

Measuring judicial quality - Developing the EU Justice Scoreboard

(Discussion paper)

Keywords: quality of justice, measurable quality indicators, qualitative analysis of judgements

The efforts to create a 'judicial common space' within the EU may serve more than one purpose. First, they can strengthen the guarantees of the Rule of Law; secondly, they facilitate the evolving of a market-friendly legal environment within the EU by making adjudication predictable at European level; and last, but not least the cooperation of this kind amongst EU countries may lead to a deeper European integration.

As a first step we should map the current condition of judicial systems within the EU. The assessment of the functioning European judicial systems can be twofold:

1. content-oriented assessment: the examination of the enforcement of legal values, principles and important institutions which are shared EU-wide (e.g. the enforcement of the principle of 'presumption of innocence');
2. quality-oriented assessment: examination of the general quality of adjudication which may also be highly informative since the quality of the work of the judges has a strong impact on the successful implementation of the project of judicial common space.

In my contribution I focus the second aspect of the assessment of the judicial system. As a starting point we can establish that the goal of creating a judicial common space is not the creation of a total uniformity among judicial systems of Member States. We can see that in the United States the various judicial systems of the member states do not generate problems in the federal state organisation. However, the example of the United States also shows us that federal laws require a uniform enforcement in all member states. Learning from that example of the U.S., we have to examine the quality of the judicial work in EU Member States on two levels: on the level of European law (A) and national law (B).

A) As for the interpretation and application of European law uniformity is a fundamental requirement. In my opinion, the uniformity of the answers to legal issues can only be guaranteed in cases brought before the European Court of Justice. In other cases, the 'awareness' of the national judges should provide sufficient guarantees for the uniform application and interpretation of European law. When I mention 'awareness' I refer to the expectations that judges should have a clear concept of the political, economical and social background of European legal acts. If judges were aware of the purpose of the European legal provisions then they could interpret and apply them in a correct manner. (This kind of awareness is not required when 'traditional' national legal provisions are being applied, such as those of the Civil Code.)

It is my belief that it is the lack of the above-mentioned ‘awareness’ why judges tend to avoid direct application of EU law and that is the reason as well for frequent misinterpretation of EU legal provisions. The key for uniform, predictable and correct application of EU law may be a profound and practice-oriented training for national judges to make them able to focus on the values, principles and social interests which drive the development of EU law.

B) The application of national law also has a European aspect: due to the enforcement of the four European freedoms goods, services, capital and people move freely across the EU and upholding and improving this movement require high-quality judiciary. That is why measuring the quality of the justice should bear utmost importance for the EU.

During the past two decades various ‘external’ (public trust, satisfaction, affordability and accessibility etc.) and ‘internal’ or ‘formal’ (timeliness, fairness of judicial process, independence and accountability of courts) benchmarks have been worked out for the assessment of the quality of judicial activity. In this field the EU Justice Scoreboard could become a very useful benchmark for evaluating and comparing the performance of the various judicial systems within the EU. However, it needs significant improvement in terms of measurable quality indicators. The main question is the following: what can be regarded as adequate criteria for the assessment of the quality of justice?

First of all, it is important to remember that quality assessment is not equal to the evaluation of the performance of individual judges. Quality assessment focuses on the evaluation of the judicial system as a whole. Accordingly, quality benchmarks indicate the strengths and the weaknesses of a given system and do not measure the skills of judges.

In the table below I have collected those parameters which can be described easily by numbers or other ‘hard facts’. They need further specification and refining of course.

Type of quality indicator	Description	Advantages	Disadvantages
Proportion of successful compensation claims in cases of judicial malpractice	<u>Frequency</u> of incorrect judicial decisions in the judicial system as a whole	Easy access to unambiguous data	Rules of compensation can be different from country to country
Proportion of successful appeals	Number of occurrence of incorrect judicial decisions at lower level courts	Easy access to unambiguous data	It evaluates the performance of lower level courts. Criteria of changing or quashing a judgement can be different from country to country
Proportion of	The level of	Easy access to data	Variations in the

decisions of the European Court of Human Rights and Constitutional Courts of the Member States (MS) where the violation of a fundamental right by a court of a Member State has been declared	commitment of the judiciary to human rights		interpretation or in the application of human rights are not necessarily a sign of poor judicial quality. Not every MS's Constitutional Court has the power to overrule court decisions.
Proportion of admitted requests by the European Court of Justice for preliminary ruling submitted by national courts	The level of expertise of national courts in the field of European law	Easy access to unambiguous data	-
Number and proportion of critical opinions in regard of a certain court decision coming from the press and academics	The overall quality of the judiciary from an external viewpoint	Lays down a detailed picture of certain problems of a given judicial system	Its reliability heavily depends on the quality of the press and the academic sphere of each country Difficult to get comparable data.
Opinion of the addressees and stakeholders on the quality of judicial activity	Opinion of prosecutors, lawyers, the police force, the parties, the defendants, court staff, etc.	Lays down a detailed picture of the problems of a given judicial system	The opinion of an addressee can be influenced by the judgement
Satisfaction level amongst stakeholders in regard of the performance of Supreme Courts (SC)	In every legal system SC's have the unique task of ensuring the uniform application of the law	-	It shows only the performance of a given SC
Selection and appointment criteria of judges	Reliability of the assessment process to select from candidates	Two of the most important guarantees of the quality work are the skills and the professional	The Anglo-Saxon and the 'Continental' selection systems are difficult to compare.

		expertise of the judges	
Has there been introduced a quality management system? If so, what are the main quality criteria set up for this system?	The importance of quality management setup for court's practice became obvious in the past few years	Easy access to data	Quality management systems were designed originally for business entities and not for judicial authorities

Besides the above-mentioned and more or less 'measurable' quality indicators, the EU also needs a qualitative analysis of the judicial activity:

A gap still exists in regard of the research of the quality of the legal reasoning. "Experts refer to this issue only in vague terms: legal reasoning must be legally sound, logically structured and comprehensible to all".¹ Or: "the decisions and actions of a court should adhere to the duties and obligations imposed on the court by relevant law as well as administrative rules, policies, and ethical and professional standards."²

The rule of law requires that judges explain plausibly and in a detailed manner *why* they decided a case in a certain way. Even if courts decide cases without delay and society is satisfied with the result the lack of a convincing explanation of the legal reasons makes decisions, from a legal point of view, unpredictable and therefore they will be in contradiction to the rule of law.

The method I suggest for the evaluation of reasoning is quite simple: We should examine the social context of a given case then analyze the legal arguments of the judgement. This method is built on the assumption that the obligation to provide reasons for judicial rulings serves as a barrier for the willingness to take non-legal factors into account, factors which otherwise could have a negative impact on the outcome of the judicial decision-making process. Problems of the coherence and convincing force of judicial reasoning may indicate therefore the presence of illegitimate and non-legal considerations in the mindset of the adjudicator.

By this method we can check not only the professional knowledge and skills of the judges but the presence of the so-called judicial wisdom which may be the most important feature of judicial quality. When I refer to judicial wisdom I mean that the judge understands what circumstances require and acts accordingly.³

¹ http://www.coe.int/t/dghl/cooperation/cepej/newsletter/Hamaide052007_en.asp

² Pim Albers: The assessment of court quality: a breach of the independence of the judiciary or a promising development? http://www.coe.int/t/dghl/cooperation/cepej/quality/Qualityofjudiciary_en.asp

³ Judiciary is quality. The Hague, 2006

http://www.coe.int/t/dghl/cooperation/cepej/quality/JudiciaryQuality_nl.pdf

Furthermore, there are other questions to answer concerning the quality work of the judiciary:

- 1) What are the standards of a convincing legal reasoning in different countries?
- 2) How can be reconciled the various quality criteria have been developed in different legal systems?
- 3) How does the quality of legislative acts affect the quality of judicial practice?

Answering these and further questions as well as the work of analyzing judgements, requires the participation and long run cooperation of academics and experts. The realisation of this endeavour can take a long time, however we cannot spare it if we want to create an effectively functioning judicial common space within the EU.

30 December 2013

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