Comparing the Efficiency and Quality of Civil Justice: The Role of Structural Differences and Definitions of Quality

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Abstract: Most studies on the efficiency and quality of civil justices are limited to formal courts, although tribunals and other quasi-courts have a central role in resolving legal disputes in many European countries. Hence, significant parts of many civil justice systems are excluded from the studies. Differences among countries may thus reflect primarily structural and terminological differences rather than disparities in the number of disputes arising or the resources used. This text studies four Nordic countries to uncover how structural and terminological differences influence comparability of efficiency and quality of courts. By studying four similar countries, differences arising from societal and legal factors are minimised. Further, the link between the structure of the civil justice system and the role and functions of courts is disseminated. Numerical comparisons tend to reduce quality to easily quantifiable measures, thus more elusive criteria remain underexplored. The quality criteria developed by European organisations serve as a starting point for developing quality criteria. It is suggested that these criteria should be supplied with other parameters, such as training of the staff and quality of supervision by lawyers. Independence and quality of proceedings are identified as critical factors for quasi-courts. Thereafter, selected Nordic quasi-courts are tested against the criteria developed. Finally, the text raises the question whether applying a formal rather than functional definition of courts risks creating a two-tier justice system.

1. Comparing the efficiency and quality of civil justice

Efficiency and quality of civil justice is pivotal for ensuring the rule of law and enforcement of rights, yet measuring the quality of justice is arduous. New public management, limited court budgets, and transformation of the justice system in Eastern and Central European countries have been an impetus for international comparisons based on quantitative data, inter alia, the CEPEJ Report of the European Commission for the Efficiency of Justice and the EU

Justice Scoreboard.[1] While important insights can be drawn from quantitative data, it may also lead to false conclusions.[2] The appeal of quantitative data lies in its ability to translate complex concepts into numeric – and seemingly tangible – parameters and turn these into grades and rankings. Therefore, easily quantifiable factors, such as case disposition times and costs, tend to dominate, while elusive aspects are often reduced to some related concept or excluded. As Erhard Blankenburg has demonstrated, the difference in litigation rates for consumer cases between Germany and the Netherlands result mainly from structural differences, differences in supply, rather than cultural differences.[3] In his critical analysis of the Lex Mundi project on courts, Christoph Kern notes how an assumption that procedural particularities do not matter may lead us to misguided interpretations.[4] Many commentators have criticised the CEPEJ studies for not taking into account the detrimental effect of absence of uniform categories on comparability.[5]

Another challenge for comparative studies on civil justice systems are the disparate set-ups of national civil justice systems, in particular, the degree to which the system builds on tribunals

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[1] F. Contini and R. Mohr, *Judicial Evaluation. Traditions, Innovation and Proposals for Measuring the Quality of Court Performance* (Saarbrücken: VDM Verlag Dr. Muller, 2008), p.3 and P.M. Langbroek, *Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States* (Strasbourg: European Commission for the Efficiency of Justice, 2010), p.7 and S. Djankov et al., "Courts" (2003) 118 The Quarterly Journal of Economics 453.

[2] M. Siems, *Comparative Law* (Cambridge: CUP, 2014), 186 and M.M. Siems, "Numerical Comparative Law: Do We Need Statistical Evidence in Law in Order to Reduce Complexity?" (2005) 13 Cardozo Journal of International & Comparative Law 521.

[3] E. Blankenburg, "Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany" (1998) 46 American Journal of Comparative Law 1, E. Blankenbrug, "Civil Litigation Rates as Indicators for Legal Cultures" in D. Nelken (ed), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997), p.41 and E. Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in The Netherlands and West Germany" (1994) 28 Law & Society Review 789. For a discussion on the role of the alternatives to litigation, see e.g. P.S. Atiyah, "Tort Law and the Alternatives: Some Anglo-American Comparisons" (1987) Duke Law Journal 1002 and R.L. Sandefur, "The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy" (2009) 42 Loyola of Los Angeles Law Review 949.

[4] C. Kern, *Justice Between Simplification and Formalism: A Discussion and Critique of the World Bank Sponsored Lex Mundi Project on Efficiency of Civil Procedure*, vol 45 (Tübingen: Mohr Siebeck, 2007), pp.13–15.

[5] On the problems arising from terminological and structural differences see e.g. M. Fabri, "Methodological Issues in the Comparative Analysis of the Number of Judges, Administrative Personnel, and Court Performance Collected by The Commission for the Efficiency of Justice of the Council Of Europe" (2017) 7 Oñati Socio-Legal Series 616, E.A. Ontanu, M. Velicogna and F. Contini, "How Many Cases? Assessing the Comparability of EU Judicial Datasets" (2017) available at http://dx.doi.org/10.2139/ssrn.2990558, A. Dori, "The EU Justice Scoreboard-Judicial Evaluation as a New Governance Tool" Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series. For more positive accounts, see A. Uzelac, "Efficiency of European Justice Systems. The Strength and Weaknesses of the CEPEJ evaluations" (2011) 1 International Journal of Procedural Law 106, A. Uzelac, "Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations" in X E Kramer and C.H. van Rhee (eds), *Civil Litigation in a Globalising World*, (Cham: Springer 2012), p.175, and J. Johnsen, "The European Commission for the Efficiency of Justice (CEPEJ) Reforming European Justice Systems – 'Mission Impossible?'" (2017) 4 International Journal for Court Administration 1.

and other quasi-courts to adjudicate civil, family and administrative law dispute. In many European countries, citizens "litigate" their cases in these organs rather than formal courts. Comparisons of civil justice systems should, therefore, include these. Furthermore, the EU emphasises enforcement of rights,[6] which should propel investigations into how well-equipped courts and quasi-courts are to produce correct outcomes.

This article explores some of the obstacles for making meaningful comparisons based on quantitative data in comparative civil procedure law. By using a wide functionalistic – rather than formalistic – approach, it seeks to uncover the role of structures and terminology in producing or obscuring comparable quantitative data. Further, it discusses the definition of quality of justice and how quality of justice can be evaluated, particularly, in non-court based civil justice systems. Where previous research on the quality of justice explores mainly barriers on the paths to justice[7], this study investigates the impact of the organisation of the civil justice system and rules of procedure on the quality of justice. It also discusses problems related to comparisons of the systems.

In order to allow an in-depth analysis, this study is limited to four Nordic countries: Denmark, Finland, Norway and Sweden. The Nordic countries have similar legal, historical and societal systems and the basic set-up of the court system is similar, apart from the fact that Finland and Sweden have administrative courts, while Denmark and Norway do not.[8] By focusing on closely related countries differences arising from fundamentally divergent forms of, inter alia, family law and social welfare law can be eliminated. This study aims at illustrating the problems rather than providing a comprehensive analysis directly applicable to most or all countries. The analysis of quasi-courts is based on a purposive sample to illustrate the diverse landscape of civil justice in the Nordic countries.

In the next part (2), an overview of Nordic court systems is given. Part 3 discusses how the definition of civil justice and its subcategories influence the comparability of statistical data on courts. The impact of court-centric versus non-court-centric systems on, inter alia, the function of courts is discussed in part 4. Thereafter, in part 5, an outline for broader measures regarding the quality of justice for quasi-courts is developed and tested on selected parts of

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[6] See notes 57–58.

[7] See e.g. H. Genn and S. Beinart, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) and M. Gramatikov, M. Barendrecht and J.H. Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 Hague Journal on the Rule of Law 349.

[8] For an introduction into Nordic courts and legal culture, see A. Nylund and J. Øyrehagen Sunde, "Courts and Court Proceedings" in P. Letto-Vanamo, D. Tamm and Bent O.G. Mortensen (eds), *Nordic Law in European Context* (Cham: Springer, forthcoming).

the Nordic civil justice systems. Part 6 offers some concluding observations and suggestions for future comparative studies in the field of civil procedure.

2. Civil justice and litigation rates on the Nordic countries

The Nordic countries have three-tiered court systems where with few exceptions all civil, commercial and criminal cases start in the District Court. Finland and Sweden have a, respectively, two- and three-tiered system of administrative courts. There are only a few special courts and these have limited jurisdiction. All four countries have Labour Courts, which hear conflict arising from collective labour agreements. Other special courts are inter alia the Danish Commercial and Maritime High Court (Sø- og Handelsretten) and the Finnish Market Court (Markkinatuomioistuin). These courts have limited caseloads and highly specialised jurisdiction. In Norway, a set of quasi-courts function as the equivalent of the Market Court. In Sweden, the Patent and Market Court (Patent- och marknadsdomstolen) is integrated in the general court system. Therefore, the cases are included in the numbers of Swedish general courts but not for the other Nordic countries.

Denmark, Finland and Norway have approximately the same number of inhabitants, 5.5 million, and Sweden almost double, 9.9 million.[9] Due to societal similarities, a similar litigation rate is expected, except for Sweden, which should have almost twice as many cases as the other three countries.

Table 1 Incoming litigious civil cases and administrative cases[10]

	Incoming litigious civil cases	Incoming administrative cases	Incoming litigious civil cases and administrative cases	Incoming non-litigious civil cases
Denmark[11]	45,509	N/A	45,509	368,449
Finland[12]	8,647	21,629	30,276	450,958

[9] In 2016, the population of Denmark was 5.73 million, of Finland 5.50 million in 2016, of Norway 5.23 million and of Sweden 9.90 million, according to the World Bank *https://data.worldbank.org/country.*

[10] The numbers do not include insolvency cases, such as bankruptcy and debt reconstruction cases.

[11] Danmarks Domstoler,*Statistik for civile sager 2017 http://www.domstol.dk/om/talogfakta/statistik/Pages/default.aspx* [accessed 1 September 2018].

[12] Oikeusministeriö, *Tuomioistuinten työtilastoja 2017. https://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/160698/OMTH_11_2018_Tuomioistuinten_ty%C3%B6tilastoja_2017.pdf?sequence=4&isAllowed=y* [accessed 1 September 2018].

Norway[13]	15,532	N/A	15,532	22,579
Sweden[14]	67,889	163,182	231,071	68,968

The official statistics of incoming civil and administrative cases indicate significant differences in litigation rates.[15] Administrative courts explain part of the difference, but even when adding administrative cases, the numbers are very different. Major differences in the number of disputes are implausible, which encourages an exploration into the underlying structural and terminological factors.

3. Civil justice and its categories – a formal or functional definition?

The first problems in comparing data on incoming cases are that categorisation of cases is based on national, idiosyncratic delimitations and definitions, and that the structure of the court system varies.

Administrative cases are a prime example: Combining the cases in administrative courts to civil cases reduces the gap between Denmark and Finland markedly. An estimated one-half of Danish civil cases have a significant public law element in them.[16] Public law elements do not automatically signify that the case would belong under the jurisdiction of administrative courts. It is, however, likely that many of the cases would do so. Interestingly, only approximately 10 per cent of Norwegian civil cases are administrative law cases.[17] Because the exact number of administrative cases is not available, administrative cases cannot be subtracted from the Danish and Norwegian statistics to make the number of litigious non-administrative civil cases comparable.

Non-litigious cases are a particular problem. Many European countries employ the category of petitionary matters, *iurisdictio voluntaria*. The category emanates from Roman law and

[13] Domstolstyrelsen, *Årsstatistikk førsteinstansene 2017. https://www.domstol.no/globalassets/upload/da/internett/domstol.no/domstoladministrasjonen/statistikk/statistikk-2018/arsstatistikk--forsteinstans-2017.pdf* [accessed 1 September 2018].
[14] Domstolsverket, *Court statistics 2017. http://www.domstol.se/Publikationer/Statistik/court_statistics_2017.pdf* [Accessed September 1, 2018].
[15] The data reported to the CEPEJ studies does not match the data found in national statistics.
[16] L. Lindencrone and E. Werlauff, *Dansk retspleje,* 6 edn. (Copenhagen: Karnov Group, 2014), p.49.
[17] Difi, *Viltvoksende nemnder? Om organisering og regulering av statlige klagenemnder. https://www.difi.no/sites/difino/files/difi-rapport-2014_2-viltvoksende-nemnder.-om-organisering-og-regulering-av-statlige-klagenemnder.pdf* [accessed 1 September 2018], p.48. Domstolsadministrasjonen, *Domstolene i Norge. Årsrapport 2016. http://aarsmelding.domstol.no/data/2016/aarsmelding.pdf* [accessed 20 September 2018], p.16, supports the conclusion.

describes cases where there is no conflict between the parties. A petitionary matter is the only way to perform a specific legal act or to change the legal status or rights of a person and is per definition non-litigious.[18] Guardianship, adoption, divorce and registration of documents are examples of possible petitionary matters. Many petitionary matters involve no dispute, no adjudicative aspects and correspond to the duties of the administration. Consequently, many of these tasks have been transferred away from courts, but the development has not been identical in each country.

Divorces serve as an example. The divorce-rate is similar in the Nordic countries: 17,500 divorce-related cases filed annually in Denmark and Finland and 30,000 in Sweden. In Finland, all divorce cases are categorised as non-litigious regardless of the presence of disputed issues. In Sweden, joint divorce petitions with no disputed elements are categorised as non-litigious. Thus, all Finnish divorce cases were classified as non-litigious, but, in Sweden, 21,871 cases were classified as non-litigious, and 9,603 divorces as litigious.[19] In Denmark, administrative bodies appoint grant divorces and out-of-court dispute resolution is a prerequisite for filing court proceedings in parenting cases. Consequently, courts are involved in only 870 divorces in 2017.[20] The same number of divorces results in different statistical data, which makes comparisons on court efficiency and litigation rate virtually impossible.

Uncontested pecuniary claims serve as another example of how structural variation in the civil justice system affects litigation rates. The number of uncontested pecuniary claims is roughly 360,000 in Denmark[21], Finland[22], and Norway.[23] In Denmark and Finland, the cases are classified non-litigious cases. The Norwegian corresponding cases are not included in the data because they are allocated to Enforcement Offices (namsmann) and Conciliation Boards (forliksråd), neither of which is formally courts. The Swedish Enforcement Authority (Kronofogdemyndigheten) hears payment orders, and thus these cases are not included in

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[18] Alfred Berger uses the term "quarrel", see *Encyclopedic Dictionary of Roman Law* (Philadelphia: The American Philosophical Society, 1968), p.524.

[19] Oikeusministeriö, *Tuomioistuinten työtilastoja 2017*, p.39 and 106–107 and Domstolsverket, *Court statistics 2017*, p.9 and 13.

[20] Danmarks Domstoler, *Statistik for civile sager 2017* and Statsforvalgningen, *Så mange blev separeret eller skilt i 2017. https://www.statsforvaltningen.dk/sfdocs/Presse/Statistik%20og%20baggrundsfakta/S%C3%A5%20mange%20blev%20separeret%20eller%20skilt%20i%202017.pdf* [accessed 3 September 2018].

[21] The number was 358,880 in 2017. Danmarks Domstoler, *Statistik for civile sager 2017.*

[22] The number was 402,808, which is an increase of approximately 59,000 cases in one year. Oikeusministeriö, *Tuomioistuinten työtilastoja 2017*, p.35.

[23] The number was 380,423 in Norway in 2017.The number includes some disputed small claims as well. Politiet, *Politiets Årsrapport 2017. https://www.politiet.no/globalassets/05-om-oss/rapporter/politiets-arsrapport-2017.pdf* [accessed 3 September 2018], p.9.

court statistics. In all four countries, the proceedings are simple and involvement of judges and lawyers is usually minimal.

These examples illustrate how and why using crude quantitative data, national categorisations and a formal definition of courts lead astray. The fallacious results from divergent classifications and structures are multiplied in comparative studies where several variables are investigated, for example the CEPEJ studies and EU Justice Scoreboard. Juxtaposing data on disposition times, the number of judges and court expenditure produces erroneous results because the reported data rely on the idiosyncrasies of each national system rather than uniform categories. Hence, statistical data should be accompanied by rigorous use of comparative law methods.[24] Even a combination of numerical and comparative methods may not suffice to make data fully comparable, because the differences in categories and structures are fundamental.

4. The role and functions of courts

The examples in part 3 convey the disparate structures of the civil justice systems in the Nordic countries. Although all Nordic countries have transferred non-adjudicative tasks away from courts, differences remain vis-à-vis the role foreseen for courts. Should courts handle exclusively litigious matters or should they also handle non-litigious matters? Should litigation be concentrated to courts or should tribunals or quasi-courts also hear cases? The answers to these questions impact the workload and function of courts.[25]

In Denmark and Norway almost no non-litigious family law matters remain within the courts, which influence the workload of courts. Handling a non-litigious divorce requires limited work; a highly contentious divorce where parental responsibility and maintenance are disputed is laborious. Thus, the average workload resulting from each divorce case is significantly higher in Denmark where courts only deal with contested cases which have been through a form of mediation, than in Finland where courts deal with all divorces and do not distinguish litigious from non-litigious ones. This could lead us to conclude that Finnish courts are more efficient than Danish courts. However, the expenditure and staff in the Danish

[24] See also Uzelac, "Efficiency of European Justice Systems. The Strength and Weaknesses of the CEPEJ Evaluations", and Uzelac, "Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations".
[25] See also S.R. Anleu and K. Mack, "Judicial Performance and Experiences of Judicial Work: Findings from Socio-Legal Research" (2014) 4 Oñati Socio-legal Series 1015.

administrative system are not included in court statistics, which reduces comparability on the total costs for divorce cases.

Recourse against social benefits[26] in the Nordic countries serves as an example of the importance of government policies on structural differences. The number of cases in each country is approximately 30,000–45,000.[27] The variation in the total number is likely to result of other differences in categorisation, social security law and setup of the system. The first step in the recourse process is often to file a request for rectification, thereafter follows formal recourse.

In 1998, the Swedish government adopted a policy to concentrate administrative recourse to administrative courts.[28] The Swedish court-based system funnels recourse against decision on social benefits into administrative courts, which heard a total of 44,374 social welfare cases in 2017.[29]

In the Finnish system, cases on social benefits are directed mainly to the Social Security Appeal Board (Sosiaaliturva-asioiden muutoksenhakulautakunta) which is a tribunal, but not a court. The number of cases was 40,668 in 2017.[30] The Insurance Court (Vakuutusoikeus) hears appeals on social benefits. Further appeal to general and administrative courts is limited. In 2016, the Supreme Administrative Court received 11 appeals from the Insurance Court, and a single case gained access to the Supreme Court.[31] This is less than 0.1 per cent of the total amount of the number of cases filed at the tribunal on social benefits.

The Danish and Norwegian systems are based on quasi-courts. Norway has more than 50 different boards in operation.[32] In Denmark, the Council of Appeal (Ankestyrelsen), an

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[26] Recourse against decisions on social and health services, such as child day care, elderly care and home care service, are generally organised differently.
[27] The number of Swedish cases is lower per inhabitant for some reason.
[28] Government bill Prop. 1997/98:101 (Sweden).
[29] Domstolsverket, *Court statistics 2017*, p.21.
[30] Until 1 January 2018, two separate boards heard the complaints, *Sosiaaliturvan muutoksenhakulautakunta* and *Työttömyysturvan muutoksenhakulautakunta*. The numbers for 2017 are not available. *Sosiaaliturvan muutoksenhakulautakunta*, *Ratkaisutilasto 2016, http://www.samu.fi/wp-content/uploads/2017/11/ratkaisutilasto_somla_2016.pdf*, and Työttömyysturvan muutoksenhakulautakunta. *Ratkaistut asiat lukuina ja prosentteina Koko vuosi 2015, http://www.samu.fi/wp-content/uploads/2017/11/ratkaisutilasto_ttlk_2015.pdf* [both accessed 3 September 2018].
[31] Numbers from 2017 are not available. Vakuutusoikeus, *Vuosikertomus 2016 http://vakuutusoikeus.fi/material/attachments/vakuutusoikeus/vakuutusoikeus/HXZjoLrz5/vuosikertomus_2016_verkkoversio_korjattuna.pdf,* p.13 [accessed 3 September 2018].
[32] No precise statistics is available, but a study estimated that the ten largest complaint boards heard a total of more than 30,000 cases in 2012, see Difi, *Viltvoksende nemnder? Om organisering og regulering av statlige klagenemnder*, p.6. Most of these cases are subject to appeal to the courts, but some are of private law character and others would not be subject to recourse in courts in the other Nordic countries.

administrative tribunal, hears cases on social benefits. In 2016, the number of incoming social benefits cases was 32,806.[33] The decisions of the Council of Appeal are subject to limited appeal to courts. The Council has administrative tasks in addition to adjudicative duties. The Norwegian system of recourse against social security benefits is particularly complex. The first tier consists of internal recourse systems within NAV, the Norwegian Labour and Welfare Administration. The system had 35,900 incoming recourse cases in 2016.[34] Decisions from NAV Klageinstansare are subject to appeal to the Norwegian Insurance Court (Trygderetten), which had 3,933 incoming cases in 2017.[35] Approximately 2–3 per cent of these cases were appealed to general courts, which is far less than 1 per cent of all recourses filed.[36] NAV Klageinstans is in practice the main instance for social security cases, although it is formally an administrative recourse organ.

The differences in the number of the incoming cases among the Nordic countries arise largely from how court-centric the system is, not from the number of "litigated" social security cases. Including social security cases would increase the litigation rate significantly.

Divergent design of recourse against administrative decisions is a manifestation of different roles of courts. Swedish administrative courts are inherently first courts. Many of the cases on social benefits are likely to be routine cases, viz. not raising particularly difficult questions of legal interpretation or principle. Yet, during first recourse the case is developed, the relevant issues must be identified, legal arguments must be refined and evidence gathered. Although the procedural rules adhere to the principle of party proceedings, some "investigatory" elements remain. Danish and Norwegian courts hear recourse against administrative decisions generally as a first or second appeal.[37] The role of the court as a de facto first or appellate court shapes the workload, i.e. the work handled by the court[38] and the nature of the work. The cases probably involve more complex legal and factual issues and may raise questions of principle. The system setup may also influence the ratio of self-represented parties and the

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[33] Ankestyrelsen, *Ankestyrelsens årsopgørelse for sagsbehandlingen i 2017. https://ast.dk/publikationer/arsopgorelse-2017*, pp.9-10 [accessed 3 September 2018].
[34] NAV Klageinstans. Numbers are on file with the author. In addition, it heard cases for rectification.
[35] Trygderetten, *Statistikk*. *https://www.trygderetten.no/statistikk?p_lang=2* [accessed 20 September 2018].
[36] E.S. Refsdal, "Vedtaksorgana i trygderettsprosessen med særleg fokus på NAV", (2010) 7 Tidsskift for erstatningsrett, forsikringsrett og velferdsrett, 121, 137.
[37] According to the Administrative Judicial Procedure Act 1996 (Finland) s.6 and the Administrative Procedure Act 2017 (Sweden) ss. 40–42, administrative decisions are subject to appeal to courts or tribunals. According to Norwegian law, the first recourse is within the administration, The Administrative Procedure Act 2012 (Norway) s.28. Sunniva Cristina Bragdø-Ellenes, *Overprøving av forvaltningsvedtak i Norge, Sverige og Frankrike* (Oslo: Universitetsforlaget, 2014).
[38] For a discussion of the difference between caseload and workload, see Ontanu, Velicogna and Contini, "How Many Cases? Assessing the Comparability of EU Judicial Datasets", pp.15–18.

availability of legal aid. Thus, courts and quasi-courts operate in divergent context and under divergent conditions.

The manifold roles and functions of courts is probably connected to how courts are perceived and the self-perception of courts, and probably also their workflow and other elements of the national litigation culture. Hence, comparisons should encompass the wider implications of structural differences.

5. Quality of justice: an elusive concept in need of refinement

If comparison of efficiency is onerous, then comparing the quality of justice surely is formidable.[39] Thus, many studies adopt a managerial approach to quality: Quality is essentially synonymous with efficiency, viz. swift and cheap proceedings. Information from user satisfaction surveys or the number of rulings against the state from the European Court of Human rights (ECtHR) is also used, and some studies focus on accountability and the rule of law.[40] The quality of the proceedings and outcomes – the core of the civil justice system – remain under-investigated.

Civil procedure and human rights law has refined standards for fair trial rights for decades, but these apply formally only to courts and tribunals. The ECtHR and the European Court of Justice (ECJ) and supranational organisations constantly monitor mainly formal courts, but quasi-courts slip largely under the radar. A comprehensive study should include the functional equivalents of courts.

At best quasi-courts and other adjudicative bodies improve access to justice by offering cheap, expedient proceedings rendering quality results. The ECtHR has acknowledged that flexibility and efficiency may justify the use of administrative bodies prior to courts, even when these do not satisfy the requirements set forth in the ECHR art.6. However, parties must have subsequent access to a judicial body with full jurisdiction and with an organisation and

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[39] See, inter alia, Siems, *Comparative Law*, pp.172-179, Siems, "Numerical Comparative Law: Do We Need Statistical Svidence in Law in Order to Reduce Complexity" and J. Niemi-Kiesiläinen, "Efficiency and Justice in Procedural Reforms: The Rise and Fall of the Oral Hearing" in C.H. Van Rhee and A. Uzelac (eds), *Civil Justice Between Efficiency and Quality: From Ius Commune to the CEPEJ* (Cambridge: Intersentia, 2008), p.29, pp.32–33.

[40] Contini and Mohr, *Judicial Evaluation. Traditions, Innovation and Proposals for Measuring the Quality of Court Performance* and Langbroek, *Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States*, D. Rottman and T. Tyler, "Thinking About Judges and Judicial Performance: Perspective of the Public and Court Users" (2014) 4 Onati Socio-legal Series 1046 and D. Piana, *Judicial accountabilities in New Europe: From Rule of Law to Quality of Justice* (London: Routledge, 2016).

proceedings fulfilling all the criteria of art.6.[41] The approach is fruitful only when time and cost does not restrain the actual access to courts and quasi-courts abide to similar, perhaps slightly more lenient, standards as courts.

Quasi-courts could compromise fair trial rights due to organisational, regulatory, procedural and other deficiencies. Lack of independence, weak regulation of procedure and recruitment are potential problems. Simplified proceedings could result in an insufficient basis for a robust ruling. Although most cases are simple, routine cases, some of them are likely to be complex or involve questions of principle, which requires access to a legal counsel. The organisation and proceedings must either be sufficiently robust and flexible to or a mechanism for directing the cases to an appropriate body must be put in place. Considering the EU policy of encouraging implementation and use of alternative dispute resolution, particularly in consumer cases[42], issues related to the quality of those proceedings are highly pertinent.

The ECJ and ECtHR have developed some tests for tribunals that identify basic requirements for adjudicative bodies. Tribunals must be, inter alia, established by law, independent and have an *inter partes* procedure where the rules of law is applied.[43] They cannot have an organisational link to the department of the authority that adopted the original decision and free from any outside directions.[44] A tribunal has a judicial function; viz. it determines

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[41] *Le Compte, Van Leuven and De Meyere v Belgium* (1981), ECLI:CE:ECHR:1981:0623JUD000687875, para.51, *Zumtobel v Austria* (1993) ECLI:CE:ECHR:1993:0921JUD001223586, paras 29–32, *Fazia Ali v The United Kingdom* (2010) ECLI:CE:ECHR:2015:1020JUD004037810, para.75. Written proceedings may be allowed in simplified proceedings under certain circumstance, see *Pönkä v Estonia* (2016). ECLI:CE:ECHR:2016:1108JUD006416011, para.30.

[42] I. Benöhr, "Alternative Dispute Resolution for Consumers in the European Union" in C.J.S. Hodges, I. Benöhr and N. Creutzfeldt-Banda (eds), *Consumer ADR in Europe* (Oxford: Hart, 2012), p.1, I. Benöhr, "Consumer Dispute Resolution After the Lisbon Treaty: Collective Actions and Alternative Procedures" (2013) 36 Journal of Consumer Policy 87 and E. Storskrubb, "EU Civil Justice at the Harmonisation Corssroads?" in A. Nylund and M. Strandberg (eds), *Civil Justice and Harmonisation of Law*, (Cambridge: Intersentia, forthcoming).

[43] See e.g. *G. Vaassen-Göbbels (a widow) v Management of the Beambtenfonds voor het Mijnbedrijf* (61/65) ECLI:EU:C:1966:39 [1966] ECR English special edition 1966/00261, *Dorsch Consult Intenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* (C-54/96) ECLI:EU:C:1997:413 [1997] ECR 1997 I-04961, paras 23 ff., *Synetairismos Farmakopoion Aitolias Akarnanias (Syfait) and Others v GlaxoSmithKlein plc, GlaxoSmithKlein AEVE* (C-53/03) ECLI:EU:C:2005:333[2005] ECR 2005 I-04609, para.29, and *Jonathan Pilato v Jean-Claude Bourgault* (C-109/07) ECLI:EU:C:2008:274 [2008] ECR 2008 I-03503, paras 22–24,*Le Compte, van Leuven and de Meyere v Belgium*, paras 54-55, *Sramek v Austria* (1984). ECLI:CE:ECHR:1984:1022JUD000879079, paras. 36–42, *Benthem v the Netherlands* (1985). ECLI:CE:ECHR:1985:1023JUD000884880, para. 40, *Cyprus v Turkey* (1994). ECLI:CE:ECHR:2001:0510JUD002578194, para. 233., *Beaumartin v France* (1994). ECLI:CE:ECHR:1994:1124JUD001528789, para. 38, *Lavents v Latvia* (2002). ECLI:CE:ECHR:2002:1128JUD005844200, para. 81, and *Biagioli v San Marino* (2014). ECLI:CE:ECHR:2014:0708DEC000816213, paras 71–73.

[44] *Pierre Corbiau v Administration des Contributions* (C-24/92) ECLI:EU:C:1993:118 [1993] ECR 1993 I-01277, paras 16-17, *Walter Schmid* (C-516/99) ECLI:EU:C:2002:313 [2002] ECR 2002 I-04573 paras 36–37, *Armin Häupl v Lidl Stiftung & Co. KG* (C-246/05) ECLI:EU:C:2007:340 [2007] ECR 2007 I-04673, paras 16–21, and *Epitropous*

matters on the basis of legal rules and after "proceedings conducted in a prescribed manner". The organ may have other duties as well, but it must ensure compliance with the substantive and procedural guarantees of fair trial rights.[45] The ECtHR has found that fair trial rights are not necessarily absolute, for instance, oral hearings may be held at the request of the parties or to admit oral evidence.[46]

Studying the Nordic bodies for recourse against decision on social benefits shed light on some problems of quality of justice arising in quasi-courts. Next, two of the enlisted criteria will be tested: independence and the quality of the rules of procedure. The Swedish system is not dealt with, since it is court-based and is constantly subject to European scrutiny.

The Finnish Social Security Appeal Board is independent and has a budget and administration of its own. The rules of procedure are the same as in administrative courts.[47] Hence, it passes both tests. The Danish Council of Appeal is independent state body. The rules of procedure are weakly regulated with just three sections specifically regulating the proceedings.[48] The rudimentary rules could be considered a weakness as elaborate rules reduce the risk of arbitrariness and peculiar practices.

The Norwegian NAV Klageinstans is part of the NAV administrative organisation and, therefore, not independent from NAV, the organisation that adopts the original decisions. Considering that social security matters are of paramount importance for the subsistence of many citizens, the organisation is problematic. The general rules of administrative law apply in NAV Klageinstans[49], although it serves in effect as the first recourse. The procedural rules are general and do not guarantee sufficient procedural safeguards, as they do not, for example, fully abide to the principle of adversarial proceedings.[50] Consequently, NAV Klageinstans is neither sufficiently independent, nor are the procedural rules ideal. Organisational proximity

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tou Elegtikou Synedriou sto Ypourgeio Politismou kai Turismou v Ypourgeio Politismou kai Tourismou – Ypriesia Dimosionomikou Elenchou (C-363/11) ECLI:EU:C:2012:825 [2012], paras 20–21.

[45] *Rolf Gustafson v Sweden* (1997) ECLI:CE:ECHR:1997:0701JUD002319694, para.45.

[46] E.g. *Pönkä v Estonia*, para.30.

[47] Act on Social Security Appeals Board 2006 (Finland) s.14.

[48] There are several provisions in the Act on rule of law and administration in the social services 1997 (Denmark), but only ss. 68–70 regulate the proceedings. The Ministry of Social and Internal Affairs has issued Guidelines on the rule of law and administration in the social services, 2017 (Denmark).

[49] The National Insurance Act 1997 (Norway) has a single section 21–12 on complaints and appeals. In addition, the NAV itself has issued a circular on complaints and appeals R21-00-2-D18. The circular is approximately one and a half pages.

[50] Jan Fridthjof Bernt, *Forvaltningsrettslig rettssikkerhet i masseforvaltningens tid*, in B. Banoun, O. Gjems-Onstad, A. Aage Skaar and B.K. Rye (eds) *Høyt skattet: Festskrift til Frederik Zimmer* (Oslo: Universitetsforlaget, 2014), p.51.

between the administration and complaints bodies is a common weakness in the Norwegian civil justice system.[51]

The organisation of civil justice has also indirect influence on the quality of justice. In many Nordic quasi-courts, the majority of the judges have part-time, limited-term positions, and are employed fulltime elsewhere. Consequently, recruiting the most qualified candidates could pose a challenge. The narrow spectre of cases and the relatively low prestige of quasi-courts are also likely to impair recruitment. Judges may give priority to their fulltime positions, which could reduce the quality of their work. The secretariat of many dispute resolution boards and quasi-courts have a key role in preparing the cases because judges rely to a larger extent on the materials prepared by the secretariat than in ordinary courts. However, the employees at the secretariats are not granted independence. On the contrary, the secretariat for the Norwegian Competition Complaints Board (Konkurranseklagemnda) was previously directly under the Norwegian Competition Authority (Konkurransetilsynet). The independence of the secretariat has been strengthened recently. [52]

Organisational and regulatory deficiencies are sometimes easily ameliorated. Two boards in Finland merged to form the Finnish Social Security Appeal Board to improve independence, efficiency and quality of the outcomes, without increasing the annual budget.[53] The rules of procedure of these bodies were aligned with those of administrative courts. The amendments resulted in modest costs.[54]

Regardless of the organisation of the civil justice system, in many systems simple, routine, mass cases are delegated to non-judicial staff. While this is sensible, having judges or lawyers supervise non-judicial staff is essential to outweigh potential deficiencies arising from lack of legal training. The proceedings for uncontested pecuniary claims in the Nordic countries serve as an example. Finland has a court-based system where non-lawyers dispose of most uncontested pecuniary claims. The larger District Courts have employees who use a

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[51] Statskonsult, *Klager over alt. Organisering av statlig klagesaksbehandling.* Rapport 2003: 19, Oslo, and Bragdø-Ellenes, *Overprøving av forvaltningsvedtak i Norge, Sverige og Frankrike.* Refsdal ("Vedtaksorgana i trygderettsprosessen med særleg fokus på NAV") argues that the low number of cases where the private party wins (approximately 10 per cent) is a sign of inadequate independence.

[52] Several Norwegian studies discuss these issues, see e.g. Statskonsult, *Klager over alt. Organisering av statlig klagesaksbehandling*, Norwegian Government Report on Consumer Dispute Resolution NOU 2010: 11 Nemndsbehandling av forbrukertvister. Oslo, 2010 and Difi, *Viltvoksende nemnder? Om organisering og regulering av statlige klagenemnder*.

[53] Government bill 74/2017 (Finland), part 4.

[54] Prior to the 2000s, the Finnish system was similar to the current Danish and Norwegian systems, but a set of reforms have made the Social Security Appeals Boards to courts in all but formal designation. See Government Bill HE 167/2006 (Finland), pp.6–13.

significant amount of their time on uncontested pecuniary claims and a judge supervising the employees and, if necessary, ruling on complex issues. However, the smallest District Courts have had a less professionalised organisation and, thus, the quality of proceedings is possibly lower.[55] A significant reduction in the number of District Courts has probably increased specialisation and, hence, the quality in the smallest courts. The Danish system is similar, where the Enforcement Court (fogedret), a division of the District Court hears the cases.

The Swedish Enforcement Authority is not a court, although it issues payment orders. However, the organisation is specialised to handle these types of cases with lawyers responsible for training, guidelines and supervision.[56] Thus, one could argue that the quality of the staff and supervision is equivalent to that in courts.

In Norway, the Conciliation Boards and the Enforcement Authorities process uncontested pecuniary claims. In practice, they are the same organisation, as they share administrative services. The local offices have been scattered in small units, have now been centralised to 12 units, which will probably improve quality. The Enforcement Authorities are a subunit of the Norwegian police, which leaves them in the shadow of tasks related to criminal investigations. The lack of visibility may result in less resources for quality development. Although digitalisation as such is not directly related to quality, the absence of comprehensive digital solutions for electronic filing of non-litigious pecuniary claims in Norway, may reflect the relatively weak organisation. Three lay judges decide cases in the Conciliation Boards with no help from a professional judge or lawyer. Although the formal criteria for independence and procedural rules are fulfilled, the question is whether lack of professionalisation and legal knowledge endangers the quality of the proceedings in the Conciliation Boards.[57]

The following example illustrates the importance of sufficient training and skills. According to ECJ case law, courts must apply parts of EU law on their own motion.[58] A consumer buys

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[55] The information stems from interviews that are part of an evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. The report was prepared by a consortium of European universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission JUST/2014/RCON/PR/CIVI/0082.

[56] Kronofogdemyndigheten, *Årsredovisning 2017*, *https://www.kronofogden.se/download/18.77420b161614b6f20243c3f/1519309001219/Kronofogdens+%C3%A5rsredovisning+2017.pdf*, pp.25-29 [accessed 1 September 2018].

[57] For more details, see A. Nylund, *Norway*. International Encyclopedia of Laws. Civil Procedure. P. Taelman and C. Van Severen (eds) (Alphen aan den Rijn: Kluwer, 2017), paras 284–319.

[58] See H. Schebesta, "Does the National Court Know European Law – A Note on Ex Officio Application after Asturcom" (2010) 18 European Review of Private Law 847, A. Ancery and B. Krans, "Consumer Protection and

a gadget and pays by instalments to a credit company. The consumer is dissatisfied with the gadget and refuses to pay the remaining instalments. The credit company files a payment claim against the consumer in uncontested proceedings. The amount of the claim and regular interest is ordinary, but the interest on overdue payments is excessive and unfair. At issue is whether the staff handling the claim in simplified proceedings will detect the unfair and, hence, unlawful interest rate and act upon it.[59] The better the in-job training and supervision is, the more likely the staff will do so. In regular court proceedings, the court is obliged to assess whether the interest rate is unfair. Thus, the outcome of the case may depend on whether the case is filed in simplified or regular proceedings. Simplified debt collection proceedings are often the flip-side of consumer dispute resolution: the type of proceedings depends on which party initiates the proceedings. Efficient enforcement of consumer law necessitates equal application of consumer rights regardless of the type of proceedings.

The examples above illustrate the need to encompass a range of factors when measuring the quality of justice. In addition to numerical data, studies should include procedural and organisational aspects such as robustness of regulation of the proceedings and quality and independence of the staff. Ideally, these aspects would be combined with research measuring, inter alia, the full costs of proceedings including all out-of-pockets and intangible costs, and perceived quality of the proceedings and outcome.[60] Otherwise, the civil justice system may de facto consist of bodies persistently producing incorrect rulings in disfavour of certain groups of people.[61]

In countries where many legal disputes are "litigated" outside formal courts, the question of quality is pertinent. Quasi-courts risk slipping under the radar of quality control because international and domestic monitoring focuses mainly on courts. Academics and policy makers may also be oblivious to these bodies, even in the Nordic countries where they are ubiquitous. The legal community at large tends to neglect these bodies as well, perhaps because many parties are self-represented and the "judges" have a weaker position than judges at courts. Considering that the average citizen is far more likely to "litigate" a case in a

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EU-Driven Judicial Activism in The Netherlands"and T. Andersson, "Ex officio Application under the EU Directive on Unfair Terms in Consumer Contracts before Swedish Courts" both in A. Nylund and M. Strandberg (eds), *Civil Procedure and Harmonisation of Law* (Cambrigde: Intersentia, forthcoming).

[59] See also Andersson, "Ex officio Application Under the EU Directive on Unfair Terms in Consumer Contracts before Swedish Courts".

[60] Gramatikov, Barendrecht and Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology".

[61] A.A.S. Zuckerman, "Justice in Crisis: Comparative Dimensions of Civil Procedure" in A.A.S. Zuckerman (ed), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (Oxford: Oxford University Press 1999), p.3.

quasi-court, at what seems to be the periphery of the legal landscape, our attention should be expanded to include adjudicative bodies regardless of their formal classification and to find appropriate, inclusive measures for quality.

6. Expanding the domain of research on civil justice

Statistical data is a valuable supplement to other methods in studying the efficiency and quality of courts and civil justice systems. It may spur an exploration of the entire "eco-system" where courts operate and expose the necessity of going beyond formal definitions. There is no reason to exclude statistics from the comparative lawyer's toolkit. On the contrary, as this text argues, it may be an instrument to unveil the importance of, inter alia, structural and terminological differences.

Assessment of the quality of civil justice systems should neither be based primarily on easily quantifiable factors, nor should it be limited to formal courts. The emerging research on consumer dispute resolution could give input on developing standards for assessment of quality in "litigation" outside courts.[62]

The investigation into efficiency and quality of civil justice raises the question of whose civil justice system we are discussing: The civil justice system of sophisticated parties, companies and citizens, with average to high-value cases or the civil justice system of low-income groups who are more likely to be involved in a case on social benefits or uncontested pecuniary claims? Is it the relatively few mid- to large-cases, or the thousands of small, routine cases? As researchers, we should discuss the consequences of these, often tacit or unconscious, delimitation for doctrines, structures and practices, both nationally and internationally. Perhaps we should devote more attention to the hinterlands of our civil justice systems.

[62] E.g. C. Hodges, I. Benöhr and N. Creutzfeldt (eds), *Consumer ADR in Europe* (London: Bloomsbury Publishing 2012), N. Creutzfeldt, "How Important is Procedural Justice for Consumer Dispute Resolution? A Case Study of an Ombudsman Model for European Consumers" (2014) 37 Journal of Consumer Policy 527 and M. Stürner, F. Gascón Inchausti and R. Caponi (eds), *The Role of Consumer ADR in the Administration of Justice: New Trends in Access to Justice Under EU Directive 2013/11* (Munich: Sellier European Law Publishers, 2014).