Better Administering for Better Judging

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1. Introduction: Research Project and Methodology:

Better administering justice for better judging: the research project called *MAJICE* in French (*Mieux administrer la justice en interne et dans les pays du Conseil de l'Europe*)[1], led by the teams of the universities of Limoges, Poitiers and Paris 1 Panthéon-Sorbonne under the supervision of the *National Research Agency,* in the context of the research program called *Governing and administering*, meant to analyze three fundamental sections of the French judicial system: administrative justice, criminal justice and civil justice. The aim was to understand common and specific features of these three jurisdictions and how they affect the administration of justice. It was moreover intended to compare the French legal system with other European systems. We have chosen England[2] and the Netherlands because they introduced the notion of efficiency and assessment long ago. This subject has been covered by authors in the past, but not in a systematic way, and especially not in a comparative way, between different EU member States, and between different court systems, levels and procedures. The work of the CEPEJ (European Commission for the Efficiency of Justice) dealing with the judicial area of the 47 Member States of the Council of Europe[3] is important in this regard[4].

In France, the assessment of justice is a recent phenomenon which can be explained by two movements. At first, increased budgetary needs of justice have made politicians more responsive to the performance of justice. In a second step, scarcity of public funds has deepened the phenomenon of "control" and courts did no longer obtain what they asked for but only to the extent they showed their needs to be what justified. From these recent events many concerns and tensions in the dialogue between politicians and judges emerged. The infringement of the independence of the judiciary by the concern of a more efficient administration of justice is regularly highlighted. Analyzing how this new method of court administration develops in practice is indispensable to appraise the real foundations of this tension. In this context, noting that this phenomenon is not specific to France is interesting. In the two countries chosen by the research teams, England and the Netherlands, a number of common points with our own questions have been experienced. The quality of justice and the legitimacy of justice are common problems in all European countries, but especially in England and the Netherlands: justice seems to be a public service in crisis. It is perceived as slow, as missing independence and sometimes as lacking humanity[5].

To carry out the research project, each laboratory had a post-doctoral researcher who was the intermediary between French, English and Dutch judicial staff, judicial-related (non-judicial) staff and academics.

The research was founded not only on scientific information but also on meetings with English and Dutch judicial and non-judicial staff and academics. These meetings were prepared with the help of questionnaires sent a few weeks before our appointments. The questionnaires, a fundamental tool of the research, were constructed by the members of the three research teams conducting the project and coordinated by the two post-doctoral researchers working for the project. Some of the questions were based on the CEPEJ documents on the efficiency and the quality of national justice systems[6].

After a number of intermediary workshops, an international conference was held at the end of the project, in Limoges, on 25th May, 2012.

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[2] The judicial system is common in England and Wales. The United Kingdom implies indeed a distinction between England and Wales, Scotland and Northern Ireland. For convenience, we will refer only to England.

[3] *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

[4] The article includes some elements resulting from scientific activities of the co-directors in 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.

[5] Some miscarriages were highly publicized and decreased public confidence in justice. See P. Langbroek, « Entre responsabilisation et indépendance des magistrats : la réorganisation du système judiciaire des Pays-Bas », *RFAP* 2008, n° 125.

[6] http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp

The questionnaires are closely linked with the topic of the MAJICE project which is to analyze three subjects: civil, criminal and administrative justice. These three jurisdictions have experienced, and are still experiencing, a lot of reforms because of the high number of cases they process. Furthermore, the efficiency of a great part of the justice systems in question depends on the success of these new forms of administration. The specificity of the MAJICE project is not to examine at first the procedural reforms of the justice systems, but the administrative and financing reforms that surround and underpin them.

In the three questionnaires we wanted to particularly highlight the following question: what are the consequences of the administrative and financing reforms on the efficiency and the quality of the justice system, for example the relevance of its assessment? Adaptations were necessary regarding the specificities of the three justice systems and the three countries considered although in these countries the three types of jurisdictions are clearly separated. In addition, there is a jurisdictional dualism in the countries studied even though there are differences we sometimes did not understand well before we went abroad. Consequently, the three questionnaires were different but were structured in the same way.

The intention here is to present some results of this research that can help to analyze the relationship between improving court administration and improving judgment which is actually one of the key issues in the judicial world.

2. Concept and Cultural Background

The interest for the examined notion of court administration or administration of justice needs of course to be explained. This research concept made the choice of a strictly defined approach. The focus is on management of the public service and not a very wide approach, as the European Court of Human Rights retains, including the final versions of court decisions.

The management of a court has become a subject that requires careful consideration. Defining this notion is very important to determine the broad conceptions of judicial procedure. Moreover, in order for the quality of the administration of justice to be considered or assessed, one has to answer the question of the necessity of the assessment, and to define what criteria or indicators should be chosen: quality or performance can not only be analyzed through the quantity of decisions reached, nor the amount of time it takes to deliver these decisions. But the question of the assessment of the quality of the service provided by justice, referred to as an organization, is particularly delicate because it is not the judge's decision, regarding its substance and reflecting his independence, that is the subject matter of the study, but the conditions under which it is prepared, delivered and executed. Above all the measures which constitute the administration of justice are more or less made public.

This process took a completely different development in the countries covered in this study, regarding each country's history, administrative culture, and judicial tradition and regarding the level of their resources.

The delicate exercise consisted in gathering, as part of the same study, comparative data of England, the Netherlands and France. It thus allows seeing if managerial opportunities of justice can be stated in the same terms in countries where reforms of judicial systems take place in different contexts and *habitus.* Such an approach is in line with that of Philippe d'Iribarne, more than twenty years ago[7], in the area of organizational sociology. This researcher had compared the working patterns in three countries, the United States, the Netherlands and France, in both the private and the public sector.

In the United States, *the culture of contract* prevails: 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 an initiative of continuous progress, while using means of sophisticated assessment. 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 behavior is expected.

In France, *the culture of honor* prevails: all decisions are taken at the 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 steps, the way they prefer, according to their own conception and pursuant to a logic of both honor and good performance.

[7] P. D'Iribarne, *La logique de l'honneur*, Le Seuil, 1989.

If we identify the United Kingdom and the United States, more particularly since the reforms of the public services in the Thatcher and Blair years, inspired by the new public management invented in the United States, 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 centralization and the strong ideology of the "French public service" and the Dutch and English pragmatism of the "what works?" system, we can find theoretical and pragmatic tools to better understand how improving court administration can improve the work of the courts.

Indeed despite the fundamental differences, this research highlights, as also pointed out by the *European Commission for the Efficiency of Justice*[8], that there is still a dominant and common culture to *administer and manage,* that is to say the culture of *performance and efficiency,* which have become key concepts for the heads of the courts, especially through the policies arising from new public management, benchmarking means and case management. Such an approximation of the different systems can be made all the more rapidly as all of them face fast-growing litigation flows they can only handle by using methods of alternative dispute-resolution, contracting processes and by investing in new information technologies that may change the judge's and his staff's work environment.

3. Recent Reforms Involving Justice in a Performance Approach

Since the adoption of recent legislations governing public finance in the early 2000, the administration of the civil, criminal and administrative judiciary has been subject to a radical change in France, in the Netherlands and in England.

In the three countries, the growth of managerial services, the organizational rationality and the standardization of processes have created the need of promoting the management of the courts and the awareness among judges of the realities of court administration.

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 through 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. It has been thus established an "integrated management, which means that the judicial, administrative, human resources and financial operations should be integrally managed by the courts themselves (or, depending on their size, the individual court tiers)"[9].

In the English courts, there is a very clear division between administrative and judicial functions, which could also be found, for example, in administrative tribunals, between the Tribunals Service and the tribunals' judiciary, before the merger between the Tribunals Service and the Her Majesty's Courts Service (see below). Each one was provided with its own management body: the Tribunals Service Executive Board, for the courts administration and the Tribunal Judicial Executive Board, for the judicial functions[10]. Despite this separation of administrative and judicial functions in civil and criminal matters there was also a collaboration: there were group meetings co-led by the Chief Executive and the Senior President[11]. The Senior President attended the Tribunals Service Management Board (TSMB) as observer and the judiciary was associated to programs and projects of importance. Since the merger, the separation between administrative and judicial functions is always established[12]. If the financial responsibility belongs to the Chief Executive (as Accounting Officer), there is a protocol that associates the judges. The Administrative Support Centres' managers are required to support the observation of key performance indicators – set by the Chief Executive, in consultation with the Senior President - by both the administrative and judicial staffs.

France is definitely moving towards these same orientations. However the French magistrates' Council has no powers neither in administrative nor in budgetary matters. In fact, the management of the judiciary is much centralized and is

[8] *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

[9] T. Bunjevac, *Court gouvernance in context: beyond independence*, *International Journal for Court Administration*, December 2011, p. 5, http://www.iaca.ws/files/12-2011-CourtGovernanceInContext-Bunjevac.pdf

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

[11] *Ibid*. Chief Executive and Senior President are leaders of the administration and the judiciary respectively.

[12] See the 2011 Framework Document describing the new relationship between the judiciary and administration, http://www.justice.gov.uk/jobs/current-vacancies/competency-framework

under the supervision of the Ministry of Justice whose central relay is represented by the Regional Administrative Departments. The courts have limited scopes for initiatives. By contrast, in the French administrative justice, the Conseil d'Etat has gradually become the leader of the entire administrative justice system with an approach including legal, administrative and budgetary aspects. Nevertheless, both in ordinary (i.e. civil and criminal) justice and in the administrative justice, current reforms are characterized 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 there seems to be very little consideration about the division between judicial and administrative functions when the courts of appeal are integrated, under the supervision of the ministry, within these regional platforms, with the services of the penitentiary authorities and the legal protection for youth and minors, whereas the French Council of State comes to an integrated management model while mastering the administrative and budgetary aspects that serve the judicial objectives it fixes.

4. The Question of the Assessment of The Judiciary

This pursuit of improvement of the public performance needs supervision. It also needs to be appraised, in order to identify what actions are needed. 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 court 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 Judiciary. Within the *RechtspraaQ* quality process, standard assessment criteria apply to the entire courts system. In addition, the Council for the Judiciary did set up a specific commission which, every four years, visits courts in order to make an audit. Each court applies locally its criteria while using, in addition to statistical analysis, satisfaction surveys among citizens, lawyers, judges, court officials and staff, or while having steering committees dealing with incidents reported in the functioning of the court. Individual assessment is not made through disciplinary proceedings. Intervision and peer review are used to assess the outcome of proceedings or of demeanors at a hearing. Assessment criteria seem quite sophisticated both from a quantitative point of view (a precise determination of the time for the judges, for the administrative staff compared with various kinds of the legal cases dealt with), which should help to clarify the allocation of budget resources, and from a qualitative point of view, including the promotion of quality while measuring a satisfaction rate for each area. The assessments are made public and are compared.

In England, the same trend can be observed concerning 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 English judicial system. The Tribunals Service and Her Majesty's Courts Service, because of their being the Ministry of Justice's executive agencies, had a significant role to play in the assessment of the judicial system. These two agencies were merged in April 2011. A new governance structure was introduced[13]. In continuity of the two previous agencies, the new agency implemented action plans for the courts and tribunals to assess performance and to supervise management, while taking into account major objectives and particularly the reduction of budgetary allocations. The performance assessment criteria are based on the efficiency, and especially on delays and on costs of court decisions. The assessment of justice is also made through numerous satisfaction surveys among citizens, witnesses and victims, or through questionnaires for professionals, dealing with very concrete criteria. The independence of magistrates excludes any individual assessment process applicable to all judges. Only some categories of judges are appraised by senior judges, taking into account a competency framework[14]. There is no individual assessment made through disciplinary proceedings.

In France, collective assessment is clearly implemented. Concerning the administrative jurisdiction, the task is assigned to the Permanent Inspectorate of the administrative jurisdictions, which is issued from the Council of State which, from time to time, 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 staff issues. Concerning the (ordinary) judicial jurisdiction, it is supervised by the Ministry of Justice under the auspices of the Court Services Division which allocates the required resources in terms of staff and budget depending on the activity and the workload. The General Inspectorate of the Judicial Services, which is currently working with the Minister of Justice, has the permanent task to assess the functioning and the performance of the (ordinary) judicial jurisdiction. Performance assessment criteria of both the (ordinary) judicial and the administrative justice converge on many points[15], even if the relevance of existing indicators is disputed[16]. The time taken to process cases, the number of pending cases, the number of magistrates or court clerks for handling cases

[13] http://www.justice.gov.uk/about/hmcts/board

[14] http://www.justice.gov.uk/jobs/current-vacancies/competency-framework; http://www.judiciary.gov.uk/publications-and-reports/judicial-college/JSB-guidance-frameworks

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

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

are the traditional indicators of recent legislation governing public finance but are not balanced by some criteria that could be taken into account regarding the subjects of litigation. Qualitative criteria are of "low quality" and mostly include the cancellation rate of the court decisions on appeal. Individual assessment of 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[17].

5. The Necessity of Quality Policies to Offset the Productivity Requirements

Faced with this risk, quality policies are necessary to offset the productivity requirements implemented. Indeed, continually increasing research in productivity of court activities is more and more threatening to both the substantive nature of court decisions and to the judges' operational independence. But it is also clear from our observations that quality, if essentially intended for a process of streamlining and standardization, may have negative effects. The objective of quality of the administration of justice may call into question the necessary quality for the legal function.

In the Netherlands, the *RechtspraaQ*, a "total quality" system, is very well structured and jointly implemented by the Council for the Judiciary and the ministry, and fully integrated in the courts' activity by "quality managers"[18]. Following a first period when measurement of performance within quantifiable targets was prevailing, integrity, expertise, legal unity, diligence and timeliness, have gradually been introduced to improve the balance of effective functioning of the entire judicial process. Satisfaction surveys, audits, assessment mechanisms based on peer review and *intervision* are means that are systematically and regularly used[19]. Current developments deal with the quality of the wording of court decisions. The Council for Justice set up an evaluation by a committee of judges and lawyers in the quality of verdicts in civil judgments from district courts only. The eventual goal is to create a model but also to define what the quality of justice is. This approach worries some judges who fear being evaluated relative to compliance with this model. We can see here a potential risk of negative effect of quality policies mentioned above.

The observed approaches in the two other countries are quite different. In England, the measurement of quality is made through many opinion polls and surveys that assess the access conditions to information and to the different jurisdictions, 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's Courts and Tribunals Service publishes the results with a ranking that promotes a competition between the courts whereas the Customer Excellence Service delivers a labeling that 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 fragmented approaches[20].

In France, as it is the case in England, it seems difficult to analyze a policy of 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, when the reform of the judicial map was removing, without joint action, 178 district courts *(tribunaux d'instance)* and local courts *(juridictions de proximité)*. User satisfaction surveys consisted in a single national survey led by the Justice Public Interest Group in May 2001 and since 2007, in surveys of victims of infringements. At the local level, only one local survey was led in 2010 under the auspices of the European Commission for the Efficiency of Justice. Beyond few limited initiatives, the discussion on the quality of justice does not manage to irrigate the French (ordinary) judicial justice which is caught up in its functioning problems as well as in implementing a system by the central administration that does not allow the accountability of local actors. In the administrative justice, working groups have been implemented on the initiative of the Council of State and other administrative courts, particularly dealing with topics such as the wording of court decisions.

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 organization and its jurisdictional functioning. The own dynamics of the concept of

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

[18] 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.

[19] 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".

[20] 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.

quality reach beyond many concepts 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.

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, greeting the citizen or 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 "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 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 dematerialization 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, concerning alternative dispute resolutions for example. Such practices, that are certainly not new, seem nevertheless to speed up. They show a greater concern for quality and effectiveness, a healthy caution as well as an increasing concern about the assessment and the positive appreciation of their image, a little destabilizing for the independence of the magistrates and of the jurisdictions, as a whole. The issue of the organization and of the arrangements experienced by courts and jurisdictions 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 what basis? To what extent such an organization could be consistent with the independence of magistrates?

6. Conclusion

Analyses of reforms in the administration of justice in the three countries studied show signs of probable changes in the profession of the judge and in court proceedings and also a temptation to separate administrative and judicial functions within the judicial systems. This more than ever involves providing criteria for distinguishing measures of administration of justice and measures of judicial functions. France has considered, both from a theoretical perspective and relying on the legal basis, criteria for distinguishing between the acts dealing with the management of justice and judicial administration acts, while questioning each complaint procedure against them. The pragmatic approach in England and in the Netherlands seems to pay less attention to such an issue. The measures of the administration of justice cannot be denied in the Netherlands, but remain in theory questionable in England.

The question of independence of the judiciary, due to a more performance-orientated administration of justice, is often brought forward by the heads of the courts. They keep protesting against the reduction of their initiatives and influence in favor of managers who have a direct relationship with the central administration[21]. Such a tension between judges and managers is not peculiar to England, France and the Netherlands, and may prevail at a European level[22]. The question is to know where the action of « judging » begins, and where the action of « administering » ends.

[21] A significant example of the protest is 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 misapprehension 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…"

[22] 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.