
Theme: Evaluation Of Courts And Judicial Systems

Monitoring and Evaluation of Courts Activities and Performance

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1. INTRODUCTION²

This article is based on a report of a research study conducted by the three authors for the European Commission for the Efficiency of Justice (Cepej) of the Council of Europe (CoE). The study focused on court monitoring and evaluation systems in six different countries, all of which are members of the Council of Europe, with particular emphasis on case management monitoring and evaluation.

Even though this phenomenon is attracting growing attention both from policy makers and judicial administrations, limited information on the subject is available concerning empirical experiences within the judicial systems. The limited available data concerning the functioning of judicial systems, however, shows a fragmented implementation of monitoring and evaluation policies. As the CEPEJ report states,³ monitoring and evaluation systems should help improve the efficiency of justice, the quality and standard of the service delivered by the courts, and should also contribute to a more consistent implementation of judicial policies.

Approaches to monitoring and evaluation “range from traditional statistical surveys of workload, 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”.⁴

The purpose of this article is to discuss an empirically derived model that describes the evolution of the courts’ evaluation and monitoring systems.

2. CONCEPTUAL FRAMEWORK

Conceptions regarding how courts should in western democracies, and theories regarding court organization and procedures, have evolved slowly in a relatively stable environment.⁵ Today, as changes are taking place more and more rapidly, especially in regard to such issues as legislation, business characteristics, etc., courts are being forced to continuously adapt and re-design their systems, procedures and practices. Old methods and ways of doing things are not capable of responding to the growing requests coming from the civil society and the growing quantity and complexity of the tasks that courts are required to perform. For these reasons we have chosen to focus our research on court monitoring and evaluation systems.

Several factors have contributed to the growing importance of judicial monitoring and evaluation in western European, including the growing attention to judicial activities and administration⁶ and the diffusion of new public management

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³ European Commission for the Efficiency of Justice (CEPEJ) - European judicial systems - Edition 2006 (2004 data) p.70

⁴ Francesco Contini & Richard Mohr (2007) Reconciling Independence and Accountability in Judicial Systems, Utrecht Law Review, submitted, p.1

⁵ Francesco Contini & Richard Mohr (2007) Reconciling Independence and Accountability in Judicial Systems, Utrecht Law Review, submitted

⁶ C. N. Tate and T. Vallinder, *The global expansion of judicial power*, New York University Press, New York 1995

G. Di Federico, 'Italy: A peculiar case', in *The Global Expansion of Judicial Power*, C. N. Tate and T. Vallinder (eds), New York University Press, New York 1995, pp.233-242

M. Velicogna and G. Y. Ng, 'Legitimacy and Internet in the judiciary: A Lesson from the Italian Courts' Websites Experience', *International Journal of law and information technology*, Oxford Journals, Oxford University Press 2006, vol., p.371

values. The importance of monitoring and evaluation is also due to the fact that, “the administration of justice looks very much like an ordinary public service organization”,⁷ has generated an awareness that the actors operating in the justice systems should earn their legitimacy not only by participating in the production of “sound juridical judgments but also by providing adequate services”.⁸

Western constitutional theory demands that the judiciary operate within the rule of law, independently from other state powers, with a view to protecting the human rights of the citizens. It is expected that within this framework judges act in an impartial and independent way. When one thinks of the judiciary in a democratic country, instantly the constitutional principle that will spring to lawyers’ and legal academic minds will be judicial independence. Judicial independence is the central theme in constitutional law, in international treaties relating to human rights and a fair trial, and is promoted by international organizations in their efforts to develop judiciaries in member countries. In addition, the concept of independence is a key concern for all parties and lawyers coming before the bench to argue their case: will this judge decide my case without bias? In constitutional courses at university relating to the separation of powers, judicial independence is also a central issue.

A second, increasingly relevant issue concerns accountability. Traditional forms of accountability are primarily designed to protect the human right of fair trial (found also in article 6 of the European Convention on Human Rights). Until recently, these forms of accountability were thought to be sufficient to guarantee fair dispute resolution within the rule of law, be it in civil, criminal or public area.⁹

Parliaments, Governments and Ministries of justice all around Europe have been confronted with mounting requests for better judicial services, a more efficient organization of services, better accountability and “modernization” of the justice machine. Furthermore, since the break down of authoritarian regimes in Eastern Europe, the development of justice systems has been increasingly regarded as a key aspect of the transition process. In these contexts, courts became crucial actors as they contribute to the development of new legislations, the adaptation of old rules to new contexts and to the prevention of the arbitrary use of power.¹⁰ Furthermore, judicial institutions created in non-democratic contexts need to be reformed in order to make them adequate for new democratic contexts and tasks.¹¹

In order for judicial organizations to innovate, it is of paramount importance that they be able to monitor and evaluate their own activities and results. Monitoring and evaluation can support courts in performing their public services, adapting to the needs of the customer/client/citizen. The general idea behind this is that quality in services and products of the court innovation lead by monitoring and evaluation will lead to satisfaction of the clients/customers/citizens.¹² It has been suggested that such satisfaction could in turn lead to public trust¹³ and governmental legitimacy.¹⁴

Another important element is the growing attention towards accountability. Mechanisms of accountability are pivotal to a good working democracy because they help ensure that no one body, be it a state institution, a private organization or person, has the power to dictate the lives of the communities they serve except based on the rule of law.¹⁵ Furthermore, as already mentioned, they provide a powerful tool to induce a traditionally insulated organization like the judiciary to be more sensitive to its customer needs. There are two ways to hold an organization to account for its actions.¹⁶ One is where the citizens are passive, whereby the organization must take steps to ensure the transparency of decision-making and service provision. The other approach requires action by citizens in their capacity as clients of public services, where

⁷ M. Fabri and P. M. Langbroek (eds), *The challenge of change for judicial systems, developing a public administration perspective*, IOS Press OHMSHA, Amsterdam, Washington 2000, p.8

⁸ Ibid.(eds), pp.8-9

⁹ See: M. J. C. Vile, *Constitutionalism and the separation of powers*, Liberty Fund, Indianapolis 1998, p.95

¹⁰ Larkins C. M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis', *The American Journal of Comparative Law* 1996, 44 vol., 605-626 p.; M. Krygier, A. Czarota and W. Sadurski (eds), *Rethinking The Rule of law after Communism*, CEU Press, Budapest 2006

¹¹ M. K. Dietrich, 'Legal and judicial reform in Central Europe and the Former Soviet Union' in *World Bank Papers* 2000; R. Gargarella, 'In Search of Democratic Justice: What Courts Should Not Do: Argentina, 1983-2002', in *Democratization and the Judiciary*, S. e. a. Gløppen (eds), Frank Cass, London 2004

¹² EFQM, 'Mission' available at <http://www.efqm.org/Default.aspx?tabid=60> 2006

¹³ G. Bouckaert and S. van de Walle, *Government and trust in government*, at EGPA Conference Finland 2001

¹⁴ Ibid.

¹⁵ M. J. C. Vile, *Constitutionalism and the separation of powers*, Liberty Fund, Indianapolis 1998 p.3; P. Selznick, *The moral commonwealth: Social theory and the promise of community*, University of California Press, Berkley, California 1992 ch. 9, U. Rosenthal, 'Macht en controle op de macht: de dringende behoefte aan publieke controle', *Nederlands Juristen Blad* 2000, 34 vol., 1703 p., p.1703

¹⁶ M. A. P. Bovens, *The quest for responsibility, accountability and citizenship in complex organizations*, Cambridge University Press, 1998 ch. 3

they have the right to demand answers for actions taken and to demand the stopping or redesign of such actions.¹⁷ In both cases, data concerning the activities of the public organization is required to be collected and made available.

As a consequence, nowadays, the traditional Western constitutional framework is expanding to include the requirements of organizational quality and efficiency imposed on justice in Europe by article 6 European Convention on Human Rights. Indeed, various countries have adopted legislation designed to improve the efficiency of justice. Monitoring and evaluation processes are assuming increasing prominence as tools that help measure outputs, assess policy implementation outcomes and allocate increasingly shrinking resources.

At this point, it is important to highlight the fact that monitoring and evaluation tools are also applied outside the context of judicial is not limited case management. Indeed, such tools are important to consider in determining equality, fairness, and integrity, customer relations (access to justice, public trust and confidence), quality of the work done by staff other than judges, personnel management and development, independence and accountability.

3. METHODOLOGY

We have used CEPEJ data on evaluation and monitoring as a basis for structuring our research framework and analysis. This data has been integrated with qualitative and quantitative information already collected in various research projects, reports and studies conducted by members of the research group and by their research networks in recent years. We also supplemented the data with semi structured questionnaires and interviews were conducted with CEPEJ contacts.

In order to create a more robust study, and to identify common and divergent patterns, we selected a multiple case study approach. The case study design is *"the logic that links the data to be collected (and the conclusions to be drawn) to the initial questions of a study"*.¹⁸ Adopting a mainly qualitative approach, the study focused on six countries: France, Italy, The Netherlands, Croatia, Serbia and Slovenia. The depth, openness, and detail of qualitative inquiry, based on a limited number of cases, was deemed to be more appropriate for increasing the understanding of a complex but still uncharted phenomena such as the monitoring and evaluation of judicial offices. In fact, the preliminary analysis of the data provided by CEPEJ, even though quite useful as a way of orienting the research, revealed serious limitations as to the possibility of better grasping the specific characteristics and dynamics of the different monitoring and evaluation initiatives. The fact that we used a small number of cases, although reducing the chance to create the type of generalized finding that could be generated under a quantitative approach, helped produce a wealth of detailed information that a more quantitative approach could not provide.¹⁹

Starting from the public data provided by CEPEJ, a research project was sketched and case studies were identified. The criteria behind the case selection was based on two factors. The first one is that, between the members of the research team, all the countries' judiciaries have been studied in depth. The second is that this selection allowed us to confront evaluation and monitoring in two diverse groups of judiciaries: three judiciaries of well established democracies and three judiciaries of recently developed democracies. An important point that needs to be stressed is that this grouping allowed us to account for different historical, institutional and legal experiences. These differences are not and should not be seen as a source of division but as an opportunity for mutual learning. This wealth of experiences make Europe an extraordinary laboratory of innovation and change.

We based our definition of monitoring and evaluation on the definition provided by CEPEJ. Regarding monitoring, we refer to procedures and practices aimed at assessing the day-to-day activity of the courts and judicial productivity. Regarding evaluation, we refer to procedures and practices directed at assessing the performance of court systems with prospective concerns, using indicators and targets.

Evidence for the case studies was collected from multiple sources allowing converging lines of inquiry, and data triangulation to enhance the validity of the research. Several methods were used to collect data and information for the case studies: literature research, document collection, electronic questionnaires, interviews, environment observation and "in action" observation. Different combinations have been used in each case in order to maximize data accuracy and reliability considering the limited resources at our disposal.²⁰

¹⁷ For more on the concept of participation see: P. Selznick, *'The moral commonwealth: Social theory and the promise of community'*, University of California Press, Berkeley, California 1992 p.314-318

¹⁸ R. K. Yin, *'Case Study Research: Design and Methods'*, Sage Publishing, Beverly Hills, CA 2003 p.27

¹⁹ M. Q. Patton, *'Qualitative Evaluation & Research Methods'*, Sage Publishing, Newbury Park, CA 1990 p.13

²⁰ J. W. Creswell, *'Qualitative inquiry and research design: Choosing among five traditions'*, Sage Publications, Inc., 1998, chapter 7; I. Maso, 'The interview as a dialogue', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996 pp.7-14; C. A. B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J. F. Gubrium and J. A. Holstein (eds), Sage, Thousand Oaks, London, New Dehli 2001, pp.83-83; R. W. Shuy, 'In person versus telephone interviewing', in *Handbook of interview research, context and method*, J. F. Gubrium and J. A. Holstein (eds), Sage, Thousand Oaks, London, New Dehli 2001, ch. 26, pp.537-555; C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, *'Research methods in social relations'*, Hold, Rinehart

Due to the fact that our field of research was an area where relatively little field research has been conducted (at the time this research was conducted), the choice was oriented to the selection of an exploratory²¹ research methodology with semi-structured interviews.²² Furthermore, in the Netherlands and France, the study greatly benefited from data collected by Gar Yein Ng in her PhD research-from 2002 to 2007. Concerning the Italian portion of the study, much of the data and information were drawn from research and studies conducted by the research Institute on judicial Systems on the subject of quality and evaluation of justice in the period from 2000 to 2007. The studies of Croatia, Serbia and Slovenia were supported by on-site visits conducted by one of the authors in each country from October 2006 to April 2007. For these three case studies, written electronic questionnaires were also submitted to CEPEJ contacts. This semi-structured questionnaire was specifically built from the CEPEJ report questions (and national answers) concerning monitoring and evaluation. Our questions were aimed at missing, unclear or interesting data that required further elaboration. Written replies from Croatia and Slovenia were analyzed and followed by a second round of questions. For the Serbian case study, a reply to the questionnaire was not provided in time.²³ To overcome this fact, additional documentary evidence was collected. For this purpose, local expert support was used to search and analyze national documentation and to translate relevant references.

A pattern-matching technique was used to compare different national experiences. This offered the opportunity to highlight trends and possibly causal relations between national context characteristics. Such a comparison included the different balance between constitutional values and division of powers, legal frameworks, judicial organization, local organization, norms, procedures and practices, technological artifact features, adoption process and results. The model presented in this article is the result of such analysis.

4. THE MODEL

Based on our research, we were able to discern different stages of development in the creation of court management monitoring and evaluation systems. Given the impetus toward democratization and NPM, we noticed a common trend towards the development of such systems. Such attempts have been met by difficulties, especially in the empirical implementation and in the capability of the systems to produce the expected results. This can be partially explained by some common factors that affect the measurement of all court activities of all countries such as setting standards for backlogs, reasonable delays and productivity. On the other hand, the different historical development and institutional settings of each country contributes to these difficulties. These differences have been kept in mind when developing our insights.

We have identified different stages of development for the operation of monitoring and evaluation systems based on the data from the case studies: bureaucratic data collection, normative framework, institution building, evaluation and monitoring, and accountability and action. We will proceed now to discuss each stage in turn.

Bureaucratic data collection takes place outside of monitoring and evaluation purposes. Examples for courts include the registration of cases in paper and electronic registers, and data collected in case tracking systems. These basic forms of data collection are ingrained in traditional court procedures and regulations. Courts in all the six countries collect such data in order to guarantee the respect of due process especially as regard the following of procedures, case handling and scheduling. Such data can be adapted for internal monitoring and evaluation purposes at court level. We concluded this because such data is usually collected according to standards and procedures individual to the court or according to data entry methodologies which are also individual to the court as is the case with Croatia, France, Italy and the Netherlands. Measures have been taken in all countries to standardize this data and adapt it for national monitoring and evaluation, however, as the data showed, such efforts have required normative and institutional developments.

Due to the complex relationship between judicial independence and accountability, a normative framework had to be developed-in order to operate monitoring and evaluation systems within the principles of constitutional law. However, in none of the countries considered, did we find any explicit constitutional basis for monitoring and evaluating court systems. This is because constitutional law mainly focuses on individual accountability and the independence of judges rather than

and Winston, 1966, chapter 7; F. Wester, 'The analysis of qualitative interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996, pp. 63-85; C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, 'Research methods in social relations', Hold, Rinehart and Winston, 1966, chapter 11; J. W. Creswell, 'Qualitative inquiry and research design: Choosing among five traditions', Sage Publications, Inc., 1998 chapter 8

²¹ C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, 'Research methods in social relations', Hold, Rinehart and Winston, 1966, part on research design

²² C. A. B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J. F. Gubrium and J. A. Holstein (eds), Sage, Thousand Oaks, London, New Delhi 2001, p.86; H. Mazeland and P. ten Have, 'Essential tensions in (semi-) open research interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University Press, Brussels 1996

²³ This was due to the transition of government in Serbia at the time the research has been conducted.

on the accountability of the court as a whole. This element could also be conceived of as part of ordinary political accountability.²⁴

As stated earlier, the movement towards democratization and NPM have been the main impetus for normative changes. Most of these changes have occurred at the legislative level; for example, Slovenia, Croatia and Serbia have enacted legislation regarding democratization of the judiciary under the EU accession rules.²⁵ Whereas France, Italy and the Netherlands drew impetus from the infusion of NPM values in reshaping of the expectations of accountability from their populations and the need to increase efficiency and cut costs. Legislation from France and Italy provide clear examples of influences from NPM; e.g. in France, the new financial law requires all public services, including the courts, to account for their spending with objective criteria. In Italy, the legislation on administrative proceedings and on the reform of the Civil Service provided general frameworks within which also the courts had to operate. The Netherlands took a mixed approach and developed a normative framework which on the one hand democratized the judicial system at the same time as implementing NPM within the courts.

Institution building has characterized the first stage of implementation of the normative framework. From the data collected this has varied widely, from the adaptation of already existing offices, to the creation of new units or even institutions such as the Council for the Judiciary in the Netherlands. In some cases, such as Croatia and Slovenia, institution building didn't really take place. However, in these two countries there is a complex relationship between different actors involved in court management at different levels which is institutionalized by the law. Nevertheless, in Slovenia, all of the institutions responsible for the efficiency of justice²⁶ share the opinion that monitoring and evaluation of the courts' performance is the main path to change and innovation. In particular, in the last two years, the Supreme Court has made consistent efforts to introduce monitoring and evaluation in courts practice. In Italy there has been a transfer of competences from the National Institute of Statistics to a Statistics Directorate General within the Ministry of Justice and a special unit within the Ministry of Justice for the evaluations of costs, performances and management. In France, two approaches have been taken. On the one hand a special court service was set up to assist in court management and on the other hand judges work as policy makers in the Ministry of Justice.

Only having established a normative framework and institutional setting can one start looking at operating an effective evaluation and monitoring system. In order to be effective, the system must operate transparently and with trustworthy standards. These standards involve various factors: trust in the monitoring and evaluating institutions, perception of usefulness of the exercise, methodology for data collection.

The trust in monitoring and evaluating institutions involves two potentially inconsistent issues. On the one hand, the independence and impartiality of the institution involved. For example, politically appointed members are more likely to be viewed with suspicion and prejudice. If court presidents are appointed by the government, in countries where political influence over the judiciary is still frequent, there could be a large trust gap. On the other hand, in the Netherlands, given the increased autonomy of judges in monitoring and evaluating their judicial system, there is more confidence in the monitoring and evaluation exercise.

As far as the perception of usefulness of the monitoring and evaluation process is concerned, this also varies. In Italy, personnel involved in the data collection exercise have low opinions regarding the usefulness of data collection, and these opinions influence their attitude towards the exercise. In addition, the political goals of standardizing practices or improving efficiency have been met with a mixture of skepticism and hostility. Finally, on the issue of methodology for data collection, the characteristics of specific organization (e.g., size of the court, case typology, number of cases, court procedures) make it difficult to create reliable indicators and standards by which to monitor and evaluate court activities in a generic way. Moreover, the use of data collected with tools designed for bureaucratic data collection can sometimes lead to a false picture of court activity. Furthermore, the politicization of data collection can sometimes lead to the manipulation of methodology and data collected thereby rendering it useless. However the manipulation of statistics is an age old tradition: there are lies, damned lies and there are statistics!

These concerns require that data be read with a pinch of salt. It is also possible that the mechanisms are built into the system in the attempt to ensure more objective, accurate and reliable results. They are trying to create such mechanisms in the Netherlands, Italy, France and Croatia through ICT, as well as through the constant development of criteria for indicators and standards.

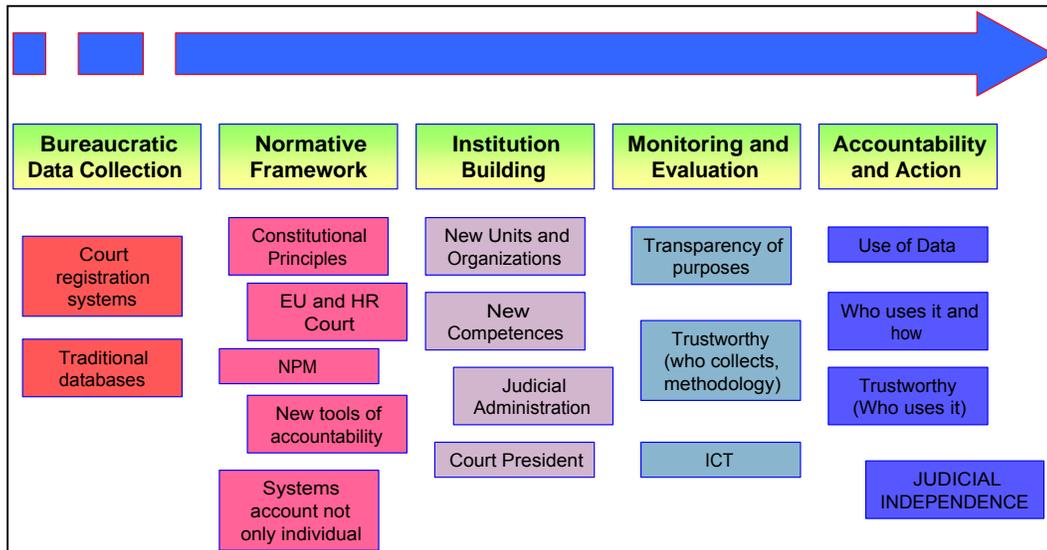
The final stage for creating an effective monitoring and evaluation system is in the mechanisms for actions and accountability based on the use of the data collected. This research has shown three main uses of the data. On the one hand, some countries collect data but do nothing with it, as was the case in Croatia for a long time. On the other hand, countries like France, the Netherlands and Italy use monitoring and evaluation data to differing degrees to hold courts to

²⁴ G. Y. Ng, 'Quality of Judicial Organization and Checks and Balances', Law, Utrecht 2007 pp.17-18

²⁵ http://ec.europa.eu/enlargement/countries/index_en.htm

²⁶ The Supreme Court of the Republic of Slovenia, Judicial Council and The Ministry of Justice.

account for spending or to allocate resources as well as to make the organization more transparent. Finally, countries like Slovenia use it to mark progress in the judicial organization and to adapt policies accordingly. In particular, a project called Lukenda²⁷ has been started in 2006 with the goal of reducing the courts' backlogs and increasing efficiency. One of the expected results of the Lukenda project is the adaptation of policies according to the collected data of the courts. Furthermore, the project is trying to develop and introduce (in cooperation with some Dutch experts) a unit-based workload measurement system for the Slovenian courts.



Problems may arise at this stage as to the trustworthiness of the institution using the data, as it may not be the same as the one collecting the data. This may be a problem because of coordination between these institutions and also because of judicial independence issues. It is not the scope of this paper to demarcate the boundaries of judicial independence but, as discussed above, many actors have argued judicial independence to block organizational development.

5. CONCLUSION

Based on these five stages, we can observe a scale by which to assess the development of the countries' monitoring and evaluation systems. However, in the use of this scale, and indeed during our conceiving of it, we urge caution. This scale is not to be used in a comparative way and if it is used at all, the historical background of the countries must be borne in mind. We observed during our research that the further down the scale the country tries to go, the harder it is to observe results from the monitoring and evaluation system development attempts. For example, bureaucratic data collection is already institutionalized and is usually the foundation of further attempts to adopt monitoring and evaluation systems. All of the countries in our study were in the process of developing norms or having developed norms were in the process of refining them. Definition of norms for creating monitoring and evaluation of court systems is somewhat tricky because of the autonomous nature of the professionals and the institutions being monitored and evaluated. Institution building, like building Rome, is a process that will take more than one day. It is not simply a matter of setting up units and tasking them with the job of monitoring and evaluating courts. It is a matter of training personnel, having a strong normative basis, and building trust within the balance of powers. This is especially sensitive for countries democratizing their public institutions, especially individuals who are being observed by international organizations.

Of course, monitoring and evaluation is not simply an exercise in data collection, but also depends on the type and quality of data collected and the use that is made of this data. This is a very sensitive and problematic issue in all of the countries that have been studied. It is at this point that it becomes harder to observe meaningful results from the adoption processes. We noticed that CEPEJ data had a similar experience. The data that we obtained from CEPEJ and CEPEJ contacts indicate that an adoption process has taken place at normative and institutional stage. There is some indication as to what is formally monitored and evaluated, but not necessarily what is done in practice, how the data is collected and what use is made of it.

Something that should be considered when conducting such research is the apparent lack of mechanisms to assess monitoring and evaluation systems and their development and successes in most countries. The Dutch example provides an exception to this experience in that they are constantly assessing the monitoring and evaluation systems internally at

²⁷ For further details see http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/zakonodaja/The_Lukanda_Project_v_ANGLESCINI.pdf

the courts and externally at the Council for the Judiciary. The experience in the Netherlands shows that such an assessment is part of an overall incremental process that is needed to develop effective systems. Especially toward the latter stages, standard institution building and normative frameworks are insufficient. Realistic programs of execution should be in place as well as accountability for those programs. This includes taking into account local characteristics, tuning the system to the specific needs and balance issues that characterizes each country.

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