Strengthening the administration of justice for better means to judge

Overall summary of the research
Loïc Cadiet, Jean-Paul Jean, Hélène Pauliat

Strengthening the administration of justice for better means to judge. The research project called *MAJICE* (2009-2011), led by the teams of the following universities: Limoges, Poitiers and Paris 1 under the supervision of the *Agence Nationale de la Recherche (ANR)*, in the context of the research program called *Gouverner et adminstrer* (to Govern and to administer)[1], meant to analyse transversally, three fundamental disciplines of the French legal system: the administrative law, the criminal law and the civil law. The matter was to analyse the way the common points and the specificities of these three areas could affect the administration of justice in each area. The examined perimeter could therefore serve as a support for the comparison with other European countries with a different legal tradition and administrative culture, but where the questions dealing with the stated goals as well as the expectancies of the citizens and the responses given by the jurisdictions in terms of efficiency and improvement of the quality of the service rendered, are similar.

The question of the assessment of the quality of the service provided by Justice, referred to as an institution, is particularly delicate because it is not the judge's decision, regarding its substance and reflecting the independence, that is the subject matter of the study, but the conditions in which it is prepared, made and fulfilled. One of the questionings of this research was thus to specify to what extent the justice's environment can influence the act of judging.

Comparing the French legal system with a similar legal system in terms of organisation as a consequence of the Napoleonic heritage, the Netherlands' judiciary, and a common law system, the United-Kingdom's system, is one of the strong point of this research. The Jacobin tradition of our legal system and the French conception of the public service shall measure themselves, regarding the citizen, with other countries that are more in favour of the institutional position and the role of the judge, and that sometimes rely on different lines; especially as in the European judicial area, and even beyond, the new public management ideology, many would include in a neo-liberal offensive[2], acts as a support to concepts, means and methods that most of the judicial systems use, as seen in France trough the *RGPP-révision générale des politiques publiques* (General Review of Public Policies)[3]

Such a process develops completely differently in countries that are covered in this study, regarding each county's history, administrative culture, and judicial tradition more or

---

1 Scientific Directors: Hélène Pauliat, OMIJ (Observatoire des Mutations Institutionnelles et Juridiques de Limoges ; Loïc Cadiet, CRPJ (Centre de Recherches sur la Justice et le Procès of Paris I) ; Jean-Paul Jean, EPRED (Equipe Poitevine de Recherche et d'Encadrement Doctoral en sciences criminelles de Poitiers). Scientific secretariat: Aurélie Binet-Grosclaude, doctor in law, researcher, Universities of Paris 1 and Poitiers; Caroline Foulquier, associate professor, University of Limoges.

2 A. Garapon, *La raison du moindre Etat, le néolibéralisme et la justice*, O. Jacob, 2010.

3 *La révision générale des politiques publiques*, *RFAP*, n° 136, 2010.

less integrated in a state system and regarding the level of their resources. The delicate exercise consists in gathering, as part of the same study, a comparative between the United Kingdom, the Netherlands and France. It thus allows seeing if the managerial opportunities of justice can be stated in the same terms as in countries where the judicial systems' reforms take place in different contexts and *habitus.* Such an approach tallies with that of Philippe d'Iribarne, more than twenty years ago[4], in the area of organisational sociology. This researcher had compared the working patterns in three countries, the United Sates, the Netherlands and France, in both the private and public sector. In the main, *the culture of contract* prevails in the United States; a few goals are very specifically laid down with expected results, pragmatism and penalties for failure for non compliance with the contract are considered as the rule within a continuous relationship between cost and efficiency. In the Netherlands, *the consensus culture* prevails; all the actors contribute to the definition of the goals and to their achievement, in a continuous progress initiative, while using sophisticated assessment means. In such a system, it seems to be difficult to be an opposing actor insofar as the actors live in a dense network and their behaviours are expected. In France, *the culture of honour* prevails; all decisions are taken at central level, by the representative of the State or the company director, but then, the other actors, at their own level, keep their points of view and shall adapt the implementation of the suggested lines, the way it pleases them, according to their own conception and pursuant a logic of both honour and well done job.

If we identify the United Kingdom and the United States, more particularly since the Thatcher and Blair years' reforms of the public services, we can measure, among legal systems, what can separate these three standards or get them closer. Between a civil law state system with the culture of public service as in France and a common law system where the private sector and the outsourcing of the State's services prevail; between the centralisation and the strong ideology of the "French public service" and the Dutch and British pragmatism of the "what works" system?

Despite the fundamental differences between the cultures and both the judicial and legal systems of these three countries, this research highlights, as also pointed out by the CEPEJ (European Commission for the Efficiency of Justice) in its works[5] dealing with the judicial area of the 47 Member States of the Council of Europe[6], that there is still a dominant and common culture to *administer and manage,* that is to say the culture of *performance and efficiency,* that have become key concepts for the heads of the courts, especially through the policies arising from the new public management, the benchmarking means and the case management. Schematically, we can consider that the influence of the Anglo-Saxon models, the management rationality of both the Netherlands and the Northern Europe countries, more generally the pragmatic approach, the obsession of calculation and tips for reduction, the

---

4 *La logique de l'honneur*, Le Seuil, 1989.

5 *Systèmes judiciaires européens : efficacité et qualité*, éd. du Conseil de l'Europe, Les études de la CEPEJ n° 12, 422 p, octobre 2010 ; http://www.coe.int/cepej

6 The report includes some elements resulting from the scientific activities of the co-directors of the research for the Council of Europe. In the European Commission for the Efficiency of Justice, J.-P. Jean chairs the group of experts Evaluation of the Council of Europe, author of the reports from 2004 to 2010 *Systèmes judicaires européens* and co-author with H. Jorry of the report *Les enquêtes de satisfaction conduites auprès des usagers des tribunaux*, Les études de la CEPEJ, n° 15, 2011 ; H. Pauliat is co-author with L. Berthier of the report *Administration et gestion des systèmes judiciaires en Europe*, Les études de la CEPEJ n° 10, 2009 ; they have contributed with L. Cadiet to the work *La qualité des décisions de justice*, Les études de la CEPEJ n° 4, Actes du colloque de Poitiers, 2007.

actual service rendered to the "client", serve as an inspiration for the modernisation and the assessment processes of the justice systems, within a decisive influence over the referrals and the judges' working methods. The resistance to such orientations lies in the defence of a more traditional concept of the office of the judge based on the act of judging and more indifferent to the effectiveness of legal decisions, less focused on the citizen-user than the respect of an equilibrium with the members of the legal professions and more particularly the lawyers. Such a conception historically prevails in Southern Europe Latin countries.

But the ideology of management, as well as the conception of a fair trial as provided for by the European Court of Human Rights, based on the reference to a reasonable period of time as provided for in article 6 of the European Convention on Human Rights and Fundamental Freedoms, definitely leads us back to a necessary challenge between the two purposes of justice: making decisions with a complete independence, subject to the formal conditions and time-limits and at optimal costs while meeting quality and efficiency standards with a satisfactory level for the citizen-taxpayer. Such an approximation of the different systems can be made all the more rapidly than all of them face fast-growing litigation flows they can only handle by using alternative dispute-resolution methods, contracting processes and by investing in new information technologies that may change the judge's and his staff's work environment. The tension between these two aims, that is to say the respect of the independence of the judge's decision, with a fast-growing interference in his current work environment in order to improve the functioning of the judiciary, is the focus of the discussions carried on in the Council of Europe, as mentioned in the reports of the CEPEJ (European Commission for the Efficiency of Justice) and the report recommendations of the Consultative Council of European Judges[7].

Conceptual choices

This research made the choice of a strictly defined approach of the concept of the administration of justice. The matter is the management of the public service and not making jurisdictional decisions. It must be made clear that the administration serves the act of judging[8]. Justice, when facing the challenge of the number of cases[9], shall improve its organisation as well as its processes of making decisions[10], in a continuous improvement of both efficiency and quality, in submitting to testing procedures related to these processes and the delivery of services given to the citizen[11]. The administration of justice is seen as a mean to "better judge", by pointing out, at a first step, who shall be responsible for the

[7] The quality of the courts' decisions, Proceedings of the conference of Poitiers, Council of Europe, Studies of the *CEPEJ* n° 4, 2007 ; Council of Europe, Recommendation (2010)12 of November 17th, 2010 on the judges: independence, effectiveness and responsibilities.

[8] *Une administration pour la justice* (J-P. Jean and D. Salas ed.) *Revue française d'administration publique* n° 125, La Documentation française, 2008.

[9] L. Cadiet, « La justice face aux défis du nombre et de la complexité », *Les Cahiers de la Justice*, 2010/1, ENM and Dalloz, p. 13.

[10] H. Pauliat, *Processus, procédures : à la recherche de la qualité de la justice…, CIAJ, Procéder. Pas d'action, pas de droit ou pas de droit, pas d'action ?*, n° 13, p. 305.

[11] J.-P. Jean and H. Pauliat, « L'administration de la justice en Europe et l'évolution de sa qualité », *D.*, 2005, chr., p. 38.

administration and the management of courts, with what sort of financial and human resources, under what applicable procedures, what shall be the objectives and the set out results. As a second step, the analysis was held in the context of the applicable texts, reform plans, available assessment means, interviews and visits, in ministries, research organisms and courts. But it seems important to specify that, concerning the teacher and researchers who are responsible for the guidelines of researches, it has been agreed that, contrary to a few strictly managerial views, the results-based culture, in a figure and quantity approach, could not represent a limit for Justice in a constitutional State. The "production" of justice has a meaning. The millions of decisions handed down, every year, by each country studied, are made in a clear procedural framework and play a decisive role in the social regulation. Be that as it may, the administration of Justice shall not have neither its origins not its results in the Finance Laws Organisation Act in France.

Indeed, the administration of justice cannot be merely reduced to a technocratic view. Administering justice is, without a doubt, a complex operation. It is not a casual activity and the principle of the independence of judges generates either a self-administration of the courts or a subservience of the managerial body to the judges' decisions. Such a same perception, seen in the three countries studied, is reflected in conceptual and organisational approaches that may be different at first sight, but also in operating realities that become similar because of an accelerated process of reforms which, in each country studied, thoroughly transforms both the organisation and functioning of the courts.

The concept of the administration of justice in France is probably conceptualised in theory, which absolutely does not happen in the Netherlands, but the judicial precedents reflect an empirical use. If the judicial precedents of the European Court of Human Rights retain from this concept a very wide approach, including the final statement of the decisions without neglecting the work environment of the judge, French law is subject to developments. The task here is to organise the functioning of the judiciary. The management of a jurisdiction has become a subject that requires a careful consideration within the institution, as well as the question of the competence of the *Conseil supérieur de la magistrature* (the French Magistrates' Council) is raised compared to the competences of the Minister of Justice in this area. And it is certainly not a coincidence that the *Conseil constitutionnel* (the French Constitutional Council) conferred a constitutional status to justice, now used both in a managerial and judicial process. When it comes to the concept of the administration of justice, it must be agreed that giving feedbacks becomes obvious. The approaches become thus slightly different depending on the country studied. If France, in each Finance Act, focuses on indicators, results to be reached, goals…by contrast, there is no debate related to justice expenditures in the English Parliament. There shall be a requirement for the accounting of how the judicial funds are spent. In terms of organisation, the three states may also diverge, because of their traditions and culture. For a long period of time, there was no Ministry of Justice in England. The administrative management is specific to the Netherlands with a management board in district courts and a manager. France is considering a different model of organisation that would succeed the *sevrices administratifs régionaux – SAR* (regional corporate services).

If pragmatism prevails in the Netherlands and in England, France is bound to an institutional conception of justice, without drawing the consequences of the two functions of justice, public service and constitutional authority. Such different approaches also show differences in the administrative actions of justice. The concept of "an act of the judiciary" is getting increasingly important in the functioning of French justice. The pragmatic approach in

the United Kingdom and in the Netherlands seems to pay less attention to such an issue. France has considered, both from a theoretical perspective and legal basis, distinguishing criteria between the acts dealing with the administration or the management of justice and judicial administration acts, while questioning each complaint procedure against them. The measures of the administration of justice cannot be denied in the Netherlands, but remain in theory questionable in the United Kingdom, without a strong legal framework. The normative conception highly prevails in France, whereas pragmatism and adaptability are relevant in the Netherlands and in England. The crucial issue remains: shall the judge be the administrator of his own jurisdiction?

The contracting concept which is common in France is difficult to understand in the Netherlands and in the United Kingdom. A pragmatic approach was agreed in the context of this research in order to deal with the significant developments of contemporary legal systems and two categories were emphasised.

On the one hand, charters, agreements, and conventions allow a procedural organisation between the different actors and particularly the heads of the courts and the lawyers in order to improve the "flow" of the procedures and the organisation and functioning of the courts as well as between the courts and the State. This is the case, for example, in England and in Wales, where the judicial courts negotiate once a year with the State, "performance contracts" through which they commit themselves to achieve a specific result, according to an agreed upon deadline, in return for additional resources in order to be successful (credits, staffs, premises, data processing, etc.). The same applies in the Netherlands where the annual negotiations are held with the Council for the Judiciary which is an intermediate institution between the State and the Courts. France is experiencing a more thematic expansion related to the performance contracts between the courts and the central administration of the Ministry of Justice, in the form, for example, of suspense items contracts.

More often than not, the contract may be used as a public policy at local level, for example, within partnerships between the police and the prosecution authorities. Such a practice exists in England in the pursuit of some infringements as well as in the Netherlands where it may take either the form of performance contracts between the police and the prosecution service or specific programs dealing with selected projects. Nonetheless, only France has available *Maisons de justice et du droit* (Centres for Law and Justice) and *Conseils départementaux d'accès au droit* (Local Law Centres).

Concerning the agreements between the courts and the parties, once again, practices vary considerably. For example, both English and Dutch normative frameworks do not require that the courts conclude with their partners (lawyers, ushers, etc…), memoranda of agreement or procedure protocols related to the way some procedures could be led. However, with no legal basis, in civil matters, such partnerships may be concluded and may sometimes happen in the Netherlands, so far and more and more, in the form of collective legal rules and, in England, approximately once a year, on the initiative of either the courts or their partners. In this latter country, there also exist hybrid procedures such as pres-action protocols.

In civil matters, the procedure schedules are, by contrast, defined by, be it by law in the Netherlands, or by Civil Procedure Rules in England. Such a practice can also be seen in the French judicial justice with a specific echo since the decree dated October 1st, 2010 on conciliation and oral procedure in civil, trade and social matters. Criminal and administrative

matters are experiencing a little expansion in this area regardless of the examined system. However, it shall be mentioned that the French administrative justice is testing procedure schedules or provisional schedules in a few courts on the basis of the report of the committee presided by Serge Daël, and referred to as *Calendrier prévisionnel de l'instruction, mise en état des dossiers, clôture de l'instruction*. But such a phenomenon cannot be a part of a contracting practice since, so far, the procedure is imposed on the parties. Such schedules could nevertheless provide scope for a sort of French case management.

On the other hand, the procedural agreements between the parties for alternative dispute resolution methods, such as mediation, are well known in the civil justice of the three mentioned systems. The negotiated or simplified types of sanction modalities between the prosecution service and the citizen in the guilty plea procedure can also be seen in the justice of the three countries studied for this research. This latter procedure is particularly developed in England where it seems to be the cornerstone of the criminal justice system. Moreover, contracting practices applied to an increasing number of disputes are experiencing in France in the form of lump sum fines and criminal orders, and in the Netherlands, in the form of criminal injunctions and transactions with the public prosecutor. In England, the fixed penalty notices are increasingly used. By contrast, any plea bargain or any negotiation on the application of a sentence is unacceptable both in England and in the Netherlands, unlike to what happens in France for some sentences such as community work. In administrative proceedings, the alternative dispute resolution methods are being experimented with, in England and in the Netherlands. In fact, as well as in France, conciliation and mediation do not seem to fit this kind of litigation. The purpose of such experimentations is nevertheless to test this presumption and, possibly to rebut it

The contract tends to become, to some extent, in the three countries and the three judicial systems studied, a necessary mean for the management of a court. But the way it is used and seen, is diverse. Is it a method that would strengthen the feeling of belonging to a structure that is to say a way placing value on a structure - the mechanism of performance contracts in the administrative courts could be an example insofar as the main part has been led by the *Conseil d'Etat* (the French Council of State) itself - or a mere managerial and administrative method because it is defined and assumed by administrative authorities, for example in the area of the French judicial justice; or even a method that could strengthen the relationships among legal communities and professions?

Concerning **new technologies,** French, English and Dutch approaches are quite disparate. From a theoretical perspective, only France seems to consider *a priori* the guaranties in relation with the European Convention on Human Rights and Fundamental Freedoms and related to, on the one hand, the dematerialised act compared to the written act and, on the other hand, the functioning of the criminal hearings without either the defendant or the witness being present, and the proper exercise of the right to be heard. Both England and the Netherlands have a more pragmatic approach based on the experimentation and followed by adapting principles to technologic realities, especially concerning the videoconference system in the Netherlands.

From a practical point of view, the use of new technologies, in the area of justice, in England, France and the Netherlands, is not the same. The expansions may be different depending on the legal area concerned.

The Netherlands seem to have the least advanced system between the three systems studied since in most areas, they are experiencing. The expansion of the videoconference in the country is almost inactive, even though few projects are in process in the Ministry of Justice.

In England, by contrast, there are several computer systems such as the PROGRESS or XHIBIT systems that allow a dematerialised management of the criminal hearings. By contrast, the communication between the different actors is still often written be it in the area of the civil, administrative or criminal justice. Last but not least, the videoconference is in the process of developing especially in the criminal system where virtual courts, between the police station and the Magistrates' Court, tend to be increasingly common throughout the entire territory.

The use of new technologies seems finally to be more developed in France where its use is more homogeneous: the expansion of the videoconference and the dematerialisation of the procedures is getting implemented in the entire judicial system, with a very important outcome for the *Cour de cassation* (the Court of cassation), the lead Court as far as this matter is concerned. Concerning the administrative justice, the experimentation step which started in 2005 shows an important caution; the spread of the dematerialisation of the procedure actually implies to be able to join security and pragmatism, while taking into account the fact that the services of a lawyer are not compulsory in administrative law and that consequently, it is not allowed to implement an access to the electronic file, which would be too binding for the citizen.

Nevertheless, it seems obvious that the undisputable contributions of new technologies to the modernisation of the working methods shall not be seen as an end but as a specific mean, that once implemented and developed on a concerted basis, would contribute to improve the functioning of the judicial system without prejudice to the purposes of the action of judging. Such a mean shall be dealt with, considering its pros and risks. The fact that new technologies can be a valuable support for a decision is easy to understand; but such a support should not imply, neither an automation nor a standardisation of the legal decisions, without going as far as the standardisation of the procedures. Moreover, the dematerialisation, that actually saves time and which is pleasant for judges, shall respect specific controls in order to avoid any wayward trend: which is the selected operator? Who shall make such choices? Concerning the acts that need some requirements, what are the verification or certification modalities? Such questions refer to a dynamic and shared conception of the justice; retaining the competence of either a magistrate or a manager, has major consequences on the conception of the independence of the judiciary. The adopted methods can lead to a sort of recentralisation of justice, insofar as all courts shall be provided with the same means, the same methods and the same operator in order to ensure a full compatibility. Such concerns are rather specific to France and they were note fully understood during the interviews that were led for this research, be it in England or in the Netherlands.

New technologies can therefore be seen as a mean for modernising justice and particularly, concerning the transmission of information but also, especially in France, as a modern mean of supervision of the magistrates, which is totally contrary to the principle of the independence of the judiciary.

In a decade, radical changes of the Judiciary's administrations

Different ways of organising the judiciary

Each of the three countries is provided with different ways of organising its judicial system. In France, the management is centralised in the Ministry of Justice for judicial jurisdictions and in the public prosecutor's services, within a same entity. The courts of appeal are provided with an increasingly diminished autonomy. By contrast, the *Conseil d'Etat* (the French Council of State) enjoys autonomy concerning the administrative justice. In the Netherlands, since the 2002 reform, the Council for the Judiciary carries out the overall management of the staffs and means in the courts, and the judges comities hold a major role in the functioning of the judicial facility. The administration of the public prosecutor's services depends on the Ministry of Justice; the *Cour de cassation* (the Court of cassation) and the *Conseil d'Etat* (the French Council of State) are independent in terms of management. In England and Wales, the role of executive agencies of specialised programs developed, both in the judicial and administrative justice, with the implementing of a Ministry of Justice, but several operations are being implemented in order to merge them.

The administration of justice, realities that come closer as a result of several reforms involving justice in a performing approach

Despite these very different organisational frames, a single rhetoric leads: the need for effectiveness and efficiency, in an increasingly constrained budgetary context, getting worse due to the economic crisis[12]. In the three countries, the objective of effectiveness prevails and both performing criteria and assessment framework, making use of performance indicators, are fixed to justice. The views dealing with quality, which emerged at the beginning of the eighties, keep prevailing in the Netherlands, but appear to be given second place both in the United Kingdom and in France, because of managerial views and organisational restructurings that are made available by the increasing growth and the hesitant advances of the dematerialisation process.

The administration of the civil, criminal and administrative judiciary has been subject to a radical change since the early 2000 in France, in the Netherlands and in England. In France, since the adoption of the recent legislation governing public finance *(LOLF)* in August 1st, 2001 and its effective implementation from 2006, the administration of justice, like other administrations, is governed by effectiveness and efficiency objectives that are strengthened by the *RGPP* (the General Public Policy Review) and under the supervision of the Ministry of Budget. The assessment of pubic policies has become essential and has been enshrined in the French Constitution as provided for in the Constitution Act of July 23rd, 2008. The budgetary reform in the Netherlands, initiated by an act in 2001 (the Government Accounts Act), has implemented a reform, based on the performance of the public prosecution as well as the results of several public services while reorganising the budgetary process. Let's mention that the Parliament shall give expenditures authorisations according to mechanisms of budget rationalising. In Great Britain, the basis of the budgetary process is the principle of rendering in terms of effectiveness of the expenditure, as provided for, since 2000, in the

[12] *Effets de la crise économique sur les systèmes judiciaires*, the newsletter of the CEPEJ, December 2010, http://www.coe.int/t/dghl/cooperation/cepej/Newsletter/2010/7_newsletter_Dec10_fr.asp.

Resource Accounting and Budgeting[13]. The Parliament do not deal with credits individually, but take into account the results of each ministry and provides global sums of money according to the results recorded by an evaluating and audit system, the National Audit Office (NAO). In a managerial approach, agencies carry out the budgetary and financial management of the policies led by the different ministers and under their supervision, they provide the necessary budgetary data to the recording of both the results and performances in order to inform the Parliament once the rendering is over.

In the three countries, the growth of the managerial services, the organisational rationality and the standardisation of the processes have created the need of promoting the management of the courts and the awareness among judges of the realities in an administration. The Netherlands have chosen an integrated model through the Council for the Judiciary, with broad prerogatives. They have given priority to judicial issues, within a self-administered budgetary frame which defines its national and local priorities, while including and negotiating budgetary limitations and which is dominated by a strong culture of rationalisation and assessment. The manager holds a very professional function and is bound to the objectives that are defined by the judicial bodies.

In France, the question of both the administration and the assessment of the judiciary is a current issue resulting from the increasing number of budgetary allocations and the recurring delays and failings. The politics, beyond the required speech dealing with the independence of the judiciary, whish they could minimise its autonomy and insist on it giving a full account of its efforts related to the rationalisation of its organisation as well as a better management of its credits. Beyond this legitimate challenge of accountability, a tension definitely remains in the relationship between the political actors and the judges. The questioning of the independence of the judiciary, due to a more performing administration of justice, is often brought forward by the heads of the courts. They keep protesting against the reduction of their initiatives in favour of managers who have a direct relationship with the central administration[14]. Such a tension between the judges and the managers of the administration of justice, whatever the work frame, is not peculiar to France and may prevail in a European level[15].

---

13 Miekatrien Sterck, Bram Scheers, Geert Bouckaert, « Réformes budgétaires dans le secteur public : tendances et défis », *Revue Internationale de politique comparée*, De Boeck Université 2004 p. 241.

14 A significant example of the protest in the annual meeting of 2001 of the First presidents: “The project of the inter-branch platforms, which was conducted without joint action, would lead, if it was implemented, to a misjudge of the prerogatives of the heads of the courts as responsible for the budget known as “the program’s operational budget” and as the secondary authorizing officers for functioning credits of the courts, legal costs credits and legal aid credits. As a matter of fact, the certification of the legal commitment and the certification of the service make the payment lie within the competence of officers who would be under the supervision of the general secretary of the ministry. If the project was maintained, the First presidents would have to ask to be discharged with their functions as secondary authorizing officers and as responsible for the budget known as “the program’s operational budget” insofar as they would not be able to carry out their powers effectively…”

15 MEDEL, conference of Bordeaux, June 22nd, 2011 « La justice à l’heure de la performance » ; Recommendation (2010)12 of November 17, 2010 of the Committee of Ministers of the Council of Europe on the judges: independence, effectiveness and responsibilities; Opinion n° 2 (2001) of November 23rd, 2001 of the Consultative Council of European judges (CCJE) related to the financing and the management of the courts with regard to the effectiveness of justice and as provided for in article 6 of the European Convention of Human Rights.

Such a point of tension between the judges and the managers seems to prevail in the matter subject of this research. In the Netherlands, judges have played a leadership role and have tackled the issue head on, in order to be directly in charge of the administration trough the complete change implemented since the 2002 reforms that made the Council for the Judiciary become the body acting between the ministry and the courts in order to ensure the autonomy of the administration of justice, with a commitment of all the actors, an entire transparency of the system and a clear definition of the responsibilities at both national and local levels. Within the jurisdictions, each court is administered by a court-council including a manager who is the chief administrative officer and who serves the objectives set out to him and which are clearly identified and related to cost and quality matters. In the British courts, there is a very clear division between administrative and judicial functions, which is also to be found, for example, in the administrative justice, between the Tribunals Service and the Tribunal's Judiciary. Each one is provided with its own management body: the Tribunals Service Executive Board (TSET), for the administration of courts and the Tribunal Judicial Executive Board (TJEB), for the judicial functions[16]. Anyhow, there is a close working relationship of both the organisational methods by section and the protocols allowing the rationalising of the cases' management processes through the LEAN process management[17]. The Administrative Support Centres' managers make the Key Performance Indicators be observed by both the administrative and judicial staffs.

France is definitely moving towards these same orientations. The Ministry of Justice holds most of the prerogatives: it manages budgets and supervises the carrying out of the objectives by the courts; *l'Inspection des services judiciaries* (the Inspection of judicial services) makes audits and surveys on the difficulties of either the organisation or the functioning of the court. The court of appeal is at a centrally-run local level; the First Presidents and the General Prosecutors handle the day-to-day management, with the support of the *SAR* (Regional Administrative Departments).The *Conseil superieur de la magistrature* (the French magistrates' Council) has no powers neither in administrative nor in budgetary matters. In fact, the management of the judiciary is much centralised and is under the supervision of the Ministry of Justice whose central relay is represented by the *SAR* (Regional Administrative Departments). The courts have limited scopes for initiatives. By contrast, in the administrative justice, the *Conseil d'Etat* (the French Council of State) has gradually become the leader of the entire system with an approach including legal, administrative and budgetary aspects. Nevertheless, both in the judicial justice and the administrative justice, the current reforms are characterised by the requirement of the implementation of a court project by the presidents, which would influence the means and the budget according to the objectives to be reached. But beyond the managerial views and the management dialogue, many magistrates consider that "such projects are (…) more often than not, the implementation of quantitative objectives laid down by the manager for the courts with no guaranty on the allocated means, in return"[18]. Concerning the judicial justice, the management methods, inspired by the United-Kingdom, are implemented as a result of the outsourcing and the sharing of service through the regional management strategic platforms and the implementation of the LEAN method through external consultants. But there seems to be very

[16] Annual Report 2009-2010 of the Tribunals Service, p. 42.

[17] A. Binet-Grosclaude, C. Foulquier, *Rapport sur l'administration de la justice en Angleterre et Pays de Galles.*

[18] E. Costa, « Des chiffres sans les lettres. La dérive managériale de la juridiction administrative », *AJDA* 2010, p. 1623 et s.

little consideration about the divisions between judicial and administrative functions when the courts of appeal are integrated, under the supervision of the ministry, within these platforms, with the services of the penitentiary authorities and the legal protection for youth and minors, whereas the *Conseil d'Etat* (the French Council of State) comes, following the example of the Dutch model, to an integrated management model while mastering the administrative and budgetary aspects that serve the judicial objectives it fixes.

Is quality an implemented or stated objective?

This same conceptual loss, in the administration of justice as implemented in France, is reflected when the whole debate deals with the quality of justice and its assessment.

The question of the quality of justice features an approximate heterogeneity in its meanings and applications, except in the Netherlands, where the *RechtspraaQ*, a "total quality" system, is very well structured and identified and jointly implemented by the Council for the Judiciary and the ministry, and fully integrated in the courts' activity by "quality managers"[19]. The satisfaction of the users is a kea working axis and it places the citizens as central to the functioning of justice and strengthens the legitimacy of the system by enhancing the public's confidence[20]. Following a first period when the measurement of performance within quantifiable targets was prevailing, integrity, expertise, legal unity, diligence and timeliness, have gradually been introduced to improve the balance of the effective functioning of the entire judicial process, within the major characteristic of the "customer" and the judiciary's actors satisfaction surveys (magistrate, courts officials, lawyers…), for whom the promotion of professionalism constituted a strong axis. The satisfactions surveys, audits, assessment mechanisms based on peer review and intervision are means that are systematically and regularly used[21]. The current developments deal with the quality of the wording of court decisions. The *PROMIS* project aims to improve the grounds of criminal judgements with an improved motivation of both the evidence and the decisions related to the sentence.

The observed approaches in the two other countries are quite different. In England, the measurement of quality is made trough many opinion polls and surveys that assess the access conditions to information and to the different jurisdictions, the processing of the users' needs, the length of procedures or individual points such as the respect of the Witness Charter, for the witnesses who play a major role in the procedure. Based on these surveys, her Majesty Courts Service publishes the results on the basis of a ranking that promotes a competition between the courts whereas the Customer Excellence Service delivers a labelling that

---

[19] See in particular, Ph. Langbroek, « Entre responsabilisation et indépendance des magistrats : la réorganisation du système judiciaire des Pays-Bas », *RFAP* 2008, n° 125, p 67 ; M. Fabri, J.-P. Jean, Ph.Langbroek and H. Pauliat (ed.), *L'administration de la justice en Europe et l'évaluation de sa qualité*, Montchrestien, 2005, spéc., pp 301-321 ; Ph. Langbroek, (ed.), *Quality management in courts and in the judicial organisations in 8 Council of Europe member States, a qualitative inventory to hypothesise factors for success or failure*, CEPEJ studies n° 13.

[20] J-P Jean and H. Jorry, *La réalisation d'enquêtes de satisfaction auprès des usagers des tribunaux des Etats membres du Conseil de l'Europe*, (avec H. Jorry), Conseil de l'Europe, *Les études de la CEPEJ* n° 14, 2011.

[21] For the period 2008 to 2011, the following objectives have been pointed out: competence, reliability, effectiveness, legitimacy, the judicial organisation shall be "deeply rooted in society".

corresponds to the right level of quality of the courts. Hence, the search for the quality of justice seems to be, in England, part of a series of sectional approaches[22]. It has been different for the administrative justice who is separated from the traditional judicial justice in England. The 2007 reform made by the Tribunals, Courts and Enforcement Act has set it up as a self-administered justice in order to streamline and specialise sections in the administrative proceedings. The Tribunal Procedure Committee aims to put an end to the multiplicity and the complexity of the procedures in the administrative courts. Now, the Administrative Justice and Tribunal Council assists the Senior President of Tribunals who holds responsibilities on quality matters and who is notably in charge of developing innovative ways of conflicts resolution and conciliation in line with a more general quality standard that would tend to get the administration closer to the administered. Such an English heterogeneous and pragmatic approach of quality requires a series of reforms and initiatives which include firstly the purpose of quality, the improvement of the service provided to the citizen, regardless of specifically identified structures for the management of quality, by contrast with the Netherlands.

In France, as it is the case in England, it seems difficult to analyse a policy of the quality of justice because of its heterogeneity and its dispersion, and even its weakness. As part of the promotion of the quality of the reception in public services, the welcoming and information policy of the courts led to the certification of a few of them through the *Charte Marianne*, when the reform of the judicial map was removing, without joint action, 178 district courts *(tribunaux d'instance)* and local courts *(juridictions de proximité)*. The *Conseil superieur de la magistrature* (the French magistrates' Council) has implemented a complaints processing system for the citizens through a complex process in the context of the constitutional amendment of July 2008[23], which shall not be subject to further reflexion once the *Défenseur des droits* (the Commissioner of Human Rights) is implemented, whereas other countries were questioning about the broad panoply of protection it provides in the area of justice and administration of justice. The user satisfaction surveys consisted in a single national survey led by the *GIP Justice* (the Justice Public Interest Group) in May 2001 and since 2007, in surveys of victims of infringements. At local level, only one local survey was led in 2010 in the *Angoulême* court under the auspices of the *CEPJ* (European Commission for the Efficiency of Justice). Beyond few limited initiatives, the discussion on the quality of justice set up more than a decade ago[24], does not manage to irrigate the French judicial justice which is caught up in its functioning problems as well as an implementing system by the central administration (top down) that does not allow the accountability of the local actors. In the administrative justice, working group have been implemented on the initiative of the *Conseil d'Etat* (the French Council of State) and other administrative jurisdictions, particularly dealing with topics such as the wording of court decisions.

---

22 Gar Yein Ng, « Quality management in the Justice System in England and Wales », *in* Ph. Langbroek, *Quality management in courts and in the judicial organisations in 8 Council of Europe member states*, p. 35.

23 J-P. Jean, *Saisine du CSM par les justiciables. La boîte de Pandore est-elle ouverte ou fermée ?* Blog éditions Dalloz 25 juin 2009. http://blog.dalloz.fr/blogdalloz/2009/06/saisine-du-csm-par-les-justiciables-la-boite-de-pandore-estelle-ouverte-ou-ferm%C3%A9e-.html

24 *La qualité de la justice* (M-L. Cavrois, H. Dalle, J-P. Jean ed.), La Documentation française, 2002.

Quality policies are necessary to offset the productivity requirements

In 2007, the Deetman Commission assessed the successive reforms of the Dutch judicial system. Beyond the policies that have been led on the improvement of quality, it seems that the continually increasing research on the productivity of the court activity was more and more threatening both the substantive nature of the court decisions and the judges' operational independence, and particularly with the challenge of both the wording and the jurisprudential standardisation. Quality, which is essentially intended for a process of streamlining and standardisation, may have negative effects. The objective of the quality of justice may call into question the necessary quality for the legal function.

Therefore, it seems necessary to expand a communication on the substantive qualities of court decisions that would not only lie on the criteria of a fair trial which mixes it up with its development process. The carried out surveys that deal with the concepts of professionalism, motivation, impartiality and which are the basis of the judge's decision, point in such a direction.

On the whole, the expression "quality of justice" conceals major heterogeneities in the Dutch, English and French systems. Nevertheless, it can be noted that the concept of quality is of both a structural and functional nature. The quality of justice is that of its administration, its organisation as well as its jurisdictional functioning. The own dynamism of the concept of quality is beyond many conceptions of justice as a public service and/or a constitutional authority; in that respect the concept of quality is in a position to allow a series of necessary initiatives, even balancing the excessive trend of the sole requirement of "performance" as well as the involvement of all the actors in "quality-approaches" that would allow to set concrete targets to improve the service provided to citizens and professional practices to be locally reached. Quality shall deal with both the administration of justice and the jurisdictional function in its whole.

The "total" quality system that prevails in the Netherlands represents a sort of hard quality template with a standardised, understood, implemented, diffuse and structured quality which is well-established in the judicial system and well-integrated by all the actors. At different levels, soft quality models, corresponding to the culture of each country, would develop in a more dispersed and episodic way. In France, quality is set out as a requirement by the judges to resist the pressures of the numbered objectives of performance. In England, it is implemented by the Government agencies; it is more dispersed but actually centred on the citizen, without conceptualisation, but it aims reforms and reorganisations that would made public the results of the competing jurisdictions.

An appropriate connection shall be made, more particularly with **the need for experimentation in the administration of justice.** The quality policies imply both know-how and training but essentially the involvement of the actors on well-defined objectives such as, for example, the greeting of the citizen or the attention paid to witnesses. Such motives imply the definition of local projects, the allocated means and a regular assessment of the results as provided for in the pragmatic Anglo-Saxon "what works?" model. In France, the Constitutional reform of July 2008 allows the legislative experimentation and entrenches impact assessments. The law dated August 10th, 2011 dealing with the citizens who shall perform the duties of assessors, is therefore experimented in the jurisdictions of two courts of appeal. In the administrative justice, whether with regard to the dematerialisation of

exchanges procedures or even with regard to the implementation of new procedures related to the hearing or the appraisals, the use of experimentation became naturally a prerequisite for any general application. In the Netherlands and in England, the same process exists. Such practices, that are certainly not new, seem nevertheless to speed up. They show a greater quality and effectiveness concern, a healthy caution as well as an increasing concern about the assessment and the positive appreciation of their image, a little destabilising for the independence of the magistrates and the jurisdictions, as a whole. The issue of these experiencing organisation arrangements can thus be raised: who is proposing (is it the minister or is it a jurisdiction that applies?), who is selecting, who is assessing the results and on which basis? To what extent such an organisation could be consistent with the independence of magistrates?

The assessment of the judiciaries

The improvement of the public performance needs supervision as well as an assessment for the certification of the required actions for the improvement of the quality and the efficiency of the service rendered to the citizen. A clear distinction shall be made between two aspects: the collective assessment of a system, a service or a jurisdiction and the individual assessment of the magistrates and the courts' officials, which implies quite different difficulties.

The sophisticated assessment process in the Netherlands exclusively deals with the collective assessment implemented under the auspices of the Council for the Justice. Within the *RechtspraaQ* quality process, standard assessment criteria apply to the entire courts system. In addition, the Council for the Justice sets up a specific commission who, every four years, visits the courthouses in order to make an audit. Each court applies locally its criteria while using, in addition to statistical analysis, various means: satisfaction surveys among citizens, lawyers, judges, courts' officials and staffs, or while carrying out steering committees dealing with the incidents reported in the functioning of the court.

The individual assessment is not made through the disciplinary proceeding. The magistrate, whose independence is respected, becomes part of a global functioning within the court, where failings may involve people who are subject to controls on their activity by the court's manager, such as the personal presence at court. Intervision and peer working make possible the assessment of the outcome of the proceedings or the demeanours at a hearing. The assessment criteria seem quite sophisticated both from a quantitative point of view (a precise determination of the time for the judges, for the administrative staffs compared with the various kinds of the legal cases dealt with), which should help to clarify the allocation of budget resources, and a qualitative point of view, including the promotion of quality while measuring a satisfaction rate for each area[25]. The assessments are made public and are compared.

In Great Britain, the same trends can be observed concerning the quality, that is to say not a structured process of assessing the courts' activity, but a set of control and audit processes that are part of a managerial concept but that suit and are specific to the complexity of the British judicial system. The independence of magistrates excludes any individual

[25] Aurélie Binet-Grosclaude and Caroline Foulquier, *Rapport sur l'administration de la justice aux Pays-Bas.*

assessment process. The Administrative Justice and Tribunals Council (AJTC), implemented in 2007, ensures the supervision of the administrative courts and shall support them. The Tribunals Service and Her Majesty Court's Service (merged since April 2001), because of their being the Ministry of Justice's executive agencies, have a significant role to play in the assessment of the judicial system. As a matter of fact, these two agencies implement action plans for the courts they assess the performances of and supervise the management of, while taking into account major objectives and particularly the reduction of the budgetary allocations[26]. The performance assessment criteria are based on the efficiency, and especially the delays and the costs of the court decisions. The assessment of justice is also made trough the numerous satisfaction surveys among the citizens, witnesses and victims, or through questionnaires for professionals, dealing with very concrete criteria. These two agencies are being merged.

In France, the collective assessment is clearly implemented for the administrative jurisdiction and for the judicial jurisdiction. Concerning the administrative jurisdiction, the task is assigned to the *Mission permanente d'inspection des juridictions administratives* (the Permanent mission on the administrative jurisdictions), which is issued from the *Conseil d'Etat* (the French Council of State) who, from time to times, supervises the activity of the administrative courts, the administrative courts of appeal, both the management and the results of the jurisdictional activity, as well as the staff issues. Let us remind that the manager of the budgetary program of the administrative jurisdiction is the Vice President of the *Conseil d'Etat* (the French Council of State) who supervises the entire system. Concerning the judicial jurisdiction, it is supervised by the Ministry of Justice under the auspices of the *direction des services judiciaries* (the Court Services Division) who allocates the required resources in terms of staff and budget depending on the activity and the workload. The *Inspection générale des services judiciaries* (the General Inspectorate of the Judicial Services), which is currently working with the Minister of Justice, with broad assignments since the reform made by the decree dated December 29th, 2010, has the permanent task to assess the functioning and the judicial jurisdictions' performance. It occasionally deals with the observed failings The Minister may ask it to conduct pre-disciplinary administrative investigations dealing with magistrates or courts' officials. The heads of the courts of appeal shall have the same powers and they can henceforth refer directly the matter to the *CSM* (the French magistrates' Council).

The performing assessment criteria of both the judicial and administrative justice converge on many points[27], even if the relevance of the existing indicators is disputed[28]. The time taken to process cases, the number of pending cases, the number of magistrates or court's clerks for handling cases are the traditional indicators of the *LOLF* (the recent legislation governing public finance) but are not balanced by some criteria that could be taken into account regarding the matter of the litigations. The qualitative criteria are of "low quality" mostly include the cancellation rate of the courts' decisions. The assessment criteria are hence basically numbered and based on an improvement of the efficiency of the courts[29] and the

[26] Aurélie Binet-Grosclaude, Caroline Foulquier, *Rapport sur l'administration de la justice en Grande-Bretagne*, p. 22 et s.

[27] Rapport Assemblée Nationale n°2857, 2010, rapporteur R. Couanau

[28] J-R. Brunetière, *Les objectifs et les indicateurs de la LOLF, quatre ans après*, *RFAP*, 2010/3.

[29] For the administrative jurisdiction, E. Costa, *Des chiffres sans les lettres- La dérive managériale de la juridiction administrative, AJDA* 2010 p. 1623.

staffs' productivity. The individual assessment of the magistrates is based on their professional competence. Furthermore, there is since 2004, a modulated bonus system based on the individual performance of each magistrate, which enhances the feeling of quantitative pressure as well as it may suggest the possibility of an infringement to the independence of magistrates, according to very questioned modalities in Europe[30].

Together these developments are points to consider. They could be clarified or challenged. The feedback conference shall be a common place to exchange constructive and prospective views on the used concepts, the mentioned experiences and the related analyses.

[30] J-P. Jean and H. Pauliat, *Primes modulables, qualité et indépendance de la justice judiciaire, D.* 2005, p. 2717.