

Efficiency *and* quality of judicial systems under pressure? Lessons learned from Europe

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At the end of the nineties legal scientist noted a crisis in the civil law proceedings. A long duration of the treatment of cases in various courts around Europe was perceived as a threat to the common European norms and standards for fair proceedings within a reasonable time according to Article 6 of the European Convention on Human Rights. It was the 23rd Ministerial Conference of Justice Ministers of the Council of Europe (London 2000) which laid the fundamentals for the establishment of the CEPEJ i.e. the *European Commission for the Efficiency of Justice* in 2002.

The main task of this Commission, as described in Resolution 2002(12) Establishing the European Commission for the Efficiency of Justice, is primarily concentrated at the ‘examination of the results achieved by the different judicial systems’ especially by taking note of principles related to efficiency of justice: access to justice, efficient court proceedings, the status and role of legal professionals, administration of justice and management of courts and the use of information and communication technology.

Given the high ambition of the CEPEJ, it was at the beginning not an easy task to fulfil all its expectations. Where should we start? Are there already concrete

¹ The speech is given on his personal capacity and does not reflect the official viewpoint of the Council of Europe.

experiences with comparing legal systems of many European countries? What methodology should be used? Are there any problems in the field of interpretation and the use of 'common' definitions for relative 'simple' terms such as a 'court', 'a judge' and 'a lawyer' to be expected? Those and many other questions were put on the agenda of the first meetings of the CEPEJ expert group (composed of six experts) on evaluation.

I had the opportunity to be one of the experts who was involved during the 'pioneers phase', to try to get answers to the questions mentioned earlier and to see if it was possible to start with the development of a methodology for describing the legal systems in its composition and functioning of the 47 Member States of the Council of Europe. I knew also beforehand that there was a lot of scepticism from the scientific world and the judicial field. Can you really compare legal systems with each other? And does this approach not lead to a comparison between 'apples' and 'pears'?

Of course we all know that apples compared to pears are different in shape and taste, but on the other hands they belong both to the same category of fruit. Does this mean that we never should examine them? Clearly not, is my opinion.

A similar analogy can be made with the legal systems. They are all different in size, shape (structure), taste (common law versus civil law systems), performance, and etcetera. The only thing however that is lacking is a common descriptive overview of all the 47 judicial systems in quantitative and qualitative terms. And that was exactly the ambition of the CEPEJ to see if we could draw such a European picture.

Based on previous experiences failed or limited attempts to generate comparative information concerning judicial systems of different countries, the expert team of the CEPEJ decided to draft a pilot questionnaire including

relevant questions about several issues related to 'efficiency of justice' such as: the funding of legal systems, access to justice, court performance, the statute of judges and prosecutors and (private) legal professionals.

Since many of the participants of this conference are having a research background, you may imagine how difficult it was to limit the number of subjects to be included in the CEPEJ-questionnaire. I experienced many 'battles' between the experts about the choice which questions should remain in the questionnaire and which questions should be left out.

After three meetings and many email exchanges between the experts a paper version of the questionnaire was ready for dissemination in December 2003. It was decided that the data collection process in each of the member states should be carried out by so-called 'national correspondents': government officials, mostly civil servants from the ministries of justice or Councils for the judiciary responsible for the coordination at the national level and the delivery of the information to the secretariat of the CEPEJ.

The first pilot report on European judicial systems was officially presented at an international conference in The Hague (the Netherlands) in the spring of 2005. Despite all the scepticism it was a huge success. The former President of the CEPEJ proudly described the report as followed:

“(...) this report is a first in Europe. There has never been such an array of data of forty European countries quite simply because for a long time it was considered impossible to collect comparable data when our countries judicial systems are so different”.

Of course the first report was not perfect. Interpretation problems, mistakes in the data provided by certain countries, ill-formulated questions are one of the few examples of issues that needed to be solved in the next

evaluation rounds. And indeed after the experience with two other evaluation rounds I can tell you that many improvements have been made.

Better definitions, clearer formulation of questions and even the use of an electronic questionnaire to facilitate the data-collection process and the analysis of the data have resulted in better reports with more precise information about the current state of affairs of our European judicial systems.

Nowadays many European countries are using the CEPEJ-evaluation reports of European judicial systems to take stock of their internal structure and performance in the light of necessary improvements to be made. For example by introducing structural reforms in the judiciary and specific measures concerning the backlog of cases and financing of the justice sector.

Even other international institutions, more specifically, the European Union and the World Bank, accepts the CEPEJ reports as one of the leading European standards concerning comparative data on judicial systems and use them for country assessments and the evaluation of the progress that have been made in the justice field, necessary to become a member of the European Union.

Looking back after a seven years period of experience with the European evaluation on judicial systems, I must conclude that this is one of the success stories of the CEPEJ.

When it comes to the concrete topics described in the CEPEJ-reports and the political interest of countries, the funding of the judiciary, is always one of the main subjects that attracts politicians and the media.

With respect to the funding of the judiciary important data on annual budgets available for courts, prosecution and legal aid can be found in the CEPEJ reports. For example

when you take a closer look at the specific chapters in these reports on financing the justice sector, you can see that there are large differences between countries regarding the budget that is available for courts. There are the lesser economic developed Eastern European countries where the resources for financing the courts (and other justice institutions) are limited and the Western European countries where more resources are existing.

However, what is interesting to note in this respect is the fact that not each 'wealthy' Western European country have the same amount of budget (per 100.000 inhabitants) available for financing courts (or is willing to pay for that). There are countries where there is a relative large public budget for courts, compared to countries where this is not the case.

One of the reasons for the differences between certain Western European countries may be caused by different policy choices, especially when it concerned civil law justice.

For instance the United Kingdom applies a full cost pricing principle, where the parties have to pay in full for the service they receive during judicial proceedings. This may explain why in the UK a smaller public budget for the judiciary is available, compared to other countries where a larger portion of the operating costs of courts are financed by public means. Another example of a country where the system is almost 'self financing' is Austria. In this country much income is generated as the results of a system of fees that are applied for administrative activities that are related to land registers and business registers. Income that may be used to cover the all the costs of courts.

It is of course a political choice that States have to make, how much public budget should be spend on courts and if some kind of profit principle should be applied in court proceedings. In countries where the last situation is the case, it may lead to critics. Especially by those who have

the opinion that it is morally wrong to put the entire costs of the civil justice system at the plate of the litigants.

Cutting public budgets for courts and introducing profit principles in judicial proceedings is of course in the current situation of financial crisis a 'tempting' option, especially for those States who are facing severe financial difficulties.

A similar development seems to be apparent when it comes to legal aid. Legal aid is normally seen as one of the cornerstones for guaranteeing access to justice. Those who cannot afford legal assistance may request for (free) legal aid. As is the case with the funding of courts, the budget for legal aid varies from one country to another. Looking at the results of the last evaluation report of the CEPEJ on European judicial systems especially the Netherlands, Norway and the United Kingdom are identified as the 'top spenders'. In those countries a large budget for (free) legal aid is available.

However, due to the influence of the financial crisis, the budget for public legal aid in those countries is currently under pressure. It may be expected that different norms will be introduced to grant legal aid and even that a greater 'self responsibility' for citizens is promoted.

In fact using policy terms such as enhancing 'self responsibility' of citizens may be seen as instruments to increase barriers for citizens to get access to legal aid. It may also result in situations where citizens are increasingly avoiding the courts or are forced to use other ways to solve their disputes (more cheaply and at lower quality).

Of course for those European countries where there is at the moment already a relative low public budget for legal aid available, there will be – given the current situation – also not a tendency to increase this budget. From that point of view access to justice is under pressure.

One of the major parts on access to justice though is not only limited to the height of the court fees or legal aid, but is also related to the fees of lawyers. Since high fees of lawyers can be a threat for a certain group of the society to receive access to justice too.

This reminds me of a debate we have had many years ago in our expert team to include questions in the evaluation scheme about lawyers fees. One of the ideas we have had was to ask countries how high a lawyer fee rate is for specific disputes (for example a personal injury case). Due to the level of complexity to collect this information and to select the right types of disputes applicable in all the 47 Member States we decided not to raise this question in future evaluations.

That is why I am now so happy with the research project directed by the research team of the Centre for Socio-Legal Studies and the Institute of European and Comparative Law of the University of Oxford which tries to find answers to important questions on funding and costs of litigation: how much does litigation cost, how can claimants fund their claims and who ends up paying? It is for the first time that on a large scale comparative information will be available on the fee systems that are used by lawyers, as well as information about other cost aspects and funding of litigation.

Moreover I would also like to congratulate Lord Justice Jackson for his extensive work concerning the examination of civil litigation costs in UK-England and Wales. In his more than six hundred pages long preliminary report a detailed description is given of the UK civil litigation system and its related costs. Some of the questions he is trying to answer is “what do lawyers earn” and is the market principle in the legal field failing. In his analysis he does not limit himself to the UK, but other European countries, USA/Canada, Australia, New Zealand and even the Caribbean are included in his study too. To my opinion

it is highly recommended that other countries take notice of this important study and initiate similar evaluations.

Looking at both the results of the study coordinated by the University of Oxford and the preliminary report of Lord Justice Jackson one may conclude that hiring a lawyer in Europe is not cheap and that there may be a failure of the market. This can be seen as just another treat of guaranteeing access to justice.

When it turned out that the budgets for legal aid and courts are under pressure, the costs for hiring a lawyer are increasing; one might face in the near future another crisis: *the access to justice crisis*. And that is what we precisely should avoid in Europe.

Returning back to the CEPEJ evaluation methodology I would like to make some closing remarks. The CEPEJ has paved the way in the complex world of comparative studies of judicial systems. As a part of this a descriptive picture is provided on the composition and functioning of legal systems, including aspects that are related to costs and funding of litigation.

However, one must bear in mind that it is only a ‘snapshot’ and that additional studies presented today are essential to get the full picture. Of course the work of the CEPEJ is evolving and more comparative knowledge is currently available, however further improvements are necessary. In that respect I have some wishes for the future.

One of them is related to the improvement of the quality and the reliability of the data. In our current approach we strongly rely on the information of one (government) source: the national correspondent. More ideal should be the use of multiple sources of information per country, especially to improve the reliability and objectivity of the information provided by the countries. However to introduce this principle in our evaluation approach, a structural strengthening of the evaluation team in terms of

capacity, expertise and budget is necessary. In times with scarce financial resources this seems to be problematic.

Another wish is that the process of data collection and analysis will be further enhanced. Despite the introduction of an electronic questionnaire, it is still a heavy burden for countries to collect all the necessary information. Major improvements in the current (electronic questionnaire) software that is used, is to my opinion essential. A more attractive user interface, better validity checks of numerical data, multi-lingual question options, a seamless integration with applications for data-analysis and possibilities to present the information concerning European judicial systems on an interactive manner on websites are just one the recommendations that I would like to suggest.

My last personal wish has to do with the early years of the CEPEJ's evaluation exercise. It started with 40 member states and in the last evaluation round almost all the member states of the Council of Europe has cooperated. Nowadays every European country accepts the importance of comparative justice sector data.

With a growing interest for the applying similar methodologies outside Europe I hope that in the future comparable approaches will be available in other continents of the world too and that other international organizations are stimulated to create comparable evaluation methodologies for international justice sector evaluation studies. This to increase a better understanding of the various judicial systems and to improve them with the aim of realizing a maximum guarantee of legal rights for citizens in (civil) litigation and affordable judicial proceedings for everyone all around the globe.

I wish you all a successful conference and a fruitful debate.

Thank you very much.

