Effective and Accountable Judicial Administration

by

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**Introduction**

This article investigates whether there is a legal basis for holding judicial administrations accountable for providing an effective service. Effectiveness in this article refers to “how well [a] process actually accomplishes its intended purpose […] from the customer's point of view” (Roberts, 1994). For the purposes of this article, the “customer”, is the person financing the service, such as court users and generally, taxpayers. As such, this article will question whether the measurement of the effectiveness of court administration, according to the aforementioned criteria, can be justified.

“Judicial administration”, namely the practical management of courts, is not so easily distinguishable from the actual legal adjudication carried out by judges. Indeed, although such concepts differ, the quality of the former is likely to affect the latter, e.g. in terms of speed and cost. Nonetheless, this article will use an approach defining administration of the judiciary as the management of resources that are necessary to ensure the proper functioning of the justice system (Pauliat and Berthier, 2009), including human resources, budget and infrastructure.

The outline is thus as follows:

- The first part of the article will discuss accountability for effective administration in broad terms;
- The second part will identify and analyse two methods highlighted in legal doctrine regarding the imposition of accountability on courts for the delivery of effective justice administration:
  a) *Judicial accountability* via appeals mechanisms, including providing judicial reasoning and open proceedings.
  b) *Managerial accountability* via quantifiable performance indicators to evaluate court administration.
- Finally, the third part will summarise the findings from the previous sections.
Effective Administration and Accountability

Bovens (2007) defines accountability as

“[A] relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.” (Bovens, 2007 : 450)

Noteworthy is the circumscribed meaning that Bovens attaches to the concept of accountability. Indeed, for the sake of conceptual clarity the author draws clear boundaries between accountability and other terms: accountability is defined as a species of the genus monitoring. Accountability is *ex post* monitoring. Under this definition, effectiveness and accountability are closely interconnected. In fact, if justice stakeholders (i.e. taxpayers or court users) represent the forum mentioned in the definition, accountability is a way in which they can monitor the effectiveness of the service. On top of that, as long as both effectiveness and accountability are perceived as strictly linked to the consumers’ judgements, they both come to be based on the same assessment criteria.

In most Western countries, judiciaries have long taken the responsibility of upholding such standards of effective administration. Although jurisprudence in this area has only rarely referred explicitly to “effective administration” *per se*, this obligation has been implicit in cases dealing with public administration (von Danwitz, 2010).

Developing countries had not followed this tendency until the late 1980s when a legal obligation for states to provide effective governance first started gaining global recognition. However, that obligation was mainly established on a contractual basis rather than on public law. Based on a study indicating the connection between good administration and other development goals, the World Bank started to couple financial loans with conditionality on “good governance”, identifying six aggregate indicators of that concept. It is worth mentioning that one of these indicators was effectiveness.³

Since then, this definition of good governance has become a recognised and generally recurring aspect of development assistance policies around the world (von Danwitz, 2010). Consequently, so has effectiveness. Externally imposing evaluative systems on another state’s administration is nevertheless a controversial issue, for several reasons. Firstly,

³ The other five being: voice and accountability, i.e. civil liberties and political stability et. al; the lack of regulatory burden; the rule of law, i.e. protection of property rights et. al; independence of the judiciary; and control of corruption (Kaufmann et al, 1999)
problems related to the internal sovereignty of the recipient state may arise. Secondly, improving the effectiveness of an administration via goals imposed by an external body risks making that administration ineffective in relation to its own core objectives: it may lead to a shift in goals.

Regarding the judiciary, this conundrum has a particular relevance. Under Montesquieu’s ([1752], 1914) theory of division of powers, the judiciary should be independent from the other branches of government. Independence of the judiciary is thus a fundamental element of a liberal democracy. As stated earlier, the administration of the judiciary (i.e. resource management) is liable, at least to some extent, to overlap with the administration of justice (i.e. legal adjudication). Consequently, accountability, being imposed on judicial administration from the outside, has always been controversial, since it may jeopardise independence in administering justice (Pauliat and Berthier, 2009).

Furthermore, whilst the interests of the “customer” often overlap with the pursuit of justice, this may not always be the case. This problem becomes particularly relevant where those interests are manifested in political ambitions, incompatible with the results of the judicial process. The scenario of an authority controlled by tyrannous rulers in charge of monitoring judicial activities is anything but unusual in history.

Nonetheless, as the ensuing part illustrates, two separate methods have been utilised in recent decades, each attempting to reconcile accountability with judiciary independence.

**Approaches to Judicial Accountability: an Appraisal**

Contini and Mohr (2007) have identified two broadly accepted methods for holding the judiciary accountable, which may be analysed under the light of Bovens’ definition: judicial and managerial accountability.

**a) Judicial Accountability**

Judicial accountability has traditionally been the primary mode of holding judiciaries accountable. It is imposed by the judiciary itself, and may consequently be seen as a way of avoiding the risk of external influence whilst still holding judges accountable. The most typical elements of judicial accountability include holding open proceedings, and publishing judges’ reasonings, which allow public scrutiny, as well as appeals procedures and other methods permitting internal scrutiny carried out by the judiciary (Contini and Mohr, 2007).
Of these methods however, only the latter provides accountability in the proper sense (according to the Bovens’ definition) i.e., a mechanism whereby ‘the actor faces consequences’ (Bovens, 2007). Public opinion may exert some pressure, but generally, it has no direct consequences. Appeals mechanisms and internal disciplinary boards are thus the primary forms of accountability imposed on court representatives, since judges and registrars arguably have a personal stake in not having “their” judgments being overturned due to their own inadequacies (Contini and Mohr, 2007). Nevertheless, apart from some noteworthy exceptions where such processes lead to direct consequences for the careers of these individuals\(^4\), consequences for such inadequacies tend to be rather intangible for those individuals whose work is put under scrutiny.

An even greater problem regarding judicial accountability is the absence of an explicit legal document or principle on which to base it. Notably, the EU represents one of the few examples where an explicit basis for requiring good administration is established, namely Article 41 CFREU. Article 41 does not, however, mention effectiveness. The rather widespread establishment of the aforementioned World Bank definition, which indeed includes effectiveness, would make it plausible to at least assume that effectiveness was also intended as an element in this later incarnation of the right to good governance. Nonetheless, it cannot be taken for granted.

Furthermore, although Article 41 refers to administration, it does not mention the judiciary itself. Even though the latter can be seen as an element of public administration in general, “administration” could also be interpreted narrowly, referring to the executive branch of government, which, under the abovementioned theory of the division of powers, definitely does not include the judiciary.

That being said, the right to a fair trial is universally considered a fundamental right and this article argues that effective administration could be considered a necessary element of that. Article 14 (1) and (3) of the ICCPR (International Covenant on Civil and Political Rights\(^5\)), for example, provides a wide range of rights that if applied would have the double effect of requiring fairness as well as effective administration. Such rights include having a fair hearing, an impartial tribunal, the right to secrecy or openness, and swiftness of procedure amongst much else. Despite being normally described in terms of fairness, they

\(^4\) The U.S. provides some as about half of its states elect supreme court justices to their office, making individual careers somewhat dependant on the effects of popular scrutiny (Alt and Lassen, 2008).

also relate to the expectations of the public in relation to judicial administration. Their absence would lead to obvious customer dissatisfaction whereas their provision leads to the opposite. Many contemporary charters contain provisions similar to that of Article 14 ICCPR e.g. the Canadian constitution and, recently, Article 47 of the CFREU. Where no explicit legal guarantee exists, judiciaries have developed such from other rights via case law. In India for example, in the Sheela Barse case, the Supreme Court extended the right to “life and personal liberty”, guaranteed in the Indian Constitution under Article 21 to include a long list of other not derivative rights. Many fundamental rights enshrined in contemporary charters are open to wide interpretations which may approximate the right to effective judicial administration.

That link however, is not self-evident. As yet, there seems to be no explicit reference to effectiveness in general in upholding the right to a fair trial. Effectiveness in this sense therefore remains a side-effect of the right to a fair trial. Furthermore, even to the extent that an obligation of being effective is implied by the right to a fair trial, weaknesses of judicial accountability, as primarily related to internal mechanisms of the judiciaries themselves, still persist.

**b) Managerial Accountability**

A separate development from judicial accountability, which increasingly is having an impact on budgetary allocation in European judicial systems, has been the concept of managerial accountability. This makes justice administration subject to the scrutiny of third party autonomous entities. This approach applies performance indicators to measure the ability of courts to attain the results for which they are funded. As such, it expressly tends to measure mainly efficiency. Increasing efficiency however, is also in the interest of the customer and as such it relates to effectiveness.

There is no single model for managerial accountability. Its diversity can be illustrated by a few European examples. In Spain for example, a structure of incentives for the judicial system has been created: there are very tangible consequences for particularly efficient judges. Case processing times are analysed according to a set of rules in order to calculate the reasonable anticipated case load for each court. Judges that manage to process a larger amount of cases than the set limit would receive increased remuneration.

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6 Section 11 (b) of the Canadian Charter of Fundamental Human Rights and Freedoms – “Any person charged with an offence has the right to be tried within a reasonable time”

7 Sheela Barse & Ors vs Union Of India & Ors on 13 August, 1986
In Italy by contrast, managerial accountability has very little direct consequence on judges and court staff: although a collection of economic objectives are set out for each court, a court manager is responsible for monitoring the achievement of these targets relying only on the power of his own influence to affect judges’ behaviour. A middle-way solution is in force in Finland, taking into account both productivity requirements and the time that is necessary for proper adjudication. Although having no automatic effects on resource allocation, the resulting analysis forms the basis of further budgetary discussions between courts and the Ministry of Justice, thus making it likely to have an impact on the behaviours of judges (Contini and Mohr, 2007).

Managerial accountability thus comes closer to our definition of accountability than traditional legal accountability mechanisms, as they typically introduce economic consequences for judges, making court performance subject to evaluation based on a cost-benefit analysis (Contini and Mohr, 2007).

It is noteworthy that this phenomenon to a large extent has been facilitated by the establishment of judicial councils, which in many jurisdictions have taken over large parts, or all, of the responsibility for administrating the judicial system. Though far from solving the riddle of independence versus accountability, this approach has been perceived to lessen the threat of political influence on courts.

Furthermore, it seems also to have made the idea of adjudication as a service to the public more apparent. Indeed, citizens’ perceptions of the effectiveness of the service provided have been identified in doctrine as a driving factor behind the aforementioned trend towards managerial accountability (Contini and Mohr, 2007).
Conclusion

Effectiveness, as an express legal obligation, for which one can be held accountable for delivering, is a very new concept, surrounded by some controversy. Applied to the judiciary it is even more complicated. Though ideally it would be in the interest of courts to provide the services expected by court users and taxpayers, the threat towards court independence is often seen as an obstacle to accountability.

This is probably the reason why legal accountability mechanisms have so far been the dominant mode of controlling the effectiveness of courts. However, that method does not truly amount to accountability as regards effectiveness requirements, as the few consequences that are imposed are imposed entirely internally, and are only indirectly related to the expectations of court customers.

Managerial accountability represents a more direct attempt at imposing accountability as it relates directly to a list of performance indicators. These indicators might not always be connected with the core of justice decisions, but they can help monitoring whether the needs of those paying for judicial administration are met in an efficient manner.

Although this has not solved the issue of the threat to judicial independence once and for all, the trend of moving responsibility for attaining these performance indicators from ministries of justice, and courts themselves, to judicial councils, seems positive and has made the issue of performance measurement less contentious. The continued proliferation of such bodies would thus indicate that increasingly, judicial administrations are being held accountable for effectively serving those paying for the service.

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Published as part of the Effectius Newsletter, Issue 16, (2011)
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Legal Acts, Cases etc.

Article 14 (1) and (3) of the ICCPR

Article 41 CFREU

Article 47 CFREU

Section 11 (b) of the Canadian Charter of Fundamental Human Rights and Freedoms

Sheela Barse & Ors vs Union Of India & Ors on 13 August, 1986