

EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY
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WORKING GROUP ON EVALUATION OF JUDGES

FINAL REPORT

Presentation by Jean-Paul Sudre, Conseil Supérieur de la Magistrature (France)

At ENCJ's general meeting held in Rome on 21 May 2004, I concluded the presentation of the working group devoted to the evaluation of judges as follows: "The theme of evaluating judges is a complex and especially rich one requiring the active participation of ENCJ members in examining the topic, exchanging useful information and engaging in group brainstorming".

In practice, the predictions in that presentation proved to be entirely accurate, both in terms of the complexity of the chosen theme and the sheer amount of input required to carry the project through to its provisional conclusion.

I would especially like to thank the following:

- all those who participated in drawing up national presentations of evaluation systems,
- the coordinators of the sub-groups who helped me to draw up the summary of work (Jacques Hamaide, Giovanni Mammone and Luigi Marini),
- the secretariat of the ENCJ which supplied the majority of the translations.

I would like to start with a few comments on our working methods before moving to the summary of our findings; I will end by temporarily concluding the work of our group.

I invite you to refer to the group presentation and organization documents, national presentations and sub-group reports which can be found on the ENCJ website.

I) Our group working methods:

A number of the network's members and observers wished to participate in this working group at the general meeting in Rome: fifteen signed up and a further five agreed to provide us with information on their national systems for evaluation of judges; these were represented by thirty-five individuals.

The group's work schedule comprised three phases:

- phase one: drawing up of national presentations for judge evaluation systems on the basis of a guidance paper and questionnaire distributed at the beginning of June 2004,
- phase two: use of information gathered during phase one by the sub-group,
- phase three: report on work undertaken.

Two meetings were held in the course of our work, the first in Rome on 21 May 2004 to establish how the group would be organized, and the second in Paris on 4 April 2005 to review sub-group findings.

Documents and information were transmitted within the working group and to the ENCJ secretariat via e-mail.

II) Sub-group findings:

The notion of judge evaluation is *a priori* understood as being relative to the assessment of the individual activity of judges as against the evaluation of the collective activity and the performance of the jurisdictions to which they belong.

In the interests of better structuring discussion and reflection we focused on four themes that were given to sub-groups:

- "Content and procedure for evaluation of judges",
- "Evaluation of judges, career, discipline and independence",
- "Evaluation of judges and evaluation of justice",
- "Evaluation of judges and the role of *Conseils supérieurs* [Higher Councils]".

This division of topics naturally allowed for some overlapping of the themes addressed in each of the sub-groups.

Where public prosecutors are concerned, they were included in national presentations for judicial bodies where they fall under the authority of a High Council or similar body.

A) Diversity of judge evaluation systems:

I should start by underlining the enormous diversity of the evaluation systems studied, which is the natural consequence of the variety of legal procedures and methods governing judges in each of the national systems.

Individual evaluation, considered natural in systems marked by the existence of a body of judges governed by career organization, is not so in systems where recruiting concerns experienced legal professionals not subject to career instances, even if, as exceptions in such systems, there is sometimes a limited and informal process of promotion concerning full-time judges.

For example, there is no individual judge evaluation measure in England, Wales, or Ireland.

In fact, even if judges in several judicial systems in Northern Europe (Denmark, Finland, Sweden and the Netherlands) are not more the object of personalized individual evaluations than their peers in England, Wales, or Ireland, evaluation measures are nevertheless strongly present for the improvement of the performance of the judicial system.

Save for a number of significant differences, Spain can be broadly included in this group.

In addition to these first two categories, a third contrasting group of judicial systems exists in which the individual evaluation of a judge is principally oriented towards the management of that judge's career advancement, in the context of a merit-based system.¹

Where measures for the individual evaluation of judges exist, these may be distinguished by two underlying principal purposes: that of the career advancement of the judge and/or the improvement of the performance of the judicial system.

It appears that it is becoming more and more desirable to ensure the synthesis of these two purposes which are by no means separate from one another. Do their respective places in a given system not determine how the evaluation of judges will be organized and according to which principles?

¹ Germany, Austria, Belgium, Bulgaria, France, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania.

B) Content and procedure for evaluation of judges:

The first sub-group studied evaluation content and procedures applied.

1) Evaluation content:

The following points were highlighted:

- definition of general evaluation criteria,
- qualitative and quantitative appraisal of work,
- scrutiny of rulings made,
- ethical practice,
- concrete modes for evaluation,
- evaluation of public prosecutors.

1.1 Definition of general evaluation criteria:

It is important to underline the fact that general instructions and principles governing evaluation systems tend to be defined by primary legislation (laws and sometimes even Constitution) and each legal system has its own criteria depending on the key purpose for evaluation.

Beyond this distinction between purposes, some reports demonstrated more or less explicitly that the fundamental criteria for evaluation are independence and the judge's capacity to satisfy the requirements of users of the judicial system.

1.2 Quantitative and qualitative appraisal of work:

Reports that addressed this theme may be separated into two categories.

In some reports, the principal aim of evaluating a judge's work is to assess how effective judicial structures are and the speed at which citizen requests are dealt with. The emphasis in this approach is on the global efficiency of a given system; for this reason, the quantity of work carried out by the judge is of vital significance (Denmark, Spain and Sweden).

Other reports highlighted the fact that evaluation is not only limited to quantitative appraisal on the basis of statistical analysis of work carried out, but may also take into account the qualitative aspect of the judge's work (Germany, Bulgaria, Finland, Hungary, Italy, Lithuania, Netherlands, Poland and Romania).

In some cases evaluation is used as a means of assessing the aptitude of the judge for different legal positions (Belgium and France).

1.3 Scrutiny of rulings made:

Several reports highlighted the especially delicate nature of scrutinizing rulings made by judges, since this could mean that the evaluating body becomes implicated in the activity of the judge under evaluation.

In some countries the content of rulings is never evaluated (Belgium and France).

Where rulings are assessed, the formal validity of the ruling, its logic, the speed with which it is made and the extent to which the jurisprudential knowledge of the judge is up-to-date are taken into consideration.

In some systems, rulings that are appealed against are evaluated, along with reasons why they were amended or passed (Bulgaria and Lithuania).

1.4 Ethical practice:

Few reports addressed the specific topic of ethical practice and the ethical values of the judge.

Where this is taken into consideration it is related principally to professional activity.

Some reports indicate that a judge's conduct in private is not taken into consideration except where this conduct would have repercussions on the credibility of their professional activity and the image of the legal institution concerned (France).

1.5 Concrete modes for evaluation:

In career advancement systems, individual evaluation of judges is carried out in a wide variety of ways.

In the majority of cases, parties involved in the evaluation may include the judge under evaluation, a senior judge, other judges or collegiate bodies.

Evaluation of judges often takes the form of a rating, whether it be global or detailed, according to a tiered value scale.

In performance-based systems, collection of individual data is very much oriented towards cases: this data may sometimes be used for the purposes of appointment.

1.6 Evaluation of public prosecutors:

In countries where public prosecutors belong to the same career as judges (Belgium, Bulgaria, France, Italy and Romania), evaluations are most often carried out according to the same criteria.

Where careers are structured in other ways, mechanisms for evaluation of public prosecutors are often similar to those for evaluation of judges (Austria and Portugal).

2) Procedure for evaluation:

The sub-group considered the following points:

- generalization of evaluation systems,
- identification of evaluating body,
- regular or occasional nature of evaluation,
- participation of the judge in the evaluation procedure and their right to contest.

2.1 Generalization of evaluation systems:

Generally speaking, in countries where non-anonymous individual evaluation is carried out, all judges undergo evaluation, although the frequency and criteria for this may vary.

In some countries, however, certain categories of judge do not undergo evaluation (Austria, Belgium and France).

2.2 Identification of evaluating body:

In systems where personalized and individual evaluation exists, this is often organized on two levels:

- firstly, pre-evaluation is carried out by a more senior judge, an inspection service or a collegiate body,
- secondly, a higher authority (individual or collegiate) makes the final decision on the basis of pre-evaluation findings.

In performance-based systems, evaluation is often carried out by ad hoc bodies, the composition and nature of which may vary, or by government authorities.

2.3 Regular or occasional nature of evaluation:

The frequency with which evaluations are carried out depends on the system in question and the principal purpose of that evaluation.

In systems where evaluation is associated with career advancement, the frequency with which evaluations are carried out will be linked to the need to assess the professionalism of the judge on a periodic basis and/or to assess that judge's career advancement and aptitude for promotion.

In these systems, the frequency of evaluation is key to regular assessment of performance.

In some cases, occasional evaluation does exist in career-oriented systems: this may be carried out at the request of the judge or upon decision by the evaluating body.

However, even in systems where a career-oriented system is not in place, there is a limited system for promotion to more senior positions, and decisions

are often made on the basis of appraisal—informal, even—of the quality of the judge's work at the time of this promotion.

2.4 Participation of the judge in the evaluation procedure and their right to contest:

Where evaluation is used in career advancement of judges, reports demonstrated a series of procedural guarantees that judges benefit from during the evaluation process:

- dialogue between the judge being evaluated and the evaluating body,
- communication of the evaluation exercise to the judge,
- the right of the judge to present their observations to the evaluating body before the final evaluation is made,
- the right to refer evaluation to a judicial body.

C) Evaluation of judges, career, discipline and independence:

The second sub-group examined the key roles of individual evaluation related to career progression before addressing specific questions about how this relates to discipline and the concept of the judge's independence.

1) The principle of merit appraisal of judges:

A number of international reference texts have allowed for the legitimacy of the principle of merit appraisal of judges and public prosecutors by conducting analysis according to the development of their career².

In systems where career progression is not subject to the single criteria of seniority and where it is expedient to avoid making choices guided by considerations other than that of objective appraisal of quality, promotions of judges cannot be granted without evaluation of their merits.

2) Key roles of evaluation relating to career progression:

2.1 Merit-based judge evaluation systems involve periodic evaluation and/or preliminary evaluation prior to any appointment or promotion decision;

Where careers are not exclusively governed by seniority, the tool used for rating, appointment and for choosing between several candidates for the same position is the individual evaluation of a judge.

² United Nations Basic Principles on the Independence of the Judiciary (1985), Recommendation R (1994) 12 of the Committee of Ministers of the Council of Europe to Member States on the independence, efficiency and role of judges of 13 October 1994, European Charter on the Statute for Judges (July 1998), Recommendation R (2000) 19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system.

However, regular evaluation of judges and updating of their records will not necessarily be related to a given appointment or promotion. The aim of such evaluation is to ensure the regular monitoring of the professional performance of a judge similar to that carried out for any agent or bureaucrat working for the State.

Depending on the legal system in question, individual evaluation of judges may meet one or both of these objectives.

2.2 Individual merit appraisal of a judge may be used to appoint that judge to a given judicial position;

Few national presentations addressed this matter, either because a judge is considered in principle to be a multi-tasking individual who is capable of stepping into any role, or because evaluation systems are not tailored to orient the judge towards a particular position because of the specific qualities such a position would require.

In some countries this evaluation may be more oriented towards human resources management (France and Italy).

This raises the more general question of the effective use of individual evaluation in whatever method as a global human resources tool for the administration of justice, enabling orientation of the judge towards a professional career path to which that judge would be particularly suited.

2.3 In merit-based promotion systems, individual evaluation of judges compensates for the weight of seniority in career advancement;

In merit-based career systems, seniority and experience hold a not insignificant place in appointment and/or promotion decisions. Where this is excessive, the importance laid on seniority and experience may eclipse the importance of the merit of the candidates.

The question of the respective influence of these two criteria is a very delicate one and is dependent on the qualitative appraisal of the performance and efficiency of each evaluation system.

Several national presentations refer to this matter for systems in which it is expressly indicated that seniority should hold the same weight as merit (Hungary and Portugal).

2.4 Individual evaluation may have financial consequences for the judge;

In some cases, a mediocre evaluation may lead to financial sanctions for the judge (Belgium).

In addition to this, career progression may be halted following an unsatisfactory evaluation of a judge's achievement within a set time limit or for a promotion to be decided between a number of candidates.

3) Evaluation of judges and discipline:

Where discipline is concerned, an initial question was addressed: in judicial systems with both a disciplinary regime and a system for the individual evaluation of judges, can individual evaluation result in disciplinary consequences?

The answer seems to be “yes” in the majority of cases: a judge demonstrating specific professional negligence at evaluation would be subject to a series of disciplinary procedures.

The national presentations did not address a second question regarding a possible link between the importance given to the individual evaluation system for judges and that given to the system of disciplinary measures.

When a system for periodic evaluation of a judge exists, is the purpose of this not to limit recourse to disciplinary procedures relating to professional negligence and other derelictions of duty in that judge’s work? Is regular evaluation not a means for preventing such negligence and enabling the judge in question and those in authority to react before any recourse to disciplinary procedures becomes necessary?

These questions bring us to the infinitely more delicate matter of the credibility of individual evaluations carried out and ultimately to how efficient the existing evaluation system is.

4) Evaluation of judges and independence:

The issue of links between evaluation and independence underpins the work of our sub-group.

Reponses given can be divided into three major groups:

4.1 Some legal systems have no individual evaluation system for judges.

In these countries, national culture and tradition mean that the power and authority of judges is held in great esteem and they are highly respected. The fact that judges are viewed in this way and are traditionally accepted as such by the public may explain why evaluation of a judge’s professional activity by anyone else but the judge in question might be deemed a form of assessment that is incompatible with the judge’s independence.

However, this standpoint does not exclude the possibility of informal assessment by a more senior judge.

4.2 Respect for the independence of judges has led other judicial systems to use individual evaluation solely as a means for quality assessment.

In these systems, individual evaluation is mostly anonymous, is not reported in the judge's personal record and has no consequence on appointments.

This is neither a means for monitoring the performance of judges over time nor a way of comparing the merits of candidates for a given position, but functions instead as a management tool.

However, individual data may sometimes be used informally in promotion procedures.

4.3 In other judicial systems, evaluation of a judge's individual activity is not considered as being incompatible with the notion of independence.

However, in order to safeguard this independence, these systems have put in place a number of protective measures at all levels of the evaluation process.

These measures would appear to take the form of published guidelines setting out evaluation criteria and the procedural rules to be applied.

The definition of the evaluating body is another essential part of the guarantees given to the judge.

Lastly, the procedural guarantees given to the judge during the evaluation process are essential to ensuring the balance and transparency of the evaluation process and to avoid the risk of problems developing.

D) Evaluation of judges and evaluation of justice:

The third sub-group examined the distinction between evaluation systems centred on the persona of the judge and those oriented towards judicial system performance before going on to illustrate with concrete examples the individual elements involved in evaluating the quality of a global judicial system.

1) Distinction between evaluation systems:

1.1 Upon analysis of the national presentations it becomes clear that each country has adopted a specific evaluation system to suit their own legal system and social values, and adapting this to work with existing constitutional assessment procedures for the legal system.

Some countries have created High Councils that are charged principally with overseeing the career advancement of judges and—in rare instances—with the organization and administration of justice.

Other countries are distinguished by a markedly high degree of autonomy and independence for the courts concerning the administration and organization of justice. Their High Councils or similar bodies have fewer responsibilities and duties regarding judges' careers.

Where the first set of countries is concerned, evaluation is essentially an

individual concept: procedures are tailored to accompany the judge throughout his/her career.

Taking the form of published guidelines, these comprise measures for protection against abuse, error and bias. These are sometimes managed by judges themselves (evaluating body or evaluation assessment body) and are often subject to checks by administrative judges (Belgium, France, Italy and Portugal).

For other countries, the aim is predominately to evaluate and gauge the work of courts and tribunals. The question of career, where this exists, does not dictate the content of evaluation procedures because these are actually part of the administrative approach both in terms of defining guidelines for evaluation and the authorities concerned (Denmark, Finland, Netherlands and Sweden).

In actual fact, the logic behind the individual approach lies in the idea that the appraisal of judges and the quality improvement expected of each of them will lead to the global improvement of the entire judicial body and therefore of the entire judicial system.

In the second approach, trust is given *a priori* to the judge and therefore investment is essentially at the level of organization and quality of the courts.

1.2 The two systems do have close connections.

In career-based systems, preoccupations over institution performance are nevertheless present even though they often come under the wing of administrative authorities and are dealt with in an autonomous way. In systems based on institution performance, indirect and sometimes informal career-based individual evaluation exists and is the by-product of the appraisal of the efficiency of judicial services.

It would seem, then, that these two approaches are much more closely connected than at first appears.

Firstly, evidence exists to support close ties between the quality of justice and the professionalism of each judge.

Secondly, individual professionalism alone cannot guarantee the high quality of the judicial body in which those individuals operate. Quality must necessarily depend also upon the professionalism of the judge's collaborators and the effectiveness of tools and facilities supporting judicial activity.

Lastly, the content of the various systems could be said to complement each other: on one hand, evaluations of courts and tribunals are becoming increasingly concerned with the qualitative aspect of individual activity; on the other hand, appraisal of the professional aptitudes of a judge cannot be undertaken without also taking into account the reality of the system of which the judge is a part.

2) Individual evaluation and “measuring” judiciary quality:

2.1 Analysis of systems oriented towards evaluation of the performance of courts and tribunals demonstrates that individual integrated data are first and foremost of a quantitative nature, relating principally to the judge’s workload and productivity (Denmark, Spain, Finland and Sweden).

In this respect, Spain has developed “judiciary work modules” which take the form of an individualized statistical approach in the context of administrative management.

These quantitative statistical data are by nature extremely simple to collect and can be highly refined.

2.2 Recent development within these systems has seen increasing importance being placed on a qualitative approach.

Furthermore, tools for quality improvement which are especially concerned with the use of individual data have been implemented in a number of countries.

The “RechtspraakQ” system in place in the Netherlands and quality procedures implemented in Finland are a perfect illustration of this: these systems are concerned with improving the quality of services by defining guidelines for quality (in procedures, rulings, organization, schedules, acceptance and treatment of claims) and by regular measurement of that quality.

The individual qualitative approach is very important in plans for reforming the Spanish evaluation system which is based on individual “activity ratings” which are not only quantitative but also qualitative (efficiency, schedule, involvement, training), all within the global context of the status of the wider system.

Another example of this qualitative approach, which takes individual quality indicators into consideration, is the plan for reform currently underway in Italy which aims to provide a means for measuring the efficiency of the judicial system more effectively.

E) Evaluation of judges and role of High Councils:

The fourth sub-group reached the following conclusions:

1) In the majority of countries with a High Council (or similar body), this plays a role in determining and devising the system for individual evaluation of judges:

While general instructions and principles for evaluation systems tend to be defined by primary legislation (Constitution and laws, etc.), in some cases High Councils are entrusted with determining a certain number of measures for

application (Belgium, Bulgaria, Spain, Hungary, Italy, Lithuania, Poland, Portugal and Romania).

This secondary normative power is exercised either by way of circulars or regulations, or by proposals drawn up for the executive, or by approval of texts prepared by governmental authorities.

In some cases analysis of the present evaluation system has been carried out (Belgium, Bulgaria and France): in some instances this was carried out by the High Council; in others the Council was simply involved in reviewing the findings of the analysis, however in both cases the High Council put forward proposals for improvements.

2) In several cases, the High Council is the evaluation body or plays a role in the individual evaluation of judges:

In most systems, evaluation is not carried out by the High Council but by a judge's immediate senior or an evaluation board.

In some countries, however, (Bulgaria, Spain, Italy and Portugal), evaluation is carried out by the High Council either directly (or where appropriate, by a special commission established within the High Council) or through inspectors appointed by that Council.

3) The High Council uses evaluations on a frequent basis:

In the vast majority of countries, individual evaluation of judges and appraisal of their merits plays an important, if not decisive, role in their career development.

Evaluation findings are often used by the High Council in the context of appointment or promotion processes.

In some cases, individual evaluation of judges is used by the High Council as a means for assessing the global operation of the judicial system.

In Germany and Austria, where there is no institution comparable to a High Council, evaluations are also used in appointments and promotions.

4) The High Council is rarely an appeal body for challenges made against individual evaluations:

Most countries provide for the possibility for a judge whose performance has been evaluated to challenge the findings of that evaluation.

Appeal bodies vary according to country; an appeal may, for example, be lodged with:

- the immediate superior,
- the evaluation board,
- ordinary courts,
- administrative courts or tribunals.

From the information that we were able to gather (not all the national presentations addressed this question), the High Council functions as an appeal body for individual evaluation in Portugal and Romania alone.

F) Conclusion:

1) The enormous diversity of the systems that exist for evaluating judges, which was mentioned at our meeting in Rome, has been examined and explained in some detail by our group.

However, I would like to highlight a certain tie that binds all of our diverse judicial systems and which relates to pressures exerted by increasing demands on those systems due to importance placed on quality and efficiency.

Whatever the level of consideration given to a judicial system and the individuals working within it, no system can escape the interrogations of citizens on the issues of quality, judges and rulings made by them.

In this context, the existence of mechanisms for individual and collective evaluation, depending on the case in question, is naturally considered a useful and necessary element of any judicial system.

I have no doubt that over the course of the next few years every judge will start to feel the effects of these demands in their daily activity.

2) As this analysis concludes, it would be worth noting the extent to which our systems have the potential for development: a number of systems are new and others are in the process of reform.

We should therefore assess the need to keep information compiled up-to-date.

3) One key question remains: that of the credibility of evaluations carried out and therefore the assessment of the effectiveness and performance of systems for evaluating judges, which was not addressed by any of the national presentations.

We can only deduce from the up-to-date nature of numerous individual evaluation systems presented and the reforms currently underway that the question of how effective evaluation procedures are lies at the very core of reflection on our different legal systems.
