

FINAL

**REPORT ON INTERNATIONAL APPROACHES TO THE
DEFENCE OF INDIGENT PERSONS IN CRIMINAL CASES**

**FOR
LORD CARTER'S REVIEW
OF
LEGAL AID PROCUREMENT**

BY

**JOHN FLOOD
AVIS WHYTE
SYLVIE BACQUET**

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EXECUTIVE SUMMARY

- 1 This report presents the findings of a comparative review of international approaches to the provision of legal aid to indigent persons involved in criminal cases. Its intent is to provide some insight into the reasons the UK's expenditure on criminal legal aid far exceeds that of any other country in the world.
- 2 In order to do this the report covers a number of subjects and countries. Section One looks at the management of the courts, part (A) the role of information technology and part (B) salaries, appointments and supervision/management of the judiciary. Section Two looks at disposition of cases, part (A) The type of lawyer used in criminal cases and costs of their use, (B) public defender programmes, (C) plea bargaining and (D) problems in multiple representation of clients. Finally Section Three looks at alternative means of dispute settlement, part (A) alternative dispute resolution and part (B) the impact of ADR on legal costs. These areas are investigated as presented (mainly) in America, Australia, France, the Netherlands and New Zealand. These subjects and jurisdictions were agreed between the Carter Review team and the Westminster research team.
- 3 Methodologically the research is based on second order analysis that is collecting and analysing existing available data. Comparative research across countries and jurisdictions is, however, not without its dangers in that the merit of some of the statistical data depends heavily on unknown factors. Factors such as the quality of the data collection, the definition of terms being measured and time span in which the measurement occurred. It is logical to presume that variations have occurred which effect the certainty of some of the results. Moreover, comparative research on judicial systems is still quite primitive. Thus many of the figures we present here must necessarily be treated with caution.
- 4 To provide context to our findings the report gives some consideration to the nature of the jurisdictions examined. It finds that the distinction between adversarial and typically common law systems, like the UK and the US and inquisitorial and typically civil law systems, like France and the Netherlands accounts for some of the differences in criminal legal aid expenditure but by no means the majority.
- 5 All the jurisdictions we cover recognise the importance of information technology to the efficient running of the judicial system both in terms of time and expenditure. And whilst the report concedes that start up costs can be significant it acknowledges that so can the long-term gains. While the UK has taken some successful strides in the use of IT, like VPDH (Virtual Pleas and directions hearings) at Minshull Street Crown Court that save the equivalent of four full days per week at cost between £10,000 and £12,000, lessons from overseas show it could go much further.

- 6 The major advances overseas have been in terms of case management systems, public access systems and the use of virtual/electronic courts. By way of illustration, all Federal Courts in the USA now require E-filing (since mid 2005) and many state courts are now progressing towards it. Australia and Canada are too moving in that direction plus the court rules of New Zealand's Supreme Court as well as its Court of Appeal (civil) enable E-filing. Indeed court records in electronic form (E-Records) are an inevitable development in all courts in comparable jurisdictions.
- 7 These advances should reduce overheads, for example, in mobilizing large amounts of documents, and can generate their own coverage costs as well as costs to support other systems, for example the PACER (Public Access to Court Electronic Records) system of the US Federal Courts, is self financing and helps maintain the CM/ECF (Case Management/Electronic Case Files) systems.
- 8 Although it is possible to identify how IT can alleviate a specific problem contributing to high legal aid costs there is little hard evidence on the cost-benefits of its use. For example, New Zealand's Legal Services Agency has implemented a complex grant file management process for atypical legal aid cases but the evaluation of its impact is not expected for another year. So far estimates of the extent to which IT will offer cost savings must be speculative.
- 9 Despite costs being an issue for many courts as the use of IT becomes more and more omnipresent, the issue courts increasingly have to confront is not whether but the way in which technology is used in the legal process. And, particularly in terms of virtual courts, the extent to which delivery of justice can and should take place in a virtual rather than physical environment.
- 10 However, a balance has to be struck between efficiency of the courtroom and the independence of the judiciary. The report's survey of judicial salaries shows that the UK's judicial resources are some of the most expensive and scarce of all the legal systems. For example, here judges at the start of their careers earn approximately £38,000 more than the average salary of a chief judge in the highest US court. To ensure best use of our judicial resources the monitoring of judges, like the American Judicial Performance Evaluation, ought to be practicable within the limits imposed by judicial autonomy.
- 11 The report demonstrates that the costs of representation may account for the majority of the legal aid spend. There is though a wide variety of terms encompassing the 'lawyer' concept. For instance, avocats and notaries in France and solicitors and barristers in the Australia and public defenders in the US. Consequently it is difficult to interpret and compare their roles across jurisdictions and the costs of their use. But it does seem apparent that where there is a mix of systems, such as

salaried lawyers (public defenders) and judicare (e.g., those working in legal clinics and community centres) legal aid cost are not as high as in the UK.

- 12 In particular the report considers the use of public defenders and finds that although originally introduced to curb costs the system has not been entirely successful in achieving the aim, at least not without great costs to the provision of justice. In part this is due (specifically in the US), to gross under-funding of programmes which leads to high case loads and poor quality. As a means of saving legal aid cost, however, the system cannot be completely dismissed as evidence from Canada, Australia and America suggests that public defender services are cheaper than private practice lawyers.
- 13 There is clearly correlation between over-criminalising behaviour and ever increasing legal aid costs. And within the UK it appears criminal legal aid expenditures are highly affected by the costs involved in bringing higher and higher numbers to trial instead of routing them out of the system at earlier stages.
- 14 The report suggests that the ability of lawyers to engage in plea bargaining might alleviate some of these issues by routing cases out of the justice system at an early stage, thus saving court time and resources.
- 15 Furthermore the increased use of Alternative Dispute Resolution techniques indicates cost savings as it provides a diversion from the courts towards schemes that are relatively low-cost and often result in creative outcomes diverting minor offenders from prisons.
- 16 There is no one explanation as to why the UK spends more on legal aid than any other country in the world, the report has covered a wide range of ideas, initiatives and interesting approaches which could be utilised to curtail expenditure without a detrimental effect on justice. These approaches fall into three main categories: management of the courts, work practices and ADR. If we were to rank these possibilities they would be case management processes, ADR techniques and a transparent form of plea bargaining.
- 17 In order for these possibilities to achieve their full potential, the cultural and professional mindset of both the legal profession and judiciary which drive the UK Rolls Royce of legal aid may require complete overhaul.

GENERAL INTRODUCTION

Lord Carter's review of legal aid procurement is charged with developing a procurement system, especially for criminal legal aid, that is both fair and cost effective. The present budget for legal aid now exceeds £2 billion a year¹ and it cannot continue an ever-upward path. We have been asked to examine international approaches to criminal legal aid and their costs impact in order to see if any of them could be applied to the British context or what lessons might be learned from overseas experience. We start with the jurisprudential context of the rights of representation.

The European Convention on Human Rights is explicit:

Article 6, "Right to a Fair Trial", contains the provision: 3. Everyone charged with a criminal offence has the following minimum rights:...(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Similarly, the 6th Amendment to the US Constitution ensures

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The jurisprudence of the courts has further promoted these values. While the World Health Organisation can talk about eradicating disease, it is impossible to talk of eradicating crime: conflict is endemic to society. The problem for governments, however, is to what extent, politically and economically, they can be the guarantor of last resort in promoting these values. Given that an open-ended demand-led budget is not a feasible policy option, what alternatives are available?

This report offers some light as to possible responses to this question. It does so by examining three areas, namely, organisation, work practices and ADR;² and five jurisdictions, namely, France, the Netherlands, the USA, Australia and New Zealand. The structure of the report is as follows:

¹ Figures from the Legal Services Commission for 2004 found the following with regard to the £2 billion legal aid budget:

- 1/3rd of total budget spent on civil cases
- 2/3rd of total budget spent on criminal cases
- 1/10th of total budget spent on asylum related cases
- Major criminal cases, lasting five weeks or more, usually fraud cases, costing on average, each about £150,000 per defence team.
- Major criminal cases lasting five weeks make up 1% of cases funded by legal aid, yet consume a quarter of the legal aid budget

² We are grateful for the research assistance of Suve Banerjee, Barrister and Visiting Lecturer University of Westminster.

1. Organisational: Management of the Courts
 - A. The role of information technology
 - B. Appointments, supervision/management of the judiciary
2. Work Practices: Disposition of Cases
 - A. Type of lawyer used in criminal cases and costs of their use
 - B. Public defender programmes
 - C. Plea bargaining
 - D. Problems in multiple representation of clients
3. Alternative Means of Dispute Settlement
 - A. Alternative dispute resolution
 - B. Impact of the use of ADR on legal costs

These areas were agreed between the Carter Review team and the Westminster research team as being the most likely to produce tangible results that could have an impact on legal aid procurement and budgets.

In addition there are a set of appendices attached to the report. And finally we attach a comparative report on case management and allocation.

METHODOLOGICAL ISSUES

This research is essentially based on second order analysis, which means that the research team has not undertaken original research such as conducting surveys or the like. We have collected and examined existing available data.

In doing comparative research across countries and jurisdictions there are dangers. We do not often know how the data were collected by the agency, court, organisation, etc. Did they count entire populations or randomly sample? If data have been collected over time, are they reliable? Have the same questions been asked each time? If changes were made, are they likely to compromise reliability? Perhaps most important is the question: is the same thing being counted in different countries? For example, do the terms judge, lawyer, case, and even legal aid mean the same or do they only approximate each other?

To a large extent we have been forced to ignore or sideline some of these questions. This is imposed on us by having to utilise whatever resources are available to us. Therefore we have attempted to compare like with like but occasionally there are doubts. We have indicated where there are problems. Two specific areas should be mentioned here regarding time and place. Some data may be available only for particular time periods, e.g., the late 1990s or early 2000s. Strictly speaking comparisons have to be hedged with all sorts of caveats. Where possible we have tried to obtain the most up to date statistics. Where that has been impossible, we have used older figures as an indicative comparison and for similar purposes we have provided currency conversions as at present day pounds sterling. With place, the situation is that in certain

countries a wide range of statistics on expenditures, lawyers' numbers, and so forth are available. However, not all countries maintain wide-ranging statistics and there are gaps. We cannot fill these. Occasionally in the report, countries will be noticeable by their absence in the topic under discussion. This means there are no statistics available in that country for us to employ. In the alternative, we have found that in some countries that are not part of the list we originally specified, there have been interesting developments that are worth mentioning and so we have included them (eg, plea bargaining in Italy; public defenders in Lithuania).

To conclude therefore, the quality of some of the statistical data presented here is largely dependent on methodology that cannot always be guaranteed as consistent. It is reasonable to assume variation in the original collection and scrutinies of the data thus the results do need to be treated with caution.

Bearing this in mind we first present, in table one, an overview of legal aid spending and justice issues for the European jurisdictions under consideration (though other European countries have been added where they provide interesting data) and in table two a similar overview for the United States,³ as a backdrop to analysis of the topics identified here as of concern to the Lord Carter's Review of the Procurement of Legal Aid Services.

However, this overview table has been prepared from various sources and thus any data interpretation and/or comparison must be done with caution. The data from the European countries were taken from a recent report by the European Commission for the Efficiency of Justice (CEPEJ) and are for 2002.⁴ The figures have been converted into UK pounds based on the currency rate at the time of writing. Data for Australia,⁵ New Zealand⁶ and the United States are from a variety of government sources and are the latest figures available for the country, which may now have varied. In some instances, the legal aid budget per head was not available and thus had to be calculated by the researchers using the latest population census.⁷ Finally, for ease of reference figures have been rounded to the nearest decimal.

³ The full data available on the United States could not be included in table one as it did not, in any meaningful way compare with the method by which other countries calculated their data categories and therefore would not allow straightforward comparison.

⁴ European Commission for the Efficiency of Justice (CEPEJ) (2005) "European Judicial Systems 2002: Report on the CEPEJ Evaluation Scheme" available at www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/systeme%20judiciaire%20A.pdf

⁵ See, Legal Aid Commission of New South Wales, Annual Report 2004-2005 www.legalaid.nsw.gov.au/asp/index.asp, Law Council of Australia www.lawcouncil.asn.au/get/publications/2404048053

⁶ The Legal Services' Agency's Fourth Annual Report 2004-2005 www.lsa.govt.nz/general/documents/LSAAR034-web.pdf and The Legal 500 www.legal500.com/asia-pdf/asia05nz.pdf

⁷ Population figures from the CIA www.cia.gov/cia/publications/factbook.

Table One: Country Data on Legal Aid Spending and Justice Issues

Countries	Population	Court budget per head £	Legal aid budget per head £	Legal Aid Annual expenditure				Total of cases brought to court per 100,000 inhabitant ⁸	Number Of lawyers	Number of lawyers per 10 000 inhabitants	Type of Justice & Legal System	Total Cost of Justice £	Offences Rates	Type of Profession
				Criminal		Non-criminal								
				Annual Expenditure £	Number of cases granted	Annual Expenditure £	Number of cases granted							
Australia NSW	20,090,437			30,098,744	41,005	30,525,134	12,941		36,124 ⁹	18	Adversarial Based on the English common law system	3,052,948,029 (2004) ¹⁰	798 per 100,000 (violent crime 2003) 5489 per 100,000 (property crime 2003) ¹¹	Referral System
France	60,656,178	19.42	3.18	55,505,901	290,385	135,691,280	398,252	3,711	40,847	6.8	Inquisitorial Civil law	235,550,697 (2002-03) ¹²	525,053 (2002-03) ¹³	Fused
Germany	82,431,390	36.45	3.83	60,339,664		256,378,301	495,686	3,381	116,305	14.1	Inquisitorial & Adversarial Civil law system			Fused with advocates
Netherlands	16,407,491	28.09	8.67	64,072,464	116,800	74,777,876	211,406	4,197		7.7	Inquisitorial (with elements of accusatorial systems) Civil law system			Fused
New Zealand	4,035,461			15,794,835	39,506	17,726,615	19,558		9,419	23.3	Adversarial Based on the English common law system		111 per 1000 (2000) ¹⁴	Fused
UK	60,441,457	11.57	36.86	1,096,474,897	1,640,000	822,325,769	1,017,000	6,230	102,646	19.7	Adversarial Common law			Referral system

⁸ A breakdown of this figure per case type can be found on the CEPEJ Report supra n 4.

⁹ This is the total number of lawyers for Australia as opposed to just NSW as the other figures.

¹⁰ www.aic.gov.au/publications/facts/2004/part7.html

¹¹ www.aic.gov.au/publications/facts/2004/part1.html#2

¹² www.justice.gouv.fr/chiffres/chiffrescles2004.pdf

¹³ www.justice.gouv.fr/chiffres/penale04.htm

¹⁴ <http://www.stats.govt.nz/analytical-reports/crime-in-nz/overall-offence-rate.htm>

Table Two: United States Data on Legal Aid Spending and Justice Issues

Population	Justice System per capita expenditure (2001) £ ¹⁵				Cases handled by indigent criminal defence programs in the Nation's 100 most populous counties (1999) £ ¹⁶		Number of Lawyers ¹⁷	Number of Lawyers per 10,000 inhabitant	Type of Justice & Legal System	Total Cost of Justice	Type of Profession
	Total Justice System	Police Protection	Judicial and legal	Corrections	Total Expenditure	Total Cases					
295,734,134	330	143	75	113	679,422,607	4,174,000	528,270	17.9	Adversarial Based on the English Common law system	88,295,611 ¹⁸	Fused

¹⁵ Sourcebook of Criminal Justice Statistics 2003, US Department of Justice at www.albany.edu/sourcebook

¹⁶ Ibid.

¹⁷ www.bls.gov/oes/current/oes231011.htm (see further Appendix Two).

¹⁸ Supra n 15.

PART ONE: Organisational—Management of the Courts

Here we consider how efficient courts are in the management of cases by focusing on the role of information technology and the salaries, appointment, management and training of the judiciary. Before investigating these efficiencies some mention should be made of the two types of systems in which the management of courts operate, that are inquisitorial and adversarial. Adversarial systems present a model whereby the judge acts as an impartial referee between the prosecution and the defence, representation is essential and defence lawyers are responsible for presenting evidence, i.e., “do more and be paid more for it.”¹⁹ With inquisitorial systems the judge is responsible for locating evidence, there may be less call for defence lawyers and they may be obliged to do less.²⁰ For instance, the French inquisitorial approach involves the judiciary in the pre-trial process from its early stages (police enquiries are supervised by the Procureur dé la Republique²¹) and relies on an examining magistrate (juges d’ instruction) to direct the criminal investigation in more serious cases as well as to prepare file(s) of evidence at trial; rather than defence lawyers or the police.²² Consequently the defence lawyer plays a minor role and is “something of an outsider in the criminal process”.²³

Research conducted by Goriely, Tata and Paterson (1997) recognises that the traditions of adversarial and inquisitorial justice systems may account for some of the differences in criminal legal aid expenditure but that these differences can be exaggerated, as it is only one of a number of potential reasons for the manifest disparities in *per capita* spending.²⁴

The distinction between adversarial and inquisitorial criminal justice systems reflects fundamental differences of approach between common and civil law systems. However, on its own it does not necessarily explain large differences in spending. Although adversarial systems spent significantly longer on jury trials, routine guilty pleas before summary courts can be disposed of as quickly, if not more quickly, than under the inquisitorial system. Nor can attribution of the expenditure differences to the ‘inquisitorial versus adversarial’ distinction explain differences between adversarial jurisdiction.²⁵ [Clearly] the notion that the ‘adversarial’/‘inquisitorial’ divide provides the full answer to the question of why international differences arise in criminal legal aid expenditure cannot be sustained.²⁶ ...To try to understand the

¹⁹ Goriely, T., Tata, C. and Paterson, A. (1997) *Expenditure on Criminal Legal Aid: Report on a Comparative Pilot Study of Scotland, England and Wales, and the Netherlands Legal studies Research Findings No.9* (Scotland: The Scottish Office Central Research Unit) at 4.

²⁰ Ibid at 4

²¹ Prosecutors in France are trained judges.

²² The reality is of criminal investigation is, however, that they are dominated by the police and involve the juge d’ instruction in only 7% of cases, Hodgson, J. (2002) “Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform” 51:3 *International Comparative Law Quarterly* 781 and see West, A. (2000) “Reform of the French Criminal Justice—Part I” 150:6956 *New Law Journal* 20th October at 1542, Part II 150:6958 *New Law Journal* 3rd November at 1630 and Part III 150:6959 *New Law Journal* 10th November at 1667.

²³ Hodgson, *ibid*.

²⁴ Goriely, *et al supra* n19 at 6.

²⁵ Ibid at 6.

²⁶ Ibid at 4.

dynamics of spending we must consider explanations beyond simple constitutional requirements.²⁷

The authors' research focussed on Scotland, England and Wales and the Netherlands. In analysing the *per capita* spending on criminal legal aid in these jurisdictions they demonstrated that the major bulk is spent on representation, particularly in summary trials.²⁸ See further section 2A, which considers the type of lawyer used in criminal cases and costs of their use.

There is another aspect to management of court processes and that relates to case allocation or assignment procedures. The effects of listing procedures are dramatic and wide-ranging. Rather than go into detail here, we are appending a separate report on case allocation, the English part undertaken by the present authors, that was prepared for the Dutch Council for the Judiciary. The study, *Internal Case Assignment: A Report on a Comparative Study into the Rules and Practices of Case Distribution in Courts in Five European Countries*, covered Denmark, England, France, Germany, and Italy, as well as providing a comparative analysis of all jurisdictions.²⁹

A. **The Role of Information Technology**³⁰

Introduction

The general mood being encouraged by this government is against tolerance of costly, established and seemingly unnecessary procedures protecting the innocent (until found guilty) in favour of financial expediency. The bigger and more costly the case, usually fraud, the greater the intolerance. Some lawyers say that the best way to protect the innocent is wholly to embrace the technology available.³¹

There are a wide range of real and potential technologies available for use in courts plus a number of ways in which technology can be integrated into the court system and case management procedures (see Table Two and Appendix 1). Consequently the scope of this section has been confined to the main type of technologies currently in use—and planned for use—in the jurisdictions under consideration. Namely, case management and electronic filing, public access, virtual courts and particular examples of technologies specifically used in criminal cases. And we comment upon the potential these technologies have for creating a more efficient justice system, improving access to justice and reducing delays, costs and time.³²

²⁷ Ibid at 6.

²⁸ Ibid at 72

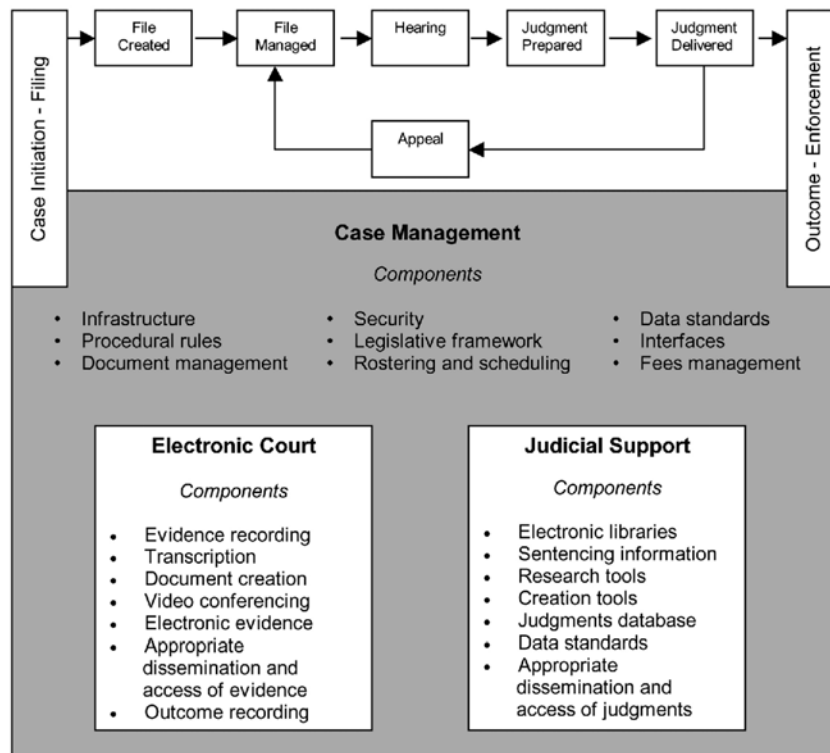
²⁹ Langbroek, P. and Fabri, M. (eds.) (2005) *Internal Case Assignment: A Report on a Comparative Study into the Rules and Practices of Case Distribution in Courts in Five European Countries* (Utrecht Institute for Legal Studies: Utrecht).

³⁰ For an account of the transformative effect of information technology see Susskin, R. (2001) *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (Oxford: Oxford University Press).

³¹ Moss, B. (2004) "Courts Key to Virtual Hearing Shows" 101:5 *Law Society's Gazette* 32

³² See, McKechnie, D. (2003) "The Use of the Internet by Courts and the Judiciary: Findings from a Study Trip and Supplementary Research" 11:2 *International Journal of Law and Information Technology* 109 at 128 and Susskin supra n.30.

Figure One: The Use of Technology in the Court System³³



(i) *United Kingdom*

An essential component of the UK's criminal justice system is the magistrates' courts. They deal with 95% of criminal cases prosecuted in the England and Wales and have critical links with other courts and enforcement agencies.³⁴ However, like most of our courts, magistrates have for many years suffered with inadequate IT systems. Furthermore, Magistrates' Court Committees³⁵ have different working practices and use different systems, which do not allow information to be shared electronically with other courts and transfer of this information to other agencies is piecemeal. It is therefore understandable why, in the early 1990's, the government resolved to develop a national standard IT strategy for magistrates courts.³⁶ Thus, in December 1998 a PFI contract, signed between the then Lord Chancellor's Department and ICL³⁷ initiated the Libra project designed to develop a national standard IT system for all magistrates' courts.³⁸ The initial term and price of which was ten and a

³³ McKechnie supra n 32 at 128.

³⁴ Malleon, K. (2005) *The Legal System* (OUP: Oxford)

³⁵ The Magistrates' Courts Committees and the Court Service were replaced (April 2005) by a single court organisation, which integrates the management of the criminal courts into a unified administration, known as Her Majesty's Court Service, www.hmcourts-service.gov.uk

³⁶ The Comptroller and the Auditor General (2003) *New IT Systems for Magistrates' Courts: the Libra project* HC 327 Session 2002-2003: 29 January 2003. (London: The Stationery Office).

³⁷ Known as Fujitsu Services since April 2002.

³⁸ Fowles, T. and Wilson, D. (2004) "IT Systems for Magistrates' Courts" 43:2 *Howard Journal of Criminal Justice* 214 and see The Comptroller and the Auditor General (2003) supra n 36.

half years and £184 million. The project has run into a number of difficulties³⁹ with its total cost now estimated at £390 million for eight and a half years service (until 2007), which only includes delivery of the infrastructure, not software provision or system integration.⁴⁰

Magistrates still do not have the IT system they need to manage their workload properly. But there are success stories surrounding the use of IT in other courts for which pilot schemes demonstrate cost savings and a greater awareness of the possibilities technology opens up. For instance, Virtual Plea and Directions Hearings (VPDH), Electronic Presentation of Evidence (EPE), Digital Audit Recording (DAR) and the XHIBIT' project—electronic delivery of information about the progress of a Crown Court trial.

VPDH will potentially permanently alter handling of Crown Court cases.⁴¹ They allow barristers, solicitors and other professions participating in the hearing, to electronically submit information to the court for plea and directions hearings rather than attending for oral presentations. The current saving at the pilot court (Minshull Street Crown Court, Manchester) equates to four full court days per week at a cost between £10,000 and £12,000 per day.⁴²

Despite the potential for technology to save costs without denying access to justice and despite the examples of good practice discussed above, the UK's under-investment in court technology is acute a fact that has been much commented upon and criticised.⁴³

(ii) *United States*

The National Association for Court Management illustrates the core competencies of courts as follows:⁴⁴

³⁹ For an account of these difficulties, which included two renegotiations of the initial contract, each time ICL requesting more funds (the first in May 2000 for £319 over 14 1/2 years encompassing the whole contract. Then, by Feb 2001, £232 for 8 1/2 year but only to deliver the infrastructure (STL to provide the core software application and appointment of a system integrator to roll out and run the application)) see The Comptroller and the Auditor General supra n 36 and Fowles and Wilson supra n 38.

⁴⁰ See Fowles and Wilson supra n 38.

⁴¹ Moss, B. (2004) "Courts Key to Virtual Hearing Shows" 101:5 *Law Society's Gazette* 32.

⁴² Ibid.

⁴³ See, for example, Brooke, Lord Justice (2004) "Behind the Times? IT in the Court of Appeal" 154:7118 *New Law Journal* 331

⁴⁴ See "Core Competency Curriculum Guidelines", National Association for Court Management at www.nacmnet.org/CCCG/cccg_CoreCompetencies. There are various organisations that engage in this kind of consulting: another main one is the National Center for State Courts www.ncsconline.org/index.html.

Figure Two: Core Competencies of the Courts



The diagram shows that courts have a range of activities that need to be attended to and that caseflow management is a vital component of these. It is therefore understandable that the major investment in technology for litigation in Federal Courts has been in electronic case management systems,⁴⁵ the stated goal of which includes:

...making detailed case information available to attorneys and the public at low cost over the internet, thereby eliminating costs and delays associated with paper files, and enabling judges to manage case loads and to decide controversies in a more efficient manner.⁴⁶

Collectively known as CM/ECF systems (Case Management / Electronic Case Files) these systems enable federal courts to receive and process case filings

⁴⁵ CM/ECF was developed by the Administrative Office of the United States Courts. Congress established the AO of U.S. Courts in 1939 to provide administrative support to federal courts. It serves as the central support agency for the administration of the federal court system. The AO also plays a pivotal role in identifying and promoting efficient practices, systems, and programs in the Judiciary. See further Administrative Office of the United States (2004) *Courts Annual Report of the Director 2004. Activities of the Administrative Office of the U.S. Courts* (Administrative Office of the U.S. Courts, Office of Public Affairs: Washington, D.C.) available at www.uscourts.gov.

⁴⁶ General order No. 5, United States Bankruptcy Court for the Northern District of Georgia, Amended and Restated Order Concerning Electronic Filing, January 26, 2000 as quoted by Walton, D. F. and McDow, W. C. (2002) "Entering the Twenty-First Century: Some Views on Electronic Case Filing from the U.S. Trustee's Perspective" XXI:3 *ABI Journal* at www.usdoj.gov/ust/press/articles/abi_042002a.pdf

electronically.⁴⁷ Within minutes of filing case documents, parties associated with the particular case (attorneys, judges, court personnel, other trial participants) are informed via e-mail that the new document has been submitted and can access the documents and dockets within minutes.⁴⁸ By the end of 2004 over 100,000 attorneys had made electronic filings over the Internet and provided more than 40% of the CM/ECF data entry.⁴⁹

Individual states and counties have also invested in new case management systems.⁵⁰ Modesto, California estimated a savings of \$700,000 (£405,000) annually by updating its system.⁵¹ Florida state courts have implemented a case management system in conjunction with a “judicial inquiry system”, which enables judges to tap into a number of different state databases including, among others, criminal history files, driver history databases, and 'Hot' files (warrants, domestic disputes, stolen vehicles etc). The final element of their programme is an online sentencing system designed amongst other things to reduce appeals.⁵²

The other US success story in terms of Federal court⁵³ technology is electronic public access (EPA), provided by the PACER, Public Access to Court Electronic Records, system the pre-eminent means by which the judiciary provide public access to court information.⁵⁴ It essentially allows remote public access to Federal electronic case files nationwide (certain personal identifiers having been first omitted). Both agency and individual users can request information about a particular individual or case, specifically:

- A listing of all parties and participants including judges, attorneys and trustees
- A compilation of case related information such as cause of action, nature of suit and dollar demand
- A chronology of dates of case events entered in the case record
- A claims registry
- A listing of new cases each day in the bankruptcy courts
- Appellate court opinions
- Judgments or case status
- Types of documents filed for certain districts for certain cases
- Many courts offer imaged copies of documents⁵⁵

⁴⁷ For further details see Appendix 1 and for information on States with electronic filing capabilities see the National Centre for State Courts at www.ncsonline.org/WC/Publications/KIS_EIFilesStateLinksPub.pdf.

⁴⁸ Anon *The United States Federal Courts. Federal Judiciary Improves court proceeding efficiencies and shrinks paper processing by publishing case files on the internet in PDF* www.adobe.fr/epaper/features/federalcourt/pdfs/us_courts.pds

⁴⁹ Administrative Office of the United States Report supra n 45.

⁵⁰ Typical of the software packages offered to courts is JISPro Criminal Court Case Management System at www.edpsoftware.com/criminalcourtcasemanagementsystemforcourtsCCMS-JISPro.html

⁵¹ Technical details of the update are found at www.fujitsu.com/downloads/US/GND/case_Stanislaus-Fujitsu.pdf

⁵² See Florida State Courts Technology at www.flcourts.org/gen_public/technology/current_projects.shtml

⁵³ PACER does not offer information on state/county courts.

⁵⁴ Administrative Office of the United States Report (2004) supra n 45 at 34.

⁵⁵ www.pacer.psc.uscourts.gov/pacerdesc.html

The Judicial Conference⁵⁶ adopted the policy to allow EPA in September 2001. The policy was then amended, September 2003,⁵⁷ to permit remote public access to electronic criminal case files to the same extent as public access to criminal case files at the courthouse.⁵⁸ Twelve months later electronic access to criminal case files was made available in a number of pilot courts. The pilot project was completed in September 2005.⁵⁹

The EPA program is completely funded via user fees (currently 8 cents per page)⁶⁰ and in January 2004 there were approximately 300,000 users (individuals and agencies).⁶¹ The following indicates fee paying and exempt users:⁶²

Table Three: Users of the Electronic Public Access Program

Fee Exempt Users (upon showing of cause)	Non Exempt Users
Indigents	Local, state or federal government agencies
Bankruptcy case trustees	Members of the media
Individual researchers associated with educational institutions	Members of the general public
Pro bono ADR neutrals	Attorneys (though attorneys of record and parties in a case receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. However, they are charged for replacement copies, whether paper or electronic)
Not-for-profit organisations	
Courts	
Users who do not incur more than \$10.00 use per calendar year.	

The programme generated approximately \$37.4 million for the Judiciary in FY 2004.⁶³ Interestingly a significant portion of this revenue funded the development and implementation of the CM/ECF systems and can also now be used to fund CM/ECF operations costs.⁶⁴

⁵⁶ The Judicial Conference of the United States is the principle policy-making body of the judiciary. Its presiding officer is the Chief Justice of the United States.

⁵⁷ The two year denial of access to criminal case, specified by the Conference, was allow further debate in relation to particular issues surrounding criminal cases.

⁵⁸ The Judicial Conference determined that the personal data identifiers must be redacted by the filer of the document (whether the document is filed electronically or on paper for late conversion to electronic format), as follows: Social Security numbers to the last four digits; financial account numbers to the last four digits; names of minor children to the initials; dates of birth to the year; and home addresses to the city and state. AO Annual Report (2004) supra n 45 at 36.

⁵⁹ The pilot courts are reporting to AO on their court reporters that details the number of transcripts ordered, whether the order was an original or a copy, and the fee charged per transcript. To date the AO has received data on 534 transcripts, including 292 transcripts in criminal cases, AO Annual Report (2004) supra n 45 at 36.

⁶⁰ These are set at a reasonable rate to cover expenses. In order to meet increasing costs, the Judicial Conference approved a one-cent increase—from 7 cents per page to 8 cents per page—to the PACER Internet access fee, effective on Jan 1, 2005 (the rate had remained unchanged since 1998) *ibid* at 34, 35.

⁶¹ Anon (2004) "IV. The Administrative Office of the United States Courts" 36:1 *The Third Branch Newsletter of the Federal Courts* www.uscourts.gov/ttb/jan04ttb/iv/ accessed 11.11.05

⁶² www.pacer.psc.uscourts.gov/faq.html

⁶³ AO Annual Report (2004) supra at 45

⁶⁴ *Ibid*.

Our final consideration here is the use of virtual courts in the US system. At the innovative end of the spectrum there is the Courtroom 21 Project recognised as the world's centre for courtroom and related technology information and experimentation (see further appendix 1).⁶⁵ At the other end virtual courts are ordinary occurrences in, for instance, the United States Court of Appeal for the Second Circuit where counsel argues federal appeal in a remote hearing room to a panel of judges who appear via a large TV monitor.⁶⁶ After some debate the Federal Rules of Criminal Procedure⁶⁷ were changed to permit remote first appearances, arraignments (common in the states), and remote witness appearances.⁶⁸

(iii) *Canada*

It is estimated that 300,000 inmates travel to and from court each year in Ontario.⁶⁹ In its more remote northern parts to bring a prisoner to court for a remand hearing can cost up to CAN\$1,500 (£742), which is excessive considering the average remand hearing takes 2 to 3 minutes.⁷⁰ Consequently Ontario has pioneered the Criminal Justice Video Network which brings together all justice providers and creates a province-wide video conferencing network for remand and consent-bail hearings.⁷¹ The accused and the court handle the preliminary hearings over a video link without the accused having to leave the prison or police station. By 2005 the Video Remand Project had implemented 132 videoconferencing units, 57 in criminal courts, 52 in correctional facilities and 23 in policing facilities.⁷² It is estimated that approximately "one in three transportations are being eliminated by the use of video technology."⁷³

The project extends throughout Ontario and the system has evolved to enable all counsel to hold teleconferences with their clients rather than visit the prison or remand centre, which has become useful where distance is a factor. Legal aid has been made available for the teleconference (which is costed at 74c a

⁶⁵ The project constantly strives to determine ways in which legal technologies can be used to best improve all components of the legal system, "to help promote more effective means of exchanging critical technical, legal, and practical information among courts...to help courts avoid 'reinventing the wheel' by offering them our cumulative knowledge and technology" Professor Lederer (Director of the Project), as quoted by Flythe, T. (2003) "The Courtroom 21 Project: A Light at the End of the Technology Tunnel" (March) *Modern Practice: Findlaw's Law Practice & Technology Magazine* at http://practice.findlaw.com/archives/feature_0303.html Accessed 25.11.05.

⁶⁶ Lederer, F. (2000) "Videoconferencing: Has the Future Arrived?" Dec *LawTechnologyNews* at http://ltn-archive.hotresponse.com/december00/litigation_support_p33.html accessed 25.11.05. Note: Federal Rule of Civil Procedure 43(a) expressly permits remote appearances

⁶⁷ Federal Rule of Criminal Procedure rule 5.1(f) and 10(c) state that video conferencing may be used to conduct an appearance if the defendant agrees.

⁶⁸ Federal Rules of Criminal Procedure December 31, 2004. The Committee on the Judiciary House of Representatives. US Government Printing Office Printing Office Washington 2004.

⁶⁹ Ontario Ministry of Community Safety and Correctional Services. www.mpss.jus.gov.on.ca/english/corr_serv/mod_system/new_design.html

⁷⁰ See Criminal Justice Video Network at www.cipa.com/award_winners/winners_05/OntarioMinCommSafetyCorrServ.html

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid

minute).⁷⁴ The benefits of the scheme to the justice system are hailed as improved accessibility and reduction of delays caused by a lack of lawyer-client communication.⁷⁵ Also cost savings for police services and reduced pressure in court holding cells.

(iv) *France*

Though the commercial courts have allowed electronic access to trade and companies registers for over 15 years,⁷⁶ the criminal records office only recently offered a service permitting members of the public to order and extract of their own police record over the internet, which for security reasons is then sent by post.⁷⁷ Other than this there is very little technological advancement in the French criminal justice system that is of note. However, the use of new technologies within the justice system is widely encouraged and a number of reforms are under way though they are still at the piloting stage.⁷⁸

(v) *Australia: Federal*

“The use of modern (or information) technology in Australian courts began with criminal trials...[and] Australian courts have in some respects taken a pioneering role in the use of technology,”⁷⁹ which is used to greater and lesser extent throughout the criminal process. In the pre-trial process all courts make use of case management systems and many jurisdictions regularly use video-conferencing technology to conduct remands and bail applications as well as for pre-trial hearings and preliminary applications.

The Federal Court of Australia currently uses a range of technologies including:

- Casetrack, a case management system (see Appendix 1)
- Esearch—which allows the public to search for information on specific cases
- Efiling—which enables litigants or legal representatives to lodge applications and other Court documents electronically (it includes a facilities for payment of any filing fees by credit card) and
- eCourt Forum—which allows parties and their legal representatives to participate in a virtual courtroom. The virtual courtroom assists in the management of pre-trial matters by allowing directions and other orders to be made online by the relevant docket Judge.

⁷⁴ See access: defence at www.legaid.on.ca/en/info/access_defence.asp

⁷⁵ See Criminal Justice Video Network at www.cipa.com/award_winners/winners_05/OntarioMinCommSafetyCorrServ.html

⁷⁶ Due to the development of the Minitel network.

⁷⁷ Committee of Experts on Information Technology and Law (CJ-IT) (2001) *Report on the Use of Electronic Documents in the Justice Sector* see Council of Europe website at www.coe.int

⁷⁸ See the Bill published by the Ministry of Justice *Programme d'actions de modernisation—exercice 2003*. It introduces an action plan for modernising the justice system and public services in general. It notably provides for assistance with pilot projects aimed at developing the use of new computing technologies available to magistrates and civil servants. Ultimately, the action plan aims at increasing the efficiency of the justice system by developing enforcement mechanisms, increase the judicial response to juvenile violence and increase victims' rights through the modernisation of the various jurisdictions within the country.

⁷⁹ Wallace, A. (2001) “Technology and the Judiciary: The Use of Technology in the Criminal Trial Process” paper presented at the 4th National Outlook Symposium on Crime in Australia, *New Crimes or New Responses*, convened by the Australian Institute of Criminology an held in Canberra 21-22 June 2001.

Australia has advanced high tech electronic courtrooms,⁸⁰ primarily for complex white-collar crime trials, multi-party civil litigation or lengthy commissions of inquiry.⁸¹ Most jurisdictions have a minimum of one courtroom (others have more) expressly tailored for use as an electronic courtroom.⁸² And various aspects of technology have been incorporated into existing courtrooms. At Federal level, the eCourt Forum (above) strategy includes electronic courtrooms and hearings, video conferencing and suggestions for complete electronic trials. Thus the court has enhanced existing courtrooms and developed new courtrooms which are electronically flexible, implemented a national video-conferencing system which “has reduced the cost and time of witnesses giving evidence and enabled more effective management of cases by presiding Judges who may be at a location away from their normal place of sitting”⁸³ and, in *de Rose v Fuller and the State of South Australia*,⁸⁴ tested a complete electronic trial. The court understands the need to bring together all the elements of its eCourt strategy and has consequently developed the “My Files” concept whereby “a single web-based interface will integrate the electronic provision of information and services.”⁸⁵

Australia: Victoria

In Victoria, electronic presentation of evidence has become a major focus for modernising the justice system. There is a trend to electronic presentation as a means to significantly shorten the length of major trials civil and/or criminal. Furthermore video conferencing has become a standard in the Supreme, County and Magistrates’ Courts, particularly for witnesses and particularly where there are security issues.

The Supreme Court of Victoria has one of the world’s most modern courtrooms specially equipped for high-tech cases. But so far these cases have involved only about 1% of the legal profession.

⁸⁰ Typically involving a networked computer operation in the courtroom providing electronic document management and exhibit handling, real-time electronic transcript and electronic communications facilities.

⁸¹ Wallace supra n 79 at 4. For example, the *Royal Commission into New South Wales Police Force*, the *Bond* and *Rothwells* trials in Western Australia and the *Metropolitan Ambulance Service in Victoria*.

⁸² Ibid at 4.

⁸³ www.fedcourt.gov.au. The Court recognises that video-conferencing facilities are increasingly relevant to ensure participation from rural and remote localities in matters before the Court and is currently exploring opportunities for enhanced use of video-conferencing through the eCourt strategy.

⁸⁴ A native title hearing was held in an electronic bush courtroom.

⁸⁵ The phased implementation of the 'My Files' project over the next few years will result in:

- improved access to the Court by increasing the services available online;
- a single logon which will allow the user (whether a judge, staff member or practitioner) to access all the services and information he or she requires, particularly through the use of electronic case files;
- a single point of data entry so that the information does not have to be re-entered on multiple systems;

(vi) *New Zealand*

New Zealand's Legal Services Agency (LSA) is currently undertaking the Legal Aid Improvement Programme (LAIP), which aims to make the legal aid scheme more efficient and effective and to improve the administration of legal aid. This will be done by *inter alia*:

- Investigating means of streamlining the LSAs administrative systems
- System generated assistance for determining granting decisions
- Complex file management for legal aid files that meet particular criteria⁸⁶

As part of the programme the LSA has completed a feasibility study on the introduction of e-lodgement (electronic lodgement) of legal aid applications, amendments and claims and plans to trial the initiative.⁸⁷ Though no date has yet been fixed for the trial, e-lodgement is "expected to result in acceleration of the granting and payment process and also a reduction in the overall effort associated with applying and deciding on legal aid."⁸⁸

It has also implemented complex grant file management processes in five legal aid offices. Complex files are those with atypical and unusual characteristics, for instance, highly costly, lengthy, legally complex, precedent setting or politically sensitive.⁸⁹

The three key objectives of complex file management were to: improve the quality of decision making in complex files; identify and manage the varied risks to the Agency that complex files represent; and embark on the most cost-effective path for the grant of aid.⁹⁰

Evaluation of the impact and value of complex grant file management is not due to take place for at least a year after full implementation. Thus we will have to wait to see whether the results achieve the objectives.

(vii) *Austria*

The Austrian ministry of justice has introduced an automated court document processing system run over the internet, which has reduced costs considerably. One point of entry with a uniform application for all types of case, civil or criminal, has been created that simplifies litigants' first experiences with the courts. The system is designed to be paperless and be available 7 days a week, 24 hours a day. In bankruptcy, for example,

⁸⁶ Specifically the programme aims to: improve the consistency, accuracy and quality of decision making by the Agency; reduce Agency costs; reduce listed provider costs in dealing with the Agency and improve timeliness of decision making, Legal Services Agency (2003) "Legal Aid Improvement Programme" 3:6 *Legal Services Agency News* Dec at 4

⁸⁷ Legal Services Agency (2005) "E-Lodgement Feasibility" 5:2 *Legal Services Agency News* May at 4. The reviews of E-lodgement found that it was feasible but dependent on the potential take up by providers, and proposed that its effectiveness relied on the extent to which supporting documentation is necessary, Legal Services Agency (2005) *Annual Report 2004-2005* at 13 (Legal Services Agency: New Zealand) available at the LSA website: www.lsa.gov.nz

⁸⁸ Legal Services Agency (2004) "The Next Three Years: Agency's Statement of Intent Published" 4:3 *Legal Services Agency News* Aug at 1.

⁸⁹ LSA *Annual Report 2004-2005* supra n 87 at 13.

⁹⁰ *Ibid.*

gazetting or advertising a case has now been reduced from a high of €1,090 to €60.⁹¹

What the foregoing illustrates is that the use of technology is crucial to any modern justice system because without it systems will not function efficiently. We can also see that there are cost savings to be made both in terms of time and money. However, there is difficulty accurately quantifying these claims in relation to a number of technologies as the cost benefit analyses have not been conducted and/or are not publicly available.

B. Case Allocation

One aspect of case management is the manner in which cases are allocated to judges. From the CEPEJ data we can see that some countries have a high number of specialist courts whereas others have few.⁹² For example, Ireland has zero but Germany has 262. Germany and France have courts divided from each other by strict categorisation of subject matter. Once the category has been determined the head of the court assigns the cases to the judges, apparently randomly. The aim is to prevent “judge shopping”, yet in some countries the prosecutor is able to do precisely this, especially France and Italy.

It is the role of prosecutors and their proximity to the courts and the criminal process that is interesting. We saw that in France and Italy prosecutors are able to “judge shop”, but it is also clear that in most of Europe prosecutors are able to determine the life course of a case. They can abbreviate its existence or allow it to complete its journey through to a judge in court. The following table gives some indication of how this appears in several countries.

Table Four: Cases Processed under the Discretion of Public Prosecutors (PP)

Country	Cases received by PP	Cases dropped by PP	Cases dropped since no offender identified	Cases negotiated by PP	Cases charged before court
Austria	600,451	77,891	370,570	42,126	65,698
Denmark	114,095	22,564		82,512	127,548
France	5,230,255	3,996,819	3,248,172	318,018	638,602
Italy	3,114,773	2,613,898	1,432,501	80,721	518,000
Liechtenstein	2,743	1,016	925	0	1,669
Netherlands	466,097	57,985	-	113,296	248,949
Sweden	393,200	160,800	-	68,300	164,100
UK-Scotland	284,191	42,898	-	46,736	51,222

Essentially these figures demonstrate that public prosecutors possess a lot of discretion in processing cases and determining whether or not they will come to court.⁹³ They have three points when they can abandon cases before the court hearing, thus making the court’s level of activity dependent on the approach of the prosecutor.

⁹¹ See Gottwald, T. “IT in Austria” www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/Letzte%20Fassung%20CEPEC.pdf

⁹² CEPEJ (2005) supra n 4 Table 9 at 30.

⁹³ Ibid Table F at 134.

Though as a guiding rule 'judge shopping' is not permitted in the UK, prosecutors here still have significant impact upon the efficient running and management of cases. An obvious illustration of this being the badly prepared prosecution case that squanders both defences and court time.⁹⁴

C. Salaries, Appointments, Supervision/Management of the Judiciary

One of the factors identified as composing efficient justice is the concept of a fair trial.⁹⁵ Clearly this is dependent, *inter alia*, on well qualified judges, immune from external influences and, as a prerequisite to the latter, properly paid.⁹⁶ With regard to this the CPEJ report offers us some useful comparative information on judges salaries generally and in particular when viewed against those of public prosecutors:

(i) Judicial Salaries

Table Five indicates that the UK pays its judges, both neophyte and higher ranking, a good deal more than its European counterparts. For instance, though the gross average national salary in the Netherlands is over a thousand euros higher than in the UK, 'new' judges in England and Wales earn over twice as much (2.74) as Dutch judges. They earn seven times (7.05) more than French judges and almost five times more than German judges (4.72).

Table Five: Judicial Salaries in the UK and Other EU Countries in GB Pounds⁹⁷

	National Average Gross Salary	Salary of Judge at the start of career	Salary of PP at the start of career	Salary Supreme or highest appellate court judge	Gross Salary of PP at Supreme or highest appellate court judge
Austria	14,669	19,269	29,257	75,798	77,298
France	14,378	16,289	16,269	44,829	44,776
Germany	17,459	24,332	27,602	56,687	64,403
Netherlands	25,538	41,962	54,307	74,562	74,468
Sweden	15,254	36,486	19,792	60,802	48,581
Switzerland	35,243	68,481	43,078	136,948	95,043
UK: England & Wales	24,759	114,824	26,202	182,073	62,728

Furthermore, as we can see from a sample of the CEPEJ tables (five above and six below), in many European countries little distinction exists between the career paths of judges and of public prosecutors. And that in some countries "they are very narrowly intertwined—up to a point where states can hardly distinguish budgets for the public prosecution from budgets for the

⁹⁴ Paraskeva, J. (2005) "Carter Could Fix it" 102/44 *Law Society Gazette* at 16.

⁹⁵ See, e.g., Art 6 ECHR.

⁹⁶ Deputy Secretary General "European Justice Systems: How Well do They Protect Our Citizens?" Speech by the Deputy Secretary General. Conference on evaluating European judicial systems. The Hague 2 May 2005

⁹⁷ The full table (number 17) can be found in the CEPEJ Report supra n 4 at 39. The original table is expressed in euros these have been converted into GB Pounds (and rounded for ease of reference) using the Universal Currency Converter at www.xe.com/ucc/ on 28th November 2005 (€1 = £0.685302).

judiciary”,⁹⁸ in France for example. However, in a few countries, virtually exclusively Northern European, there is enormous variation between the salary, and thus seemingly status, of judges and public prosecutors with the UK that showing the greatest variation.

Table Six: Judges’ and Public Prosecutors Salaries, as a Ratio of the Average Gross Salary in Euros⁹⁹

	Judges’ salary/average salary		Public prosecutors’ Salary/average salary	
	Lowest	Highest	Lowest	Highest
Austria	1,3	5,2	2,0	5,3
France	1,1	3,1	1,1	3,1
Germany	1,4	3,3	1,6	3,7
Netherlands	1,6	2,9	2,1	2,9
Sweden	2,4	4,0	1,3	3,2
Switzerland	1,9	3,9	1,2	2,7
UK: England & Wales	4,6	7,4	1,1	2,5

The primary record for judicial salaries in the US from the National Centre for State Courts (NCSC) and though not recorded in the same way as the figures above do still provide some useful comparisons.¹⁰⁰ For example the average salary of a chief judge in the highest court is approximately £38,000 less than that earned by a neophyte UK judge.

Table Seven: US Judicial Salaries

	Mean \$ (£)	Median \$ (£)	Range \$ (£)	Average Annual % change 1997-2004
Chief, Highest Court	131,471 (76,923)	127,040 (74,249)	95,000 to 191,483 (55,520 to 111,933)	3.1
Associate Justice, Court of Last Resort	127,169 (74,340)	123,095 (71,943)	95,000 to 175,575 (55,533 to 102,648)	3.1
Judge Intermediate Appellate Courts	123,629 (72,272)	119,700 (69,959)	99,864 to 164,604 (99,864 to 96,234)	3.0
Judge General Jurisdiction Trial Courts	114,431 (66,895)	110,330 (64,480)	88,164 to 158,100 (51,545 to 92,434)	3.2

The clear discrepancy, particularly between UK and US judges’ salaries, is of special interest to the question of the extent to which judicial salaries have a detrimental affect on the justice system. Chief Justice William Rehnquist has commented on this problem:

Inadequate judicial pay undermines the strength of our judiciary [and], seriously compromises the judicial independence fostered by life tenure. It creates a sense of unfairness within the Judiciary that erodes the morale of our judges. Many of the very best lawyers, those with a great deal of experience, are not willing to accept a

⁹⁸ Ibid at 39.

⁹⁹ The full table (number 18) can be found in the CEPEJ Report supra n 4 at 40.

¹⁰⁰ National Centre for State Courts (2005) 29:2 *Survey of Judicial Salaries* as at Oct. 2004.

[judgeship] knowing that their salary will not even keep pace with inflation...We cannot afford a Judiciary made up primarily of the wealthy or the inexperienced.¹⁰¹

By contrast the DCA presented evidence to UK's Senior Salaries Review Body in August this year which declared that the current judicial remuneration levels are plenty enough to recruit and retain high quality individuals.¹⁰² What we need to ensure is that the best and most efficient use is made of this comparatively expensive resource. This may require some form of judicial evaluation (see further judicial performance evaluation below).

(ii) *Types of Judiciary*

Different jurisdictions possess different types of judiciary, which might affect the delivery of these processes within the criminal justice system.

Broadly, the judiciary in common law countries is either appointed or elected to office after a period in practice. In civil code countries the norm is a career judiciary where judges are appointed directly after law school. In all European jurisdictions judges are appointed not elected to a term of office. These distinctions between common law and civil code countries can result in big differences in judicial numbers. For example, there are 2,195 professional judges in England & Wales (with Northern Ireland and Scotland the total is 2,484) (pop UK 60,441,457). In France there are 6,240 professional judges (pop 60,656,178) and in Germany, 20,901 (pop 82,341,390). Even if we include non-professional judges, the proportions do not change dramatically. The UK has 30,328, France has 21,767, and Germany has 35,781.¹⁰³

The United States (pop 295,734,134) has a mixture of judges at federal, state, and local levels, including a number of administrative law judges employed by government agencies. According to the US Department of Labor, in 2002, there were approximately 27,000 judges, magistrates, and magistrate judges, primarily in state and local government. There were 19,000 administrative law judges and their like of whom 57% were in state governments, 24% in federal government, and 16% in local governments. Although being a lawyer is the usual requirement for a judgeship, around 40 states allow non-lawyers to hold certain limited judicial positions.¹⁰⁴ Judges are elected in 38 states from terms of four to six years and the elections are made on a party political basis. While the framers of the constitution saw power flowing from the people, elected judges raise a number of questions over impartiality and independence.

Bogira clearly shows in *Courtroom 302* that the judge he observed needed the endorsement of the Democratic Party to be re-elected and that the politicians would closely monitor his disposition rate in court. Moreover, any sensitive

¹⁰¹ As quoted by Marshall, M. H. (2005) Address to the Massachusetts Bar Association on 5th March 2005 at

www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/mbaspeech2005.pdf

¹⁰² Allan, A. (2005) "Departmental Evidence to the Salaries Review Body" at www.dca.gov.uk/judiciary/judgepay.pdf accessed 29th November 2005.

¹⁰³ CEPEJ Report supra n 4 table 12 at 24.

¹⁰⁴ US Department of Labor Bureau of Labor Statistics, "Judges, Magistrates, and Other Judicial Workers" www.bls.gov/oco/ocos272.htm

cases, such as those involving racial elements, could influence the political outcome of an election. Recent cases such as that against Rep. Tom DeLay, former House majority leader, for illegal campaign contributions in Texas show the problems surrounding the elected judiciary.¹⁰⁵ Because of his position a number of judges have had to recuse themselves from his case through either having made political donations to him or having received them from him. In death penalty cases it has been argued that an elected judiciary favours capital punishment too much and ought to be reined in by independent federal judges.¹⁰⁶ And in situations where judges have been perceived to be too liberal in capital punishment cases, they have not been re-elected (eg, in Tennessee and Mississippi supreme court justices were not retained in this situation: in the latter even the Mississippi Prosecutor's Association campaigned against the sitting judge).¹⁰⁷ The situation of the elected judge was summed up by Otto Kaus, a California Supreme Court justice from 1980 to 1985, who described the dilemma confronted by elected judges when they decide a controversial case while campaigning for re-election as "like finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."¹⁰⁸ Other evidence suggests that elected judges are more likely to favour in-state parties than out of state, that is those who voted them into office. In a study of 7000 cases, awards against out of state defendants were significantly higher than against in-state defendants.¹⁰⁹ Even the fate of indigent defendants could depend on whether the attorney representing them has contributed to the judge's campaign.¹¹⁰

(iii) *Judicial Performance Evaluation*

Despite the dangers inherent in interfering with the judiciary's activities some jurisdictions have considered it useful to implement judicial performance evaluation programmes.¹¹¹ The state of Virginia represents a notable example.¹¹² In Virginia the state legislature elects judges yet had no stated criteria for establishing what constituted "good" or "effective" judicial performance. The programme would provide information for judicial "self-improvement" and re-election. The JPE programme would consist of (i)

¹⁰⁵ Texas is one of seven states to elect all of its judges on a partisan basis. See Blumenthal, R. (2005) "DeLay Case Turns Spotlight on Texas Judicial System" *New York Times* 8th November.

¹⁰⁶ Bright, S. (2000) "Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights" 78 *Texas Law Review* 1806 www.schr.org/reports/docs/texas.pdf

¹⁰⁷ Fabian, J. (2001) "The Paradox of Elected Judges: Tension in the American Judicial System" *Georgetown Journal of Legal Ethics* available at www.findarticles.com/p/articles/mi_qa3975/is_200110/ai_n9004340

¹⁰⁸ Quoted in *ibid*.

¹⁰⁹ Ransford, M. (1999) "Elected Judges Favor People Who Voted Them Into Office" *Ball State University News Center* www.bsu.edu/news/article/0,1370,-1019-1048,00.html

¹¹⁰ See Bright *supra* n 106.

¹¹¹ See the National Center for State Courts (NCSC) "Resource Guide" for Judicial Performance Evaluation at <http://www.ncsconline.org/WC/Education/JudPerGuide.htm>

¹¹² See "Report of the Judicial Performance Evaluation Task Force" 2001 www.courts.state.va.us/publications/judicial_performance_eval_task_force_report.pdf Eighteen states have judicial performance evaluation programmes.

surveys completed by attorneys and in lower courts juries would be surveyed, (ii) observations of courts by retired judges trained for the task, (iii) self-appraisal by judges, and (iv) a review of the results by a facilitator judge.¹¹³ In states where the programmes have been fully implemented the results of the JPE are publicly distributed on the internet.¹¹⁴

(iv) *Length of Cases*

Not unconnected to the question of judicial performance is consideration of the length it takes to process cases. For justice to be effective a reasonable time for proceedings must be organised. In the US with regard to criminal cases the time to be expended from arrest trial to disposition is set at 180 days for felonies and 90 days for misdemeanors.¹¹⁵ Furthermore, the American Bar Association's (ABA) standards, stipulate the length of time it should take the 90th, 98th and 100th percentile of cases to be resolved, in accordance with Table Nine below.¹¹⁶

Table Eight Case Disposition Time Standards Adopted by the Conference of State Court Administrators (COSA), the Conference of Chief Justices (CCJ), and the American Bar Association (ABA)¹¹⁷

	COSCA & CCJ	ABA
Criminal Cases (time from arrest to trial or disposition)		
Felony	180 days	90% in 120 days 98% in 180 days 100% in 12 days
Misdemeanor	90 days	90% in 30 days 100% in 90 days

A good many of the European jurisdictions we consider do not offer such time effective dispositions and “the average length of [their] court proceedings to too long.”¹¹⁸ The CEPEJ Report includes some interesting data on the timeframe of cases (see figure 3 below). In robbery cases, the average length of the case from the start of the prosecution until disposition at first instance varied from roughly 80 days in Iceland to 480 days in Switzerland. England and Wales measured around 100 days, France 200, and Germany 220.¹¹⁹

¹¹³ The cost per judge of the JPE was estimated at \$3,400.

¹¹⁴ See, eg, Colorado's results at www.cojudicialperformance.com/districts.html#appeals where the majority of judges are recommended for retention (re-election) but the two for whom “no opinion” is expressed are criticised quite severely.

¹¹⁵ National Centre for State Courts (2005) “Trial Court Performance Standards & Measurement System” at www.ncsonline.org/D_Research/TCPS/Measures/me_2.1.2.htm Accessed 14.12.2005.

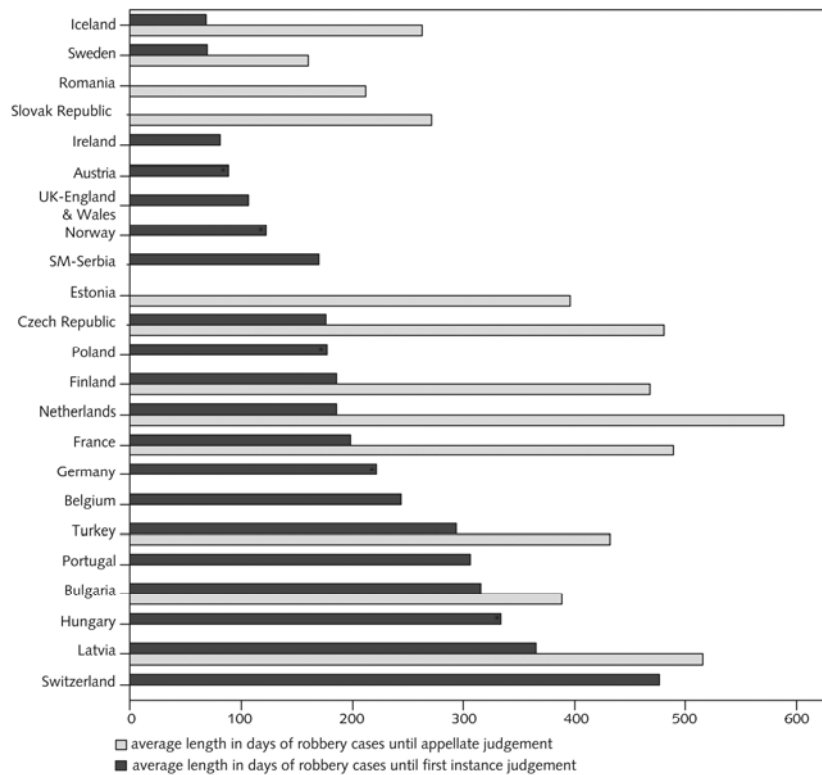
¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ “European Justice Systems: How Well do They Protect Our Citizens?” Speech by the Deputy Secretary General. Conference on evaluating European judicial systems. The Hague 2 May 2005.

¹¹⁹ CEPEJ Report, supra n 4 at 52, Table 26.

Figure Three: The Average Length of Robbery Cases, from the Start of Prosecution



Data: Q62, Q63 * = report for criminal cases in general

The discrepancies highlighted in the table obviously call for some means of calculating what a reasonable time span (from charge to settlement) should be for particular types of cases. For example, in the US the National Centre for State Courts has developed the Trial Court Performance Standards Measurement System, which (largely depending on the courts record keeping system) provides information with regard to the time it takes to dispose of cases.¹²⁰ Information that can be measured against the time standards adopted by the American Bar Association (ABA) or the Conference of State Court Administrators (COSCA) and the Chief Justices (CCJ). As a result the system had provided a framework for understanding the practical effectiveness of trial courts, led to improvements in court performance and ensured a more responsive justice system.¹²¹

¹²⁰ Supra n115.

¹²¹ Bureau of Justice Assistance (1995) "Trial Performance Standards and Measurement System" www.ncjrs.gov/pdffiles/tcps.pdf Accessed 19.12.2005.