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Chapter 16. The Obsession over Efficiency of Justice Systems: On Realities, Perceptions, Deterrence and the Bliss of Ignorance[1]

16.1. Introduction

The paper at hand analyses the causes and consequences of our growing obsession over (measuring and upgrading) the efficiency of justice systems, with a special focus on criminal justice. In order to achieve this, the phenomenon of the efficiency-obsession, as detected in the domain of the 'justice business', needs to be traced back to its actual disciplinary origins that have little (if anything) to do with legal sciences and its daily practice. Thus, at the very onset of the discourse it is justified, probably even far overdue, to deal with fundamental questions on the matter: why do we even care about whether and how efficient our justice systems are? Moreover, what exactly do we expect to gain in terms of knowledge, insight and understanding of justice systems by measuring their (presumable or perceivable) efficiency? To what extent is it even possible to measure any given justice system's efficiency? How should we

[1] The research for this paper has been funded by the Institute of Justice in Warszawa (*Instytut Wymiaru Sprawiedliwości*) within the framework of the scientific and research project Comparative Research Platform 2023 and its Efficiency of the Justice System research team. The author expresses her gratitude to the Institute and in particular its Director Dr. hab. Marcin Wielec for enabling and supporting the research at hand, while acknowledging the indispensable value of the research team's fruitful discussions throughout the six scientific seminars successfully coordinated monthly by Dr. hab. Jarosław Szymanek, under the excellent overall project coordination of Dr. Zbigniew Więckowski.

deal with the elements of space, time and culture when it comes to the (comparative) interpretation of such efficiency measurements? Finally, are there perhaps more meaningful solutions to upgrading our justice systems than trying to increase Clearance Rates and/or decrease Disposition Times, the two most prominent indicators currently used to assess the efficiency of the judiciary?

In order to meaningfully tackle these and many alike research questions, in a first step throughout the second heading of this paper we shall define the key terms 'efficiency' and 'justice' in relation to the phrase 'efficiency of justice'. This will be done against the backdrop of the efficiency-concept's disciplinary economic origins and by approaching the judiciary as a type of market-driven organisation which is in the business of the administration of law – a justice business. Here we focus on the 'managerialisation' of the 'justice business', understood as a:

> *process that changed the organisational practices of justice towards the quest for higher efficiency, to be obtained through the optimisation of human and material means and the use of private-sector management tools and practices, such as the user/client approach to service processes, a market-driven control of costs and the measurement of performance to assess actions by result.*[2]

This booming 'managerialisation' of the 'justice business', which is clearly not a kind of market-driven private enterprise, but evidently a fully monopolised state power, has led to a growing influx in more or less meaningful attempts to measure and index the

[2] Cit. B. Cappellina, *Legitimising EU Governance through Performance Assessment Instruments – European Indicators for a Judicial Administration Policy*, "International Review of Public Policy" 2020, Vol. 2, No. 2, p. 145, with reference to: C. Hood, *A public management for all seasons?*, "Public Administration" 1991, Vol. 69, Issue 1, pp. 3–19, DOI: 10.1111/j.1467-9299.1991.tb00779.x; C. Vigour, *Professions in Policy and Knowledge Transfer: Adaptations of Lean Management, and Jurisdictional Conflict in a Reform of the French Public Service*, "International Journal of Sociology" 2015, Vol. 45, pp. 112–132, DOI: 10.1080/00207659.2015.1061855.

judiciary's performance in order to evaluate and upgrade its efficiency. The ultimate justification for this efficiency-obsession is to produce the 'justice-product' with little or no waste of resources, based on the firm belief that 'court and public prosecution services efficiency remain one of the key pillars for upholding the rule of law and a determining factor of a fair trial as defined by Article 6 of the European Convention on Human Rights.'[3] The question however arises whether we are indeed merely decreasing the per-unit costs of justice, or in fact committing consumer fraud by simply continuing to label the product as justice, while actually selling a different product that in terms of its quality may no longer be considered justice?

Throughout the third heading of the paper at hand we will discuss the current state of art in measuring performance and assessing efficiency of the judiciary. There is a generally accepted notion of the countries of our region having a less efficient justice system than most other (esp. western) European countries. Now, this assumption might be investigated by determining the level of efficiency of the justice systems in each of the project team countries, as well as in relation to other European countries. However, on a conceptual level, this issue must as a starting point clearly determine what level of efficiency should be assessed as efficient (baseline), as compared to non- or less efficient and whether levels of efficiency are a category outside of any social (and therefore cultural, normative, historical, economic, etc.) context, or an inevitable part of it. Depending on this conceptual perspective the matter in question may be approached as either an abstract and mathematical measure of certain indicators (e.g., justice system budget per capita, number of judges or prosecutors *per capita*, Case Clearance Rates), or rather as a probable reflection of the broader social context, taking into account government efficiency in general, as well as cultural particularities that relate to work efficiency in more general terms (e.g., extremely long summer breaks including July and August during which not

[3] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 125, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access: 22.05.2023].

only the Croatian justice system, but work efficiency in general becomes extremely low in all areas except for tourism). As we shall see, none of these issues have been settled in a meaningful conceptual nor a methodologically sound manner throughout the current state of art in measuring performance and assessing efficiency of the judiciary. Therefore another, yet closely related and utmost important question arises here: what could be plausible alternative (less obvious) goals of the booming efficiency-obsession and diverse measurement initiatives such as, for example, the infamous global *Rule of Law Index*, or the *EU Justice Scoreboard* and the *European Commission for the Efficiency of Justice*[4] *Evaluations*? The proclaimed purpose of such measurement initiatives is to provide objective and empirical data for an evidence-based policy aimed at improving judiciaries' performances. Yet, at the very least as an unintended side-effect, we see that 'the "quiet power of indicators" operates to drive change in public policy'.[5] In a sense, such indicators are being used as instruments of soft law that nevertheless still produce hard and durable effects very much alike those typically enforced through hard law instruments,[6] thereby efficiently bypassing the division of powers and legitimate national authorities' competences in the realm of the judiciary.

Based on the foregoing critical investigation into the state of art in the judiciary's performance and efficiency measurement and in view of its less obvious purposes and effects, in the paper's forth heading we investigate a set of arguments that should help pave the way towards developing more meaningful and thus fully legitimate alternatives to the current efficiency-dogma imposed on judicial systems by way of performance indicators. Here we look at the negative consequences of increased judicial efficiency, especially at how a decreased per-unit cost of criminal adjudication in times of rising penal populism acts as an accelerator for criminalisation, in turn

[4] Hereinafter: CEPEJ.

[5] Cit. B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 142, with reference to: S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators*, Cambridge 2015, on the term 'quiet power of indicators.'

[6] B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 142.

generating more crime, thus putting even more efficiency-pressure on the judiciary. Now, in view of Popitz's thesis about the 'preventative effect of ignorance' acting as a norm-stabiliser, so to say the 'bright side' of the dark figure of crime, there is indeed good reason to question whether we should indeed pursue the goal of a fully efficient justice system? In this regard it is of utmost importance to look at empirical findings that strongly indicate that the deterrent effects of criminal law are extremely limited, and are (if at all) to be found in the realm of perceptions, rather than realities. Therefore, it will be argued that an efficient criminal justice system, when it comes to fulfilling its deterrent function, needs to be as concerned with its public perception, as it should be with its actual performance. Because at the end of the day the addressees of the norms are most likely to be deterred by their perception of the criminal justice system's efficiency, rather than by actual performance indicators and measurements of reality.

With the paper's fifth and final heading a first attempt is made to sketch new ideas and a set of exemplary practical solutions as an alternative to the efficiency-obsession and booming 'managerialisation' of the 'justice business.' These are both future-oriented proposals for the Polish legislator, as they are suggestions for using the presented findings in legal theory and practice. Clearly, none of the ideas and proposals will solve any of the grand mysteries of legal sciences or its daily practice, nor provide full-fledged answers to any of the posed questions about the efficiency of justice systems. However, if they manage to raise at least some good new questions, while providing food for thought on innovative ideas about potential solutions, then the goal of the research and the paper at hand will have been reached.

16.2. Key Terms Explained in View of the Efficiency--Obsession in the 'Justice Business'

Throughout this introductory section, first the key terms shall be defined and put in context. This will be done against the backdrop of a briefly sketched reference to efficiency as a management concept,

in order to pave the way for a much-needed discussion about the concept's highly questionable transposition into the domain of legal sciences and its daily practice, in particular its dubious application within the 'justice business'. Second, we look at some key trends in measuring efficiency of justice systems in order to detect both purpose and consequences of this growing obsession. Already at this point it must be stressed that the said measurement obsession in the judiciary needs to be understood within the context of a much broader global measurement-frenzy which has meanwhile infected most (if not all) domains of modern society. The two main questions that arise here are on the one hand the measurability of abstract social constructs (such as justice) and on the other hand the expected benefits such measurements might provide us with (such as measures to produce justice more efficiently). This now brings us back to the introduction's first task – defining the key terms of the following discussions: efficiency and justice.

The word 'efficiency' captures the quality or degree of being efficient, whereby 'efficient' means to be 'productive of desired effects', 'especially capable of producing desired results with little or no waste'.[7] Now, when applying the term 'efficiency' with direct reference to 'justice systems', then obviously there is some kind of underlying economic tone to it. A tone that clearly signals an approach towards justice systems or the judiciary as a type of business – the 'justice business.' At the core of the 'justice business' (or system) lies the production of justice, whereby 'justice' is understood as 'the administration of law', or as 'the maintenance or administration of what is just especially by the impartial adjustment of conflicting claims or the assignment of merited rewards or punishments'.[8] Essentially this means that a 'justice business' would qualify as efficient if it were capable of producing the administration of law with little or no waste of resources. Clearly, although well defined, we still have no clue what exactly this means, nor how to make an objective and methodologically sound measure of said efficiency.

[7] Cit. *Merriam-Webster Dictionary*, 'Efficient', https://www.merriam-webster.com/dictionary/efficient [access: 11.06.2023].

[8] Cit. *Merriam-Webster Dictionary*, 'Justice', https://www.merriam-webster.com/dictionary/justice [access: 11.06.2023].

Most of all because the product itself (justice) is an abstract social construct which puts it at the very centre of social sciences, where of all the disciplines, economics has probably 'had the most success in adopting measurement theories, primarily because many economic variables (like price and quantity) can be measured easily and objectively'.[9] This well explains the strong overarching economic sound to the phrase 'efficiency of justice systems', making a brief reference to efficiency as a management concept, a mandatory next step in any critical analysis aimed at rethinking why and how we measure justice (systems), in an attempt to come up with new ideas and impulses for legal sciences and its daily practice.

The idea that making each individual process (more) efficient will result in an (more) efficient organisation overall still lies at the very core of most our ideas about efficiency ('process efficiency').[10] In the context of justice systems this might play out as, for example, reducing time and resources needed for criminal adjudication which, as a rule, should be the end result of a lengthy and costly trial process, by simply introducing 'plea bargaining'. Now, if the measures applied for assessing the degree of a (justice) organisation's efficiency are 'Clearance Rates' and/or 'Disposition Times', there is no doubt that such kind of efficiency-measure (like plea bargaining) will add up and eventually result in a more efficient (justice) organisation overall. Similarly, increasing for example the number of cases resolved by 'friendly settlements' before the European Court of Human Rights,[11] by introducing a compulsory 12-week non-contentious phase to its procedure, will undoubtedly make it more efficient in terms of reducing its workload by striking out such cases of its list, provided that one measures its efficiency as a decrease in backlog of cases.[12] Both examples, plea bargaining and friendly

[9] Cit. *Encyclopedia Britannica*, 'Measurement', 2023, https://www.britannica.com/technology/measurement [access: 11.06.2023].

[10] M. Witzel, *A Short History of Efficiency*, "Business Strategy Review" 2002, Vol. 13, No. 4, p. 38, https://doi.org/10.1111/1467-8616.00232 [access: 10.06.2023].

[11] Hereinafter: ECtHR.

[12] See in more detail about human rights concerns regarding settlements before the ECtHR in: V. Fikfak, *Against settlement before the European Court of Human Rights*, "International Journal of Constitutional Law" 2022, Vol. 20, Issue 3, pp. 942–975, https://doi.org/10.1093/icon/moac087 [access: 10.06.2023].

settlement, as efficiency-increasing procedures, perfectly fit into the concept of 'process efficiency' as a management concept that has been transposed from economics to the legal sciences and its daily practice. There are countless further examples clearly demonstrating how said management concept is being applied in the 'justice business', with a clear tendency of even further expansion. Nevertheless, little do we know about the quality of justice such efficiency-enhancing procedures produce, let alone if the product of such 'justice businesses' in fact is still the same?[13] One would assume that the burden of proof falls on those proposing and introducing such efficiency-enhancing procedures to show that the quality of justice will remain the same. However, empirical research documents that this is not the case, and even in the aftermath of already having introduced these efficiency-enhancing procedures, we have no evidence that the increase in efficiency does not come at the cost of the quality of the product, which at the end of the day might perhaps not even be the same product at all? With this notion we have already moved away from the causes of our obsession with efficiency in the judiciary and entered the analysis of its consequences, a topic that will be discussed in much more detail further down the road in the paper's forth heading.

At this point it suffices to conclude that (process) efficiency is essentially an economic management concept that works well in the setting of business organisations, while the measurement of efficiency works well for many economic variables (such as price and quantity), as these can be measured easily and objectively. In the next, second heading of this paper, we shall explore whether and how efficiency and performance can be measured in the judiciary and what the current state of art looks like. Before we do so, we

[13] See, for example, a recent review of the research on plea bargaining that shows (among many other important findings) that to date there is still a huge lack regarding the practice and impacts of plea bargaining, despite plea bargaining meanwhile having become the rule, whereas criminal trials are the exception in the United States of America: R. Subramanian, L. Digard, M. Washington II, S. Sorage, *In the Shadows: A Review of the Research on Plea Bargaining*, New York 2020, https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf [access: 10.06.2023].

take a quick look at some key trends in measuring (efficiency of) justice systems in order to demonstrate the scope of this growing obsession. Besides the infamous *Rule of Law Index*,[14] or the *Fragile State Index* (formerly known as the *Failed State Index*)[15] and many more alike,[16] well-fitting within the ongoing much broader 'global indexing and ranking frenzy' across vast areas of modern society,[17] there are methodologically much more sound attempts to measure the efficiency and quality of European justice systems, such as for example the *EU Justice Scoreboard* or the *CEPEJ Evaluations*. Both will be discussed in more detail in the next heading, but for the time being it is to be pointed out that there is a steadily growing volume in diverse indexing, indicatoring and measuring initiatives targeting abstract normative constructs,[18] whereby it remains largely unclear

[14] See the webpage of the World Justice Project's Rule of Law Index: https://worldjusticeproject.org/rule-of-law-index/ [access: 03.06.2023].

[15] See the webpage of the Fund for Peace's Fragile States Index: https://fragilestatesindex.org/ [access: 03.06.2023].

[16] See, for example: *Global Slavery Index*, https://www.walkfree.org/global-slavery-index/ [access 03.06.2023]; *Global Organized Crime Index*, https://ocindex.net/ [access: 03.06.2023]; *Global Terrorism Index*, https://www.visionofhumanity.org/maps/global-terrorism-index/#/ [access 03.06.2023]; *Corruption Perception Index*, https://www.transparency.org/en/cpi/2022 [access 03.06.2023]. Initiatives to create a: *Global Femicide Index* (S. Walklate, K. Fitz-Gibbon, J. McCulloch, J.M. Maher, *Towards a Global Femicide Index: Counting the Costs*, Abingdon, New York 2020), or the *World Press Freedom Index* (https://rsf.org/en/index [access: 03.06.2023]), to name but a few.

[17] In more detail on our meanwhile "hyper-numeric world preoccupied with quantification", see: P. Andreas, K.M. Greenhill (eds.), *Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, Ithaca, New York 2010.

[18] Davis, Kingsbury and Merry point out that: "With the turn to evidence-based governance, reliance on statistical data along with its synthesis into the kinds of scales, ranks, and composite indexes we refer to as indicators has become essential for policy formation and political decision making. The use of indicators in governance has expanded from economic and sector-specific quantitative data to measurement of almost every phenomenon. […] Indicators are both a form of knowledge and a technology for governance. Like other forms of knowledge, indicators influence governance when they form the basis for political decision making, public awareness, and the terms in which problems are conceptualized and solutions imagined. Conversely, the kinds of information embodied in indicators, the forms in which they are produced and disseminated, and how they function as knowledge are all influenced by governance practices. The

to what extent this is meaningful or even possible. Why then such obsession with indexing and indicators?

Well, the appeal of indicators and indexes as well as measurements is their ability to boil down complex social phenomena and normative constructs to easily comprehendible numerical values which lend themselves to powerful visualisations and comparisons across space and time through rankings, thus they appear to be objective, scientific, transparent and reflecting accountability.[19] Nevertheless, the expected benefits such measurement-obsessions might provide us with are essentially nonprovable, making the whole endeavour rather obscure. There is steadily growing:

> *concern about the way indicators present themselves as more effective and reliable and valid than is truly warranted.* […] *indicators strive to appear objective and neutral and they need to maintain that appearance to be credible. But they are in essence political creatures. Social and political processes determine their creation, use, and effects on policies and publics.*[20]

Finally, there is also a large grey area in which the measurement of justice systems' performance and efficiency is conflated with the measurements of laypersons', professionals' and experts' perceptions about justice systems' performance and efficiency. This becomes most obvious when taking, for example, a look at the *Rule of Law*

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production of indicators is itself a political process, shaped by the power to categorize, count, analyze, and promote a system of knowledge that has effects beyond the producers. In these respect indicators are comparable to law." Cit. K.E. Davis, B. Kingsbury, S.E. Merry, *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, pp. 1–2, https://doi.org/10.1017/CBO9781139871532.001 [access: 03.06.2023].

[19] See: D. Nelken, *Conclusion: Contesting Global Indicators*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, p. 321, https://doi.org/10.1017/CBO9781139871532.011 [access: 03.06.2023].

[20] Cit. D. Nelken, *Conclusion…*, *op. cit.*, p. 318.

Index's methodology or at certain indicators of the *EU Justice Scoreboard* such as the perceived judicial independence and effectiveness of investment protection. With such conflation of realities and perceptions, the challenge of accurately measuring performance and assessing efficiency in the judiciary becomes even more complex and less sound, as we shall discuss in the following heading.

16.3. State of the Art in Measuring Performance and Assessing Efficiency in the Judiciary

Continuing with the just-described challenge of conflating measurements of justice systems' performance and efficiency with the measurements of laypersons', professionals' and experts' perceptions about justice systems' performance and efficiency, we shall have a look at 2 examples. The first one is from the *Rule of Law Index* that essentially is a perception/opinion survey, comparable to the *Eurobarometer Rule of Law Survey*,[21] and not at all a measurement that targets actual indicators of any given judiciary's performance or efficiency in reality. The second example is sourced from the *EU Justice Scoreboard* and it shall demonstrate not only the conflation of measuring realities and perceptions within the same initiative, but also show that the two – reality and perception – (more often than not) are two rather distant types of assessment.

[21] See in full detail: https://europa.eu/eurobarometer/surveys/detail/2235 [access: 05.06.2023].

Table 1. *Examples of variables used to construct the WJP Rule of Law Index 2023**

GPP3	In your opinion, most judges decide cases according to: (a) What the government tells them to do; (b) What powerful private interests tell them to do; (c) What the law says. [Single answer]
GPP 4	Assume that a government officer makes a decision that is clearly illegal and unfair, and people complain against this decision before the judges. In practice, how likely is that the judges are able to stop the illegal decision? [Very Likely (1), Likely (.667), Unlikely (.333), Very Unlikely (0)]
GPP7	If a police chief is found taking money from a criminal organisation, such as a drug cartel or an arms smuggler, how likely is this officer to be sent to jail? [Very Likely (1), Likely (.667), Unlikely (.333), Very Unlikely (0)]
GPP55	Imagine that the local police detain two persons equally suspected of committing a crime. In your opinion, which of the following characteristics would place one of them at a disadvantage? The suspect is: A homosexual. [Yes (0), No (1)]
QRQ178	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: Were in fact presumed innocent by the judge during trial until all evidence has been presented? [100% (1), 75% (0.8), 50% (0.6), 25% (0.4), 5% (0.2), 0% (0)]
QRQ179	Based on your experience with common criminal cases (such as armed robbery) during the last year, approximately what percentage (%) of the suspects: Were in fact presumed innocent during the criminal investigation? [100% (1), 75% (0.8), 50% (0.6), 25% (0.4), 5% (0.2), 0% (0)]
QRQ202	On a scale of 1 to 10 (with 10 being a very serious problem, and 1 being not a serious problem), please tell us how significant are the following problems faced by the criminal defense system in the city where you live: Lack of adequate training/education of state-provided or pro-bono defense attorneys. [10 Point Scale: Serious Problem (0) – Not a Serious Problem (1)]
QRQ204	Please assume that someone in this neighborhood has a dispute with another resident over an unpaid debt. How likely is it that one or both parties resort to violence in the process of settling the dispute (for example, to intimidate one of the parties, or to ask for a payment of the unpaid debt)? [Very Likely (0), Likely (.333), Unlikely (.667), Very Unlikely (1)]

* GPP – General Population Poll; QRQ – Qualified Respondents' Questionnaire, only Criminal Law.

Source: *World Justice Project Rule of Law Index 2023, Variable Map*, https://worldjusticeproject.org/rule-of-law-index/downloads/ROLIndex2023_Table_of_Variables.pdf [access: 05.06.2023].

Table 1 provides us with exemplary 8 variables (out of a total of more than 500 variables) used to construct the *Rule of Law Index*.[22] The first 4 variables are part of the General Population Poll (GPP) and, as the name already suggests, are questions asked to laypersons, whereas the next 4 variables are part of the Qualified Respondents' Questionnaire (QRQ) to be completed by legal practitioners and experts, in the example here, relating only to criminal law. Now, the interested legal scholar, when reading through both sets of variables, the one addressing laypersons (GPP) as well as the one addressing legal practitioners and experts (QRQ), might quickly realise that in all likelihood neither of the two groups of survey participants in fact can essentially answer any of the posed questions. In a nutshell, the laypersons will have to rely on the accuracy and validity of the sources of the information based on which they build their opinion on. This will most likely be (social) media and the press, which most certainly do not representatively report about criminal justice practices, but commonly focus on negative and newsworthy incidents. In this sense one can expect that respondents' opinions are merely a reflection of the public discourse about (more or less closely) related topics to those covered with the variables. Now, the legal practitioners and experts in criminal law, expected to provide their assessments to the second set of the presented 4 variables, and to which the author of this paper presumes to belong to, will most definitely be in no position to accurately answer any of the posed questions, at least not without some sort of prior analysis and thorough investigation into the matter at stake.

Considering that the *Rule of Law Index* is very broadly used not only throughout media and public policy, but also in social sciences (particularly legal sciences), it seems justified to use this

[22] In the Rule of Law Index's methodology, it is stated that: "The country scores and rankings presented in this report are built from more than 500 variables drawn from the assessments of over 149,000 households and 3,400 legal practitioners and experts in 142 countries and jurisdictions, making it the most accurate portrayal of the factors that contribute to shaping the rule of law in a country or jurisdiction." Cit. *World Justice Project Rule of Law Index 2023 Methodology*, p. 183, https://worldjusticeproject.org/rule-of-law-index/downloads/Index-Methodology-2023.pdf [access: 05.06.2023].

opportunity to caution the interested reader about what the index is in fact composed of and what degree of accuracy may be reasonably expected from it. Thus, since the *World Justice Project* – a new EU funded project – intends 'to generate and disseminate people-centred indicators to assess justice, governance, and the rule of law in the EU at the subnational level', with these indicators aiming to 'provide an overview of how government institutions perform based on the experiences and perceptions of people living in different regions of the EU when they interact with authorities from different levels',[23] European legal scholars and practitioners might want to take a much closer and more critical look at the *Rule of Law Index*.[24]

Finally, those of us legal scholars involved in empirical data collection and analysis know that there is no such thing as a 'flawless'

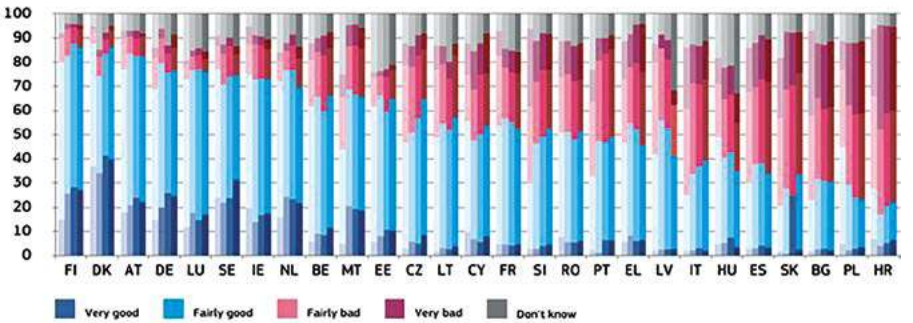
[23] Cit. World Justice Project webpage on "The World Justice Project is starting a new and multi-year project to produce people-centered indicators to assess justice, governance, and the rule of law in the European Union at the subnational level", https://worldjusticeproject.org/our-work/research-and-data/european-union-subnational-justice-governance-and-rule-law-indicators [access: 05.06.2023].

[24] Besides taking a deep dive into the methodology itself, especially by reading through the 500 variables the index is composed of (including as variables several other indexes and surveys, such as the: *Open Data Index*, *Political Terror Scale*, *Gallup World Poll*, *UNODC Homicide Statistics*, *Uppsala Conflict Data Program*, *Center for Systemic Peace*) as well as how exactly this has been done, the interested reader is advised to consult for example: T. Ginsburg, *Pitfalls of Measuring the Rule of Law*, "Hague Journal on the Rule of Law" 2011, Vol. 3, Issue 2, pp. 269–280, https://doi.org/10.1017/S187640451120006X [access: 05.06.2023]; S.E. Skaaning, *Measuring the Rule of Law*, "Political Research Quarterly" 2010, Vol. 63, Issue 2, pp. 449–460, http://www.jstor.org/stable/20721503 [access: 05.06.2023]; A. Jakab, L. Kirchmair, *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*, "German Law Journal" 2021, Vol. 22, Issue 6, https://doi.org/10.1017/glj.2021.46 [access: 05.06.2023]; R. Urueña, *Indicators and the Law: A Case Study of the Rule of Law Index*, [in:] S.E. Merry, K.E. Davis, B. Kingsbury (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law, Cambridge Studies in Law and Society*, Cambridge 2015, https://doi.org/10.1017/CBO9781139871532.003 [access: 05.06.2023]; A. Jakab, V.O. Lorincz, *International Indices as Models for the Rule of Law Scoreboard of the European Union: Methodological Issues*, "Max Planck Institute for Comparative Public Law & International Law Research Paper" 2017, No. 2017-21, http://dx.doi.org/10.2139/ssrn.3032501 [access: 05.06.2023].

empirical research undertaking. This standard accordingly applies to all indexing, ranking and measuring attempts referred to within this paper. Nevertheless, when discussing scientific empirical research, especially the academic publishing of its findings, the scientific community has established strict criteria and (peer) review procedures that ensure critical and objective contesting of any research concept, its methodology, the research instruments, data analysis and findings/conclusions. This is however missing in the case of so called 'grey literature' and 'grey research' stemming from the non-academic/non-scientific sector, or from diverse governmental/public agencies. Within this lack of possibility to contest these actors' research concepts, methodologies, instruments, data (analysis) and findings prior to publication lies the challenge itself, and as a consequence we end up (potentially) relying on 'research findings' and 'research methodologies' or 'research data' which – at least according to the common scientific publishing standards – perhaps might have never seen the light of day. Thus, such critical discussions are not only serving the purpose of gatekeeping, but are essentially intended to increase the quality of the scientific work in question.

Now, on to our next example, illustrated in way of Figures 1 and 2. Both are sourced from the *2023 EU Justice Scoreboard*. Within the discourse at hand, the aim is to show how easily data *on* and *about* judicial performance are conflated with each other, even within the same evaluation effort. The distinction might appear subtle on first thought and come down to distinguishing between the two words 'on' and 'about'. Yet, the factual difference is huge, as in the case of Figure 1 we look at data 'about' the judiciary in terms of its perceived performance (e.g., independence) as assessed by laypersons (comparable to the *Rule of Law Index*'s household survey), whereas in case of Figure 2 we are presented with hard facts 'on' the realities of justice systems across Europe (e.g., number of judges in ratio to population). Regardless of what we intend to do with both data sets and how they might be meaningfully applied in any analysis of judiciaries' performance, it is of utmost importance not to conflate the two with each other and to be aware of their underlying specific (and vastly different) data sources and methodologies.

Figure 1. *2023 EU Justice Scoreboard (%) – How the general public perceives the independence of courts and judges**



* Member States are ordered first by the percentage of respondents who stated that the independence of courts and judges is very good or fairly good (total good); if some Member States have the same percentage of total good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is fairly bad or very bad (total bad); if some Member States have the same percentage of total good and total bad, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very good; if some Member States have the same percentage of total good, total bad and of very good, then they are ordered by the percentage of respondents who stated that the independence of courts and judges is very bad.

Source: Eurobarometer: 2016, 2021 and 2022 (light colours), 2023 (dark colours).[25]

The core challenge with barometers, just as with indexes, assessments and estimates, just as with victimisation surveys or risk calculations in general, is that there is only a limited possibility to evaluate or test their accuracy. This does not imply that the data and findings they produce are incorrect, but merely points out the fact that they too suffer from limitations and shortcomings, which eventually make all assumptions and predictions based on their findings (more or less) speculative. In that sense they ought best to be used as one of many sources of information *about* the rule of law

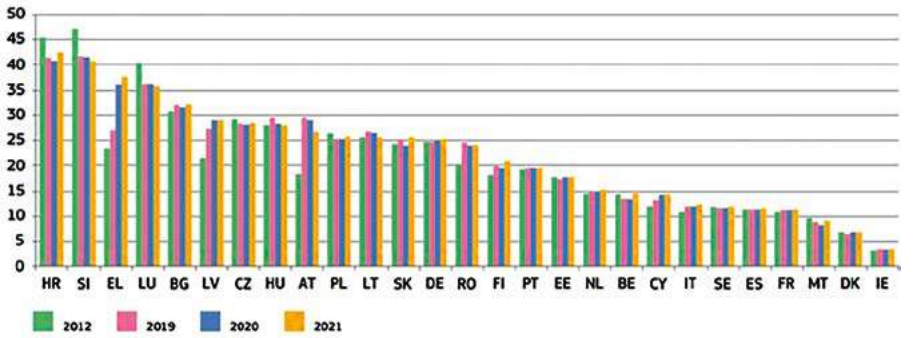
[25] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 41, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

(perception), not as hard facts and figures that accurately capture the real scope of rule of law (reality). Such measurement initiatives' obvious advantage lies in their inherent ability to advocate for social change by addressing and mobilising a much broader audience than traditional scientific and academic research undertakings ever could hope for. Although this does not resolve any of the methodological challenges they face, it marks a territory for prospective collaborations and synergies of efforts among civil society actors, (inter) national organisations and the academic community. A first necessary and far overdue precondition to truly advancing the state of art in empirical performance research on the judiciary would therefore be to start off a broad and frank discussion between actors engaged in collecting facts and data *on* justice systems (realities), and those producing estimates and assessments *about* justice systems (realities). Otherwise, we will all remain in our comfortable own silos, trapped 'in an echo chamber of like-minded and right-thinking souls who provide each other little incentive or encouragement to really interrogate how we are thinking and working'.[26, 27]

[26] Cit. A.T. Gallagher, *What's Wrong with the Global Slavery Index?*, "Anti--Trafficking Review" 2017, Issue 8, https://antitraffickingreview.org/index.php/atrjournal/article/view/228/216 [access: 11.06.2023], s.p.

[27] See in more detail with focus on the *Global Slavery Index*: D. Derenčinović, A. Getoš Kalac, *Trafficking in Human Beings: Focus on European Human Rights Standards and the State of Art in Empirical Research*, [in:] T. Karlović, E. Ivičević Karas (eds.), *Legatum pro Anima – Zbornik radova u* čast *Marku Petraku*, Zagreb 2024, pp. 1043–1068.

Figure 2. *2023 EU Justice Scoreboard – Number of judges, 2012, 2019–2021* (per 100,000 inhabitants)*



* This category consists of judges working full-time, in accordance with the CEPEJ methodology. It does not include the Rechtspfleger/court clerks that exist in some Member States. AT: data on administrative justice have been part of the data since 2016. EL: since 2016, data on the number of professional judges include all the ranks for criminal and civil justice as well as administrative judges. IT: Regional audit commissions, local tax commissions and military courts are not taken into consideration. Administrative justice has been taken into account since 2018.

Source: Council of Europe's European Commission for the Efficiency of Justice (CEPEJ).[28]

Clearly, it would be inappropriate to completely disregard what has been thus far accomplished in the area of measuring the performance and assessing the efficiency of judicial systems. In this regard the two key measures, as quite uniformly applied throughout the field, have been developed and clearly defined: For one, there is the Clearance Rate (CR), which:

> *is the ratio obtained by dividing the number of resolved cases by the number of incoming cases in a given period, expressed as a percentage. It demonstrates how the court*

[28] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 30, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

> *or the judicial system is coping with the in-flow of cases and allows comparison between systems regardless of their differences and individual characteristics.*[29]

Thus, there is the Disposition Time (DT), which:

> *is the calculated time necessary for a pending case to be resolved, considering the current pace of work. It is reached by dividing the number of pending cases at the end of a particular period by the number of resolved cases within that period, multiplied by 365. More pending than resolved cases will lead to a DT higher than 365 days (one year) and vice versa.*[30]

Now, obviously it is possible to come up with a measure of efficiency of the justice system, especially if we approach it as the 'justice business' and focus primarily on 'process efficiency'. Even if we were to subscribe to this, what matters most is the measuring of all those indicators we consider to be accelerators or decelerators of a justice system's performance.

There are clearly multiple and complexly interconnected factors that either accelerate or rather decelerate, sometimes even work both ways, the efficiency of the justice system. Factors on the macro level such as budget, quality of the normative framework, culture of legal settlement of conflicts, overall government efficiency, etc., clearly have a key impact on the justice system in terms of case load and complexity on the one hand and capacity to handle inflow of cases on the other hand. On the mezzo level of different organizational units (courts, prosecutorial offices, ministries, local government, etc.) geography, population density, unequal distribution of budgets, lack of administrative and technical support, etc. play an as much important role as management types and skills of lead actors

[29] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 125, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access 22.05.2023].

[30] Ibidem.

or professional culture and work climate, IT support or even office space and venues in general. Finally, on the micro level factors such as age and gender, quality of education and lifelong learning and training opportunities are equally important as are remuneration, advancement opportunities, motivation and, last but not least, corruptibility and misconducts of all types. Now, all these factors are then embedded into an interwoven net of normative frameworks which to a great extent (but not ultimately) determine the efficiency of the justice system. This also demonstrates that purely normative causation of inefficiency of justice systems is highly unlikely – a sensible normative framework is not the solution to a more efficient justice system, but merely one of its basic preconditions.

Eventually our quest for efficiency within the justice system builds upon the conviction or presumption that, given the right data input and provided with the right mathematical formulas, the 'managerialisation' of the 'justice business,' should on a daily basis look something like this:

> *Sometime in the not too distance future, we envisioned then, court executives and other stakeholders, will get all the critical information about their court's performance on their computers instantly. For court managers, the homepage of their court's website would display a window highlighting performance information summarized by a single number, the CPI [note: Court Performance Index], accompanied by a green or red triangle with another number indicating whether the CPI is up or down from the previous day and by how many points. (Think of the way the Dow Jones Industrial Average is shown on CNBC and CNN.)*
>
> *If a quick morning check of the court's CPI by the court manager or chief judge, for instance, reveals a green, upward pointing triangle and an increase since the previous day, all would be well. The court manager or chief judge could relax and get a cup of coffee. On the other hand, the cup of coffee may need to wait if the morning check discloses a red downward-pointing triangle and a significant downturn in*

the CPI. By drilling down through several screens of progressively more detailed and less aggregated performance data, beginning with a display of four to ten core court performance measures that constitute the components of the CPI (think, again, of the Dow and its component company stock values), court managers and judges would be able to pinpoint the court, division, case type or resources needing attention.

The court manager may click the CPI icon to show a more detailed screen displaying a 'balanced scorecard' of the four to ten performance measures that contribute to the CPI (e.g., adaptations of the National Center for State Courts' CourTools or Appellate CourTools). Each of the performance measures on this screen are displayed in the same simple way as the CPI, i.e., a single score for the measure, a smaller number indicating a change in the measure, if any, and a triangle indicating a downturn or upturn in the measure.

The manager might discover, for example, that the early results of one measure – for example, an online survey of court employee engagement posted the morning of the previous day – is largely responsible for dragging down the court's CPI. From the 'real time' data displayed on the screen the court manager learns that 37 percent of the court employees already had responded to the survey within 24 hours of their posting on the website.

A few more clicks by the court manager produces screens revealing important additional information about this measure including trends over time; the alignment of the measures with the court's management processes such as strategic planning, budgeting, quality improvement, and employee evaluation; related measures; and best practices in the performance area gauged by the measures. Further, a note on the screen showing trends of the measures over time may indicate that the response rate to previous administrations

> *of the surveys was higher than 90 percent of all the court's employees and that, in the past, the early returns tended to be the most negative. The court manager decides not to jump to conclusions but to mobilise the management team in the event that the survey results do not improve as more of the court employees complete the online questionnaires.*
>
> *In a few minutes of the morning, the court manager will have viewed the performance 'dashboard' and determined the days 'score' and what needs to be done. In this example, the court manager decides simply to alert and to mobilise the court's management team in case the measure that caused the CPI downturn does not show improvement in the days ahead.*[31]

The issue at stake here is not whether or not such a scenario appears more or less probable to eventually play out like this in courts. The question rather concerns a very basic yet utmost important insight into assessing performance and increasing efficiency, as the provided example illustrates: the efficiency-obsession and its measurement become a 'beast of its own'. We see that behind the red triangle (the drop of the CPI, seen as an alerting decrease in the court's performance) in fact lies the CPI itself, or to be more exact the *online survey of court employee engagement*, being one of the indicators measured and used to compose the CPI. Perhaps it is only an interesting coincidence that the scenario plays out exactly like this and that the very cause of the alerting decrease in the court's performance turns out to be the CPI itself, nevertheless it clearly illustrates some of the hidden dangers inherent to such approaches, namely that by constructing and obsession over indexing and measurement we might be (artificially and counterproductively) creating additional challenges that eat up resources which might have

[31] Cit. I. Keilitz, *A Justice Index: The Quest for the Holy Grail of Court Performance Measurement*, Made2Measure, 08.09.2010, https://made2measure.blogspot.com/2010/09/justice-index-quest-for-holy-grail-of.html?m=1 [access: 28.07.2023], s.p.

been utilised more efficiently, e.g., by the court manager or chief judge having his/her morning coffee with the heads of sections and discussing detected challenges as well as their solutions.

On a final note, we ought to briefly consider another (less apparent) danger inherent to assessing performance and measuring efficiency. This is the question of the lacking legitimacy and competences of the executive branch (as well as civil society) to factually intervene in the 'justice business' via 'efficiency-increasing' soft law or 'naming and shaming' or 'ranking' or 'best practices', etc., thereby clearly bypassing and surpassing necessary hard law competences (which they do not have). Capellina in this regard conducted a highly informative rather recent analysis about the legitimising of EU governance through performance assessment instruments and provided valuable insights into how the CEPEJ indicators are (being used as) much more than a simple data basis for informed policy creation. She concludes that:

> *the paper proves that the quantification of social reality produced by indicators has effects that go beyond the expectations and the control of the actors that shaped them. The example of the side effects produced by the CEPEJ report, both in national reforms and through the nurturing of a powerful competitor in the field of evaluation and governance of European judicial systems, illustrates these contrasted dynamics. This last example illustrates that the potential of indicators is relevant in three main aspects: providing a sufficiently loose framework to solve vertical and horizontal cooperation problems at the international level; determining policy goals through the selection of areas of measurement and evaluation, and providing proof to influence local and national policy-makers over reforms either through lesson-drawing, persuasion or conditionality.*[32]

Clearly, either explicitly or implicitly, all indexing, measuring, assessing and ranking of judicial performance and efficiency, is

[32] Cit. B. Cappellina, *Legitimising EU Governance…*, *op. cit.*, p. 154.

being conducted and obsessed over with the purpose of inducing change, arguably a positive one. However, what is frequently disregarded is that already the conceptualisation and the disciplinary approach towards the issue at stake, let alone the decision on which indicators and in what way to focus, pretty much predetermine where one looks for solutions. With this we open up the next heading's main topic – case studies demonstrating consequences of the 'managerialisation' of the 'justice business' which might provide us with the argumentative basis for exploring alternative approaches to looking at and understanding efficiency of justice systems.

16.4. Case Studies on Consequences of the 'Managerialisation' of the 'Justice Business'

Alternative dispute resolution[33] methods, in particular 'mediation'[34], is believed to be a meaningful way of settling legal disputes outside the courtroom, or better to say, without the courts and judges having to 'produce justice', but rather relaying on 'alternative production of justice'. In that sense ADR might best be described as a kind of 'generic or hybrid justice' when compared to the 'authorised justice' as traditionally produced by courts and judges in courtrooms. Whether or not such 'generic or hybrid justice' in terms of its essential quality is still the same as 'authorised justice' is not relevant for the discussion at hand, although at least on a conceptual level it needs to be underlined that any 'opt-out mediation model' in its very essence is no longer a proper type of truly 'voluntary' mediation.[35] Thus, on a methodological note it is rather challenging to imagine

[33] Hereinafter: ADR.

[34] See, for example, the outputs of the CEPEJ Working Group on mediation (CEPEJ-GT-MED): https://www.coe.int/en/web/cepej/cepej-work/mediation [access: 28.07.2023], in particular CEPEJ's European Handbook for Mediation Lawmaking (European Handbook for Mediation Lawmaking. As adopted at the 32th plenary meeting of the CEPEJ, Strasbourg, 13–14 June 2019, https://rm.coe.int/cepej-2019-9-en-handbook/1680951928 [access: 28.07.2023]).

[35] See in more detail about the effects of 'opt-in' vs. 'opt-out' mediation models: G. De Palo, *A Ten-Year-Long "EU Mediation Paradox" When an EU Directive Needs to Be More… Directive*, Briefing requested by the JURI committee,

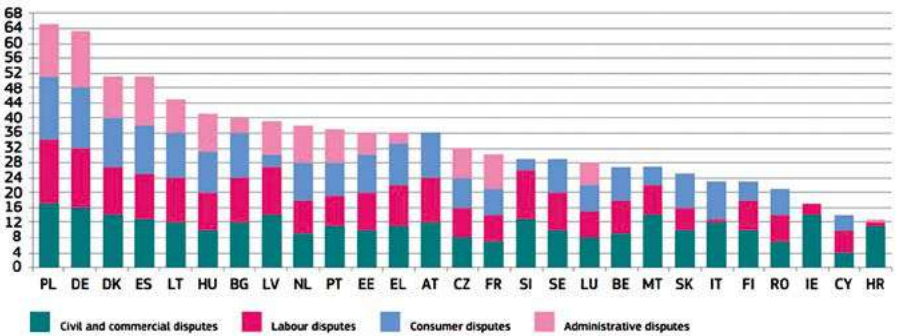
the empirical research design that could provide for a solid proof that ADR produces the same type and quality of justice as the one produced traditionally by courts and judges in courtrooms.[36] What is however relevant for the analysis at hand is the question whether an increase in the application of ADR methods does in fact lead to an increase in justice systems' performance and efficiency. Well, at least from the standpoint of how the *2023 EU Justice Scoreboard* perceives the 'quality of justice' within the framework of assessing judiciaries' performance, there is believed to be a clear link between increased application of ADR, quality of justice and overall effectiveness of national justice systems.[37] Therefore the *2023 EU Justice Scoreboard* monitors and compares states' efforts to promote the voluntary use of alternative dispute resolution (ADR) as an indicator of justice systems' accessibility, as illustrated in Figure 3.

November 2018, https://www.mondoadr.it/wp-content/uploads/Briefing-Note-GDP-EU-Parliament.pdf [access: 24.07.2023].

[36] Such an empirical analysis would in fact need to be either experimental (*in vitro*) or observational (*in vitro*), ideally a combination of both, and based on a randomised assignment of cases to either ADR methods on the one hand and traditional dispute resolution by courts/judges on the other hand. Now, by doing so the question of voluntarity regarding ADR methods would automatically arise, whereas without prior randomisation any empirical study struggles with the impact of 'opt-in' and 'opt-out' effects of ADR methods as compared to traditional dispute resolution methods where such impacts are irrelevant.

[37] The *2023 EU Justice Scoreboard* claims to provide: "data on the established three key elements of effective national justice systems: efficiency, quality, and independence" (cit. *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access 02.08.2023], Foreword), thereby evidently building upon the conceptual belief that ADR, as a quality indicator, feeds into the key elements of effective national justice systems in a positive manner.

Figure 3. *2023 EU Justice Scoreboard – Promotion of and incentives for using ADR methods, 2022**



* Maximum possible: 68 points. Aggregated indicators based on the following indicators: 1) website providing information on ADR; 2) media publicity campaigns; 3) brochures for the general public; 4) provision by the court of specific information sessions on ADR upon request; 5) court ADR/mediation coordinator; 6) publication of evaluations on the use of ADR; 7) publication of statistics on the use of ADR; 8) partial or full coverage by legal aid of costs ADR incurred; 9) full or partial refund of court fees, including stamp duties, if ADR is successful; 10) no requirement for a lawyer for ADR procedures; 11) judge can act as a mediator; 12) agreement reached by the parties becomes enforceable by the court; 13) possibility to initiate proceedings/file a claim and submit documentary evidence online; 14) parties can be informed of the initiation and different steps of procedures electronically; 15) possibility of online payment of applicable fees; 16) use of technology (artificial intelligence applications, chat bots) to facilitate the submission and resolution of disputes; and 17) other means. For each of these 17 indicators, one point was awarded for each area of law. IE: administrative cases fall into the category of civil and commercial cases. EL: ADR exists in public procurement procedures before administrative courts of appeal. ES: ADR is mandatory in labour law cases. PT: for civil/commercial disputes, court fees are refunded only in the case of justices for peace. SK: the Slovak legal order does not support the use of ADR for administrative purposes. FI: consumer and labour disputes are also considered to be civil cases. SE: judges have procedural discretion on ADR. Seeking an amicable dispute settlement is a mandatory task for the judge unless it is inappropriate due to the nature of the case.

Source: European Commission.[38]

[38] Source of figure and text: *The 2023 EU Justice Scoreboard*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2023) 309 final, Publications Office of the European Union, Luxembourg 2023, p. 24, https://commission.europa.eu/system/files/2023-06/Justice%20Scoreboard%202023_0.pdf [access: 02.08.2023].

Clearly, there is a kind of basic logic in assuming that broad availability of ADR methods might make justice systems more accessible to its users/consumers, but is there any sound empirical proof for this assumption? Furthermore, even if there were such proof, can such accessibility be actually measured indirectly, by collecting data about justice systems' promoting and incentivising the use of ADR methods? Now, obviously this can be done, but it remains doubtful (at best) whether this is in fact altogether meaningful, or rather in itself serves the purpose of promoting and incentivising the use of ADR methods across EU member states' justice systems.

Throughout the past few decades, most democratic societies have witnessed an increasing mismatch between cases and adjudication resources, since our modern way of life has 'generated more crime, more civil injuries, and more contract disputes; trial processes grew more professionalized, formal, and elaborate as contemporary notions of fairness and due process evolved'.[39] This leads to an ever-growing trend in fast-tracked, out-of-court or alternative dispute resolution mechanisms, tackling the delays and backlogs of cases created by the said mismatch of cases and adjudication resources. In this regard Brown notes:

> *The reasons that judges, policymakers, scholars, and others experience pressure for greater adjudicative efficiency is not the focus here. The starting point is that the perceived need for greater efficiency is widespread and longstanding; as the primary diagnosis of adjudication's modern predicament, it has driven the relentless trend to resolve each case more quickly and cheaply. The pressure for efficiency has deeply reshaped adjudication practice, driving innovation of non-trial practices in order to match caseloads to court capacity.*[40]

[39] Cit. D.K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, "Virginia Law Review" 2014, Vol. 100, No. 1, p. 184, http://www.jstor.org/stable/24362653 [access: 02.08.2023].

[40] D.K. Brown, *The Perverse Effects…*, *op. cit.*, p. 185.

Brown points out that in criminal adjudication the state 'can switch from a costlier process for reaching judgments, such as trials, to a cheaper one, such as settlement' and that this 'kind of substitution is commonly described in criminal adjudication as improved efficiency. In blunt terms, it describes the production of more criminal court judgments at a lower per-unit cost, and therein lies the complication.'[41] Brown continues by arguing that:

> *[t]his sort of efficiency gain – a decrease in the cost of the service – can be expected, on the premise of an ordinary demand function, to trigger more demand. Cheaper adjudication can lead to even more cases entering the criminal court system. That response is a widely recognized and routine effect of efficiency improvements in all sorts of contexts, but it is little discussed in criminal adjudication. In many settings this effect is not only unproblematic but welcome; it may be the goal of improving efficiency. In other contexts, however, increased demand as a result of increased efficiency is undesirable, even yielding perverse results.*[42]

Essentially, what Brown shows very skilfully is that the parameters dictating the perceived need for increased efficiency of the criminal justice system are far from naturally given circumstances, but rather discretionary decisions by legislatures, police, prosecutors, and ultimately, to some degree, public opinion, which are all impacted by the increase of adjudicative efficiency that acts as an incentive for (even further) criminalisation and increase in caseload.[43] According to Brown:

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[41] Ibidem, p. 186.

[42] Ibidem.

[43] "Once one recognizes this flexibility in criminalization and enforcement policy, it is easy to see that the connection between criminal offending and caseloads is far from straightforward. That recognition makes the link between caseloads and adjudicative efficiency more problematic as well. Legislatures, police, and prosecutors (and ultimately, to some degree, public opinion) exercise a lot of discretion in determining caseloads; the number of prosecutions is not simply a direct function of the rates of criminal offending in the world outside

Broadly speaking, as greater efficiency reduces the overall cost of criminal law enforcement, it makes it less costly for legislatures to create new offenses, and more tempting to choose criminal enforcement over other public policy strategies to address social problems or regulatory agendas. Adding new offenses to criminal codes is cheap, but funding their enforcement is not. Yet more efficient adjudication reduces the effective level of 'per unit', or per-offense, spending on prosecutors, courts, and defenders. That amounts to an incentive for legislatures to expand the types of conduct or social harms that they criminalize; it incrementally makes criminal law enforcement more appealing as a policy response to social problems.[44]

Adjudication's efficiency contributes to excessive enforcement and punishment policies. This sounds heretical in an age that valorizes efficiency and is skeptical of both public expenditure and public sector inefficiency. Yet high costs – or, the same thing, resource limits – are uncontroversial means to force better spending choices in many contexts […].[45]

Recognizing that an efficiency improvement is distinct from efficiency's effects reminds us that there is no ex-ante reason to assume that lower adjudication costs necessarily lead to better criminal justice policy outcomes, or that higher costs are inevitably linked to worse ones. Those judgments are difficult, and they are at bottom political. But it can improve

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the court room. The discretion to change the number of crimes by legislating crime definitions, uncovering more with greater policing investments, or addressing some violations with policies other than criminal prosecution – all of this opens the possibility for policymakers to make these decisions in response to changes in the *price of adjudication*, which changes with gains in efficiency." Cit. D.K. Brown, *The Perverse Effects…*, *op. cit.*, p. 199.

[44] Ibidem, pp. 200–201.

[45] Ibidem, p. 222.

> *political decision-making* […] *to acknowledge that the price of goods with negative externalities can be too low.*[46]

Therefore, a state's increase in criminalisation – both in terms of broadened scope of criminal behaviours as well as increased sentencing ranges – must be adequately reflected in the state's proportional increase in resources allocated to the adjudication of the increased caseload. Put differently, a sensible alternative approach to increasing efficiency of justice systems would be decriminalisation in the realm of criminal adjudication and deregulation when looking at the broad area of all judicial dealings. Otherwise, the 'holy grail' of maximal adjudication efficiency might eventually turn out to be a curse rather than a blessing (case in point: the mass-incarcerations in the US), whereby the obsession over judicial performance assessment and justice systems' efficiency measuring could easily prove to be its tool, rather than merely an objective or scientific attempt to provide a basis for evidence-based (criminal) policy creation.

Although the presented case study and its conclusions relate to the realm of criminal justice, there are obvious parallels to most other areas of judicial adjudication. Here, as well, the ambivalent relationship between the judiciary and the judicial administration in light of efficiency pressures and how these pressures impact judicial independence, has been the subject of critical scholarly attention.[47] Even the CEPEJ itself, for example, concludes that '[i]n the majority of the states and entities, prosecutors improved the share of resolved cases over received ones. Presumably, the decreasing influx of cases, explained mainly by the COVID-19 pandemic measures, facilitated these results',[48] thereby clearly indicating that 'efficiency' of the judiciary might in fact come down to the simple (unintended) result of a global health pandemics, due to which we witnessed a decrease

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[46] Ibidem, p. 223.

[47] H. Schulze-Fielitz, C. Schütz (eds.), *Justiz und Justizverwaltung zwischen Ökonomisierungsdruck und Unabhängigkeit*, Berlin 2002.

[48] Cit. European judicial systems – CEPEJ Evaluation Report – 2022 Evaluation cycle (2020 data), Part 1. Tables, graphs and analyses, Council of Europe, Strasbourg 2022, p. 161, https://rm.coe.int/cepej-report-2020-22-e-web/1680a86279 [access: 22.05.2023].

in crime worldwide.[49] If such coincidental (and tragic) events are 'measured into judicial efficiency', then indeed on the one hand the question arises as to what we are actually measuring, whereas on the other hand it seems legit to propose decriminalisation and deregulation as a means to decrease case-income while increasing adjudication outcome and therefore improving efficiency without engaging in a 'price dumping' of the 'justice-product' itself.

The last part of the present analysis investigates two important aspects of the 'judicial efficiency' debate which have been largely neglected thus far. One aspect relates to what Popitz has coined as the 'Preventative Effect of Ignorance' (German: "*Präventivwirkung des Nichtwissens*"),[50] whereas the other aspect deals with the *prominence of impressions and perceptions over facts and realities*, considering how this mismatch between appearances and realities might be explored more vigorously in creating a positive and efficient image of judiciaries, thereby boosting the deterrent effect of adjudication and law in more general terms.

Popitz's thesis about the 'Preventative Effect of Ignorance' dating back to 1968 is broadly known throughout the German-speaking legal scholarship, but has largely remained unnoticed elsewhere. Essentially, his thesis demonstrates that there is an utmost bright side to the dark figure (of crime or norm-transgression). He argues that the 'bliss of ignorance', the circumstance that we do not know about all the actual transgressions of norms, but only the small fraction that gets detected, processed and adjudicated, has a norm-stabilising effect in the sense that it upholds our (faulty) belief in the norm, which otherwise would not be the norm anymore.[51] Thus,

[49] See, for example: A.E. Nivette, R. Zahnow, R. Aguilar *et al.*, *A global analysis of the impact of COVID-19 stay-at-home restrictions on crime*, "Nature Human Behaviour" 2021, Vol. 5, https://doi.org/10.1038/s41562-021-01139-z [access: 22.05.2023].

[50] H. Popitz, *Über die Präventivwirkung des Nichtwissens (1968), Mit einer Einführung von Fritz Sack und Hubert Treiber*, Berlin 2002.

[51] "If the norm is no longer or too rarely sanctioned, it loses its teeth – if it has to bite constantly, its teeth become dull. […] But it is not only the sanction that loses its weight when the neighbor to the right and left is punished. It thus also becomes obvious – and indeed in a conceivably unambiguous way – that the neighbour also does not comply with the standard. However, this demonstration

not only the norm would no longer be the norm if we were to know the actual incidence of its transgression, but also the punishment for norm-transgressions would no longer have the deterrent effect of punishment, if all norm-transgressions were to be punished.[52] Popitz's thesis has meanwhile been put to experimental testing, and the first empirical findings indicate that there is good reason to belief that full transparency of norm-transgressions is highly likely to cause norm-transgression in itself.[53] Put differently, if we know (or assume to know) that most people transgress a certain norm, then we are much more inclined to behave in such a norm-transgressing way ourselves. This now clearly is not intended to provide for a monocausal explanation of the cause of all norm-transgression. It rather highlights in the context of the analysis at hand and related to the judicial-efficiency-obsession, that there might very well be far-reaching negative side-effects of fully efficient justice systems, that are not being accounted for. In that sense one would be wise to consider which degree of judicial efficiency might still be in line with providing for a certain amount of 'blissful ignorance' that is needed to uphold the (perception of the) norm as the norm, and thereby society as such.

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of the extent of the non-applicability of the provision will have an impact on the willingness to conform, as will the weight loss of the sanction. If too many are pilloried, not only does the pillory lose its horror, but also the violation of norms loses its exceptional character and thus the character of an act in which something is 'broken' and broken." Cit. H. Popitz, *Über die Präventivwirkung…*, *op. cit.*, pp. 19–20.

[52] "Punishment can only maintain its social effectiveness as long as the majority does not 'get what it deserves'. The preventive effect of the penalty also only remains in place as long as the general prevention of the number of unreported cases is maintained. The splendor and misery of punishment are based on 'the wonderful, beautiful care of nature,' to which we owe the fact that 'they do not know' – or at least very little." Cit. H. Popitz, *Über die Präventivwirkung…*, *op. cit.*, p. 23.

[53] Besides the well-known series of sociological and criminological experiments conducted by Solomon Asch, Stanley Milgram and Philip Zimbardo, the interested reader is advised to consult: A. Diekmann, W. Przepiorka, H. Rauhut, *Die Präventivwirkung des Nichtwissens im Experiment*, "Zeitschrift für Soziologie" 2011, Vol. 40, No. 1, https://doi.org/10.5167/uzh-95632 [access: 22.05.2023], who specifically tested for Popitz's thesis.

We see that appearance matters, rather frequently even over substance. This is true for many aspects of daily life, but obviously even more when it comes to the efficiency assessment of judicial systems. Otherwise, neither the *Rule of Law Index*, nor numerous 'perception-indicators' applied throughout the *EU Justice Scoreboard* or the *CEPEJ evaluations*, would be of any relevance whatsoever for the assessment of judicial efficiency. Now, in view of this, it appears more than just legitimate to focus our attention on empirical findings about the deterrent effect of law and its adjudication, which indicate that appearance indeed might matter much more than substance. Research suggests that there is a rather limited deterrent effect of (criminal) law and punishment (at best), which essentially comes down to prospective lawbreakers conducting a cost-benefit assessment, whereby they do not factor-in the actually proscribed sentences, even less the actual sentencing practices, but rather relay on the *perceived* probability of their detection, prosecution and punishment.[54] In other words, a deterrent effect of the judiciary may most likely be expected with regards to *how efficient the judiciary is being perceived by potential lawbreakers*, not with regards to how efficient the judiciary in fact really is. So, the goal should be to investigate more vividly (e.g., through the *Rule of Law Index* or the *Justice Scoreboard* or the *Eurobarometer*) what creates and impacts citizens' perceptions about the efficiency of justice systems.

Where do citizens mainly source the information about the judiciary from? What type of information are they most likely to pick up and which one to disregard? How firm are such perceptions and impressions about the judiciary, and which would be promising avenues to change them? These are just as important questions for the usage of perception-indicators for the measurement of actual efficiency, as they are important for facilitating a more efficient appearance of the judiciary. Presumably most (if not all) information on which citizens base their perceptions of the justice

[54] See in particular: H. Hirtenlehner, *Die unklare Beziehung von Normakzeptanz und Sanktionsrisikobeurteilung. Gerechtigkeitsglaube oder moralfestigende Normverdeutlichung?*, "Zeitschrift für Rechtssoziologie" 2022, Vol. 42, Issue 2, https://doi.org/10.1515/zfrs-2022-0206 [access: 22.05.2023].

systems are sourced from the press and (social) media. Now, these are well-known for reporting extremely selectively about the judiciary with a clear focus on 'newsworthiness'. This mainly coincides with scandals and negatively framed news about the performance of the judiciary – it is difficult to imagine a news piece about a swift and efficient prosecution leading up to a conviction imposing an adequate punishment (in the assessment of the author). What on earth would be 'newsworthy' about this? Undoubtably there are countless cases of police, prosecutors, and judges working efficiently and in high quality, but who has ever read about such cases in the press or the (social) media? Here there is a window of opportunity where the judiciary has been far too inactive and out of touch with contemporary realities. It is no longer enough for the 'justice business,' to produce its 'justice-product' and do so efficiently – it has to engage in marketing and PR and image-boosting.

Clearly, it is not being suggested that judiciaries ought to start off an untruthful propaganda campaign, aimed at mass deception and disinformation of its citizens. Rather, we ought to consider more accurately and much more attractively informing citizens about the actual efficiency of judicial systems. That might range from active communication strategies, professional public relations staff, open and proactive engagement or even dialogue with the press and media, and go all the way to visually appealing interactive court websites with cool dashboards (like the ones so successfully utilized by the *Rule of Law Index* and many indexes alike) and social media outreach. Such actively improved perception of the judiciary's efficiency might be a valuable goal in itself, as it serves both transparency as well as open data principles, while it would quite likely (as an intended side-effect) boost the deterrent effects of perceived detection, prosecution and adjudication, potentially decreasing norm transgressions and thus lowering the incoming caseload.

To sum up, the presented case studies, although mainly referring to the realm of criminal justice, provide us with valuable insights and fresh ideas about more meaningful approaches towards justice systems and the assessment or improvement of their performance. We see that in many ways the challenges justice systems are being faced with nowadays, in particular the growing mismatch between

incoming caseload and outgoing adjudication, are generated by discretionary decisions of legislatures, police, prosecutors, and ultimately the public themselves, rather than they are some naturally given circumstances outside the reach of our influence. We also have established that ultimately it might very likely be a rather bad idea to aim for a 100% efficient justice system that would detect, process and adjudicate each and every transgression of the law. Clearly, that is (for now) a utopian goal anyway, but even if it were to be achievable, there are good reasons not to work efficiently towards that goal, as this would likely undermine the very stability of norms within societies, by vividly displaying that the norms are in fact not norms of behaviour (anymore), but rather exceptions to the actual norms of human behaviour. In that sense absolute transparency of norm transgressing behaviour and its fully efficient adjudication should not and cannot be the goal, not only because of its likely dangerous side-effects destabilising the very norms themselves, but also due to the necessity of safeguarding a minimum of freedom, even if this implies a certain degree of (freedom for) norm-transgression and (freedom from) transgression-adjudication. Rather we should aim for drastically changing and updating the manner in which citizens are being informed by justice systems about their performance and efficiency. This would not only serve the principles of transparency and open data, but (as an intended side-effect) also boost the judiciary's appearance and its increased perception as efficient amongst its citizens, thereby quite likely increasing the expected deterrent effects of judicial adjudication. With this we already enter the realm of the fifth and final heading recommending actionable proposals and providing new impulses for legal sciences.

16.5. Conclusions

Prior research indicates that the efficiency of justice systems can be significantly improved by shortening the length of proceedings, proper enforcement of court decisions, strengthening transparency, improving the quality of training of judges, improving gender balance in the senior judiciary, introducing digitalisation, to name but

a few. Empirical research from cognitive sciences (e.g., the field of the psychology of human decision-making) thus demonstrates that not only the effectiveness, but also the quality and thus fairness of decision-making throughout the whole justice system might very well be under a much-underestimated influence of very simple and inherently human needs, such as more frequent breaks or levels of blood sugar.[55] Contemplating about the research that has been conducted previously and published in 2023 within the framework of the Polish-Hungarian Research Platform project organised by the Institute of Justice in Warszawa,[56] the aim of this analysis has been to make a valuable contribution to the ongoing discourse about justice systems' efficiency, while clearly opening up the very concept of the 'justice business' and its stampeding 'managerialisation' to critical reflections with the ultimate goal of initiating new ideas and

[55] See in more detail: S. Danziger, J. Levav, L. Avnaim-Pesso, *Extraneous factors in judicial decisions*, "Proceedings of the National Academy of Sciences of the United States of America" 2011, Vol. 108, No. 17, https://doi.org/10.1073/pnas.1018033108 [access: 22.05.2023]; J.C. Bublitz, *What Is Wrong with Hungry Judges? A Case Study of Legal Implications of Cognitive Science*, [in:] A. Waltermann, D. Roef, J. Hage, M. Jelicic (eds.), *Law, Science, Rationality*, "Maastricht Law Series" 2019, Vol. 14; C.M. Barnes, J. Schaubroeck, M. Huth, S. Ghumman, *Lack of sleep and unethical conduct*, "Organizational Behavior and Human Decision Processes" 2011, Vol. 115, Issue 2, https://doi.org/10.1016/j.obhdp.2011.01.009 [access: 22.05.2023].

[56] For more details and the valuable findings from the previous studies conducted through the Research Platform project about the efficiency of justice systems, including the efficiency, duration and complexity of cases dealt with in courts, as well as the human factor, see: E. Veress, *Effectiveness of (Civil) Justice, the Human Factor and Supreme Courts: Debates and Implications*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; A. Mezglewski, *Effectiveness of the human factor in justice in the light of research on the application of law*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; E. Varadi-Csema, *Efficiency of Criminal Justice – a Prevention-focused Approach*, [in:] *Efficiency of the Judiciary*, A. Mezglewski (ed.), Warszawa 2023; M. Rau, *The impact of the human factor on the effectiveness of criminal proceedings. A socio-psychological perspective*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; A. Tunia, *Effectiveness of the human factor in justice in the light of dogmatic studies*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023; K. Zombory, *The right to an effective remedy: a key element for ensuring the effectiveness of the ECHR human rights system – the example of Poland and Hungary*, [in:] A. Mezglewski (ed.), *Efficiency of the Judiciary*, Warszawa 2023.

solutions as well as question, thereby also boosting constructive further discussions. Due to the complex nature of the research questions at hands, its likewise theoretical as well as practical perspective, a transdisciplinary research approach is imperative, and as such the potential answers and solutions need to be framed. Obviously, it is not a question of 'whether', but a question of 'how' the efficiency of justice systems can best be improved, whereby actionable measures have to be designed in such a manner that they realistically fit into the Polish social, cultural and normative context, without causing an imbalance between efficiency and quality or causing dangerous and unintended side-effects. Thus, when considering and finetuning any of the following proposals, it will be of particular importance to simultaneously design a set of truly measurable indicators for each proposed action that should at a later point be used for sound evaluations and policy-recalibrations, in line with the leitmotiv of an evidence-based policy.

On a conceptual level there needs to be a well-informed and clear decision about the willingness and legitimacy of implementing hidden hard-law effects through the application of seemingly only soft-law tools, such as promoted by the *EU Justice Scoreboard*. On a broader level it should be transparently and critically discussed how much power diverse performance-assessing and efficiency--measuring indexes, indicators and other measuring initiatives targeting our national justice systems should be granted, especially without an existing legal framework or practical setup that would foresee internal and external scientific quality assurance of such measuring initiatives. Within the aforementioned deliberations it should not be taken for granted that the judiciary is a 'justice business,' nor that justice is a 'product/service' that can be provided more efficiently by simply 'outsourcing' some of it to ADR methods, thereby generically decreasing the case volume, while still 'selling' all of it as justice (of the same quality).

On a methodological and very practical level, attention must be paid to the details of diverse measuring initiatives in order to ensure that one distinguishes between measuring hard facts as compared to presumed perceptions about judicial efficiency. Otherwise, the two get conflated with far-reaching consequences stemming from the

mismatch between appearance and substance of justice systems' performance. Further research is clearly needed to determine the source of information citizens utilise in creating their perceptions and assessments of the judiciary. This would not only inform us about the (lack of) soundness of using perception-indicators as measures of efficiency or quality of justice, but likewise enable the creating of professional communication strategies towards the public and the press and (social) media, aimed at transparently providing for hard facts on which perceptions of the judiciary should be built on.

On the policy level that determines the need for criminalisation and regulation, it needs to be recognised that 100% efficiency of the judiciary is neither achievable nor even desirable, as this would undermine the very stability of norms in any given society. The 'bliss of ignorance' in terms of not truly knowing how often the norms in our society are transgressed has an utmost stabilising effect on our system of norms and the very values they protect. Thus, by boosting efficiency of the judiciary, we engage in a sort of 'price dumping' that makes it attractive to consider criminalisation and regulation over other (potentially much more meaningful) ways to define and settle conflicting interests within society. There are solid grounds for recommending decriminalisation and deregulation as a much more meaningful approach to increasing judicial efficiency. At the very least the legislator should be obliged to secure additional resources to the judiciary that are proportionate to any increase in criminalisation and regulation and the consequentially increasing caseload – anything else would in itself aid to the judiciary's decease in efficiency – by fault and discretionary decision of the legislature, not the judiciary.

To conclude with – adjudication is not, and it should not be, cheap! Perhaps one of the most impactful ways of maintaining and upgrading judicial systems' high quality is to ensure that it never gets cheap, while considering that we will produce justice most efficiently by decriminalisation and deregulation, essentially by (re) focusing on those core values and fundamental interests that truly need judicial adjudication.

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