
Judiciary In Times Of Scarcity: Retrenchment And Reform

By Frans van Dijk¹ and Horatius Dumbrava²

1. Introduction

The judicial organizations of many countries in Europe experience major changes. Organizational structures are revised and digital technology is implemented rapidly. The banking crisis and economic recession have speeded up these developments, but they have also altered the emphasis: from quality of justice to efficiency. In many countries the economic problems have led to an increase of court cases, in a time when there are drastic reductions of public expenditure, including that of the judiciary. In Portugal and Greece, governments have entered into reform packages with ECB, IMF and EC that include drastic reform of the judiciary as part of a modernization of the public sector, in return for financial assistance. The judicial organizations of not only these two countries, but others as well face the challenge of improving the efficient functioning of the judiciary in the interest of society and economy while having to cope with increased case loads and reduced budgets.

The European Network of Councils for the judiciary (ENCJ), in which the judiciaries of most (aspiring) member states of the EU participate as members or, in case they do not have a council for the judiciary, as observers, is very much concerned about the impact of the economic crisis on the judiciary. In 2011 it passed the so-called Vilnius Declaration. This declaration on the one hand calls on the judiciaries themselves to innovate and on the other hand exhorts governments to enable the judiciary to fulfill its crucial tasks under the present difficult circumstances.³ The ENCJ instituted a working group to take an inventory of reforms taking place in European countries, to evaluate these reforms and propose recommendations. This working group has completed its report, and its analysis and recommendations have been endorsed by the ENCJ as a whole. As the chair (Dumbrava) and a member of the working group, we wrote the report, compiling the findings of the other members.⁴ Judiciaries are already putting the report to good use.

This article focuses on the findings and recommendations of the ENCJ, and borrows literally from the report, as we want to recognize its findings. We combine this with a discussion of the relationship between the judiciary and the economy. The article starts with this subject and first discusses the relevance of the judiciary to the economy, then the impact of the economic recession upon the judiciary. Data for the Netherlands, in particular, are used to provide some insight into the magnitude of impact involved. We will also examine briefly the developments in Greece and Portugal. This discussion provides the backdrop for a review of the measures enacted to deal with the impact of the recession and of the wider reforms taking place. It should be noted that it is often not easy to demarcate both types of interventions. We will look at content as well as process of reform. In both areas we will summarize the recommendations of the ENCJ.

2. Importance of the Judiciary for the Economy

Three approaches are worthwhile to examine here. The first approach concerns the contribution of legal institutions to wealth creation and economic growth. In the past twenty years much empirical research has been done in this area. Current thinking is reflected in the latest global competitiveness report of the World Economic Forum.⁵ Institutions are not the only, but certainly one of the key factors that determine the wealth of nations. Institutions, in the definition of the report, are “the legal and administrative framework within which individuals, firms, and governments interact to generate wealth” (p. 4). The report argues that the quality of institutions has a strong influence on competitiveness and growth, and it provides references to supporting research. To capture this quality several indicators are used with respect to the judiciary: (1) judicial independence, (2) efficiency of the legal framework to settle disputes and, also (3) to challenge regulations, and (4) the protection of property rights in general as well as (5) intellectual property rights. 144 countries are scored on a range of indicators, including these five. Worldwide, the list of top ten nations is dominated by European countries such as Finland, Switzerland and the Netherlands (on all five indicators they are in the top ten), followed closely by the UK, Germany and the other Scandinavian countries. The only other country that appears in all top ten lists is New Zealand, with Singapore very close behind.

¹ Van Dijk is director of Strategy of the Netherlands Council for the Judiciary. This article is based on his presentation at the 2012 Meeting of IACA in The Hague.

² Dumbrava is member of the High Council of the Magistrature of Romania.

³ ENCJ, Vilnius declaration on challenges and opportunities for the judiciary in the current economic climate, 2011, http://www.encj.eu/images/stories/pdf/GA/Vilnius/encj_vilnius_declaration.pdf

⁴ ENCJ, Judicial reform in Europe; Report 2011-2012, 2012, www.encj.eu/images/stories/pdf/GA/Dublin/final_report_judicial_reform.pdf
We are particularly grateful to John Thornhill for his contribution to the report.

⁵ K. Schwab, *The Global Competitiveness Report 2012-2013*. World Economic Forum, 2012.

It is striking that, while some European countries perform modestly (France, Estonia), others perform weakly (Spain, Turkey), and still others even belong to the worst in the world (several countries on the Balkan and in Eastern Europe, but also Italy in several important respects). These scores are subjective, based on the views of so called business leaders, and should be considered with caution. Nonetheless, they cannot be ignored.

When it comes to the actual impact on the economy, Van Velthoven reviewed the empirical literature.⁶ His study concludes that the influence of the legal infrastructure is determined primarily by the degree of protection by law of property rights and by the quality of the judiciary (independence, timeliness and expertise). He derived an estimate for the Netherlands: the high quality of the legal infrastructure of the Netherlands compared to the worldwide average accounts for 0.8% (percentage point) per year of long-term economic growth. This magnitude is consistent with an estimate for Italy where the opposite is the case. The Italian central bank has often noted that the inefficiency of civil justice is a source of injustice and hinders economic development. Specifically, Mario Draghi, now president of the ECB, has expressed this view.⁷ According to estimates of the central bank, the poor performance of the courts, in particular with respect to timeliness, reduces economic growth annually by 1.0% (one percentage point). This is an enormous percentage, considering that Italian economic growth was just 0.3 % in the last ten years.

The second approach is much less ambitious and focuses on analyzing the direct economic benefits to be gained by removing bottlenecks, such as court delay. This approach does not claim to draw conclusions about wealth or economic growth in general, and takes a micro perspective. A study for the Netherlands is the only one known to us that provides estimates, and it dates back to 1998.⁸ Interviews with a broad range of users of the courts and their representatives showed the factors that led to major costs. Court delay was the greatest concern. To give a few examples, delay was reported as leading to postponement of investment and other profitable activities, and sometimes to the cancellation of these activities. Also, activities that harm other parties continue longer than necessary, and this is only partially compensated in the court rulings. Conflicts in the workplace continue longer than necessary, and disrupt organizations longer. If civil cases would be speeded up eight months and administrative cases by six months, the annual gains would be 0.1% of gross domestic product (GDP). Other bottlenecks were, for instance, lack of clarity of verdicts and legal uniformity, leading to uncertainty and more cases than necessary. Another very practical complaint concerned the long time parties and their lawyers often have to wait before their hearings start. The total gains to be reached were calculated at 0.25% of GDP. In other countries gains could be much larger. It should also be emphasized that this approach does not take into account the wider beneficial effects of court rulings on economic behavior in general, which indeed takes place under the so-called shadow of the law. The first approach incorporates this wider impact.

The third approach starts from the broad perspective of structural reform deemed necessary to overcome the current economic crisis. The troika of EC, ECB and IMF have reached agreements with Ireland, Portugal and Greece about structural reform. The plans for Portugal and Greece also provide an analysis of the functioning of the judiciaries of these two countries.⁹ With respect to Greece it is stated that the inefficiency of the judiciary has led to large backlogs of civil and administrative cases, and that these backlogs have a negative impact on private and foreign investment, entrepreneurship, exports and tax revenue. In Portugal backlogs and time-consuming procedures hamper the functioning of markets in several sectors of the economy. Specific attention is requested to ensure the effective and timely enforcement of contracts and competition rules. While these statements are of a rather general nature, the programs agreed upon are very concrete.

We conclude that the legal institutions, among which the judiciary plays a key role, strongly affect the economy. Measures that have a negative impact on the functioning of the judiciary will also affect the economy negatively.

3. Impact of Recession on Caseload

During economic downturns many companies as well as individuals get into financial difficulties and cannot meet their contractual obligations anymore. As a result, the volume of money claims as well as debt recovery and bankruptcies

⁶ B. van Velthoven, *The value of the judicial infrastructure for the Dutch economy*. Research Memorandum 1, Raad voor de rechtspraak.

⁷ M. Draghi, *Overview of economic and financial developments in Italy*, 2011, www.bis.org/review/r110603b.pdf. Also, IMF, Europe: navigating stormy waters, *Regional Economic Outlook*, 2011, p 68.

⁸ Ministerie van Justitie (1998). *Rechtspraak en rechtshandhaving; maatschappelijke effecten van verbetering*, Werkgroep Effecten Rechtspraak, www.rechtspraak.nl

⁹ Letter of the minister of Finance and the governor of the Central Bank of Greece to the IMF, www.imf.org/external/np/loi/2011/grc/070411.pdf. Also Portugal, <http://www.imf.org/external/np/loi/2011/prt/051711.pdf>.

increase.¹⁰ Labor conflicts multiply, while the more extensive use of social security programs also leads to more cases. The number of family law matters and criminal cases may increase too. Consequently, as all but a few countries suffered in the crisis, the volume of civil and administrative cases increased in most countries. For instance in Ireland civil cases increased by 40% since 2006 and in Denmark by 35% since 2008.¹¹ Table 1 shows the increase of civil cases in the Netherlands. Here, it has been statistically validated that the volume of cases increases during economic downturns and stabilizes in good times.¹² Several countries also reported an increase in criminal cases.

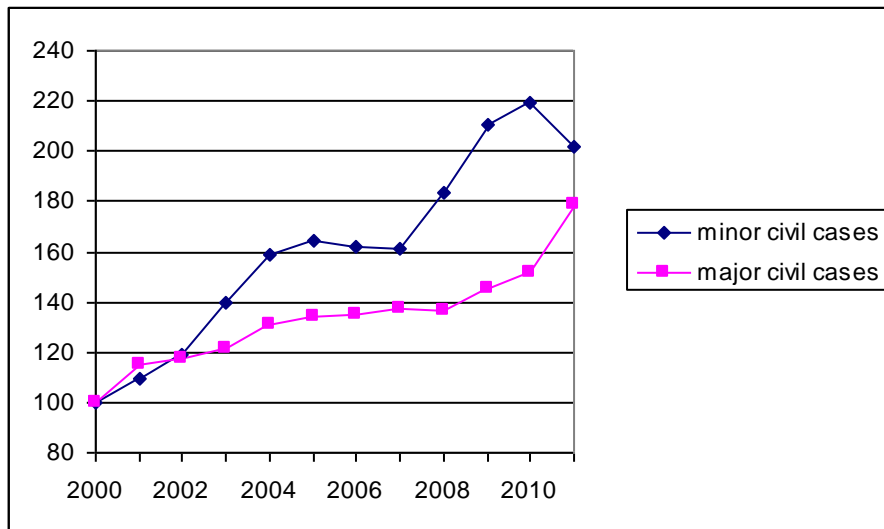


Figure 1. Volume of civil cases of first instance courts in the Netherlands. Volume in 2000 is set at 100.¹³

It is difficult to document the impact of the crisis on caseload for the whole of Europe, as the downturn varies very much in timing. Also, we are still in the middle of an unfolding crisis, and it is therefore not possible to observe the cumulative effect on caseload of the whole crisis. The great recession of the thirties of the last century provides some insight into the effects. Figure 2 shows the influence of that recession in the Netherlands. While the institutional environment has changed since then, the figure shows that all types of cases can be affected and that increases can last very long.

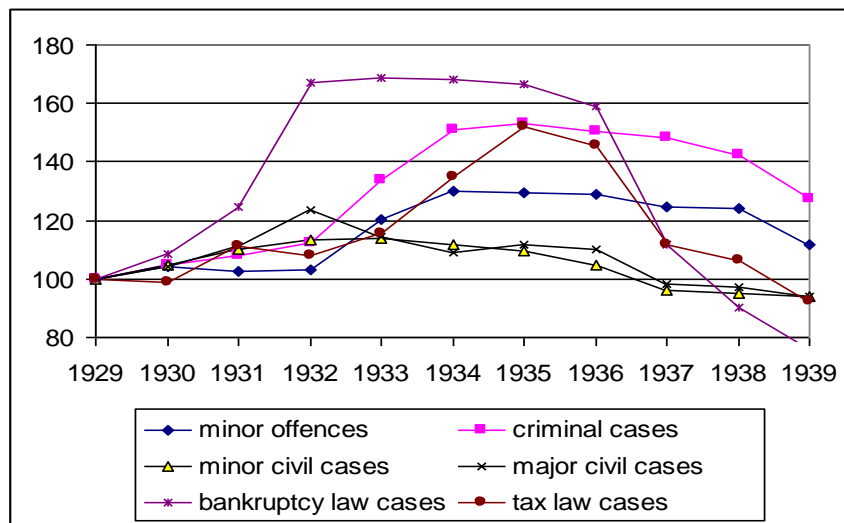


Figure 2. Volume of cases in the Netherlands during the great recession 1929-1939. Volume in 1929 is set at 100.¹⁴

¹⁰ These effects were reported by most judicial organizations in countries that suffered from the economic crisis, in response to the ENCJ questionnaire.

¹¹ Responses to the ENCJ-questionnaire by the Court Administrations of Ireland and Denmark.

¹² WODC, Capaciteitsbehoefte Justitiële ketens t/m 2016, www.wodc.nl, 2011.

¹³ Raad voor de rechtspraak, fact sheets, www.rechtspraak.nl.

The increase of the number of cases has led to concerns about increased court delay in many countries.

4. Impact of Austerity on the Judiciary

As public deficits and debts got out of control in many European countries austerity measures were taken. In many countries the judiciary was not exempted. Again, it is difficult to give a precise overview of the budget cuts, because the crisis arose at different points in time in the various countries and the governments reacted very differently. Some judicial organizations have absorbed budget reductions of up to 20%, (for example: Ireland, the UK and Lithuania.¹⁵) In other countries budget cuts have not yet been implemented or have met with strong resistance by the Parliaments. For instance, in the Netherlands a proposal to fund the cost of civil and administrative cases solely by court fees was defeated. As noted already, budget cuts aggravate the difficulties of the courts trying to contain delay. The courts are in a double bind: more cases and less budget. The likely result is longer processing time, which is bad for parties, and also for the economy as a whole.

5. Measures Taken

The ENCJ working group has examined what measures affect the judiciary.¹⁶ This was done by means of a questionnaire among the ENCJ members and observers, and by in depth discussions within the working group. As not all countries responded, it was not possible to compile a complete overview.¹⁷ Still, we believe a representative picture has emerged. The typical measures will be discussed below. It should be noted that many kinds of measures have been taken to reduce expenditure in the short run.¹⁸ In several countries the salaries of judges and staff have been reduced (see below). Also, the recruitment of judges and staff has often come to a standstill, and in Belgium for instance, the appointment of new judges has been delayed. In some cases, no maintenance is carried out in court buildings and no equipment is purchased or replaced. This situation is expected to continue in many countries. Such measures are a threat to the performance of judiciaries as they are increasing court delay.

5.1 Reduction of Salaries¹⁹

The reduction of salaries of judges is discussed here in more detail, as this type of cost reducing measure is part of the public sector reform programs in several countries whose governments have been keen to include the judiciary. These countries include: Portugal, Spain, Lithuania, Latvia, Romania and Ireland. The salaries of judges and other employees of the courts have been reduced, sometimes by more than 20%. Also, related costs, such as the contribution to pension funds have been charged to the judges more than before. In most instances constitutional courts have considered or are considering the acceptability of these measures. In Ireland a referendum was needed to amend the constitution so that the salaries of judges could be reduced. Many other countries have frozen salaries, such as Poland and the UK. These measures are generally part of pay cuts or freezes impacting all civil servants, from which judges are not exempted, but usually judges are not more adversely affected. However, in Portugal and Slovakia salaries of judges were reduced more than those of civil servants.

A problem with the intervention into the salaries of judges is the potential threat it raises to the independence of the judiciary. Salary cuts can be used as individual or collective punishment. Another issue is that excessive reduction of salaries of judges could make the judiciary vulnerable to undue interference. It can also affect the quality of justice in that judicial bodies become less attractive as employers. It is known that some judges have resigned following the salary cuts. Salary reductions are emergency measures that, unlike the reforms discussed below, have the characteristic that they yield quickly which is an advantage, but they contribute in no way to the performance of the judiciary.

The widely shared view within the ENCJ is that as long as the reduction applies equally to all public sector salaries, judicial independence is not compromised. Despite this, the remuneration of judges should remain commensurate with their profession and responsibility, and therefore any reduction of remuneration should only be considered in extraordinary economic circumstance, and it should be strictly limited in time. Furthermore, it is widely felt that the salaries of judges as well as prosecutors should be determined by law, so as to guarantee judicial independence, and any review or determination should involve the judiciary itself. Such decisions should not be discretionary decisions of the executive.

¹⁴ See E. Bauw, F. van Dijk & F. van Tulder, *Recessie en rechtspraak*, ESB 2009, 94, p468-471.

¹⁵ Responses to ENCJ questionnaire by the court administrations of Ireland, UK and Lithuania.

¹⁶ Judiciary is defined here as the ensemble of judges, their legal staff and all administrative staff as well as governing bodies of courts and councils for the judiciary.

¹⁷ See also Cepej, *European Judicial systems*, Edition 2012 (2010 data), 2010, chapter 17.

¹⁸ ENCJ, 2012, op.cit., p. 14.

¹⁹ ENCJ, 2012, op.cit., p. 14.

5.2 Reduction of Volume of Cases

Reduction in the number of court cases is an important issue in many countries. As argued above, the judiciaries of most countries are struggling with large and increasing caseloads and budgets that do not keep pace. There is also the belief that there are too many unmeritorious cases and in-case applications primarily motivated by delay tactics.

Increase of Court Fees²⁰

To reduce the volume of cases and also to generate more income court fees have been raised in many countries. The decision to increase fees is commonly made by the legislature rather than the judiciary. In some countries the increase is intended to reduce the number of unmeritorious cases or applications that are chiefly designed to delay proceedings and even to get them shelved indeterminately (Portugal, Greece, and Italy).

Other countries introduce such measures mainly to produce a greater yield (Latvia). Nowhere were rates considered that even come close to the rates that have been proposed in the Netherlands. If this proposal would have been adopted, the fees for civil cases would become higher than the actual cost price of proceedings. The proposal was, however, defeated in Parliament, but lower options are still under consideration. It is noted that in some countries the courts themselves determine the legality of increases, either by their role in checking the consistency of laws with the constitution or by interpreting European law.

Reducing the Volume of (appeal) Cases by Law²¹

Another way to achieve a reduction of caseloads is to limit access to justice by law, for instance by setting a financial minimum for civil cases, such as in Germany. This approach seems to focus primarily on reducing the amount of appeals. In several countries, measures have been taken to simplify the appeal process, and thereby reduce the number of unnecessary appeal hearings. Norway and Austria provide examples. In the European judiciaries there seems to be a preference for various forms of leave arrangements, which allow judges to determine themselves which cases merit appeal, instead of mechanically applying legal provisions. There are many cases in which it is immediately clear that the decision of the court of first instance will hold. In those cases appeal hearings are a waste of time.

Expanding Alternative Dispute Resolution²²

Finally, in many countries Alternative Dispute Resolution (ADR) is promoted. Its success varies greatly. In several Eastern European countries, voluntary mediation seems not to be working: parties insist on a court decision. On the other hand, in the UK and Ireland pre-procedures are mandatory, at least in the sense that in court decisions it is taken into account whether a party has or has not seriously attempted mediation. Obviously, in these countries there is popular and parliamentary support for this approach. The Netherlands has taken an intermediate position. In the Netherlands, most disputes are traditionally settled out of court by negotiation. Mediation is not mandatory or controversial, but it is not used much. Surprisingly, ADR is often not evaluated from the perspective of the litigant. In general, evaluation is confined to the question whether ADR leads to less court cases. The issue of whether litigants are better off as a result of mediation, in particular, in terms of time, costs and quality of the outcome, is generally not addressed. One of the few exceptions is a study for the Netherlands. In this study it was found that, despite high success rates of mediation, it took more time and was more expensive on average, taking into account the adjudication of cases in which mediation failed. Reportedly, in Austria mediation leads to lower costs, taking all these factors into account. Apparently, the question of whether or not litigants are better off by using ADR has not been answered and depends on local conditions.

Reduction of caseloads by these three measures saves costs and, depending upon the budgetary system, may help to reduce court delay. It can also lead to the allocation of scarce resources to meritorious rather than frivolous cases. Extra revenue is raised when court fees are increased. The main disadvantage with higher fees is that such measures reduce access to justice: an increase in fees infringes the fundamental right of access to an independent and impartial tribunal established by law (art. 6 ECHR). Also, when substantial numbers of cases cannot be brought before the courts anymore, the protection of rights is not enforced in full, and this will result in damage to, for instance, the economy. Increased use of ADR may contribute to a reduction of caseload, but it is not guaranteed that litigants are better off.

The view of the ENCJ is that the reduction of caseloads must not be a goal in itself. Any measures, including increase of court fees, must leave access to justice intact. Measures aimed at discouraging frivolous cases are useful, providing such measures do not impede meritorious cases going to court. If court fees are increased, the financial circumstances of the parties have to be taken into consideration, either by differentiating tariffs or by legal aid. Regulating access to appeal

²⁰ ENCJ, 2012, op.cit., p. 9

²¹ ENCJ, 2012, op.cit., p. 9.

²² ENCJ, 2012, op.cit., p. 10.

should preferably be done under the auspices of the judiciary, taking the merits of cases into account, and not by mechanical legal rules.

5.3 Reorganization of the Courts²³

Most European countries are geographically consolidating judicial functions, thereby reducing the number of courts. These reorganizations are not only driven by financial reasons. Some countries do so to enhance the quality of justice. This is the case in Denmark, Norway and the Netherlands. These countries have not achieved net savings or do not expect to realize savings from reducing the number of courts. In most other countries it is expected that, besides higher quality, cost reductions can be reached by closing underused and sometimes even run-down courts, and shifting the cases to nearby courts. This is the case in Portugal and Greece, but also in countries as diverse as Austria, Ireland, UK, Poland, Romania and Turkey. In addition, the Netherlands, Poland and Turkey are consolidating the management of the remaining small courts to reduce the costs of management and overhead in general. In other countries, such as Belgium that has 320 courts, the revision of the structure is considered necessary, but consensus on specific measures has not yet been reached. Besides savings and quality in general, specialization, ensuring the minimally necessary number of judges, introducing new technology and improving timeliness are mentioned as motives for up scaling. Consolidation of courts has therefore advantages from the perspective of quality of justice (specialization) and timeliness (less delay due to absence of judges). These reorganizations all lead to larger travel distances for parties, and thus to the deterioration of geographical access to justice. It seems, however, that many judiciaries no longer attach much weight to this problem. Part of the explanation is that the physical presence of parties and other trial participants such as witnesses is becoming less important as the implementation of information technology, particularly video conferencing, is gradually becoming standard in large countries, and participation in a hearing remotely is not seen as a serious obstacle by many.

In some countries, such as the UK, the desirability of a visible presence of the judiciary in local communities is an important consideration, particularly in local criminal cases. As the saying goes “Justice must be seen to be done”. This argument is comparable to the periodic discussion of community courts in, for instance, the Netherlands, but it is not considered to be decisive. Finally, it is striking that many countries expect cost reductions while others do not. Obviously, local circumstances differ, but the risk also exists that the potential for cost reduction is overrated, and/or the time needed to realize these reductions is underestimated.

In the view of the ENCJ, consolidation of courts must be motivated by the need to provide high quality justice, and not solely by potential cost savings. Judiciaries should evaluate carefully whether net cost savings can be reached by merging courts, and must take into account that it could be many years before the desired savings can be effectively achieved. Consolidation of courts should be accompanied by increased utilization of ICT to reduce the frequency of necessary visits in person by parties to the courts. Also, ICT should be used to increase the visibility of court proceedings.

5.4 Reduction of Costs per Case

The measures discussed so far are the major approaches found in European countries seeking to reduce cost. Almost all countries are also working on simplifying and digitalizing procedures, however, mainly with the aim of shortening lead times and improving other aspects of quality. Still, this will result in lower costs per case.

Simplifying Procedures²⁴

A first aspect is the reduction of the number of types of procedures, as is occurring in Italy and is contemplated in the Netherlands. This is a step towards simplification of the procedures themselves and towards simplifying supporting IT systems. Concerning the procedures themselves, the common denominator is the introduction of simple and fast procedures, which allow the judge tight control. In such procedures the repeated exchange of documents and the postponement of cases become the exception. Also greater use is made of oral sentencing to avoid long, written sentences. In some countries attempts are made to prevent dysfunctional adversarial tactics by lawyers, for instance by punishing lawyers (financially) who cause unnecessary delay or who register frivolous cases.

Particularly interesting is the radical redesign of procedures, instituted as a pilot program in Ireland’s commercial court. The length of civil proceedings has been reduced to 9-12 weeks. In the Netherlands experiments are underway that pursue a similar result. Also, a new procedure has been introduced in administrative law there to speed up proceedings: within 13 weeks a hearing has to take place. At the end or immediately after this hearing the judge proclaims his decision. Only in very complicated cases further hearings are allowed. It is expected that the number of settlements will increase, and the duration of the procedure will be reduced to six months on average. Furthermore in several countries small claims

²³ ENCJ, 2012, op.cit., p. 6-8.

²⁴ ENCJ, 2012, p. 11.

procedures have been developed. These procedures have simplified procedures, strict format and low costs in common, and lend themselves for digitalization.

Digitalizing Procedures²⁵

These changes are often implemented in combination with the digitalization of procedures. Filing cases electronically and electronic exchange of documents with digital signatures are rapidly becoming common. The already mentioned commercial court in Ireland is an example of an integrated approach towards simplification and digitalization. The term "e-court" is spreading. Often this refers to small claim procedures such as in the UK, Poland and Ireland, but the use goes much further. Another promising area is electronic case tracking, which provides the capability of following the progression of cases on the Internet. In the Netherlands and Austria, such a system exists for lawyers who can monitor their cases on line, but not yet for litigants. At the High Court of Ireland it is possible for anyone to examine the status of cases on line, while in Romania everyone can consult the Internet site of the judiciary for information on parties, procedural delay and judgments.

Turning to the use of IT in courtrooms, in many countries the written record has been or is being replaced by audio and/or, as in Sweden, video recording. In this country, the appeal procedure is completely based upon the procedure in first instance. The appeal hearing uses the video footage of the hearing in the first instance. Hearing of the same witnesses again is not allowed unless important questions were not adequately addressed at the first instance trial. New or supplemental witness evidence is always allowed. Video conferencing is used in many countries, although the nature of use differs. In all countries, video conferencing is used to hear parties and others such as remote witnesses and to protect vulnerable or anonymous witnesses. In several countries, this is the extent of the use of video conferencing, but in countries with large travel distances, video conferencing is used more extensively, and leads to large efficiency gains for the parties. There is still a lot of debate about whether considerable information is lost when people are not physically present. In Latvia the judiciary has experimented carefully with both audio recording and video conferencing, and both techniques are now being introduced nationwide. In Turkey audio and video technology is used to avoid having to bring defendants in criminal cases from prisons to the courts.

Use of better IT systems can reduce the costs of the courts. The maintenance of a variety of IT applications, however, can be very costly, and integration can be much more cost-effective. One of the examples is the integrated court IT system that has been put in place in Turkey. This system incorporates applications that allow documents to be sent in electronically, the use of electronic signatures as well as the registration of cases.

Stricter Case Management²⁶

Case management is an important tool to increase the efficiency of court proceedings. In several countries (the UK and Norway among others) pre-trial conferences are held to plan proceedings. Early guilty plea procedures have reduced the delays in the second tier courts. In Ireland, Austria, Norway and the UK lawyers are required to identify in advance the witnesses whose testimony they want to present. In other countries conferences are more voluntary in nature. Another possibility is to have a first hearing of a case at a very early stage (in the Netherlands in administrative law). In this hearing the case is either decided immediately or, in more complicated cases, the further proceedings are scheduled based upon the issues that need to be clarified to decide the case.

All these measures individually, but in particular in combination, reduce the duration of court procedures and increase the efficiency of these proceedings. The efficiency gains that have been achieved or are envisaged by these developments have - to our knowledge - not systematically been calculated, but according to most observers these gains are very large, and offer the possibility of substantial and structural cost savings. As access to services in society in general has already largely been redefined as electronic access, judiciaries have to keep pace with this trend in society. Electronic access to justice is a necessity. It should be realized, however, that digitalization is a large, time consuming operation, of which the costs precede the benefits. Substantial capital investment is needed. The question that can be asked is whether the demands of a fair trial are still fully met by these simplified and digital procedures. In practice the judiciaries do not perceive this to be a significant problem. Most judges welcome these developments wholeheartedly.

In the view of the ENCJ, simplification of judicial proceedings, improvement of case management and introduction of new technologies offer the chance to modernize the administration of justice, thereby improving access to justice, quality of justice as well as efficiency. All judiciaries need to adopt innovative programs to reach these goals. As these innovations require the modernization of procedural law, these programs require the close cooperation of judicial organizations and government agencies responsible for the relevant legislation.

²⁵ ENCJ, 2012, p. 11 and 12.

²⁶ ENCJ, 2012, op.cit., p. 12 and 13.

5.5 Redistribution of Tasks²⁷

The basic idea of redistributing the tasks of judges and support staff to allow judges to concentrate on the core of their judicial tasks has been put into practice by various countries. In countries as diverse as Poland and Spain reorganizations are implemented in which judges shift work to administrative and legal assistants. In many countries there is room for improvement in this area: judges often perform relatively simple, administrative tasks that may just as easily be done by staff. They often perceive this as not satisfactory. Also, depending on the legal system, legal staff can be utilized to prepare cases and/or drafts of verdicts and/or to preliminarily screen cases, to determine for instance, whether or not cases are eligible for appeal. In Ireland the high court successfully uses judicial fellows, (comparable with the US law clerks) to prepare cases. Another option is to delegate simple judicial functions to legal staff. This goes, however, against the independence of the judiciary, as only appointed judicial office holders – including lay judges – should make judicial decisions. Delegation of tasks to judicial office holders with a brief confined to simple judicial decisions is a distinct possibility. An example of this is the use of *Rechtspfleger* in German and Austrian courts.

The experience in the Netherlands and Spain has been that delegation leads to higher efficiency, only if judges trust their legal staff, and do not feel compelled to monitor their work intensively or redo much of their work. To ensure this a highly qualified legal staff is needed, but it also requires judges to adjust to working in teams instead of alone.

In the view of the ENCJ redistribution of tasks within courts allows judges to concentrate on their core judicial tasks, and this is an important goal in itself, apart from the cost savings that may be realized. To be effective, judges must be provided with all necessary support. They must be able to rely on their staff and this requires highly qualified staff.

5.6 Allocation of Cases across Courts and Judges²⁸

Optimization of the workloads of courts and judges has been identified as a priority matter for judicial reform in most of the responding countries. Many resources are wasted when some courts and judges do not have sufficient, full caseloads when other courts and judges have too many cases. In some countries flexibility exists in the allocation of cases across courts to equalize workload. The implication is that parties have to travel further, and in some countries the choice is left to the parties: either wait for their case to be heard in the court nearby or have their case immediately heard in a different court located at a further distance. An alternative to this approach is to have judges of other courts work temporarily at the courts that have too many cases, for instance, by secondments of judges. In Romania the national IT system of managing the files provides for case management and assignment across courts. It provides a random distribution system to ensure a balance in the distribution of cases between judges.

The ENCJ recommends that, while maintaining a transparent mechanism, the allocation of cases to courts and judges should be made more flexible in order to utilize the deployment of judges better.

5.7 Reducing Bureaucracy and Overhead²⁹

Reducing bureaucracy in general and centralization of support and administrative tasks are part of many of the discussed reorganizations. It must be noted, however, that quite a number of courts still lack the most essential information about processing time and backlogs of cases. Without this information proper and timely justice cannot be guaranteed. Courts need staff to gather and analyze data. Innovation and deployment of IT also require manpower outside the primary processes for the adjudication of cases. It has to be recognized that digitalization results in courts changing from organizations of people to organizations of people and information systems. This leads to a different staffing structure and to IT taking a larger part of the budget. In many countries, reducing overhead is considered possible by closing small courts, yet at the same time more high-quality business and IT knowledge is introduced in the courts.

In the view of the ENCJ, reduction in overheads is desirable, but must be carefully balanced with increasing needs to have adequate information about caseload and processing time.

5.8 Improving Budget Systems³⁰

In the judiciaries of most countries, there is no explicit link between the number and complexity of cases and budgets, with the result that both can easily diverge, and workload, lead times and case inventories get out of control. In this situation governments may be tempted to impose austerity targets, ignoring the consequences for court delay. This has happened in various countries. A disparate relationship between the number of cases and budgets is usually accompanied by the absence of clearly stated expectations with regard to what can be considered as a “regular production of judges”. In many

²⁷ ENCJ, 2012, op.cit., p. 18.

²⁸ ENCJ, 2012, op.cit., p. 19.

²⁹ ENCJ, 2012, op.cit., p. 19.

³⁰ ENCJ, 2012, op.cit., p. 15-17.

countries, this state of affairs is viewed as no longer tenable, and workload measurement systems and methods of performance budgeting are implemented. The budgetary system of the Netherlands is often seen as an example: budgets are strictly based on projected output, differentiated by workload. This system has allowed the judiciary to expand sufficiently even under adverse economic conditions when caseloads rapidly increased.

It should be recognized, however, that many judges in the Netherlands feel that the system is too “technocratic” and constricting. Efforts are underway to simplify the system. Within the ENCJ the prevailing opinion is that a more businesslike approach to management and finance is desirable, as it promotes, on the one hand, the functioning of the courts, and gives stronger incentives for the efficient use of public funds. On the other hand, it promotes the independence of the judiciary by making one of the vulnerable links between the judiciary and the other state powers much more transparent: more cases means more budget; otherwise court delays will increase.

The ENCJ view is therefore that the funding of the judiciary should reflect its need to manage the caseload properly. Only in this way can timely justice be guaranteed. While it is recognized that funding based on output requires the measurement of output and processing times (workload measurement), such measurement systems need to remain simple, and the outcome measures should be used with caution to safeguard judicial independence. For instance, workload measurement norms should not be applied mechanically to individual cases. Furthermore, to ensure and strengthen the separation of powers, the judiciary should be closely involved at all stages in the budgetary process and should be responsible for the financial management of the courts individually and as a whole, within the budgets allocated to them.

6. Evaluation of Measures and Reforms

The discussion so far shows that, while in many countries reform of the judiciary is on-going, the economic crisis has led to additional measures, and has also speeded up reforms. To evaluate the merits of these measures, they should be evaluated against the core values of the judiciary. We distinguish three areas with respect to core values: first, access to justice: the right to see a judge at reasonable cost including travel cost and time and in a timely fashion; second, impartiality and independence; and third, high standards of professionalism.

Figure 3 provides a matrix of measures and core values and our assessment. This is to some extent subjective, and not all nuances are taken into account.

	Access to justice	Independence	Professionalism
Reduction of salaries or freezing of new appointments	-	-	--
Reorganization of courts: re-drawing judicial maps/jurisdictions	-/0	0	++
Reduction of volume of cases by increasing court fees, by law or expanding ADR	--/+	0	0
Lowering costs per case: simplifying and digitalizing procedures and strict case management	++	0	++
Delegation of tasks	+	0/-	++
Flexible allocation of cases over courts and judges	+	0/-	0
Reducing bureaucracy and overhead	0	0	0
Improving funding systems	+	+	+

Figure 3. Evaluation of measures against core values of the judiciary.

To advance the judiciary, the current short-term expenditure reducing measures are detrimental. Clearly, simplifying and digitalizing procedures in combination with strict case management is the best option, followed closely by improving funding systems and delegation of tasks. Redrawing judicial maps/jurisdictions has also a strong potential, especially if the negative impact on geographical access to justice can be mitigated by modern information technology.

7. Process of Reform³¹

Content is not the only thing that matters. Brilliant ideas can be brought to nothing, if they are forced upon the people who are supposed to put them into practice. The responses to the ENCJ questionnaire showed that judiciaries (judicial councils, courts, judges) are often not sufficiently involved in devising a development strategy for the units involved, but rather the important decisions are drafted and adopted by the executive and legislative branches of government, and subsequently enforced. Moreover, decisions about budgets are heavily influenced by the ministers of Finance, especially when budget cuts are part of measures that affect the whole public sector. The reduction and freeze of salaries are a case in point. As the funding systems of the judiciary in many countries are weak in themselves, judiciaries are vulnerable to ill-informed outside interventions. Furthermore, ministries and parliaments are not always aware of the importance of a well-functioning, independent judiciary for society in general and the economy in particular. While supranational organizations such as EC, ECB and IMF express such awareness (see section 2), individual governments not always act accordingly. Consequently, the conditions for effective judicial reform are not met in most countries.

In the view of the ENCJ, the starting point for any reform must be the understanding that the principle of separation of powers is crucial to effective democratic government. It is essential to preserve this principle at all times to ensure good governance for all citizens in a safe, legal environment. One of the three branches of governance is the judiciary - the branch that is responsible for safeguarding the proportionate justice delivered to the citizens by the courts. While taking the separation of powers as starting point, it must also be recognized that judicial reform cannot be handled by the judiciary alone. Laws that regulate judicial procedures must also be revised. Judicial reform thus requires the cooperation of the three branches of governance, and it is necessary that the judiciary be involved at all stages of reform. It also has the hands-on experience others lack. In this process, the judiciary needs to be pro-active in recognizing the need and criteria for reform, to initiate discussions and present ideas. Finally, it is important that reforms are not driven purely by financial considerations, but by longer-term factors.

8. Conclusions

The judiciary is the key component of the legal institutions that provide the framework in which welfare and economic growth can be generated. Irrespective of the approach taken, research shows that its contribution to the economy is great. In some countries judicial reform is an important part of structural reform to overcome the economic crisis. The role of the judiciary is particularly important during economic downturns. In such periods the volume of court cases increases, while the pressure on public finance increases as well, endangering the budgets of judicial organizations. The combination of a larger caseload and lower budgets leads to acute increases of court delay, which then hampers economic recovery. In many European countries this is exactly what is happening, and it is a major concern.

As was shown, a variety of measures and reforms are being implemented, partly productive and partly counterproductive. Within the judiciaries of Europe broad consensus exists about the directions judicial reform should take.³² In nearly all countries judicial maps are being redrawn with the result that the judicial function will be concentrated in fewer courts, and judicial procedures are being redesigned with the aim of simplifying procedures, digitalization and stricter case management. Reduction of the volume of lawsuits is not in itself a goal, but the incidence of frivolous cases and delay tactics need to be addressed, while maintaining access to justice for all other cases, irrespective of the income of parties. It is also recognized that there is a need for better funding systems of the judiciary that guarantee its independence and promotes the efficient adjudication of cases. Finally, in many countries efforts are under way to better organize the courts. Redistribution of tasks, efficient allocation of cases over courts and judges, and reduction of overhead are cases in point.

The ENCJ notes that in many countries these reforms must be implemented with lower or at the best current budgets. That makes implementation difficult. Fundamental reforms take time, and their costs precede the benefits. Nevertheless, these reforms are the best strategy moving forward. Short term cost reductions such as large salary cuts do not contribute to necessary reform, and pose a threat to the functioning of judicial organizations. Judiciaries should take the initiative and supply the ideas for reform. They should try to convince governments that long-term reforms are needed, despite the fact that these reforms only gradually deliver cost savings. This choice is only possible if the starting point is shared, in the words of the Vilnius declaration, that "Every economic measure, however transitory it is, likely to affect the judiciary, must preserve the essential role of justice in a democratic society. The judiciary must continue to guarantee, even in stringent economic situations, the fundamental right of every citizen of access to justice, effective protection of fundamental rights and the delivery of quality justice in a reasonable time."³³

³¹ ENCJ, 2012, op.cit., p. 21 and 22.

³² ENCJ, 2012, op. cit., p. 24.

³³ ENCJ, 2011, op. cit., p. 2.