

Session 6. Chairman: Christina Biebesheimer. Jean-Paul Jean. “The Efficiency of Justice in Europe”

In deciding "to develop the evaluation functions" of the European Commission for the Efficiency of Justice (CEPEJ) in the Action Plan adopted in Warsaw in May 2005, the Heads of State and government of the Council of Europe's member states have expressed their support to the process set up by the CEPEJ and wish to strengthen it. This exercise aims to have a detailed knowledge of the functioning of the justice system in all European states and has become the corner stone of the action of the Commission. The process aims to define a set of quantitative and qualitative figures to be regularly collected and equally processed in all member states and to bring out shared indicators of the quality and efficiency of court activities in the states of the Council of Europe. The CEPEJ set up in 2005 a working group on the evaluation of judicial systems in order to set up a questionnaire that can be used in a systematic way for regular evaluation exercises. The six experts of the CEPEJ worked with national correspondents who were considered as the main interlocutors of the experts when collecting new figures and as those primarily responsible for the quality and reliability of data. The scientific expert of the CEPEJ had many contacts with national correspondents to validate and clarify the figures. The 2006 edition of the report is based on the 2004 figures.

The report collects three main types of data:

- Quantitative data (demographic and economic data, budgetary data concerning the judicial system, access to justice and courts, organization of the court system...)
- Qualitative data, on which each country is expected to provide thorough justification. National replies contain descriptions of legal systems and explanations that greatly contribute to the understanding of the figures
- Significant illustrations of the functioning of courts, covering 4 fields (voluntary manslaughter, robbery with violence, divorces, dismissal procedures within the private sector).

The report aims to develop a dataset based on common standards that will allow to define a large number of indicators. 40 key indicators are expected by 2007. Among other purposes, they will help Eastern European countries to identify absolute priorities in order to improve the functioning of their judicial systems (for example, IT systems). The report is also oriented towards the satisfaction of the users of the courts and victims.

Several improvement suggestions are being considered. They concern the definition of key indicators and the definition of the performance of judicial systems. Special effort should be dedicated to stressing the difference between funding and performance (the level of budgetary expenses does not reflect the quality of justice).

Discussion

Nuno Garoupa

As a consumer of these indicators, I know how it is difficult to get hard data on judicial systems. The output of the project is positive in many aspects. First, it provides a very important work in harmonizing concepts and definitions through Europe and this will help to compare things. Second, it creates an obligation to ministries to quantify their activities and this contributes to changing the culture within the ministries of Justice. Third, the report avoids cautiously ranking – which is not the case for most other institutions and works.

– but this raises the question of quality control of info

Three remarks can be done on the data basis.

1. There is a standard problem with measurement errors when provided by ministries. Apart from the fact that they want to look good on the report, data might be biased by the questionnaire itself and the very questions that are asked. For instance, judges' salaries in Portugal are quite low but judges have subsidies for the housing, which the report does not take into account.
2. Also, it seems fishy that some countries (like Italy) could report plea bargaining and no negotiated penalties.
3. There are missing data on the price of justice (what is the price of justice – that differs from budgets?), judicial careers, evaluation and compensation of judges, budgets, jurisdictional structure, data on specialized courts and the way competences are allocated in different countries.

Moving from data to indicators, the report does not propose any judicial performance indicators or whatsoever (clearance rates...). A question is: the indicators on length of proceeding are assumed to be not comparable although in fact we want to make it comparable. How is it computed by systems? Looking at courts, the most interesting is the second statistical moments – and not the first. The problem is not the average, but standard deviation is what is interesting. Many cases finish in the first 3 months and many cases finish after years. When we have a bimodal distribution, average is not good but “wrong”!

At the conceptual level, I am also worried that the project is called “efficiency of justice”. This is not the same thing that “efficacy”. If we want to perform efficiency analysis, we need data on benefits and value to be produced, while here we only have data on inputs and costs. Countries with the lowest cost is the most efficient ! This is a methodological problem.

I am favourable to the development of good performance indicators. But what are we looking for? As an academic, I believe that we need a model of justice or a theory to do so. What is the model of justice behind the report?

Roger Bowles

The paper provides us with a lot of useful data. But there is a tension between the expression of objectives: “the most precise picture possible of the judicial systems of 45 European states” vs. “to assess the efficiency of judicial systems”. And it lacks key elements of the foundations for such a task: how do we pass from description to efficiency? Let me report some of the objectives of the judicial system. The definition and protection of rights is a central function of law and the state. The judicial system represents a key part of the public provision to support this function. It finds expression in a wide range of institutions including criminal, civil, administrative and other types of law and procedure. The key outcomes of provision can be summarized as follows:

- Are rights and responsibilities clearly defined, well understood and reliably enforced?
- Are legal decisions made in a way which is 1°) predictable and timely? 2°) even-handed, acceptable and fair? 3°) affordable to all citizens and groups?

These are primarily consumer satisfaction measures. They capture the demand side of the market. Until they can be proxied reliably we cannot say anything about the efficiency of provision since that requires judgments about the costs of provision relative to what is being delivered. The consumer demands can in principle be met in many different ways: e.g. private law and private arbitration, criminal law/public prosecutor/public court/public defender, a mixed economy solution with elements of public and private provision. More generally, considering the efficiency of provision, how is provision of decision making organised and funded? What types of market failure might occur and how might this be appropriately reflected in the organization of the judicial system?

The implications are that from a descriptive perspective we need to know what is being delivered and through what (formal and informal/public and private) channels. From an analytical perspective, we need to know how the costs of providing service of comparable quality vary across countries, whether it is possible to identify efficiency frontiers (through SFA or DEA), what the trade-off between speed of resolution, cost per case and quality of justice dispensed looks like, and what drives differences in the solutions countries choose. To conclude, the report is a very useful start in an under-researched field. It might benefit from more motivation for measures used, more recognition of institutional alternatives, more discussion of outcome and output measures, more derivation of 'efficiency' measures, and more discussion of the key purposes to which findings are to be put.

Jean-Paul Jean

The conclusion of Nuno Garoupa was actually my introduction. The system of values adopted is that of the COE, *i.e.* efficiency and respect of human rights. What matters is the satisfaction of citizens and this also relates to Roger Bowles' point on consumers' demand.

Concerning the question of how to distinguish private and public enforcement, we have gathered only hard data, what is measurable. How to take arbitration into a statistical system? It is impossible because parties wish to keep their arrangements confidential. By contrast, any decision made by a judge can be taken into account in public statistics.

On the demand, A.6 (Human Rights Convention) considers that a key principle is the notion of « reasonable delay ». The user of the judicial system will ask two questions: how much does it cost ? What is the delay ? This is the reason why we want to improve the foreseeable nature on both aspects. Also, this can help to choose between settlement and trial and, therefore, contribute to the regulation of the penal system.

Concerning judicial salaries, we have faced difficulties in measuring net vs. gross salaries – a choice has been made to consider only net salaries and to gather further data separately – this gives academics an invitation to work on these data to refine measurement.

It is clear that the average delay of procedures is not informative – because the notion of average case is not sensible. The data has to be integrated with other separately gathered data. We have not found a consensus on the definition of efficiency by academics. Therefore, we can try to measure performance and compare performance to costs. We have to undertake a pragmatic approach.

Question time

Stefan Voigt

The usage of private arbitration could be an indirect quality indicator of justice – the more private arbitration, the lesser the quality of justice. Do you provide an interpretation of your data ? Data to some extent may reflect trust of people in their prosecutors and in the public justice, or they may simply reflect the utilization of the judicial system. Different interpretations are possible.

You said your objective was priority setting. Before doing any priority setting, you have to have a model – I'm skeptical of the ability to do this on the basis of these data.

Giuseppe Dari-Mattiaci

We need a model of the goals of justice. Also, do we have an idea of how judges interact within the judicial system? Do differences across countries reflect the different ability of getting cases

in courts or the different ability to get cases out of courts? We may need to build an indicator of the conflict – data on conflicts exist (cf OECD; for instance, dismissal data).

An analysis of variance could be interesting to value the output of justice (high variance in judicial decision may discourage people from resorting to courts).

Benito Arruñada

I disagree with using both the words efficiency and efficacy – what is measured is costs and budgets. Efficacy has to be measured as an outcome. A general comment is that there is a temptation to use measure of satisfaction as proxies for quality. But what is the definition of the valuable user here? Satisfaction by citizens as an indicator of output would be a very poor measure – many organizations are measuring trust towards institutions. What we need is some more specific measure of output that allows evaluation of policies. Moreover, it is tempting to use consumer satisfaction as a quality indicator, but the relevant user is the user with information about the system and his working, otherwise we may get the wrong info – all consumers are indirect users of the courts through businessmen.

Jacques Ould-Aoudia

The report is of very high quality. One major step is that it obliges to raise the question of the norm. It provides a *de jure* approach and an input / output measure. The issue of outcomes is more problematic.

Answer to Stefan Voigt

Arbitration does not allow us to measure the quality of a judicial system alone because arbitration is determined by other strategies like confidentiality. As for the priorities, we try to identify them progressively. The statistic resources have not been fully exploited so far.

Answer to Giuseppe Dari-Mattiaci

Information about conflicts is given by litigation rates and the ratio lawyers / population. One can observe that this ratio is higher in Southern Europe than in Northern Europe. This may be due to Protestant values in Northern Europe. The same observation can be done in France. I completely agree with the remark on variance. The statistical system will get more and more sophisticated.

Answer to Benito Arruñada

Reports on users are very important when they study actual users of the judicial system at the local level and do not only reflect general and poorly informed opinion.

I would like to conclude this intervention by inviting any of you to send me an e-mail with his or her “top 5” quality indicators, based on the reading of the CEPEJ Report.