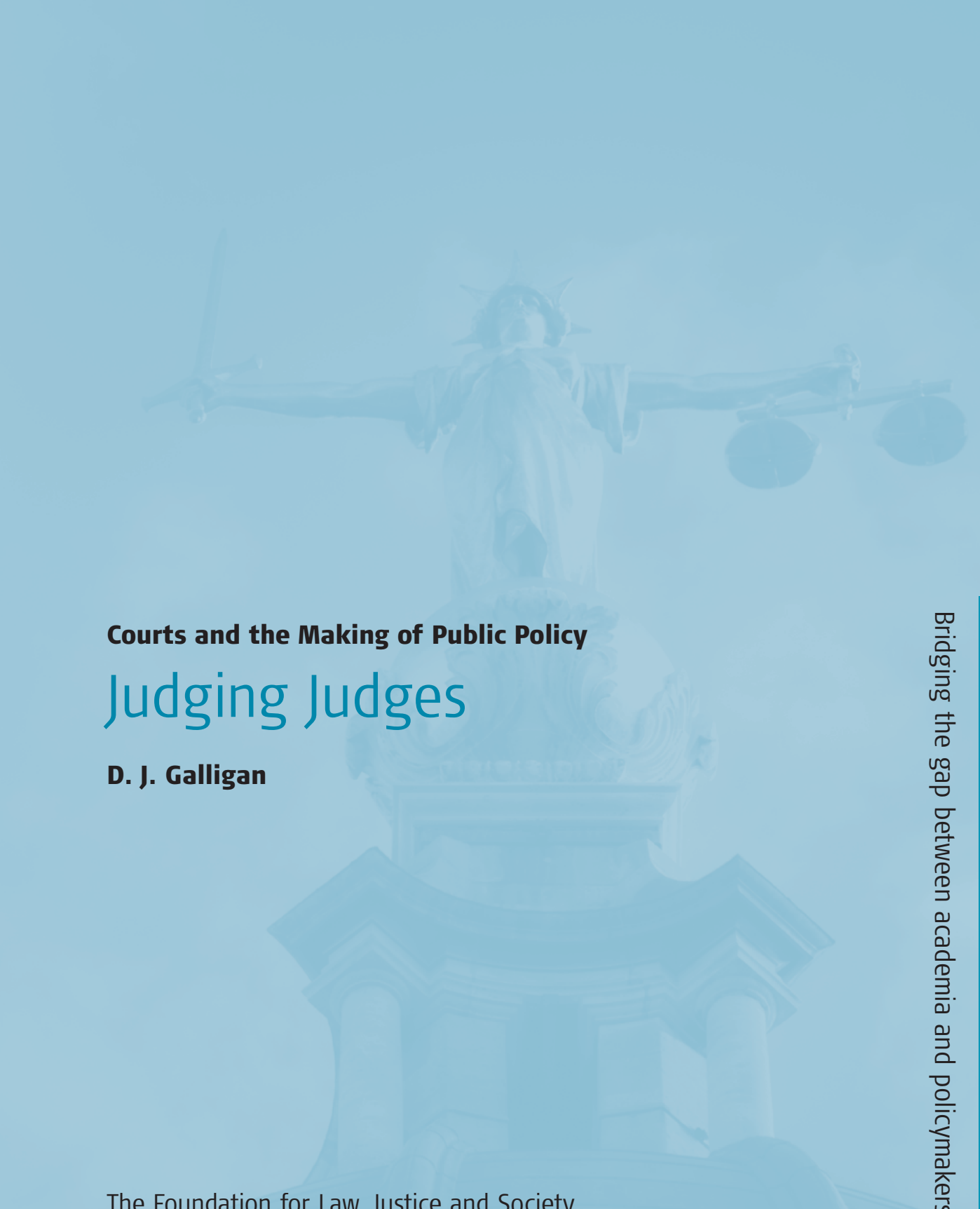

Courts and the Making of Public Policy

Judging Judges

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Executive Summary

- The principle of independence of the judiciary, while fundamental to a society based on the rule of law, is sometimes used to preclude the evaluation of courts. Such an approach is mistaken: judges and courts should be both independent and subject to evaluation.

- How to evaluate judges and courts raises particular issues, such as how to maintain judicial independence and at the same time develop mechanisms of accountability. Few European countries, old democracies as well as new ones, have yet addressed these issues.

- Evaluation must take a twofold approach to address the distinct exercises of assessing judges *individually* and the judicial *system* as a whole. It is necessary with respect to each to devise separate standards of evaluation against which they can be meaningfully assessed. In evaluating judges *individually*, three types of standards are relevant: qualifications and training, judicial competence, and good conduct.

- While European countries have made some progress in developing each set of standards, greater progress has been made in the United States, especially in relation to judicial competence. The American Bar Association's *Guidelines for the Evaluation of Judicial Performance* has become a benchmark for the state and federal jurisdictions.

- Evaluation of the *judicial system* presents quite different issues for evaluation. Here the object is to determine whether a system of courts is performing well. The standards of assessment are mainly: (i) effective and efficient operation of the courts, and (ii) gaining and maintaining public confidence. The principal mechanisms for evaluation here are the meeting of targets, the use of statistics and qualitative assessment.

- The general conclusion to be drawn from this study is that evaluation of judges is essential for both a well-functioning judiciary and a robust rule of law. Considerable progress has been made in developing methods of assessment, but in this respect European societies have much to learn from the experience of the United States.

Judging Judges

Introduction

Jeremy Bentham was opposed to judicial independence because it made judges unaccountable and allowed them to do what they like. He thought they should be subject to the rigorous scrutiny of public opinion. However, his advice has not generally been followed; rather, judicial independence is widely accepted as a necessary condition of a constitutional system.

Judicial independence means that judges should be able to hear and decide cases fairly and impartially without interference from external factors. It means that judges should not be involved in the political process; it also means that neither the other branches of government nor private persons or entities should interfere in the performance of their tasks. It can and sometimes has also been taken to mean that courts and judges are, or should be, immune from any process of accountability or evaluation short of serious misconduct.[1]

This last view is a mistaken one. There is no reason in principle why courts and judges should not be assessed and evaluated according to acceptable standards. Courts are part of the system of governance and, in common with other parts, should be granted powers according to publicly recognized standards and be accountable for their use. Suitable standards of performance and mechanisms of accountability strengthen rather than weaken judicial independence. Judicial independence should not mean judicial isolation, since isolation fuels suspicion and criticism. Moreover, judicial independence is not the only value in issue; the integrity of the judiciary and their impartiality are closely related and equally important. A judicial system that is seen to be working to a high standard is likely to win respect and support. High standards are achieved by the combination of quality performance and clear lines of accountability.

1. See further: National Center for State Courts: Knowledge and Information Services, *Fostering Judicial Independence in State and Federal Courts* (Memo 27.2.1998)

At the same time, the need to preserve judicial independence, integrity and impartiality does restrict the kinds of standards that are compatible with a constitutional order. It also restricts the process of accountability; that is, the process by which courts should justifiably be assessed and evaluated. Subject to those two sets of restrictions, it is not only justifiable but a necessity of a well-functioning constitutional order that standards and mechanisms of assessment should be established.

The object of this policy brief is twofold: first, to describe and evaluate the manner in which several European countries, the European Union and the United States approach this issue; secondly, based on that experience, to propose a framework of assessment that is suitable for constitutional orders such as Bulgaria.

Issues

There are three distinct but related issues: (i) what are the standards of assessment of judges and courts; (ii) how are the standards applied; and (iii) how can quality be improved. The first involves devising standards of assessment that are suitable for the task. The second raises the question of how to assess whether the standards are being met. The third focuses on approaches and mechanisms that could be deployed to improve the quality.

A distinction should be made between *the assessment of individual judges* and assessment of *the court system and justice system*. Judges could be performing well but the system as a whole not, since organizational and institutional features enter into the latter, over which individual judges have no control. In other words, good quality performance by judges is a necessary condition of good performance of the court system, but not sufficient. Similarly, the system may be functioning reasonably well but some individual judges not.

Evaluation of judges

Standards

The main standards for assessing judges are: (i) suitable qualifications and training; (ii) competence in managing, deciding, and finalizing cases; and (iii) good conduct.

Qualifications and training

Qualifications and training are handled in different ways by different countries. The UK approach at the higher levels of the judiciary is to appoint barristers who have had extensive experience of practice, usually becoming Queen's Counsel or otherwise of senior status. The result is that the pool from which appointments are made is small but of high quality. At the bottom end, magistrates are laypersons who need not be qualified legally. The Judicial Studies Board, created in 1979, provides training for superior court judges; its scope has been extended now to include magistrates and members of administrative tribunals, which are quasi-judicial bodies.

The continental tradition is very different, with judges usually entering the profession as a career and working their way up the ladder to the higher courts. Germany follows that pattern, although appointment to the highest courts is different, due mainly to the practice of a significant number of places being filled by professors of law rather than professional judges. The French system, a good example of which is the supreme administrative court, the Conseil d'État, draws most of its members from the prestigious and competitive *grandes écoles* where they are normally trained for careers as civil servants and often as administrative court judges. Once recruited, members undergo extensive training in law and administration, and only later in their careers concentrate on the judicial work of the Conseil d'État.[2]

Judges in the United States are traditionally drawn from a wider range of legal backgrounds and have qualifications that are much more diverse than those of European countries. In some jurisdictions, including the federal, they are appointed, while in numerous states they are elected. Some say appointments, whether by election or appointment, are more politically inclined than in Europe. The precise arrangements for appointment or election, and opportunities for training, vary from state to state, and between states and the federal system.

Many systems provide for and indeed require some retraining from time to time, and create special bodies for that purpose. They usually operate under the control of the courts. Retraining opportunities for judges are especially important in modern European countries, given the range and complexity of their tasks under national, European and international law. Annual Reports of the USA Federal Judicial Center show its extensive educational programmes for federal judges.

Given the variety of approaches to qualifications and training, it is hard to generalize beyond emphasizing the need for: (a) adequate legal qualifications; (b) experience as a lawyer in practice, preferably in the same area of law as the judicial practice; and (c) regular opportunities for retraining and refresher courses.

Judicial competence

Judicial competence consists of the capacity to perform all the usual tasks of judges, from managing the case and the personnel involved, to making timely and sound decisions. This is probably the most under-developed and contentious aspect of evaluation. The two basic questions are: what should be the *standards* of judicial competence; and how should they be *implemented*.

The United States has made considerable progress with provision for regular evaluation of *judicial competence*. It includes efficiency in deciding cases, one aspect of which is timelines, another substantive performance. It extends to the judge's handling of

2. See: Brown, L. N. and Bell, J. (2002) *French Administrative Law*. Oxford: Oxford University Press; Koopmans, T. (2002) *Courts and Political Institutions*. Cambridge: Cambridge University Press.

the lawyers, the parties and the witnesses, and to their ability to conduct proceedings with integrity, treating parties and witnesses according to principles of equality and fairness.[3]

Judicial competence is assessed in various ways, including each judge's self-assessment, and observation by and comments of other judges, lawyers and litigants; witnesses, experts and sometimes interest groups are able to participate in surveys of the judicial performance of individual judges. Some benches meet annually to evaluate each other's performance. These are naturally internal and confidential.

Several state jurisdictions have adopted procedures for the regular evaluation of judges. In New Hampshire, an official within the court conducts a review. It includes discussion with the judge, giving attention to any problems, and preparing a written report if a problem is identified. The Chief Judge may assist in rectifying the problem. In the event of its not being rectified, internal disciplinary action may be taken. Connecticut relies heavily on questionnaires to attorneys and jurors, which ask about the judge's attitudes towards particular groups and his or her performance based on specific criteria. Information gained in this way is used for several purposes: the Court Administrator meets regularly with judges to discuss it; it is used in the design of educational programmes for judges; and is available to reappointment committees or bodies. [102]

Where complaints are made about a judge's behaviour, such information is naturally taken into account in assessments. It tends also to be an opportunity for internal investigation of the complaint.

The American Bar Association (ABA) has issued *Guidelines for the Evaluation of Judicial Performance* (1985). The guidelines have been widely adopted, although not by all states. The goal is stated to be the self-improvement of each judge rather than threat of sanctions or outside intervention. This ensures that the standards and their implementation do not undermine judicial independence. The underlying principle is that evaluation improves performance. Notions of confidentiality and accountability are inherent in this approach; the results of evaluation are restricted to the individual judge, the presiding judge of the court, and the Supreme Court of the jurisdiction. Evaluations tend to become public matters only in cases of serious misconduct or prolonged failure of a judge to perform the duties of office competently. Apart from the ABA's guidelines, there are numerous other codes on judicial behaviour and evaluation.

The initiative for creating systems of evaluation may come from the political branch, as in the case of Virginia where the Governor asked the judiciary to devise criteria and methods for evaluating their performance. The result is a comprehensive system and a commendable methodology.

In addition to the ABA, several other institutions take a close interest in the evaluation of judges; these include: Federal Judicial Center, National Center for State Courts, American Judicature Society, Administrative Office of the US Courts, and Judicial Conference of the US. Both chambers of Congress have Judiciary Committees. The Supreme Court has a Committee on Judicial Conduct with a membership of judges, lawyers, and laypeople. State Supreme and other courts often have similar bodies.[4]

European countries have little to compare with the United States in terms of procedures of judicial evaluation. In Britain, the Judicial Studies Board provides training opportunities for judges and magistrates at all levels. HM Commissioners for Judicial Appointments report on the selection process and the relative qualifications of nominees or applicants for judicial appointment. Monitoring of courts is extensive, but is less concerned with the evaluation of individual judges than with the system.

3. According to available information, 18 states have in place systems of evaluation.

4. A good example is New Hampshire.

In France, the *Conseil Supérieure Magistrature* (CSM) is a body headed by the president for whom the Minister of Justice deputizes. It has 16 members and acts as a disciplinary and supervisory body of the judiciary. It advises on appointments to the Cour de Cassation and presiding judges of courts of appeal. In recent years, the CSM has moved towards evaluation of judges as opposed to monitoring the system. This proposal has been controversial. The main idea is to link judicial evaluation and performance to promotion and remuneration. The CSM is a reasonably independent body and is provided for in the constitution. The high proportion of judges among its membership helps to ensure judicial independence and maintain the notion of judicial self-government, although, owing to the highly centralized system of government in France, these notions have never been as strong there as in other countries.

Good conduct

Any legal system must have some procedure for dealing with judicial misconduct. The usual pattern is for serious misconduct to be grounds for removal, a process that sometimes requires trial by the legislative body. Impeachment of judges, meaning the process of removal, is an exceptional measure and rarely brought. The idea is that, in order to protect their independence, judges should not be under threat of removal or other disciplinary proceedings except in the most clear and serious cases.

Judicial independence does not, however, rule out supervisory arrangements within the court system. Here, the idea is that, provided judges are supervising themselves and their colleagues, judicial independence is not at risk. Judicial self-government is considered desirable and may legitimately include the monitoring of performance and the taking of remedial action against individual judges where necessary.

Such processes have to be handled carefully, and generally are presented as ways of self-improvement rather than the imposition or threat of imposition of sanctions. Confidentiality of proceedings helps to maintain that direction. But of course the line between sufficient judicial assessment and independence is fine and can be hard to draw.

Evaluation of the judicial system

Evaluation of the system of courts and judges presents quite different issues from those concerning judges as individuals. The object here is to devise ways of testing whether a particular court or set of courts is performing well. This extends beyond judges to include administrative and managerial staff. It also includes the assessment of complex organizations to determine whether they are meeting their objectives. This is clearly a more difficult issue to assess, although in examining the system rather than individual judges it has the advantage of not appearing to pose a direct threat to judicial independence. In the United States, the Congress created the Federal Judicial Center in 1967, whose task is to improve judicial administration in the American courts.[5]

Methods

The methods for evaluating the court and justice system include: (i) the setting of targets for different courts and other bodies to meet; (ii) the use of statistics; and (iii) regular qualitative review.

Targets

The setting of targets, often expressed as objectives, goals or performance indicators, became a popular device in the UK during the managerial revolution of the 1980s, when the government of the day attempted to make public institutions operate as if they were private. In place of profit as the key indicator of performance as in business, the managerial approach is to formulate a set of targets to be achieved within a specified period. *Efficiency* is the key concept and is tested according to how well the targets are achieved. In the case of courts it could be the number of cases decided, or, for prosecutors, the number successfully proved in court. Institutions are expected to draw up business or corporate plans which set out the short- and long-term targets.

5. For an account of its activities, see: Federal Judicial Center, *Annual Reports*

In 2002 the British government published a *Public Service Agremeent* which states its commitments and undertakings in the administration of justice. These include: bringing 1.2 million cases to justice by 2005–6; reducing the number of ineffective trials; increasing value for money by three per cent a year; and enhancing public confidence in the criminal justice system.

Targets are generally rather simple and ostensibly unproblematic. The main drawback is that they can be overly crude, do not reflect other more intangible goals that are harder to measure, and can be easily manipulated.

Statistics

The use of statistics is long-established practice and is heavily relied on by governments and agencies in policy formulation and adjustments, as well as in monitoring performance. In the UK, a great range of statistics is gathered and to some extent relied on, although many are ignored and not used in evaluation of the system or in policy formulation. Among the bodies gathering statistics are: the police, the Department of Constitutional Affairs, the Home Office and the Office for National Statistics. The subjects on which statistics are gathered include: the courts at all levels and types; jury trials; police and prisons; Crown Prosecution Service; crime, convictions, and punishments; legal aid and so on.

The National Statistician is an independent public body which produces extensive guidelines for consultation with ministers regarding past, present and future projects, for surveys and other statistical exercises. These include when the government may request and use statistics; it also sets out the consultation arrangements between government bodies and statisticians.

The National Statistician has also produced a set of standards to ensure quality and integrity in the gathering and use of statistics.

The compilation and reliance on statistics is similar in the United States and to a greater or lesser degree in other Western European countries. The Administrative Office of the US Courts keeps extensive statistics on the judicial branch. The Judiciary Committees of each House of Congress take a close interest in the court system and regularly commission reports and surveys, holding hearings on issues of controversy, and introducing and debating legislation on the judicial system.

It is probably true to say that the US system places greater emphasis on judicial self-government, and hence self-monitoring, than does the British system, which relies heavily on a range of agencies and institutions from outside the judicial system.

Qualitative review

Qualitative review takes several forms, the main aspects of which are: surveys of interested parties, commissioned research and commissions of enquiry. Each of these forms is widely used in Great Britain.

The conduct of surveys by questioning the parties involved in different aspects of the court and justice system is well-established. The Home Office and to a lesser extent the Department of Constitutional Affairs commission research both internally and from outside bodies, usually university institutes, such as my own – the Oxford Centre for Socio-Legal Studies – or the Oxford Institute of Criminology. Reviews in the form of public commissions of enquiry are a familiar and integral part of the British system. Lord Woolf's enquiry in the mid-1990s was a major review of the civil justice system which recommended substantive changes to various aspects. Lord Justice Auld recently conducted a similar review of the criminal justice system. Reviews of these kinds are taken seriously by government and in both these cases led to extensive changes to the systems.

The performance of public bodies or activities are often closely monitored by specialist institutions, such as the Council on Tribunals, which conducts periodic reviews of particular tribunals. The Council

and the Department of Constitutional Affairs regularly produces ad hoc reports on the experience of users of tribunals.

In the United States, the Federal Judicial Center completed 16 major research and evaluation projects in 2004. It had another 38 in progress and responded to 300 requests from other institutions for research assistance on specific matters.

The World Bank takes a close interest in judicial and system evaluation and has published data from various sources. It emphasizes the need for empirical research before undertaking reform of the judicial branch. Its interests include:

- how and why citizens use courts;
- reasons for court delays;
- pace of civil litigation in the United States;
- case management study of Canadian courts;
- how to conduct an effective case level analysis of court data;
- use of resources; and
- tests of efficiency.

Standards

The standards for evaluating courts and other parts of the justice system include the following: (i) efficiency in operation; and (ii) gaining and maintaining public confidence in the system.

Efficiency in operation depends on the criteria of efficiency. According to the managerial approach, efficiency is translated into precise targets. Whether an institution meets the targets is then a fairly easy matter to determine, provided suitable statistical data is compiled. Targets tend in practice to be rather simple, but could in principle be made more complex and receptive to the character of the institution and its purposes. For instance, it could progress from enumerating the number of cases decided to assessing the quality of the decisions. That is a more difficult matter to assess and probably is better left to the evaluation of individual judges. If the judges are well-trained and judicially competent, the quality of their judgements is likely to be sound. It may be that the only feasible way of evaluating the justice system or institutions within it is to focus on relatively objective and external criteria.

The targets set for institutions within the justice system of the UK include the following:

- reduce the number of ineffective trials;
- reduce waiting times at all stages in the proceedings – pre-trial, bail, etc.;
- monitor court hours;
- increase the number of offenders brought to trial;
- improve the listing and management of cases;
- ensure better enforcement of all court orders; and
- reduce the length of youth cases and sentences.

The gaining and maintenance of public confidence in the system of courts and justice is a principal standard for assessing the justice system. Public confidence depends partly on efficiency, but goes farther and includes more particular standards, such as openness and transparency; equal and non-discriminatory treatment; and availability of access. Public confidence is considered to be most important in certain areas, such as criminal justice, the handling of domestic disputes, and access to the system of justice.

The British system places heavy emphasis on the monitoring and improvement of racial, disability and gender equality in the appointment of judges and court officials. It also places emphasis on applying principles of equality to the proceedings of courts and justice institutions. Statistical methods are most commonly used to assess these matters.

The provision of effective representation and legal aid for people encountering the justice system is a major objective of the British system, although the emphasis is strongly on the criminal and family sides rather than the civil. In the administrative law area, the tribunal system was intended to make justice 'cheap, informal and accessible'. The Legal Services Commission is responsible for compiling statistics on issues of legal aid and access. Its approach generally is target-centred and reliant on statistical data. It also probes the trends in equality by monitoring ethnicity, gender and disability in clients, applicants, outcomes and staff.

The United States Federal Court system is overseen by 24 committees of the Judicial Conference of the United States, which is chaired by the Chief Justice and composed of members of the federal judiciary. Where legislation is required, the Conference makes recommendations to the legislative branch. The Conference makes policy concerning the administration of the courts and related bodies. The administrative director is responsible for implementing them and liaising with the political branches. Administration of the court system is squarely under the control of the judicial branch, which settles budgets, and determines rules of practice and procedure, court administration and discipline.

The Judicial Conference of the United States recently stated the objectives of the judicial system as follows: simplicity of procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay. [121]

The ABA has recently called for the establishment of a National Commission on the Federal Courts, which would comprise representatives of the three branches of government, as well as representatives of litigants and other groups. Among its tasks would be to make recommendations to Congress on court practice, procedure, administration and the like.

Conclusion

To conclude, there is still much to be learnt about how to ensure that judicial systems are working well. Considering the importance placed on the role of the judiciary in modern societies and their integral role in maintaining the distinctive character of such societies, we may be surprised that the matter has not been subjected to closer study and research. The lines of enquiry to be followed in advancing our knowledge and understanding are easily drawn, and are broadly three: the standards by which to judge the judges, both collectively and individually; how to test whether the standards are being met; and how to improve compliance with them.

The author would like to record that this policy brief draws on a report prepared for the Centre for Liberal Strategies in Sofia, Bulgaria as part of a study of the administrative court system in Bulgaria. That study was funded by the British Embassy in Bulgaria.

The Foundation

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In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far reaching consequences in terms of the distribution of benefits and burdens within society. The 'Courts and the Making of Public Policy' programme seeks to provide a critical assessment of the role of courts in policymaking from both empirical and theoretical perspectives, assessing their level of influence and scrutinising the efficacy and the legitimacy of their involvement. The programme considers a range of issues within this context: including the relationship between courts, legislatures and executives; how judicial policymaking fits within a democratic society; what training and qualifications judges have for policy decisions; and how suitable the judicial forum is for handling the information that is needed for informed policy choices.

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