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Measuring the judicial performance of the European Court of Human Rights

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Measuring The Judicial Performance Of The European Court Of Human Rights

By Elizabeth Lambert Abdelgawad¹

Abstract:

Faced with a sharp rise in the number of individual applications, the European Court of Human Rights has been forced to provide greater accountability to governments eager to downsize its budget and staff. This has resulted in the introduction of quantitative criteria, to the detriment of quality and of the service rendered to individual victims. These new management policies have admittedly reduced the number of pending cases, but they have also considerably eroded the right of individual application. The new managerial policy has definitely shaped a new Court.

Keywords: Results-Based Management; quality of justice; European Court of Human Rights; productivity; audits.

1. Introduction

The evaluation of judicial performance has become a matter of concern for economists, sociologists, political scientists and more rarely jurists. It is the consequence of the extension of the market model² to the justice system in the form of New Public Management. The latter has been abundantly documented, and while the justice system does have its specificities, it has not been immune from this policy trend.³ The obligation for European states to comply with the requirements of Article 6 of the European Convention on Human Rights (whose procedural guarantees include the notion of 'reasonable time') has been alternatively analyzed as 'the best remaining safeguard against the disciplinary instrumentalization of ethics and the excesses of managerial rationality'⁴ and as a typical illustration of the prevailing new management doctrine.⁵

What limited amount of research has been done on the measurement of the performance of supranational justice has mainly focused on international criminal justice.⁶ Yet, the new management trend has also resulted in sweeping changes in other courts, such as the European Court of Human Rights (hereafter ECtHR), which experienced both new management reforms and a 'modernization' effort in the early 2000s and after 2010, under the impetus of a few highly influential actors.

The ECtHR was set up by the European Convention on Human Rights in order to sanction the most serious violations (the ones politicians had in mind just after WW2) and has progressively become victim of its own success, being overwhelmed by an increasing number of individual applications (brought by individuals or groups of individuals against State Parties). Yet there was a common belief at the time of enacting the convention that the Court would receive very few applications, and nearly only interstate applications (brought by States to denounce the non-respect of the convention by another Member State). The original purpose has evolved in the seventies with the enlargement of the Council of Europe and the

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² L. Cadet, « Ordre concurrentiel et justice », in Mélanges Antoine Pirovano, Paris, éd. Frison-Roche, 2003, pp.109-143, n°25-30.

³ Jean-Marc Sauvé, « Organisation et rendement de la Cour de Justice de l'Union européenne. Comment faire face à la croissance du contentieux en temps de crise ? Introduction », online <http://www.conseil-etat.fr/Actualites/Discours-Interventions/Organisation-et-rendement-de-la-Cour-de-justice-de-l-Union-europeenne>, p.3. Also : La prise en compte de la notion de qualité dans la mesure de la performance judiciaire (QUALIJUS) – justice administrative, Rapport final QUALIJUS, 19.6.2015, p.7. C. Vigour, "Justice: l'introduction d'une rationalité managériale comme euphémisation des enjeux politiques", *Droit et société*, 2006, n°63-64, p.23.

⁴ Eric Alt et Marie-Astrid Le Theule, « La justice aux prises avec l'éthique et la performance », *Pyramides* [En ligne], 22 | 2011, URL: <http://pyramides.revues.org/908>.

⁵ Guy CANIVET, « Comment concilier le respect des principes de qualité du procès équitable avec les flux d'affaires dont sont saisies les juridictions? », in Marie-Luce CAVROIS, Hubert DALLE et Jean-Paul JEAN, *La qualité de la justice*, op. cit., p. 213-240 (p. 236).

⁶ David Wippman, 'The costs of international justice', *AJIL*(2006)100(4)861-881. The author faults these courts for their cost-benefit approach (p.863).

increasing number of individual applications. Yet the new spirit, emanating from Protocols 9 and 11, inspired by a desire to facilitate the access to justice by citizens in Europe, has been subverted by budget pressures as the most powerful governments have refused to increase resources necessary to fulfil this ambitious challenge since the mid-nineties. While in the terms of the Brighton declaration adopted in 2012, 'The States Parties also reaffirm their attachment to the right of individual application to the European Court of Human Rights ("the Court") as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention,⁷ this masks an entirely different reality. The numbers – ironically – speak for themselves. What other Court has such a high rate of inadmissibility (95%)?⁸ And what other Court declares 90% of the above 95% of cases inadmissible through a non-contradictory, non-public and non-reasoned single-judge process?⁹ Thus there exists an attempt to come back to the initial purpose (only address the most serious violations) in name of austerity. The report enacted in December 2015 by the CDDH on the long-term reform of the system often refers to the budgetary constraints, and while it 'recalls that the Committee of Ministers needs to examine the possibility of allocating a temporary extraordinary budget of a total of 30 million euros to be used over a period of eight years', it notes once more that it 'is nevertheless aware of the continuing financial difficulties and budgetary constraints faced by many member States¹⁰'.

While this author clearly supports the view that measuring court performance is a necessary element of transparency and accountability and that some elements of judicial innovation are required, the aims of this paper are to point out that the focus of the current debate is too much on the Court's efficiency, in its disposal of cases, and so to argue that the parameters used to assess the Court's performance should be enlarged to cover qualitative and not only quantitative factors. The scope of this paper is thus limited to a critical analysis of the criteria used to assess whether the ECtHR is performant or not (where do they come from, which actors have impacted them?), and not so much to address the impacts of such a shift (notably the Court's distancing itself from certain categories of applications and the increasing role of the Registrar), as this has been covered by previous publications¹¹.

A voluminous academic literature has analyzed the many reforms of the Court and their impact: some academics have notably already shown how admissibility requirements have been used by the ECtHR for strategic and substantive reasons¹²; yet the issue of the measurement of its judicial performance has not been covered. Thus this paper studies the evaluation of judicial performance at the ECtHR in two successive stages. First, it looks into the sources and origins of the application of the 'performance' concept to the ECtHR. Second, it focuses on the measurement of performance, especially when it comes to the quality of justice. For the purposes of this paper, I adopt the definitions used in the Qualijus study conducted by a French academic team. The more comprehensive term is 'performance',¹³ which comprises effectiveness, efficiency and quality. Effectiveness is understood as 'the ratio between the goals set and the results expected'; efficiency is 'the ratio between the resources allocated and the results obtained' and quality is defined as the 'ability of an entity to meet the needs it is designed to fulfil'. The latter includes the quality expected by recipients, the quality experienced by users and the quality intended by the institution and effectively delivered. According to the same study, quality 'ultimately depends on the recipient's present or future assessment of the services provided'.¹⁴

⁷ Brighton Declaration, 19 and 20 April 2012: http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.

⁸ According to President Costa in a speech given on 25 January 2008 (p. 4), the proportion of 94% of inadmissible cases 'reveals an anomaly'.

⁹ According to an interviewee's confidential statements, the Brussels Conference adopted in 2015 has introduced a minimal degree of reasoning, deviating very little from previous practice. The source explained that reasoning for single-judge decisions would fall under two groups: A-list (most reasoned decisions) and B-list (comprising non-compliance with the six-month time limit and with the exhaustion of domestic remedies). (http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf).

¹⁰ CDDH(2015)R84 Addendum I, CDDH report on the longer-term future of the system of the European Convention on Human Rights, 11.12.2015, 77, [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH\(2015\)R84_Addendum%20I_EN-Final.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH(2015)R84_Addendum%20I_EN-Final.pdf).

¹¹ E. Lambert Abdelgawad, « La mesure de la performance judiciaire de la Cour Européenne des droits de l'homme : une politique managériale à tout prix », *Revue Française d'Administration Publique* (Special issue, Feb. 2017). See also Lize R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be drawn', *Human Rights Law Review* (2014)14, 671-669.

¹² Tickell, 'Dismantling the Iron cage: the Discursive persistence and legal failure of a 'Bureaucratic rational' construction of the admissibility decision-making of the European Court of Human Rights' (2011)12, *German Law Journal* 1786. F. de Londras & K. Dzehtsiarou, 'Managing judicial innovation in the European Court of Human Rights', *Human Rights Law Review* (2015) 523-547.

¹³ This concept is sometimes more broadly defined: for Stefan Voigt and Nora El-Bialy (Stefan Voigt & Nora El-Bialy, 'Identifying the determinants of aggregate judicial performance: taxpayers' money well spent?', *Eur. J. Law Econ*, 11.12.2014, Springer, online), performance includes the dimensions of 'judicial independence', 'judicial accountability', 'judicial effectiveness' and 'judicial output'. The latter criterion is the only one mentioned in their 2014 paper.

¹⁴ Final Report, QUALIJUS, La prise en compte de la notion de qualité dans la mesure de la performance judiciaire (QUALIJUS) - Justice administrative-, June 2015, 8-10 (<http://www.gip-recherche-justice.fr/wp-content/uploads/2016/01/Rapport-final-QUALIJUS-Justice-administrative.pdf>).

This research is based on rigorous analysis of the Council of Europe's program and budget documents, the ECtHR's internal and external audits, and the many studies produced ahead of ECtHR reforms. About ten interviews were also conducted.¹⁵ In conclusion we will briefly consider the impact of the introduction of these managerial policies to suggest adding new indicators.

2. The Origins of the Concept of Performance Applied to the European Court of Human Rights

The first landmark in the history of the Council of Europe and of the Convention system was in 1994, when under the impetus of the main contributing states and with the aid of successive secretaries-general, a zero-growth policy was established for the budget of the Council – at the very time when the successive integration of the Central and Eastern European countries was going to turn it into a large pan-European institution¹⁶. The second landmark was in 1999-2000, with the decision to change the organization's budgetary management by implementing the Results-Based-Budgeting (RBB) strategy, as the increasing number of Member States put a strong strain on the budget, with pressure from the German, Italian and British governments to cut down on costs. The new policy was clearly results-based, with no concern for the processes leading to the results.¹⁷ These two landmarks were followed by numerous concrete reforms notably the introduction of IT tools to speed up the management of certain cases (notably repetitive cases under the Well-Established Case-Law mechanism)¹⁸, of a priority policy to give priority to the most serious cases¹⁹, of Rule 47 with stricter requirements for an application to be considered as valid²⁰ and the set-up of specialized hubs at the Registry 'aiming for more standardized and consistent drafting' on thematic issues such as asylum and migration^{21,22}.

In the ECtHR, the managerial revolution took place in several steps, with an internal audit in 2001²³, another internal audit in 2004 in response to requests for additional resources,²⁴ Lord Woolf's 2005 report on the ECtHR's working methods, the 2006 Report of the Group of Wise Persons in 2006 and an external audit in 2012.²⁵ The same protagonist was involved in the 2005 and 2006 reports (he presided and drafted the former in the first person): Lord Woolf. Lord Woolf was the former head of the British judiciary, the president of the Bank of England's Financial Markets Law Committee and a steadfast advocate of alternative dispute resolution methods – having also chaired the network of the Presidents of the Supreme Judicial Courts of the European Union's Working Group on mediation. His considerable legacy includes the expansion of friendly settlements and the introduction of unilateral declarations in Strasbourg in 2001.²⁶ The reform process was steered by Erik Fribergh, the Section Registrar (2002-2005) and then Registrar of the Court (November 2005- November 2015). A judge in his native country, Sweden, he began working in 1978 for his government as deputy secretary of the Governmental Commission on Unnecessary Bureaucracy and for the Ministry of Justice (1979-1983).²⁷ The Court's Presidents also played an important role in implementing the managerial reforms; particularly the Swiss ex-President Luzius Wildhaber, who claimed that 'the effectiveness of the system is the goal of any change'²⁸. In his 2000 speech,

¹⁵ Most of the interviewees wished to remain fully anonymous. We interviewed the previous Chief Registrar, the Chief of the case-management and working methods Department, a Chief Division, the Director and the assistant Director of the Filtering section, lawyers at the CEPEJ as well as several judges at the European Court of Human Rights.

¹⁶ E. Lambert Abdelgawad, 'The economic crisis and the evolution of the System based on the ECHR: is there any Correlation?', *European Law Journal* (Special Issue), 2016 (vol.22, issue 1), 74-91.

¹⁷ In the words of the former Registrar Erik Fribergh, RBB(2012)8, Seminar on Results Based Budgeting : objectives, expected results and performance indicators, 26.09.2012, p.1 : 'We must go much more for the results and not the processes which lead us there'.

¹⁸ ECtHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 4, para.8.

¹⁹ ECtHR, The Court's priority policy : http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf.

²⁰ ECtHR, Report on the implementation of the revised rules on the lodging of new applications, 02.2015, 1, 'so that resources could be switched to tasks with higher priorities'. During 2014, 23% of the applications failed to comply with this revised rule (http://www.echr.coe.int/Documents/Report_Rule_47_ENG.pdf).

²¹ ECtHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 4, para.12.

²² See also our article E. Lambert Abdelgawad, 'La mesure de la performance judiciaire de la Cour européenne des droits de l'homme: une logique manageriale a tout prix?', RFAP (2016)159, 819-834.

²³ Report n°02/2001, Report of the audit of the European Court of Human Rights, Report n°02/2001 of 3 August 2001, Internal Audit Department, Human Rights Law Journal (2001) vol.22, n°5-8, 335-337, 336. This audit notably recommended pursuing efforts to expand the use of information technologies.

²⁴ The objective of the 2004 audit was to evaluate the ECtHR's productivity level according to the criterion of the number of cases per judge in order to assess the need for additional staff. The audit reported that average productivity had the potential to be increased by 20%.

²⁵ CM(2012)100, para.284.

²⁶ Unilateral declarations were approved by the Court for the first time in the case of Akman v. Turkey, 26 June 2001, no. 37453/97, see P. Dourneau-Josette, « Les modes de règlement alternatifs des requêtes devant la Cour européenne des droits de l'homme : les règlements amiables et les déclarations unilatérales », in *Revue des affaires européennes* 2014/3, 565, 576.

²⁷ <http://www.internationalcriminaljustice.net/presenters.php> (10 March 2016). <https://wcd.coe.int/ViewDoc.jsp?id=928023&Site=COE> (10 March 2016).

²⁸ Speech given on 23 January 2003, 2.

Wildhaber already spoke of 'productivity'; since then, his opening speeches have been peppered with words such as 'production', 'effectiveness' and 'productivity'.²⁹ The reforms were also inspired by other models of internal justice (the German and Spanish constitutional courts and the US Supreme Court)³⁰. Curiously, and perhaps crucially, the work done by the CEPEJ (*European Commission for the Efficiency of Justice*) established by Resolution (2002)12³¹ in the Council of Europe to 'promote the efficiency and quality of judicial systems at the service of European citizens'³² have been all but ignored in the ECtHR's output. Explanation given by interviewees on this point were obscure and unconvincing: they claimed to be unaware of the CEPEJ,³³ made sure to respect the Court's independence or said the ECtHR is an atypical tribunal.

Meanwhile the number of individual applications had grown exponentially, with roughly 151,000 pending cases as of 1 June 2011, while States have been increasingly reluctant to increase the Court's budget and expand its staff. Regarding human resources at the Registrar, after two reinforcement program in the early and mid-2000s, the number of available positions was capped in 2009, 2010 and 2011 and began decreasing in 2012, even as the number of pending cases reached a peak in 2011.³⁴ At the same time, the Court's budget, which has been increasing slightly for many years, will begin decreasing in 2017.³⁵ The Court is evidently under-funded; this was acknowledged even by the first internal audit³⁶ and by the external auditor in 2012.³⁷ Most importantly, the latter report concluded that despite the Court's increase in 'productivity', 'efforts in this area alone cannot suffice and the reform process should be pursued so as to guarantee the sustainability of the Court's work and the quality of the Convention system in the longer term'.³⁸ Even President Wildhaber claimed in January 2005 that the productivity of the ECtHR was not at fault, calling the Court, 'without a shadow of a doubt, the most productive of all international tribunals'.³⁹ The same speech marked the first time that a President publicly expressed concern about the impact of the obsession for productivity.⁴⁰

Clearly, the rhetoric promoting efficiency and the better use of resources prevailed not only to boost productivity as resources increased very marginally; it was also used to provide the Committee of Ministers and the Secretariat General of the Council of Europe with the means and legitimacy to better control the Strasbourg Court, whose role has grown over the years. Actually these audits and the internal reports have paved the way for the intergovernmental Conferences and Declarations (from Interlaken in 2010 to Brussels in 2015) which have clearly indicated to the Court the ways this latter should manage its case-law. By setting the criteria for the measurement of performance, the executives have built a new ECtHR.

3. Measuring the Court's Performance: Why and How?

Measuring the performance of any Court requires first examining its original purpose and the analysis on this aspect is quite instructive. In budgetary documents, the ECtHR's mission is invariably phrased as 'ensuring the observance undertaken by the Parties to the Convention', following the wording used in Article 19 of the ECHR. Yet the remainder of these descriptions has changed considerably: while it was commonly agreed that applications from individuals and/or states served as triggers allowing the Court to perform its function, in the early 2000s, emphasis was laid on victims and their compensation via 'just satisfaction'.⁴¹ The Court is said to perform a "public service" whose "clients" are both the

²⁹ Speech given on 19 January 2007, 2; Speech given on 29 January 2010, 6 & 7; Speech given on 27 January 2012, 4.

³⁰ Two interviews cited the proceedings before the German constitutional court as a model.

³¹ Resolution of 18.9.2002. A member of the World Bank has observer status in the CEPEJ.

³² P. Boillat, S. Leyenberger, « L'administration et l'évaluation du service public de la justice, vu du Conseil de l'Europe », RFAP, 2008/1, n°125, 55-66, 56.

³³ Yet there is an observer from the Court in the CEPEJ and there are ongoing collaborations between the CEPEJ Secretariat and the Department for the Execution of Judgments regarding lengths of proceedings and national appeals.

³⁴ In 2001: 185 permanent positions (79 A; 86 B; 10 C and 10 L); 2009/2010/2011: 629 positions (175 A, 426 B, 10 C, 18 L); 2012: 626 positions (174 A, 423 B, 11 C, 18 L); 2013: 625 positions (174 A, 422 B, 11 C, 18 L); 2014: 620 positions (174 A, 418 B, 12 C, 12 L); 2015: 619 positions (174 A, 417 B, 16 C, 16 L); 2016: 614 positions (172 A, 414 B, 12 C, 16 L); 2017: 614 positions (172 A, 414 B, 12 C, 16 L).

³⁵ The budget increased from 44,425,411 euros in 2006, to 58,588,600 in 2010, and 71,438,400 in 2016. It will begin decreasing in 2017 (71,405,800 euros).

³⁶ Report n°02/2001). European Law Institute, Statement on case-overload at the European Court of human rights, 6th July 2012, p.18.

³⁷ CM(2012)100, para.297.

³⁸ CM(2012)100, para.350.

³⁹ Speech given on 21 January 2005, 7.

⁴⁰ Speech given on 21 January 2005, p. 7: 'the main aim of the Convention is not to have as many applications as possible declared inadmissible, but rather to secure effective protection of human rights in the member States. Driving up the statistics of terminated cases every year can only be achieved by concentrating on the easier, more numerous inadmissible applications, which will inevitably be at the expense of the more complex, meritorious ones.'

⁴¹ CM(2006)146 vol1, titre IV.

public at large and the governments. The *pro victima* approach of 2004-2007 then gave way to a new approach: in 2010, the Court's purpose was very vaguely defined: 'maintaining and strengthening democracy and the rule of law founded on fundamental rights and freedoms throughout the Council of Europe Member States'.⁴² In 2014, the definition of the Court's mission was buried in a magma of numbers, aimed at driving home the idea that the Court's procedural choices were inevitable, useful and efficient: accelerated filtering with the introduction of a single judge, hierarchization policy, 'deter[ing] manifestly ill-founded applications through an appropriate communication policy'...⁴³ This shift rings out strongly with the idea of default judgments and the already statements of the Court that its 'principal task is to secure the respect for human rights, rather than compensate applicants' losses minutely and exhaustively' and that the emphasis of its activity is 'on passing public judgments that set human-rights standards across Europe'⁴⁴.

Regarding the measurement of performance, examination of the Council of Europe's program and budget documents beginning in 2003⁴⁵ shows that highly detailed log frames were devised, thoroughly describing expected results and performance indicators. Criteria generally fall within two categories: quantitative performance and quality of justice.

3.1 The Quantitative Measurement of the ECtHR's Performance

The vast majority of 'expected results' and 'performance indicators' are quantitative. Yet, they differ significantly from the criteria usually selected to evaluate judicial work. Indicators used to assess the efficiency of justice in the EU comprise three quantitative criteria, namely length of proceedings, clearance rate (the ratio of the number of resolved cases over the number of incoming cases) and number of pending cases.⁴⁶ These are meant to assess the system's ability to handle the backlog and flow of incoming cases. The average length for resolving a case is a common measurement tool, but while there are some statistics on that in Strasbourg, reducing the duration of proceedings has only been very recently included among the expected results. Another similar criterion has been used – *the number of cases a judge has decided*.⁴⁷ It is however considered 'problematic, because it might lead to false incentives';⁴⁸ distinctions would need to be made according to the complexity of the cases. *Clearance rate* has curiously not been among the criteria used by the Court's Registry, even though it is mentioned in the Brighton Declaration⁴⁹ and used extensively by the CEPEJ. On the other hand, the number of pending cases has been largely publicized over the years to call attention to the ECtHR's unmanageable situation.

The successive program and budget documents include changing and varied criteria. Their presentation itself has changed; expected results are now far more detailed than in the early years, which were marked by a tendency towards the overlap of expected results and performance indicators. The latter only reproduced the former with more precise numbers. In 2005,⁵⁰ the three main expected results pertaining to the Court's performance in terms of 'production' were first to decide 20,000 cases (18,000 Committee cases and 2,000 Chamber or Grand Chamber cases), second to reduce the backlog (by 40% for cases pending for over three years after being allocated to a decision-making body), and third to fully comply with the backlog criteria (meaning a maximum one-year duration for each stage in the proceedings). Other results were set in the 'judicial administration' section, including the introduction of a pilot procedure.⁵¹ In 2007,⁵² the document added the rise of 'productivity', measured as 'the average number of finally disposed applications of per case-processing lawyer'. A new approach was adopted in 2011⁵³ as the Court was expected to focus on priority cases⁵⁴ and as the single judge procedure was to be 'optimized'.

⁴² CM(2010)130, 27.8.2010 : Draft Council of Europe Programme and Budget 2011, p.24, online : <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804bf098> (6 April 2016). See also Draft Programme and Budget 2012-2013, p.22.

⁴³ Programme and Budget 2014-2015, p.20.

⁴⁴ Kharuk and others v Ukraine, n703/05 et al., merits and just satisfaction, 26.07.2012, para.23. Lize R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be drawn', Human Rights Law Review (2014)14, 671-669, 680: 'Again, this approach clearly equips the Court to process these applications efficiently, yet the expedited and simplified process also means that individual cases are not addressed on their own merits in each and every case'.

⁴⁵ The Council of Europe's website does not give access to budget documents prior to that date.

⁴⁶ The 2014 EU Justice Scoreboard, COM(2014)155 final, 6.

⁴⁷ According to the available figures, productivity increased on average from 105 to 145 cases per lawyer per year.

⁴⁸ CCJE(2014)2, 24.10.2014, para.34.

⁴⁹ Declaration 19 & 20 April 2012, para.5.

⁵⁰ CM(2004)155 vol.1, vote IV, 51.

⁵¹ Idem, P.53.

⁵² Budget 2007, CM(2006)146vol1, title IV, 58.

⁵³ CM(2010)130, 30. See also CM(2011)130, Draft Council of Europe Programme and Budget 2012-2013, 30-31.

⁵⁴ Since June 2009 the Court has adopted a priority policy : see http://www.echr.coe.int/Documents/Priority_policy_ENG.pdf. Category 1 refers to "urgent applications", category II notably to applications raising an important question of general interest, category III concerns "core rights" (Articles 2, 3, 4 or 5 § 1 of the Convention).

In the above documents the two key criteria are 'production' – i.e., the increase in the number of cases decided according to court formation (with a focus on single-judge and priority cases in recent years) – and the decrease of pending cases⁵⁵. In terms of number of judgments, the ECtHR's productivity has dropped significantly, from 1625 judgments delivered in 2009 (an unequalled peak) to 823 in 2015, i.e., roughly the level of 2002.⁵⁶ The sharpest decrease occurred between 2010 and 2011 (1499 to 1157 judgments). The year 2011 saw the entry into force of Protocol 14, which placed emphasis on eliminating manifestly inadmissible applications through the newly established single-judge system. We share the view that by moving in this direction, the Court increasingly distances itself from certain applications⁵⁷ in order to protect the efficient working of the system. Undoubtedly, focusing on quantitative factors has progressively led to reforms which have reduced the individual right of petition to the Court as already analyzed in our previous analysis⁵⁸. Will the next step consist in replacing judges by electronic predictive models for a certain number of cases (well-established and repetitive cases)?⁵⁹

Thus these quantitative criteria are clearly questionable. Former Registrar Erik Fribergh himself acknowledged that they cannot properly assess the extent to which the Court has fulfilled its mission of ensuring observance with the rights and freedoms set forth in the ECHR (which is its *raison d'être* according to Article 19), which depends on 'the nature of the cases' and the 'quality of the decision'.⁶⁰ He nevertheless argued that the focus on priority applications introduced a qualitative dimension, as the Court concentrates on the cases deemed to be most important.⁶¹ This is why criteria on the quality of justice are particularly important.

3.2 Uncertain Qualitative Criteria

'The rigor of numbers has its limitations: each quantitative data must be interpreted and complemented by qualitative appreciations',⁶² even if such evaluation is more difficult.⁶³ For the ECtHR, quality criteria have taken a back seat to numbers and have changed considerably over the years, giving the impression of fumbling and short-term vision or even lack of vision dependent on the States' desires and diktat.

Yet, numerous studies could have helped in establishing and strengthening a clear approach. Three main forms of quality criteria can be broadly distinguished: those assessing the quality of the functioning of justice as a whole (including the independence and impartiality of the courts, but also the quality of the service provided to users of the justice system, as the ECtHR fulfils a public service), the quality of the judiciary process (compliance with procedural safeguards, etc.) and the quality of the court decisions delivered (whether they are clear, reasoned, etc.).⁶⁴

Benoit Frydman proposed the highly pertinent hypothesis of a 'progressive shift in contemporary theory and practice from a substantial conception to a procedural and now managerial conception of the quality of court decisions. Where control is concerned, this goes hand in hand with the multiplication of criteria and bodies piling up on top of each other'.⁶⁵ The procedural conception, based on Articles 6 and 13 of the ECHR, emphasizes compliance with the right to a fair trial as the condition for producing a quality decision. This criterion, developed by the ECtHR for national courts, does not seem to apply to the Court itself due to the specificities of its procedure (which is for the most part written). However, it has directly inspired a managerial conception, as 'considering that the quality of justice depends on the conduct of proceedings, it is as a rule indispensable to carefully examine the conditions in which justice is administered and delivered'.⁶⁶ Even though

⁵⁵ ECtHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 3: 'In the past few years, roughly three quarters of new cases were allocated to the single-judge formation, and so could be dealt with quickly'.

⁵⁶ ECtHR, Annual Report (2015), 203.

⁵⁷ Lize R. Glas, 'Changes in the Procedural Practice of the European Court of Human Rights: Consequences for the Convention System and Lessons to be Drawn', *Human Rights Law review* (2014)14, 671-699.

⁵⁸ E. Lambert Abdelgawad, « La mesure de la performance judiciaire de la Cour Européenne des droits de l'homme : une politique managériale à tout prix », *Revue Française d'Administration Publique* (2016, 819-834). Also, F. de Londras & K. Dzehtsiarou, 'Managing judicial innovation in the European Court of Human Rights', *Human Rights Law Review* (2015) 546, concluding that '(...) constitutionalist development of the Convention through judicial innovation necessarily creeps only slowly in the ECjHR'.

⁵⁹ N. Aletras, D. Tsarapatsanis, D. Preotiuc-Pietro & V. Lampos, 'Predicting judicial decisions of the European Court of Human Rights: a Natural language Processing perspective', *PeerJ Computer Science* (2016).

⁶⁰ E. Fribergh, *RBB*(2012)8, 26.09.2012, 2. 'In short, the quality of the Court's work is more important than the number of applications dealt with'.

⁶¹ E. Fribergh, *RBB*(2012)8, 26.09.2012, 2.

⁶² D. Migaud, « Les cinq défis de l'évaluation », *RFAP*, 2013/4, n°148, 849-858, 856

⁶³ TEPSA, « The reform of the EU Courts The need of a management approach », F. Dehousse, version 2.0, 9.

⁶⁴ J.-P. Jean, « La qualité des décisions de justice au sens du Conseil de l'Europe », in *La qualité des décisions de justice*, Actes du colloque de Poitiers, CEPEJ, Les études de la CEPEJ n°4, 30.

⁶⁵ B. Frydman, "L'évolution des critères et des modes de contrôle de la qualité des décisions de justice », in *La qualité des décisions de justice*, Actes du colloque de Poitiers, CEPEJ, éd. Du Conseil de l'Europe, 18 et s., 19.

⁶⁶ *Idem*, 25.

the shift from the procedural to the managerial approach is understandable (as the backlog of cases may have a negative impact on the right to a fair trial), as Benoit Frydman writes, the managerial approach requires a 'fundamentally different conception of quality control'. The latter is no longer a judicial control, but 'relies on techniques borrowed from management', including 'the setting up of reference standards and quantitative indicators (...), periodic assessment procedures (...), the definition of performance targets, (...) which can be very strict in terms of regulating behaviors'.⁶⁷

The EU uses a diverse set of criteria, pertaining both to the institution itself and to its relations with the outside world. Indicators include monitoring and evaluation of court activities (which comprises satisfaction surveys, access to justice, availability of electronic submission of claims), the training of judges, the availability of Information and Communication Technology, budget, human resources, and the availability of alternative dispute resolution methods.⁶⁸ Within the Council of Europe, the CEPEJ has adopted a chiefly pragmatic and empirical approach attempting to define the foundations of a quality system. It has been, and still is a user-oriented approach; satisfaction surveys are the heart of the evaluation of the quality of justice, with a focus on the perceptions and expectations of users. In 2010 it adopted a 'Handbook for conducting satisfaction surveys aimed at Court users in Council of Europe's member States',⁶⁹ 'based in particular on the experience of certain member states and relevant best practices to be highlighted'.⁷⁰ This approach 'reflects a concept of justice focused more on the users of a service than on the internal performance of the judicial system'.⁷¹ Classically, even if different questionnaires have been developed for different categories of users (victims, lawyers, etc.), there are shared criteria: general perception of the functioning of justice, access to information, quality of decisions, relations with the court or service, and preparation and conduct of hearings.⁷² These criteria could be very well adapted to the ECtHR, which can receive applications from any individual complaining of a violation of the ECHR who has exhausted available domestic remedies. At least, in scholarly literature, some proposals have been made to translate such standards to the ECtHR.⁷³

In Strasbourg as in many national courts – to varying extents – the challenge of quality has been to do well, if not better, with resources that do not match the increased workload⁷⁴. Yet the ECtHR differs from other national and supranational courts in several respects: it overrides 47 national justice systems; there is no possibility of appealing its decisions; victims see it as their ultimate hope of justice; additionally, as it is a human rights court, it sanctions at the national level violations of procedural safeguards, insufficient substantiations of court decisions, the courts' partiality or lack of independence – precisely criteria for measuring the quality of justice. In light of its role in enforcing these criteria, the ECtHR must be beyond reproach on these questions; failing that it could lose its legitimacy and authority. For the ECtHR, the burden/tension⁷⁵ relating to the balance that needs to be found between the quality of decisions and ever more pressing management incentives is a much more crucial issue than in national courts and other international courts that do not have to assess these aspects themselves. Additionally, without being a fourth level of jurisdiction, the Court acts as an extension of domestic justice in accordance with the subsidiarity principle. Therefore, there is no reason to exempt it from compliance with at least some of the criteria routinely applied to domestic courts⁷⁶.

All the successive presidents have without fail discussed the Court's challenge: increasing productivity without harming the 'quality' of its work. In 2001, President Wildhaber appeared to define quality as the refusal to weaken the standards and to adopt a two-tiered justice system⁷⁷ in the wake of the accession of numerous states from the former Soviet bloc. The dynamic and evolutive interpretation of the Convention is another component of the 'quality' of judicial activities⁷⁸. Two important aspects remain: the reasoning and consistency of the decisions delivered. In 2008, the Consultative

⁶⁷ *Idem*, 27.

⁶⁸ The 2014 EU Justice Scoreboard, COM(2014)155 final, 6.

⁶⁹ CEPEJ(2010), according to a report by Jean-Paul Jean and Hélène Jorry.

⁷⁰ *Idem*, 2.

⁷¹ *Idem*, 2.

⁷² *Idem* 16-30.

⁷³ E. Brems & L. Lavrysen, 'Procedural justice in Human Rights Adjudication: the European Court of Human Rights', *Human Rights Quarterly* (2013)176-200. These authors refer to Tyler's publications putting the emphasis on four criteria: 'participation (voice), neutrality, respect and trust' (p.180).

⁷⁴ F. Van Dijk & H. Dumbrava, « Judiciary in times of scarcity: retrenchment and reform », *International Journal for Court Administration* (2013) 5(1)15-24.

⁷⁵ Jean-Marc Sauvé, « Organisation et rendement de la Cour de Justice de l'Union européenne. Comment faire face à la croissance du contentieux en temps de crise ? Introduction », sur internet, p.4.

⁷⁶ T. Barkhuysen & M. van Emmerik, 'Legitimacy of European Court of Human Rights Judgments: procedural aspects', chap.27, in N. Huls, M. Adams & J. Bomhoff (eds), *The Legitimacy of Highest Courts' Rulings* (2009), 437-449, who strongly oppose the shift towards a pick-and-choose policy and the restrictions to the right of individual application. These authors conclude that the States should increase the budget of the Court and that at the same time 'it is therefore necessary to invest considerably in improving the quality of the Court's procedure' (p.449) in order to prevent a 'legitimacy crisis'.

⁷⁷ Speech 25th January 2000, 2.

⁷⁸ Speech 23th January 2003, 5.

Council of European Judges issued an opinion that emphasized the need for 'proper reasoning [...] which should not be neglected in the name of speed'.⁷⁹ Indeed, 'the purpose of a judicial decision is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case law which may prevent the emergence of other disputes and ensure social harmony'.⁸⁰ As the ECtHR's approach consists in balancing the interests and moral values at stake, the fundamental criterion, following Perelman and Dworkin, is the quality of the argument underpinning the decision. Judgments must be understood by the applicants, or at least by their lawyers who are in charge of explaining the reasons for the decision to their clients. This concern has been recently addressed by the ECtHR as the decision was taken at the end of 2016 to replace the letter from the Registry by a formal judicial decision to be sent to the applicant when the issue has been dealt with by a single judge⁸¹. In addition to reasoning, the criterion of consistency has been regularly invoked, and described as essential with regard to the rules governing the content of persuasive discourse as defined by the Rhetoric.⁸² The introduction of the Jurisconsult following the adoption of Protocol no. 11 was clearly in response to the objective of ensuring 'the necessary consistency of the Court's case-law'. This is an important criterion to assess the quality of the decisions which has been regularly emphasized by Presidents,⁸³ especially in the face of the increasing number of decisions⁸⁴.

Regarding the quality of the Court's overall functioning, the actual users of the ECtHR, 99 per cent of whom are individuals, expect an independent, impartial justice that they can trust. They also expect information on the steps in the proceedings, on the date when the decision will be delivered and/or the hearing will take place, as well as on the access to the Registry and the Court, including by phone and email. Additionally, they 'also want a justice that they can understand, that listens to them, where they have a place'.⁸⁵

In the ECtHR's program and budget documents, both the paucity and the weakness of the qualitative criteria are striking, as is the total absence of references to the quality expected and experienced by individual users. The lack of more user-centered criteria is problematic, unless one argues that the only users are governments, but this reasoning does not make sense as long as the bulk of the Court's control still pertains to the right of individual application. More than for quantitative criteria, there is a clear lack of consistency in the expected results and performance indicators, which are constantly readjusted, revealing a lack of vision. Additionally, a sharp break occurred in the late 2000s. The 2003 document includes fairly detailed qualitative objectives, including the consistency and uniformity of the case-law⁸⁶. In 2004, there is a mention of a public judicial procedure for all decisions on admissibility and judgments on the merits.⁸⁷ From 2007,⁸⁸ a new criterion was added, that is the electronic access to the decisions the day they are delivered. 2010⁸⁹ saw a break: consistency is no longer one of the six 'expected results'. New criteria were set, such as 'training in the Court's application becomes systematic', 'workflows are being developed for the most complex chamber cases', and 'awareness of the Court's activities is increased', measured on the basis of the number of visits to the website. In 2014-2015,⁹⁰ the budget sets the objective of better informing applicants 'about the admissibility criteria so that the inflow of manifestly ill-founded applications is reduced'. It should also be noted that the extension or greater transparency of legal aid, which is known to be weak at the ECtHR, has never been among the qualitative criteria across the years.

⁷⁹ CCJE(2008)5, 18.12.2008, Opinion no. 11(2008) of the CCJE to the Attention of the Committee of Ministers of the Council of Europe on the Quality of Judicial Decisions, para.34.

⁸⁰ *Idem*, para.7.

⁸¹ ECtHR, The Interlaken process and the Court (2016 Report), 1.9.2016, 5, para.15. A request had been made in the Brussels Declaration (27.03.2015), in that regard 'welcomes the intention expressed by the Court to provide brief reasons for the inadmissibility decisions of a single judge, and invites it to do so as from January 2016',

http://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf, 5). See also J. Gerards, 'Inadmissibility decisions of the European Court of Human Rights: a critique of the lack of reasoning', *Human Rights Law Review* (2014)148-158.

⁸² F. Martineau, « Critères et standards rhétoriques de la bonne décision de justice », in *La qualité des décisions de justice*, Actes du colloque de Poitiers, CEPEJ, Conseil de l'Europe, 89, 95.

⁸³ See for instance President Luzius Wildhaber, Speech given on 25 January 2001, 6.

⁸⁴ J. Gerards, 'Inadmissibility decisions of the European Court of Human Rights: a critique of the lack of reasoning', *Human Rights Law Review* (2014)148-158.

⁸⁵ J.-P. Jean, « La qualité des décisions de justice au sens du Conseil de l'Europe », in *La qualité des décisions de justice*, Actes du colloque de Poitiers, CEPEJ, Les études de la CEPEJ n°4, 45. E. Brems & L. Lavrysen, 'Procedural justice in Human Rights Adjudication: the European Court of Human Rights', *Human Rights Quarterly* (2013)176-200. E. Brems & J. Gerards, *Procedural review in European fundamental rights cases*, CUP, April 2017, chap. 1, 2 & 6.

⁸⁶ CM(2003)93, vol.II, title IV, 96.

⁸⁷ CM(2004)155, vol.1, title IV: 'activities': 'The Court responds to such applications by decisions (on admissibility) or judgments (on the merits and just satisfaction) following a judicial procedure which is public'.

⁸⁸ Budget 2007, CM(2006)146vol1, title IV, 58.

⁸⁹ Budget 2010, 57.

⁹⁰ Programme and budget 2014-2015, 20.

Undoubtedly the intergovernmental conferences held between 2010 and 2015 had a strong impact on this evolving policy. The ECtHR has been attentive, if not submissive, to governments' expectations: as President Costa announced during the second Conference in Izmir: 'the Court has already taken measures to implement the recommendations *addressed to it*.'⁹¹

In an apparent paradox, while statistics show that the productivity of the ECtHR has increased, the perception of the Court's work by applicants and especially by governments (who asked for these management-oriented reforms) has certainly not improved. Regarding applicants and their representatives, the only indications we have (in the absence of satisfaction surveys) have to do with the lawyers' dissatisfaction on aspects such as lack of transparency in the proceedings, the very low level of legal aid granted,⁹² and the lack of reasoning of the grounds of inadmissibility of applications.⁹³ Regarding respondent states, strong criticisms and refusals to implement some judgments have been voiced in the past five years. Overall the new management approach has tended to overshadow the fundamental issue of the quality of reasoning, and most of the criticisms now voiced against the Court are currently in relation to this problem.

The Court is in need not only of compliance but also of acceptance by States. In this regard the procedural justice approach has shown how important the sense of procedural fairness is⁹⁴. The ECtHR's backlog has been misguidedly interpreted as a result of the Court's inability to handle incoming cases, whereas in fact its main cause was the inability of Member States to implement and ensure compliance with the ECHR domestically. This statement could be easily illustrated by the numerous repetitive cases (for instance regarding the bad conditions of detentions) which are a consequence of the incapacity of the States to fully comply with previous cases (leading judgments) on these issues; yet, as the violation is of a structural nature, the number and complexity of measures expected from the States are particularly terrible. Insufficient conditions of detention often call for reforms of the penal code itself to reduce the length of imprisonment penalties⁹⁵. The Court itself acknowledged that case-management tools cannot solve the issue of repetitive applications, as the source of the problem lies in the non-compliance by States of previous judgments⁹⁶. Moreover, the reasoning of decisions and the satisfaction of users have been neglected, now resulting in much more challenging criticisms of the decisions themselves and of the Court's legitimacy, requiring quite different remedies.

4. Conclusion

Faced with the increasing number of states parties to the ECHR and the enormous backlog of individual cases in Strasbourg, the ECtHR has been forced to provide greater accountability to governments eager to downsize the Court's budget and staff. This has resulted in the introduction of quantitative criteria, to the detriment of quality and of the service rendered to individual victims. These new management policies have almost exclusively been devised in the interests of states, in order to reassure them. It is uncertain whether that objective has even been fulfilled; never has the Court been criticized as much as now. Evaluation, a core feature of NPM, has further weakened its independence and made it increasingly subject to the states' impulses. 'Focusing on the concept of speed can become counter-productive and harm the very administration of justice',⁹⁷ raising the risk of 'introducing a 'two-tier justice system'.⁹⁸ Yet, other reforms were possible. For instance, the states that contribute the bulk of the cases examined by the Court (citizens from four states send around 60% of the applications received by Strasbourg⁹⁹) could have set up Information Offices following the model

⁹¹ Emphasis mine.

⁹² Cf notably E. Lambert Abdelgawad (ed.), Preventing and sanctioning hindrances to the right of individual petition before the European Court of human rights, Intersentia, 2011.

⁹³ P. Spinosi, « L'approche d'un praticien français face à la procédure d'examen de la recevabilité des requêtes », in P. Dourneau-Josette & E. Lambert Abdelgawad (dir.), Quel filtrage des requêtes par la Cour européenne des droits de l'homme ?, ed. du Conseil de l'Europe, 2011, 243-254. P. Dourneau-Josette, « Les relations entre les avocats et le greffe de la Cour européenne des droits de l'homme », in M. Forowicz, E. Lambert Abdelgawad & I. Sevinc, La défense des requérants devant la Cour européenne des droits de l'homme, Nemesis & Anthemis, Coll. Droit et Justice n°104, 2012, 93, 99.

⁹⁴ E. Brems & L. Lavrysen, 'Procedural justice in Human Rights Adjudication: the European Court of Human Rights', Human Rights Quarterly (2013)176-200, who refer to the developments on a social psychology of procedural justice conducted by Tom R. Tyler and his associates (p.178).

⁹⁵ For instance, Directorate of Human Rights, H/Exec(2015)7, 12.2.2015, Group of cases Bragadireanu v/Romania, General measures adopted for the execution of 93 cases concerning mainly overcrowding and material conditions of detention in penitentiary and police detention facilities.

⁹⁶ ECtHR, Comment from the Court on the report of the CDDH on the longer-term future of the Convention system, 2.2016, http://www.echr.coe.int/Documents/2016_Comment_on_CDDH_report_on_longer-term_future_of_Convention_ENG.pdf, 1, para.3

⁹⁷ QUALIJUS, Synthesis, « La prise en compte de la notion de la qualité de la justice dans la mesure de la performance judiciaire », <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/01/Synth%C3%A8se-QUALIJUS-JA2.pdf>, 5.

⁹⁸ Idem, 5.

⁹⁹ According to Court statistics, as of 31 December 2015, applications concerning Ukraine, Russia, Turkey and Italy make up 60.2% of all applications pending before a Court formation.

of the one opened in Warsaw (which was undeniably successful¹⁰⁰ but short-lived), to improve the preparation of applications (and to discourage some of them). This has never been done for unclear reasons. Ultimately this paper has attempted to demonstrate that the introduction of managerial policies with quantitative criteria did have a positive impact in terms of reducing the Court's backlog. However, at the same time, as we have shown in another article,¹⁰¹ it has also deeply transformed the Court's function and progressively gnawed away at the right of individual application. The new management approach shaped a different Court; it is no accident that its objectives have been changed. Protocol 14 and all the reforms introduced since 2010 have marked shifts away from the spirit of Protocol 11. Yet case management is not only a technical matter; it is also a matter of access to justice.¹⁰² All the successive reforms introduced after 2010 had the objective of discouraging individual applications and clear the backlog as fast as possible. As others,¹⁰³ starting with the Court's former British president,¹⁰⁴ I am firmly convinced that they have addressed the symptoms of the disease, but not the cause. Several reforms have also contributed to reinforcing the Court's Registry, in the name of the search for a greater efficiency and rationality of available tools. The one that received the most exposure is the introduction of single-judge cases¹⁰⁵; the second is the support to friendly settlements and unilateral declarations. This article has thus attempted to demonstrate how fundamental it would be to add qualitative criteria (such as the access to the Court, the quality of reasoning and the degree of transparency of the procedure measured through satisfaction surveys) when we come to measure the Court's performance as the quality of justice delivered to individuals must remain, from our point of view, the goal to achieve.

The pressing question today lies no longer in establishing whether the ECtHR is effective or efficient; it is rather about the extent to which fundamental rights are going to be sacrificed for the sake of meeting quantitative targets. One of the members of Lord Woolf's review team wrote that these reforms 'could enable to stem the tide until a fundamental review of the Convention can take place'. That review would consist in withdrawing the right of individual application and officializing the pick and choose policy.¹⁰⁶ The Court blindly acts as if already its only clients were states, with individuals downplayed as mere whistleblowers. According to this author, the European Court of Human Rights cannot work in isolation and should primarily be accountable to European citizens, as they are the only ones holding the rights enshrined in the Convention (and as they indirectly fund this public service).



¹⁰⁰ H. Machinska, 'Pilot lawyer project developed by the Council of Europe to make direct access to the European Court of Human Rights easier and more effective for individuals', in E. Lambert Abdelgawad (ed.) *Preventing and sanctioning hindrances to the right of individual petition before the European Court of Human Rights*, Intersentia, 2011, 165-168. M. M. McKenzie, 'Review of the working methods of the European Court of Human Rights', in *Reforming the European Convention on Human Rights: A Work in Progress*, Council of Europe Publishing, pp.147 ff., notes that 'the project had been endorsed by the External Auditor to the Secretary General and also at the Oslo Seminar in October 2004' (p. 149).

¹⁰¹ E. Lambert Abdelgawad, « La mesure de la performance judiciaire de la Cour Européenne des droits de l'homme : une politique managériale à tout prix », *Revue Française d'Administration Publique* (Special issue, Feb. 2017).

¹⁰² A. Tickell, "More 'efficient' justice at the European Court of Human Rights: but at whose expense?", *Public Law*(2015)206.

¹⁰³ P. Leach, « Access to the European Court of human rights – from a legal entitlement to a lottery? », *Human Rights Law Journal* (2006) vol.27, n°1-4, 11.

¹⁰⁴ Sir Nicholas Bratza, « The future of the European Court of human rights –storm clouds and silver Linings », Thomas More Lecture, October 2002.

¹⁰⁵ Between 2011 and 2014, single judges declared 287,828 applications inadmissible.

¹⁰⁶ M. McKenzie, 'Review of the working methods of the European Court of Human Rights', in *Reforming the European Convention on Human Rights: A Work in Progress*, Council of Europe Publishing, pp.147 ff.: 'Second [the review team's recommendation] will provide a test bed for one way of achieving a long-term solution, that is having regional centres providing courts of first instance and allowing the existing Court to play a different role. A role whereby it ceases to be accessible as of right, but can instead select and control its own caseload' (151).