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Measuring Public Confidence in European Courts: Lessons for Australia?

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MEASURING PUBLIC CONFIDENCE IN EUROPEAN COURTS: LESSONS FOR AUSTRALIA?

Background to the research

This paper considers indicators of public confidence in the courts in nine continental European Union countries,¹ considering ways this may be evaluated, factors contributing to or detracting from public confidence, and ways some European countries have addressed public interests and concerns. We draw on a European study² that set out to explore ways of measuring the quality of justice. The study developed a framework within which participating nations reported on their efforts to measure and improve the performance of their judicial systems, including the institutional framework, recruitment and training, means of evaluation, and measures of satisfaction and quality.

European study's focus on quality measurement can cast some light on recent Australian debates about the value of monitoring or research in relation to court performance. Various efforts have been made by Justice or Attorney-Generals' Departments, the Productivity Commission and the courts themselves to gauge their performance against their own standards or in comparison with other courts. As the periodic skirmishes between various courts and the Productivity Commission indicate, the possibility of measuring, comparing or evaluating justice systems is fraught with complexity and conflict. The very suggestion of performance management has provoked the New South Wales Chief Justice to damn any such attempt as 'autistic'. More accurately, he has commented that 'not everything that counts can be counted. Some matters can only be judged'.³

The European research aimed to understand the quality measurement systems that had been used in the jurisdictions involved in the study, to assess their impact and the possibility of generalising any of them to other jurisdictions. It was by no means assumed that quality was to be measured quantitatively. As will be seen in more detail shortly, a vast range of indicators was available, from financial data and information on appeals and their outcomes to public campaigns in the media and on the streets. While noting a tendency, reflected in Chief Justice Spigelman's remarks, for judges and managers to value different types of information and to appeal to diverse sets of values, the researchers

¹ This article draws on analysis of data from the nine EU countries involved throughout the study: Austria, Belgium, Denmark, Finland, France, Italy, Netherlands, Portugal and Spain.

² The study involved twelve European countries and Québec. It focused on the period from the late 1990s to 2003. It was managed in various phases by Marco Fabri and the Research Institute on Judicial Systems of the Italian National Research Council (IRSIG-CNR), Bologna, Philip Langbroek at the Institute of Constitutional and Administrative Law at Utrecht University and H el ene Pauliat with the Mission Droit et justice of the French Ministry of Justice. It was funded by the Agis programme of the European Union, the Dutch Ministry of Justice and the Dutch Judicial Council. The preparation of this article has been supported by the Italian Ministry of Research and the University of Wollongong, Australia.

³ James Spigelman CJ, 'The Autistic School of Management', *Lawyers Weekly* 6 October 2006, quoted by George Zdenkowski and others in this collection of conference papers.

remained equally interested in all approaches. We return, below, to some further observations on the tensions between legal and managerial approaches and the possibility of their reconciliation.

In the present paper we explore a variety of ways in which courts and other public institutions may be able to gather evidence of public confidence, or the lack of it, in order to make judgments as to their standing in the community. Throughout the study we have been particularly interested in measures that may lead courts to some action to improve or reform their performance, and here we report on those measures that appeared to enhance the capacity of the courts to earn public confidence. The attendance of so many judicial officers, academics and others at this conference is indication enough that confidence in the courts counts. Let us consider what information we might be able to gain to better understand its quality, which may be of more interest than its quantity.

Europe hardly offers Australia a model for a uniform system of court performance monitoring. The European scene is even more complex than Australia's. While we have a federal system with a common legal heritage and appeal to a single High Court, Europe has a diversity of traditions rooted in civil and common law, sovereignty of independent nations, each with their own hierarchy of appeal courts, with the possibility of appeal on a limited range of grounds to the European Court of Human Rights. European experience does, however, provide a fertile botanical garden for those interested in diverse approaches, in the tradition of 'letting a hundred flowers bloom'.⁴ In fact, one of the observations we draw from the European experience is that local and responsive exercises in quality monitoring and management may be of greater value than grand plans comparing, say, Tasmanian apples with Queensland mangoes. Or pasta with potatoes.

We will subsequently see what we may learn from the European experiences of trying to measure the quality of justice. Since our concern at this conference is with public confidence in the courts, we concentrate on the ways in which confidence may be measured, what contributes to public confidence, and what can be done to enhance it. We draw on a range of examples including both positive and negative ones, before concluding with some general observations on directions for good practice.

The place of the public

Before citing the methods and outcomes of various European exercises, we must face the fundamental difficulty inherent in the vague meaning of the term 'public'. A great deal may ride on whether we view 'the public' as taxpayers, citizens, 'clients' of the court or 'parties to an action' before the court. The judiciary and the other branches of government appeal to their position vis à vis the public, either as citizens authorising and respecting their authority or as the voters and taxpayers to whom they are accountable. If the executive government justifies the introduction of managerial accountability to show the taxpayers they are getting value for money, the judges protect their authority by appeals to judicial independence. There will be occasion to remark, in what follows, that these

⁴ Recognising the irony of quoting a famous expression of Mao Ze Dong, who was neither European nor Australian nor, whatever his other achievements, was he noted for his contribution to the development of the rule of law.

appeals often result in zero sum games that may be related to a paucity of reliable information about the wishes and beliefs of the public.

It is possible to map some of the distinctions between various conceptions of the public, and thus to see the derivation of particular viewpoints, as we will have occasion to do shortly. The next step however is to review the traditional forms of public scrutiny of the courts and justice systems.

The public gaze is a fundamental guarantee of the fairness of the trial and a ‘condition of justice’.⁵ The demand for public scrutiny of the judicial function was elucidated in the years immediately after the French Revolution when Mirabeau insisted to the Constituent Assembly that even the most corrupt judge could be trusted ‘à la face du public’.⁶ It was again defended in response to the crisis in the United States following the publicity of the O.J. Simpson trial, by the director of the American Judicature Society:

... if the rule of law, and the independent judiciary that is required for it, are to be maintained, the public must support the legitimacy of these institutions. ... [W]e believe that openness and public access is [sic] the ultimate guardian of fairness in our justice system.⁷

This approach to public scrutiny is on one hand a legal version of accountability: the public must see justice being done. On the other it is a guarantee of judicial authority, so that ‘the public ... support the legitimacy’ of the courts.

A third possible way to guarantee the openness of courts is through the direct involvement of the people in decision making in courts. In the countries considered in this research,⁸ this operates to improve the capacity of the court system to decide cases in specific matters (eg, lay members of commercial or labour tribunals) or to improve the legitimacy of the decision in the most serious crimes (eg, juries in the courts of assize) rather than to make judiciaries accountable to the people. Crises of legitimacy of justice systems may be almost endemic, as appears to be the case in Latin Europe, or they may be prompted by specific events. The most spectacular of these which our research encompasses was the public outcry over the Dutroux affair in Belgium. The bungled prosecution of Dutroux for murder and child sex offences led in October 1996 to the massive demonstration known as the ‘marche blanche’, considered to be Belgium’s ‘most important protest march since the

⁵ Garapon, A., ‘Il Rituale Giudiziario’ in *I Diritti Nascosti: Approccio Antropologico e Prospettiva Sociologica*, Giasanti, A. and Maggioni, G. (eds.) (1995). Milano: Raffaello Cortina Editore. pp. 289–305, 302.

⁶ ‘Donnez-moi le juge que voudrez, partial, corrupt, mon ennemi même, si vous voulez: peu m’importe pourvu qu’il ne puisse rien faire qu’à la face du public.’ Quoted Millar, R.W., ‘The Formative Principles of Civil Procedure’, *Illinois Law Review* (1923–24) 18: 1–36; 94–117; 150–168.

⁷ Zemans, F.K., ‘Public Access: Ultimate Guardian of Fairness in Our Justice System’, *Judicature* 79 (1996) 173–175.

⁸ The role of lay judges and jurors varies considerably across the countries considered. As a general trend juries are used mainly in panels with professional judges to try the most serious cases. But the involvement of lay people in judicial decision making also includes the appointment to labour and commercial courts of people who usually have some degree of knowledge on the subject to be decided, as in France and Austria, and the district court in Finland. Finally semi-professional judges, usually with some qualifications or experience in law, decide minor cases in countries such as Italy and Spain (justices of the peace). Portugal and the Netherlands have no lay judges.

second World War'.⁹ The government and the justice system were obliged to respond to this political and legal crisis: a parliamentary commission as well as a number of internal inquiries were charged with investigating the sources of public discontent and recommending reforms. The diagnosis appears to have been summed up as 'mal connu, mal aimé', leading to attempts to bridge the perceived gulf between the courts and the public. While a considerable program of reforms has been discussed in Belgium, the tangible results during the study period appear to have been limited to policies aimed at improving of the position of victims of crime and providing more information and better orientation to the courts and their processes for both victims and offenders.

While critical events like the *marche blanche* can prompt urgent and unusual responses, the normal functioning of justice systems is oriented on one hand to fiscal accountability and on the other to a notion of transparency which often amounts to little more than leaving the courtroom door unlocked. In the absence of any genuine involvement by or reliable information from the public, the various mechanisms for ensuring internal accountability and the passive public gaze are deemed to guarantee adequate measures for reporting back to the public: written decisions, media access to the courts, annual reports and fiscal responsibility. As institutional checks on the legitimacy and accountability of the courts, these legal and fiscal mechanisms operate with few means to register any dissenting views or take any action as a consequence. The only exceptions to this situation are the capacity of the parties to appeal the decision in individual cases, and the occasional channels for active scrutiny or public direction of the justice system available through Parliamentary processes.

The experiences of the nine nations in the study provide useful examples of the need to gain information on the views of the public as a collection of real people, rather than simply an abstract collectivity, and to see what consequences this information may have. In contrast to the traditional means of accounting for funds and publicly recording legal decisions, the broader scope of interaction with the public is haphazard. Let us now consider some of the ways of promoting that interaction.

Measures of public confidence

Public opinion surveys

The uses of public opinion polls in evaluations of justice are often examples of research without consequences, though we will have cause to note one or two exceptions. Courts and justice ministries solicit opinions from the public and also use opinion polls which may be independent of the ministries. Many of the national reports to the European study referred to surveys of citizen confidence in the justice system, such as those of the regular 'Eurobarometer' surveys of public opinion carried out by the European Union.¹⁰ These were most often cited by the Latin countries, where public appraisal puts the courts at the lowest end of the scale of public institutions. France and Italy rate their justice systems at or near the bottom of the scale of public satisfaction. The Spanish report notes that only in those two countries and Portugal do citizens rank their judiciary lower than they do in Spain, where only the politicians and their parties are lower on the scale of satisfaction

⁹ Depré, R. and Plessier, J., 'Belgique' in *L'administration de la justice en Europe et l'évaluation de sa qualité*, Fabri, M., Jean, J.-P., Langbroek, P. and Pauliat, H.(eds.) (2005a). Paris: Montchrestien, p. 138.

¹⁰ http://europa.eu.int/comm/public_opinion/index_en.htm

than the courts.¹¹ These broad public opinion surveys, though disturbing for the countries at the bottom of the scale and, no doubt, reassuring for those at the top, give little indication of where the problems lie, let alone what to do about them.

Surveys of court users provide more detailed and potentially more useful information. Surveys in Finland indicate that court users are less satisfied with the courts than are citizens in general, while the converse is true of Spain.¹² Since court users form their opinions from experience rather than by the public image or media representation of the courts, we would also expect them to be better informed. Well structured surveys of court users indicate in more detail just where the problems may lie. Themes emerging from surveys in France, Denmark, Portugal, Spain and Finland point variously to accessibility (cost and complexity), delay, fairness and judicial competence as issues of importance or concern to users.

Of greater interest are some of the findings on fairness and competence of judges, in part because they begin to give us some insight into how the users evaluate these qualities. In Portugal court users were concerned at ‘favouritism’,¹³ while French users referred to ‘inequality’ in the administration of justice (‘inégalité devant la justice’).¹⁴ These comments flag somewhat different public perceptions of judicial impartiality than the independence from executive government to which the judges traditionally refer. We return to this issue in more detail below.

Respondents in France and Portugal questioned the competence of judges in regard to the comprehensibility of their written decisions.¹⁵ In Spain there was concern that judges did not adequately understand the case before them.¹⁶ Data available from detailed surveys in Denmark proved to be useful in a controversy following a law professor’s criticisms of the inadequate reasoning of appeal court judgements. The critique focused on but was not limited to a particular case in which no reason was given for reducing a five year sentence to four years. A financial newspaper reported interviews with lawyers who said they were ‘shocked by badly written and incomprehensible explanatory statements’ from one of the courts particularly criticised in the law professor’s article. The President of that court responded by quoting survey data which indicated 82% user satisfaction with court services, but only 59% satisfaction with judges’ explanatory statements.¹⁷ Here relevant data had been collected on a court by court basis, so it was actually available to address a particular controversy. The end result of that affair has been that the Judicial Council

¹¹ Muñoz, H.S., ‘Qualité et Justice en Espagne’ in *The Administration of Justice in Europe: Towards the Development of Quality Standards*, Fabri, M., Langbroek, P. and Pauliat, H. (eds.) (2003). Bologna: Lo Scarabeo. 158.

¹² Ibid. at 162; Aarnio et al. ‘Quality and Justice in Finland’ in Fabri et al. (eds) (2003) above n 11 at 208.

¹³ de Sousa-Santos, B., Gomes, C. and Pedroso, J., ‘Portugal’ in Fabri et al. (eds.) (2005) above n. 9 at 335.

¹⁴ Deffigier, C., Gaboriau, S., Marshal, D., Pauliat, H. and Plazy, J.-M., ‘France’ in Fabri et al. eds (2005) above n. 9 at 266.

¹⁵ Ibid. at 266, de Sousa-Santos above n. 13 at 335.

¹⁶ Muñoz, above n. 11 at 162.

¹⁷ The President also invited dissatisfied lawyers to lodge formal complaints with the court. Complaints, and the mechanisms for handling them, form another means of evaluating justice systems, which fall between legal (including disciplinary) measures and administrative ones. They are also a means of gaining direct information from the public and lawyers using the courts.

prepared ‘a new language policy [that] aims at establishing general guidelines for explanatory statements, which will make them more concise and comprehensible.’¹⁸

Other instances in which informed public opinion has led to changed practices are seen in the Netherlands and again in Denmark. Both cases involved public concern over possible conflicts of interest among judges who worked at other jobs, either as a sideline (Denmark) or who were selected as part time ‘substitute’ judges from among practising lawyers (Netherlands). In Denmark public reporting of sideline jobs in 2001 indicated that judges were earning average additional incomes from €11,000 – 88,000 per annum (depending on the court), most of which came from private arbitration. Concern was based on whether such judges are deprived of adequate time for court work (which was denied by court presidents) or involve conflicts with impartiality.¹⁹ Impartiality was at the heart of public concerns in the Netherlands where a pressure group, Court Watch, investigated possible conflicts of interest, notably where a substitute judge may be hearing a case involving a colleague from the law firm in which they normally work. ‘Court Watch has forced the courts to publish the secondary functions of all their judges on the website for the judiciary.’²⁰

Data collection with inappropriate consequences

The public view of judicial impartiality illustrated in these Dutch and Danish examples stands in interesting contrast to the more common notion based in independence from the executive government. One instance of a threat to the classical notion of judicial independence arose in Spain, where a system was established to determine the number of judges and staff needed in different courts. 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.²¹ In 1997 the Spanish Judicial Council²² 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, since 2003, have been used to determine the judges’ needs and, until 2006, also affected their remuneration. Those judges who dealt with at least 20% more cases than the measure anticipated were to receive additional remuneration (from 5 to 10% of their salary). Even though the Judicial Council refrained from using the system also to sanction the less productive judges by reducing their salaries,²³ the introduction of this remuneration system drew strong criticism from the Spanish judges, who are organised

¹⁸ Wittrup, J. and Sørensen, P., ‘Quality and Justice in Denmark’ in Fabri et al. eds (2003) above n. 11 at 144.

¹⁹ Ibid. at 131–2. An ironic aspect of this controversy is found in the remarks of the Director of the Council of the Judiciary who in 2000 told regional seminars of judges and clerical staff that one of the reasons for courts to improve their performance was that they were in competition with private sector providers of dispute resolution services (ibid at 140). These are the competitors for whom the judges are working in their spare time.

²⁰ Ng, G., ‘Nederland’ in Fabri et al. eds (2005) above n. 9 at 313.

²¹ Signifredi, P., ‘Misurare la produttività dei giudici: il caso Spagnolo’ (2006). Bologna: IRSIG-CNR.

²² Consejo General del Poder Judicial (CGPJ).

²³ Signifredi above n. 21 at 8.

into a number of judicial associations, some of which challenged the legality of the system in the administrative disputes jurisdiction of the Supreme Court. In 2006 the Court upheld the challenges to the legality of this system of variable remuneration brought by several of those associations, holding that the regulations could not be used to determine the remuneration or career prospects of an independent judiciary.²⁴

Responses to perceived public concerns

The ambivalence in judicial attitudes to public opinion, seen in Garapon's characterisation of the public as both 'guarantee and menace'²⁵ is illustrated in confrontations between judicial decisions and public opinion. Controversies over inadequately harsh sentences for crimes, highlighted in the media, seem almost to be a ubiquitous, if not perennial phenomenon. National reports from France and Denmark reflect similar patterns of events and reactions in the two countries. In France this debate followed a reorganisation in 2000 of the responsibilities of the *juges d'instruction* and the *juges des libertés et de la détention* (who deal with applications for alternatives to detention) which saw a marked decline in incarceration rates. Public reaction highlighted issues of security as a result of this decline, and, as the national report puts it, 'the jurisprudence changed: the number of committals to provisional detention increased significantly, independent of any legislative change'.²⁶ In Denmark the debate over sentencing for violent crime was heated, with judges accused of being 'flabby humanitarians' by a member of Parliament. With the judges and the government resisting pressure for legislated mandatory minimum sentences, it was found that average sentences for violent crimes had increased from 87 days imprisonment in 1995 to 119 in 2000. This data tracks changes following a 1994 legislative change which allowed harsher sentences.²⁷ It is unclear how much of this change is attributable to legislation and how much to judicial responses to public opinion, as in France. The apparent accommodation of the judges to public opinion in these instances suggests that while it may be denigrated as 'irrational' and formally discounted as a source of judicial decision-making, public opinion may operate in unacknowledged and unofficial ways.

We may draw some tentative conclusions from this brief summary of the role of the public in assessing and directing the justice systems under discussion. The public, in its various guises as citizens, voters, taxpayers and users of court services, has a legitimate interest in the quality of justice. Public opinion is often solicited in forms which have little relevance to policy implications and therefore few consequences for the reform of justice systems. Initiatives which bring together public interests and perceptions with effective mechanisms for assessment and reform were initiated, as in Denmark, by informed public opinion and met by responsive and well-informed judicial administration. When there are perceptions of a crisis of legitimacy or of deep-seated public criticisms of the justice system, responses are inconsistent. While often purporting to better inform the citizens as to the processes of justice, the nexus between information and outcomes remains tenuous. Judges pride themselves on their aloofness from public opinion while apparently accommodating it almost surreptitiously. The judiciary may well be as poorly informed about public opinion as the public is held to be about judicial processes. The information

²⁴ Tribunal Supremo *Num.*: 14/2004 *Votación*: 21/02/2006.

²⁵ Garapon above n. 5 at 302.

²⁶ Deffigier above n. 14 at 274.

²⁷ Wittrup above n. 18 at 144–5.

available to most justice systems (ministries, judges and judicial councils alike) is based on media reporting of crime, justice and public responses (through editorials or sound grabs) of dubious validity, and opinion polls of equally dubious relevance to key policy issues.

Areas of public concern

The various forms of public input to the justice systems we have been reporting do, however, suggest some common themes and possible directions. When they are able to express views about substantive issues of justice, through well directed surveys or well informed pressure groups, public perceptions are more sophisticated than the ‘irrational’ or ‘archaic and uncontrollable’ mechanisms feared by the judges as the other face of the public guarantee of justice.²⁸

Impartiality and coherent decisions

Evidence from Portugal, France and Denmark shows that people really do want to be better informed about the processes of justice through comprehensibly argued judicial decisions. This is clearly important to individual litigants, but also relevant on a broader scale to sentencing decisions. In addition we have seen that the users of the justice systems of the Netherlands, France, Portugal and Denmark consider the impartiality of judges to be important, and threatened. Of particular and perhaps surprising interest is the nature of that impartiality and the source of its vulnerability. In contrast to the frequently expressed concern that the judiciary must maintain its independence from ministries or the interference of governments, the impartiality envisaged by the users has more to do with equality between the parties. This is threatened when judges have second jobs, which might mean working with other lawyers who may appear before them, or when prosecutors are perceived to be working out of the same office as the judge. This is a simple and fundamental conception of impartiality which serves as a reminder that the separation of powers was never more than a necessary but insufficient condition for the more basic principle of fair judgment.

If comprehensible reasons for decisions and transparent impartiality indicate public sources of a sense of justice which transcend a narrow legal formalism, other public concerns are relevant to more managerial areas the courts’ operations. Avoiding unnecessary delay and accommodating the rights and needs of victims are two themes which have frequently emerged from public expressions of concern. They both lend themselves to managerial measures, each with its own difficulties.

Delay

Delay has legal, managerial and public dimensions. It may be assessed as the denial of justice in a specific case, or as an average or median case processing time. The former has few implications for systemic issues, while the latter is difficult to reconcile with the unpredictable vagaries of specific cases. Nonetheless, under the banner of case management reforms, the issue has become almost a text-book case study in judicial and managerial roles. The managerial approach is to set goals, and measure progress towards them. It is also possible to understand delay in public and in legal terms, as in the following instances.

²⁸ Garapon above n. 4 at 301–2.

Complaints mechanisms in France and Spain have registered some 2,000 and 1,000 complaints per year (respectively), but limited evaluative data suggests that very rarely have these resulted in action against a judge. What is of particular interest here is that the complaints are overwhelming about unjustifiable delay (France) and the only two cases of sanctions against judges in Spain were in response to very serious delay.²⁹ The very limited number of cases resulting in sanctions suggests that it is difficult for citizens to take action against judges through a disciplinary system controlled (as in both these cases) by the judiciary. That successes have been limited to matters involving delay suggests that this is the major concern of court users (for which there is some evidence³⁰) and also that it is one of the few areas in which disciplinary committees can or will find against judges.

The legal processes of quality control through judicial and appellate processes are generally so well established and so deeply ingrained in the nation's constitution and laws that they are almost invisible from the point of view of quality assessment in relation to reforms. Where they have been conspicuous is in the jurisprudence that has grown out of decisions of the European Court of Human Rights (ECHR). A number of the countries reported that decisions involving appeals under article 6 (Right to a fair trial) of the European Convention on Human Rights had repercussions for the quality assurance of their justice systems. Article 6.1 includes the provision that 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. Findings that trials had exceeded 'a reasonable time' were more commonly cited than any of the other grounds, reflecting the pattern of complaints reported above.

The capacity of ECHR decisions to go beyond the individual case to influence the overall functioning of the judicial system depends on the particular institutional setting in which it is located. Various agencies of the Council of Europe (COE), notably the Committee of Foreign Ministers of Member States, have responsibility for overseeing compliance with decisions of the Court and monitoring the adequacy of measures taken by national judicial systems to avoid repetition of such violations.³¹

This approach has demonstrated that it can produce systemic changes which may not necessarily be desirable. The Italian case illustrates this point. Until 2000 Italy was the country with the highest number of appeals and violations on the grounds of excessive delay in court proceedings, whose sheer number were practically blocking the decision-making capacity of the ECHR. Consequently the Committee of Foreign Ministers asked the Italian government to take steps to speed up judicial proceedings and to reduce the number of appeals to the court. Even if the Italian government was not able to achieve satisfactory results in case processing times, it was able to reduce appeals to the Court, thanks to passage of the so-called 'Pinto' legislation.³² This placed a judge within the courts of appeal to hear appeals against excessive delay and also provided for compensation. Thus before being able to appeal to the ECHR, a claim must first be

²⁹ Defiggier, C. et al. above n. 14 at 268; Deffigier, C., Plazy, J.-M., Marshal, D., Gaboriau, S. and Pauliat, H., 'Qualité et Justice en France' in Fabri et al. eds (2003) above n. 11 at 152-3.

³⁰ This is discussed below in relation to surveys of court users.

³¹ Buonomo, F., 'Nuove regole per l'adempimento delle sentenze CEDU', *Diritto e Giustizia* (2005).

³² Law number 89 of 2001.

screened by the Italian judicial system which may eventually offer compensation. It is clear that this system treats the symptoms rather than the disease: it has reduced the number of appeals to Strasbourg but not the length of trials.³³

Victim support

Victim support has been incorporated into many mission statements and policy documents across Europe. It has been built into the French performance objectives under new program budgeting provisions, but it is too early to tell whether measures such as these will have any real effect. Victims' rights are included in the Spanish charter of rights to justice. In legal terms this charter is framed more strongly than its English equivalent, being explicitly a 'Carta de derechos' (ie legal rights), and it extends to include policy initiatives such as providing for victim support centres across the country. Support services of this sort are easily distinguished from judicial processes and so avoid the complex interactions between the legal and managerial systems. This is an area where something can be done towards meeting public demands, while also requiring follow up evaluation, including from the point of view of the public, to gauge the extent to which these initiatives do meet public expectations.

Addressing public confidence

The foregoing discussion of some current practices employed in evaluating the quality of justice in Europe has highlighted a number of difficulties. In conclusion we try to analyse certain factors underlying such problems in practice, and relate these to any indications of a possible way forward by reference to the earlier consideration of the principles upon which justice systems are based. A couple of the more promising examples arising from the research will again introduce a practical element to the discussion before we sum up with some tentative general proposals.

The distinctive power bases of the key players involved in the delivery of justice are explicitly enshrined in the principle of the separation of powers. According to that doctrine, judges are to remain independent of the executive power and, a related issue, aloof from popular influences. As a principle of long official and even constitutional standing it underpins many of the institutional arrangements, as well as the habits of thought, obtaining in justice systems. Indeed, with the proliferation of judicial councils as a bulwark between the judiciary and the executive, the doctrine appears to be enjoying a period of particular influence. While powers should perhaps be separated through institutional internal divisions, evaluative mechanisms do not thrive on them. The research found many instances of unilateralism and entrenched opposition based precisely in these divisions of power. We have had occasion to refer to the zero sum games that result.

The evaluation of quality, and other means 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

³³ Carnevali, D., 'La violazione della ragionevole durata del processo: alcuni dati sull'applicazione della Legge Pinto' in *Giusto Processo?*, Guarnieri, C. and Zannotti, F.(eds.) (2006) 289. Padova: CEDAM.

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 technology) are understood as the solution to problems which really arise in the very conception of the process. Losing sight of the goals of the evaluation system, 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.

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. The Italian Pinto legislation is illustrative: through a combination of domestic legal devices and the promise of compensation, appeals to the ECHR on the grounds of delay were reduced *without reducing the delay itself*. Less spectacular examples of technical solutions to juridical, managerial and political problems were seen in the automatic connections made by some justice ministries and judicial councils between evaluative devices and financial allocation. The Spanish system of output measures as a basis for judicial remuneration illustrates both ritualism and technologism: on the one hand, the measuring system becomes an end in itself, losing sight of the purposes for which it exists. On the other, the results of that measurement are applied mathematically to financial outputs. By focussing the attention of the judges on their salaries, of the ministry on the measures, and of both interest groups on the nexus between the two, any broader interests or ends are effectively eclipsed.

This brief overview of the principles which underlie the evaluation of justice bear out the issues we identified in practice: the balkanisation of interests within the justice systems; the ritualism of seeking evaluative mechanisms for their own sake; and the search for a quick technological fix which will have assured or automatic outcomes at the level of the data (such as the number of appeals) without necessarily overcoming the root problem. This syndrome is collectively characterised by an approach blinkered by partial interests and a hiatus between means and ends, so losing sight of the underlying aims and principles of the justice system. Evaluative mechanisms must take into account a complex of interests and values, not losing sight of their diverse sources in the judges, court and departmental personnel, citizens, lawyers, victims of crime and other court users. As long as many of these interests are represented only abstractly, the views and interests of real persons can only be adduced from the media or as a by-product of technical data collection. That these interests often enter into the debate only as representations of overarching demands for accountability *versus* independence stifles broader debate.

Potential solutions to these problems can be illustrated by some practical examples from the research. Before turning to those it may help to clarify the principles underlying demands for accountability, independence and public confidence. Both authority and accountability are means of representing interests which cannot literally be present in a practical setting such as a court or a ministry. The ministries and courts represent the traditional sources of authority of the state and of law. Modern democracies also base the legitimate authority of the state and the judiciary in the confidence of the public, who are also represented as an abstraction, or in a few cases as a jury or citizen judge. The

representation of law, state and a sovereign people prospectively authorises courts to pass judgment on those real persons before the court who stand to lose property or liberty as a consequence. The authority of the entire system must stand above the interests of the parties, including the victims of crime, while being based in the represented abstraction, the people. This paradoxical relationship between justice and the public leads to various devices for keeping popular interests at arms length. Continually represented only as an abstraction, the confidence of the public can be formally canvassed in opinion polls, or informally (and unreliably) deduced from the media. In keeping a distance between themselves and actual members of the public, justice systems may lose sight of the legitimate interests of people as users of the courts. Where those interests have been able to communicate effectively we have seen demands for timely justice, competent and communicative judges, and transparent judicial impartiality. We discovered more vocal citizen concern over judges' connections with the private interests of parties (through their other appointments, as in the Netherlands and Denmark) than with those of public authorities.

Accountability can be used as a retrospective check on the representativeness of the justice system. This does not imply that it should be any less broad in its conception of the interests to which it must answer. Substantive issues of timeliness, competence, communication and impartiality are as central to the system of accountability as to that of authority. Courts are only accountable to the executive as a means to the end of accounting to the citizens. And as we see in this overview of citizens' concerns, they are accountable for a lot more than money.

To sum up our broad observations on the issues involved in measuring public confidence, we make two general points. First, it is necessary to determine what is important. It is only when there is effective communication among a range of interests in deciding goals and values that we find the sort of breakthroughs seen in Denmark and the Netherlands. The public concern over judges' conflicts of interest was seen to cut across the traditional contest between judicial and executive power, and to be amenable to satisfactory solutions. Valid information on matters of public concern could be put to use.

Second, problems identified must be analysed and solved. Setting out to find information with a view to improving procedures and practices leads to better results than the endless debates over the minutiae of measurement systems. These are at their worst when they are manipulated to give the right answer without addressing the substantive problem.³⁴ They work best when they are built in to the governance of the courts as a way of responding to needs and legitimate public demands.

A theme common to these observations is the importance of addressing a range of significant values, including judicial impartiality and coherent decisions, as well as demands for delay reduction. Quantitative measures of time and money may be relevant where case processing times are distressing to the public and where courts must maintain high standards in tight fiscal circumstances. But they are far from the whole story.

³⁴ The clearest example of this arose in the case of Italy's reduction of appeals to the ECHR. This is of particular interest since it operated at the level of legal appeals, and not just technocratic measurement systems.

Positive directions for Europe and Australia

We now return to some practical examples arising out of the research which, we believe, point to some positive directions. We must explore 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. We see progress in those areas where the demands of the public are heard, and when judges and managers work together to respond to those demands as well as to understand each others' values and interests.

This approach is exemplified in a local pilot scheme in Finland. In 1999 in the district of the Rovaniemi Court of Appeal (which includes nine first instance district courts) 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 benchmarks³⁵. One of the results is the development of a new culture of communication between all the actors involved in the judicial process.

The targets dealt with substantive legal and judicial management issues, and were able to be assessed by fairly straightforward measures. They included increased consistency in sentencing (initially in theft, drink driving and assault, expanded to narcotics cases the 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. Not only was this an innovative local quality assurance pilot scheme, but it was itself evaluated,³⁶ with such positive results that it was recommended for nationwide adoption and was awarded a European prize for 'innovative practice contributing to the quality of civil justice'.³⁷

Despite the obvious differences among the European judicial systems and between them and our own, we hope some of the discussion so far will have had a recognisable ring to it. Here are some of the issues that have seemed familiar to us:

- Disputes between judges and Attorney-General's or Justice Department over the relevance of outcome measures, and the juxtaposition of independence versus accountability as two ends of a single spectrum.
- Attempts to compare apples and mangos for the sake of comparison (instead of trying to produce better apples *or* mangos).

³⁵ Aarnio et al. above n. 12 at 178–82; 'Quality Project in the Courts in the Jurisdiction of the Court of Appeal of Rovaniemi, Finland' (2005) <http://www.oikeus.fi/uploads/wz1uke8tvs.pdf> accessed 6 March 2006.

³⁶ This is a notable exception to the project's general observation of the remarkably low rate of evaluation of specific reforms.

³⁷ Aarnio et al. above n. 12 at 181–2; http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Finalists%20E.asp#TopOfPage accessed 6 March 2006.

- The ritualism involved in measuring for the sake of measuring, even though no tangible consequences will flow from such an exercise. As has been observed of the common room squabbles of some of the less relevant university disciplines, the heat of the dispute often appears to be inversely proportional to what is really at stake.
- While judges maintain their focus on independence from the executive branch, impartiality is equally threatened by their failure to remain aloof from connections with the parties particularly where they are represented by members of the legal profession close to the judges. The recruitment of part time and temporary judges to certain benches in Australia echoes the Dutch experience. With shortening judicial careers and longer working lives, the activities pursued by judges after their departure from the bench can have a similarly deleterious effect on public perceptions of judicial impartiality.

So to sum up the general findings that can be made from this survey of European practices, we conclude with the following points, and invite readers to elaborate on them from their own experiences.

To avoid measuring what can be counted, rather than (as Chief Justice Spigelman put it) what counts, courts must have ways of finding out what does count as far as the public is concerned. There are few better sources of information on key factors in public confidence than the public themselves. This information should be systematically collected, through consultation with court users and relevant interest groups or through reliable and well directed investigations of public opinion on issues which are within the courts' capacity to address. Courts and ministries may be misled by impressionistic and ideas on public concerns gained exclusively through the mass media and informal chatter. Any monitoring process must investigate and take note of public concerns, and build measures of them into monitoring and quality assurance systems. Measuring these things for their own sake is an error we have already referred to as 'ritualism'. The bodies responsible for the governance of the courts must be set up to address the relevant concerns that they encounter. Concerns should be addressed, and reasonable expectations met, so long as they are related to the way the service is administered, not to specific cases.

The public should be understood as comprising a variety of interest groups, professions and classes. The public cannot be adequately represented as a unified mass, nor are communications exclusively via the mass media an adequate strategy.

It is in the interests of the courts and the departments administering them to ensure open channels of communication between themselves and with a range of public interests. The relevant interests, and the people and organisations representing those interests, vary among jurisdictions, from criminal to civil, and from industrial to environmental. The courts themselves are well placed to identify those interests and to recognise and respond to legitimate communications from them.