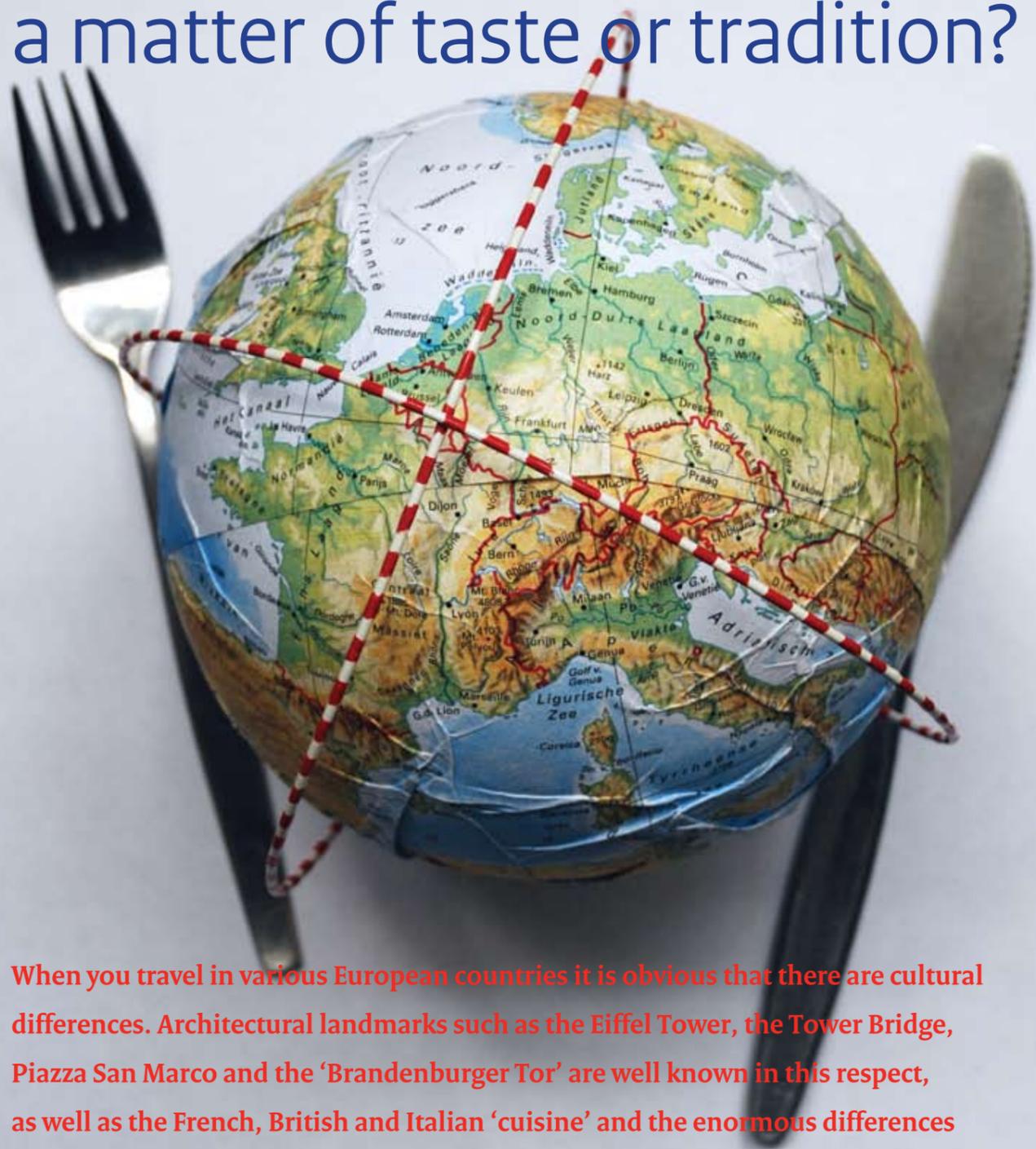


European judicial systems: a matter of taste or tradition?



When you travel in various European countries it is obvious that there are cultural differences. Architectural landmarks such as the Eiffel Tower, the Tower Bridge, Piazza San Marco and the 'Brandenburger Tor' are well known in this respect, as well as the French, British and Italian 'cuisine' and the enormous differences in language. Almost similar differences can be found in the legal systems of the member states of the European Union. By Dr. Pim Albers (NL)



The most common known discrimination that legal scholars make concerns a separation between countries with a common law system and countries where judicial proceedings are based on the civil law tradition. Common law systems prevail in the United Kingdom and Ireland. The reasoning is based on the case and is compared with alike earlier cases. So the basic structure is flexible and is open for discussion.

In the civil law tradition the reasoning is based on rules given by a law. So no discussion about the structure, only how to interpret the structure in this given case. One can say the reasoning in common law is from the bottom up and in civil law from top down. These are completely different ways of approaching a case. For example a contract in common law has to define many conditions.

A contract in civil law has as base the contract law and has only to define some interpretations of that law. As a consequence a contract in common law is longer then a comparable law on civil law.

Cultures of litigation

Looking at the judicial landscape in Europe the majority of the systems are based on the civil law tradition. But there is more diversity between the legal systems that can be discovered. Travelling from one European country to another one may find trials by jury, professional judges versus lay-judges, specialised courts versus courts of general jurisdiction, long lasting proceedings versus short ones, etc. All differences that are based on variations in legal cultures and traditions.

So, at a journey in the European judicial landscape one sees for example in the Southern European countries (Spain, Portugal, Italy and Greece) a culture of litigation where disputes are resolved during oral hearings and civil proceedings are extended due to the fact that lawyers are motivated to bring in new evidence. Looking at the absolute figures of the number of acting lawyers in the EU-member states, these countries have also the highest numbers of lawyers per 100,000 inhabitants. One might think that this will result in an increase of cases brought before the courts. However when the Council of Europe's report on European judicial systems (CEPEJ 2006) is studied, this is only true for Italy. This country is confronted with a high volume of civil (and criminal) cases.

The existence of many Italian lawyers combined with the need to draft extensive judgments, have resulted in a substantial increase of the backlog of cases and a long duration of the judicial proce-

dings. It must be noted that Italy is not the only country where there are problems with backlog of cases and a long duration of proceedings. One must conclude that to solve a same sort of dispute, the amount of time spent on that case, differs greatly between countries.

In some countries similar problems in the functioning of administration of justice exist, however to solve these problems different approaches can be identified. For example in the United Kingdom different 'tracks' exist in civil proceedings. Depending on the character of the dispute (and the monetary value of the claim) civil law cases can be treated quickly (short track proceeding) or more intensively (medium track or long track proceeding). Another solution is to reduce the role of a lawyer in civil proceedings with a relatively low monetary value. In the Netherlands there is no obligation to have legal representation in civil law cases with a monetary value below € 25.000. This measure does not only create easier access to justice, but may contribute to a reduction of the length of proceedings for certain cases since these proceedings are treated within a short time period. In France solutions in reducing the length of proceedings may be found in a 'contractualisation' approach. As a part of this approach parties (lawyers and litigants) make an 'agreement' with the court about the maximum number of hearings, the deadlines for sending relevant documents to the courts and - if feasible - to provide an indication of the expected duration of the proceeding. Judges are as a result of this lesser 'passive' and will become real managers of the judicial proceeding.

Mediation

Reading the first part of this article can lead to the conclusion that in Europe disputes are only solved by courts (or tribunals). This is not true, because there are already a high number of countries where disputes are resolved outside the courts by using Alternative Dispute Resolution (ADR). ADR is present in different forms, for example through mediation, conciliation and arbitration. The instrument of mediation is most successfully applied in the field of commercial law and family law (divorce and child custody cases). Due to their specific character the final outcome of a mediation is perceived as more satisfactory for both of the parties, compared with a traditional court proceeding. Another advantage of mediation (if this is placed outside the courts) and ADR is that it will contribute to the reduction of the number of incoming court cases. This is also one of the reasons



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that at a European level ADR, more specifically mediation, is promoted as one of the solutions to solve the problems of the courts. Concerning 'cross-border' disputes in civil and commercial matters the standard dispute resolution mechanism will not be a competent court, but a mediator. For this reason the European Union has drafted a framework decision concerning mediation in civil and commercial matters (2008/52/EG). The intention is that the framework decision will offer citizens a relative simple, uniform and cheap solution for resolving disputes with a cross national character. The use of the framework decision, together with other initiatives at a European level, can be seen as a modest attempt to harmonise certain conflict resolution mechanism between the member states.

eJustice

However I do not expect that in the near future all the courts in Europe will work in a similar manner. Differences in legal tradition and culture will remain. On the other side, due to increased possibilities to exchange and publish information about the operation of courts, judicial proceedings and ADR I expect that countries will learn more and more from each other and that certain 'best practice' solutions will be transposed from one country to another. In this respect the 'eJustice' project of the European Union can have a catalysing role. As a part of this project a European 'eJustice' portal is developed where citizens, legal professions and the judiciary can retrieve (practical) information about judicial proceedings in the EU-member states. Also certain registers can be searched online such as: the insolvency registers, the land registers and business registers. For uncontested claims an electronic payment order will become available and in the long run citizens may have the possibility to submit their case electronically before a court in one of the 27 member states. Of course, the last option does not imply that citizens will have the freedom to choose between the various courts in Europe and that they will make use of an 'Internet dispute resolution price comparison' website, to discover which country is having the cheapest court proceedings, the shortest duration and the highest quality of the decision. For the time being this will remain science fiction and it is unclear if this ever will become reality.

'The freedom to choose between the various courts in Europe will remain science fiction, and it is unclear if this ever will become reality...'

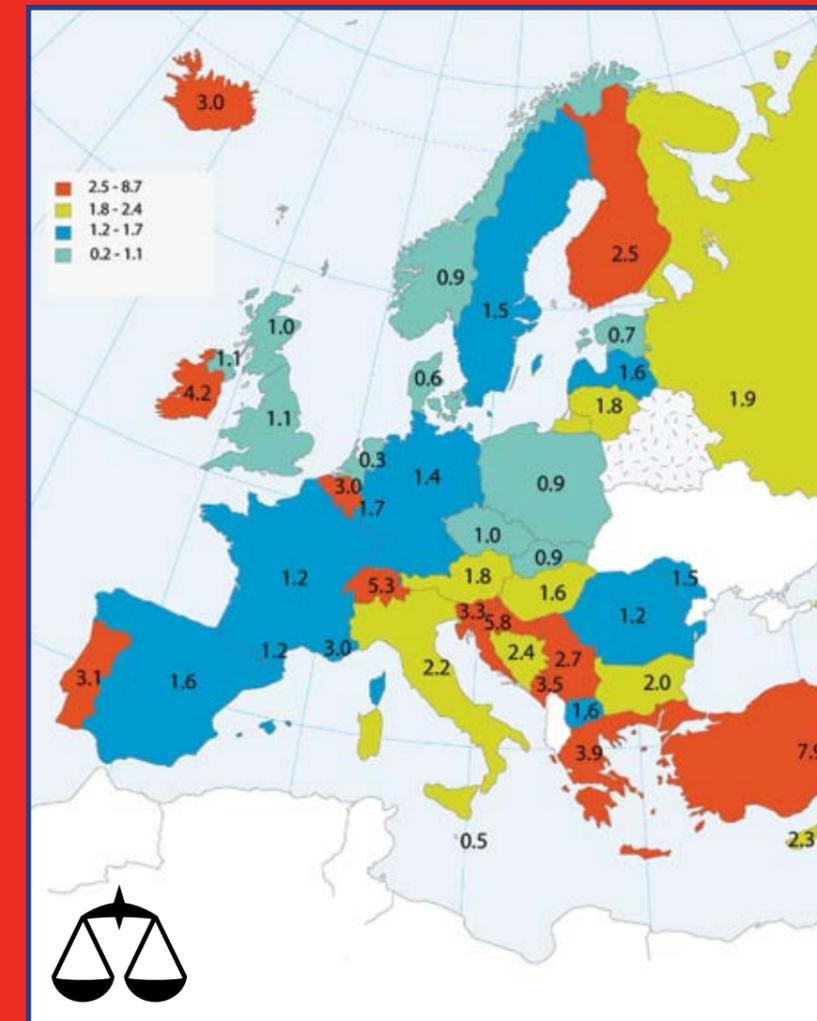
Dr. Pim Albers



Cultures in court buildings

The last point that I would like to raise in connection with differences in legal culture and tradition is related to the court building architecture. As I have already indicated in the beginning of the article, each country has its own architectural landmark. Is this also true for court buildings? The answer is yes. The traditional court building architecture reflects the symbols of justice, impartiality, fairness and strictness. This is often visualised by neo-roman pillars, numerous stairs and a statue of Lady Justice on top of the building. Buildings to impress the court visitors and to provide the idea that you are in a 'house of justice'. Classical court buildings can be found in many European countries, but especially in Belgium, France, Spain, Italy and Greece these types of buildings are present in the major cities. In the Nordic countries (for example the Netherlands and Denmark) however a different concept in the construction of court buildings is applied. Under the influence of modernisation programmes, large reconstruction plans and a pragmatic approach, new types of court buildings have been introduced over the recent years. Sometimes they reflect the 'transparency of the judiciary', especially in those court room buildings where the façade is composed of glass. In addition to this new concepts for court office buildings have been applied. For example this has resulted in Denmark in the choice for locating certain court buildings outside the centre of a city, combined with sufficient parking facilities and an easy access to a public transportation system. Even at a European level architects have used their creativity in the construction of the European court of Human Rights in Strasbourg. When you look from the outside at the front of the building you might discover the balance of justice (reflected in the two hearing rooms at the left and the right and the central hall in the middle of the court building), combined with the notion of access to justice and transparency (as with other modern court buildings is the case, the architect has used a lot of glass). Beautiful or not, it is still a matter of taste. ★

Court locations per 100,000 inhabitants in 2006



Source: 'European judicial systems', edition 2008 (data 2006): Efficiency and quality of justice. European Commission for the Efficiency of Justice (CEPEJ)

Number of professional judges sitting in courts (fte) per 100,000 inhabitants in 2006



Judicial facts & figures

