units used for the distribution of public services such as healthcare, education, social security, thus reinforcing the dismantling of links between the territorial basis of the justice system and other public services. This in turn led to further upheavals due to the need to interact with different public bodies that are now, in geographical terms, even less connected.

33 Images broadcast on various television channels in the final months of 2014 and the beginning of 2015 showing building work still in progress while judicial proceedings and trials were taking place, staff and magistrates transporting thousands of files in their own private cars during the court vacation, and the difficulties experienced by staff and magistrates working in temporary modular offices while the courts were still undergoing repairs, among many other problems daily reported by many members of the judiciary, unions, associations and politicians, became famous.

34 See Dias, *supra* note 7.

35 Among other issues, the discussion centres on whether administrative courts should be incorporated as sections of the law courts, as is the case with the labour and criminal courts, the duplication of structures, such as the two Supreme Courts (Justice and Administration) and two High Councils (for the Administrative and Tax Courts and for the Judiciary in general), and the separate management of human resources, in particular judges, which leads to dysfunctionality.

36 See MJ – Ministério da Justiça, *supra* note 31.

6.3 Working conditions and the functioning of the courts

Implementing a reorganisation of the courts without ensuring their physical capacity in advance inevitably leads to poor working conditions, with the result that the services provided to citizens do not meet the usual quality standards. In this case, the lack of forward planning and guarantees of suitable physical conditions to accommodate services and human resources meant that many courts began functioning without the minimum conditions to enable them to carry out their work properly. Courts still undergoing building work, staff working in temporary modular offices, temporary billeting for personnel and case files were just some of the problems that took a long time to solve in many courts, and some still remain. Consequently, the morale of staff working in the judicial system has been significantly reduced, as has their capacity to carry out their work in a competent and dignified manner.³⁷ Concentration, in many cases, required new buildings to accommodate the human resources, equipment and archives and anticipate future needs. In reality, the redistribution of different services (sections, courts of the first and second instances, local courts, Departments for Investigation and Penal Action – DIAPs – etc.) in premises dispersed around the country appeared to be based on 'tidying up' services and judicial staff rather than any effective need to access specialist services, thus creating problems both for professionals and for citizens in search of justice.

The chaos that resulted from the implementation of the reform made it clear that the planning necessary to ensure that the services were organised in suitable buildings of the appropriate size for the actors and users – i.e. that they guaranteed adequate space for all (internal staff, lawyers, users, support services, etc.) – was lacking. The schedule for the reform (which had to be executed within a few months) and the resources available (for finance, equipment, human resources and buildings) resulted in a troubled start for the new judicial map, in very precarious working conditions that could have given the Portuguese Authority for Working Conditions grounds for closing down some services.

6.4 Additional services and alternative dispute resolution mechanisms

The reform of the judicial map, if correctly planned and executed, should also have included adequate links between the judicial services and Alternative Dispute Resolution (ADR) mechanisms, such as legal advice and information, mediation and arbitration services. This would have involved not only studying and estimating the need for these services under the new geographical organisation to ensure even coverage, particularly in municipalities that would be deprived of a court or in cases where the courts were more distant, but also ensuring that information was made available on the options provided for citizens (including legal professionals). Moreover, although some services which offer mediation may be involved in court cases and therefore require special links with the courts, this was not adequately planned or resolved in the years which followed.

A reorganisation of the ADR mechanisms should therefore have been considered in the new judicial map, in order to ensure that they were equally distributed throughout the 23 districts, linked to the various judicial services, and accessible to all citizens.

The new judicial map also failed to consider links with the main support services in the courts (social security services, forensic medicine institutes, registry offices, etc.), thus adding to the difficulties in ensuring the necessary links between judicial and other state services.

The current Government, led by the Socialist Party, with the parliamentary support of the two other parties of the left, promised to tackle these problems but as the Government nears the end of its term in office, little has been done, proving that, in Portugal, ADR mechanisms are more 'law in books' than 'law in action'.

37 T.M. Lima, 'Trabalho decente, seguro e sem riscos: uma questão de direitos', (2004) *Revista Manifesto*, no. 7, pp. 33-41; T.M. Lima, 'Riscos Profissionais no trabalho intelectual: da ergonomia aos factores psicossociais', in *Actas do Colóquio Internacional Segurança e Higiene Ocupacionais* (2006).

6.5 Consultation services for citizens: The Public Prosecution Service in (in)action

As earlier studies have established, the provision of a public consultation service is an essential part of the duties of the Public Prosecution Service in Portugal.³⁸ However, the reform of the judicial map was implemented with no concern for incorporating a coherent, connected network of supplementary support services for citizens provided by the Public Prosecution Service. There is no model for the Public Prosecution Service's consultation service by judicial or general area, or common timetable for supporting citizens. The Prosecutor General sought to remedy this with the provisions envisaged in the new LOSJ (Law No. 62/2013 of 26 August) and its regulatory framework (under Decree-Law No. 49/2014 of 27 March), leading to regulations for the functioning of the Public Prosecution Service's consultation service in each of the 23 districts. The overall guidelines apply to all districts, but allowances are made for differences according to specific geographical and demographic situations. Even so, this is not justified given that a certain level of standardisation and regularity is required for services offered to citizens. The inadequate information on the Public Prosecution Service's consultation service compounded a problem that had existed prior to the new reform of the judicial map. Efforts by the Prosecutor General and even the Public Prosecutors' Union to create mechanisms, in particular internet pages,³⁹ to provide information on the different services and competences of the Public Prosecution Service, should, nevertheless, be noted.

In addition, there is still a need for a better definition of exactly what public consultation services can achieve, whether in legal or simply administrative terms, so that the performance inspection procedures for Public Prosecution Service magistrates and judicial support services can also evaluate the volume/backlog of case files, the support provided and the results of this service. The ability to provide clarification and resolve possible conflicts in the judicial phase, which is included in this service, is essential to achieving a competent, informed and swifter justice system for citizens seeking to solve or clarify their problems.

6.6 Management of the judicial system

Whatever the model of the judicial map and regardless of the extent to which structures are concentrated, the model for the governance of the judicial system and management of the courts is crucial to the proper functioning of any reform of the judiciary. In this reform of the judicial map, a rigid structure of governance and system management was retained, even at court level.⁴⁰ Despite the creation of a management board for each district court, the management model, divided between the judicial and executive powers, did not alter the fact that many services with a direct influence on the functioning of the autonomous courts were poorly coordinated. This is a problem which intensifies if some of these services are directly dependent on structures within the Ministry of Justice (particularly court management structures), while the judicial actors have little capacity to manage the local human and material resources that resolve day-to-day problems effectively and swiftly. It is therefore imperative to rethink court management in terms of an autonomous model similar to the ones used in the Nordic countries, Ireland or the Netherlands, in which the Ministry of Justice is responsible on a central level for regulating and overseeing the work of the justice system, in order to ensure local management and a greater capacity to resolve problems and respond to structural and everyday needs.⁴¹ However, there is known to be longstanding resistance to this, particularly on the part of the political authorities, which have managed to maintain external 'control' over the judiciary, with repercussions in terms of negotiations with organisations within the sector, especially the judicature. The judicature itself has been equally opposed to a more concentrated management model, since it fears losing

38 See Dias, *supra* note 4; J.P. Dias, 'Desafios ao Ministério Público em Portugal: "porta de entrada" para a cidadania', (2014) *Configurações*, no. 13, pp. 27-36; J.P. Dias, 'O papel de interface do Ministério Público em Portugal: da relevância à institucionalização de "novas" funções', (2015) 16 *Cronos*, no. 1, pp. 161-185.

39 It should be noted that the Public Prosecutors' Union launched the worthy 'Information Campaign for the Public Prosecution Service' initiative, which, according to its website (<<http://ministerio-publico.pt/>>), aims to 'provide information on the Public Prosecution Service and how it is organised, its functions, how it serves the country and the entire population and how people can use the Public Prosecution Service (offering information, by residential area or topic, on where to find the appropriate service, its contacts and timetable)'.

40 The management of buildings, equipment, information technology and human and financial resources is divided between the Directorate-General for the Administration of Justice, the Institute of Financial Management and Judicial Infrastructures and the various Councils (of the Judiciary, Administrative and Tax Courts, Public Prosecution and Justice Officials).

41 See Dias, *supra* note 7.

its (albeit limited) 'autonomy' in managing careers and disciplinary measures, currently divided among the various High Councils, and views this as a factor that would restrict its independence, even though this is more apparent than real. Nowadays, one of the issues at the centre of the social and political debate in many countries concerns extending autonomous or independent management of the courts, which is considered essential to their (functional and judicial) independence from the executive powers. In Portugal, one of the recurring themes in this debate is the redefinition of the overall management model of the judicial system through the creation of a single High Council of Justice (to replace the present High Councils) that would cover the various services within the Ministry of Justice and would therefore be capable of assuming effective management of the courts and their resources (including the judicial professions). This model would, from the outset, help to eliminate repeated instances of blame shifting and provide for greater accountability. We need only to look at the existing governance and management model to see that it is incapable of attributing any responsibility for failures in the system: the 'crash' in the CITIUS software system in September 2014 is only the most obvious example.

7. Conclusion

According to the previous Minister of Justice, the recent reform of the judicial map aimed to improve the efficiency and quality of justice on the basis of concentrated management of the courts and greater organisational specialisation. However, the reform failed to ensure that services were brought closer to citizens. Moreover, the way in which it was planned and implemented, under heavy external pressure (the Troika effect) gave rise to a series of problems and difficulties that reflect serious inefficiencies and structural problems and remain unresolved after four years.

In planning the geographical distribution of the courts, the failure to take territorial and social cohesion into account, poor links with alternative dispute resolution mechanisms, shortage of adequate physical working conditions and infrastructures, failure to structure an integrated system for the Public Prosecution Service's consultation service and preservation of the overall management model for the judicial system demonstrate that the reform was inadequate and limited from the outset. Moreover, there has still been no review of the actual problems that have persisted since the introduction of the new judicial map, although several promises were made. The current Minister of Justice, Francisca Van Dunem, has stated that her short-term concern is to resolve the most serious problems in the hope that an overall reformulation can be planned in the medium- to long-term.⁴² On 24 May 2016, a set of measures were announced to correct the most glaring errors identified in a preliminary assessment of the reform,⁴³ with the aim of introducing measures that will effectively 'bring justice closer to citizens'. In order to achieve this, the Ministry of Justice proposes reopening '20 court premises that were closed down, the mandatory holding of trials in the current 27 local sections, and the division of the central family and juvenile sections'.⁴⁴ Other concerns reflected in the proposed changes include tackling the consequences of the ongoing abandonment of the interior rural regions with increasingly ageing populations and improving access to the justice system by reducing distances and costs for those who seek justice. These measures, which are considered urgent, essentially aim to fulfil the political pledge to reopen the courts closed down by the previous Government but do not reflect the results of any in-depth assessment of the reform involving public discussion on essential changes. Once again, the decision has been to opt for specific minor revisions which, although well-directed, should be properly linked to a more structural reform plan. By 2018, only minor changes and improvements had been made, particularly to infrastructures, which have had no significant impact on the overall functioning of the judicial system.

42 See her remarks at the hearing of the Parliamentary Committee for Constitutional Affairs, Rights, Freedoms and Guarantees on 2 February 2016, at <<http://www.portugal.gov.pt/pt/ministerios/mj/noticias/20160202-mj-ar.aspx>> (last visited 9 July 2018).

43 For details of the corrective measures announced, see <<http://www.portugal.gov.pt/pt/ministerios/mj/noticias/20160524-mj-mapa-judiciario.aspx>> (last visited 9 July 2018).

44 Ibid.

In conclusion, there are three major areas that should form the basis of any judicial reform, particularly a structural reform such as the organisation of the judiciary.⁴⁵

Citizenship and social trust

The courts are central to the quality of democracy and have a broad role to play, especially in protecting and ensuring rights, liberties and guarantees and social control, and in facilitating social and economic development. In addition, they have symbolic functions significantly associated with the level of confidence citizens have in the functioning of state institutions and the administration of justice. The judicial map reform process should therefore involve citizens in drawing up a balance between rationalisation and proximity, on the grounds that the development of inclusive state policies strengthens democracy and social cohesion and that this will not be achieved merely through the formal political legitimisation that results from the electoral process.

Access to the law and justice

Access to the courts is currently constrained by many factors such as legal costs, restrictions on legal aid, and access to other legal services, in particular the Public Prosecution Service. However, physical distance is also an important aspect of access, and reforms of the judicial map should not compound geographical abandonment. It is necessary to take into account the impoverishment of populations, geographical asymmetries and the travel difficulties and costs for parties and witnesses during the entire proceedings. It is possible to create a balance between rationalisation, access and citizenship without using methods that are too punitive for communities in the interior of the country. The present reform has made justice, in general, more distant.

Quality and efficiency

As is the case with enforcement procedures, the move towards specialisation and concentration of litigation can offer advantages in terms of quality and efficiency. However, in certain areas, particularly in family, juvenile and labour justice, this should be combined with local services, namely those provided by the Public Prosecution Service, to ensure that access is not restricted, since efficiency and quality cannot be achieved merely through specialised judicial bodies. Citizens and companies continue to wait far longer than is reasonable in courts that have specialised jurisdiction. It is also essential for professionals working in these areas to receive specific training – which is not the case at the moment – and for innovations to be introduced into the internal operations and working methods of the support units and judicial proceedings in order to change the model that has existed for decades. However, the reform envisaged or achieved very little in this regard.

As we have argued in this article, the process of implementing the reform under external pressure reduced its chances of achieving its defined objectives, whether in terms of improving proximity and efficiency or cutting costs. The chaos which ensued and the visible, measurable results show the errors of the strategy adopted and the model implemented, with serious consequences for the functioning of the judicial system and consequently for citizens and businesses that require judicial protection.

One conclusion appears obvious: a top-down reform aggravated by the external demands of the Troika as part of an agreement to provide financial support for Portugal whilst ignoring the social context of the various territories and the wider interests of citizens, has every potential to prove, in practice, harmful to citizens and democracy. ■

45 See Gomes, notes 4 and 11.