

## An evaluation of the quality of justice in Europe and its developments in France

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### Introduction

French justice, like justice in other European countries, is undergoing profound changes. In a general context of public expenditure restrictions, it has to face the expectations of citizens and the requirements as to the results to be achieved.

Justice has to report on its activities and its efficiency. The European Union, the Council of Europe, and in particular the European Commission for efficiency of justice (CEPEJ), as well as each country progressively acquire appropriate measuring and evaluation tools.

However, this absolutely necessary evaluation of the judicial systems should not challenge the independence of judges in any decision they take.

The French debate on the evaluation of justice and the way in which it is administered has been speeded up by the Institutional Act on Budget Acts (LOLF) of 11 August 2001, which laid down general principles for budget legislation. From the 2006 financial year onwards the LOLF provides for an aggregation of ministries' budgets, which will have to be presented according to certain missions and programmes so that, under parliamentary supervision, performance can be evaluated in relation to fixed objectives. The Justice Ministry's 2005 budget thus comes with seventy 'performance indicators' which act as benchmarks for the purpose of this evaluation.

After a period of indifference and an amused detachment towards the heralded technocratic approach, the judicial professions began to express their concern as they realised that this was not merely window-dressing without any affect on the slow modernisation of judicial services, but rather a far-reaching change with direct implications for professional practice.<sup>1</sup> Measures driven by the Ministry of Finance, such as setting an overall allocation for each court, drawing up performance indicators and introducing performance incentives,<sup>2</sup> considerably disturbed the judicial community, despite the fact that some of these tools were already being used in some courts.<sup>3</sup>

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1 J.-P. Jean, 'Evaluation et qualit  ', in: *Dictionnaire de la justice* (ed. L. Cadiet), 2004.

2 Highly controversial in both their principles and their implementing provisions, they are now described merely as 'adjustable' in Decree No. 2003-1284 of 26 December 2003 on the compensation plan for some members of the judiciary (JO, 30 Dec., p. 22405). See D. Jean-Pierre, 'R  mun  rer le m  rite dans la fonction publique: la grande illusion ou un nouvel espoir?', *Jurisclasseur p  riodique* (JCP), Ed. A, 2004, Savoir No. 1738.

3 The Court of Cassation, the Auditor-General's Department, the Conseil d'Etat and the administrative courts.

Holding judges to account for their activities does not raise any basic problems at the constitutional level. While the independence of the judiciary is guaranteed under Article 64 of the Constitution, the judicial system is also covered by Article 15 of the Declaration of the Rights of Man and of the Citizen, according to which society has the right to require every public agent to account for his administration.

The debate on the evaluation of justice had in fact been envisioned for several years as a result of work on methods for measuring judicial activity. Research had amply prepared the ground,<sup>4</sup> pointing to the need for agreed reliable indicators and a constant interplay between quantity and quality in judicial work. Comparative studies highlighted the speed with which Western countries were developing new methods of administering justice based on the new public management techniques already applied in other public services.<sup>5</sup> In France the adoption of a budget evaluation, new administrative methods and quality initiatives, the recognition of users' rights and the drive for greater efficiency<sup>6</sup> are in keeping with the constantly uttered determination to reform central government.<sup>7</sup> The judicial system could not remain in splendid isolation; society is calling it to account, doubtless because greater use of punishment in social control makes it increasingly important,<sup>8</sup> but also because its budget is climbing at a time when public finances are in severe difficulties.<sup>9</sup>

The anxieties caused by this debate, in particular among judges, are legitimate, for questions immediately arise about the purpose of their office, which cannot be to mass-produce judgments. But, at the same time, they are aware that, despite considerable efforts over the past few years, the way in which the courts are run, especially as regards the procedure and the response by parties to proceedings, too often falls far short of expectations.<sup>10</sup> The best way of making headway on this difficult issue, which will be one of the major challenges for the judicial authorities over the next few years, is to avoid becoming bogged down in the usual specifically French approach. The European perspective, if it accommodates each country's particular features, is a more effective way of repositioning the French debate on evaluating the quality of justice. Practitioners must be at the forefront here, as has already occurred in the Netherlands, a pioneer in this field. The National Legal Service Training College, which has already taken a number of steps in this direction, must play a leading role in changing the culture of everyone working in the judicial system.<sup>11</sup>

The comparative approach that is developing is also aimed at measuring justice standards in each country in a world where competition between legal systems is also a factor in economic choices and reference models. One has only to read the World Bank documents on these issues to understand their strategic importance.<sup>12</sup> But the debate on the quality of justice should not be

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4 E. Breen (ed.), *Evaluer la justice*, 2002; M.-L. Cavrois *et al.*, *La qualité de la justice*, 2002; G. Canivet, 'Comment concilier le respect des principes de qualité du procès équitable avec le flux d'affaires dont sont saisies les juridictions?', in: Cavrois *et al.*, *op. cit.*; H. Dalle, *Qualité de la justice et évaluation des tribunaux de grande instance*, Report to the Minister of Justice, 2001, <http://www.ladocumentationfrancaise.fr/brp/notices/014000419.shtml>

5 A.-L. Sibony, 'Quelles leçons tirer des expériences étrangères?', in: Breen, *supra* note 4, and Cavrois *et al.*, *supra* note 4, especially on the work in the Netherlands and North America.

6 Working group chaired by Jean-Claude Magendie, *La célérité de la justice*, report to the Minister of Justice, September 2004.

7 L. Cadiet and L. Richer (eds.), *Réforme de la justice, réforme de l'Etat*, 2002; D. Soulez-Larivière and H. Dalle (eds.), *Notre justice*, 2002.

8 A. Garapon and D. Salas, *La République pénalisée*, 1996; D. Salas, *Le tiers pouvoir*, 2000; J.-P. Jean, 'La judiciarisation des questions de société', 1997 *Revue Après-demain*, October, and 'La Justice, pilier ou béquille de la démocratie', *Le Monde diplomatique*, January 2001.

9 The justice system's share of the central government budget rose from 1.06% in 1980 to 1.86% in 2004.

10 Survey of judicial-system users ('Enquête sur les usagers de la justice'), Louis Harris Institute/Law and Justice Research Unit, March 2001.

11 Cf. European symposium on 26 and 27 May 2003 (instigated by the Law and Justice Research Unit), under the European Commission's Grotius programme. Subject file available at <http://www.gip-recherche-justice.fr/dossiers/dossiers.htm>

12 R. Messick, 'Reducing Court Delays: Five Lessons from the United States', *PREM Notes*, No. 34, December 1999, World Bank; E. Buscaglia and M. Dakolias, *Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account*, 1999. Cf. the report *Doing Business in 2004: Understanding Regulation*, on the World Bank website: <http://www.doingbusiness.org/Main/>

conducted in purely quantitative terms by bodies that do not really comprehend the essence of the judicial system as the protector of a public good outside the rules of the market, although the economic dimension of law and justice is not excluded. European standards and the discussions instituted in a number of international bodies may assist in advancing methods and objectives forming part of a system of shared values within France.<sup>13</sup>

The questions relative to the quality of the judicial systems will be more and more numerous; it is thus imperative to clarify the rules allowing justice to be estimated in order to avoid that quality becomes a political tool which is susceptible to, possibly, having its independence undermined.

## **1. Evaluating the quality of justice: a debate now well under way in Europe**

The debate on increasing judicial productivity and improving its management methods and quality is occurring at a particular juncture in European integration which sees national judicial systems acquiring mounting importance. The approach to the functioning of the judicial system in Europe embodies different cultural heritages. To illustrate this, we need only call to mind the contrast between, on the one hand, the Dutch approach – which arises out of the Protestant culture of Northern Europe and is marked by pragmatism and statistical rationality and has long been applying new public management theories to general government – and, on the other hand, the approach of the Mediterranean countries in Europe, whose judicial tradition stems from the theory of the lawfully established court, statute law, and entrusting the conduct of civil cases to lawyers (with a risk of potentially never-ending proceedings).<sup>14</sup> France undoubtedly has the specific characteristic, in mainland Europe, of being situated at the right latitude to embody both cultures.

### ***1.1. European standards for the quality of justice***

Certain principles enshrined in both EU law and European human rights law underline a convergence towards better-quality judicial systems.

#### ***1.1.1. Guiding principles stemming from the European Convention***

The quality of justice unquestionably requires a definition or an approach which allows it to be rationally grasped. Obviously reference should be made to the principles laid down in the European Convention on Human Rights and the European Court's interpretation thereof. However, reference to these principles cannot suffice as they merely indicate a 'standard level' of justice for different countries; although certain indicators are set out, any evaluation remains a delicate matter.

##### **1.1.1.1. The principles of the Convention determine the quality of a trial**

If we take the European Convention as our benchmark, high-quality justice would apply the principles appearing, amongst other places, in Article 6 of the Convention – its foundations would be the right to a fair trial, reflected in access to a court at the outset, observance of defence rights during the trial, a public hearing unless the exclusion of the public is justified, an

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DoingBusiness2004.aspx

13 M. Fabri *et al.*, *L'administration de la justice et l'évaluation de sa qualité en Europe*, 2005.

14 As a result Italy has by far the highest rate of judgments against a country by the European Court for breach of the 'reasonable time' requirement (299 judgments on this out of a total of 410 such breaches of the Convention in 2002). After the reform of its civil justice system through the 'Pinto Act' (Law No. 89 of 24 March 2001) there were only three judgments against it the following year.

independent and impartial tribunal established by law, and a decision within a reasonable time<sup>15</sup> – and in Article 13, laying down the right to an effective remedy. The Court has on several occasions had the opportunity to reiterate what constitutes a tribunal<sup>16</sup> and the characteristics that it must possess: independence, especially from the legislature and the executive, a certain duration of its members' terms of office, impartiality, and safeguards afforded by its procedure. These principles have been transposed into the justice section (Chapter 6) of the European Union's Charter of Fundamental Rights; this defines the fundamental rights of the plaintiff or defendant, adopting a broader approach than the European Convention.<sup>17</sup> The right to a hearing recognised by Article 47 of the Charter is not confined to disputes concerning civil or criminal law; moreover, the remedy afforded to the individual is a remedy before a court.<sup>18</sup>

These principles are still insufficient in themselves, since European case law has focused on elements of procedure. The hesitations of the European Court of Human Rights regarding the concept of impartiality<sup>19</sup> indicate the problems in framing an approach that is favourable to the plaintiff or defendant without calling into question certain national judicial traditions<sup>20</sup> and without 'technicising' the debate. There are institutional standards and European procedural standards for high-quality trials<sup>21</sup> which concern the trial itself and not merely justice or the judicial system. The Charter of Fundamental Rights would therefore seem a more satisfactory answer to questions of quality. Also the European principles sometimes lose some of their credibility when the European Court itself has trouble observing them, especially those relating to 'reasonable time'! The reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.<sup>22</sup> These are criteria which the Court of Justice of the European Communities has likewise adopted.<sup>23</sup> The European Court has stated that although Article 6 requires that judicial proceedings be expeditious, regard must also be had to the more general principle of the proper administration of justice.<sup>24</sup> Expeditious therefore does not mean precipitate,<sup>25</sup> and speed is not always a token of quality: it may even call into question the basic safeguards of a fair trial.<sup>26</sup> 'Reasonable time' is not an easy matter to determine; it would seem

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15 J.-P. Marguénaud, *La Cour européenne des droits de l'homme*, 2003.

16 ECtHR, 29 April 1988, *Belilos v. Switzerland*, Series A, No. 132, p. 29, § 64; 1989 *Revue générale de droit international public*, p. 273, comment by G. Cohen-Jonathan. It is characterised in the substantive sense by its judicial function, determining matters within its jurisdiction on the basis of rules of law and after proceedings conducted in a prescribed manner. More recently, regarding independent administrative authorities that might be classed as tribunals in certain circumstances: ECtHR, 27 August 2002, *Didier v. France*, JCP 2003, II, 10177, comment by G. Gonzalez. See F. Sudre and C. Pichenal (eds.), *La diffusion du modèle européen du procès équitable*, 2003.

17 S. Carotenuto and J. Mendes Constant, 'L'inscription de la justice dans la Charte des droits fondamentaux de l'Union européenne', *Petites affiches*, No. 134, 5 July 2002, p. 4.

18 As Carotenuto and Mendes Constant (*supra* note 17, p. 5) emphasise (translation): 'the first article of the chapter on justice is not an appropriation of the Convention's provisions but rather a collation of case law from the Court of Justice and the European Court of Human Rights.' On this question, see F. Sudre, *Droit international et européen des droits de l'homme*, 2003, No. 103 f, p. 150.

19 Sudre, *supra* note 18, No. 214, p. 334; F. Sudre *et al.*, *Les Grands arrêts de la Cour européenne des droits de l'homme*, 2004, No. 26, p. 248.

20 S. Guinchard, 'Les normes européennes garantes d'un procès de qualité', in: Cavois *et al.*, *supra* note 4, p. 63. See J. Andriantsimbazovina, 'Les exigences de la Convention européenne des droits de l'homme: la fiction déjà dépassée par la réalité?', in F. Sudre and I. Pingel (eds.), *Le ministère public et les exigences du procès équitable*, 2003.

21 To adopt the term coined by Serge Guinchard.

22 For example, *Pélissier v. France*, and *Philis v. Greece* of 27 June 1997.

23 ECJ, 17 December 1998, *Baustahlgewebe GmbH*, 1999 *Revue trimestrielle des droits de l'homme* (RTDH), p. 487, report F. Sudre.

24 ECtHR, 12 October 1992, *Boddaert v. Belgium*, Series A, No. 235-D, p. 82, § 39; ECtHR, 22 June 2000, *Coëme v. Belgium*.

25 See Commission de réflexion sur l'éthique dans la magistrature (Review Committee on Ethics in the Judiciary), *Cabannes Report*, La Documentation française, 2003, p. 22.

26 ECtHR 19 October 2004, *Makhfi v. France*, finding France guilty of breaching Article 6.3 in connection with an assize court trial in which the defence counsel had to address the court at twenty-five past four in the morning: 'It is essential that not only defendants but also their defence counsel should be able to answer questions and address the court without being in a state of excessive fatigue. Similarly, it is crucial that judges and juries should be fully capable of concentrating and paying attention in order to follow the proceedings and deliver a well-informed judgment.' On 12 January 2000 the Criminal Division of the Court of Cassation had dismissed the appeal on the ground that the

to be more the time necessary to arrive at a result than a period of time in the procedural sense of the term.<sup>27</sup>

#### 1.1.1.2. The principles of the Convention include the need for justice to be effective

The principles to which the European Court of Human Rights makes reference are factors that the courts must respect in order to guarantee equality of arms and to give parties to proceedings a maximum number of safeguards. They must not, however, result in procedural safeguards being given precedence over the quality of justice as a whole. Logic suggests that the required safeguards for the parties are bound to lengthen proceedings; it will be necessary, for example, to be satisfied of the impartiality of the bodies at every stage of the proceedings.<sup>28</sup> We have thus reached the point of challenging the very reasons that determined the creation of independent administrative authorities. The independent regulatory authorities, which were supposed to speed up the penalty system because criminal justice was so slow and ill-adapted, are now under an obligation to comply strictly with Article 6 of the Convention.

Thus the principles framed must not be interpreted rigidly. The right to a court, for example, 'of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard'.<sup>29</sup> This means that the requirements for a fair trial must be reconciled with the need for promptness, case-flow management and economy in the courts.<sup>30</sup> The role of the principles is therefore both to afford safeguards to the parties concerned and to guarantee 'proper administration of justice' in order to ensure full confidence in the judicial system, thus enshrining the principles of reasoned judgments – essential for an understanding and therefore the acceptance of court decisions – and of the certainty of the law, which reflects the idea of the foreseeability and unambiguity of decisions.<sup>31</sup> The rights secured must be effective; however, a judgment can be effective and effectual only once it has been executed. Thus confidence in the judicial system would be seriously affected if the right to bring a case to court resulted in an ineffectual final decision. The European Court has stated: 'It would be inconceivable that Article 6.1 should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions'; the execution of a judgment must therefore 'be regarded as an integral part of the 'trial' for the purposes of Article 6',<sup>32</sup> and such execution must itself occur within a reasonable time.

The European Court believes more generally that the Convention places a positive duty on states 'to organise their legal systems so as to allow the courts to comply with the requirements of

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presiding judge had unfettered discretion in deciding whether an adjournment of the hearing was necessary.

27 J.-F. Kriegk, 'Le délai raisonnable: office du juge et office de l'autorité publique', *Petites affiches*, 26 June 2003, No. 127, p. 4.

28 In fact the question of the 'timing of a fair trial' could arise. See J.-F. Brisson, 'Les pouvoirs de sanction des autorités de régulation et l'article 6 § 1 de la Convention européenne des droits de l'homme', 1999 *Actualité juridique du droit administratif* (AJDA), p. 847. See also the 2001 Conseil d'Etat public report on independent administrative authorities: *Les autorités administratives indépendantes*, Etudes et documents du Conseil d'Etat (EDCE), No. 52, p. 295 (p. 311 f.).

29 For example, ECtHR, 19 December 1997, *Brualla Gomez de la Torre v. Spain*, Reports 1997-VIII, p. 2955, § 33; Recueil Dalloz 1998, Sommaires, p. 210, comment by N. Fricero. See also J.-P. Costa, 'Le droit à un tribunal et ses limites selon la jurisprudence de la Cour européenne des droits de l'homme', in: *Mélanges en l'honneur de Jean Buffet, la procédure en tous ses états*, 2004, p. 159.

30 Canivet, *supra* note 4, p. 213.

31 O. Dufour, 'La Cour de cassation, juge de la qualité?', *Petites affiches*, 29 January 2002, No. 21, p. 3, on the 2002 official opening of the Court of Cassation. The President, Guy Canivet, has written that the Court of Cassation takes the first step in monitoring quality, that of the detection of defects.

32 ECtHR, 19 March 1997, *Hornsby v. Greece*, Reports 1997-II-495; Recueil Dalloz 1998, Jurisprudence, p. 74, comment by N. Fricero; *Les Grands arrêts de la Cour européenne des droits de l'homme*, No. 28, p. 272, a wording adopted by the Conseil d'Etat (15 March 2000), *Allais*, App. No. 189042.

Article 6.1 including that of trial within a ‘reasonable time’.<sup>33</sup> It has even specified that ‘the courts of states parties cannot, without themselves violating Article 6 of the Convention, authorise enforcement of a judgment of a third country which fails to apply the guarantees of Article 6’.<sup>34</sup> This approach is particularly important for the integration of judicial systems within Europe, since proper management of the courts is crucial to the very existence of high-quality justice.

### *1.1.2. European Union powers and progress*

#### 1.1.2.1. Trust in the quality of legal systems underlies the principle of mutual recognition of court decisions

From the European Council to the Court of Justice of the European Communities,<sup>35</sup> mutual trust in judicial systems is now an incontrovertible point of reference for practitioners. Since European Union member states have all ratified the European Convention on Human Rights, the machinery for protecting fundamental rights, placed under the supervision of the European Court of Human Rights, has hitherto been considered adequate to ensure mutual trust in the European judicial area. But the Union now intends to take its own measures to improve the quality standard and therefore the safeguards of each judicial system, especially in connection with the accession process for new members.

To define the content of these standards, the European Commission has presented a Green Paper on procedural safeguards in order that ‘divergent practices’ in the way in which the European Convention on Human Rights is applied do not ‘run the risk of hindering mutual trust and confidence which is the basis of mutual recognition’.<sup>36</sup> The Commission plans specific legislative harmonisation measures concerning the right to a lawyer, the right to an interpreter and the right of vulnerable persons to proper protection. It has also put forward another measure which has attracted less attention, on establishing a system of mutual evaluation which potentially involves introducing a practical mechanism for evaluating the operation of member states’ judicial systems.<sup>37</sup>

Evaluation mechanisms in the European Union are nothing new. In the specific field covered by the ‘third pillar’ – justice and home affairs – an operational system has been set up, under the convention implementing the Schengen Agreement, to accompany the abolition of controls at the Union’s internal borders. Another system has been provided to evaluate the application, at the national level, of international undertakings in the fight against organised crime,<sup>38</sup> which has had concrete results in terms of judicial assistance and drug enforcement.<sup>39</sup> Another programme is

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33 Sudre *et al.*, *supra* note 19, p. 270.

34 Sudre, *supra* note 18, p. 300; ECtHR, 20 July 2001, *Pellegrini v. Italy*, 2002 *Revue trimestrielle des droits de l’homme* (RTDH), p. 463, comment by J.-P. Costa.

35 ECJ, 11 February 2003, Joined cases C-187/01 and C-385/01, *Gözütok and Brügger* (Recueil Dalloz 2003, Jurisprudence, p. 1458, comment by F. Julien-Laferrrière), especially §§ 33 to 35: ‘In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA [Convention implementing the Schengen Agreement] is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.’ Cf. F. Massias, *Revue de science criminelle*, 2003, p. 625.

36 COM(2003) 75 final of 19 February 2003; Green Paper from the Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union.

37 As underscored by Isabelle Jégouzo, in: G. de Kerchove and A. Weyembergh (eds.), *Sécurité et justice: enjeu de la politique extérieure de l’Union européenne*, 2003, p. 147.

38 Joint Action of 5 December 1997, OJL 344, 15.12.1997, p. 7.

39 The third phase of evaluation concerning the transmission to Europol of information from member state police forces is in progress.

under way concerning the fight against terrorism.<sup>40</sup> Their significance lies mainly in their combination of practical, legislative and institutional approaches to analysing the performance of existing national systems. Their specific and highly confidential nature is perhaps regrettable.<sup>41</sup> However, it is the evaluation of the judicial system as a whole that enables its quality to be measured in terms of its compliance with the minimum standards required in the European judicial area. Thus countries applying to join the European Union have been subject to a procedure for assessing their observance of fair-trial criteria and their methods of operation. In addition to checking whether their legislation has been adjusted to the EU law on judicial cooperation in civil and criminal matters, five fields have been evaluated: the independence of the judiciary, the efficiency of justice (organisation of the courts, case flow, and case-processing times), the recruitment and training of court staff and members of the legal service, access to the courts, ethical safeguards, and combating corruption. These arrangements are accompanied by a safeguard clause whereby, in the event of problems, the application of instruments based on mutual recognition of court decisions can be suspended.<sup>42</sup>

The trust between players in the different judicial systems will determine the efficiency of the system of mutual recognition of decisions. The system presupposes that members of the legal service know and accept the operation of foreign systems which may be very different from their own. The particular cooperation mechanisms arising from Eurojust, the European judicial network and the now indispensable role of liaison magistrates<sup>43</sup> are all facilitating this exchange. The handling of a highly publicised court case such as the trial of Bertrand Cantat in Vilnius no doubt considerably advanced the knowledge of and trust in the Lithuanian criminal justice system, which was faster than the French system in trying – with all the necessary safeguards – a criminal case.

#### 1.1.2.2. Approaches forming part of the draft European Constitution<sup>44</sup>

Article I-42 of the project of the Treaty establishing a Constitution for Europe, concerning specific provisions on bringing about an area of freedom, security and justice, lays down, amongst other things, that national parliaments may participate in the evaluation mechanisms provided for in Article III-260 in connection with the Commission's general report on the activities of the European Union to the European Parliament and the Council of Ministers. In Part III of the draft treaty, on the policies and functioning of the Union, Articles III-257 to III-264<sup>45</sup> specify the provisions which are applicable to the area of freedom, security and justice. Article III-260 lays down the conditions under which member states, in collaboration with the Commission, may 'conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Chapter by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.'

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40 Council Decision of 28 November 2002 establishing a mechanism for evaluating the legal systems and their implementation at national level in the fight against terrorism, *OJ L* 349/1, 24.12.2002.

41 Jégouzo, *supra* note 37.

42 Article 39 of the Accession Act. This may take the form of a temporary suspension of relevant provisions or decisions in relations between a new Member State and any other Member State or Member States, without prejudice to the continuation of judicial cooperation.

43 O. de Baynast and P. Rancé, *L'Europe judiciaire, enjeux et perspectives*, 2001; E. Barbe, *Justice et affaires intérieures dans l'Union européenne*, 2002.

44 L. Bellulo and B. Sturlese, 'La Constitution européenne: une opportunité pour l'Europe de la justice', *Jurisclasseur périodique*, 2004, I, 156.

45 See Constitutional Council (Conseil Constitutionnel), Decision 2004-505 DC of 19 November 2004, *on the treaty establishing a Constitution for Europe*.

We may also note that Part II of the Treaty, containing a charter of the fundamental rights of the Union, includes, in Title V on citizens' rights, an Article II-101 establishing a 'right to good administration', and in Title VI on justice Articles II-107 to II-110 repeat the main principles established by the European Court's case law.<sup>46</sup>

However, while the European Union may increase its output of legal instruments, it cannot suddenly lay down permanent and credible evaluation criteria, since the professionals who conduct judicial cooperation need, as a basis for their work, not only indisputable minimum standards (for example, an effective right to a lawyer, interpreter and remedy) but also a reliable overall evaluation of the quality of a judicial system, which can only be the result of a comprehensive assessment based on manifold criteria developed and shared by all of them. The European Parliament has taken this course by appointing a former Portuguese Minister of Justice, Antonio Costa, to head a task force on the quality of justice in member states. The European Commission, for its part, is attentively following the pioneering work of the Council of Europe on these matters.

### ***1.2. The work of the Council of Europe***

The Council of Europe has long been considering how to reconcile the promotion of human rights with the effective functioning of the judicial system. Since 1976 and its first two resolutions on legal aid,<sup>47</sup> sixteen recommendations have been adopted which provide technical and policy tools enabling member states to frame extremely useful common guidelines. They apply to both criminal and civil courts, with primary emphasis on the need to facilitate effective access to the law and to justice.<sup>48</sup> Improving efficiency is a priority and must be facilitated by the development of alternative methods of dispute resolution (in particular mediation and conciliation),<sup>49</sup> the simplification of procedures,<sup>50</sup> better work organisation<sup>51</sup> and the use of new technologies.<sup>52</sup> A number of provisions emphasise the role of professionals and the statutory and ethical safeguards that must apply to them.<sup>53</sup>

The work of representatives from the 46 Council of Europe member states has continued, over the past few years, to explore the subject of alternative methods of dispute resolution. But a new priority has been added – the effective functioning of judicial systems and the need to improve their efficiency. This has a crucial bearing on all other issues since there cannot be a proper administration of justice without the proper functioning of the judicial system. This priority has emerged simply as a result of the development of bilateral exchanges between member countries' judicial systems for the purpose of improved cooperation and the joint production of international legal instruments. In particular this requires quality criteria for the operation of judicial systems

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46 Article II-107: Right to an effective remedy and to a fair trial; Article II-108: Presumption of innocence and the right of defence; Article II-109: Principles of legality and proportionality of criminal offences and penalties; Article II-110: Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

47 Resolution (76) 5 on legal aid in civil, commercial and administrative matters, adopted by the Committee of Ministers on 18 February 1976, and Resolution (78) 8 of 2 March 1978 on legal aid and advice. All the texts cited are available at [www.legal.coe.int](http://www.legal.coe.int).

48 For the very poor: Recommendation R (93) 1 of 8 January 1993. For a comparative approach to legal aid, see the French Senate, *Etudes de législation comparée*, LC 137, July 2004.

49 R (86) 12 of 16 September 1986, R (98) 1 of 21 January 1998, R (99) 19 of 15 September 1999, R (2001) 9 of 5 September 2001, and R (2002) 10 of 18 September 2002.

50 R (87) 18 of 17 September 1987.

51 R (95) 12 of 11 September 1995.

52 R (2001) 2 & 3 of 28 February 2001. Initiatives on the new information technologies as tools to have permanently available the data necessary to establish and revise indicators of quality and efficiency of justice are multiplying at all levels (international seminar on the modernisation of justice in the European Union, Madrid, 27-28 June 2002).

53 R (94) 12 of 13 October 1994 on independence, efficiency and the role of judges; see 1998 European Charter on the Statute for Judges; R (2000) 19 on the role of public prosecution in the criminal justice system; R (2000) 21 of 25 October 2000 on the freedom to exercise the profession of a lawyer.



based on the guiding principles for trials enshrined in the European Convention. To this end, the Council of Europe established the European Commission for the Efficiency of Justice (CEPEJ)<sup>54</sup> in 2002. The objectives laid down for it are clear: ‘to improve the efficiency and the functioning of the justice system of member states, with a view to ensuring that everyone within their jurisdiction can enforce their legal rights effectively, thereby generating increased confidence of the citizens in the justice system and to enable a better implementation of the international legal instruments of the Council of Europe concerning efficiency and fairness of justice’. The CEPEJ has a line function.<sup>55</sup> It is required to evaluate the performance of the various judicial systems, to identify concrete ways of evaluating and improving their functioning and to provide assistance to member states at their request. To implement this extremely broad remit, the CEPEJ can, amongst other things, draw on all the statistical and knowledge systems of each country, have recourse to experts and researchers, construct data analysis tools, produce best practice guides and make whatever recommendations are necessary. With support from a working group of national experts charged with producing studies and making specific proposals,<sup>56</sup> the CEPEJ has agreed a programme of work containing three priority themes: common tools for evaluating judicial systems, the delay in judicial proceedings, and the position of users.

A number of observers take part in this work, chief among them is the European Commission, but also the World Bank, the Hague Conference on Private International Law, representatives from judicial systems in North America, South America and Asian countries, and European NGOs representing judges, prosecutors, court clerks, lawyers and notaries. This interest shows how much law and justice are central to globalised trade, in which economic and commercial investment (but not only that) often depends on legal certainty and the efficiency of the national judicial system.

In 2004 guidelines were drawn up for moving beyond the concept of ‘reasonable time’ and determining optimum time frames for each type of proceedings. The key idea is that of the ‘foreseeable time frame’, which entails providing accurate information to users or even negotiation with the parties concerned and their lawyers on an acceptable time frame for each case, depending on the procedure adopted.<sup>57</sup>

The Committee of Ministers has also adopted a pilot scheme for analysing judicial systems that is intended to become a reference tool for member states and is based on indicators for measuring courts’ work and the standard of operation.<sup>58</sup> This evaluation approach, like any methodology for measuring a human activity, includes a number of perfectible components, especially as it must apply to forty-six judicial systems, each of which has its own culture, its own history and its own level of development. We need only think of the computer systems which the east European countries used to have and the degree of independence – or indeed corruption – of judges in some Council of Europe member states. This analysis scheme has been tested on a sample of countries of very different economic standards to gauge both the current situation (judges, registrars, IT, statistics, etc.) and what should eventually exist (guarantees of judges’ independence, availability of legal aid, arrangements governing access to legal information, users’ position and rights, tools for analysing courts’ work, the content of backlogs, the length of time decisions take in each type of case, the effectiveness of decisions, the enforcement rates and so on). The indicators selected

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54 Resolution (2002) 12, adopted by the Council of Ministers on 18 September 2002. CEPEJ website: [www.coe.int/CEPEJ](http://www.coe.int/CEPEJ)

55 The CEPEJ is chaired by Eberhard Desch, Head of the International Law Division at Germany’s Federal Ministry of Justice.

56 J.-P. Jean chairs the CEPEJ working group.

57 The framework programme ‘A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe’ was adopted on 11 June 2004.

58 The documents mentioned are available on the CEPEJ website.

are intended to identify ratios and benchmarks in a few key fields, giving each country a better picture of its judicial system's performance and allowing comparison with countries at a similar level of development. The database thus built up can be used to identify priorities (accessibility, time frames, effectiveness, etc.) based on criteria from the European Court's case law (access to justice, fair trial, the right to an interpreter, reasoned judgments, the right to an effective remedy, etc.) and to set objectives for judicial policy (user information, complaint processing times, victims' rights, information on foreseeable time frames, waiting times, etc.). A first comprehensive report has been prepared allowing a comparative analysis of the condition and operation of judicial systems in the forty Council of Europe countries that took part in this initial exercise.<sup>59</sup> The second report (European judicial systems, 2006 edition (2004 data)) has been published in October 2006 concerning 45 countries.

## **2. The quality of judicial work is considerably affected by organisational developments within the courts and in judicial administration**

At the same time as the Council of Europe work, a coordinated study – supported by the European Commission – was being made of twelve European Union member and applicant countries, focusing on methods of justice administration and evaluating its quality.<sup>60</sup> The research project, conducted jointly by academics and legal practitioners, has identified the main issues in this sphere in Europe.

Trying to carry out a comparative analysis may seem like attempting the impossible, so disparate do European judicial systems seem. How can one compare justice in France, Italy, the Netherlands, Bulgaria and Turkey? Somewhat paradoxically, the research showed that countries had allowed for this problem, even though questions relating to the administration of justice were far from having been settled. Since all the countries studied were members of the Council of Europe, their judicial systems had, in varying degrees, assimilated the constraints and requirements arising out of the European Convention on Human Rights and the Court's case law. The principles governing a fair trial appear either in the country's constitution or in provisions making direct reference to the Convention. We must now go further: national courts are all European courts, and comparison is becoming a necessity.

Although these principles are not sufficient to guide the pursuit of high-quality justice; there seem to be some determining factors common to all systems despite their disparity. The independence of the judiciary is systematically emphasised. Independence, most obviously from the world of politics but also from business<sup>61</sup> and the media,<sup>62</sup> is essential. Most countries are currently asking how justice can be administered: should the basic role be given to the head of the court, at the risk of diverting him from his judicial duties? Should the administrative management of a court be assigned instead to an administrator, and, if so, what powers would he have, to whom would he report, and by whom would he be supervised? Such questions point to the basic question of where the line should be drawn between judicial power and justice as a public service. While a judge is independent in actually dispensing justice, he is not necessarily free of

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<sup>59</sup> Council of Europe/CEPEJ, *European judicial systems - Facts and figures*, Council of Europe Publishing, 2005.

<sup>60</sup> 2000-2002 study coordinated by the Law and Justice Research Unit as part of the European Commission's Grotius II programme, covering twelve European countries and Quebec. See Fabri *et al.*, *supra* note 13, to which reference should be made for comparative summaries and monographs on each of the countries studied (Austria, Belgium, Bulgaria, Denmark, Finland, France, Italy, the Netherlands, Portugal, Romania, Spain and Turkey, plus Quebec, which joined the study).

<sup>61</sup> Judges must be given a salary commensurate with their duties in order to avoid bribery or conflicts of interest.

<sup>62</sup> A number of countries have made provision for public relations officers in courts.

all supervision in his administrative work. But therein lies the basic difficulty: when a presiding judge decides to make a budget allocation to a case that he regards as having priority or to assign a particular judge to a particular office, that choice constitutes a factor that may decisively influence the work of this court.

### ***2.1. Administration of justice at the central level: what powers should be granted to judicial service commissions?***

Administration of the judicial system is shared between the Ministry of Justice, the Judicial Service Commission or its equivalent<sup>63</sup> and the court managers. This division of responsibilities is often problematic, but ‘good governance’ of the courts means that national and local management of the system must be efficient. Three standard models of judicial administration may be identified: the ministerial model, in which there is no judicial service commission<sup>64</sup> and which creates problems in terms of European law<sup>65</sup> but which tends to lean towards a degree of decentralisation; a ‘classic’ model, in which there is a judicial service commission with traditional powers relating mainly to judges’ careers, but without any financial or administrative responsibilities<sup>66</sup> as most powers are held by the Ministry of Justice; and lastly a mixed model, in which the judicial service commission is given relatively wide-ranging financial and administrative responsibilities,<sup>67</sup> allocating funds to courts itself whilst trying to encourage dynamic management.

This classification does not take in all models,<sup>68</sup> but gives some idea of European practice. These approaches are not without an effect on the quality of justice. Is the existence of an independent commission with management tasks consistent with the logic of democracy: is it possible for judicial policy choices to be largely outside the remit of the executive, which is generally accountable to Parliament? But if a system is built mainly on a commission with extended powers and courts with new tasks, it may lead to better management of the judicial system if quality-improvement policies have been developed on the basis of criteria proposed or accepted by judges.

### ***2.2. Organisation of the courts: a managerial head of court?***

If more powers are to be granted to the courts, this raises the question of the role of judges. Is the head of the court to be the presiding judge or the head of an administrative department – a manager? This question bears on the philosophy of the judicial system. Most countries have made provision for or intend to establish, side by side with the presiding judge who is the head of court,

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63 J.-F. Kriegk, ‘Les Conseils supérieurs de justice, clef de voûte de l’indépendance judiciaire?’, *Recueil Dalloz* 2004, *Chroniques*, p. 2166.

64 As in Austria and Finland.

65 In particular regarding Recommendation R (94) 12 of the Committee of Ministers to member states on independence, efficiency and the role of judges (13 October 1994), and above all in terms of the European Charter on the Statute for Judges (§ 1.3 envisages the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge).

66 Spain (Consejo General del Poder Judicial), Italy (Consiglio Superiore della Magistratura), Portugal (with the original feature of a judicial service commission for management and disciplinary matters and a prosecution service commission responsible for the Public Prosecutor’s Office), Belgium (with a judicial service commission established very recently, after the Dutroux case). Certain judicial service commissions have some powers in financial and administrative matters but do not allocate funds between courts. France is one of the countries in which the judicial service commission has fewest powers in these fields.

67 Denmark and the Netherlands. Hungary seems to be moving towards a similar system with a National Council of Justice.

68 Eastern countries such as Turkey and Romania could be fitted into this pattern, but these countries’ main concern at present is to achieve the proper independence of the courts, which is also a basic requirement. Bulgaria offers an interesting experiment in the separation of functions between the Minister of Justice and the Supreme Judicial Council, mediated by the Constitutional Court.

a body of staff specifically performing administrative tasks.<sup>69</sup> The Netherlands has gone a fair way down this path, with its court administration having undergone far-reaching changes over the past few years. Since 1 January 2002 every court has been run by a committee consisting of the presiding judge, the deputy presiding judges in charge of different fields, and the court's director/administrator. The president of the court is therefore a judge, and the director is an administrator. Their functions have been separated, but experience – admittedly recent – seems to show that judges are now becoming more involved in administrative duties.

Judges' involvement in management seems indispensable if the judicial system is to be made consistent and more efficient. But how are a judge's managerial skills to be determined? We then come up against the conflict of interest between independence and efficiency. How should a head of court be chosen?<sup>70</sup> Can a judge be removed from his duties as being a poor manager without calling into question his judicial abilities and therefore his independence? While this approach does not really create problems in the Netherlands, it is still necessary to identify an authority competent to express an opinion, together with the safeguards necessary to protect a judge's independence.

There then arises the question of training and recruitment:<sup>71</sup> high-quality justice presupposes competent judges trained in administration as well as their judicial function if we opt for this model. We would then have judges who are judicially competent but, as administrators, carry administrative, financial and other responsibilities.

Most countries are expressly seeking administrative efficiency and 'performance' or 'court productivity'. A convergence of such approaches cannot be without its consequences for the development of the French judicial system.

### **3. A few markers for French approaches**

The faster pace of change due to the imminent entry into force of the Institutional Act on Budget Acts (LOLF) necessitates a genuine public-management policy for the courts. The administration of justice in France is built on an excessively complex system detrimental to its efficiency.<sup>72</sup> At the appeal court level, any administrative or management decision must be taken jointly by the president of the court of appeal and the head of the prosecution department at that court, the preparatory work having been done by the coordinator from the regional administrative service (SAR) – unrecognised by the Code of Judicial Organisation – who must not encroach on the powers of the head registrar, whose role is nevertheless specified in the selfsame code.<sup>73</sup> The judge/prosecution diarchy is coupled with a judicial map that is ill-adapted and difficult to reform.<sup>74</sup> The implementation of the LOLF should bring about changes in the organisation and operation of the SARs to allow budgeting and management by objectives based on public

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69 In Belgium the judge is not an administrator, as it is the chief court clerk who is the administrative head; in Austria, the presiding judge is assisted by a court administrator; in Spain, the role of the secretary-registrar is central; in Italy, it is planned to create a court manager; a trial-court administrator was created in Portugal in 2000; and it is planned to create a court administrator in Bulgaria.

70 In Belgium, applicants for the position of head of court must submit a document explaining their opinions on management and the organisation of courts.

71 Cf. G. Oberto, *Recrutement et formation des magistrats en Europe - Etude comparative*, 2003.

72 H. Dalle and J.-P. Jean, 'Moderniser la justice et les tribunaux', in: Soulez-Larivière and Dalle, *supra* note 7.

73 Management powers are given to chief registrars, not to heads of court (Code of Judicial Organisation, Articles R. 812-1 and 812-2). The chief registrars are responsible to the heads of court. In 2003 the SAR Assessment Task Force recommended speedily adopting a legal status for the SARs by a Conseil d'Etat decree. SAR officials, established by administrative memorandum as 'coordinators', are finding it increasingly difficult to know where they fit into the hierarchy.

74 J. Commaille, *Territoires de justice, une sociologie politique de la carte judiciaire*, 2000; J.-P. Jean, 'La mythique réforme de la carte judiciaire: entre justice de proximité et spécialisation des contentieux', in: Cadet and Richer, *supra* note 7.

spending control, all in a context of greater accountability of public managers.<sup>75</sup> Beyond these structural reforms, which are fundamental but difficult to implement, far-reaching changes have been continuing for several years which, in the light of what is happening in Europe, should help us reconsider traditional notions of justice management without compromising the core function of the judicial profession.

### **3.1. New factors in public policy on court administration**

Three points may be mentioned briefly: the growth of contractualisation, the recognition of the place of the citizen, and the need for reliable evaluation tools.

#### *3.1.1. Growth of contractualisation*

The law of 9 September 2002 allows greater contractualisation in relations between the Ministry of Justice and the appeal courts.<sup>76</sup> For example, backlog-reduction contracts have been signed at a number of appeal courts, consisting of the allocation of additional resources over a three-year period, during which the courts must attain various specified quantitative and qualitative objectives. Administrative courts have taken a similar path.<sup>77</sup> The merit of this system lies in its attempt to think about a comprehensive policy for faster case processing without challenging the safeguards for parties to proceedings. Its implementation is facilitated by the fact that the LOLF entails an extension of powers and responsibilities for heads of court, who have been made deputy commitments officers.<sup>78</sup>

#### *3.1.2. Recognition of the place of the citizen*

Following normal practice in other European countries, the Law and Justice Research Unit carried out an initial survey of actual justice users in 2001,<sup>79</sup> modifying the traditional opinion-poll approach, which is influenced more by the media treatment of court cases than by the daily reality of court work.<sup>80</sup> Satisfaction surveys conducted in the courts are in the pipeline, enabling us to gauge reception facilities, the provision of information, waiting times, etc. The first surveys will be on victims.

Some legal provisions are beginning specifically to address the information need which the public has expressed. Thus the law of 15 June 2000 provides for the effective service of decisions, an explanation of case discontinuance decisions and information to plaintiffs and respondents, in criminal investigations and case preparation, about case progress and anticipated completion times. The law of 9 March 2004 has a provision for an appeal against discontinuance

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75 Cf. summary of the report by the Judicial Services Inspectorate.

76 On the utility of internal contractualisation with regard to service quality, see L. Cluzel, 'La promotion de la qualité dans les services publics, un précédent pour la justice?', in: Breen, *supra* note 4, p. 53.

77 The administrative jurisdiction is separately organised – the Conseil d'Etat supervises the courts and has its own budget. The law of 9 September 2002 has also made planning agreements possible between the Conseil d'Etat and all the administrative appeal courts, which are to receive additional human and material resources. By 2007 they should be processing approximately twice as many cases, with the average judgment time being reduced to a year and a half. An evaluation of the system is planned.

78 Code of Judicial Organisation, Article R. 213-30 (Decree No. 2004-435 of 24 May 2004; JO, 25 May, p. 9200), relating to the powers of appeal court presidents and state prosecutors as deputy commitments officers, specifies that 'the president and the state prosecutor are jointly established as deputy commitments officers for the income and expenditure of the courts in their jurisdiction, with the exception of investment income and expenditure', although this provision initially applies in certain appeal courts only.

79 Survey conducted by the Louis Harris Institute in March/April 2001 of a representative sample covering 1201 people who had had personal experience of the judicial system over the past three years through a case before a district court, a regional court (civil cases), a police court or a regional criminal court. See J.-P. Jean, 'Au nom du peuple français? La justice face aux attentes des citoyens usagers', in: Soulez-Larivière and Dalle, *supra* note 7. All quality initiatives depend on the central place of the user being acknowledged. See L. Cluzel, *Le service public et l'exigence de qualité* (diss. University of Paris II), 2004; P. Blondel, 'Le justiciable, à ne pas oublier', in: *Mélanges en l'honneur de Jean Buffet, la procédure en tous ses états*, 2004, p. 19.

80 B. François, 'Les justiciables et la justice à travers les sondages d'opinion', in: Cadiet and Richer, *supra* note 7, p. 41.

decisions if a perpetrator has been identified. These information requirements are sometimes experienced as constraints by judicial professionals, but a victim or respondent has a fundamental right to know what is happening to ‘his’ case.

### *3.1.3. The need to improve the tools for evaluating justice*

There seems to be very little evaluation of public policy at the Ministry of Justice, as stated in a report from the Senate Planning Bureau<sup>81</sup> following substantial work by the Senate on this question.<sup>82</sup> Evaluation experiments have been conducted in a number of courts, and a project has been piloted in courts of comparable size.<sup>83</sup> While there has been a reaction from a few practitioners, usually presiding judges of regional courts, such initiatives could be widely supported and developed now that the availability of statistical information is no longer a problem.

## **3.2. Decisive implications for judges’ work and status**

Administration of the courts essentially affects judges. The current structural reforms have a direct influence on how they perform their work. Given the complexity of the basic issues, the respective roles of the Judicial Service Commission and the Ministry of Justice must be reconsidered.

### *3.2.1. Adjustable bonuses for judges?*

The general quality approach in various public services and the preparations for implementing the LOLF are producing the further development of management techniques, in the judicial system as elsewhere. Setting specific objectives and assessing the way in which they were met was the first stage. ‘Productivity bonuses’ were then introduced, making it possible to assess how the set objectives were being attained. A decree of 7 January 2002<sup>84</sup> introduced a remuneration plan for some members of the Court of Cassation. It was rescinded by the decrees of 26 December 2003,<sup>85</sup> but the criteria for awarding bonuses, which have now become ‘adjustable’, are still too vaguely defined. Is the introduction of such a bonus compatible with the principle of independence of the judiciary? Does it not reflect an ‘inexorable privatisation of justice’?<sup>86</sup> It is a delicate matter to apply the concept of ‘remuneration for the extent and value of services rendered’ to the judiciary, since its members cannot be likened to ordinary civil servants.<sup>87</sup> However, as the Cabannes report points out, a judge’s duty of care must not be construed as a speed requirement regardless of the nature of the case at issue.<sup>88</sup> The criteria for awarding

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81 Information report, *Placer l'évaluation des politiques publiques au coeur de la réforme de l'Etat*, No. 392 (2003-2004), drafted on behalf of the Senate Planning Bureau and submitted on 30 June 2004.

82 See the Cointat reports and the earlier Haenel-Arthuis report.

83 Cf. H. Dalle, ‘Les méthodes d'évaluation de la qualité de l'activité d'un TGI’, in: Cavrois *et al.*, *supra* note 4, p. 171.

84 Decree No. 2002-31 of 7 January 2002 concerning the remuneration plan for some members of the Court of Cassation, adopted on 7 January 2002 (JO, 9 January, pp. 523 and 526).

85 Decree No. 2003-1284 of 26 December 2003, *supra* note 2. Provision was made for a payment intended to remunerate the extent and value of services rendered and to take account of obligations pertaining to their office. This payment comprised a fixed bonus (awarded by virtue of the office held), an adjustable bonus (awarded on the basis of the judge’s contribution to the efficiency of the judicial institution) and a bonus for extra work (awarded for additional work resulting from prolonged absences of judges). The decree was accompanied by another two decrees adopted on the same day: No. 2003-1285 concerning the compensation plan for members of the legal service working at the Court of Cassation, and No. 2003-1286 concerning the compensation plan for certain categories of staff at the Legal Service Training College (JO, 30 December, pp. 22406 and 22407).

86 Y. Benhamou, ‘Vers une inexorable privatisation de la justice?’, *Recueil Dalloz* 2003, Point de vue, p. 2771.

87 The public authorities are nevertheless leaning towards some alignment: Decree No. 2004-676 of 5 July 2004 establishing new grade-related bonuses for members of the judiciary holding higher offices (JO, 10 July, p. 12537).

88 ‘Care is not speed or haste, which may give rise to error, but rather a necessary awareness on the judge’s part that his decision is awaited and that any negligence or laxness on his part when dealing with cases can only have adverse effects on parties and public order.’ (*Cabannes Report*, *supra* note 25, p. 22).

bonuses, even if left to the discretion of the heads of court, must not be based solely on rapidity or the number of cases tried. While a legitimate individual evaluation procedure for judges already exists, the very concept of a performance bonus arguably runs counter to the judge's function, which must not in any way be dependent on government.

### *3.2.2. Judges' specific responsibility as regards administrative duties*

The safety and security duties of presiding judges and court presidents, the procedures for awarding public contracts, any budget management failures, and their position as deputy commitments officers all create a system of criminal, administrative and disciplinary accountability for heads of court that is identical to that governing all public decision-makers. The Auditor-General's Department, which until the 1990s refrained from taking an interest in court management, has not failed to point this out,<sup>89</sup> although it has been careful to specify that 'the ordinary courts, in terms of their administrative and budgetary operation, constitute local ministry departments of a special kind.'<sup>90</sup> Heads of court, just like judges seconded to wholly administrative duties (central administration officers, SAR coordinators, etc.), have become Janus figures, judging and managing at the same time, with an independent status for their judicial duties and administrative officer status in their administrative duties. Twofold duties are matched by a twofold status.

### *3.2.3. Wider powers required for the Judicial Service Commission*

A number of European countries, mainly in the north (the Netherlands, Finland, Denmark), have opened up the way to greater accountability of heads of court or the court-management team. But while the powers and responsibilities of the devolved level are growing, and with them the accountability of heads of appeal courts, an endeavour must also be made to acquire the means of choosing people with expertise and ability in the field of court administration.

This new requirement must be taken into consideration when choosing heads of court. The Judicial Service Commission is currently unable to take objective account of applicants' managerial or management skills due to a lack of adequate information and suitable evaluation tools. The composition of the Judicial Service Commission must also include new skills, especially as it is supposed to be given wider powers in line with developments in most European countries. It should be the task of a pluralistic Judicial Service Commission, more open to society and equipped with new resources, to manage judges so as to achieve greater consistency in the administration of justice<sup>91</sup> and devise evaluation tools for courts and judges in partnership with them,<sup>92</sup> an approach which is, of course, more acceptable than one emanating from government.

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89 See, for example, the 2003 Annual Report of the Auditor-General's Department on real-estate management of the courts, pp. 59 *et seq.* The Auditor-General's Department has pointed out that although setting up the regional administration services (SARs) introduced an additional level in the property system, the roles of heads of court and jurisdiction, chief court clerks, and judges with responsibility for facilities have not been redefined.

90 Speech by the President of the Auditor-General's Department, Pierre Joxe, at an annual meeting of presidents of courts of appeal on 27 March 1998 at the Court of Cassation, available on its website.

91 J.-F. Burgelin, 'Une justice à reconstruire', 2002 *Revue du droit et de la science politique en France et à l'étranger*, special issue, *La VIe République*, p. 117.

92 The Cannac report points out this partnership aspect. Judges in the Netherlands have put together their extremely sophisticated evaluation system themselves.

### *3.2.4. The need to establish guiding principles for modernising the justice services*

The rules of the Constitution do not appear to prevent judges, in this new context, from carrying on court management and purely judicial work simultaneously.<sup>93</sup> Two main principles should be applied:

- The principle of the independence of the judiciary, enshrined in Article 64 of the French Constitution, which the Constitutional Council interprets as the independence of courts and judges:<sup>94</sup> ‘The judiciary, which, under Article 66 of the Constitution, enforces individual liberty, comprises both judges and public prosecutors.’<sup>95</sup>
- The principle of the irremovability of judges, whereby they cannot be appointed to a new post without their consent, even if it represents a promotion.

These principles, on which the Constitutional Council is endeavouring to remain vigilant,<sup>96</sup> require reinterpretation in the light of the changing duties of a judge, and especially a head of court. The principle of the irremovability of presiding judges from their functions raises a problem: if a judge’s management is open to scrutiny, as in the Netherlands, he can be removed from his duties in the event of administrative incompetence and reinstated in a purely judicial role. Only one body protecting judges’ independence – the Judicial Service Commission – can legitimately manage this dichotomy.

Accountability in administrative matters is still evolving owing to judges’ guaranteed independence in performing their judicial functions,<sup>97</sup> which must be reconciled with the requirement laid down in Article 15 of the 1789 Declaration.<sup>98</sup> Should we accept that a judge is a full member of the judiciary when he is determining cases but ‘only’ a public servant when he is administering or managing? The division of roles cannot be this rigid: decisions taken in court administration often have repercussions in the judicial sphere and for court policy. Constitutional safeguards are essential. One solution may therefore be for judges with duties involving court administration to report to the Judicial Service Commission, even if Article 15 of the Declaration also suggests the idea of accountability: if citizens have the right to be informed about a public service, it is primarily because they have agreed to be taxed and are therefore entitled to know how their money is being spent. The full significance of the LOLF thus becomes apparent; information and transparency will be all the more effective if citizens have objectives, indicators and auditing methods at their disposal. If the public service is to be accountable, it must be held liable if it fails to meet citizens’ expectations.<sup>99</sup>

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93 T.-S. Renoux, ‘Le poids de la Constitution dans les réformes de la justice’, in: Cadiet and Richer, *supra* note 7, p. 103.

94 Decision 70-40 DC of 9 July 1970.

95 Decision 93-326 DC of 11 August 1993, *Law amending Law No. 93-2 of 4 January 1993 reforming the Code of Criminal Procedure*; Decision 2004-492 DC of 2 March 2004 (Recueil Dalloz 2004, Sommaires, p. 2756, comment by B. de Lamy), *Law adapting the judicial system to changes in criminal practice*: the provision in question does not ignore ‘the principle whereby the judiciary comprises both judges and public prosecutors’. On the question of the oneness of the judiciary: T. Graffin, ‘Le statut des magistrats devant le Conseil constitutionnel: une défense discutable de l’unité du corps judiciaire au profit d’une exigence forte d’indépendance des magistrats’, 2001 *Revue du droit public*, p. 831.

96 It might nevertheless be thought, as argued by Dominique Rousseau, that it could provide better protection (see D. Rousseau, *Droit du contentieux constitutionnel*, 2001, pp. 264 *et seq.*).

97 Decision 98-396 DC of 19 February 1998 (Recueil Dalloz, 2000, Sommaires, p. 53, comment by J.-C. Car). The principle of independence is inseparable from the exercise of judicial functions.

98 ‘Society has the right to require every public agent to account for his administration’; V.D. Turpin, ‘Pouvoir ou autorité juridictionnelle’, 2002 *Revue du droit et de la science politique en France et à l’étranger*, special issue, *La VI<sup>e</sup> République*, p. 383.

99 Cluzel, *supra* note 79, p. 542.



Given the institutional and organisational complexity of court administration, should we not first ask the question that is basic to any form of organisation – who is accountable for what and to whom? – before laying down the principles that should guide this debate. Faced with an ineluctable growth in budget constraints and quality requirements, the judicial system cannot take refuge in its purely historical distinctiveness. In the light of European practice, the French judicial institution needs to know towards which institutional and organisational model it wishes to evolve in order to meet new societal demands whilst upholding the fundamental principles that give it legitimacy.

Even if European states are built on their own judicial culture, judicial systems are coming closer either on the legal standard (procedural rules) or on the justice organization (new public management). The more sensitive issue remains the decision taken by the Court, which has to be protected by the independence of the judge (Council of Europe, Recommendation 94(12), October 13<sup>th</sup> 1994).