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Predictability and Stability of Judicial Decisions

Introductory remarks on the evaluation of quality of justice

It is a recent trend in the examination and study of the judiciary that special attention is paid to the criteria of the quality of justice. Different, sometimes overlapping projects have been launched worldwide in order to define these criteria. Judges themselves and the public always had clear and definite views on the quality of justice drawn from their personal experience or based on reactions to shortcomings in the judicial system. Opinion polls show great confidence in courts. However, courts are often criticized for being controversial, slow and expensive.¹

Nowadays, in certain parts of the world a wider notion of quality is appearing as a result of the growing number of countries which are developing integral quality systems for courts. This trend started in the United States with the creation of the Trial Court Performance Standards (TCPS).²

The interest for integral quality systems is growing not only at the level of individual states, but also at a European level. For example in 2004 the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament published a working document with the title ‘the quality of criminal justice and the harmonisation of criminal legislation in the Member States’.³

¹ EUROPEAN COMMISSION FOR EFFICIENCY OF JUSTICE (CEPEJ) Checklist for promoting the quality of justice and the courts adopted by the CEPEJ at its 11th plenary meeting (Strasbourg, 2-3 July 2008)
The Council of Europe launched an even more important initiative by creating CEPEJ (the European Commission for the Efficiency of Justice). The CEPEJ reports on the evaluation judicial systems give a good overview how the various judicial systems are working and what the main trends are. Moreover, the CEPEJ created in 2007 a working group on quality. One of the tasks of this working group is to collect information concerning initiatives taken by member states to promote and increase the quality in the courts. Another task is to develop concrete instruments for the member states in the area of court quality.⁴

CEPEJ made it clear that it does not aim at to produce neither a theory of quality of justice nor to define its notion. However it aims to promote the quality within the justice systems and to give to policy makers and judicial practitioners concrete tools to improve the quality of their own system, taking into account their specificities.⁵

Another organisation devoted to judicial quality assessment, the International Framework for Court Excellence – following the pioneering criteria established by the US Trial Court Performance Standards – defined seven areas for court excellence based on ten court values. The ten basic values include equality before the law, fairness, impartiality, independence of decision-making, competence, integrity, transparency, accessibility, timeliness and certainty. The seven areas of court excellence are 1. court management, 2. court policies, 3. resources, 4. proceedings, 5. client needs and satisfaction, 6. accessible court services, and 7. public trust and confidence.⁶

I focus on the relation of the value of certainty and the quality criterion of public trust and acceptance. As this seminar proves, the trend of applying quality criteria to judicial bodies has reached the CFI, too. The peculiarity of the CFI is that it is a supra-national, European court that has substantial delegated power to exercise judicial control over EU institutions and member-states. At the meantime it is a first instance court under the review of the European Court of Justice.

The criteria of stability, consistency and predictability

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⁴ Pim Albers, *op.cit.*, 59.
⁵ EUROPEAN COMMISSION FOR EFFICIENCY OF JUSTICE (CEPEJ) Checklist for promoting the quality of justice and the courts adopted by the CEPEJ at its 11th plenary meeting (Strasbourg, 2-3 July 2008)
⁶ International Framework for Court Excellence p. 17.
Why is important the stability, consistency and predictability of judicial decisions? The first answer has to do with political philosophy. The role and the legitimacy of the judiciary in modern political communities that are democracies is different from the other branches of the government. The judiciary is a counter-majoritarian institution, it does not depend, thus is independent from the will of the majority, that is from the democratic processes in a more general way. Despite the frequently mentioned but vague characteristic of democratic deficit, the EU functions through democratic processes from the direct election of parliamentarians through the often used method of deciding unanimously to the use of popular referenda at national level on basic European questions. Consequently, the counter-majoritarian logic of judicial bodies is legitimate as far as their decisions are not arbitrary, inconsistent, contradicting or groundless. The unlimited power of having the final say in disputes has to be counter-balanced by a strict scrutiny of the consistency and constancy of the procedures and decisions.

Therefore the quality of justice is the ground of the legitimacy of a court.

But it is possible to define the quality of justice at all? The main element in the judicial process is the decision itself. The decision with all its consequences is the function that a court is expected to fulfil. Even if we say that it is hard to define the quality of justice, judges have to reflect consciously to the case of consistency and predictability.

The first and unconditional prerequisite of a “quality justice” is judicial independence. Judicial independence is linked to impartial, fair proceedings, freedom from restrictions and improper influences, as well as access to adequate financial resources.

Secondly, legal certainty is a basic value that judges try to ensure in the legal system. But sometimes judges forget that legal certainty is not only a requirement for the law-maker, the law-enforcement or for the individuals but legal certainty has to prevail in the judicial process itself.

What are the possible tools to achieve at least a relative stability of the jurisprudence?

When adjudicating a case and interpreting the law, courts develop and apply a number of tests, like balancing, proportionality etc. The coherent use of these tests
endorses that all interested should calculate the likelihood of the decisions of the respective court. In the case of the CFI the range of those affected is much wider that in the case of, let say, a local national court where as a rule only the involved parties are effected. The decisions of the European courts influence the member-states and the whole European community, and all those acting in its framework.

In hard cases at new challenges it is difficult to follow even the well-established jurisprudence. But those cases offer opportunity for the restatement of the respective jurisprudence, moreover to introduce innovative elements into legal interpretation.

However, always there will be decisions that cause surprises. Moreover, the predictability of the jurisprudence does not mean that the decisions are evident. Jurisprudence is looking for an efficient balance between predictability and flexibility.7 The stability has also to do with the essential and permanent elements of the jurisprudence of a court in contrast with its accidental and transitory elements. I would add a further element: innovation that is novelty and originality. This latter element comes out mostly in the so-called hard cases.

Difficulties to obtain consistency

Different circumstances interfere with the judicial process, and create obstacles to achieve consistent jurisprudence.

1. The following internal factors might threaten the consistency of the jurisprudence:

a) The changing composition of the court. In the case of the CFI we speak of a supra-national court where judges coming from different legal systems and cultures sit on the same bench. The composition of the court depends from the nomination of member-state governments. The appointment procedure is not controlled by the court, and the quality requirement depends on the sometimes arbitrary decision of the member-states. In all similar courts it is a permanent challenge to accommodate new judges to the ‘settled case-law’. As Richard Posner put it: “If changing judges changes law, it is not even clear what law is.”8

Moreover, the CFI in the overwhelming majority of the cases (84,3 % in 2008) proceeds in three-member panels. This is highly different and much more difficult

than to achieve innovative new legal doctrines by greater chambers consisting let say of fifteen judges.

b) Subconscious elements in the decisions of the judges influence often the final outcome of the judicial process; these subconscious elements might have great weight and the can hardly be defined.

c) Case-by-case decisions might be justified by the changing circumstances; nevertheless, when the observance of case-by-case judgements turns into the change of the standards case-by-case. Parallel jurisdictions exercised by the different panels of the same court – with all the good faith – might cause the divergence of the jurisdiction within the same court.

d) The lack of justified motivation of the judgements.

Legal theory considers good decisions those that are predictable: like cases shall be defined in like fashion. As Hart or MacCormick explained: analogical reasoning and justification produces ‘adequate’ and ‘reasonably defensible’ judicial decisions that, even if they are discretionary, are not arbitrary or irrational.9 As, even in civil law countries or at supra-national courts, “judges have and exercise discretion”.10

As regards the length of the motivation: the ECJ has been criticised for the shortness of its justifications given to the judgments, as well as for the unfounded and authoritarian use of the reference to the “settled case law” of the Court.11 The CFI writes long decisions12, if necessary, but does not waste too much words to the dismissals. The simple stylistic form is: the court “dismisses the action”, or in its slightly sophisticated form “it dismisses the action as inadmissible”. All courts suffer from overload of cases, and develop different techniques to handle the problem. As the CFI has a backlog of closely 1200 cases, it is justifiable that it tries to bypass minor cases in order to go in-depth into important cases.

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10 Posner, op. cit., 5.
12 1373 paragraphs in the Microsoft v Commission case for example.
2. Among the **external factors** influencing the stability of the jurisprudence one might recall the followings:

a) the amendment of the legal context, including the European regulations, the international standards, and the national legislatures.

b) The reference to historical circumstances (e.g. the legal consequences of the so-called ‘war on terror’).

In order to specify these conditions to the CFI, one can refer to the case of Kadi, Yusuf and Al Barakaat v Council and Commission\(^{13}\).

CFI had to decide on the lawfulness of a regulation adopted in order to give effect to UN Security Council resolutions directed to the freezing of funds destined for Islamic terrorist organisations. Among other things, it was asserted that the provisions in question infringed the human rights of Mr. Kadi, a Saudi Arabian businessman. That in turn impugned the Security Council resolutions. The CFI held that it had no jurisdiction to question the lawfulness of the resolutions directly but, since the resolutions took effect subject to general principles of public international law (including respect for human rights), it had jurisdiction to consider compatibility with those principles when examining the lawfulness of the measures adopted by the EC institutions in order to implement the Security Council resolutions. In these cases among others the position of UN Security Council decisions within the framework of the EU an EC was at stake.

The underlying case was linked to the war on terrorism as far as prohibition of export of goods, flight ban and freeze of funds in respect of the Taliban of Afghanistan by Commission and Council regulations that were challenged by the applicants. The CFI had to interpret the relation of international law to EU regulations, all put in the context of the war on terror. The infringement of the human rights of Mr. Kadi, a Saudi Arabian businessman was also at stake.

The judgment delivered by the CFI was in a lot of aspects peculiar and atypical. The CFI declared that the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to **jus cogens**, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.\(^{14}\) Critics of the decision considered this reasoning

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\(^{13}\) Case T-306/01

\(^{14}\) Para 226
„unexpected and circumlocutory, and even surprising”. The decision of the CFI, according to the commentaries, was not predictable, but it was innovative („very compelling at its core” – as Joseph Weiler described it).

The judgement was challenged before the Court of Justice that in several points reversed the first instance decision, while endorsed some part of the first instance decision. Here we touch upon a specific feature of the CFI: it is, as its name defines, a first instance court, and thus the final arbiter of the quality of the court’s work is adjudicated by the ECJ. Thus the predictability and flexibility of the CFI depends partly on the ECJ.

Constrains on judicial decisions

Approaching the problem of judicial consistency not from the point of view of the features undermining the stability of judicial decisions but from the constraints that facilitate the achievement of ‘good’ judgements, one arrives to the same conclusions. The most important internal constraint on judicial discretion are the force of the precedents (understood in broad sense), and legal method.

The elements of external constraint are the academic criticism and evaluation, as well as the social acceptance of the respective jurisprudence.

Finally, let me quote the optimistic approach of Benjamin Cardozo:

“The work of a judge is in one sense enduring and in other sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish.”

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16 EJIL (2008) Vol. 19 No. 5. 895
17 C-402/05. P and C-415/05. P