

Reconciling independence and accountability in judicial systems*

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1. Introduction

Since the mid 1990s, the contraction of available resources and the spread of 'new public management' approaches have presented new challenges to European judicial systems, expecting them to improve simultaneously their efficiency, quality of service delivery and accountability mechanisms, in line with the expectations on other branches of the public sector.¹ Through an analysis of some of the findings of several research projects financed by different institutions,² this article considers ways in which these expectations, and the projects to which they give rise, play off against the very different traditions of the law and the judiciary. In various countries these expectations have produced a number of procedural, structural and above all managerial policies³ that have led to new forms of 'managerial' evaluation of the activities of courts and judges. The approaches to be found range from traditional statistical surveys of caseload, largely lacking in any consequences, to performance based remuneration systems that define the salary of individual judges based on the number of cases they decide.

The development of these reforms has been characterised by tensions between professional groups coming from diverse disciplinary backgrounds, and upholding divergent principles. These tensions have been expressed as conflicts of values, such as independence versus productivity.⁴ In courts and justice ministries the fault lines between these disciplines, principles and values generally pit the judges against the executive (and sometimes the legislature). In many cases the judges and their associations have opposed these reforms, complaining that they are an attack on their independence, while the policy makers (parliamentarians, ministers or judicial councils) simply reiterate the need to implement new forms of managerial accountability.⁵

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1 C. Pollitt *et al.*, *Public Management Reform. A Comparative Analysis*, 2006, p. 101.

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

3 M. Fabri, 'Policies to Enhance the Quality of Justice in Europe', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, pp. 77-80.

4 P. Langbroek, 'Quality Management Concerning Judges, Judgements and Court Services', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, p. 49.

5 J. Douglas *et al.*, 'The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?', 2003 *Public Administration Review* 4, pp. 441-453; K. Malleon, *The New Judiciary: The Effects of Expansion and Activism*, 1999, chapter 3, quoted by G.Y. Ng, *Quality of Judicial Organisation and Checks and Balances*, 2007, p. 17; American Bar Association, *An Independent Judiciary. Report of the ABA Commission on Separation of Powers and Judicial Independence* 1997, <http://www.abanet.org/govaffairs/judiciary/>

Having brought these conflicts into stark focus, this change of scene reveals that the concept of accountability – especially in the judicial reform debate – has become ‘fluid’ and ‘amorphous’, as Le Sueur⁶ has observed. Since definitions of accountability have often simply neglected debates over the specific role of judges and the legal traditions on which they rely, it becomes all the more necessary to clarify the concept. Moving from some of the contributions of public administration we hope to cast some light on the concept of accountability as commonly used in the judicial reform debate.⁷

Our first step, then, will be to analyse the terms of that debate to highlight the different conceptions of accountability at work. We then try to reconceptualise accountability in a way that comprehends both the legal and managerial traditions, pointing out their common aims as well as their divergent focus and methods. Therefore we seek neither to promote a managerial conception of accountability at the expense of the legal tradition, nor to champion judicial demands against requirements for managerial accountability.

Noting the limitations of one sided approaches based either in law or in management, we identify the very tension between managerial and legal demands as a major constraint on the improvement of judicial systems and their effective assessment. After analysing the problems associated with specific managerial policies implemented in Spain, Finland and Italy, we propose a reconceptualisation of accountability in a judicial context. Instead of pitting ‘independence’ against ‘accountability’, or legal against managerial accountability, we suggest that these approaches may be reconciled by building upon their common aims, and by involving the diverse actors in suitable ways. This proposal is then illustrated by reference to a final case study which we see as an instance of ‘cooperative accountability’. This conceptual foundation and subsequent analysis allow us to identify approaches capable of reconciling the classic dilemma between independence and accountability, from a theoretical and a practical point of view. These approaches demonstrate the continuing relevance, twenty years later, of Cappelletti’s proposal for a socially responsible justice system, based on the idea of ‘responsive law’.⁸

2. Independence versus accountability?

We begin this analysis of the question of public sector accountability as it applies to judicial systems by reviewing the way tensions have been played out in debates over judicial reform. These have been conceived as based in the opposition between independence and accountability for many years,⁹ but the change of scene we are currently witnessing modifies the way the issues are framed in a number of ways.

The problem has traditionally been approached by considering the links between judicial discretion and the political role of judges.¹⁰ But as attention has been focussed on the problem of resources and their use, the crucial question becomes the relationship between the judiciary (and judicial organisations), the resources allocated and the services delivered to the community. The judge is then no longer valued exclusively as an independent decision-maker, but also as an

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6 A. Le Sueur, ‘Developing Mechanisms for Judicial Accountability in the UK’, 2004 *Legal Studies* 73.

7 M. Bovens, ‘Analysing and Assessing Public Accountability. A Conceptual Framework’, 2006 *European Governance Papers (EUROGOV)*, p. 5.

8 M. Cappelletti, *Giudici Irresponsabili?*, 1989; P. Nonet *et al.*, *Law & Society in Transition*, 2001.

9 A.B. Atchison *et al.*, ‘Judicial Independence and Judicial Accountability: A Selected Bibliography’, 1999 *Southern California Law Review* 3, pp. 723-810.

10 C. Guarnieri *et al.*, *The Power of Judges*, 2002, p. 154; J.L. Waltman *et al.* (eds.), *The Political Role of Law Courts in Modern Democracies*, 1988, p. 1

actor with a role to play as part of a public organisation delivering services to the public. If judges as independent decision-makers were to be evaluated according to the extent of their independence and the quality of their decisions, the newly conceived judiciary is subject to ‘managerial’ performance methods that neglect fundamental values of the judicial process. In such cases accountability comes to be seen exclusively from a managerial perspective.

In the judicial reform debate, accountability and judicial independence are values that are generally considered to be in tension, if not actually clashing.¹¹ According to a former director of the American Judicature Society, the judges’ defence of their own independence is essentially based on two arguments. The first is that independence represents a value in itself. The second is that it is damaged by the mechanisms of accountability.¹² A number of authors agree with this second argument. Russell, for instance, observes that in liberal democratic regimes, even as a result of the increase of judicial power, ‘the liberal principle of judicial independence runs up against the democratic principle of accountability’.¹³ In any case, in those regimes in which the legitimacy of public power is directly connected with mechanisms of accountability, the courts have much to gain by adopting them.¹⁴

A somewhat more insightful judicial or legal response has accepted the need for accountability, but maintained that ‘the demand for accountability is satisfied by the hearing of almost all matters in open court, by the freedom of the media to report on such proceedings, by the critical view of academic commentators, and by the possibility of being overruled by higher courts’.¹⁵ On this view, the judges are already as accountable as they need to be, on their own terms, and the managerial conception of accountability is at best an irrelevance. Whether in the more consolidated democracies,¹⁶ or in those in the process of consolidation, it is increasingly difficult to claim that judges do not need to be held accountable. The question of judicial accountability cannot be simply brushed aside with the argument that it is damaging to independence.

As to the question of whether independence constitutes an end in itself, it suffices to recall the words of Cappelletti, for whom ‘the independence of the judiciary from the executive, far from being an end in itself, is nothing but another instrumental value [which is] intended as a means of safeguarding another value, that is, the impartiality of the judge’. In other words, just as will be seen in the case of accountability, neither the independence of the judiciary nor that of the individual judge is an end in itself. It is, rather, a necessary means to the end of the adjudication of cases by an impartial and neutral third party.¹⁷

The problem has been posed as one of balancing accountability with impartiality, that is to say, with the values that justify the guarantees of independence. That would require that we identify the various ways of keeping the conflicting requirements of legitimacy in equilibrium: how to protect the impartiality of the judge, while ensuring democratic accountability.¹⁸ This

11 *Ibid.*; Atchison *et al.* 1999, *supra* note 9.

12 F.K. Zemans, ‘Public Access: Ultimate Guardian of Fairness in Our Justice System’, 1996 *Judicature* 4, pp. 173-175.

13 P.H. Russell *et al.* (eds.), *Judicial Independence in the Age of Democracy*, 2001. This passage is introduced as follows: ‘If the movement of authoritarian regimes toward liberal democracy raises the question of the minimum conditions of judicial independence required for a regime to be truly liberal, the growth of judicial power within long established liberal democracies and the assignment of major responsibilities to the judiciaries in new and emerging liberal democracies rise the very opposite question of how independent a powerful judiciary can be without undermining democracy.’ (p. 2).

14 W. Voermans, ‘Judicial transparency furthering public accountability for new judiciaries’, 2007 *Utrecht Law Review* 1; Le Sueur 2004, *supra* note 6.

15 H. Corder, ‘Seeking Social Justice? Judicial Independence and Responsiveness in a Changing South Africa’, in Russell *et al.* 2001, *supra* note 13, p. 202.

16 M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, 1995.

17 Guarnieri *et al.* 2002, *supra* note 10, p. 156.

18 *Ibid.* pp. 156 and 160.

approach poses the problem as a zero sum game, suggesting that the two principles may be traded off so that an increase in accountability leads to a reduction in the independence (and hence impartiality), and vice versa. In this paper we challenge the very idea of a ‘balance’ between accountability and impartiality. To that end we will analyse the notion of accountability, in the following section, and propose a more inclusive definition which does not posit a system of opposing forces.

Following that conceptual work we will have occasion to analyse several case studies in which managerial accountability has played out as a zero-sum game. We will conclude, however, by showing that, under different circumstances, greater accountability – in the inclusive sense that we propose – may instead strengthen other key values such as independence and impartiality. This is a crucial issue. If there is complete agreement that these key values lie at the heart of the judicial system, then it must be possible to *account for* those values too. It cannot be taken for granted that judges will always act with the required degree of impartiality or independence. In some countries considered in this study, problems have arisen when judges act as private arbitrators in alternative dispute resolution. These activities may threaten the independence and impartiality of the judge towards a party in a particular case. They may compromise the judge’s independence or appearance of independence more generally.

There is no shortage of criticisms of this sort. In Italy, a 1981 research publication exposed the risks associated with the phenomenon of arbitration as a sideline job for judges.¹⁹ For more than twenty years there have been debates and arguments urging the Judicial Council (*Consiglio superiore della magistratura*) and the Parliament to remedy this situation by barring ordinary judges (though not administrative ones) from arbitrating. A similar situation occurred in Denmark as a result of media criticism. Concerned at the implications for productivity as well as independence and impartiality, the Council of Presidents of court offices asked the Minister of Justice to restrict judges’ sideline jobs outside the courts.²⁰

Each of these cases demonstrates accountability mechanisms that have been used to promote impartiality and independence. Independent research or newspaper reports have brought a problem to the attention of the forum of public opinion and stakeholders or the parliament: the actions legally carried out by some judges may be in conflict with the principles of independence and impartiality. At that point in both cases consequences followed. In Denmark these were limited to a gentle request to reduce these extracurricular activities. In Italy, twenty years of discussion have finally led to far-reaching solutions: the judges may no longer engage in private arbitrations. The paradoxical end result was that Parliament and the arms of executive Government – opportunely stimulated by informal and soft accountability mechanisms – have acted to make the judges more independent and impartial. These two examples illustrate well how the independence of the judiciary is not necessarily in conflict with accountability. They show, moreover, that an inclusive approach to the problem of accountability may reinforce the very values that are often thought to be threatened by it.

3. Accountability and judicial systems

Having highlighted some of the confusion in the debate over the accountability of judges, we turn now to explore the different forms of accountability operating in judicial systems. The empirical

¹⁹ F. Zannotti, *Le Attività Extragiudiziarie dei Magistrati Ordinari*, 1981.

²⁰ J. Wittrup *et al.*, ‘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. 494.

research allowed us to identify different forms of accountability based on different institutional and organisational arrangements and promoting different values. The traditional legal forms of *legal accountability* developed to protect the respect for formal rules, have been overlaid by new methods of *managerial accountability* that have been developed to protect and promote efficiency, cost control, and link results to resources. Before reporting on those results, we attempt a reconceptualisation of the notion of accountability that will offer a map by which we may organise our results.

In recent years accountability has been one of the key issues stressed by the new public management.²¹ While this has had the advantage of drawing attention to the concept, it has also had less desirable effects. In public debates in many countries accountability has lost its original, instrumental function to become an iconic end in itself, to the neglect of other values and interests.²² In addition, in the judicial reform context, the idea of ‘reinventing government’²³ has often given accountability a narrower scope, to the extent that it has been almost exclusively focused upon economic and managerial values, tools and methods.²⁴ This tendency risks losing sight of the original meaning of the concept and with it other values and interests required for the effective operation of the public sector. These issues are brought into particular focus when the public sector includes courts and judges. This study’s focus on judicial systems illustrates the particular tension between entrenched professional groups – managers and judges – each with their own disciplinary base and their valued traditions.

Given the problems in recent conceptualising of accountability in the judicial reform debate, it is timely to recall the definition given to the term by Simon *et al.* nearly fifty years ago: ‘Accountability is the combination of methods, procedures and forces determining which values are to be reflected in administrative decisions’.²⁵ If, as is commonly held, public officials acting in the name of or on account of the State are responsible to the citizens for their actions, accountability becomes the instrument which expresses this responsibility.²⁶ This is characterised by a mass of formal and institutional procedures as well as by various unanticipated intrusions from political and social forces making claims and demanding responses in ways which are both unprogrammed and unprogrammable. Accountability can thus be characterised on one hand as those systems which instil the values and interests of the appropriate stakeholders²⁷ within organisational behaviour. On the other hand, accountability can be characterised as the ‘mechanisms’ by which one can analyse or assess whether the organisation builds those values and interests into its own actions and decisions. In this way accountability can be considered as a two way channel of communication. First, it must convey information about the functioning of the organisation to those having the right to know. This information may include its objectives, its fundamental values, and the interests it is dedicated to protecting. Second, it must provide for methods and techniques to ensure that the members of the organisation act consistently with those values and interests. Thus accountability is that complex of means which reinforce the responsibility of public actors.

21 T. Hernes, ‘Four Ideal-Type Organizational Responses to New Public Management Reforms and Some Consequences’, 2005 *International Review of Administrative Sciences* 1, pp. 5-17.

22 Bovens 2006, *supra* note 7, p. 7.

23 D. Osborne *et al.*, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector*, 1992.

24 NACAM, *Holding Courts Accountable. Counting What Counts*, 2001, quoted in D.C. Steelman, *Caseflow Management. The Heart of Court Management in the New Millennium*, 2000, p. 123.

25 H.A. Simon *et al.*, *Public Administration*, 1961, p. 513.

26 *Ibid.* p. 513.

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

It is evident that the concept of accountability, defined inclusively as above, cannot be limited to simply verifying productivity or efficiency, but includes a broader complex of values which public organisations must adopt based in the fundamental values of democratic regimes. These include legality, equality, independence and impartiality.²⁸ This inclusive notion of accountability is at a different and perhaps higher level than the individual values specific to a single unit of public administration. Accountability is conceived in such a way as to enable the democratic process of establishing respect for those values, whether of efficiency or independence, efficacy in achieving objectives, or impartiality in the treatment of citizens.

In this context, the recent work of Bovens clarifies and expands the conceptual foundations laid by Simon *et al.* (even if not explicitly). It offers a useful map of the elements that must be considered if we are to describe and analyse the problem of accountability in judicial systems. Bovens defines accountability as ‘a relationship between an actor and a forum in which the actor is obliged to explain and justify his conduct, the forum can pose questions and pass judgement, and the actor may face consequences’.²⁹ The *actor* may be a single individual (in the present context, a judge or official) or an entire organisation³⁰ or group of organisations (such as an entire judicial system). The forum may be constituted by an interest group or a group of stakeholders (social accountability), by peer groups (professional accountability), by inspectors, controllers and supervisors (administrative accountability), or by elected or political representatives or the media (political accountability). To these must be added legal-judicial accountability. One form of this accountability may be seen in the role of the courts as *forums* that must evaluate the legality the actions of other organisations, public or private.³¹ On the other hand, there is the question of the accountability of the judicial system itself, which includes those who work in it, and hence also the outcomes of their work.

Each of these forums performs its own assessment based on different interests, values and methods, taking account of different aspects of an actor’s conduct. Ultimately, the relationship of accountability has consequences for the actor, which may be positive, neutral or negative; formal or informal.³² This distinguishes accountability from other evaluative exercises that remain an end in themselves, without consequences, if not quite ritualistic.³³ The application of this schema to the different forms of accountability we have identified is summed up in the table in the appendix. It is a framework that we will refer to and develop in the following pages.

3.1. Legal and judicial accountability

Much of the work of the courts and judiciary is directed towards quality control. The court registry keeps a formal record of every single procedural event, so that the parties or the authorities can check that correct procedures are followed. Hearings are, by law, open to the public. The judge justifies each decision according to the facts and the law. The courts of appeal have their

28 We have broadened this analysis of democratic institutions and their justification, to include a discussion of representation (following Pitkin) and the concept of ‘the people’ (following Agamben) in R. Mohr *et al.*, ‘Judicial Evaluation in Context: Principles, Practices and Promise in Nine European Countries’, 2007 *European Journal of Legal Studies* 2, pp. 1-40.

29 Bovens 2006, *supra* note 7, p. 12.

30 This in turn may be considered as a collectivity or as a hierarchy. In the first case, all are responsible for one, in the second, one is responsible for all. Bovens 2006, *supra* note 7, pp. 18-19. This distinction may be used to define effective accountability mechanisms for courts. In more detail, the alternatives are to create mechanisms based on peer review or peer pressure, which is the responsibility of the collectivity (the judges of a court or of a section), or else to follow a hierarchical system in which the senior managers are responsible for every aspect of the conduct of the various organisational actors, including the judges, as in the case of the Dutch ‘*integraal management*’.

31 Simon *et al.* 1961, *supra* note 25, pp. 514-515.

32 Bovens 2006, *supra* note 7, pp. 10-11.

33 J. Meyer *et al.*, ‘Institutionalized Organisations: Formal Structures as Myth and Ceremony’, 1977 *American Journal of Sociology* 2, pp. 340-363.

own raison d'être in reviewing the decisions of first instance courts. Yet, given the definition of accountability proposed above, it is necessary to distinguish between the practices and methods that enable the checking of legality and those calibrated to managerial demands. Each has consequences in its own sphere, so that the specifically legal checks and balances operate through legal procedures and only impact on the legal process.

The judicial registers, the files that record the proceedings in each case, the public nature of oral proceedings, judicial reasons for decisions and appeal courts are the mechanisms that keep track of the proceedings and allow the checks on the proper application of the law so that the legality of each case may be verified. However, while these mechanisms provide some guarantee of transparency of the proper conduct of cases,³⁴ they do *not represent true accountability* in the strict sense. In fact, where errors in filing or the application of the law do occur, they do not generally lead to consequences for the individual registry staff or judges. In these cases the consequences of the evaluative process are *confined to the judicial processes themselves*.

It is only in certain cases that these errors have consequences for those who committed them, and these are mediated through specific institutional arrangements such as the court hierarchy or disciplinary bodies. These institutional arrangements represent accountability mechanisms in the precise sense adopted in this work. In regard to the hierarchy, we must note that their efficacy as an accountability mechanism applies mainly to the administrative personnel. This is not so in the case of disciplinary matters. The judicial systems under consideration have forums consisting of disciplinary commissions which apply more or less effective procedures³⁵ in evaluating the performance of the actors (judges and public servants) according to ethical, procedural or disciplinary standards. Other bodies are available to check and, if necessary, apply sanctions in the area of financial responsibility, normally limited to ensuring that expenditure is accounted for in accordance with specific formal requirements. The same applies to civil liability and criminal responsibility, within the established limits of the various jurisdictions.

The forms of legal and judicial accountability that permeate judicial systems are thus seen to be based on particular *forums* that determine whether the performance of the *actor* (judge, public servant, etc) has committed any violations or errors of disciplinary, accounting or other codes. These are determined according to existing norms, and the findings may be adverse, or they may absolve the actor of any wrongdoing (see the table in the appendix). The quality control procedures carried out through these channels are generally well established and rooted in national constitutions, in laws and in everyday practices that may often seem invisible from the judicial viewpoint.³⁶ In other words, at least at present in the countries considered here, these forms of accountability do not appear to come into conflict with the principles of independence or of impartiality.

The procedures that ensure conformity to the law reflect the importance judicial systems give to protecting and enforcing fundamental principles of the rule of law and the authority of the state. However, they tell us little about how they use the resources that the state allocates to them. To understand these outcomes we need to consider systems of managerial accountability.

34 Ng 2007, *supra* note 5, p. 17.

35 See the discussion above on the limited effectiveness of judicial discipline; also G. Di Federico (ed.), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe*, 2005.

36 This is not necessarily the case when these accountability mechanisms are first introduced. In both Italy and France, the introduction of judges' civil liability (and the related accountability mechanisms) was accompanied by intense conflicts between the political and the judicial branches. G. Di Federico, 'La Crisi del Sistema Giudiziario ed il Referendum sulla Responsabilità Civile dei Magistrati', in P. Corbetta *et al.* (eds.), *Politica in Italia. I Fatti dell'anno e le Interpretazioni*, 1989, pp. 93-129.

3.2. Managerial accountability

The research considered here has revealed many efforts by ministries and judicial councils to develop forms of managerial accountability³⁷ and to promote values such as efficiency and cost control. More or less effective accountability mechanisms have been designed in line with reforms that aim to improve the allocation of resources to the courts by calculating judges' needs in each court, or to improve the statistical evaluation of court productivity. In Austria, a very sophisticated computerised personnel information system based on detailed statistical indicators has been set up and is currently used to calculate the number of judges needed in particular courts.³⁸ In France, a budgetary law ('*Loi organique relative aux lois de finances*', 1 August 2001) required the Ministry of Justice to submit budgets according to missions and programmes, whose objectives and results were to be examined by Parliament as part of the financial allocation process.³⁹ In the Netherlands the process of developing new forms of managerial accountability was developed in conjunction with the establishment of a Judicial Council. A 'program to strengthen the organisation of the judiciary' was established as a judicial initiative, which developed quantitative measures of cases, personnel and time, originally based on the model of the European Foundation for Quality Management (EFQM). These measures, together with planning proposals from the courts responsible for their implementation, now form the basis of annual resource allocation.⁴⁰ Along the lines of the reactions discussed above, these reforms met resistance from judges arguing that they were representing a threat to judicial independence. Besides, the implementation of these new mechanisms of accountability raises other questions for judicial reform, such as the legitimate objectives of the accountability mechanisms, who was to identify them, and the link between outcomes and financial allocations.⁴¹ The technical foundations of these tools are also contested: in each of the countries we have considered, the judges express concerns that systems measuring statistical outputs are incapable of revealing the complexity of judicial work and questioning the appropriateness of 'informatics solutions', including those based on detailed data bases.

On the other hand, managers have difficulty appreciating the *modus operandi* and units of analysis of the judiciary. Even those conscientious managers who understand and measure case processing times with care and attention can be surprised, as were the Finnish team, when an individual case is overturned for excessive delay by the European Court of Human Rights.⁴² To the manager or the statistician, this is an 'outlier', an extraordinary piece of data which simply disrupts normal calculations. To the judge, this is an injustice which must be remedied in the specific case. The two forms of accountability work with different units of analysis: while the judges examine, decide and may even be evaluated on the basis of individual cases, the managers evaluate, and are evaluated according to, aggregated data and cases.

To illustrate the issues raised by the new managerial accountability mechanisms that have been introduced to evaluate the activities of European courts, judges and court administrators in the past decade, the following section offers a case study of three of them. All of these cases used

37 Fabri 2005, *supra* note 3.

38 G.E. Kodek *et al.*, 'Quality and Justice in Austria', in M. Fabri *et al.* (eds.), *The Administration of Justice in Europe: Towards the Development of Quality Standards*, 2003, p. 15; P. Bauer, 'A Show Case for the Future: E-Justice in Austria', in M. Fabri *et al.* (eds.), *Justice and Technology in Europe: How ICT Is Changing Judicial Business*, 2001.

39 C. Deffigier *et al.*, 'France', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, p. 235; J.P. Jean *et al.*, 'An evaluation of the quality of justice in Europe and its developments in France', 2006 *Utrecht Law Review* 2, pp. 44-60.

40 G.Y. Ng, 'Nederland', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, pp. 310-311.

41 Meyer *et al.* 1977, *supra* note 33.

42 A. Aarnio *et al.*, 'Quality and Justice in Finland', in M. Fabri *et al.* (eds.), *The Administration of Justice in Europe: Towards the Development of Quality Standards*, 2003, p. 209.

forms of management by objectives (MBO) in judicial systems, albeit in different ways and contexts. This allows us to identify the distinctive characteristics of this form of accountability and will be helpful in assessing if, how and where this approach comes into conflict with judicial impartiality and the principle of independence.

4. Case studies I: Management by objectives applied to judicial systems

In Finland the Ministry of Justice⁴³ has collaborated with the court offices to introduce systems of MBO that apply both to the individual judge (still being trialled) as well as at the national level, following the introduction of this approach across the whole national public administration in 1995. The system assesses the courts' performance using indicators of their productivity, economy and efficacy. Productivity is calculated in terms of the number of decisions per judge or per unit of administrative staff. The principal indicator of the economy or efficiency of the courts is the cost per decision, calculated by dividing the annual budget of a particular court by the number of decisions made by its judges. The calculation of efficacy is more complex. It is based on the assumption that the length of proceedings is fundamental to the judicial process and the rights of the citizens. Consequently case processing times are taken as the key measure of efficacy.⁴⁴

Even though these indicators were developed in order to allocate resources to particular court offices, their use for this purpose does not follow automatically. The indicators instead form a source of knowledge on which to base discussion around the negotiation of the budget of each individual court. They are also used during annual meetings to help the Ministry of Justice and the heads of each court office to define the objectives to be met. Although this soft approach should allow even handed negotiation between competing values it has been criticised by the judiciary. Some have argued that the definition of objectives by officials of the Ministry would violate judicial independence which is protected by the Constitution. Others maintain that with the introduction of the system of management by results the judge's attention would shift to the number of cases and their processing times, thus reducing the quality of the decisions.⁴⁵ It has also been suggested that the system of measurable objectives could not be implemented by the courts. The Ministry of Justice replied,

'The judiciary through its management by results system may not interfere with the objective and subjective independence of the courts in their decision making and other application of the law, which is the real essence of the independent judicial power safeguarded in the constitution. The fact that general information about handling times, (...) is written in documents of courts dealing with management by results does not in itself lessen or endanger the independence of the court in reaching a decision in individual court cases.'⁴⁶

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

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

44 A. Aarnio *et al.*, 'Finland', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, pp. 231-232.

45 Aarnio *et al.* 2003, *supra* note 42, p. 176.

46 *Ibid.*, p. 177.

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

The introduction of management by objectives in Italy has led directly to the realisation of this concern. In this case, instead of starting with instruments to focus on the functioning of the judicial system, or of the individual office, the new system set out to consider the results achieved by the managers of each court office, with consequences for their remuneration and career prospects. These did not cover the work of the court's chief judge. In practice, each court manager must, after a 'frank discussion' with the chief judge, define the organisational objectives to be met. It is taken for granted that these objectives do not include the outputs of the whole court, for example the number of civil cases to be dealt with in the current year, on the grounds that this would violate judicial independence. Instead the objectives are exclusively those of the individual managers and their limited areas of responsibility. In contrast, such accountability mechanisms explicitly exclude any possible consequence for the chief judge, who has the broader responsibility for the whole court's performance. Consequently the objectives defined by the manager are strictly limited to administrative tasks such as reducing filing backlogs and are marginal to the legal and managerial objectives, like reducing the cost per judicial decision. These objectives are clearly very different from the ones considered in the Finnish case. An ad hoc committee based in the Ministry of Justice will assess the results reached by each manager and possibly decide on adjustment of their remuneration.⁴⁷

The Italian Ministry's decision to limit its MBO-driven exercise to the court managers could be interpreted as a strategy of stealth which first attacks the point of least resistance (the court managers). After that position was consolidated one could extend it to the judiciary. However, we have seen no trace of any argument which would support that interpretation. The Ministry's official explanation seems instead to rely on the necessity of developing an adequate information system to allow monitoring of the objectives of each court office before extending the system of MBO. More precisely, the system should 'provide in real time an up to date picture of the on-going progress in order to permit timely intervention to minimise the divergence between the stated [objectives] and the current situation'.⁴⁸ Considering the current state of information technologies in the Ministry and in the courts, such a management information system would take several years to establish.

We must observe in passing that both the heads of the court – the chief judge and the court manager – must take responsibility for outcomes as well as for case processing times. This is recognised in the Netherlands through the system known as '*integraal management*'.⁴⁹ Any other approach will surely neglect part of the problem.

As we saw in the Finnish experience, a system of MBO can be based on a small amount of essential data. Similar systems exist in some other countries, such as Denmark. This need not

47 The official documentation of this project can be found at http://www.giustizia.it/ministero/struttura/uffdircoll/approfondim_comm_valutaz.htm

48 F. Piantelli, *La Programmazione Strategica e gli Strumenti di Gestione: Esperienze a Confronto*, Ministero della Giustizia, 2005, <http://www.giustizia.it/newsonline/data/multimedia/685.pdf>, p. 2.

49 This is a system of management and accountability with an integrated view of the court and the registry which takes account, among other factors, of the joint responsibility of the chief judge and the office manager (or registrar). M. Velicogna *et al.*, 'Il Giudice-Manager e l'Integraal Management in Olanda', Paper presented at the *Conferenza annuale della Società Italiana di Scienza Politica*, Bologna, 2006; Ng 2007, *supra* note 5; P. Langbroek, 'Changing the Judiciary and Judicial Administration: The Netherlands and Guatemala', Paper presented at the *Conference Empowerment, Security and Opportunity through Law and Justice*, Saint Petersburg, 2001.

be considered as an objective representation of the ‘true’ functioning of the court office, but as base line information from which to negotiate budgets and objectives. Seen in the light of such processes, the technology that the Italian Ministry anticipates appears to be a technocratic pretext, indicating the existing tensions between the divergent logics of managerial and legal accountability, seen above.

The one-side Italian solution clearly reflects the logic and the power relations of the particular historic moment. The Ministry of Justice, already engaged in conflicts over judicial reform, has not yet seen fit to extend this system to the chief judges since it would only have deepened the existing conflicts with the judiciary. This is why the system has focused purely upon the weakest link in the chain: the court managers.

A number of European countries have developed systems for measuring output and relating this to the number of judges required in particular courts.⁵⁰ Spain, however, tried to go beyond the allocation of judges to relate the judges’ salaries to their individual productivity. The Spanish system was initially used to determine the number of judges and administrative staff to assign to each court. The system, based on so-called output measures’ (*‘módulos de dedicación’*) was quite rough and gave only a broad indication of the number of cases that each office could realistically process. The system was criticised by the judiciary on the grounds that the measures did not take into account weightings for different types of cases.⁵¹

In 1997 the Spanish Judicial Council⁵² collected the various critiques in a ‘white paper’ which also proposed means of refining the output measures. Groups of expert judges developed new measures calculating the average times it took judges to dispose of various types of cases. In 2000 new output measures were approved that, from 2003, were used to determine the judges’ needs and also affected their remuneration. In practice, those judges who dealt with at least 20% more cases than anticipated by the module received additional remuneration (from 5 to 10% of their salary). The Judicial Council decided not to use the modular system also to sanction the less productive judges by reducing their salaries.⁵³ Even so, it is not surprising that the introduction of this remuneration system drew strong criticism from the Spanish judges. Two of the judges’ associations, even though they accepted the need to evaluate the judiciary, considered the system insufficiently reliable to form a basis for remuneration. A third association was far more radical in its critique, calling the system ‘productivity-focussed and mean’ and incompatible with judicial activity. Despite these strong criticisms, the Judicial Council continued to apply the measures to determine a performance based salary, working to improve the methodology. A consultancy firm produced a new system to record the productivity of judges intended to permit a more comprehensive assessment of their work. The new system was much more complex, based on several clusters of indicators covering five areas of judicial activity: efficacy, quality, timeliness, commitment and professional development.⁵⁴

In the meantime, the Spanish Supreme Court heard the various appeals brought by the associations and nullified the regulations.⁵⁵ Among other grounds, the Court held that the output measures impacted negatively on the economic independence of the judiciary that the State must

50 Kodek *et al.* 2003, *supra* note 38, p. 15; Bauer 2001, *supra* note 38.

51 P. Signifredi, *Misurare la Produttività dei Giudici: Il Caso Spagnolo*, IRSIG-CNR, 2006, pp. 1-30.

52 Consejo General del Poder Judicial (CGPJ).

53 Signifredi 2006, *supra* note 51, p. 8.

54 *Ibid.*, p. 9.

55 Decisions of the *Tribunal Supremo, Sala de lo contencioso administrativo, Full Bench*, on appeals nos. 14, 16, 17, 18 and 30, 2004.

guarantee. Secondly, it was held that the measures violated the principle that judges' remuneration must be based on objective, equitable and transparent criteria.⁵⁶

The systems considered in this set of case studies represent a number of more or less rigorous accountability mechanisms developed to assess and improve the functioning of justice from a managerial perspective. These accountability mechanisms have consequences, either at the level of the allocation of resources to various courts and court offices (Austria, France and the Netherlands) or in some cases for the remuneration of personnel (administrative managers in Italy, judges in Spain). As such, they can be seen to qualify as accountability mechanisms within the paradigm of managerial accountability. Yet, as we have seen, the implementation of MBO in judicial systems is open to challenge – and the Spanish case has been successfully challenged in court – from the legal and judicial perspective.

5. Can independence be reconciled with accountability?

The criticisms of these managerial approaches by judges and their associations constitute instances of the well established opposition of judicial independence and managerial accountability that we discussed above. The judiciary has argued that these measures have a negative impact on independence and that they cannot accurately measure judicial activity in all its complexity. Regardless of whether these measures have been developed by ministries or by judicial councils, the tensions between independence and accountability have sprung up in new forms as a result of these conflicts. The managerial approach shifts the debate from the question of the freedom of judicial discretion, familiar from studies in political science and jurisprudence, to the nexus between resources allocated to the system and its actors and the results they achieve. In many cases the situation comes down to a tug-of-war between actors with irreconcilable interests: the familiar zero-sum game.

Although the power relations offer ready explanations of the events in the three cases we have reported, we should not let them obscure other important dimensions of the question. In the following pages we analyse these failures in order to propose an alternative approach. We first approach this conceptually, to show that judicial independence can be reconciled with accountability, as long as both are conceived broadly enough and as part of the very same effort of protecting and improving the respect of the key values on which judicial systems are based. We then illustrate that proposal, in the final sections, with a case study that we commend as showing the way towards a broad or 'cooperative' form of accountability. We close by drawing certain conclusions from that case study in the context of the foregoing analysis.

As noted above, the accountability mechanisms typical of managerial approaches conceive their unit of analysis as being aggregated data. These mechanisms are, in the first place, based on statistical and economic approaches. The forum predominantly consists of ministries, judicial councils, or ad hoc bodies whose authority derives from their institutional position and associated managerial responsibility for the judicial system. They are charged with defining criteria, standards and objectives, which they do in terms of productivity and efficiency. Performance is measured by the degree to which these objectives are met, either by individuals or by the whole court. Ultimately these methods have consequences either at the organisational level, or at the level of the individual official (judge or administrative manager).

⁵⁶ Decision of the *Tribunal Supremo, Sala de lo contencioso-administrativo, Full Bench, Votación: 21/02/2006.*

It has been seen that the legal and judicial evaluative mechanisms that permeate these institutions are based on radically different logic, criteria and units of analysis: individual cases, checked against legal criteria and whose consequences are limited to the trial and its results. These systems of evaluation only rarely go beyond guaranteeing a certain level of transparency to become true and proper forms of accountability, with consequences for the actors. Even these, as we have seen, are limited and mediated by disciplinary commissions or other judicial bodies.

We can draw some tentative conclusions from the wide gulf that we have seen opening up between the traditional legal mechanisms and the burgeoning forms of managerial accountability. The first point to note is that the cost of using these systems is directly related to their complexity. The Italian and Spanish cases indicate, albeit in different ways, a worrying tendency to make the means of monitoring activity ever more complex and fragmented and, therefore, costly.⁵⁷ This may be due to the technical difficulty involved in measuring such complex and multi-faceted tasks as those of the judge. It may also derive in to some extent from the judges' dissatisfaction with the type of knowledge which is produced by these systems. Such different approaches to the production of knowledge underlying the accountability mechanisms may generate a kind of cognitive dissonance in the epistemological gap between traditional jurisprudential studies and the 'new management' studies introduced into the public sector over the past fifteen years. Despite the efforts of some countries⁵⁸ and costly roll-outs of information technology, it is unlikely that a system of managerial accountability could ever approach the level of detail or the depth of analysis possible within a system of legal accountability.

Another difficulty in the coexistence of these two approaches is that, while traditional legal and judicial accountability only has consequences for the individual actors in specific and limited cases (e.g. disciplinary commissions),⁵⁹ managerial accountability, provided it is not purely ritualistic, does have consequences, for individuals and organisations. This creates apparently paradoxical situations. If a judge makes an error in legal interpretation that is discovered in subsequent hearings or appeals, the decision may be overturned but there are no consequences for the judge. In the same way, a procedural error by the registry may be corrected with no repercussions for the official responsible. On the other hand, to use examples we have just discussed, if a Spanish judge or a Finnish court fails to meet a particular objective, this may have consequences for remuneration⁶⁰ or financial allocation. To highlight the differences between these two approaches we could say that judges whose decisions are overturned on a legal appeal would not suffer personal consequences. In a managerial system, on the other hand, it is feasible that judges who decide more or less cases than the expected objectives may see adjustments to their salary or to the resources allocated to their court.

In light of this discussion we may conclude that the difficulty in implementing new forms of accountability derives from an awkward conjunction of means and ends. This is the combined effect of the possible consequences for anyone who fails to meet defined objectives, where the achievement of those ends is measured by quantitative data that are held to be incapable of

57 United States experience indicates how quickly such measurement systems can become so complex and onerous that they become almost impossible to use, as has been the case with the Trial Court Performance Standards. This has led to calls for a return to simpler systems, such as 'CourTools'. B. Ostrom, *CourTools: A Court Performance Framework*, National Center for State Courts, 2006. See also the principles, standards and benchmarks of 'Client Services in Local Courts', designed to be applied as a simple daily checklist, taking one person 15 minutes, through to a three person peer review taking one day; <http://www.uow.edu.au/law/crt/clientsservices/index.html>, accessed 17 October 2007.

58 We have referred to the experience in Austria, Italy and Spain in their push to improve their respective systems of performance measurement.

59 For statistics on disciplinary proceedings see CEPEJ, *European Judicial Systems*, 2006, pp. 123-124.

60 The Spanish situation has been mitigated since the decision of the Tribunal Supremo, mentioned above.

describing the actual operations of a court or the complexity of its work. These perceptions lie at the heart of the sceptical and critical attitude of judges to these new approaches.

In concluding this discussion we need to return to consider the possibility that these mechanisms interfere with judicial independence and impartiality. While a number of writers have claimed that budgetary mechanisms can certainly influence the independence of the courts,⁶¹ it is more difficult to establish that this reduces the impartiality of the judge in deciding a particular case. This impartiality is the principle value that the institutions must protect. In each of the examples considered, the ‘pressure’ applied by the organs of government to increase productivity are not directed to the parties or the outcomes of specific cases, but to the full aggregate of procedures dealt with by the court office and the judges.

The above discussion has nonetheless shown at least one way in which the problem may be rendered less acute. The Finnish case shows the potential benefit of treating the data produced by the managerial systems as a foundation for discussion in a collaborative process, rather than as absolute data to be applied automatically. This approach seems more reasonable in part due to the difficulty of correctly interpreting the meaning of particular data or of all the information collected by these systems. It also offers opportunities of avoiding the risk that ‘managerial’ values may prevail to the neglect of the other values which must be protected in the judicial processes. It is of particular importance, where one institutional value may be seen to trump the others, that the data be interpreted and the outcomes evaluated from the points of view of all the relevant interests and values.

The mechanisms developed for ensuring accountability and conformity to standards of law and good practice are widely understood to be desirable and even essential to public management and to justice alike. Whether the pressures come from adverse findings of the ECHR, from parliaments demanding more formal and specific accountability, or from cash-strapped ministries, it often becomes obvious that new evaluative mechanisms must be implemented. When these have failed we have commonly noted one or two underlying factors: either a ritualistic adherence to some tenets of evaluative practice, or a more or less cynical justification of the means by the ends. In the former case the mechanisms and processes take on a life of their own, so that increasingly elaborate data collection protocols (or measures, or information technologies) are understood as the solution to problems which really arise in the very conception of the process. Losing sight of the goals of the accountability mechanisms, as of the justice system itself, attention shifts to the minutiae of the data and away from the purpose for which it was required in the first place. The system of management by objectives developed by the Italian Ministry clearly illustrates how a managerial system of accountability can shift from a means to an end in itself.

If ritualism mistakes means for ends, a narrow focus on the quick fix makes the converse error. With sufficient will, power and cunning, a technological solution may be imposed on many different problems. Technical solutions to juridical, managerial and political problems were seen in the automatic connections made by some justice ministries (Austria) and judicial councils (Spain) between accountability mechanisms and financial allocation. The Spanish attempt to use output measures as a basis for judicial remuneration illustrates both ritualism and technologism: on the one hand, the measuring system became an end in itself, losing sight of the purposes for which it existed. On the other, the results of that measurement were applied mathematically to financial outputs. By focussing the attention of the judges on their salaries, of the ministry on the

61 Douglas *et al.* 2003, *supra* note 5; Fabri, ‘Policies to Enhance the Quality of Justice in Europe’, *supra* note 3, p. 73.

measures, and of both interest groups on the nexus between the two, any broader interests or ends were effectively eclipsed.

We turn now to a practical example from the research that suggest ways in which these problems can be overcome, and that it may be possible to reconcile the diverse forms of accountability with independence and impartiality.

6. Case studies II: The Quality Project of the Rovaniemi Court of Appeal

The framework of analysis we have proposed allows us to identify the characteristics of an emerging form of accountability that may be described as mixed, since it incorporates a diversity of interests, and cooperative, since it involves different institutional actors who show willingness and ability to collaborate and adapt. This emerging form of accountability also offer useful empirical evidence that may indicate ways to deal with the tensions between different institutional actors who hold interests and values that are difficult to reconcile.

We see progress in those areas where judges and managers work together to respond to well formulated public demands as well as to understand each others' values, interests and modes of representation. These developments show the extent to which various institutional actors may be involved in assessing and implementing proposals that have a broader base than their own immediate institutional environment.

In addition to the Finnish experience of national management by results considered above, it is worth drawing attention to a local pilot scheme. This was begun in 1999 in the district of the Rovaniemi Court of Appeal (which includes nine first instance district courts) where quality targets were set by a Development Committee of the Quality Project whose members are judges, practising lawyers and prosecutors. The committee worked through a process that involved frequent communications among the judges, and between the judges and the various stakeholder groups. These communications included an increased dialogue among judges on court practices, the formation of working groups, annual quality conferences and the preparation of quality benchmarks.⁶² One of the results is the development of a new culture of communication between all the actors involved in the judicial process.⁶³ This approach is based on a recognition that the resolution of disputes does not solely depend upon the court, its officials and its funding body, but also upon the various actors involved in the proceedings, starting with the lawyers and prosecutors.⁶⁴

The objectives were chosen for their social relevance and salience,⁶⁵ and they addressed important legal, judicial and managerial issues arising in both the court office and the legal proceedings, assessed by fairly straightforward measures. They included increased consistency in sentencing (initially in theft, drink driving and assault, expanded to narcotics cases the

62 J. Witttrup *et al.*, 'Denmark', in M. Fabri *et al.* (eds.), *L'administration de la Justice en Europe et l'évaluation de sa Qualité*, 2005, pp. 185-204; *Quality Project in the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland*, Rovaniemen Hovioikeus (Court of Appeal of Rovaniemi, Finland), 2005, <http://www.oikeus.fi/uploads/wz1uke8tvs.pdf>

63 Aarnio *et al.* 2003, *supra* note 42, pp. 181-182; see also http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Finalists%20E.asp#TopOfPage, accessed March 2006.

64 This conception is perfectly consistent with the one developed by the European Commission for the Efficiency of Justice of the Council of Europe: CEPEJ, *A New Objective for Judicial Systems: The Processing of Each Case within an Optimum and Foreseeable Timeframe. Framework Programme*, CEPEJ, 2004, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2004\)19&Sector=secDG1&Language=lanEnglish&Ver=rev2&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.0](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2004)19&Sector=secDG1&Language=lanEnglish&Ver=rev2&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6.0); CEPEJ, *Compendium of 'Best Practices' on Time Management of Judicial Proceedings*, CEPEJ, 2006, [https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ\(2006\)13&Sector=secDG1&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6](https://wcd.coe.int/ViewDoc.jsp?Ref=CEPEJ(2006)13&Sector=secDG1&Language=lanEnglish&Ver=original&BackColorInternet=eff2fa&BackColorIntranet=eff2fa&BackColorLogged=c1cbe6)

65 A. Savela, *Evaluation of the Quality of Adjudication in Courts of Law Principles and Proposed Quality Benchmarks Quality Project of the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi*, 2006. *Quality Project in the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland*, *supra* note 62, p. 2.

following year), overcoming impediments to the preparation of civil cases (in consultation with lawyers), leadership skills in the admission of evidence, improvement in the quality of written judgements and increasing participation in judicial training (to 100%) with some expansion of postgraduate study. In addition the project addressed issues at the boundaries of judicial, legal and administrative management, such as case allocation based on judges' specialised skills, and monitoring the progress of individual cases through intermediate hearings to final determination.

These objectives, identified through dialogue among the participants, promote measures that have a far greater impact on judicial independence than do those of managerial accountability systems. In hearing a case, a Rovaniemi judge must consider not only the facts and the law, but also the standards set by the quality commission for the writing of decisions. Cases are not simply allocated on an automatic or random basis,⁶⁶ but through a system that takes account of the nature of the case and seeks to allocate each to the judge with the most relevant skills. In the conduct of trials the judge must pay attention to the protocols established by working groups. However, we must also note that while the internal and external *independence* of the judge may be reduced through such measures, this in no way threatens the core value that must be protected: the *impartiality* of the judge.

7. Towards cooperative accountability

This case study highlights the role of the entire collectivity of people providing the services necessary to resolve disputes. They work together to provide the conditions needed to hear the needs of their clientele and to selectively approve those proposals that they consider to be necessary and compatible with the institutional structure of the court and the values on which it is based. They have stepped out of the comfort zone provided by an isolated and self-sufficient system, in favour of an administration of justice that can respond to social needs and can bring more to the resolution of disputes than just a formally correct procedure.⁶⁷ This is just the sort of 'socially responsible justice' that Cappelletti hoped for.⁶⁸

The question may arise, from a theoretical point of view, whether we are dealing here with a social responsibility mechanism,⁶⁹ rather than one of accountability, given that no external authority has the role of a forum. With this in mind, the pilot project has developed mechanisms such as an annual conference on quality, and the participation of all the judges in working groups, which create group and peer pressure as favourable conditions for horizontal and 'soft' accountability.

A key advantage of initiatives like the one from Rovaniemi is that the objectives are defined by the same personnel who must implement them. While this promotes a greater degree of commitment and willingness, it does not necessarily guarantee the transparency of the court's operations. Furthermore these social forms of accountability, together with the sharing of objectives and purposes between courts, lawyers and the public, risk creating forms of collusion among actors with mixed interests.⁷⁰ However, that risk may be mitigated by the role played by the Ministry. In fact, even though the Ministry is not directly involved in the assessment process or the definition of its criteria, it uses the project's quality assessments in the process of budget negotiation described in the previous section. This is where the institutions of executive govern-

66 P. Langbroek *et al.* (eds.), *The Right Judge for Each Case*, 2007.

67 Nonet *et al.* 2001, *supra* note 8, pp. 73 and 75.

68 Cappelletti 1989, *supra* note 8, chapter 3.

69 Bovens 2006, *supra* note 7.

70 *Ibid.*

ment have the opportunity to intervene and act as a forum. Finally, it is worth noting that the pilot project, as well as the services provided by the courts involved, have been externally evaluated,⁷¹ with such positive results that the scheme was recommended for nationwide adoption and was awarded the European ‘Crystal Scales of Justice’ prize for ‘innovative practice contributing to the quality of civil justice’.⁷²

Rovaniemi is not the only project in Europe that has tried to approach the problems of the quality of justice and the services provided by courts by balancing the traditional legal and judicial values with managerial principles and greater attention to client services. Forms of accountability being applied in Denmark and the Netherlands were also found through the present research to have some of the characteristics we have just described.⁷³

These innovative approaches, in which judges are expected to respond to managerial criteria, or managers to public criteria (to suggest two of the possible combinations) are more interesting but also riskier than some of the one dimensional procedures we discussed earlier. Seeing the situation from these alternative viewpoints, it becomes clear that courts and judges cannot be evaluated according to a single dimension, whether that be legal or managerial. The criteria to be applied must therefore be inclusive, recognising the legitimacy of the different approaches and of the different representations that are apparent in forms of the traditional and newly emerging forms of accountability. Each of these criteria or interests has its own legitimacy, and in many cases brings with it well-established methods for evaluating justice from a particular perspective. The important issue, illustrated by the Rovaniemi case study, lies in finding approaches that are able to take account of these diverse interests. As seen there, the methods for choosing the criteria were negotiated, as were their possible consequences. Furthermore, each participant was able to contribute to achieving the results that had been agreed upon through the negotiation process.

The creation of conditions favourable to communication between the various institutional actors can therefore be seen to be essential to a satisfactory system of accountability. This system will be one that develops a set of accountability mechanisms that take account of and understand the full breadth of values and interests that must be emphasised and followed by judicial systems. These are the conditions necessary to overcome the stalemate between judges who think of the court as a temple to law and justice, protected by the sacred value of independence, and managers who see the court as a decision factory, to be directed and evaluated through managerial or productivist forms of accountability.

71 This is a notable exception to our general finding of the remarkably low rate of evaluation of specific reforms.

72 Aarnio *et al.* 2003, *supra* note 42, pp. 181-182.

73 Wittrup *et al.* 2005, *supra* note 62; Langbroek 2001, *supra* note 49; Ng 2007, *supra* note 5.

Appendix: Types of accountability in justice systems

<i>Key variables</i>	<i>Types of accountability</i>		
	<i>Legal and judicial</i>	<i>Managerial</i>	<i>Cooperative</i>
Actor	Individual actor (judge, public servant, manager) in specific cases of accountability (disciplinary, accounting, civil liability etc.)	Individual organisational actor, individual judicial organisation, justice system	Individual judge, prosecutor or lawyer participating in a quality control project
Forum	Various, clearly legal (disciplinary commissions, other courts, superiors)	Office managers, ministries, judicial councils, only marginally legal	‘Quality conference’, peer groups
Object (conduct of actor under consideration)	Individual performance	Individual and organisational performance	Individual and organisational performances related to quality targets
Values and principles	Legality	Relationship between resources and results, output, productivity, efficacy	Plurality of values (legal, judicial, managerial, public)
Methods	Legal analysis (Procedural, disciplinary, ethical codes, civil & criminal law) in specific cases	Analysis of aggregated numerical data. Measures of success in meeting objectives established by some authority	Quality reports, peer review, checks of the gaps between results and the goals established by the working party
Consequences	Personal, possibly serious (salary reduction, loss of seniority, dismissal) but in fact, only in rare cases	Risk of ritualism (lack of consequences). Resource allocation to courts, role definition, judicial remuneration	Risks of ritualism (possible lack of consequences) and of collusive behaviours. Ad hoc solutions, informal pressures to support the guidelines established by the quality conference
Tensions with principles of independence and impartiality	Seemingly none. In the systems considered, normally incorporated into normal operations of justice, and taken for granted	Individual judges and judges associations complain of reduced independence	A reduction of individual independence is accepted, but there is no reduction of impartiality