



IMPROVING CASELOAD AND WORKLOAD SYSTEMS IN COURTS AND ADMINISTRATIONS:

Special Types of First Instance Criminal Cases in Regional Courts in Germany

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Case- and workload systems are in place in many modern administrations and judiciaries. They serve several goals: effective distribution of work among staff, providing data for budget negotiations, motivation of staff by sharing the load fairly and equitably.

Such systems find their limits where substantial parts of the workload consist of cases small in numbers but with a widely differing demand of staff required to deal with them. They fall far below statistical relevance in terms of numbers, but create substantial impact in staff allocation terms. These limits can be felt in any administration where such phenomena occur and create specific managerial demands. They are particularly prominent in courts where allocation of cases to judges as independent actors cannot be arbitrary.

On the basis of research done on resolved criminal cases in 16 German regional courts in the years 2009, 2011 and 2012, this policy paper recommends the usage of retrospect analyses for such kind of cases and, on their basis, educated estimates to reach the goal of the even and reliable distribution of the resources. These methods also enable to solve similar problems in other branches of public administration where widely differing tasks and the presence of cases in statistically not relevant numbers have to be dealt with.

INTRODUCTION: THE FUNCTIONS OF CASELOAD SYSTEMS AND THE PROBLEM OF WEIGHTING SPECIAL CASES

Most administrations and jurisdictions are short-staffed. In many countries, courts and administrations do not receive sufficient financial resources. In addition, they are under constant pressure to render account for efficiency and efficacy of their work as well as the way staff time is managed. It is possible to approach this problem as an ordinary managerial and staffing problem, but **courts and judges have special constitutional tasks and responsibilities.** Despite their independent position, they are also accountable to society for the way they use their resources².

Courts and administrations often have to deal with very different kinds of cases, and so staffing involves choices about where to deploy judges and staff. This policy paper shows how workload planning of the courts has been developed and implemented in Germany, and in what ways courts can use scarce resources of knowledge and skills efficiently. The methods shown can also be applied in other areas of public administration, where varying numbers and grades of difficulties of cases have to be administered.

For every administration, **workload or caseload systems** are essential to provide for a satisfactory output of cases and to avoid build-ups and backlogs. They **serve several purposes:**

- First, an even and efficient case distribution is a prerequisite for **effective case management;**
- Second, caseload systems indicate the staff needs of individual courts and administrations, but also of those of a region or state, bringing substance to **budget negotiations** of courts and ministries with finance ministers and parliaments;
- Finally, providing a well-balanced distribution of incoming cases is essential to have content and **motivated staff.** If administrations, courts, judges and non-judicial staff have to carry an overload, it is vital that a transparent caseload system shows that this overload is shared fairly and equally.

SHORTCOMINGS OF GENERAL CASELOAD SYSTEMS IN GERMAN COURTS

Elaborate systems of weighted caseloads can be found in many jurisdictions. In the United States, the National Center of State Courts has acquired considerable experience with them³. In Europe, Germany has a long tradition of such systems, dating back to the late 19th century⁴, with continuous refinements ending in what is now called the PEBBŞY system.

PEBBŞY is a nation-wide system to calculate the average time necessary for a judge or a non-judicial staff member to deal with a given case⁵.

The **approach** is to identify and examine certain groups of cases which produce the major part of a court's workload⁶ and estimate the average time necessary for a judge to deal with a case in each category⁷. In relation to the annual overall working time for judges and the expected number of cases in a given court, the necessary number of judges can then be calculated.

As with the old systems, **PEBBŞY figures are now used:**

- to establish staff needs in budgetary negotiations with the ministry of justice, the ministry of finance and parliament, usually on the basis of the number of cases that have been brought before the courts in the preceding year; and
- for fair and equal distribution of staff among courts⁸.

Overall, the PEBBŞY system works well as long as the number of cases of a specific type (e.g., civil cases) is high and as far as the average time needed to deal in practice with this type of case does not vary a lot.

This is not the case, however, of first instance criminal cases at the level of regional courts in Germany⁹: the number of cases is relatively small and the actual time necessary to work on these cases differs a lot from case to case, leading criminal law judges in many regional courts to feel that they got more than their fair share of work:

- Quite often, presiding councils saw the need to assign other judges to criminal panels in order to ensure that cases of provisional detention could be dealt with in time and that a buildup of cases with no provisional detention could be avoided. This resulted in **judges being taken away from civil cases**, thereby increasing the caseload of remaining civil judges above the national average;
- Moreover, it became clear that it is impossible to define staff needs at the time when these cases come in because staff demand created by these cases can at best be guessed or estimated, **the real workload becoming apparent only once the case is finished** or at least when it is tried;
- In addition, quite often actual staff demand is not created in the year when the case comes in (and when it will be counted in the PEBBŞY system) but in a later year when it may be put on trial.

HOW TO ADEQUATELY WEIGH FIRST INSTANCE CRIMINAL CASES (SEVERE CRIMES)?

In this situation, court leaders have been looking for more adequate solutions. Given the statistically insufficient basis for the PEBBŞY figures, one working hypothesis was that **examination of a larger number of cases** would produce reliable and acceptable results.

Six courts of appeal¹⁰ and sixteen regional courts¹¹ in Germany decided to use a multi-criteria approach to **examine the grade of difficulty** of these first instance (severe) criminal cases:

- Data was collected from a **large number of courts** in order to arrive at a wider range of data than collected when the PEBBŞY system was first established;
- The regional courts involved showed a **large variety in size**, Berlin and Cologne being the largest whereas Dessau, Stendal and Bückeberg are rather small courts;
- There were courts of more **rural regions and courts in large cities**, in order to establish whether the grade of difficulty of criminal cases in metropolitan regions was higher than in the country.

In order to find criteria for measuring the grade of difficulty, a group of experienced trial judges discussed which factors impact on the degree of difficulty and consequently on the staff needed for an individual case. They developed a scale of indicators for the grade of difficulty¹². Each indicator was connected with a point system to indicate its weight in grading the difficulty of the case.

STRENGTHS AND WEAKNESSES OF THIS METHOD

By examining elapsed cases only, this methodological approach has obvious shortcomings and limits:

- Staff needs for the expected *incoming* cases are disregarded;
- Workload related to pending cases is not taken into account.

On the other hand, looking back at elapsed cases shows in a detailed and transparent manner why a particular court or particular panels within a court have carried a much higher than average workload.

It can provide an argument for the panel or for the court to get relief in subsequent years, either:

- because a trend of a high number of difficult cases could be established over the years, or

- because extra staff needs of the first year (e.g. by moving more judges from civil to criminal panels) need to be compensated in the following year (e.g. in order to work away possible backlogs in civil cases).

It was expected that, with reliable data like this, an above average workload could be made transparent and that assignment of a higher number of judges to these types of cases than expected under PEBB\$Y figures might find more acceptance among judges in other courts.

RESULTS

On the basis of this scale, in 2009, 2011 and 2012¹³ about 2.500 cases in each year have been examined, the total being 7.688.

The results confirmed that:

- few complex cases are brought to regional courts,
- complex cases are unevenly spread among regions, and between rural and urban areas.

It was also possible to determine an average degree of difficulty:

- for each type of cases (general and severe crimes cases, juvenile and juvenile victims' cases, economic crimes cases) under consideration,
- over time, and
- per regional court.

It showed that economics crimes cases brought to the court in Cologne are almost twice as difficult as those brought to the other courts in rank. This is in line:

- with the fact that the court had a considerable number of pending cases awaiting trial where quite often trial had to be postponed because urgent cases with provisional detention had come in,
- correlates with the length of trial.

On the other hand, examination of all the **data collected surprisingly showed that the overall number of all the severe crimes cases considered, PEBB\$Y figures appeared to be reliable** on a nation-wide basis. However, clearly was not helpful for managerial solutions individual courts.

POLICY OPTIONS

With these results court leaders could not expect to successfully negotiate for additional judicial and non-judicial staff. They found themselves in the dilemma that, **as a managerial tool, PEBBŞY was no reliable option**. The following options remained. (which **can be applied both in other jurisdictions with similar conditions** and elsewhere in the public sector where similar dilemma arise). Likewise, they are choices for other areas of public administration where staff has to be assigned for work with a wide range of difficulty:

- a) The first option is to **proceed as before**, i.e. to assign staff to courts and panels according to PEBBŞY or other general workload figures. This however neglects regional differences in weighted cases. It leads to the risk that cases remain pending by lack of sufficient staff, possibly leading to political and media pressure on courts and judges.
- b) The second option is to **bring in ad hoc or part-time judges** or to reactivate retired judges on demand when panels are blocked by pending cases. In some jurisdictions, this may be an option where the law provides for such remedies and where sufficient funds are available. Countries like Germany do not have such options because ad hoc appointments and assignments of judges would be regarded as violating constitutional guarantees that, for every given case, competent judge(s) have to be determined in advance¹⁴.
- c) A third option is to **transfer judges from one court to another or within courts** “on demand”. The risk here is that such assignments might be regarded as arbitrary, willful and lacking transparency. In jurisdictions like Germany, the aforementioned constitutional considerations stand against such actions.
- d) A fourth option (complementary to the previous ones) lies in making **active pre-estimate of staff demand**, i.e. assigning additional judges under the expectation of difficult cases coming in. Although it would appear possible that information from the prosecutors’ offices might allow a certain rough estimate, such option would run the risk that judges may be assigned to panels while the expected cases may not be brought before the court at the time foreseen. Politically, a waste in manpower could be claimed. It could also be argued that there was a lack in transparency and perhaps too close a relation between the court administration and the prosecution. Finally, the basis for such an estimate could be challenged by judges, the media and by politicians.

POLICY RECOMMENDATIONS

Managing small caseloads with a wide range of staff demand cannot be recommended under the PEBB§Y system or any other general weighted caseload system. Instead, **where workload systems are inaccurate in the way shown above, only a mix of actions seems appropriate. These are:**

1. Planning

As a first and very preliminary step, use the experience gathered from the courts, internal estimates and traditional workload figures to assign staff – a clearly preliminary and unreliable move.

2. Retrospect analysis

Analyze the degree of difficulty of cases, which enables:

- Evaluating whether initial allocation of staff to courts and panels based on estimates has been reliable. This would enhance the reliability and accuracy of the caseload system and the transparency;
- Compensating courts for excessive workload in the past by allocating extra staff in the future which had to stress their staff resources in order to ensure timely handling of cases of a high degree of difficulty by;
- Detecting whether in certain regions or courts cases with extra demand are more common than elsewhere (e.g. economic crimes, drug cartel cases, et cetera).

3. Feedback for future planning

Use the results of retrospect analysis to allow better planning estimates for the future, which entails:

- After some experience with data from resolved cases, resources could be planned on the basis of better founded estimates of weighted caseload for longer periods, e.g. 3-5 years;
- Extra needs of regional courts will become more transparent;
- In addition, as external events such as economic crisis or change in the law hit the courts after some time, it may be possible to forecast when additional resources are needed after the external event is going to occur; at the local level, information by the prosecution (if reliable as to the volume and the dates) on cases to be brought before the courts might be considered.

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ENDNOTES

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² Cf. Consultative Council of European Judges (CCJE), Opinion 18 (2015), paras. 20 ss., cf. the website of the Council of Europe, <http://www.coe.int/>

³ cf. <http://www.ncsc.org/workload-assessment>; for the methodology see Lienhard, A./Kettiger, D. (2011); Lienhard, A./Kettiger, D./Winkler, D./Uster, H. (2015; Lefstein, N (2011); an excellent overview can be found in Müller, A., (2016)

⁴ cf. Müller, A. (2016), pp. 148-175; Brück, W. (1969; Schaffer, W. (1984).

⁵ PEBBŞY stands for “Erarbeitung eines Systems der Personalbedarfsberechnung für den richterlichen, staats-(amts-)anwaltlichen und Rechtspflegerdienst der ordentlichen Gerichtsbarkeit”, i.e. implementation of a system to assess staff needs of judges, prosecutors, Rechtspfleger (greffiers) in courts of ordinary jurisdiction and in prosecutors’ offices. For detailed information cf. *PEBBŞY I, Erarbeitung eines Systems der Personalbedarfsberechnung für den richterlichen, staats-(amts-)anwaltlichen und Rechtspflegerdienst der ordentlichen Gerichtsbarkeit*, published by the ministry of justice of Baden-Wuerttemberg, 2002, Bundesanzeiger-Verlag Köln; *Ergänzungsband PEBBŞY I und II*, 2003/04, Bundesanzeiger-Verlag Köln.

⁶ e.g. civil and family cases in local courts, first instance civil cases in regional courts, small crimes cases in local courts, severe crimes cases in regional courts, and diverse groups of appeals cases in both regional and higher regional courts.

⁷ In order to find reliable data, case numbers in all courts of the Länder were counted, average clearance rates were taken into account, court files in representative courts were analyzed and surveys among judges and non-judicial staff were undertaken.

⁸ As a management tool, in the court of appeal district Cologne, comparative workload and staff need is calculated every three months on the basis of incoming caseload in the preceding 12 months, which ensures that seasonal differences (e.g. a higher amount of incoming cases at the end of the year, a lower amount during holiday season) are left out. The overall workload of each court, active judicial staff of each court and the average workload of all judges in the C.A. district are being compared. The calculation shows to what extent each court is relatively under- or overstaffed. Consequently, newly appointed judges primarily are being assigned to understaffed courts. With about 50 appointments per year, there is sufficient flexibility to reach a fairly even assignment of judicial staff (even if the judiciary as a whole is understaffed).

⁹ First instance jurisdiction of regional courts is limited to severe crimes. As a result, the number of incoming cases is relatively small (from 20-30 cases per year in smaller regional courts to 150-200 cases in very large courts). In addition, depending on the volume of the case trials may last between one day or several months, sometimes well over a year. When the PEBBŞY system was first established, these cases were analyzed only in a few courts and only over a period of a few months with the result that the overall number of cases taken into account was only about 400. For this category of cases, this was of course no statistically reliable method, because, due to the wide range of staff demand created by these cases, a much higher number of cases would have had to be examined in order to produce a statistically valid result. In addition, even if a reliable nationwide average workload for these cases could have been established, this would not help with staff management among regional courts or inside a given regional court because staff demand in individual courts or panels would depend largely on the nature of the (few) cases coming in rather than on the national average.

¹⁰ Berlin, Braunschweig, Bremen, Celle, Cologne, Naumburg; Schleswig and Stuttgart joined in 2011.

¹¹ In 2009, the courts in Aachen, Berlin, Bonn, Braunschweig, Bremen, Bückeburg, Dessau, Halle, Hannover, Hildesheim, Köln, Lüneburg, Magdeburg, Stade, Stendal, Verden participated. In the following years, regional courts in Stuttgart, Osnabrück, Lübeck, Itzehoe, Lüneburg, Göttingen, Flensburg and Kiel joined, bringing the overall number to 23; Berlin and Bremen could not take part in 2012.

¹² Relevant factors considered by the judges were: number of defendants, number of defense lawyers, presence of interpreters, presence of experts, presence of witnesses, volume of the court file, number of wire-taps, number of victims represented, international aspects of the case, number of motions claiming bias on behalf of the court, number of other motions.

¹³ 2010 was left out because it was decided to first analyze 2009 data before continuing the program.

¹⁴ Details cannot be discussed here. A detailed overview can be found in Langbroek, P./ Fabri, M (2007).