Chapter 9
Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations

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Abstract The efforts to harmonise civil procedure in Europe have to take seriously the fact that procedural rules depend on the procedural structures that implement them. This chapter presents, on the basis of the CEPEJ evaluation, the divergences of procedural structures regarding three core organisational structures: courts, judges and lawyers. After showing the drastic differences of these structures, a change of perspective is proposed. Instead of focusing on harmonisation of rules and structures, focus should be shifted to issues important for the users of the justice system: the results of judicial activities, in the first place the effectiveness and quality of legal protection. However, the current pool of information in this respect is insufficient. Pointing to on-going efforts of the CEPEJ to stimulate the uniform collection of data about judicial timeframes and the quality of court work, the author draws conclusions regarding the desirable direction of future harmonisation efforts.

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9.1 Introduction

Is the harmonisation of civil procedure a noble, but elusive goal? While the notion of a 'United States of Europe' has somewhat started to turn into reality, just as Churchill predicted in his bold speech of 1946,[1] the civil procedure of European countries is still to a large extent a parochial matter, which suffers from a significant level of 'Balkanisation.'

Yes, some harmonisation trends are well visible, in particular among legal scholars. Some of them, like Marcel Storme, have devoted to harmonisation a remarkable opus of work,[2] fighting, *inter alia*, against 'a hallucinating number of regulations in the procedural field.' Advocating an 'approximation' of the laws concerning the judiciary and civil procedure,[3] Storme was following the paths of the great international proceduralists who, like Mauro Cappeletti, wanted to see in Europe 'a sort of renewal and reinforcement of the *ius commune* to which local contradicting law must give precedence.'[4]

At the European level (or, in narrower terms, at the European Union level), we are today still far from such a 'precedence' of harmonised, 'Europeanised' rules and practices. United Europe should, so the politicians say, eventually become 'a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own.'[5] However, procedural harmonisation has been rather successfully stopped at the doorstep of the 'cross-border' requirement, and by various techniques and methods, including insisting on the promotion of their own domestic procedural principles and rules, the European States have demonstrated their reluctance to harmonise civil procedure.[6] Regulating isolated and largely secondary matters, the 'uniform' procedural law of the European Union has not produced much real harmonisation; rather, instead of harmonisation, it is threatening to produce a hallucinating number of European legislative acts and instruments (regulations, directives, decisions, resolutions, et cetera).[7]

[1] In the famous speech delivered on 9 September 1946 at the University of Zurich, Switzerland.

[2] See, e.g., Storme 1994.

[3] Cf. Storme 1994.

[4] Trocker 2005, 35.

[5] Tampere Conclusions, *Towards a Union of Freedom, Security and Justice: The Tampere Milestones*, at 5 (Presidency Conclusions of the European Council held in Tampere on 15 and 16 October 1999).

[6] Cf. Freundenthal 2010, 10–14.

[7] As an illustration, just the list of legislative instruments ('acquis') of the EU Directorate for Justice, Liberty and Security (DG JLS) dated October 2009 stretches over 58 pages. See http://ec.europa.eu/home-affairs/doc_centre/intro/docs/jha_acquis_1009_en.pdf (last consulted in May 2011).

This chapter will deal with another aspect of harmonisation—the harmonisation of *procedure*, rather than the harmonisation of *procedural law*. Difficult as it might seem, the harmonisation of procedural laws in Europe is only the easier part of the job. Laws should not only be unified, harmonised or at least 'approximated,' they should be implemented in the same, or at least compatible, way. The ideal of an area of justice with equal or compatible standards of legal protection for all European citizens creates an obligation of result, not an obligation of formal adherence to the same values or legal norms.

So far, most of the harmonisation efforts aimed at the approximation of civil procedure in Europe had to face the sheer fact of the incommensurability of the starting organisational premises. The colourful variety of inter-linked institutions and players in the field of civil justice has made genuine procedural harmonisation difficult, if not impossible, since the similarity of rules (or even the enactment of the same rules) was no guarantee for the harmonised practices. This was, *inter alia*, on many occasions proved by differences in the implementation of the current body of rules of European civil procedure.[8]

In this text, I will employ empirical analysis in order to discuss the prospects for future harmonisation of civil procedure. The arguments are presented in two steps. In the first step, I will present some illustrations of the divergent procedural structures that exist in Europe, in particular with respect to the organisational framework entrusted with the conduct of civil proceedings. The data used in this part of the paper will mainly rely on the findings of the European Commission for the Efficiency of Justice (CEPEJ), which is the first international inter-governmental organisation that is systematically engaged in the collection of statistical information relevant for the functioning of the national civil justice systems. After showing that the procedural structures which should apply the future 'uniform' procedural law in Europe are dramatically different, in the second step a change of perspective will be proposed. Instead of focusing on the harmonisation of rules (and, partly, on the harmonisation of structures), the focus should be shifted to the issues that are of principal importance to the users of the justice system—to the harmonisation of the results of judicial activities. Harmonisation of the outcomes is thereby an issue of substantive law; the procedural harmonisation that would need to be achieved relates to the effectiveness and the quality of legal protection. The current pool of information about the issues relevant to the comparative assessment of the effectiveness of legal protection is incomplete and insufficient. Therefore, pointing to the on-going efforts of the CEPEJ to stimulate the uniform collection of data on procedural duration and to monitor judicial timeframes (which have also started to show certain weaknesses and limitations), a suggestion for the need to develop capacity to monitor the results of civil procedure and to start harmonisation from there will be made.

[8] See, e.g., examples from several countries published in a recent book: Freudenthal 2010, 11–12; Kramer 2010, 17–36; Betetto 2010, 103–110.

9.2 Can it be More Different? Divergent Structures as a Basis for Harmonised European Civil Procedure

In this part of the chapter, an inquiry into the differences between the procedural structures of various European civil justice systems is made. I use the term 'procedural structures' to indicate the organisational framework of civil procedure, which consists of various institutions and actors that participate in the process. The procedural structures that are at the core of the system of civil justice are the courts, the judges and the lawyers; further procedural structures would also encompass other legal professionals (enforcement agents, notaries), paralegals (e.g. court clerks or *Rechtspfleger*), other participants such as experts or interpreters, as well as the professional organisations and State authorities that play a bigger or smaller role in the administration of justice. All in all, these institutions and actors form a procedural landscape within which civil justice is dispensed.

For a long time the European procedural landscape was not a subject of systematic examination, though valuable research was sporadically undertaken, often under the auspices of the International Association of Procedural Law (IAPL).[9] A significant obstacle to systematic research was the difficulty of obtaining accurate, comparable and comprehensive data on the relevant aspects of the functioning of civil justice. The situation changed after the establishment of the European Commission for the Efficiency of Justice (CEPEJ) in 2003. This standing body of the Council of Europe was formed with the mandate 'to enable the European countries to examine the results achieved by the different judicial systems ... by using, amongst other things, common statistical criteria and means of evaluation.'[10] This mandate may be taken as another manifestation of the idea that procedural comparisons should go beyond comparisons of abstract rules. Superficial study of the similarities of statutory regulation in various jurisdictions is not enough for the proper understanding of the functioning of the European justice systems. Comparison of organisational elements that form the national procedural landscape is the first step in the realisation of the idea that (also) law in action, and not (only) law in books, has to be studied and evaluated. In such a context, the main aim of the CEPEJ was defined as 'improving the efficiency and the functioning of the justice system of [European] States, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively.'[11] The main tasks of the CEPEJ included the analysis of the 'results of the judicial systems'; 'identifying difficulties they meet' and proposing concrete ways of

[9] Among many comparative studies concerning European and global procedural landscapes published by the IAPL members and under its auspices see Rechberger and Klicka 2002; Trocker and Varano 2005; Van Rhee 2005.

[10] From Resolution No. I 'Delivering justice in the 21st century' of the 23rd Conference of European Ministers of Justice, 8–9 June 2000, London.

[11] Council of Europe Resolution, Res. (2002) 12 of 18 September 2002 establishing the CEPEJ, Art. 1 (Aims).

improving both the evaluation of the results of the justice systems, and their functioning.[12]

The three guiding 'principles' upon which the resolution establishing the CEPEJ was grounded were *access to justice*, the *efficiency* of judicial proceedings, and the proper *enforcement* of court decisions. All of these principles could only be implemented through the organisational structures and the actors in those structures: courts, judges, lawyers, bailiffs, et cetera. Therefore, the indicators and statistical comparisons that were developed in the course of the CEPEJ's work dealt primarily with the structural, quantitative data, such as the data on the number of courts, judges, cases, et cetera. Being an inter-governmental organisation composed of experts from 47 European countries, the CEPEJ secured for the first time the collection of data that were relatively complete and—at least in some areas—fairly accurate. An insight into developments and trends is also gradually becoming possible, as four evaluation rounds were conducted in the 2004–2010 period, each producing an ever growing corpus of data.

For the purpose of this chapter, I will present only a section of relevant findings extracted from the CEPEJ evaluation reports and suggest conclusions that may be drawn from them. The starting premise is that the first step to harmonisation is the objective assessment of similarities and the open acknowledgment of differences. To that extent, an analysis of the data collected by the CEPEJ can provide illuminative insights that are important for future harmonisation plans.

I will concentrate on three elements which form the core of the organisational structures necessary for civil proceedings: *courts, judges* and *lawyers*. For each of these structures, some tentative results of comparisons arising from the CEPEJ evaluation rounds which might have an impact on the harmonisation efforts will be presented.

9.2.1 Courts

There is no common European definition of a 'court'

In the first evaluation round, the CEPEJ collected information about the 'total number of courts in each country, the number of general jurisdiction courts at first instance and the number of specialised courts at first instance.' What had to be counted were the 'main seats' only, and not sub-locations.[13] The very notion of what a 'court' was in the first round was not defined, in spite of some preliminary efforts to indicate possible differences in the understanding of this notion.[14] However, it turned out that the court definitions and structures were not at all

[12] Ibidem, Art. 2(1).

[13] CEPEJ 2005, 29.

[14] So, e.g., Pim Albers pointed out in his preparatory study produced for the CEPEJ that '[t]he counting of the numbers of courts seems "at first glance" to be simple. However, for this indicator there are also various options to define what a court is. Courts can be defined as "a meeting room" in an office to settle a dispute between parties or on the other hand as a fully

uniform. The result was that variations were huge, starting with the simplest forms, such as the courts of general jurisdiction. The finding for 2002 was that 'the average number of inhabitants served by one general jurisdiction first instance court' ranged 'from 18,600 (Spain) to 842,000 (the Netherlands).'[15] At the same time, methodological problems with such a comparison were noted, such as:

- the difference in counting the number of the 'smallest' type of courts (in some countries they were within the definition of the 'main seats,' in others they were not);
- regarding the special courts, some countries had courts that suited all the definitions of a court, but were not part of the normal court system and its budget;
- there was a big difference in the concept of special courts (some of the countries had barely one type of special courts, others had a large number of specialised courts—e.g. Turkey with 12 different types of specialised courts).[16]

Trying to cope with some of the problems spotted in the first round, in the next round the explanatory notes clarified that 'a court can be considered either as a legal entity or [as] a geographical location.' The distinction was explained by provisional definitions: *courts as administrative structures* were defined as 'bodies established by law appointed to adjudicate on specific type(s) of judicial disputes within a specified administrative structure where one or several judge(s) is/are sitting, on a temporary or permanent basis,' which should be distinguished from *courts as geographic locations*, defined as 'premises or court buildings where judicial hearings are taking place.'[17]

These definitions did not quite resolve all outstanding issues, but at least in some countries led to dramatically different ranking. A good example is the record holder Spain that reported for 2002 a total number of 3,083 courts[18] with a total number of 4,109 professional judges, then two years later reported 2,548 first instance courts but only 683 'court offices or buildings' and 431 judicial districts. At the opposite end of the spectrum, the Netherlands reported for 2002 altogether the total number of 28 courts in the entire country with 1,809 judges sitting in them. It was, however, noted that there were a further 61 sub-offices (i.e. separate court locations or court buildings) of the 'main seats' of the 19 district courts.[19]

In any case, it is clear that the concept and understanding of a 'court' is not harmonised, which is partly due to the fact that it is ambiguous even from the

(Footnote 14 continued)
equipped office with a court staff and a court administration. In the first situation the court operates as a sub office from the main court office,' Albers 2003, 4.

[15] EJS 2005, 32.

[16] EJS 2005, 32–33.

[17] CEPEJ 2008, 318.

[18] Out of which 2.249 are general jurisdiction first instance courts. See CEPEJ report Spain, 2004, 7 (available at http://www.coe.int/cepej; (last consulted in May 2011).

[19] CEPEJ report the Netherlands, 2004, 8 (available at http://www.coe.int/cepej; (last consulted in May 2011).

perspective of individual jurisdictions. In some countries, the organisational meaning of a 'court' is close to the procedural meaning of the word—it is a tribunal (a panel or even a sole judge) that adjudicates individual matters. In other countries, the courts are more or less synonymous with the location or physical placement (the place where judicial offices and hearing rooms are concentrated). Finally, the definition of the court may be linked to strictly administrative considerations, such as single leadership, defined territorial jurisdiction, common budget, and joint court services and employees.

Further differences may be traced with respect to the matters submitted to a particular 'court.' In fact, the strict application of the CEPEJ reference to a court as a body which 'adjudicates on specific type(s) of judicial disputes' would need to exclude a number of specialised courts in a number of countries which deal with extra-contentious matters, or to undertake activities of a merely administrative nature, such as the holding of company registers or registers of immovables.[20] Such 'courts' (sometimes operating on their own premises, sometimes within the same buildings as other courts) are basically incomparable with the organisational structures in other countries, where such administrative tasks may be given to bodies outside of the judiciary (or, even if they are in the court jurisdiction, they may be ancillary activities of the courts of general jurisdiction or other specialised courts).

The different purposes for which courts are being used in different European countries may also be indicative of the different understanding of the social role and aim of judges and civil procedure as such (for more detail see Sect. 9.2.2).

The density of the court network and the level of differentiation of the courts within European court systems are rather different

The methodological difficulties regarding the definition of courts may make the comparisons more complicated, but they do not make them impossible. After the corrections made in the course of the first evaluation exercises, the CEPEJ produced a more refined scheme; however, the results again revealed considerable differences. In particular a difference in the approach of the North-western and South-eastern jurisdictions could be seen, which is easily identifiable in the following figure, reproduced from the CEPEJ report published in 2008, showing the number of courts of general jurisdiction per 100,000 inhabitants in 2006.[21] The Northern countries (the United Kingdom, Ireland, the Scandinavian countries, the Netherlands, Germany and Poland) have a considerably smaller number of

[20] In 2002, Turkey was the second European State according to the total number of courts per inhabitant. This was, however, partly due to the existence of a large number of land registration courts (848); separate categories of 'enforcement courts' (civil and criminal) are also a part of the official judicial landscape. See CEPEJ report Turkey, 2002, 6 (available at http://www.coe.int/cepej; (last consulted in May 2011).

[21] EJS 2008, 77, Figure 23. The information relates to the courts in the meaning of 'administrative structures.'

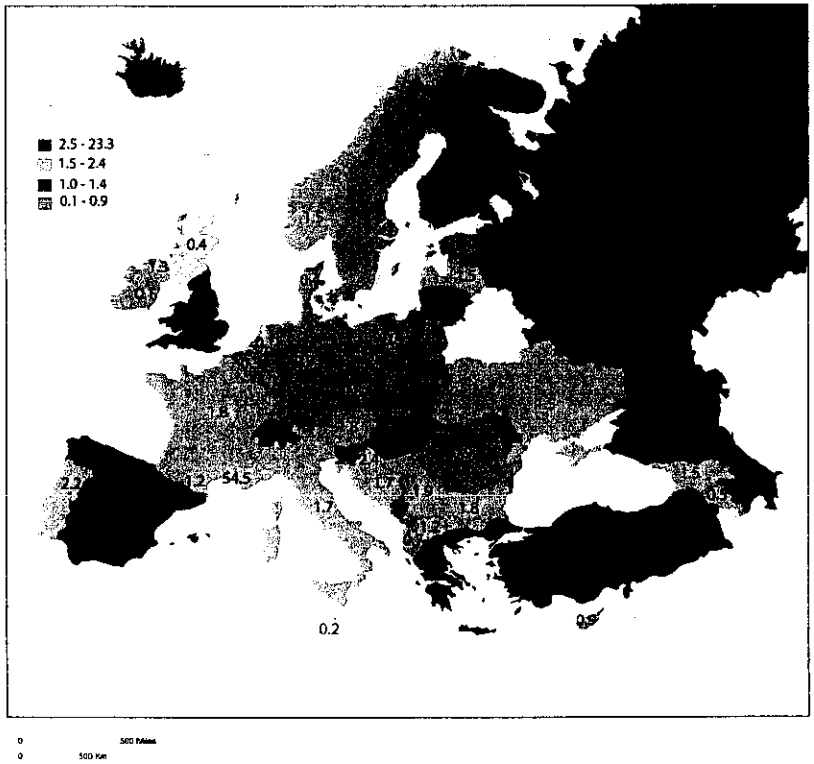

Fig. 9.1 Number of courts of general jurisdiction per 100,000 inhabitants in 2006

courts per capita (from 0.1 to 1.5 general jurisdiction courts per 100,000 inhabitants), while the Southern and Eastern countries (Spain, France, Italy, Austria, the successor countries of the former Yugoslavia, the Russian Federation and Turkey) have considerably higher figures (more than 1.5, with the highest figures of 6.9 in the Russian Federation and 6.4 in Turkey) (Fig. 9.1).

The picture was only slightly different regarding the comparison of the courts in the meaning of 'court locations.' Again, in particular the countries of the European South (from Italy to Turkey) had a 'density' of the court network which was several times higher than the density in the North.[22]

Even greater differences existed in the level of specialisation within the court structures. While some European countries have only one layer of courts—the

[22] Compare, e.g., the Netherlands with 0.3 court locations per 100,000 inhabitants to Turkey with 7.9. See EJS 2008, 78.

courts of general jurisdiction—in other countries the specialised courts make up to ninety per cent of the overall number of courts. Therefore, the calculated figure which reported that 'as a European average, specialised first instance courts represent 19 per cent of all the first instance courts considered as legal entities'[23] has very little real meaning, except that it warns that already at the conceptual level one should be careful, since the meaning of 'specialised' can be rather different. For example, the statement that 'the court system in Belgium is mainly based on specialised first instance courts (90.7 per cent of the first instance courts)' relies on the fact that the largest number of 'courts' is related to the institution of the Justice of the Peace. Such 'specialised' courts are quite different from specialised structures for dealing with administrative, commercial or labour cases. Before speaking about harmonisation, one should clarify the starting points and make an in-depth inquiry regarding the different systematisation of court structures in the European countries.

This analysis should, however, be narrowed down to the matters relevant for the harmonisation of civil procedure. Are there any conclusions that we can draw from the considerable organisational differences? Do the statistical comparisons regarding the numbers of courts, their jurisdiction, differentiation and population-coverage have any real impact at the level of court functioning? Do they reflect on the course of civil procedure and have important consequences on the prospects for harmonisation?

It is obvious that any discussion based on the bare figures and incomplete information should be extremely cautious and avoid jumping to conclusions. Still, I would suggest that the analysis of the organisational differences is important for an understanding of the differences in the functioning of civil justice systems, and that it has important consequences for an understanding of the varying procedural styles and approaches to civil procedure in different European countries. Some tentative conclusions are already possible, and may be derived from the 'big picture' presented in the CEPEJ reports.

The first conclusion is that the organisational differences create a background which sometimes contains invisible impediments for pan-European debates on the harmonisation of civil procedure. Perceptions regarding what is meant to be harmonised are not the same in the environment which is rather specialised, and in the environment composed of only one layer of courts. Equally, perceptions about a desirable 'uniform' style of procedure are different in a decentralised environment of many smaller courts than in an environment where adjudication is concentrated in a smaller number of larger courts. The same procedural norms may function differently in different organisational structures. Therefore, the harmonisation of civil procedure at the European level would also imply the approximation of organisational structures, starting first with the creation of the same conceptual framework (uniform definitions of 'courts,' 'specialisation,' et cetera). At a later

[23] CEPEJ 2010, 84.

stage, the reduction of structural differences may also be instrumental for reducing the options for failures in the harmonisation process.[24]

Another conclusion relevant for the harmonisation of civil procedure relates to the cultural and civilisational changes that also affect the organisational framework for the judicial processes. At first sight, one can be tempted to discuss the density of the court network in terms of right of access to a court, which is among the fundamental aspects of the right to a fair trial. The access to justice argument would require a higher density of the court network: the more courts, the better access to them. In the light of collected empirical evidence, it seems that this equation does not work. On the contrary, those countries which have the fewest courts per capita (e.g. the Netherlands, Denmark or Finland) are not among those which would normally be accused of having poor access to justice.[25] Interestingly, those countries which have a high number of courts (also in terms of physical facilities, i.e. court locations) are often among the countries that have more problems with securing the right to a fair trial than others (e.g. Croatia, Slovenia, Italy, Greece, Bulgaria and Turkey). The explanation for this may be twofold. On the one hand, this indicates that the development of transportation and infrastructure (faster and easier travel), but also of the procedural routines and styles (new methods of communication, use of recorded and written materials, increased use of legal representatives) have made the availability of a 'local' forum much less necessary, and even desirable, than in the nineteenth and most of the twentieth century. On the other hand, the problems faced by some jurisdictions which still have a relatively high number of courts may be an indication that the whole justice system has difficulties adjusting to the needs of the changed social environment. Finally, the high number of courts may as such have a negative impact on the fairness and effectiveness of trials. Fewer courts may mean more efficiency, but also better quality of adjudication. Small courts with very few judges, operating in small, closed environments, may be vulnerable to local pressures affecting their independence and impartiality; even if this is not the case, the high number of independent court structures could also produce different procedural routines, and impair the uniform application of the law. At the same time, the atomisation of the court network may negatively affect the efficient use of resources, for example by uneven case-load and burden on various courts, as well as by more difficult case management and court administration practices. Of course, even in such an

[24] The prospects for such *rapprochement* of procedural structures are ambiguous. On the one hand, the example of the United Kingdom—which has in the past decade reformed some of its peculiar judicial structures which existed for centuries (introducing, *inter alia*, bodies such as the Supreme Court and the Ministry of Justice), making them much more similar to structures on the European Continent—shows that reduction of structural differences is possible. However, the CEPEJ reports also indicate that reforms in Europe do not go in a uniform direction: the number of countries that have reduced the number of courts is not very different from the number of those that have increased them; the situation is the same with respect to the increase and reduction in the number of specialised courts. See EJS 2008, 72–73.

[25] Again, another indication may be the small number of violations of Art. 6 of the ECHR established in respect to those countries before the ECHR.

atomised and particularised environment the courts can still fulfil their social function, but it will come at high costs—the case of Switzerland being a good example.[26] The 'ideal' size of the courts may also be an important matter of discussion.[27] Although the perceptions about it may vary (which can also be a product of different concepts of civil and other judicial procedures), the style of work, or even the perception of the judicial function, is inevitably different in the very small and very large courts.

Finally, the different levels of specialisation of courts also have far-reaching procedural implications. The specialisation of courts tends to produce a specialisation of procedures, and indeed in most countries with specialised systems civil procedure before courts of general jurisdiction differs in a number of ways from the procedure before the commercial, labour or family courts. Different procedures are, of course, possible or even desirable before the same courts, if they deal with different types of matters. However, while the one-layer court types stimulate convergence, the multi-type court structures are an incentive for divergence of procedural rules. In a conventional perception of a 'modern' civil procedure of the twentieth century, there was one standard (default) type of litigation, which was a model that was applied with a very small number of departing rules in specific, non-standard types of matters. With a growing number of 'specialised' courts and 'specialised' procedure, one may begin to doubt whether there is a standard type of civil procedure, or a uniform concept of trial any more, or whether the judicial process in civil matters has splintered into a number of independent specialised fragments adjusted to smaller specific areas. In the two scenarios, the approach to the harmonisation of civil procedure would need to be poles apart. In the context of a non-specialised, generalist approach, the harmonisation efforts may proceed through the harmonisation of fundamental procedural rules and principles (just as suggested by the Hazard-Taruffo project). In the specialised universe of fragmentary proceedings, the main path to harmonisation might be through a mosaic of partial *rapprochement* of small individual areas (which, in a way, is happening with the EU civil procedure regulations).

A separate, and to date not sufficiently researched aspect of the differentiation of courts, is the one regarding the different methods of dealing with cases of lower importance or value, and the resulting implications for the court structures. So far, the CEPEJ has only started to collect data regarding the definition of small claims and the

[26] Switzerland is among the countries with the highest density of the court network, with 6 courts (geographic locations) per 100,000 inhabitants, but also one of the countries with the highest expenses of the justice system—see EJS 2010, 86 (courts) and 21 (public budget allocated to courts). In spite of high expenses, there is also a feeling that Swiss civil procedure should gain in efficiency—see on this account Domej 2009, 75–88.

[27] The CEPEJ held discussions on the topic: 'Does the size of the court matter?' at the SATURN meeting with the members of the Network of Pilot Courts held in Geneva on 13 April 2010. Although no strong conclusions could be drawn from the reports presented at that event, it was shown that the size of the court may definitely have an impact on productivity (Dutch research indicated, e.g., that courts smaller or larger than 300 FTEs (Full Time Equivalents) are less productive).

corresponding monetary thresholds. In this aspect, significant variations were found: while in Lithuania small claims are those equal to or not exceeding €72.40, in San Marino every claim up to (and including) €50,000 is regarded as being of a minor value.[28] The CEPEJ report notes correctly that 'these differences may partly be caused by the specific economic situation of the countries, the civil procedural rules that are applied and the level of specialisation of courts in this area.'[29] However, the impact that value or importance of a civil claim may have on the organisational structures has not been properly reflected in the present findings of the CEPEJ.[30] In any case, there are indications that the court structures in some countries take all civil cases, irrespective of their value and social importance, by the same layer of courts of general jurisdiction. Although virtually all judicial systems have some special rules regarding litigation in small claims, the one-layer approach may lead to a procedural philosophy that requires more or less the same or comparable efforts for the litigation of all cases, irrespective of their value,[31] whereas a differentiated approach may be a sign that the civil justice system adopts the principle of proportionality, which requires that the level of court efforts and engagement of judicial authorities should correspond to the 'amount of money involved..., importance of the case,... complexity... and financial position of each party.'[32] These differences may create divergence in procedural practices, very significant for the end-users which may for the same case get a fast-track summary proceeding in one jurisdiction, and a full-fledged lengthy court litigation in another.

The court budgets of different European countries are radically different

Stating that the different judicial systems in Europe have considerably different budgets may seem to be a kind of platitude. Of course, in this group of States with different economic and industrial power, it is only normal that the judiciaries of Europe do not enjoy the same level of economic wealth. The data collected

[28] EJS 2010, 89.

[29] Ibidem.

[30] Although some questions were asked about the 'first instance courts competent for debt collection in small claims,' the distinction between the courts handling cases of lower or higher social importance has not been separately defined. Rather, it seems that the lowest courts (such as Justices of the Peace) were added to the category of specialised courts if this was the self-understanding of the reporting country. In other systems in which two types of courts (lower and higher) dealing with 'smaller' or 'bigger' matters were both understood to belong to general jurisdiction courts, they were reported differently. Another problem with the CEPEJ scheme may be in the fact that the litigious handling of small cases was not clearly distinguished from the non-litigious collection of small monetary debts.

[31] As argued in procedural doctrine of the former Yugoslavia, the principle *de minimis non curat praetor* should be treated with caution, since 'there are no "small" and "big" matters in civil adjudication.' Triva and Dika 2004, 822. Accordingly, in the practice of civil procedure there are barely any differences in the style and length of litigation between cases of marginal social importance, and those in which significant social and economic issues are at stake.

[32] So Lord Woolf, defining the principle of proportionality as one of the most essential elements of the 'Overriding Objective' embodied in Part 1 of the Civil Procedure Rules 1998.

through the CEPEJ evaluation rounds have, however, shed a new light on the differences of the court budgets in Europe, and the results may be disturbing for the prospects of harmonisation.

Comparing the annual budget of all courts in different European jurisdictions, scaled in proportion to the number of inhabitants, reveals the fact that about one-third of all Council of Europe members have a budget of up to €30 per inhabitant, one-third from €30 to €60, and one-third over €60 per inhabitant. The extremes are extraordinarily far apart: while some countries, like Moldova or Armenia, still spend only about €2 or €3 per inhabitant, the budget of the Swiss judiciary is over €100 per inhabitant (see Fig. 9.2).

The impact of the different budgets of national judiciaries on the ability to harmonise European procedural practices should not be underestimated. The economic situation and the costs of living may be different from State to State. But, there are several common issues which do not depend much on the local differences. One is connected to the running costs of the operation of the justice system, where minimum conditions should be secured to guarantee minimal effectiveness. It may be difficult to secure any acceptable standard of justice if the courts are not able to pay postal costs, maintenance of the court buildings or advances on costs of proceedings borne by the courts (e.g. costs of evidence taken *ex officio*); all of this is still happening, and not infrequently, in some of the countries with low court budgets.

For the future, an even more important issue will be the capacity for modernisation. The costs of the introduction of information technology (IT) equipment and other modern tools of court work (e.g. embracing the new forms of 'e-justice,' automated summary proceedings, et cetera) are similar and comparable everywhere, and they are not inconsiderable. If the overall court budget is low, it is probable that the investment in new technologies will be even lower. A case in point is provided by a comparison between Greece and the Netherlands: while the former spends only 0.1 per cent of the court budget on computerisation, the latter devotes to IT the whole of 8 per cent of the overall budget for courts.[33] With such a state of affairs, not only will harmonisation be more difficult, but it is quite likely that the differences will grow larger, as the reforms in regard to facilitating the speed and quality of processing civil cases are today to a great extent connected with the introduction of new technical tools. They are becoming indispensable as a medium of the mass-processing of certain claims (e.g. the automated processing of payment orders issuance), as a facilitating factor in all processes (new methods of service or delivery of documents, evidence-taking by IT means, electronic recording of court hearings, holding of e-files, et cetera) and as a universal tool for court administration and case management (introduction of Integrated Case Management Solutions). Such new tools also play an important analytical role in the collection and processing of relevant statistical data, which in turn enables

[33] EJS 2010, 26 (data for 2008). At the same time, Greece had a total annual court budget of about €32 and the Netherlands of about €89 per inhabitant.

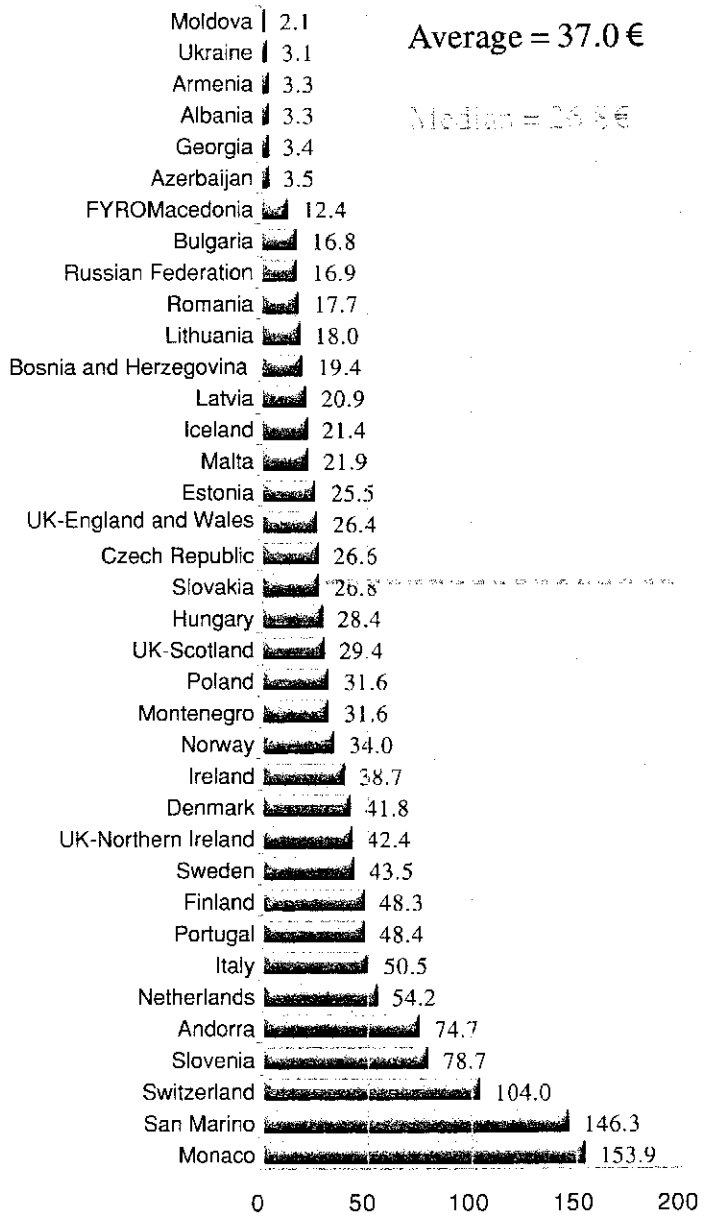

Fig. 9.2 Annual public budget allocated to all courts per inhabitant[34]

[34] Reproduced from EJS 2010, 21 (Figure 2.4).

better planning and optimisation of available resources. If the 'poor' judiciaries of Europe continue to lag behind, being bound by the old, customary procedural practices, the gap between them and the civil justice systems using new, innovative models and methods in civil procedure will become greater and greater.

Fortunately (or not), the investments in new technologies are in fact a smaller part of the judicial budgets. The average spending on IT in Europe is about three per cent of the overall court budget, and even those countries that invest a lot do not spend on this account over ten per cent. On average, the biggest share of the European court budgets goes to salaries (in particular judges' salaries) which make up seventy per cent of the total expenses. Except in England and in Ireland, the salaries in all other European countries make up over fifty per cent of the judicial budget (in some, e.g. in Greece, salaries make up 96 per cent of the court budget).[35] Therefore, the lack of investment in IT may not be so great an obstacle to overcome, and some trends towards intensifying investments in IT can already be noted even in States with more modest judicial budgets.

On the other hand, the different court budgets can also be an indicator of the different numbers of judges and of the differences in their salaries, which can also be relevant for the harmonisation processes. These issues will be discussed in the next section (see Sect. 9.2.2).

9.2.2 Judges

I commented more extensively on the CEPEJ findings regarding judges in other papers.[36] Therefore, in this one I will only briefly highlight two issues imminently relevant to harmonisation prospects.

Definitions and the professional status of judges are not harmonised in Europe

In the preparatory study on the evaluation of judicial systems, it was noted that 'the meaning of what a *judge* is varies also per country.'[37] The definition given in the recommendations of the Council of Europe is more related to the function, and not to the status and particular definition of judges, insofar as it includes '*all persons exercising judicial functions*, including those dealing with *constitutional, criminal, civil, commercial and administrative law* matters.'[38]

The CEPEJ evaluation reports essentially follow the same type of definition, but make it even broader and vaguer. The starting point for collecting data about judges is the definition—allegedly derived from the European Court of Human Rights case law—according to which 'a judge is a person entrusted with giving or taking part in

[35] EJS 2010, 25–26.

[36] See Uzelac 2006, 41–72; Uzelac 2011.

[37] Albers 2003, 3.

[38] Recommendation No. R. (94) 12 on the independence, efficiency and the role of judges of the Council of Europe, at 1.

a judicial decision [regarding] *opposing parties* who can be either physical or moral entities, during *a trial*' (emphasis added). Although this definition would on its face encompass only those issues dealing with litigious matters, just in the next sentence a line which detaches judicial status from any substantive function is added, describing a 'judge' as a person who 'decides, according to the law and following organised proceedings, on *any issue within his/her jurisdiction*' (emphasis added).[39]

From the very start it was obvious that various types of judges had to be singled out and evaluated separately. Therefore, at the outset three different types of judges were identified in European States—*professional judges* whose 'main task is to handle cases in a court and are nominated for life (or for a long and extended period),' *substitute judges* whose 'main profession... is concentrated in another legal profession,' and *lay judges* that also participate in the judicial functions, but do not have a specific legal education.[40] However, in the first evaluation round the data that were finally collected regarded only two categories, the categories of *professional* and *non-professional judges*. The category of professional judges was described in an explanatory note of the evaluation scheme as 'those who have been trained and who are paid as such (and where their main function is to work as a judge).' To that extent, the 'professional' category was essentially identified with two elements—(legal) training and financial compensation, whereas the 'non-professionals' were designated as 'volunteers who are compensated [only] for their expenses and who give binding decisions in courts,' but also were partly confounded with lay judges.[41] To cover the practices of some countries, in the first round it was further inquired whether there was an institution of *temporary judges*[42] (reported to exist in ten countries).[43]

Already difficulties occurred at the level of data collection. In the first round (EJS 2002), the number of professional judges was reported in full time equivalent (in order to reflect the participation of part-time judges),[44] but this did not reflect well the practice of engaging temporary judges. Thus, in the later rounds, a separate query related to 'professional judges occasionally presiding over a hearing' was added. However, the data on professional judges were still of much better quality than the data on non-professional judges. The reason was, as stated, that 'in some countries, non professional judges can take the place of professional judges and are a source of flexible—and often cheap—capacity to the courts,' while 'in

[39] EJS 2008, 108.

[40] Albers 2003, 3.

[41] EJS 2008, 108.

[42] EJS 2002, 33.

[43] Denmark, England & Wales, Finland, France, Italy, Norway, Portugal, Scotland, Sweden and Switzerland. In Finland and Sweden these judges were not paid, in all other countries they were compensated on the basis of their activity.

[44] The intention to count the full time equivalents of employed judges, rather than counting 'heads,' also revealed another issue—the fact that in some countries a significant number of judges are not working in the courts for various reasons, e.g. secondment to ministries of justice. Some countries also reported that illness or maternity leave results in differences between the number of fully employed judges and those who actually work in the courts.

other systems, non professional judges are required by law to handle certain cases as lay judges; these do not provide extra capacity... [and also] may, up to some point, overlap with (the notion of) "temporary judges".'[45]

The analysis of 'professional judges sitting occasionally' was deepened in the last evaluation of the CEPEJ, which reported more extensively on this category of judges in the EJS 2010 report:

> In order to tackle a legitimate demand from their citizens for 'neighbourhood' and 'rapid' justice, some States or entities have reinforced the number of judges by bringing in judges who occasionally preside over a case. These professional judges are sometimes called 'non presiding judges' or 'deputy judges.' This option is available in particular in Common-Law States or entities to lawyers who are to become full-time judges. They are therefore experienced legal professionals who have a solid basis of legal training and who have already benefited from specific training to judicial functions.[46]

Of twelve European countries that reported the existence of 'occasional' judges, a very special case was the one of England and Wales, where occasional judges—who spend between 15 and 30 days practising as judges in court sessions—are in number four times more numerous in relation to 'permanent' professional judges. But the participation of occasional judges is also significant in the Netherlands, France, Spain and Sweden.[47]

As to 'non professional' judges, although they might also have legal training (and act occasionally as honorary, i.e. unpaid judges), most of the non-professional judges in Europe are lay judges. However, their participation in civil trials (and in other types of proceedings) occurs in multiple, mutually incomparable forms. In England, lay judges sit in colleges (panels) in magistrates courts, where they generally do not deal with civil cases (but allegedly process 95 per cent of all criminal offences). The second type of non-professional judges are the justices of the peace,[48] which, according to the CEPEJ report, 'deal principally with the treatment of civil complaints of minor importance (or minor offences).'[49] The other forms of non-professional judges, primarily concerned with non-criminal cases, are those that participate in the adjudication process in specialised courts or proceedings, such as those of labour and commercial law. Finally, there is also a practice of using lay judges as assessors in some panels, where they sit and decide together with professional judges. In a number of post-Socialist countries (Czech Republic, Estonia, Poland and Slovenia), it is still a widespread practice in a number of first instance courts, both in civil and in criminal cases (e.g. the practice of using juror-judges, *suci porotnici*, in the successor countries of the former Yugoslavia).[50]

[45] EJS 2002, 33.

[46] EJS 2010, 121.

[47] See EJS 2010, ibidem, Table 7.4.

[48] Yet, in some countries they may be paid on an occasional basis.

[49] EJS 2010, 122.

[50] Ibidem. The CEPEJ has not included under non-professional judges the category of jurors—citizens sitting in a jury—which also exists in some European countries.

The lack of a common definition of judges, but—even more—the varying level of use of particular types and forms of judges, may be an important impediment to the harmonisation of civil procedure at the European level. For the judicial systems composed exclusively of professional, legally trained judges who operate in a closed administrative (bureaucratic) environment, there will be a natural inclination towards detailed, precisely elaborated technical rules of civil procedure. The more a system uses lay elements (but also non-professional, temporary or occasional adjudicators), the more there will be a need for a less technical approach, and the emphasis would naturally be transposed to broad principles, legal standards, fairness and substantive justice. The harmonisation of rules, without harmonisation of the structures that apply them, may create mixtures which are disharmonious, or even adverse to the interest of justice. Thus, the differences in the professional status and in the more or less closed (or open) system of engagement of judges should be seriously taken into account before any harmonisation actions are deliberated and planned.

The social functions and tasks of judges are quite different, which is reflected in the considerable differences in the figures regarding those considered to be 'judges.'

In spite of the different approaches to the status of judges, the point which seemed to be most comparable was the one regarding professional, full-time judges. All European judiciaries are largely based on professional judges, and all of the countries that participated in the CEPEJ evaluation were able to submit figures regarding their number.

The comparison resulted in interesting findings. Given the different scope of use of temporary and lay judges, as well as some local differences, it was only to be expected that the number of judges (scaled in relation to the number of inhabitants) might diverge. However, the revealed divergences far exceeded what could have been expected and explained by such elements.[51] As shown in Table 9.1, the number of judges per 100,000 inhabitants had in 2008 a span which went from 3.3 in Ireland to 53.5 in Slovenia. Even excluding the common law countries and the Caucasus region which have from 3-7 professional judges per 100,000 inhabitants, the difference between the countries of Romanic and Germanic legal tradition is one hundred per cent (from 10 to 20 and more), while countries of a former Socialist legal tradition (plus Greece) have from 25 to 50.

These findings may have an important impact on the prospects for procedural convergence in Europe. The first challenge is to explain the differences properly. The hypotheses that were mentioned in the course of the CEPEJ work, which also resulted in a more focused collection of data in these aspects, were:

[51] The diplomatically correct commentary in the CEPEJ report noted that 'generally speaking, an imbalance can be noticed between Western and Eastern European States or entities, there being more judges in Eastern Europe.' The explanation that a pre-eminent role is in some systems given to lay judges could, however, not cover more than a few countries, and even then only partly. See EJS 2010, 120.

Table 9.1 Number of professional judges sitting in courts (FTE) per 100,000 inhabitants in 2008[52]

Country	Number of professional judges	Country	Number of professional judges
Slovenia	53.5	Ukraine	15.5
Croatia	42.5	Belgium	15.2
Montenegro	39.7	Iceland	14.7
Serbia	34.1	Switzerland	14.1
Greece	33.3	Netherlands	13.3
FYRO Macedonia	32.2	Moldova	12.9
Czech Republic	29.2	Cyprus	12.5
Hungary	28.9	Albania	12.3
Bulgaria	28.3	Sweden	11.3
Poland	25.9	Norway	11.3
Slovakia	25.7	Spain	10.7
Russian Federation	24.2	Italy	10.2
Lithuania	22.5	Turkey	10.1
Bosnia and Herzegovina	22.3	France	9.1
Latvia	20.8	Denmark	6.9
Austria	19.9	Armenia	6.8
Romania	19.2	Georgia	6.4
Portugal	18	Azerbaijan	5.7
Estonia	17.7	UK-England and Wales	3.5
Finland	17.4	Ireland	3.3

Table 9.2 Number of incoming first instance litigious civil/commercial cases per 100.000 inhabitants in 2008[53]

Finland—183	Austria—1,325	France—2,728
Norway—340	Slovenia—1,541	Croatia—3,163
UK (England)—549	Turkey—1,562	Spain—3,579
Sweden—559	Hungary—1,888	Italy—4,768
Denmark—1,090	Poland—1,959	Belgium—6,198
Switzerland—1,133	Serbia—2,610	Russian Federation—7,157

- that in some countries the courts receive a much greater number of litigious cases than in other countries;
- that judges in some countries deal with a number of extra-judicial activities, and have a broad jurisdiction which includes involvement in resolving a number of non-litigious cases, not assigned to judges in other countries.

The data gathered would apparently support both submissions, at least at first sight. As to the number of incoming litigious civil and commercial cases per 100,000 inhabitants, here is only a sample of the results for 2008 (Table 9.2).

[52] Data taken from EJS 2010, 117–118, sorted from highest to lowest figures; the smallest States (Andorra, Lichtenstein, Monaco, San Marino and Luxembourg) are excluded for reasons of incomparability.

[53] EJS 2010, sorted data from Figure 9.5, 143.

Table 9.3 Number of incoming first instance non-litigious civil/commercial cases per 100,000 inhabitants in 2008[55]

Switzerland—71	Spain—485	Serbia—2,512
Denmark—92	Turkey—704	Finland—5,067
France—159	Czech Republic—1,027	Poland—5,143
Norway—254	Slovenia—1,580	Croatia—5,193
Sweden—230	Italy—2,132	Netherlands—5,776
Russian Federation—323	Romania—2,543	Austria—9,921

In an *ad hoc* attempt to explain these findings, the CEPEJ report stated that '*citizens seem to be more prone to go to court to solve disputes*... in the Central and Eastern Europe[an] States..., South-Eastern European States... and the countries of the South of Europe... than in the countries of the North of Europe and the States of the Caucasus.'[54]

The inquiry into the number of non-litigious cases resulted in the following findings (Table 9.3):

The differences among countries in the number of non-litigious cases, according to the CEPEJ report, 'can be explained in particular by the existence or non-existence, within the courts, of land and commercial registers.'[56] The suggested conclusion was that 'the court workload is heavily influenced by non-litigious cases in some States,' while 'in other States ... litigious cases constitute the main work of the first instance courts... [where] the part of activity which is directly assigned to the judges—solving a dispute—is much higher.'[57]

A deeper analysis of both explanations for the varying level of 'judicialisation' of European justice systems may however lead to different conclusions. The suggestion that in some European countries 'citizens are more prone to go to court to solve disputes' is not supported by any serious collateral evidence, at least not if 'being prone' is defined as a cultural or societal inclination towards court litigation, irrespective of its forms, results and costs. Some studies indicate that extra-judicial methods of dispute settlement, such as conciliation, are broadly used in some cultures of the Far East (e.g. China and Japan). However, in spite of some anecdotes about the increased local eagerness to sue and litigate every dispute in life, the possible differences between various peoples in Europe are certainly not so great as to legitimise a ratio of 1 to 40 in the number of incoming civil suits reported in the neighbouring countries of Finland and the Russian Federation. People go to court to resolve disputes not because they *like to* but because they *have to*. One of the reasons for the lower number of litigious court cases may be the difficulties in the access to courts arising from high costs

[54] EJS 2010, 144. The authors swiftly added a disclaimer, asserting that the CEPEJ report 'is not the place for a sociological analysis.'

[55] EJS 2010, sorted data from Figure 9.6, 144.

[56] EJS 2010, 145.

[57] Ibidem.

and the cumbersome proceedings of getting to justice. But, while costs may still play a certain role, it is very difficult to state that countries with the lowest number of litigious cases (Finland, Norway, England and Sweden) have inaccessible civil justice systems; at least, according to the CEPEJ survey, all these countries are among those that have proportionally the largest share of their total court budget allocated to legal aid.[58] In fact, exactly these countries are among the leaders, and they offer models for other States in the formation of their legal aid policies. At the opposite end of the spectrum, it is also symptomatic that citizens flock to courts most in the countries where one would expect the least likelihood of quick decisions of high quality. Namely, some of the States having the largest reported number of litigious court cases are those that suffer from systemic problems regarding the effectiveness of legal protection (Italy, Croatia and the Russian Federation).

Viewed from this perspective, the large number of incoming litigious cases can be an indication of problems in the civil justice systems, rather than an indication of their accessibility and user-friendliness. But, the differences in the reported number of litigious cases can also be an important indicator of divergences in the understanding of what has to be counted as a proper 'litigious matter' which deserves to be resolved in a court of law. One problem may already occur with the understanding of a 'dispute,' as not all of the matters that are statistically counted as litigious may really concern a serious disagreement, difference or dispute.[59] In particular, the proceedings of collecting (uncontested) debt should in a number of jurisdictions be commenced by the formal raising of the claim in judicial proceedings—often regarded as 'litigious,' even if no objection to the claim was raised—which naturally causes a manifold rise in the number of 'litigations.' Another aspect may regard the definition and number of 'petty' cases. Irrespective of the 'harmonised' European cross-border threshold of small claims as claims not exceeding '€2,000 at the time when the claim form is received by the court,'[60] the CEPEJ survey reveals that the monetary value of a small claim in the national law of the European States again has almost a one-to-one hundred ratio.[61]

When it comes to non-litigious cases, the statement that a large number of such cases in the court statistics involve considerable activity and engagement of judges should also be subject to questioning. If the highest number of non-litigious cases

[58] Cf. EJS 2010, at 3.2, 52, Table 3.3.

[59] One of such obvious examples from the law of successor countries of the former Yugoslavia concerns 'litigious' divorce proceedings, since even the divorce proceedings initiated by the mutual agreement of the spouses are counted as 'litigation' (*parnica*). See, e.g., Croatian Family law (*Obiteljski zakon*), Official Gazette 116/03, Art. 280(2).

[60] See European Small Claims Procedure, Regulation No. 861/2007 establishing a European Small Claims Procedure, OJ 2007, L 199/1, Art. 2(1).

[61] See *supra* n. 26 and the text above it.

relate to proceedings concerned with land or company registers, or the cases of issuing payment orders in uncontested matters (if those cases are classified as non-litigious), they can clearly be handled mainly by other court personnel, or even by automated IT systems, requiring very little or no input of judicial work. The examples that might confirm this assumption are those of Finland or the Netherlands, which have a high number of reported non-litigious cases and a low number of judges per capita; another example is Austria, which has the absolutely highest reported number of non-litigious cases (almost twice as many as the first country ranked next), with the largest share of semi-automated payment orders, enforcement cases and land registry cases, all not requiring a substantive input of judicial work.[62]

In short, the analysis of figures cannot result in unequivocal statements without an in-depth study of the causes for the considerable differences from country to country. But, it is safe to reach a preliminary general conclusion regarding the meaning of the differences. There are sufficient indications that the profile of what is considered to be 'judicial work'—the social functions and tasks of judges—is quite different in different European countries. While some countries treat judges as decision-makers who provide high-quality service in important and difficult legal disputes, others treat them as a qualified but universally applicable work force for handling a number of legal matters, with the emphasis on the mass-processing of a high number of cases, not necessarily litigious and/or important cases.

These differences in the understanding of the social function(s) of judges and the divergences in their typical tasks are an important challenge to the harmonisation of civil procedure in Europe. In the different national environments, there will even be different perceptions regarding what should be the target of procedural harmonisation. For example, for judges in South-eastern European countries, the main challenges today—and in fact the main potential 'harmonisation issues'—in civil proceedings are related to payment orders, enforcement proceedings or judicial registers, all the issues that for a number of Northern justice systems are not at all interesting for judges, partly also because they are not seen as a social function of the courts at all. On the other hand, the judges trained within an environment where the indication of judicial success is the judges' 'productivity'—the processing of a set number of cases (several hundreds or even thousands a year)—are not likely to follow the passion for sophisticated methods of judicial case management, adjusted to the needs of the individual case. They will even less understand the urge to achieve excellence in legal arguments, to profile legal constructions and policies that will be used as precedents for future cases, or to master the techniques of handling complex, multi-party cases (let alone mentioning the futuristic concepts of class actions or group litigation). The visions of Judge Hercules[63] (who may have some European relatives in the North and in the

[62] Cf. Austrian Report for the Evaluation Scheme 2010 (available at http://www.coe.int/cepej; (last consulted in May 2011), 16–17.

[63] For the metaphor of Judge Hercules (an ideal, immensely wise judge fit to decide the most difficult cases) see Dworkin 1975, 1057–1109; see also Dworkin 1986.

West) and the Weberian Judge F. Bureaucrat[64] (best described in Merryman's vision of Western European judges)[65] have very thin common ground. Consequently, there is also a very small common basis upon which one could build harmonised rules of civil procedure, and it may be even smaller for the building of a common judge-made case law.[66] The starting point of the problems may already be the borders of the regulation of civil procedure: for some, the main problems might be in the attempts to reach a peaceful conclusion of the dispute before the case reaches the court, thus filtering all cases that should never land in courts; for others, the story would only begin when cases reach the court, and would concentrate around achieving the appropriate throughput and output while engaging the least effort, time and resources.

Ultimately, the differences in social functions which are reflected in the lower or higher level of 'judicialisation' (in the sense of *density* of judicial posts in the society) invoke some pragmatic opposition to harmonisation processes. Every harmonisation has its winners and losers, depending on the course of the harmonisation. For an oversized Southern European judiciary, a harmonisation based on the filtration of cases, pre-trial techniques of dispute settlement, effectiveness and substantive justice could result in a massive loss of jobs (or at least of its own *ratio vivendi*); for the slim, but effective Northern European judicial corps, the increase in formalisation, the extension of jurisdiction to 'non-judicial tasks' and the focus on bureaucratic efficiency would mean a loss of dignity and social esteem. Thus, professional resistance to any far-reaching project of harmonisation would seem to be almost inevitable.

9.2.3 Lawyers

The mosaic of actors and services for providing justice in civil cases would be incomplete without lawyers. It is therefore worth inquiring into the findings of the CEPEJ evaluation rounds related to lawyers, trying to assess their impact on the harmonisation of civil procedure.

The CEPEJ started from the definition of lawyers contained in the recommendations of the Council of Europe, where a lawyer is defined as 'a person qualified and authorised according to the national law to plead and act on behalf of

[64] F. is for Faceless. On the concept of the 'bureaucratic' judiciary see Uzelac 1993, 515–550.

[65] Cf., e.g., Merryman's anthological description of civil law judges as 'a kind of expert clerk' and 'a civil servant who performs important but essentially uncreative functions.' Merryman 1985, 36–37.

[66] This leads us to suspect the appropriateness of the otherwise tempting suggestion that setting minimum standards of protection and leaving the harmonisation to judge-made law is a good and flexible way to proceed. But see Eliantonio 2009, available at http://www.ejcl.org/133/art133-4.pdf (last consulted in May 2011).

his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters.'[67]

The collection of data regarding lawyers revealed divergences similar (if not greater) to those spotted regarding judges. Albeit a uniform definition of lawyers was used, the CEPEJ was soon faced with the fact that in various nations different categories of lawyers are used. In the later evaluation round, with a special reference to English division of barristers and solicitors (the latter, as a rule, not being authorised to represent clients in courts), data was collected separately for 'proper' lawyers and for legal advisors. The need for separate categories was, however, not limited only to common law countries. In Scandinavian countries and in Malta, the national reporters pointed out that registration as a lawyer with a bar association is not necessary to undertake the activities of a lawyer, as there are 'no formal requirements or licensing for practising law... or for appearing before courts.'[68] In most other countries, certain elements of lawyers' monopolies to court representation or legal advice were established, but the forms and the extent of such monopolies were rather different. These differences can only be partly illustrated by the fact that, according to the 2010 report, 17 countries (37.8 per cent) provided a monopoly of representation in civil cases, 14 countries (31.1 per cent) in administrative cases, 36 countries (80 per cent) in criminal cases for defendants, and 22 countries (48.9 per cent) in criminal cases for victims. In each of these categories, a number of fine shades may further be distinguished, as—according to comments of the reporters—in many countries different forms of monopoly are provided depending on the type of court, the value of the claim or the legal matters involved. Further comments noted that monopoly does or does not apply to the parties themselves if they wish to appear in court on their own behalf (e.g. in Switzerland), or that permission to appear and to represent before the Supreme Court may depend on a special permission of the court (e.g. in Norway).[69] Equally colourful is the regulation of organisational structures of the legal profession, with bar associations regulating the legal profession at the national, regional or local levels.[70] Another element which should be given sufficient attention in the context of the harmonisation of civil proceedings is the method of charging and calculating lawyers' fees, where CEPEJ also diagnosed a colourful mix

[67] Recommendation Rec. (2000) 21 of the Council of Europe on the freedom of exercise of the profession of lawyer.

[68] Comments of the Swedish national reporter, EJS 2010, 238.

[69] See EJS 2010, 245–246. We are sticking here to cursory comments of the national reporters—it is certain that a more detailed and studious comparison of procedural regimes would reveal many other differences.

[70] See EJS 2010, 243–244.

Table 9.4 Number of lawyers per 100,000 inhabitants in 2008[72]

Country	Number of lawyers	Country	Number of lawyers
Greece	350.6	Croatia	84.7
Italy	332.1	Montenegro	83.0
Spain	266.5	Romania	81.7
Portugal	260.2	Czech Republic	80.6
Malta	217.6	France	75.8
Germany (data 2006)	168.0	Poland	71.6
Belgium	155.9	Slovenia	57.7
Bulgaria	151.8	Estonia	49.6
Albania	126.2	Sweden	49.4
Switzerland	123.3	Latvia	48.4
Norway	122.6	Lithuania	47.3
Hungary	98.1	Ireland	45.7
Denmark	95.8	Russian Federation	43.9
Netherlands	94.8	Moldova	36.4
Macedonia	92.9	Finland	34.4
Slovakia	88.9	Bosnia & Herzegovina	32.3
Turkey	88.8	Armenia	24.4
Austria	86.7	Azerbaijan	9.0

of strict statutory regulation, binding or recommended tariffs of professional organisations and freely negotiated fee agreements.[71]

The numeric indicators regarding lawyers resulted again in interesting comparisons. Just as in the case of judges, considerable variations in the level of 'lawyerisation' have been clearly established—see Table 9.4.

Exploring the full background and meaning of these figures would deserve a separate series of studies. Superficial comparisons may drive us to various conclusions, some of them logical and some rather puzzling. So, for instance, it may be concluded that there is a positive relationship between the number of lawyers in

[71] EJS 2010, 246–247. For 2008, 14 States (30 per cent) indicated that lawyers' fees are regulated by law, 10 States (21.7 per cent) reported various types of regulation by bar association(s) (orientation standards, codes of conduct, indicative guidelines, local suggested draft agreements, binding regulation), and 37 States (78.7 per cent) asserted the possibility of freely negotiated agreements. Due to different standards for different types of cases (e.g. for criminal cases, legal aid cases, et cetera) these self-assessments should be considered with care because there might be important differences even within the categories of States that provided the same answers.

[72] Data taken from EJS 2010, 239, Figure 12.2. The smallest States (Andorra, Lichtenstein, Monaco, San Marino and Luxembourg) are excluded for reasons of incomparability. Also excluded are the data for the UK, where the discrepancy between the number of lawyers (barristers) and legal advisors (solicitors) is very significant (UK-Scotland—5.4 without and 203.6 with legal advisors; UK-Northern Ireland—35.1 without and 173.8 with legal advisors; UK-England & Wales—282.3 with legal advisors, about ten times less without them).

a country and the number of incoming civil litigious cases,[73] what corresponds to a commonsensical supposition (the more litigation, the more lawyers, and vice versa). A very low number of lawyers in some countries, such as Azerbaijan, Armenia or Moldova, may be an indication of still underdeveloped legal infrastructure in these countries that are in the process of strengthening the rule of law. But, on the other hand, the highest number of lawyers per capita (over 300) is recorded in Greece and Italy, the countries that also can hardly be regarded as the champions in the effective protection of legal rights. In fact, another similarity with the numerical analysis of the judicial profession comes to surface: a larger number of lawyers does not necessarily mean better, more effective, affordable and accessible civil justice.

In any case, it is certain that the varying organisational structures, different status and number of lawyers need to be seriously considered in any plans to harmonise civil procedure in Europe. The rules of civil procedure are applied by legal professions that are independent and self-regulated, and the lawyers are a crucial element in this chain. The way in which these rules are applied in practice depends to a great extent on the willingness, perceptions and interests of these legal professionals, and their highly autonomous and protected status make them partly immune from the efforts aimed at forcing them to change their routines and practices. The reforms of civil justice systems in South-eastern Europe often proved that innovative changes in procedural legislation failed because of opposition from legal professionals, who safely and with no consequences ignored the novelties (or their purpose). The impact of harmonisation on the market in legal services may be an important hurdle to reforms that aim to prevent litigation, accelerate judicial proceedings and simplify the proceedings, as such reforms could be perceived (often rightly) as an element that may mean the loss of business (or the need to undergo a demanding process of changing habits and *modus operandi*). These considerations do not play only in the 'over-lawyerised' countries, but also across Europe, especially since it was established that, on average, the number of lawyers in Europe grew at a median rate of seven and one-half per cent at the annual level.[74]

9.3 Roads to Harmonisation: Harmonisation of Structures v Harmonisation of Results

The purpose of this paper was to show the organisational challenges and difficulties encountered in the process of harmonisation of civil procedure in Europe. The analysis based on the evaluation of European judiciaries conducted by the

[73] I am grateful to Pim Albers for pointing to this conclusion and for submitting illustrations which support it.

[74] Average annual variation between 2004 and 2008, see EJS 2010, 241 (Figure 12.4).

European Commission for the Efficiency of Justice has demonstrated that all such efforts need to take very seriously the huge structural differences among the European civil justice systems. But, the intention of this analysis was not to argue that harmonisation is impossible or undesirable. On the contrary, like the internationalisation and Europeanization of many other fields of progress, harmonisation in the field of civil procedure is also a desirable goal. The question is only how to proceed with the harmonisation of civil procedure in the right way. I would suggest that, in addition to the mainstream efforts, there are two ways which should be explored.

As demonstrated in the previous Chapter, the harmonisation of the rules of civil procedure, which was up to now the focus of attention, needs to be supplemented by actions that will take into account the different structures that are needed to implement harmonised laws and rules of civil procedure. The harmonisation of legal norms regulating civil procedure will not harmonise civil procedure, unless further steps are undertaken. One straightforward conclusion from the already presented arguments may be the need to *harmonise procedural structures*, i.e. to diminish gradually the very considerable differences among justice systems. Considering just the numerical indicators, it has been shown that the extremes found on the territory of Europe are very far apart, often in a ratio of one-to-one hundred (or more).[75] These extremes are not tolerable, and if any serious harmonisation is planned, they need to be abolished.

Indeed, the CEPEJ evaluation rounds, covering so far the period between 2002 and 2008, show that, in certain fields, the harmonisation of structures may be traced. At least when it comes to the least developed justice systems of Europe, those that had the lowest figures in respect to their judicial infrastructures, it is clear that the extremes are being softened: the court budgets are being increased, the number of judges and lawyers is growing, and so is also their revenue and remuneration. The latest CEPEJ report contains a survey of comprehensive judicial reforms planned in a number of countries.[76] It may be early to predict their outcome, but the already established trends are on average going in the direction of convergence (in spite of some opposite examples).

The publication of the CEPEJ reports has by itself boosted some structural reforms. They were noted in particular as reforms regarding the organisation of the network of courts (the 'judicial map') in some countries. This trend was noted in the last CEPEJ evaluation round,[77] but has in particular been going on in South-eastern Europe, where, *inter alia*, the reorganisation of the court network was stimulated by the European Commission and various twinning missions as a part of the adjustment of the legal system necessary in the context of EU accession

[75] An example of differences that are far above a one-to-one hundred ratio may be the amount available for legal aid in different European countries, which ranges from €7 to €3,742 per case. EJS 2010, 289.

[76] EJS 2010, Chapter 16, 279–287.

[77] EJS 2010, 289.

negotiations. In some successor countries of the former Yugoslavia, a significant effort was made to 'rationalise,' i.e. to reduce the number of courts, which was evaluated as excessive in light of the replies from the CEPEJ scheme.[78] The results were not always the same, but at least the trend of reducing the extremely high figures was initiated, which may be taken as a form of harmonisation.

Over time, the trend of harmonising procedural structures will certainly advance. It seems that, to a certain extent, such an intention may be compatible with the CEPEJ policies of assisting the national justice systems by proposing concrete ways of improving their functioning. However, the harmonisation of procedural structures may be a very long process, and it is very questionable what its scope and effect could be. It may be a viable task to evaluate the efficiency of the court system and propose a reduction or increase in the number of courts, although some practical difficulties may affect this process (e.g. local concerns, the political situation, et cetera). But, when it comes to a potential for harmonising the legal professions, prospects for significant changes are much gloomier. In particular, a significant reduction in the number of lawyers or judges is hardly imaginable, no matter how much scientific research may prove its desirability. Changing working habits, self-understanding of inherited roles, and the traditional methods of work can be possible only if many preconditions are met. But, more importantly, for a far-reaching structural transformation a social consensus is needed, as well as the awareness of the necessity for change (and its precise direction). The critical mass may be reached in some countries that are otherwise undergoing a dynamic process of social change (which is why a number of them are labelled as 'transition' countries). Significant structural changes may be quite likely there (yet, their success is not guaranteed). But, the structural differences are great even among the circle of States that understand themselves as well-established, well-functioning democracies with functioning justice systems. The need for reforms, including the need to harmonise certain forms and structures, may exist there as well, but it is not likely that public awareness about this need is sufficient to motivate deep structural transformations, only for the sake of 'harmonisation.' In the end, one should ask whether the costs and efforts of such a transformation do pay off if the system is already producing satisfactory results.

Another direction of procedural harmonisation should therefore have precedence. When the heads of the European Union requested 'better compatibility and more convergence between the legal systems of Member States,'[79] this formula was designated to denote the need of the European citizens to be awarded the same or comparable standards of legal protection in the joint 'area of justice.' The procedural convergence need not necessarily be either the convergence of

[78] A survey of such efforts in Croatia, Bosnia and Herzegovina, Serbia, Slovenia, Macedonia, Kosovo and Montenegro was presented recently at the Regional Conference 'Reorganisation of Court Network in Montenegro' held in Budva on 15–17 November 2010.

[79] Tampere milestones, cit *supra* n. 5.

procedural rules, or the convergence of procedural structures—it can also be achieved as the *convergence (harmonisation) of results of the national justice systems.*

The results, of course, can be defined in a different way. But, the proper perspective that would correspond to the intention of the Tampere milestones, echoing at the same time the jurisprudence of the European Court of Human Rights regarding Article 6(1) of the ECHR, would be the perspective of the *end users of the justice system.* The product of civil justice is (or should be) the *effective protection of users' rights.* The protection of the rights of the users of the justice system can be effective only if it is *fair,* and if it is concretely and effectively delivered in *optimum and foreseeable* (or at least *reasonable*) *time.*

Could the results of civil justice be effectively monitored and compared across European countries? Is it possible to harmonise the speed and the essential content of legal protection in different European jurisdictions, no matter what their procedural and structural differences are? The CEPEJ has also undertaken valuable work in two related fields, trying to set the standards for the *quality* of justice,[80] and for the *timeframes* within which justice is delivered.[81] One should, however, admit that the results of the work in these two fields have not yet produced sufficiently reliable criteria for comparisons and evaluation, but rather have pointed to the existing deficiencies in the national justice systems. The developed checklists for the national justice systems, such as the Time Management Checklist,[82] have revealed that most European countries do not possess sufficient ability to monitor all relevant aspects of the duration of judicial proceedings. Some of the tools that are in the process of development, such as the common user satisfaction surveys,[83] are just about to be tested on a broader scale across the European countries.[84] The collection of data in this respect has started, but the first data gathered is far more fragmentary and incomplete than the data collected

[80] On the concept of the quality of the courts and the Judiciary and the work of the CEPEJ Working Group on Quality, see Albers 2009, 57–74.

[81] The CEPEJ has worked since its creation on the issues related to the timeframes of proceedings, first within the Task Force for Judicial Timeframes (TF-DEL), and then, since 2007, within the work of the Centre for Judicial Time Management (SATURN Centre—Study and Analysis of Judicial Time Use Research Network). See in more detail at http://www.coe.int/cepej (last consulted in May 2011).

[82] CEPEJ, Time Management Checklist, Checklist of indicators for the analysis of the length of proceedings in the justice system, adopted by the CEPEJ at its 6th plenary meeting (7–9 December 2005), document CEPEJ (2005) 12 REV.

[83] Cf. CEPEJ Handbook for conducting satisfaction surveys aimed at court users in Council of Europe Member States, adopted by CEPEJ at its 15th plenary meeting (Strasbourg, 9–10 September 2010), CEPEJ 2010, 1.

[84] The latest development in this respect concerns the collaboration of CEPEJ and the Lisbon Network (set up in 1995 within the Council of Europe and consisting of different judicial training bodies in Europe). The Lisbon network will be entrusted with the testing of the CEPEJ satisfaction surveys for court users. It remains to be seen how adequate the bodies competent for judicial training will be in fulfilling this task.

regarding the structural elements of the justice systems.[85] This may be an indication that many contemporary justice systems in Europe are still much more self-centred than user-oriented. They possess good insights into their budgets, staff and organisational structures, case-loads and backlogs, but not in those elements which are important from the users' perspective. These elements are, for example, foreseeable timeframes, clear procedural calendars, transparent time and case management, easily accessible information about the available options in the pursuit of individual and collective rights, user-friendly procedures, clearly defined fee and costs arrangements and fair legal aid systems for those who cannot afford the full costs of legal protection. The fact that several European jurisdictions are in these aspects more advanced than others only underlines the differences and enhances the need for harmonisation.

Let us return to the initial question of this paper. Is the harmonisation of civil procedure a noble, but elusive goal? In the light of the arguments presented here, it may be concluded that it is a difficult goal. With a lot of effort, it may be reached, but the proper way of trying to reach it should commence with the idea of equalising the expectations and positions of users *vis-à-vis* the justice system. Differences in this respect in Europe are not only huge, they are also not sufficiently diagnosed and monitored. The extremes, such as the established human rights violations regarding fairness and length of proceedings, are only symptoms and tentative indications. It is certain that in the current state of affairs neither in Greater Europe nor in the EU can citizens approach courts and authorities in other States with the expectation of receiving the same standards of legal protection, both regarding its fairness and its effectiveness. But, after developing and implementing instruments that are adequate for making objective comparisons across the lines of national civil procedures, the roads to harmonisation will be open, and their direction will be manifest. The harmonisation of results of civil procedure may inevitably imply some harmonisation of procedural structures, at least where it is diagnosed that underdeveloped—or disproportionately oversized—procedural structures clearly have a negative impact on the effectiveness of legal protection. Certainly, reforms adjusted to the needs and realities of every jurisdiction should be introduced in order to fine-tune the system and improve its results, thereby tending to reach the perhaps unreachable ideal of an optimally harmonised European justice. But, where different procedural structures turn out to be equally effective, fair, transparent and user-friendly, the pluralism of procedural forms may even be considered as desirable, just as harmony may be better achieved by polyphonic voices than by voices chanting in unison.

[85] The fact that the data regarding the timeframes of proceedings are incomplete was consistently noted in all EJS reports, including the latest edition, where the readers were warned again 'considering the limited number of responding States… to interpret the data… with care.' EJS 2010, 167.

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This book is an important contribution to the discussion about globalisation of civil procedure. Globalisation of legal matters and the inherent necessity of having to litigate in foreign courts or to enforce judgments in other countries considerably complicate civil proceedings due to great differences in civil procedure. This may jeopardise access to justice. As a result, the debate on the need for the harmonisation of civil procedure becomes ever more prominent. This book discusses the globalisation and harmonisation of civil procedure from various angles, including fundamental (international) principles of civil justice, legal history, private international law, law and economics and (European) policy. It offers important theoretical and practical perspectives and is valuable reading for, amongst others, academic researchers, policy makers, judges, legal practitioners and court bailiffs.

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