THE EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)
Reforming European justice systems – mission impossible?"
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1 INTRODUCTION

My paper concerns the Council of Europe's (CoE) work to improve justice. It explains and exemplifies a policy strategy that the Council applies in it's strive for implementing the demands of the European Human Rights Convention (*ECHR*) on the judicial systems in Europe.

The Convention obliges all member states to put up efficient systems for remedying violations within their own national legal systems. If such systems are missing or do not provide sufficient redress, most member states now accepts that everyone is free to bring their case before the European Court of Human Rights (*ECtHR*). Over the years the Court has produced an extensive case law on violations of the provisions that protects people's access to justice. It develops and concretizes the general wordings used in the text of the ECHR.

However, international complaint mechanisms are only one type of instruments for disseminating human rights. In addition to judicial instruments like the ECtHR, we find policy oriented or informal vehicles for implementation of human rights like the one I will focus upon; namely the *European Commission for the Efficiency of Justice* – usually abbreviated "*CEPEJ*" – from the French version of its name. As one of the numerous committees of the Council of Europe it focuses on the development of the judicial systems of the member states.[2]

I start with an overview of the two main factors that explain that establishment of CEPEJ, namely the provisions on access to justice in in ECHR and the large volume of complaints forwarded to ECtHR and outlines its organization and working methods. (2) I then turn to a deeper analysis of two main tasks of CEPEJ (3-4) and end with some viewpoints on the powers that CEPEJ possess to fulfil them.

2 CEPEJ AND WHY IT WAS ESTABLISHED

2.1 Human rights background

CoE established CEPEJ as a means for improving the judicial protection granted by ECHR, especially in:

- art 6: Right to a fair trial;
- art 5: Right to liberty and security;
- Article 13: Right to an effective remedy.

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[1] The author has participated in the work of CEPEJ as an expert since 2003. Views and opinions in this paper are the author's own and do not express any official opinion of CEPEJ.

[2] Abbreviations used in the text:
Council - Council of Europe; also abbreviated *CoE*
CEPEJ - European Commission for the Efficiency of Justice
(European) Convention - The European Convention on Human Rights (1950); also abbreviated *ECHR*
(European) Court - The European Court on Human Rights; also abbreviated *ECtHR*
References are incomplete. All CEPEJ documents referred to are downloadable from: http://www.coe.int/t/dg1/legalcooperation/cepej/default_EN.asp? unless otherwise stated.

The human rights doctrine on access to justice is essential. Human rights bodies have repeatedly said that human rights should be effective and work for everyone, including the poor. Several major principles for the organisation and functioning of courts can be read from the wording of ECHR art 6. As framework of this paper I will emphasize that

- the courts' competence and the organization of the court system should be established by law;
- case handling should be timely;
- everyone should have access to court when needed;
- everyone is entitled to representation before courts on an equal footing, ("equality of arms") and to legal aid when necessary for proper representation.

2.2 Timeliness at the European Court of Human Rights

We might assume that it varied significantly how well article 6 was implemented in the national justice systems of the founding member states when ECHR became operational in 1953. Although justice improvement has been a significant part of the human rights policies of the Council of Europe since the start, the triggering event for establishing CEPEJ in 2002 was the increasing problems that ECtHR experienced with timeliness. The Court had for long received complaints in tens of thousands each year; resulting in a steadily increasing backlog despite an extensive screening.

Some figures might provide an impression of the problems that triggered the establishment of CEPEJ. In 2005 the Court had 44,000 incoming cases, and a caseload of 82,000, of which 72,000 qualified as backlog. Compared to three years before, the increase of incoming complaints was over 7,000.

Analyses showed that the bulk of the complaints related to violations of Article 6 on fair trial, with by far the largest category being violations of the entitlement to trial 'within reasonable time'. It appeared as a detrimental paradox that the Court – designed to be the prime protector of swift trials – was itself unable to comply with the requirement.

Most complaints came from jurisdictions in Southern Europe, and in Eastern Europe that joined after the dissolution of the Soviet Union.[3] One theory is that a Mediterranean legal culture exists that for a complex of reasons has become insensitive to the evils of delay. Statistical evidence is, however, insufficient.[4]

2.3 Overview of the organization, working methods and areas of CEPEJ

The steering bodies of the Council wanted to remedy the problem both by making national remedies against human rights violations more effective, and by removing the causes for the complaints by improving the quality and speed of the member states' judicial systems and decided to establish CEPEJ from 2003. Resolution *(2002)12 on establishment* outlines five major tasks for CEPEJ:

- examine results achieved by the different judicial systems by using common statistical and evaluation methods;

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3 According to oral information from the president of the court, L. Wildhaber, Presented at the CEPEJ Plenary on 7-9 December 2005 and recorded by the author.

The forty-seven countries of CoE cover a wider area than the traditional geographic concept of "Europe". For example is Turkey a member.

- define problems and areas for improvements and exchange views on how the European judicial systems work;
- develop better tools for analysing judicial systems and models for improving them that are well adapted to the existing problems in the member states;
- assisting individual member states on their request in how better to comply with the human rights requirements;
- suggest, if necessary, that the relevant steering committees of the Council of Europe draft new legal instruments or amendments to existing ones.

The bodies of CEPEJ are**:**

- a plenary with representatives from all member states that meets twice a year;
- a bureau with four members elected from the representatives, that function as the board of CEPEJ;
- 1-3 (or more) working parties with a maximum of six expert members.

CEPEJ might develop indicators, collect and analyse data and define measures and means of evaluation. It might also issue reports containing statistics, best practice surveys, guidelines, action plans, opinions and general comments. The Commission might establish collaboration with research groups and invite qualified persons, specialists and NGOs for exchange, arrange hearings and create networks of professionals working in the justice area.

CEPEJ is not a supervisory or monitoring body, which means that independent *control* of the member states' fulfilment of their human rights obligations on efficient justice is outside its scope. Improvements presuppose voluntary acceptance and collaboration from the states. Still the data gathered by CEPEJ – for example on unrepresented poor parties in trials – might indicate that human rights obligations are violated.

When handling violations of ECHR article 6 the Court has repeatedly stated that Article 6 (1) of the Convention imposes on the Contracting States the duty "to organize their judicial systems so that they can meet its requirements."[5] Member states are free to choose varying strategies to fulfil their obligations, but their systems must work in practice.

CEPEJ task is to provide them with sufficient tools and encourage them to use them. Ambitions are far reaching. Although ECHR only provides *minimum* rights that governments must not violate, states are free to establish better systems. CoE often encourages such developments. Through CEPEJ it has launched an ambitious policy strategy for improving the efficiency of European judicial systems on the assumption of voluntarily acceptance by the member states. Strategies concern improvements in both the quality and the speed of courts above the minimum level suggested by the case law of ECtHR.

CEPEJ is now in its tenth year. My main question in the paper is: How successful has it been in fulfilling its mandate and reaching its goals?

CEPEJ main fields of work at present are:

- Statistical evaluation of the judicial systems in CoE's member states
- Identifying and developing measures to reduce delays and improve time management

[5] See for example Hadjidjanis v Greece (Judgment of 28 April 2005).

- Bettering the quality of the overall management of judicial work
- Improve the enforcement systems
- Extending the use of mediation as a means to reduce court use.

As the title of my presentation suggests, CEPEJ is not purely a success story. First, the mandate is extensive and the challenges are huge. Secondly, resources are limited. Thirdly, willingness and capacity to reform their justice systems vary significantly between the member states. Obviously the present activities do not cover all parts of the mandate. Expressively and tacitly priorities have been made. Limitations in CEPEJ's approach can easily be pointed out:

Emphasis on legal aid, which is paramount to access for the lower classes, has been limited. Criminal justice has not received much attention. Alternative channels for handling legal problems, like informal problem solution, administrative procedures, ombudsmen, consumer complaint systems and business arbitration have not been in focus, but mediation, has received some attention. Neither has the supply of legal advice as a means for a rational use of the courts drawn much interest. CEPEJ has given more attention to the judicial systems in Southern and Eastern Europe than to the Western and Northern systems since they are supposed to have significantly more deficits. The latter are mainly forwarded as models for improvements and standards for the less efficient ones.

2.3 Further analysis

In the rest of the paper I limit my analysis to three issues. I think that a more in depth analysis of selected tasks will give you a better picture than attempting at an overview of all CEPEJ activities. First I look into the two tasks that CEPEJ has put most of its efforts into, and discuss what has been achieved. The first one concerns the collection and issuing of reliable statistics on the main characteristics of the European justice systems. The second is about developing strategies for timeliness without reducing judicial quality. I intend to show what CEPEJ has and might achieve in the two most prioritized areas. Additionally I discuss legal aid which also seems central to from its mandate. My point is to exemplify important challenges not prioritized in practice by CEPEJ during its first decade of work. I will end with some reflections over the powers of CEPEJ and whether they are sufficient for its mandate.

3 TWO PRIORITIZED AREAS

3.1 European judicial survey

A coherent reform policy presupposes a precise understanding of how the different judicial systems in Europe work and tools that can be used to locate problems. As recommended in its mandate, one of CEPEJ working groups[6] has gathered statistical data for measuring and evaluating the performance of the judicial systems in Europe. Starting in 2004, it has become a comprehensive exercise:

An extensive questionnaire is sent to all member states every second year. The last European survey of judicial systems was published in 2010 from 2008-data, gathered from 45 of the 47 member states. Only Germany and Lichtenstein are missing among the 47 member states.[7] Together the 45 jurisdictions comprehend

[6] CEPEJ-GT-EVAL

[7] Germany is missing due to its federal structure. The judicial systems are administered by the "Länder", not the federal government. Germany therefore lacks national judicial statistics and the statistics produced by the "Länder" is not uniform. The federal government also thinks it lacks authority to put up

over 700 mill people.[8] The result is an extensive report of almost 400 pages, packed with information, available at the website of CEPEJ.[9] It boasts of some 2 million data entries,[10] and contains statistics on:

- Public expenditures on judicial systems (courts, prosecution, legal aid)
- Access to justice and the users of the courts
- Fair trial, workload and court efficiency (Organisation, caseloads, backlogs, enforcement)
- ADR (Alternatives to courts)
- Professional actors (Judges and staff, prosecutors, lawyers, notaries, interpreters)
- Major trends in the development of European judicial systems[11]

A comparative study of 45 jurisdictions is a demanding task with vast methodology problems. From a researcher's point of view, there are certain peculiarities connected with studies carried out under the auspices of an international organization of states:

All data in the survey has to be collected through official channels. The ministries and court administrations in the member states appoint national correspondents that provide the information and answer the questionnaire. If research or other sources show differing data, the study has to stick to the official version. CEPEJ might question the received information in private and the correspondent might agree to changes. Obvious unreliable information might be let out, but as an international body of governments, CEPEJ cannot substitute information it has received from its member states with information from other sources.[12]

The judicial systems in Europe differ significantly, if not drastically, both in structure and in the conceptualization of its elements and functions. National statistics differ similarly. The huge variations also mean that the correspondents perceive many of the questions differently, and that answers and statistical information on the same question might well relate to features in the different judicial systems that are not fully comparable. The concept of courts, for example, varies significantly in the judicial statistics of the member states.

Using a functional approach by defining certain essential functions of judicial systems independent of the national conceptualizations also is difficult. If CEPEJ defines for example "judicatory tasks" as meaning the application of law on facts by institutions independent of government and asks for statistical information about the institutions that perform such functions *independent* of the national structures and conceptualizations, the result often is 'blank' answers since the national statistics might lack entities that corresponded to the functional description. Some states might also substitute the information asked for with statistical information on entities that partly perform judicatory tasks according to the CEPEJ definition, partly other tasks

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guidelines on uniformity and develop national statistics from the statistics of the different "Länder". Obviously this means a significant gap in the European statistics of CEPEJ.

[8] CEPEJ 2010 p. 11.

[9] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

[10] CEPEJ 2010 p. 8.

[11] European Commission for the Efficiency of Justice 2010 *European judicial systems. Edition 2010 (data 2008). Efficiency and quality of justice. (CEPEJ 2010)* p 3-4.

[12] CEPEJ 2010 p 6.

without being able to separate the judicatory part. Others might provide statistics only from institutions that purely perform judicatory tasks according to the definition, and leave out statistics from other institutions that mix judicatory functions with other tasks.[13]

CEPEJ holds regular meetings with the national correspondents to remedy the problem and issues lengthy instructions on how to fill in the questionnaire. The questionnaire also underwent major revisions up to the last collection of data in 2008, which is similar to the version used for the 2006 data. The data collected is now thought reliable enough for comparisons over time.

Although 45 states participate, it does not mean that they have delivered information on all questions in the questionnaire. The heterogeneity both in the judicial systems and in the national statistics means that many questions are difficult or impossible to answer. The response rate therefore varies significantly from table to table. Some might have data from less than half of the 45 states.

However, missing answers also indicate a lack of knowledge and control from the authorities in question. To CEPEJ such findings also are of value, because they indicate a need for improvement. When questions on time management result in limited response from jurisdictions with the largest shares of complaints to ECtHR, they indicate that proper statistical tools for controlling time use are lacking.

CEPEJ has been reluctant to present data in a way that might be conceived as *rankings* of the states. The last report explicitly says: "Indeed, comparing does not mean ranking."[14] Therefore, reports mostly have presented statistics alphabetically according to the names of the states, although some data also have been ordered according to numeric value. Comments have been sparse, mainly limited to what can be read directly from the tables and figures.

CEPEJ also has been reluctant to analyse the immense variations in the figures. The main justification is fear that such analysis might easily amount to criticism of several states. The differing quality of the data also might lead to severe misjudgements of the findings.

From a scientific point of view such presentations often appear unsatisfactory, and the alphabetic ordering makes it difficult to read essential information from many of the tables and figures. However, the 2010 report contains more analyses and rankings than the previous versions, and CEPEJ encourages everyone interested to make their own analysis of the findings. The data sets used in the last three reports are now available from the website of CEPEJ.[15]

Due to the vast methodology problems described, one might ask if the European survey project is too ambitious. It is well known that international academic studies of judicial systems that use statistical methods for comparisons, have been vulnerable to the criticism of whether they actually compare the same phenomenon. Still I find the CEPEJ study interesting and capable to produce data of value. It is a huge

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[13] In Norway, prosecution in criminal cases is carried out both by prosecutors that have prosecution as their main task and a much larger number of prosecutors that mix prosecution with police work of different kind. Until 2010 statistics from Norway only contained the judicatory work of the full-time prosecutors (the Higher Prosecutor Authorities. In the last edition also the police prosecutors are counted, but not their staff, see CEPEJ 2010 p 181-182. The full chapter on criminal prosecution provides several illustrations of the variations and challenges connected to the development of common judicial statistics for Europe, L.C. p. 181-194.

[14] CEPEJ 2010 p. 10.

[15] See footnote 2.

enterprise. It includes many jurisdictions that have been absent in law and society research. More than 100 people have been involved in the data collection of the last report. The leading French newspaper “Le Monde” spent a full page on the 2008 report when it was published. Also the last report has received significant media attention, see the CEPEJ website.[16]

However, some advantages also connect to the methodology compared to ordinary research. Since the governments of the jurisdictions studied have decided to set up CEPEJ themselves and also confirmed the study, their commitment to providing the data asked for is far greater than in a study conducted by an independent institution like a university or a research institute. They also provide data usually available only for internal use. Some states have developed new national statistics to better contribute to common European statistics on judicial systems. Such efforts also mean improvements in the national statistics as a tool for internal administration of justice, which is also an objective of CEPEJ.

3.2 Delay

3.2.1 The problem

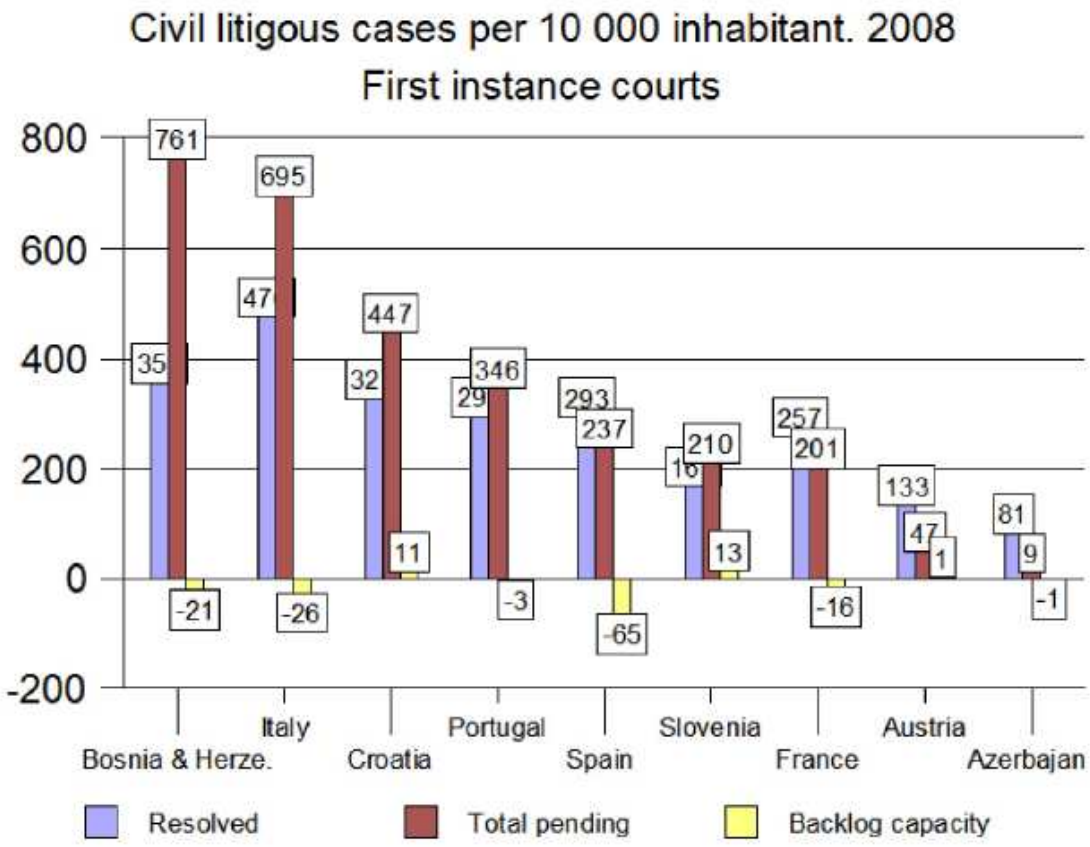
I will now turn to CEPEJ work on combating delay and give some concrete examples of the usefulness of CEPEJ statistics.

Timeliness is one of the major principles embodied in ECHR art 6. Cases should be finalized within “reasonable time.” If we look at the European survey, we will see that severe problems concerning time use still prevail in several states. Time use differ with type of cases and the European survey distinguishes between litigious and non litigious civil cases, land registry cases, business registry, administrative law, enforcement cases, severe criminal cases, misdemeanour cases, etc. States are ranked alphabetically in all tables. They should be looked upon as raw data that need further refinement.

In figure 1 I have selected some of the states with the largest backlogs of civil litigious cases and compared them to the two states with the smallest backlogs. It might give you an idea about the challenge. [17]

[16] See footnote 2.

[17] Source: CEPEJ 2010 Appendices, table 6 p 302



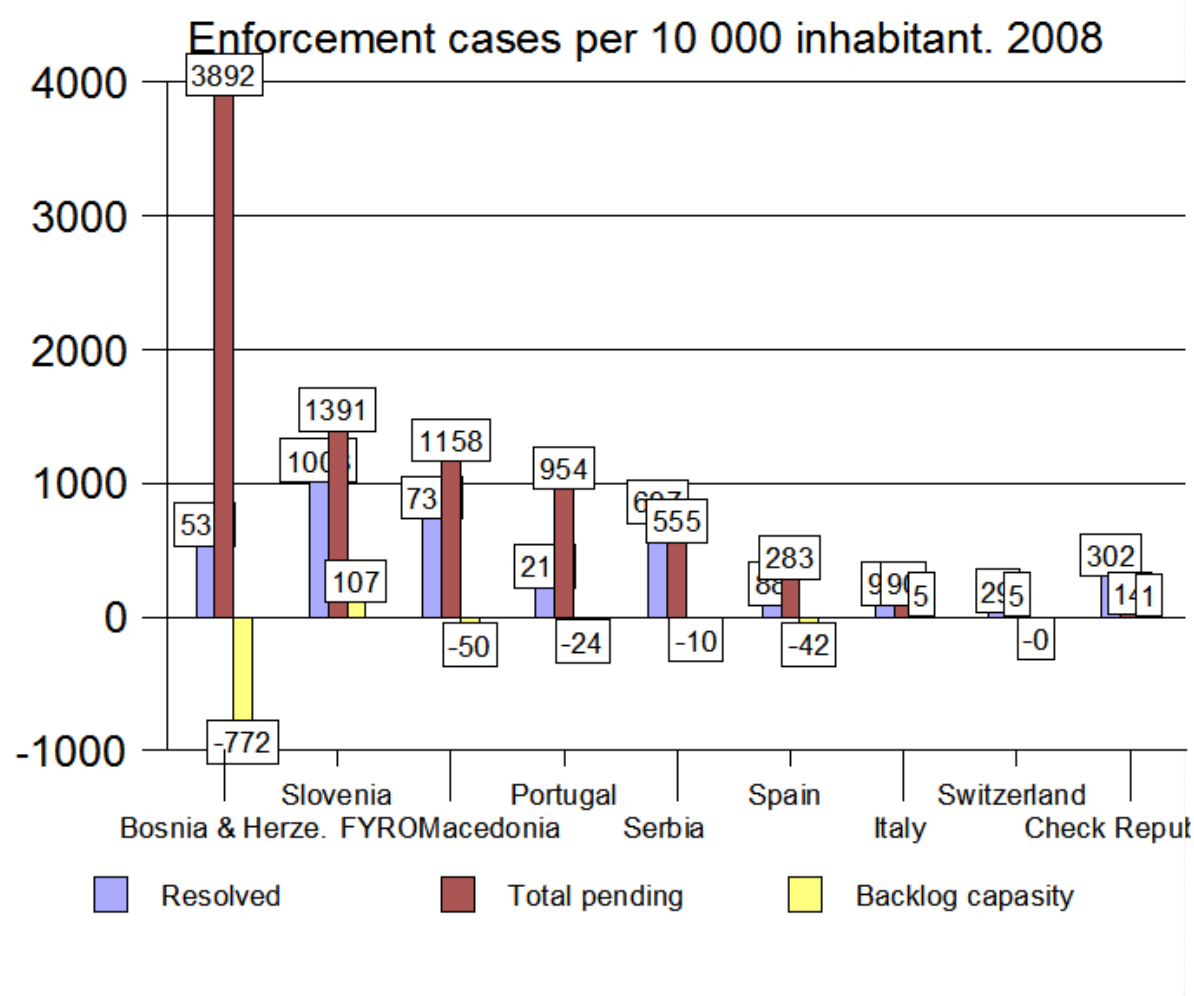
Bosnia and Herzegovina had a number of pending cases more than twice the number of incoming cases in 2008. Backlog capacity is negative and means that the courts received more cases than it resolved and that the number of pending cases increased in 2008 and will continue to do so unless the number of incoming cases decreases or the capacity increases. The situation is quite similar, although not just as serious, in Italy and Croatia and perhaps in Portugal.

Spain gives reason for concern due to the large negative backlog capacity that is far greater than for any other country in Europe. If this trend continues for three years, the number of pending cases will almost surpass Croatia.

If we look at Austria and Azerbaijan, the picture is very different. The number of incoming cases per 10 000 inhabitant in Austria is one fourth of the number in Italy and only one sixth in Azerbaijan. People's use of the court system is far lower in these two countries than in the countries with the most clogged courts. The number of pending cases is insignificant compared to Bosnia and Herzegovina and Italy. No serious backlog problem seems to exist.

A brief look at enforcement in figure 2 adds to the picture. It does not help much if the courts are speedy in delivering their final judgements if the execution of them is ineffective.[18]

[18] CEPEJ 2010 table 11 p 305



The figures for Bosnia and Herzegovina are frightening. They mean that enforcement is highly ineffective. The large negative backlog capacity also means that the situation is rapidly worsening. Also Slovenia, Former Republic of Yugoslavia (FYROM), Portugal and Serbia have significantly more enforcement cases pending than litigious civil cases.

Although there are many limitations in the conclusions that can be drawn from the CEPEJ statistics, they clearly mean that the "reasonable time" criterion does not work satisfactorily in several jurisdictions. However, CEPEJ has not come far yet in explaining *why* it is so. More research is sorely needed.

3.2.2 Working Methods of CEPEJ SATURN

As mentioned, CEPEJ established a separate working group on time management from the start. It is now named the "SATURN Centre for judicial time management" after the Roman god of time. CEPEJ also has established a network of "pilot courts" with members from most member states that are used for providing information about the challenges in the member states, best practice ideas and also to test out remedies developed by SATURN.

SATURN has issued several reports and guidelines for clearing out cases within the limit of “reasonable time” set by article 6. I will give an overview of the most significant ones. They are available at the CEPEJ website.[19]

[19] See footnote 2.

Framework Programme.[20] At the start in 2003 a working group developed a basis document titled 'A new objective for judicial systems: the processing of each case within an optimum and foreseeable time frame'. The document was named 'Framework Programme' and contains a wide range of general strategies – named "action lines" – for increasing the speed of European judicial systems. Most of them concern time-management systems for court and court administrations and has guided the later work of SATURN. Among them are:

- agreed time schedules between the court and the parties;
- increased use of ADR;
- better measures against delaying tactics;
- complaint systems against delay;
- measures that reduce the need for appeal;
- more use of multi tracking of cases instead of joining all in one queue;
- Increased attention to vulnerable parties;
- Involvement of the organisations of the actors in time management;
- Increased use of ICT tools.

From the word "optimum" we read that the ambition was not only to make the minimum standards of ECHR art 6 expressed in "reasonable time" effective, but to promote a time use that satisfies all well founded expectations of speedy courts.

Guidelines.[21] The "SATURN Guidelines for judicial time management" adopted in 2008 contains measures both for the courts and for policy makers and administrative authorities. The Guidelines include an essential appendix on time management statistics for the courts – European uniform guidelines for monitoring of judicial timeframes (EUGMONT), which is used in the European Survey.

Implementation project.[22] It does not help to issue sensible guidelines if they are not used. SATURN therefore launched an implementation program on selected guidelines, meant both to stimulate courts to identify weaknesses in their time management systems and to remedy them as far as possible. Especial focus is put upon warning systems against possible violations of the "reasonable time" criterion. After a test program in seven pilot courts, an implementation guide was adopted in 2011.

Check list[23]*.* The "Time Management Checklist", adopted in 2005, is a tool for internal use by the courts and national judicial administrations. The purpose is to improve the collection of appropriate information and the analysis of the duration of judicial proceedings and help in reducing undue delays, ensure effectiveness of the proceedings and provide necessary transparency and foreseeability to the users of the justice systems**.**

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20 *CEPEJ (2004)*, 19 Rev 2. "A new objective for judicial systems: the processing of each case within an optimum and foreseeable time frame". A new, updated strategy is under preparation. (CEPEJ-SATURN(2011)5Rev2)

21 CEPEJ(2008)8Rev.

22 CEPEJ-SATURN(2011)2, CEPEJ-SATURN(2011)9

23 CEPEJ(2005)12Rev

Best practise compendium[24] is a compilation of time management practices collected especially from the pilot courts, but also from other available sources.

Northern Europe study.[25] The study: "Time management of justice systems: a Northern Europe study" contains a broad collection of time management strategies described in governmental reports from Northern Europe governments. Most tools address policy makers and administrators of justice systems, but several also address the courts. Part II contains tools developed for time management in criminal cases at the police and prosecution, but many of them might be adoptable by the courts.

"Reasonable time" in the case law of ECtHR.[26] The report "Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights" analyses the major considerations behind the "reasonable time" standard (Article 6 ECHR article) and spells out the general deadlines that can be extracted from the judgments of the European Courts of Human Rights.

Most courts only measure their own time use, while the ECtHR looks at the combined time use including appeals and enforcement. In criminal cases measurement starts when a suspect is "substantially affected" by the investigation, which in many jurisdictions happens long before the case arrives in court. Still statistics on combined time use at the pretrial and trial stage are generally missing.

- *Statistical data on time use*. A fresh report from 2011 tries to remedy some of these problems. It contains statistical analysis of the *combined* time use at the first instance level and the appellate levels. Table 3 show one telling table from the report:[27]

[24] CEPEJ(2006)13

[25] CEPEJ Studies No. 2, 2006

[26] CEPEJ Studies No. 3, 2006, by Martine Calvez, under updating.

[27] CEPEJ-SATURN(2011)3E p 83

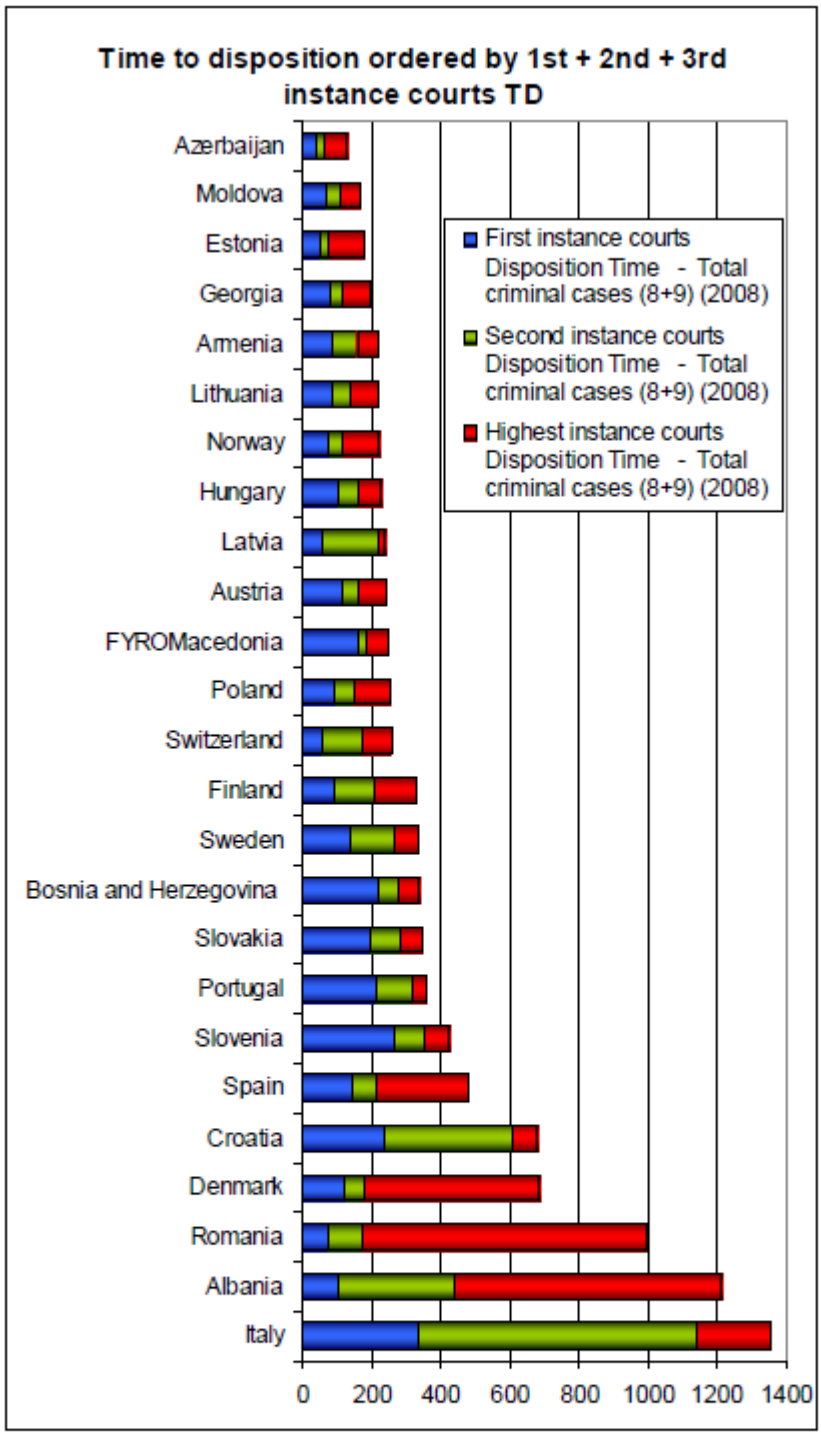

Figure 60 - First, second and highest instance courts total criminal cases (2008) Disposition time (in 25 states) ordered by 1s+2nd+3rd instance courts

Average disposition time in criminal cases varies enormously among the member states.[28] Some are slow at the first instance, others at the appellate stages and some on all of them. Italy comes out at the bottom both at the first instance (more than a year) and especially at the second instance that lasts for more than two years on average. However, third instance handling seems slower in several other countries – among them Denmark. Disposition time is long in several of the countries with large volume of pending cases, but nor without exceptions.

4 LEGAL AID – A NON PRIORITIZED TASK

Legal aid schemes are essential for access to court for the poorer part of the population both in civil and criminal cases. Art 6 (3) guarantees legal aid in criminal cases "… when the interests of justice so require". *Airy v. Ireland* from 1979 establishes the right to legal aid according to discretionary criteria for all cases with access to court according to that art 6 (1). They are:

- the importance of the case to the individual (applicant);
- the complexity of the case;
- the individual's capacity to represent himself;
- costs and the individual's capacity to carry them.

Over the years, the Council of Europe has issued several resolutions and recommendations on legal aid improvements. CEPEJ is well aware of the importance of legal aid schemes and its mandate also opens for a separate working group on such schemes. However, little has happened until now and the reason given is budget constraints. The questions on legal aid in the European Judicial Survey have not been many, mainly mapping some basic information about the schemes. In my opinion they still tell that European judicial systems face major challenges.

A listing of the total 2008 public expenditure on courts and legal aid shows huge variations. Monaco reports 161 euro per inhabitant and Switzerland 112, while Moldova used 2 and Ukraine, Albania and Armenia used 3 euro. The Netherlands used 80 euro and Norway 66.[29]

Looking specifically into legal aid, expenditures varied enormously among the states that could provide figures. While Ukraine used 0, 01 euro per inhabitant and Azerbaijan and Hungary 0, 02, England and Wales spent 35 euro per inhabitant and Northern Ireland 50. Norway spent 32 and the Netherlands 26.[30]

The legal aid budget only made up a very small share of the court budget in several countries, while the UK jurisdictions spent significantly more on legal aid than on courts. Norway spends approximately equally on legal aid and courts, while the Netherlands spend one third of its combined budget on legal aid and two third on courts. An analysis I did two years ago indicates that Southern and South Eastern

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[28] Disposition time is a theoretical figure:
"The Disposition time (DT)15: "compares the number of resolved cases during the observed period and the number of unresolved cases at the end of the observed period". 16 It is calculated by dividing the 365 days of a year by the case turnover ratio. It estimates the number of days necessary for a pending case to be solved in court…" (CEPEJ-SATURN(201)3E p 12). It is a rough, but still useful indicator, since actual time use might be different.

[29] CEPEJ 2010 fig 2.20 p 38

[30] CEPEJ 2010 fig 2.15 p. 32

jurisdictions with the seemingly largest problems with speed and backlogs, spends rather equally with the Northern and Western European jurisdictions on courts but far less on legal aid.

All countries responded that they provide legal representation in court cases in criminal matters and 43 in civil matters. Still it obviously varies enormously how extensive the schemes are in practice. All together Croatia provided 3 grants per 10 000 inhabitant, Armenia and Bosnia and Herzegovina 7, while the Netherlands reported 248, Northern Ireland 484, Scotland 598 and Turkey 830. Only 27 states gave data.[31]

The data gathered are rough and basic. I still believe they give an impression of an immense variation in the access to legal aid in Europe. Although the sources of error are vast, one cannot escape the impression that the enormous variation in legal aid funding among European countries also mean that the legal aid offered to the poorer part of the population differs significantly both in volume and quality. A proposition that one will find widespread violations of the entitlement to legal aid embodied in Article 6 in the countries with the poorest funding seems close at hand. The figures strongly suggest that states also prioritize very differently between civil and criminal legal aid. Not being able in ten years to address this serious and pressing human rights issue for the efficiency of justice to poor people in Europe, is in my opinion a serious shortcoming of CEPEJ.

5 CONCLUSIONS

5.1 Powers of CEPEJ

What are the powers that CEPEJ dispose of for fulfilling its mandate? What sort of tools can it use to influence judicial development in Europe?

According to its mandate CEPEJ is supposed to provide technical assistance upon request to any member of the Council of Europe in developing their judicial systems. It might also function as a catalyst for exchanges between different jurisdictions, and promote ideas of improving justice at seminars, conferences and other suitable events and use its website as a 'clearing-house' for studies and reform ideas. The main undertaking is to produce viable reform ideas, convey them to governments, interest groups and the public on the assumption of voluntary adoption by the states. Although 'gentle persuasion' might seem to be CEPEJ's main instrument for stimulating the member states to carry out judicial reforms, other mechanisms might add to its influence.

The Council of Europe is an international body that uses legally binding instruments, 'soft law', and other policy strategies to influence their member states. Its main bodies consist of representatives of the member states, which mean that major decisions usually build on a broad consensus. While CEPEJ itself is excluded from monitoring the member states, issue recommendations or use other instruments of international law, it might draft proposals when needed and forward them to the bodies of the Council that possess legislative power according to international law.

Still, ideology and appeal to the self-interests of the member states remains the main tools. As a human rights-based organization, CoE has a powerful image as the main promoter of human rights in Europe. All member states have obliged themselves to loyal implementation of the Convention and the case law of the Court. Although member states are free to fulfil their obligations with other means than suggested by CEPEJ, there is reason to believe that countries with deficits in their

[31] CEPEJ 2010 table 3.3 p 52-53

judicial systems will be receptive to reform models developed by CEPEJ. Since the other member states and the CoE back them, implementing these models will minimize the risk for being found in violation of ECHR.

ECtHR has referred to CEPEJ tools on time management in a number of decisions on alleged violations of the "reasonable time standard." One example is *Scordino* v *Italy*, see § 73 and 74.[32] ECtHR cited the 'Framework Programme', and said that establishing a compensation system for violations of Article 6, is not sufficient. Remedies must effectively prevent delay. Obviously such references significantly increase impacts if governments neglect relevant CEPEJ tools. They pressure member states to consciously consider whether to adopt CEPEJ tools or comparable ones, or run the risk of being found in violation of ECHR. In SATURN we think that such references should be made far more frequently than to day and work on a better dialogue with the ECtHR.

The Convention and the case law of the Court might also be used in national courts. ECHR article 13 obliges all states to provide an effective legal remedy in national law for securing everyone their rights under the Convention. Lawyers might allege violations of its provisions on access to court, both before national courts[33] and – if not successful – before ECtHR. New judgments will develop the case law of the Court and bear upon all 47 member states.

Governments dislike the Court finding against them. Since the Convention allows individuals to sue, the risk of being found in violation is significantly higher than for most other human rights instruments that do not provide for an individual complaint procedure. Several states prefer to operate with safety margins and change dubious rules or practices as a precaution instead of risk being found in violation of the Convention. These features add weight to the policy recommendations of the Council. Many states – often the small and rich ones – emphasize the development of human rights as an important part of their foreign policy. They are then vulnerable to complaints of not fulfilling them at home.

Legal aid activists might also use the human rights' framework in national debates as arguments for judicial reform. Such activism might help the national implementation. Amnesty International might provide a model. As an NGO, they *inter alia* focus on violations of the prohibition against cruel or unusual punishment, the death penalty, persecution and imprisonment without a fair trial, censorship and intimidation of political opponents to the regime in power, etc. They invoke public opinion, pressure groups and other governments to put pressure on the government responsible for the alleged violation. Similarly, pressures to fulfil human rights commitments on access to court might be brought to bear upon governments by activist organizations on judicial improvements

Another important enforcement vehicle comes from the accession process for countries wishing to join the European Union. They are all required to meet a set of conditions – the Copenhagen criteria – before they can become members. They must guarantee democracy, the rule of law, human rights and the protection of minorities. The standards applied on the judicial systems are derived from the provisions in the Convention, especially from Article 6. When monitoring reports show that their judicial systems and legal aid schemes of the applicant countries have deficits, they must sufficiently remedy them before they can join. Knowing the strong drive of several

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32 Case of Scordino v. Italy (No. 1) Application no. 36813/97

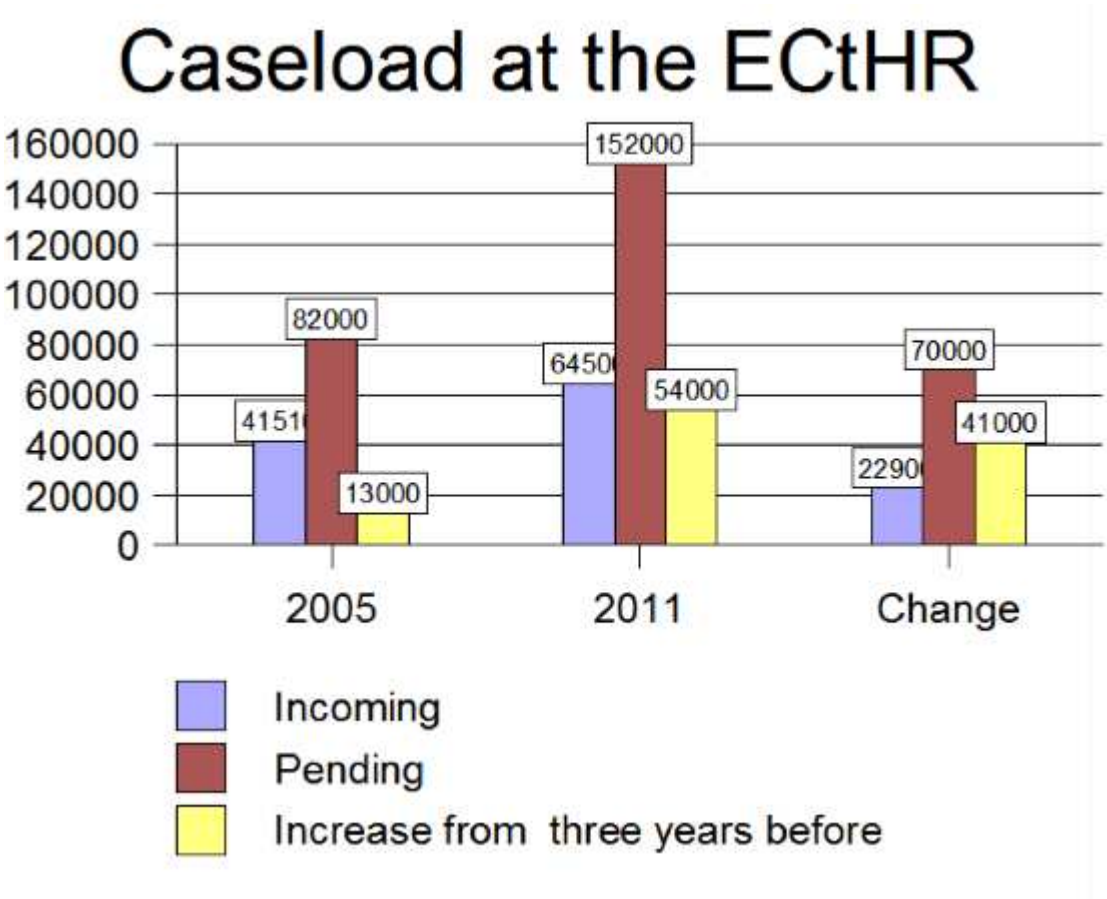
33 … or other bodies with the competence to function as a national remedy against violations of the ECHR.

states to become part of the Union, the accession process also facilitates the adoption of reform proposals from CEPEJ.

The accession of EU to the ECHR means that the case law of ECtHR will increase in importance to all EU members. There are signs that the human rights policies of the Council of Europe will receive increased attention from the EU. Since most of the states with malfunctioning justice systems either are members or aspire to become members, I think some hope exist that the EU accession to CoE will impact on their willingness to reform.

5.2 Impacts

In figure 1 I showed the backlogs of ECtHR almost a decade ago when CEPEJ was established. Figure 4 compare them to some present numbers.[34]



Incoming cases has increased with more than half and backlog has almost doubled. The challenges for CEPEJ and CoE are larger than ever.

[34] Sources: European Court of Human Rights Annual Report, 2002 p x, 2005 p 121, 2008 p 127, 2011 p 151 and president Wildhaber see footnote 3.