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(CEPEJ)**

**Administration and management
of judicial systems in Europe**

**Study by the
Observatoire des Mutations Institutionnelles et Juridiques
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University of Limoges**

**Authors:
Laurent BERTHIER, PhD student at the OMIJ
Hélène PAULIAT, Professor of public law, member of the IUF**

Foreword

This study is based on the 2004 data supplied by the CEPEJ as a result of questionnaires sent to the member states and answered by justice experts (for the relevant questions and replies for this study, see appendix; the study has been achieved in June 2008 with the data available at this date).

We nevertheless encountered some difficulties in processing this data; of course the various member countries are not at the same stage in their thinking on the subject and do not assign the same meaning to the terms used; but it must also be emphasised that the relevance of the replies varies and that some of the questions are rather imprecise. For instance, there are very many ways of answering a question on the “processing of complaints” lodged by members of the public, depending on whether this is taken in the standard sense of a complaint to be dealt with, further to an application and through a strict succession of procedural steps, or in the more specific sense of a complaint about malfunctioning in the judicial service. It was sometimes hard to determine which point the respondent country wished to make. The same applies to the term “administration of justice”. It would also have been very useful to have a general outline of each member country’s judicial system; some gave an account of their courts but not of their judicial structure; this made it essential to search, in some cases through each questionnaire, for a description or even an outline of general aspects such as the management system (eg by the minister, by an independent institution or by a supreme court). In some instances the use of English also proved to be a source of uncertainties and even errors.

In point of fact, we had the impression that few questions concerned actual management, especially specific budgetary mechanisms and topics such as the use of contracts. This last issue is sometimes addressed in connection with urgent procedures or length of proceedings, but never in comprehensive fashion. It might be an interesting factor in the light of the major changes ahead.

Clearly, however, the database is an exceptional body of information. At a later stage, it would be interesting to be able to monitor developments with the accent on a number of issues mentioned above, in order to assess changes in these areas in the various member countries.

Summary

Studying the administration and management of justice and of the courts is a difficult task because the actual research topic is ambiguous; terminology fluctuates from one European country to another, which means that great caution must be exercised in making comparisons.

Court administration and management are often regarded as factors for achieving or encouraging a certain standard in the quality of justice. This is not an entirely new approach, for some countries at least, but it is not easy to translate into practical terms in judicial systems. Those seeking to organise the administration of justice and the management of the courts come up against a constitutional principle prevailing in almost all the Council of Europe countries: the principle of the independence of the judiciary. It is therefore essential to work out mechanisms for improving the quality of justice by acting on judicial administration and management, while establishing safeguards to protect the independence of justice and of the judiciary. Once this first balance has been struck, it is also important to determine what qualifies as administration and what qualifies as court proceedings; in other words, it is imperative to establish the boundary between the two tasks, which are sometimes in the hands of the same authority. The study therefore emphasises the different models for the administration of justice used in European countries, highlighting the identity and role of the regulatory bodies (unitary model, decentralised or competitive model, autonomy-oriented or managerial model). There are two clear trends: one bases the quality of justice on the qualities of the judge, with the accent on the judge's independence, safeguarded by the council for the judiciary (regulatory body); the other bases the quality of justice on the quality of the judicial system as a whole, with the accent on efficiency, steered by the council for judiciary. European bodies appear on the whole to opt for this second trend.

The administration of justice is now viewed as a tool supposed to restore the public's confidence in their justice system. Techniques deriving from quality-based management are therefore widely brought into play to improve the quality of justice by fostering dialogue with members of the public. Thus contracts and evaluation are widely used by many countries, the former to clarify and improve relations between the courts or between the courts and litigants, and the latter to assess the overall quality of justice and of the judicial system (the mechanisms involved range from annual activity reports to the establishment of performance indicators). But the pursuit of quality also depends on mastering and resolving malfunctions in the justice system; despite possible efforts to reduce time-limits or improve various processes, the fact remains that malfunctions may occur or be revealed: opinion polls can measure the public's satisfaction with their judicial system, but the results must be viewed with great caution, given the conditions in which polls are sometimes conducted. The study focuses on one particular aspect: dealing with complaints from members of the public. It demonstrates that the terms used sometimes reflect very different situations,

but also that the replies vary considerably (whether to involve an ombudsman, the court itself, a council for the judiciary or another body) even when countries are referring to the same thing.

The quality of justice is based on techniques and objectives that vary from one country to another, but the pursuit of efficiency in the judicial system, while safeguarding its independence with the use of councils for the judiciary with broader powers, and the effort to restore the public's much-needed confidence in their justice system are basic factors in Europe.

Introduction

Does administering justice mean administering, or hearing and deciding cases? The Council of Europe member countries have had to think about the answer to this question, since the methods chosen for the administration and management of the judicial system as a whole and the courts in particular reflect the model adopted and therefore the nature of the relations that these countries want to establish between justice and the other powers and institutions. Using the database of the European Commission for the Efficiency of Justice (CEPEJ), we have been able to conduct a comprehensive study of the administration and management methods used in the 46 Council of Europe member countries. The purpose of this study is obviously not to give an exhaustive picture of the machinery in each country; on the contrary, the idea is to try to summarise the data and identify some basic models for the administration and management of judicial systems. So we did not consider it essential to highlight all the minor differences in each system; we have mainly established a few major principles and described some general models. We have noted some key features of European systems: thus, the administration of justice and the management of the courts are hardly ever viewed in isolation; they are usually part of an overall approach which involves looking at the efficiency or quality of administration or management in terms of the public's expectations, or more generally in terms of the function to be performed by justice in a state governed by the rule of law; they can also be viewed in terms of efforts to improve performance, with queries as to whether a given mechanism or management method is likely to make management more efficient or improve the quality of justice.

Naturally, the diversity of the countries studied precludes a completely uniform interpretation. Some countries are merely starting to look into these issues; they are gradually realising that it is useful to choose a management method, but are usually preoccupied by more specific problems such as fighting corruption and safeguarding the independence of the judiciary. So there cannot be a single model in Europe, since the options chosen derive largely from historical, political, social, economic and other considerations specific to the country concerned. The actual structure of the justice system and the state needs to be taken into account: the same model cannot apply in the Russian Federation and in Andorra or San Marino, or in Azerbaijan and in the Netherlands; they differ in the number of courts and in relations between courts, while budget levels and priorities are bound to be very different. But even among comparable countries, such as those which have not undergone drastic upheavals or difficult transitions, approaches vary because neither administrative conceptions, nor priorities, nor the funds allocated to justice are the same.

As a result, the basic principles and models identified cannot but be general, reflecting administration and management systems and also the countries' concerns. There is some attraction for a particular model, mainly geared to a form of New Public Management applied to the justice system;

but financial and budgetary considerations are not the only important ones. As with any other public service, the legitimacy of the justice system also depends on taking account of the users' interests. We have thus seen remarks about dealing with litigants' complaints on specific issues, either the length of proceedings, which is a problem concerning the administration and management of the judicial system but probably more directly affecting the person in question, or the conduct of a judge or the overall functioning of the system. Dealing with these complaints often causes the court or the system as a whole to devise solutions or responses which can be worked out only on the basis of administrative and management principles; to find out which authority or institution a complaint must be referred to, it is essential to know exactly how the court is organised and how it relates to other institutions such as mediators or the ombudsman and also to the council for the judiciary and the ministry concerned, while always bearing in mind the requirement of the independence of the judiciary.

Lastly, the actual concept of the administration of justice is problematic. It is difficult to define precisely because here again, each country has its distinctive features and the only way to draw up an appropriate classification would be to carry out a comprehensive study of this particular topic. Thus, short of studying each procedure in each country and each type of court if there are several, it is virtually impossible to identify the dividing lines between the administration of justice and the trial process; yet a classification of measures would be essential to assess the scope of the administrative and management powers of each court president or more generally, each head of court. It would seem that the only trend to be highlighted is a growing awareness of the link between the two aspects, and the need to distinguish between these measures in order to identify possible forms of supervision in a spirit of respect for the independence and impartiality of the judiciary.

The study demonstrates that there is a demand for the justice system – like any other institution required to act in the public interest – to be accountable, either in general for the use of public funds, or more specifically, or at least in more regulated fashion, for its malfunctions, whether administrative or otherwise, depending on the dividing line chosen. The concept of the administration of justice is therefore a variable one; but for the time being, the study cannot answer an important question: where do the administration and management of justice end and where do proceedings and judgment begin?

I) The administration working for supposed quality: a complex relationship between administration and justice

In classic terms, the administration can be described as a set of organs, bodies and staff placed under the authority of the government and responsible for performing tasks in the public interest¹. The justice system is defined by the function it discharges in a given state: resolving disputes on the basis of pre-established law. In more organic terms, the justice system is the set of institutions, usually courts, responsible for performing this fundamental task in a state governed by the rule of law. According to this initial approach, the semantic ties between administration and justice are therefore very tenuous and the two are virtually interdependent². Yet a closer look at the combination of these two very distinct entities suggests that matters are not quite so straightforward: it is often said that the justice system sometimes finds it hard to come to terms with the demands of the administration³.

Analysis of this semantic combination then makes it clear that the link between administration and justice, albeit obvious according to an organic approach, has been distorted. However, if we take a more functional approach to the administration, we can consider how to transcend this initial opposition between administration and justice, enabling the two to act in concert to ensure the quality of justice.

A) The classic distortion of the link between administration and justice in the name of independence

It is hard to define the scope of the term “administration of justice”. From an organic point of view, it covers the institutions empowered by pre-established rules (the constitution and ordinary or institutional legislation) to do justice, but also, more generally, all the bodies empowered not to do justice but to “manage” it (ministries, councils for the judiciary etc). But there has to be a compromise between this first approach and a second, more functional approach which defines the administration of justice as the range

1. According to J. Chevallier, this classic and in fact rather vague definition of the administration (see Gilles Guglieni, *Dictionnaire de la culture juridique*, ss. dir. de D. Alland et S. Rials, Lamy-PUF, éd. 2003, p. 26) fails to describe the necessarily “subordinate” nature of the administration, which can be a “tool for action in the service of a government perceived as different and superior”, J. Chevallier, *Sciences administratives*, PUF, 3^e éd. (2002), p. 72.

2. “The ties between the justice system and the administration are reciprocal. The justice system supervises the administration (...). On the other hand, it needs the administration in order to function: judges merely settle disputes (“on behalf of the state”); the practical enforcement of their decisions depends on the co-operation of the law enforcement agencies, ie the administration (...). Like parliament, the courts have to use the administration to implement their decisions” (*unofficial translation*) (J. Chevallier, op. cit., p. 93).

3. H. Pauliat, *L'administration de la justice dans les institutions françaises*, in « L'éthique des gens de justice », PULIM 2001, p. 75.

of human resources – staff, funds etc – ensuring the functioning of the justice system⁴. At the end of the day, according to this dual approach, defining the administration of justice amounts to considering a set of resources required for the organisation, structuring and functioning of the task assigned to the justice system. It will be noted in passing that according to a European view of the administration of justice, the latter tends to cover the range of processes revolving around court proceedings, which reflects a strictly functional approach to the administration of justice, confined to the activity of the courts⁵. The problem is then to determine the strategic position of the administration, which spans organisation and functioning, especially if “proper” administration is increasingly perceived as a real necessity⁶.

4. H. Pauliat, *L'administration de la justice dans les institutions françaises*, op. cit., p. 75.

5. ECHR, 28 October 1999, *Zielinski and Pradal, Gonzalez and others v. France*, Rec. 1999-VII ; AJDA 2000, p. 533, chron. J.-F. Flauss ; RTD civ. 2000, p. 436, note by J.-P. Marguénaud ; *Les grands arrêts de la Cour européenne des Droits de l'Homme*, PUF, 4e éd. (2007), p. 287 ff: “while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute”; the European Court of Human Rights thus appears to place the administration of justice and the administration of court proceedings on the same footing, although a balance needs to be struck between the procedural principles defined in Article 6 of the European Convention on Human Rights and the new requirements in terms of speed, flow management and even judicial economics; on these points, see M.-L. Cavrois, H. Dalle and J.-P. Jean, *La qualité de la justice*, La documentation française, 2002 ; J.-P. Jean and H. Pauliat, « L'administration de la justice en Europe et l'évaluation de sa qualité », *D.* 2005, n° 9 p. 598. This European position is similar to that of the French Conseil constitutionnel: 224 DC du 23 janvier 1987 *Conseil de la concurrence*: “where the application of a law or specific regulation might give rise to various contentious proceedings which would be shared out between the administrative courts and the ordinary courts according to the usual rules of jurisdiction, the legislature may, in the interests of the proper administration of justice, unify the rules governing the jurisdiction of the courts within the type of court primarily concerned” (*unofficial translation*), see L. Favoreu and L. Philip, *Les grandes décisions du Conseil constitutionnel*, D. 13^e édition (2005), n° 38, p. 667; H. Pauliat, « Les différents modes d'administration de la justice en Europe et au Québec et leur influence sur la qualité », in *L'administration de la justice en Europe et l'évaluation de sa qualité*, dir. par M. Fabri, J.-P. Jean, P. Langbroek et H. Pauliat, p. 23 ff.

6. “The proper administration of justice and the effective management of courts is an essential condition for the proper functioning of the judicial system and requires, amongst others, adequate budgetary appropriations”, Council of Europe Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ); more generally, see J. Chevallier: “the premise that public management, serving the general interest, cannot be measured in terms of efficiency has been superseded by the idea that the administration, just like private companies, is required to constantly improve its performance and to reduce its costs; it is expected to perform its tasks under the best possible conditions, providing high-quality services and making the best use of the resources at its disposal” (*unofficial translation*), J. Chevallier, *L'Etat post-moderne*, Droit et Société 2003, p. 66.

The fact remains, however, that the two alternatives suggested by the twofold dimension of the administration of justice, balanced between organisational and functional, engender a “territorial dispute” in the judicial system between purely “administrative” concerns and judicial concerns⁷. Countries settle this dispute in different ways⁸. Some advocate independence, the policy whereby a judge must simply hear and decide cases, not administer: the dividing line between administrative and judicial concerns definitely exists and the judge is not an administrator. Examples include Finland and Bulgaria⁹. This “separatist” view contrasts with another which lumps judicial and administrative concerns together insofar as the amount of budgetary resources allocated conditions the quality of judicial activity; this view results in a rather unclear sharing out of responsibilities between the different “protagonists” in a court: the president of the court, the public prosecutor and the registrar. In the Netherlands, for example, the courts are administered by a committee made up of the president of the court, the chief vice-presidents and an administrator who acts as director. In Belgium the court administrator is the chief registrar. The situation in France is complex: the head of court is in charge of court management, but has to rely on a regional administration and on the registry. These different models in fact make it difficult to determine quality standards, since each country has its own view of the best way of administering a court. However, when several people share responsibility for a court, some clarification is needed to prevent administrative and judicial functions from overlapping and thereby paralysing the general functioning of the court.

Be that as it may, over and above these very general introductory remarks, the administration of justice is a “background” administration with a single purpose: to ensure that the principle of independence, the basic principle underpinning the organisation and functioning of the justice system, is effectively and efficiently applied; from this standpoint, the administration of justice can be described as a varying range of safeguards.

It is based first and foremost on a prescriptive safeguard, at the top of the hierarchy of laws, since all European countries enshrine judicial independence in their constitutions¹⁰. However, the wording of this principle may vary from one constitution to another. The constitutions of Germany, Spain, Italy, Belgium and Romania guarantee the independence of the judiciary, who are subject only to the law, while those of Portugal and Poland

7. Pierre Lampué, « La notion d’acte juridictionnel », *RDP* 1946, p. 5 ff.; see L.-M. Raingard de la Blétière, « Peut-on adapter l’administration aux finalités de la justice ? », *RFAP*, n° 57 p. 61 ff.

8. H. Dalle, « Administration de la justice et acte juridictionnel », in *L’éthique des gens de justice*, PULIM 2001, p. 93 ff.

9. Italy and Austria are also considering this position.

10. T. S. Renoux, “Legal foundations – constitutional and legislative – of the administration of justice and judicial organisation”, in *The administration of justice and court management*, Council of Europe colloquy in Bordeaux, June 1995, Council of Europe documents, p. 15 ff.

more generally guarantee the independence of the courts. Croatia refers to the independence of judicial power. In France the principle of judicial independence is asserted only empirically through the institutional safeguard afforded by the role of the President of the Republic¹¹. Generally speaking, here again, judicial independence usually takes the form of statutory protection rather than concern for the functional dimension¹².

That is not the main point, however. A more important issue is the institutional protection of judicial independence through the remarkable growth of the councils for the judiciary¹³. Any study of the administration of justice and therefore of the degree of judicial independence must inevitably take a close look at the different roles of the “regulatory” bodies known as councils for the judiciary; their importance varies, which sometimes makes it hard to distinguish how administrative powers in this area are shared out. Various models can be constructed¹⁴, based on the greater or lesser extent to which administrative tasks are shared out: the unitary and centralised model, the decentralised or “competitive” model and the “autonomy-oriented” model – distinctions similar to those between the different forms of state¹⁵.

Under the “unitary” model, the administration of justice is exclusively a matter for the ministry of justice. There is no council for the judiciary in any form¹⁶, although the principle of judicial independence is formally asserted in the constitution or equivalent text. Under this model, the administration of the judicial system (management of the judiciary and distribution of budgetary resources) is a government monopoly, which is somewhat reminiscent of a more functionalist conception of the separation of

11. Art. 64 of the Constitution of 4 October 1958: “The President of the Republic shall be the guarantor of the independence of the judicial authority”; see Jorge Mendes Constante, « La place de la justice dans la société. La justice et la conception française de la séparation des pouvoirs », *Les cahiers français*, n° 334, p. 19 ff; H. Solus et R. Perrot, *Droit judiciaire privé*, S. 1961, T. I., p. 473 ff. The Armenian Constitution of 5 July 1995 defines the independence of the judicial authority in the same way in its Article 94.

12. Only the Greek Constitution appears to establish independence in functional terms: under Article 87-1, “Justice shall be administered by courts composed of regular judges who shall enjoy functional and personal independence”. Incidentally, the European Court of Human Rights attaches importance to the functional nature of judicial independence, which in fact amounts to assessing the impartiality of judges, ECHR 24 May 1989, *Hauschildt v. Danemark*, *Les grands arrêts de la Cour européenne des Droits de l’Homme (GACEDH)*, éd. 2007, p. 313.

13. A deliberately generic term due to the wide range of titles.

14. On these issues, see in particular *Les Conseils supérieurs de la magistrature en Europe*, dir. par T.-S. Renoux, La documentation française, 1999 ; J.-F. Kriegk, « Les Conseils supérieurs de justice, clef de voûte de l’indépendance judiciaire ? (examen comparatif à partir de critères internationalement reconnus) », D. 2004 n° 30, p. 2166 ff.

15. Unitary state, whether decentralised or not, regional state and federal state.

16. Austria, Bosnia and Herzegovina, Iceland, Luxembourg, Switzerland (only at federal level).

powers, with justice viewed as a state function which is therefore closely linked to the executive¹⁷.

The second, more “**decentralised**” or even “competitive” model, which is more intermediate, goes some way to sharing out the administration of justice between two distinct entities: the ministry of justice, which nevertheless seems to keep most of the prerogatives in this area, and possibly a council for the judiciary. A substantial majority of European countries have adopted this model. As a median approach, it sometimes causes problems in the sharing out of powers between the ministry and the council for the judiciary, and consequently a concentration of powers in the hands of the ministry, but it can, conversely, foster the emergence of specific tasks assigned to the council. In most cases, the sharing out of administrative powers between the ministry of justice and the council for the judiciary is rather detrimental to the latter, in the sense that these councils are given fairly meagre traditional powers amounting to no more than the management of judges and prosecutors¹⁸, or even in some cases, of judges alone¹⁹. This conventional task simply means managing judges’ and prosecutors’ careers, while continuing to ensure traditional guarantees of independence in terms of appointment, advancement, discipline and vocational training; administrative, financial and more generally political powers are conferred on the ministry alone.

When the administration of justice is shared out in this rather unequal and apparently watertight manner, there can nevertheless be room for some specific features benefiting the councils for the judiciary. In Armenia, for example, the Judicial Council is empowered to make recommendations on training programmes for the judiciary; it can also give its opinion on sentence remissions granted by the President of the Republic²⁰. In Belgium the High Council of Justice, which was established partly as a result of the “*Octopus*” agreement in the wake of the notorious “*Dutroux*” case, is empowered to give opinions and make proposals on the functioning and organisation of the courts²¹. Likewise, it is responsible for the

17. This can cause some problems in terms of international instruments such as the European Charter on the Statute for Judges, which provides in paragraph 1.3: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.

18. Albania, Andorra, Azerbaijan, Croatia, Estonia, France, Canton of Geneva, Italy, Lithuania, Norway, Moldova, Poland, Czech Republic, Russia, Slovakia, Canton of Ticino and Ukraine.

19. Macedonia and Slovenia.

20. Art. 95 of the Constitution.

21. The 1847 Constitution of the Republic and Canton of Geneva provides in Article 135-2 that “the High Council of Justice shall ensure that the courts function properly and in particular that the members of the judiciary discharge their duties with dignity”; the Constitution of the Republic and Canton of Ticino provides in Article 79

auditing and general supervision of the courts, and above all empowered to take action on complaints concerning the functioning of the courts²². Under the Spanish Constitution, the General Council of the Judiciary is the governing body of the judiciary²³. In Turkey, the Constitution provides that the Supreme Council of Judges and Public Prosecutors “shall take final decisions on proposals by the Ministry of Justice concerning the abolition of a court or an office of judge or public prosecutor, or changes in the jurisdiction of a court”²⁴.

Lastly, this lack of clarity in the sharing out of administrative powers can engender changes precisely to clarify the situation. This seems to be happening in Bulgaria, where the Supreme Judicial Council²⁵ exercises the main administrative prerogatives with regard to the judicial system. It has substantial budgetary powers and can prepare the draft justice budget for submission to the Cabinet. The reforms undertaken in 2002 and 2003 appear to be heading towards this greater “decentralisation”, which does not necessarily mean really clarifying the sharing out of administrative functions between the ministry and the council for the judiciary. Furthermore, the reforms voted by parliament are not always applied immediately or in the spirit in which they were devised.

Altogether, the intermediate or “decentralised” model is distinguished by a lack of clarity in the sharing out of roles between the ministry and the council for the judiciary; the balance is usually in favour of the ministry, which as a rule retains general organisational powers, while the council for the judiciary merely exercises specific powers. A further characteristic of this median model is the mix of countries that have adopted it, so that it features some peculiar variations. As the example of Bulgaria shows, there is nevertheless a trend towards strengthening the councils’ managerial powers.

Lastly, there is a third, “**autonomy-oriented**” or more managerial model in which the council for the judiciary has broader powers to manage both the judiciary and the organisation and functioning of the courts. This model is exemplified by countries such as Denmark, Hungary, Ireland, the Netherlands and to a lesser extent Sweden: the Swedish system is rather centralised; an administrative authority, the National Courts Administration, is responsible for court management; however, its role is limited to ensuring the best possible distribution of resources among the courts.

In Denmark, as of 1998, the government lost its prerogatives regarding the administration of justice to a body independent of the two other arms of government: the Court Administration. The Board of Governors,

that the High Council of Justice shall perform a duty of care and attention with regard to the judiciary.

22. See below, p. 15.

23. Art. 122-2 of the 1978 Constitution.

24. Art. 159.2 of the 1995 Constitution.

25. Art. 130 of the 1991 Constitution.

which is part of it, exercises the main administrative powers (preparing budgets and distributing funds to the courts). In the Netherlands, the Council for the Administration of Justice is in charge of the day-to-day management of the courts. It has the same prerogatives as the Danish Board of Governors in budgetary matters. It also has the very specific task of modernising the courts to ensure genuine efficiency, so that it can in fact be described as the true regulator of the judicial system, since it takes a practical part in improving the quality of the system²⁶.

These different approaches suggest the possibility of closer ties between administration and justice in order to improve the quality of the judicial system.

B) The possibility of closer ties between administration and justice for the sake of efficiency

Two distinct models seem to emerge from this initial overview of the administration of justice, reflecting two different conceptions of the quality of justice. In the first model (which is widespread in South European countries), the quality of justice depends solely on the quality of the judge as a person and therefore on preserving his/her independence; as a result, the councils for the judiciary only have powers to manage the judiciary. In the second model (which is mainly in use in North European countries), promoting the quality of justice hinges more on improving the judicial system as a whole. With this in mind, councils for the judiciary seem to be focusing in particular on a genuine effort to improve the quality of justice by translating into practice the general ideology of striving for performance and efficiency, particularly by measuring the courts' activity. At the end of the day, the "autonomy-oriented" model would seem to be preferable in that it provides the more favourable environment for developing the tools required for a quality-based approach, in line with a European perspective²⁷. This second model is clearly the one to refer to, all the more so as the Consultative Council of European Judges has just issued an opinion for 2007²⁸ advocating a series of measures closer to the "autonomy-oriented" model. The Consultative Council considers that the council for the judiciary is intended to safeguard both the independence of the judicial system and the independence of individual judges, and at the same time to promote the efficiency and quality of justice in accordance with Article 6 of the ECHR, in order to reinforce public confidence in the justice system. It recommends

26. In Ireland the Court Service is responsible for management of the courts and is therefore empowered to set targets and decide how to achieve them. It thus helps to improve the quality of justice. The same is true in Hungary, where the National Council for the Judiciary manages the justice budget and supervises the courts' work.

27. J.-P. Jean and H. Pauliat, « L'administration de la justice en Europe et l'évaluation de sa qualité », *D.* 2005, n° 9 p. 598.

28. Opinion No. 10 (2007) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society, available on the Council of Europe website.

that the council for the judiciary should have a broad range of tasks enabling it to protect and promote judicial independence and the efficiency of justice, while taking care to avoid conflicts of interest in the performance of these different tasks. It considers that the council for the judiciary must be actively involved in assessing the quality of justice and making use of techniques designed to increase the efficiency of judges' work; it should also have extensive financial powers for the negotiation and administration of the justice budget, and powers relating to the administration and management of the courts in order to improve the quality of justice. In conclusion, the Consultative Council encourages co-operation between councils for the judiciary at European and international level.

Although comparisons are not always justified, trends in the organisation of judicial systems seem to follow trends in the legal forms of the state. In Europe there are few strictly unitary systems in which the ministry of justice has a standard-setting monopoly in the administration of justice. On the contrary, the decentralised model seems to be the main one. However, this causes a problematic lack of clarity in the sharing out of tasks, and this leads to a process of increasing autonomy which varies from one country to another and may result in the establishment of genuinely autonomous management (the "autonomy-oriented" model). If this process were confirmed, speeded up by encouragement from the top European authorities, it might be possible to envisage a still more autonomous model, a "federal" model to pursue the analogy with the different forms of state, so as to establish the existence of a judicial power which is truly independent of the other powers, and a clear, genuine sharing out of powers, based on the effective application of the subsidiarity principle. Who can administer justice better than the judiciary?

In the final analysis, the administration must not be viewed as a straitjacket in which there can be no modernisation or rationalisation process. On the contrary, it must be regarded as a "tool" at the service of justice, capable of supporting any approach aimed at continuously improving the quality of the judicial system²⁹.

The administration of justice can thus be a factor for innovation; rather than being a brake on any attempts to modernise, it becomes a catalyst and a discoverer of innovative practices.

29. J.-P. Jean, « Justice. Quels modes d'administration et d'évaluation pour un service public complexe qui doit rendre des décisions en toute indépendance ? », in *The Challenge of Change for Judicial Systems*, dir. par M. Fabri et Ph. M. Langbroek, IOS Press 2000, p. 47 ff; S. Renaud, « Amélioration de la qualité de la justice : difficultés théoriques et pratiques », *RRJ* 2002 n° esp. p. 2211.

II) The administration of justice in pursuit of quality: re-establishing dialogue between justice and the public

The administration of justice is now regarded as a tool; there is much discussion on the subject, to try to determine how the justice system can best provide the service it owes the public. So it is viewed as a vehicle or medium for new techniques that will give it greater legitimacy and transparency both in the eyes of the citizens who are its “users” and in the eyes of the legal professionals co-operating with it (lawyers, solicitors etc.). The drive for efficiency and quality compels the public authorities and legal professionals to devise innovative management and administration methods to respond as effectively as possible to the constraints imposed and demands made on them. These techniques have taken longer to become entrenched in the justice system than in other institutions and public services, simply because it was thought that they might be largely incompatible with its aims. Thus, the use of contracts is a very recent development in some countries; and the culture of evaluation is taking root, but unevenly and above all in ways that differ markedly from one country to another.

A) Introducing techniques derived from quality-based management

The main techniques are the use of contracts and evaluation.

1) The logical diversity of the areas covered and functions performed by contracts

The use of contracts is doubtless the main technique used to point up the new type of relations required between the courts on the one hand and the funding authorities on the other (ministries of justice, councils for the judiciary and other institutions). The introduction of contracts has prompted much-needed discussion in the courts, as can be seen particularly in countries with a fairly decentralised judicial system. Contractual relations are more transparent and in principle preclude criticism that the independence of the courts is being infringed. In these countries they are coupled with a results-based focus; the contract is drawn up between the national authorities and the court in order to achieve a number of objectives set according to the state of the court at a given time, the resources at its disposal and the scope for improvement it can expect. Contracts are not used only in relations of this type, however; they are also used, but less frequently according to the CEPEJ’s data, between lawyers and judges, ie between legal professionals. Thus, France draws attention to the procedural contracts it has introduced, in other words the technique enabling judges and counsel for the parties to decide on the timetable for the proceedings at the very first hearing. It is hoped that this will reduce the length of proceedings, but above all make it predictable; it makes the applicant and counsel more active participants in their case, or at least gives them a measure of control over the case-file, thanks to increased co-operation between lawyers, judges and “users”. Denmark uses contractual relations for

a comparable purpose: at the preliminary hearing, the court can agree with the parties and counsel on the arrangements for the rest of the proceedings. Finland and Iceland are developing similar facilities, apparently on a less formal basis. But the idea is also to make proceedings more transparent, or at least easier. Norway accepts the use of contracts to reduce the statutory time-limits if the parties agree to it.

Attempts are also being made in Albania, but they are clearly more administrative than legitimising, so to speak: judges merely decide on the dates of the subsequent hearings, but there is no formal commitment; the dates are therefore given for purposes of information rather than co-operation.

Some countries are not developing the contractual technique at all³⁰, either because they do not consider it compatible with justice or because they stress that only complete command of the proceedings by the court is in the public interest. However, contractual relations can also take other forms, such as direct relations between the justice system and litigants; in the Netherlands and Germany, for example, there are negotiated sentences; the same is true, albeit to a lesser extent, of Italy and France; in such cases the administration of justice includes enforcement of the decision. These are measures to enforce court decisions, but they are designed to improve the functioning of this public service and therefore its quality.

Contractual relations are thus a useful technique for the purposes of a quality-based approach to the administration of justice; they are bound to develop, since several countries are taking steps to digitise judicial documents. They will consequently have to make use of contracts, if only to determine the accredited organisation of their choice and the accrediting organisation, but also to specify what can be removed from the paper medium and digitised, who the beneficiaries of the system will be (lawyers, litigants, other national or European courts etc.) and what the limits are (will interconnections between files be authorised, and if so, to what extent?). The system will then be designed to establish trust within and between the different judicial systems in Europe. There are also other techniques for the pursuit of quality, however, and one of them is evaluation.

2) A marked preference for the collective evaluation of justice

A rational assessment of the quality of justice calls for reliable assessment systems. Many European countries thus describe general

30. Armenia. In Austria, time-limits are set by the courts on a discretionary basis, under the terms of the relevant legislation. Poland states that there is no room for a contractual debate; the administration and management of justice, in the sense of the management of proceedings and cases, is entirely a matter for the courts. Nevertheless, Poland does not rule out any possibility of discussion between the parties, their lawyers and the judges, so there is no formal agreement or mutual undertaking, but each person's requests are simply taken into account.

processes serving to define criteria and analytical grids. This does not completely rule out subjective approaches, but in some cases they are minimal.

Almost all European countries at least have an annual activity report. Only Estonia, Georgia and Greece state that they do not use this method, which often amounts to providing feedback. Yet the requirement of an annual activity report is not perceived as a performance criterion; it means taking stock of the court's activity over the past year, which does not, however, prevent many countries from compiling databases on the number of incoming or outgoing cases, case flows and so on, in order to increase control over timeframes and length of proceedings.

Whether the report serves a useful purpose is an interesting point, revolving around the questions of who draws up the report or establishes the data, which authority the report is transmitted to, what information it provides and what action can be taken on it. On this point, European countries fall into several groups: annual activity reports and/or statistics may be addressed to the ministry of justice (Albania, Finland, France, Italy with its Directorate General of Statistics, Turkey), or to the council for the judiciary (Andorra, Portugal with inspectors from the departments under the authority of the council for the judiciary), to the Supreme Court (Cyprus), seldom to parliament (San Marino), or to several authorities at once (in Iceland, statistics are addressed to the Supreme Court, the Administrative Council of District Courts and the Minister of Justice). The data varies: it may concern the length of proceedings, the number of applications to the court concerned, the number of decisions given by the court, the number of pending cases, the number of appeals against decisions (Montenegro, Serbia), the judges' and prosecutors' workload (Bulgaria, Romania) or the number of decisions enforced (Spain); conversely, statistics may be compiled only on certain decisions or categories of decision (Austria, Denmark to monitor the length of certain proceedings, Lithuania, Turkey). Most countries do not regard this strictly as an evaluation process. The reports and statistics simply provide an overview of the functioning of the courts and assess the length of proceedings, either in general terms or specifically, focusing on proceedings in the most serious cases such as rape and other crimes, or on points indicative of case-flow trends.

It is harder to assess evaluation systems, especially those for evaluating the performance of the justice system as a whole or the courts in particular. Countries differ quite markedly in terms of the arrangements for evaluating performance – who has to practise it, who determines the criteria or indicators for evaluating performance, how evaluation is practised and for what purpose. The actual definition of performance is debatable: some countries interpret it as the almost logical consequence of judges' and prosecutors' careers, thereby confusing it with professional appraisal³¹. The criteria are obviously more traditional, since appraisal then concerns judges'

31. Only France appears to practise the system of performance or output bonuses; Spain experimented with it but gave it up on account of the consequences.

and prosecutors' professional qualities, capacity for action, professional ethics and so on. But this is not an evaluation of the justice system or of a court as such.

Performance criteria and indicators are significant: most countries have opted for the standards of the European Convention on Human Rights and their application by the European Court. They thus include among performance indicators the independence of the justice system, the impartiality of the judiciary (Armenia), a fair trial, reasonable time (Cyprus), judges' and prosecutors' workload (Estonia, Lithuania, Russia; Slovenia is one the few countries whose indicators focus almost entirely on the amount of work done per judge or prosecutor, per court, in the light of case flows). Slovakia has made a real effort to detail these indicators; besides verifying compliance with European procedural principles, it emphasises the quality of the process for preparing decisions, the way in which hearing days are used, the reasons for which proceedings are suspended and dignity in the conduct of judges; in many cases, these are simply factors among others. The countries that have developed these criteria furthest and thought most about their relevance provide an interesting analytical grid combining indicators relating to European standards but also to economic aspects, reflecting the efficiency and effectiveness of the justice system. Austria, Denmark, Hungary and Italy place the accent on statistical indicators on the number of decisions and the number of cases dealt with, linking them to timeframes, but France has attempted to introduce more specific points based on the Institutional Law on Budget Laws (LOLF): the average length of proceedings, the number of cases dealt with per judge, the proportion of criminal offences on which the courts take action, the proportion of appeals on the facts or on points of law, and so on. These indicators are debatable, but should be credited with going further than a mere statistical analysis. Moreover, this approach is part of a comprehensive budgetary and financial strategy for evaluating the performance of public policies. The Netherlands rely on all-round management and therefore value the measurement of productivity, using a wide range of indicators. Spain states its concern for the speed and efficiency of justice, but the indicators are rather basic. Generally speaking, North European countries, including Sweden, tend to introduce indicators to genuinely assess the performance of the justice system and therefore, in a sense, to improve the public's, or more specifically the users', perception of it. The administration of justice is not necessarily viewed as different from other services or public policies; management is important and must serve to increase productivity and efficiency. France still seems to have a different approach; although there is already much discussion on this point, the idea is rather to justify the resources allocated to the judicial system, the budget increases, the additional posts of judge or prosecutor created, and so on. The intention is chiefly to report, not to manage performance. Indicators are being introduced in other countries, but they are often linked to European standards (Bosnia and Herzegovina).

Performance can be assessed by an independent authority – independent of the executive, in particular; but a distinction needs to be

drawn between an authority which assesses after determining the indicators and one which merely applies criteria determined by another authority. The indicators may thus be determined by the executive (Finland, Germany, Iceland, Slovakia, Sweden), parliament (France, Norway), the judiciary (Hungary, Netherlands, to a lesser extent Romania), parliament and the judiciary (Russia), the executive and the judiciary (Slovenia) or the executive and parliament (England and Wales). The replies to the questionnaire often cover several aspects at once. In order for the judicial system to be democratic and efficient, the judiciary themselves do not necessarily have to determine the indicators, either through their council for the judiciary or court by court. The indicators can be defined by parliament or the government, depending on the overall requirements of the various public policies; and the intention may be to emphasise one or the other aspect in order to encourage the development of a particular aspect of a given criminal or civil law policy. So the administration of justice and evaluation of its performance cannot always be a matter for the judicial authorities themselves. Obviously, what is important is that the judiciary and the civil servants working with them should be involved in defining these criteria, so as to be able to gauge how relevant and applicable they are. If the indicators were to be determined by the council for the judiciary alone, this might have a negative impact: the question would then be how to make the council accountable and to which authority.

The main question is whether the indicators established are linked to targets set for the courts; in other words, are they tailored to the situation of each court or are they designed for general purposes? Is compliance with these indicators, and therefore assessment of performance, associated with targets to be met by the courts? Austria has not embarked on this strategy; it has fairly specific indicators, but the courts do not have to meet specific, practical targets. France has set the courts overall objectives, but does not link them to an action plan negotiated with the ministry. The idea is to deliver high-quality decisions within a reasonable time and to improve the enforcement of criminal judgments, but without linking these objectives to annual programming for the courts. Hungary has also set general objectives such as improving public confidence in the judicial system, but without linking this to budget allocation for example. Romania places the accent on fighting corruption and on efforts to improve confidence in the judicial system, which depends on eradicating corruption. Some countries (Bosnia and Herzegovina, Slovenia) are embarking, or have embarked, on a policy of drawing up an annual plan for the courts, setting their targets and defining the link with the indicators and the manner in which they are reach their targets; the courts' budgets are then allocated on the basis of these parameters. Denmark probably affords the most consummate example. The judge responsible for administrative tasks draws up an action plan for the court and has to submit the targets he/she intends to meet; the Danish Court Administration then selects the points that should be emphasised in the action plan.

However, administration and management techniques should not preclude other strategies for improving the quality of the justice system; the corollary of the new administration and management methods is accountability. This does not mean the same as responsibility, since it concerns more specific areas and different situations. But it must be pointed out that litigants, or more generally people who come or have come into contact with the justice system, wish to lodge complaints against malfunctions or anomalies in the administration of justice. This is a recent development in many countries; yet it is closely bound up with the administration of justice, since it implies that the judicial system must be in a position to address these problems and work out solutions.

B) Remedying malfunctions through quality-based management

The public seems to be concerned about the quality of justice in the various countries and, at the same time, according to various surveys and polls,³² to express a certain mistrust of the institution. That is why European countries are tending to introduce machinery for dealing with complaints from members of the public.

1) Measuring the public's satisfaction with the judicial system

Studies³³ nevertheless reveal a wide range of views: members of the public highlight the slowness of the judicial process, the complex language used, the high cost of the proceedings, the fact that legal professionals are distant or inaccessible, the lack of available information on the justice system, its failure to communicate properly and the fact that the judicial process makes so little room for ordinary people.

Not all Council of Europe member countries, however, have special systems for ascertaining the state of public opinion or litigants' views on the functioning and quality of the justice system. Some countries conduct regular, or at least comprehensive, opinion polls on the subject; examples include Austria, and Belgium, which conducted a telephone survey on the justice system; the results were published in 2004 and supplied quantitative

32. See J.-P. Jean, « Les demandes des usagers de la justice », in M.-L. Cavrois, H. Dalle, J.-P. Jean, *La qualité de la justice*, La Documentation française, 2002, p. 23. See also J.-P. Jean, « Au nom du peuple français ? La justice face aux attentes des citoyens-usagers », in D. Soulez-Larivière, H. Dalle, *Notre justice ; le livre vérité de la justice française*, Laffont, 2002, p. 103 ; B. François, « Les justiciables et la justice à travers les sondages d'opinion », in L. Cadiet, L. Richer, *Réforme de la justice, réforme de l'Etat*, PUF, coll. Droit et Justice, 2003, p. 41.

33. Examples include the study conducted by the University of Liège and the Catholic University of Louvain, in Belgium, on: « La Justice en question : après le baromètre de la justice, une recherche qualitative ». On the survey itself, see: S. Parmentier, G. Vervaeke, J. Goethals, R. Doutrelepont, A. Lemaitre, B. Cloet, J. Schoffelen, M. Vanderhallen, M. Sintobin, T. Van Win, M. Vandekerke, *Une radiographie de la justice; les résultats du premier baromètre de la justice en Belgique*, Gand, Academia Press, 2004.

and above all qualitative information on the subject, based on a sample of 3,200 people. Belgium has also developed surveys and polls of target groups on specific issues, an original approach in that legal professionals (judges, lawyers, registrars etc.) are questioned as well as members of the public. The findings of these target-group surveys are normally analysed in depth by the High Council of Justice, which tries to draw conclusions from them in order to improve the quality of Belgium's judicial system. France conducted a broad survey in May 2001³⁴ and a survey of victims in 2006. Portugal is a special case, since the Ministry of Justice and the University of Coimbra have set up the Permanent Observatory of Justice, which regularly conducts and publishes surveys. Italy carries out only local opinion polls. Spain has reliable information thanks to the surveys conducted by bar associations and lawyers' associations. In Lithuania monthly surveys are conducted to find out people's views on social institutions, including the courts. This is also practised in Slovenia, where opinion polls concern various institutions, with a single question on the justice system. More originally, some countries carry out online opinion polls: in Serbia, some courts ask questions on their websites to find out how members of the public view justice in their country (eg is the court well or poorly organised? Are there too few judges?). The great disadvantage is the lack of co-ordination in this system, with varying degrees of precision in the questions. Norway does not have this type of general survey of people's satisfaction with or confidence in their judicial system. Other countries directly survey legal professionals (judges and prosecutors), but often for a more specific purpose such as fighting corruption³⁵.

This demand for results and information doubtless reflects uncertainty about the role and tasks of the justice system. Citizens' complaints about the functioning of justice are indications of the way society views the system. Each complaint can be regarded as a source of information on the quality of the service provided, so if these signals are to serve a purpose, it is important to deal with them with the greatest care. In endeavouring to re-establish the legitimacy of the justice system, it would be a mistake to turn a blind eye to these complaints.

2) Dealing with complaints about malfunctions

The question of how to deal with complaints from members of the public is often overshadowed by another question concerning the responsibility of the judiciary, and sometimes the personal liability of individual judges³⁶. The difficulty, however, is to identify among these

34. A satisfaction survey of 1,201 persons representative of litigants: *La qualité de la justice*, op. cit., p. 243. The bar associations, among others, also carry out surveys.

35. As in Romania.

36. For an overview, F. Bottini, « La responsabilité personnelle des magistrats », *RRJ*, 2006-4, p. 2193 ; M. Deguegue (dir.), *Justice et responsabilité de l'Etat*, PUF, coll. Droit et justice, 2003, especially N. Albert, « De la responsabilité de l'Etat à la responsabilité personnelle des magistrats ; les actions récursoires et disciplinaires à

complaints those which can be dealt with specifically and independently³⁷; in this sense, the growing number of complaints suggests that the public is interested in the functioning of the justice system and seeks to understand how it works. But the question is how to deal with people's complaints: it is essential to provide a response, especially as this is a public service, so as to then be able to remedy malfunctions, miscarriages of justice³⁸ and delays. Who should respond? Given the definition of a complaint, the obvious answer is a body that can act as ombudsman³⁹, with special procedures and processes. The characteristics of the function of ombudsman are a special status assigned to an authority who must be regarded as independent and objective, and specific tasks involving supervision of the administrative authorities and/or the courts, especially through a system for studying and processing complaints, which may result in the issuing of recommendations to the institution where the difficulty originated⁴⁰. This function is essential in

l'encontre des magistrats », p. 209 ; M.-A. Frison-Roche, « La responsabilité des magistrats : l'évolution d'une idée », *JCP*, 1999, I, 174 ; for a historical analysis of this personal liability, G. Kerbaol, *La responsabilité personnelle des magistrats de l'ordre judiciaire*, Thèse Montpellier I, 2003 ; see also *La responsabilité des magistrats*, H. Pauliat et S. Gaboriau (dir.), PULIM, 2008 (with a comparative approach).

37. This is rather different from the traditional issue in France of the scope of Article L. 781-1 of the Judicial Code (now Article L. 141-1 since the order of 8 June 2006), which provides that "the state is required to make good any damage caused by the improper administration of justice. Such liability is incurred only in the event of gross negligence or a denial of justice". For a recent, enlightening example of this issue: J. Pradel, « Inactivité d'un juge d'instruction pendant plus de quatre ans et responsabilité de l'Etat », commentaire de l'arrêt Cass., civ. 1ère, 13 mars 2007, D. 2007, JP, p. 1929.

38. On this concept, see E. de Valicourt, *L'erreur judiciaire*, L'Harmattan, coll. Logiques juridiques, 2005. In Andorra, the state provides reparation for damage caused by a miscarriage of justice; complaints are lodged with the High Court of Justice.

39. See Recommendation R (85) 13 of 23 September 1985 of the Committee of Ministers to member states on the institution of the ombudsman; the recommendation draws attention to the functions of the ombudsman, which include considering individual complaints about impugned errors or other shortcomings on the part of the administrative authorities, with a view to enhancing the protection of individuals in their dealings with those authorities.

40. This definition is modelled on that proposed by G. Cornu, *Vocabulaire juridique*, Quadrige, PUF, 2000, under the heading Ombudsman and European Ombudsman. The term "Ombudsman" is originally Swedish, meaning a representative to whom people could come with grievances. The term "Ombudsmediator" is sometimes used, combining the status and tasks of a traditional ombudsman and a mediator. As Ms R. Saint-Germain, the Quebec Ombudsperson in Canada, points out, "the credibility of each post of ombudsman depends on the combination of independence, impartiality, fairness, confidentiality and accessibility. These founding principles and values reinforce one another and condition our effectiveness. That is why the manner in which the function is performed determines its impact. The formal safeguards surrounding the ombudsman's status underpin his/her independence and support his/her capacity to act. They are essential if the ombudsman is to discharge his/her task to the full" (*unofficial translation*). (Statement at the colloquy held in Montreal in

a state governed by the rule of law, to build up a real system for managing complaints and improve the quality of the judicial system⁴¹. European countries have adopted very different mechanisms to address this issue; debates are still in progress, but the systems are becoming increasingly sophisticated.

The European Charter on the Statute for Judges⁴², which is not binding, mentions the issue of complaints by members of the public about miscarriages of justice, in a paragraph on the liability of judges. According to the explanatory memorandum, states have organised their complaints procedures to varying degrees, and it is not always very well organised. The Charter consequently provides for the possibility for an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities; it points out, however, that judges have no monopoly on miscarriages of justice, so it cannot be ruled out that this same independent body might have to deal with issues involving a miscarriage of justice stemming from the activity or lack of activity of a lawyer or other legal professional (registrar, bailiff, etc.).

The European data shows that the way in which these complaints are processed may indeed⁴³ be clearly or less clearly determined: 22 countries say that they have a system for compensating users for excessive length of proceedings; 44 countries or entities have a system for assessing compensation for persons wrongfully arrested and 43 have a similar system

May 2007, *Universalité et diversité de l'institution de l'Ombudsman*). There are many sectoral studies (see for example P. Langbroek, P. Rijkema, "Demands of proper administrative conduct ; a research project into the ombudsprudence of the Dutch National Ombudsman", *Utrecht Law Review*, vol. II, Issue 2, December 2006). See also the special issue of the journal *Ethique publique*, autumn 2007, volume 9 No. 2, on the guardians of ethics.

41. A few precautions are nevertheless needed; the ombudsman can be perceived as an administrative authority, albeit an independent one, or even in some cases as a political authority: it all depends how the institution is set up, organised and perhaps monitored. The link between ombudsman and justice system must be very clearly specified. The 1994 Constitution of Bosnia and Herzegovina provided for the establishment of three ombudsmen (one for each community) and each one was empowered to intervene in pending court proceedings. This prompts for reservations, since the ombudsman can then intervene in the judicial process, which considerably alters his/her role. The Venice Commission stated that in its view the ombudsman should be able to supervise the functioning of the administration of justice (in the sense of all judicial activities not involving decisions, including the activity of court registries, solicitors and bailiffs, as well as delays, the administrative management of files etc.) and possibly intervene in the enforcement of court decisions.

42. The European Charter was adopted on 10 July 1998; for a detailed analysis, see T.-S. Renoux (dir.), *Les Conseils supérieurs de la magistrature en Europe*, La Documentation française, 2000, especially the third part on the Charter (p. 271 ff).

43. On the concepts of malfunction and miscarriage of justice, see D. Sabourault, « La fonction juridictionnelle entre autorité, indépendance et responsabilité », in M. Deguerge (dir.), *Justice et responsabilité de l'Etat*, op. cit., p. 171 ff.

for wrongful convictions⁴⁴. But it is important to define the meaning of a complaint, as the different countries see it, before addressing the question of whether it should be dealt with specifically or not⁴⁵.

a) Definition of a complaint

An inter-university study has suggested an analytical grid for identifying the characteristics of complaints, since not all criticisms from members of the public can be described as complaints. So an effort is needed to identify the types of complaint that can be specifically processed in the judicial system. According to the studies on the subject, a complaint can concern the content of a court decision, the policy pursued or the functioning of the judicial system.

A complaint about the content of a court decision cannot be regarded as a complaint by the person concerned about the judicial system or the functioning of the judicial public service. This “criticism”, to use a vague term, can be dealt with only by a reform of court decisions⁴⁶ and cannot cause the decision to be challenged by another institution. To take an example elsewhere than in the Council of Europe countries, the Canadian system is of interest: on its home page, the website of the Canadian Judicial Council has a link informing members of the public who are unhappy with a particular point in the justice system how they can make complaints. But potential complainants are warned that their complaint cannot concern a court decision. Only the traditional legal remedies apply in that case. Court decisions are directly connected with the independence of the judiciary; systems for the review of court decisions can operate only according to the procedural rules established in each country.

It is harder to decide on the legal nature of a complaint concerning the excessive length of proceedings⁴⁷; should it be regarded as the extension of the court decision and therefore be dealt with by a court, possibly a special one, or should it be seen as criticising the functioning of

44. See *European systems*, 2006 edition, CEPEJ Studies No. 1, Council of Europe Publishing, p. 58 ff, table 17.

45. For a slightly less comprehensive but different study of the subject, see H. Pauliat, « Le traitement des plaintes des justiciables : un ombudsman serait-il nécessaire ? », *Ethique publique*, autumn 2007, vol. 9, n°2, pp. 83-96.

46. The only possibility envisaged by Albania, Georgia, Ireland and Liechtenstein.

47. The Council of Europe drew the member states' attention to the courts' excess workload at a very early stage: see Recommendation No. R (86) 12 of 16 September 1986 of the Committee of Ministers to member states concerning measures to prevent and reduce the excessive workload in the courts. The text does not make any reference to the institution of the ombudsman. Most Council of Europe member countries now have a procedure for providing compensation to litigants in the event of the excessive length of proceedings (Andorra, Austria, Azerbaijan, Bulgaria, Croatia, Denmark, France, Greece, Hungary, Iceland, Italy, Luxembourg, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, England and Wales, Northern Ireland, Scotland).

the judicial public service and therefore be processed by another authority? In most countries which have taken steps to deal with malfunctions of this kind, the response varies: France, for example, has agreed to allow individual victims of the excessive length of proceedings to obtain compensation before the administrative courts⁴⁸; a system involving the administrative courts also exists in Portugal⁴⁹, but the High Council for the Judiciary intervenes, and can take steps to speed up criminal proceedings in a given case⁵⁰. Italy has set up a similar system under the Pinto Law⁵¹; after the European Court of Human Rights had given several judgments against it, Austria set up a satisfactory system under the Public Authorities Liability Act: if a court fails to take any steps after a certain time, one of the parties can apply to this court or to a higher court to require it to take a specific step within a specified time. If the court takes all the procedural steps requested in the application within four weeks of the decision, the parties' application is considered to be withdrawn because it has been satisfied, unless the parties decide within two weeks of being notified of the court's decision that they wish to maintain their application. In that case the higher court has to rule on the application for damages⁵². Belgium has taken a particularly daring and controversial step in holding the state liable in its legislative capacity⁵³; in

48. See in particular CE, A, 28 June 2002, *Garde des Sceaux, Ministre de la Justice c./ Magiera*, Rec. Leb., p. 247 ; *AJDA*, 2002, p. 596, chron. Donnat et Casas ; *RFDA*, 2002, p. 756, concl. Lamy ; see also CE, 25 January 2006, *SARL Potchou*, *AJDA*, 2006, p. 589, chron. Landais et Lenica and Decree No. 2005-911 of 28 July 2005, art. R. 311-1 7° of the CJA.

49. The administrative courts, Art. 4, nr1, g) of Law 107-D/2003 of 31 December.

50. The Portuguese Criminal Code provides for this; 46 applications were lodged for the purpose in 2004, a marked increase over previous years.

51. Law No. 89 of 24 March 2001; in their third annual report on the excessive length of judicial proceedings in Italy for 2003 (CM/Inf/DH(2004)23 revised on 24 September 2004), the Ministers' Deputies emphasised that the Pinto Law had not resolved all the difficulties, quite the reverse, since it not only failed to speed up pending proceedings but was also likely to further aggravate the backlog of the courts. See also interim Resolution ResDH(2005)114.

52. The European Court of Human Rights has stated that this system is indeed an effective remedy to encourage reduction of the length of proceedings. Henceforth, this remedy must be used by parties complaining of the excessive length of proceedings before they apply to the European Court of Human Rights.

53. Belgian Court of Cassation, 30 June 2006, *Etat belge c./ Mme Ferrara Jung* (n° C.02.0570.F); "In finding the applicant liable towards the respondent on account of negligence, which consisted in "failing to legislate in order to give the judiciary the necessary resources to efficiently provide justice as a public service, particularly in compliance with Article 6.1 of the [...] Convention for the Protection of Human Rights and Fundamental Freedoms, the judgment does not infringe the general principle of law and does not violate any of the provisions cited in the submissions, in this area". The judgment of the Court of Appeal had found that "for these reasons, the Belgian state commits negligence which renders it liable towards its nationals when it fails to take the legislative measures that will ensure compliance with the provisions of Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and in particular, when the effect of this failure is to deprive the judiciary – in this case the Brussels courts – of resources sufficient to enable them to deal with the cases referred to them within the reasonable time (6 to 8 months) determined

Slovenia, a compensation fund has been set up; in Poland, the parties can claim financial compensation before a higher court⁵⁴. Complainants can in some cases apply to the prosecuting authorities⁵⁵, to the ministry of justice⁵⁶ or to the Constitutional Court⁵⁷. The Committee of Ministers regularly draws the member states' attention to the need to make provision for the award of financial compensation in the event of excessive length of proceedings⁵⁸. Most countries, spurred on by the case-law of the European Court of Human Rights⁵⁹, seek to provide financial compensation for damage arising from the excessive length of proceedings. This malfunction is thus addressed specifically and does not usually match the idea of a complaint that might be laid before another authority such as an ombudsman. Yet intervention by an ombudsman is not impossible; Azerbaijan, for example, has introduced a special procedure which will no doubt, however, pose a few problems. Under the Law on the Ombudsman of 28 December 2001, the Ombudsman is entitled to investigate complaints of human rights violations, particularly due to failure to comply with time-limits, loss of documents or failure to communicate them to the courts in time and delays in the enforcement of court decisions. The "complaints" have to be processed within thirty days, but the time-limit can be extended by a further month if additional information needs to be obtained. In Georgia, the Public Defender can ensure that human rights are respected during a trial, but has no powers concerning the excessive length of proceedings⁶⁰. Sweden brings several authorities into play in this area: the Ombudsman and the Chancellor of Justice can criticise an authority which is taking time to rule on a case, including the judicial authorities; but neither of them is empowered to order a public authority to speed up proceedings or bring them to an end by a specified time.

Complaints about the individual conduct of a judge, giving rise to disciplinary proceedings, should also be dealt with specifically. A special institution is normally in charge of situations of this kind; it may be a council for the judiciary, such as the High Council of the Judiciary in France.

above" (*unofficial translations*). Furthermore, the Code of Criminal Procedure provides that if the length of criminal proceedings exceeds reasonable time, the judge may convict the accused by merely declaring him/her guilty or may impose a lighter sentence than the statutory minimum sentence.

54. Law of 17 June 2004. In countries such as Austria and Spain, as in Poland, there are several mechanisms, some designed to speed up proceedings and others designed to provide compensation in the event of excessive length of proceedings (see also ECHR, Grand Chamber, 29 March 2006, *Ernestina Zullo v. Italy*, especially § 79 ff.).

55. Denmark.

56. Spain, Sweden.

57. Croatia.

58. Examples include Interim Resolution CM/ResDH(2007)74 on excessively lengthy proceedings in Greek administrative courts and the lack of an effective domestic remedy.

59. Among others, ECHR, 26 October 2000, *Kudla v. Poland*, RFDA, 2003, p. 85.

60. If the Public Defender observes a violation of fundamental rights during proceedings, however, he/she can request the court to reopen the case.

However, some countries have assigned a particular role to specific bodies: the Defender of the People can play a major role in Spain⁶¹, and the same is true in Finland⁶² and Sweden. Under the Act of 3 April 2006, a Complaints Secretariat placed under the joint responsibility of the Lord Chancellor (minister of justice) and the Lord Chief Justice (who represents the judicial authorities before the government and parliament) processes requests from individuals in England and Wales and decides on the action to be taken on them. British citizens can address their complaints to the Ombudsman, who will refer them to the Secretariat⁶³. Denmark also has a formal arrangement, based on the Judicial Code, which enables all litigants who consider that they have not been properly treated by a judge to apply directly to the disciplinary tribunal for judges. In the Netherlands, since 2002, all courts have introduced a procedure for dealing with complaints about the behaviour of a judge or a court official. The Supreme Court has a special division to deal with complaints about judges. Interestingly, this division operates as an ombudsman, but can also take disciplinary measures against judges. In Romania, anyone can lodge a complaint with the Superior Council of the Magistracy against the inappropriate conduct of a judge⁶⁴. The Canadian system is very sophisticated: any member of the public can complain to the Canadian Judicial Council about the behaviour of a federal judge, and to

61. The Defender of the People or Ombudsman is provided for by Article 54 of the Spanish Constitution, and his/her status is detailed in an implementing act of 7 May 1981, as amended. Section 13 of the act provides that "When the Ombudsman receives complaints concerning the functioning of the administration of justice, he/she shall refer them to the prosecuting authorities so that they may consider whether they are well-founded and may take the appropriate steps in accordance with the law, or shall refer them to the General Council of the Judiciary, depending on the type of complaint" (*unofficial translation*).

62. Complaints against a judge have to be lodged with the minister or the parliamentary ombudsman.

63. This special complaints system has existed for a long time: members of the public can complain to the Lord Chancellor about the conduct of a judge; these complaints are processed by a special administrative unit responsible for investigating them and taking action, under an agreement concluded in April 2003 between the representatives of the profession and the Lord Chancellor (see *Le régime disciplinaire des magistrats du siège*, Documents de législation comparée du Sénat, n° LC 131, January 2004, p. 9).

64. Romania has established a system primarily geared to combating corruption, so it should not be placed on the same footing as other countries with similar arrangements. Likewise, Turkey has a specific system: a party can lodge a complaint against a judge with the Director General for Criminal Affairs and the Head of the Inspections Office. In Bosnia and Herzegovina, when a complaint against a judge is lodged with a court or with the Minister of Justice, they must immediately refer the complaint to the High Judicial and Prosecutorial Council. The Council has two years to investigate the complaint and give a decision on the matter, either by initiating disciplinary proceedings or by dismissing the complaint if it considers it ill-founded. The system is useful in that country, since it explicitly covers complaints concerning court officials, such as registry officials; in such cases, the president of the court has to decide on the matter, but is not subject to a time-limit.

reinforce the system, the Council has drawn up a set of ethical principles with which all judges have to comply⁶⁵.

The French system is currently undergoing substantial changes. Consideration was recently given to a complaints system involving the Ombudsman, who would then have been empowered to refer cases to the High Council of the Judiciary. Any individual or corporation considering, in a court case concerning them, that the conduct of a judge was likely to constitute a disciplinary offence could have complained directly to the Ombudsman, and the latter could have asked the first presidents of appeal courts and the chief public prosecutors at those courts, or the presidents of courts and public prosecutors, for any relevant information. The Ombudsman would not have been allowed to assess judges' decisions, but could have referred the complaint to the Minister of Justice for referral to the High Council of the Judiciary, if he/she had considered that it was likely to be classified as concerning a disciplinary matter and if the complaint had not caused the head of court to refer the matter to the High Council of the Judiciary. However, actual classification as a disciplinary offence posed a problem. Assessment of a judge's conduct can hardly be dissociated from assessment of the merits of appeals lodged with the court of appeal or the Court of Cassation in the same case. It is sometimes very hard to distinguish clearly between several forms of misconduct which have resulted in a miscarriage of justice. The Constitutional Council⁶⁶ identified a breach of the Constitution, in that a serious and deliberate violation of a procedural rule must be established by a court decision that has become final⁶⁷. According to the Council, the text increases the risk of confusion and thereby the risk of infringing the principles of the separation of powers and the independence of the judiciary. It was rightly pointed out that this reform was likely to strengthen government control over the judiciary: making judges liable in disciplinary terms for their serious errors in assessing evidence or in

65. See Administrative Justice Council, decision of 11 August 2006, *Beaudin v. Harvey*, appl. No. 2005 QCC JA 197. See also Inquiry Committee of the Canadian Judicial Council, decision of 16 March 2006, *complaint by M. Marois against judge Michel DuBois*, No. 2004-CMQC-3, under Section 268 of the Courts of Justice Act. The Canadian Judicial Council has very detailed administrative rules on inquiries.

66. Decision No. 2007-551 DC of 1 March 2007, *Loi organique relative au recrutement, à la formation et à la responsabilité des magistrats*, Droit pénal, April 2007, No. 4, Alerte 15, « Outreau : une réforme touchée mais pas coulée » ; D. Ludet, A. Martinel, « Les demi-vérités du Conseil constitutionnel », *D.* 2007, jp, p. 1401 ; *DA*, 2007, no. 4, comm. 62.

67. The purpose of the text was to make it possible to prosecute judges beyond the limits imposed by the case-law of the High Council of the Judiciary, which excludes judges' decisions from disciplinary supervision; this case-law does not eliminate judicial activity as a whole from the scope of disciplinary liability (failures to act and omissions can give rise to prosecution), but the High Council of the Judiciary refuses in principle to "assess the intellectual process followed by an investigating judge in dealing with the proceedings assigned to him or her" (*unofficial translation*) (see decision S 55 of 27 June 1991, *Recueil des décisions disciplinaires*, p. 286). On this point, D. Ludet, « Formation et responsabilité des magistrats : quelles réformes ? », *Les cahiers français*, La Documentation française, 2006, n° 334, p. 77, esp. p. 83.

exercising discretion would mean empowering the disciplinary authority to assess the lawfulness of a court decision, and if the membership of this authority is appointed by the executive, it brings the system under complete control; allowing complainants themselves to instigate disciplinary proceedings against judges, via the Minister of Justice, ensures that the system hinges on him or her – a political figure⁶⁸.

This decision bolsters the principle that the Ombudsman, as an independent administrative authority, cannot assess court decisions⁶⁹. Nor can French citizens apply directly to the High Council of the Judiciary, which is now compelled, however, to “draw up and make public a list of judges’ ethical obligations”⁷⁰. Nor can they submit their complaints to the heads of courts, nor appeal to an appropriate body, such as the High Council of the Judiciary, against a rejection by one of those heads of courts. In some countries, therefore, disciplinary rules are clearly established by specific texts and institutions.

Lastly, some countries take a special approach to complaints concerning the performance of the courts. The question here is what is understood by performance. Albania, for example, says that problems concerning the performance of the courts are generally submitted to the High Council of Justice and in some cases to the Ministry of Justice as well; however, as it gives no precise performance indicators or targets, we cannot identify any specific features in this area. The problems simply concern malfunctions in the judicial system. Croatia refers to a similar situation: court presidents are responsible for processing complaints from members of the public concerning the performance of the courts, and these complaints can also be referred to the Ministry of Justice. Here too, a scrutiny of the replies suggests that these criticisms are levelled at the functioning of the judicial system in general, not at the failure of a court to perform satisfactorily.

68. F. Bottini, op. cit., p. 2209 ff.

69. The committee discussions before the vote on the bill highlight the parliamentarians’ and Justice Minister’s doubts on the subject: “Some wonder whether it would be possible to allow the Ombudsman to refer a matter directly to the High Council of the Judiciary when he/she considers that a disciplinary offence is established. However, this proposal poses problems. In terms of principle, it carries a definite constitutional risk. Empowering the Ombudsman to initiate disciplinary proceedings against a judge might be regarded as infringing the independence of the judiciary: this extension to an administrative authority, albeit an independent one, of the referral of a matter to the High Council of the Judiciary may well increase the number of instances in which court decisions are challenged otherwise than through the statutory remedies provided for the purpose. On the contrary, care must be taken to avoid increasing the number of authorities empowered to refer matters to the disciplinary authority, so that disciplinary proceedings are not used to destabilise judges in their judicial activity. It also means that the Ombudsman would be given... a power competing with, or even superior to, that of the Minister of Justice, since he/she could disregard a refusal by the Minister of Justice to refer the matter to the High Council for the Judiciary” (*unofficial translation*).

70. Institutional Law No. 2007-287 of 5 March 2007 laying down the principles governing the recruitment, training and liability of judges, Section 18.

Poland is more specific: there are complaints about the administrative performance of the courts (failure to act, error in managing a case, etc). Responsibility rests with the hierarchy of the judicial system: these complaints are dealt with by the president of the court or the Minister of Justice. This system can ensure a response in some instances and increase the courts' performance in specific cases. England rightly pointed out that the terms were ambiguous, since criticism of performance is relative and can affect the issue of independence.

b) The specific nature of complaints

The complaints to be dealt with concern the almost day-to-day administrative functioning of the justice system, but neither in terms of procedures nor in terms of court decisions – rather in terms of the process leading to a court decision, though this definition should not include administrative complaints, which are regarded as mere requests for information. However, this approach requires these processes to have been clearly defined in a sort of litigants' charter⁷¹, covering the foreseeable timeframe for processing the file, the dates of meetings between judges, lawyers and litigants, the arrangements for reception, accompaniment and supply of information to users, and so on. A clear distinction must be drawn between strictly ethical obligations – with the possibility of disciplinary proceedings before the appropriate body in the event of failure to fulfil them – and the general obligations to be met by all public services and public officials. Yet complaints must not be defined too narrowly; despite the unsatisfactorily broad view taken in the study in Belgium, in which a complaint was defined as “any expression of dissatisfaction on the part of a litigant with regard to the functioning of the judicial system”, Belgium's High Council of Justice provides a useful definition⁷²: “a complaint concerning the functioning of the judicial system criticises a situation in which the service provided to members of the public is not consistent with what the latter can legitimately expect of the proper functioning of the judicial system”. A complaint can therefore partly concern a malfunction, although this approach should not encompass only situations in which a judge's personal liability or negligence is investigated. A malfunction can cover poor habits or practices in a court, but also problems such as the unexpected effects of legislation, the fact of contradictory investigations and the poor management of litigants' files.

The situation is comparable in Luxembourg, where the Ombudsman has given an opinion on the plan to set up a High Council of Justice⁷³, taking the same view as that mentioned in respect of Belgium. According to the

71. Similar to the Victims' Charter drawn up by the Home Office in England and Wales.

72. Opinion on two bills concerning the procedure for complaints about the judicial system, approved by the plenary assembly on 22 February 2006.

73. Recommandation relative à l'institution d'un Conseil supérieur de la justice, du 22 mars 2006.

Ombudsman, and in view of the special nature of Luxembourg's judicial system, especially the close connections between judges and lawyers, the Ombudsman did not seem to be the institution best suited to receiving complaints from persons directly and personally affected by a malfunction in the judicial administration. He considered that members of the public should have the right to lodge complaints in the event of malfunctions, but these complaints were submitted in different directions, to the courts, the executive, parliament, the ombudsman or elsewhere. Only an outside authority capable of channelling complaints would be able to ensure that they were credibly received. The Ombudsman accordingly proposed that it should be possible for any individual or corporation, or a lawyer working in Luxembourg, to lodge an individual complaint with the High Council of Justice. If the complaint proved well-founded after examination of the file, the Council would make a recommendation, which would be addressed directly to the bodies concerned, to the Ministry of Justice and to the complainant.

Unlike the previous ones, the conception of complaint adopted here has the advantage of being part of the general process covering the organisation, management and functioning of the justice system: once the complaint has been identified as such, there must be a competent authority to receive it, process it and above all draw conclusions from it, in other words remedy the malfunction concerned. The advantage of this conception of a complaint is that not only must the authority responsible for processing it and acting on it find a solution or a response to the specific case concerned, but it must also view this complaint as part of a broader approach ensuring that such malfunctions do not occur again; it must therefore draw general lessons from the complaint, which is clearly a function of the ombudsman⁷⁴.

If clear processes are established for registering files, monitoring timeframes, supervising hearings and setting dates for deliberations, any complaints lodged by members of the public can generate a sort of interactive dialogue between the courts and the authority responsible for processing the complaints; any malfunction identified or revealed as a result of these complaints can cause the processes to be improved at a prior stage and therefore prevent further comparable malfunctions. Complaints should therefore be viewed as a factor for measuring the degree of public satisfaction with the judicial public service rather than with the justice system, and this serves to renew the management of the system. The process must therefore tie in with all the arrangements for the recruitment

74. This mechanism also partially exists in Bosnia and Herzegovina: if the Minister of Justice finds, after investigating a complaint, that there are malfunctions in the administration of justice, he/she has to inform the president of the court concerned and/or the High Judicial and Prosecutorial Council, and they are then responsible for taking the appropriate steps to remedy the problems. If the Ombudsman finds, after investigating a complaint, that there are malfunctions, he/she can make recommendations to the court concerned or to the High Judicial and Prosecutorial Council to advise them how to resolve this type of problem.

and training of heads of courts⁷⁵: as the process does not concern proceedings and decisions, the administrative management of case files can be taken separately from the administration of justice and of the courts. Complaints will then concern all identifiable measures for the administration of justice and some measures for court administration, which inevitably requires the system introduced to involve several different institutions, including the professional bodies of the legal professions concerned.

Once a complaint has been registered, it is helpful to determine the institution or authority that can process it and provide a response or solution, and to identify the institution's or authority's possible prerogatives and the nature of the powers conferred on it.

c) Bodies empowered to process complaints

Several processing arrangements can be considered, depending on whether preference is given to processing complaints inside or outside the judicial system and nationally or locally.

When members of the public want to lodge a complaint, they must have access to clear procedural channels and they must also know exactly what they can criticise and whom they must complain to. Generally speaking, if they simply want to obtain general information or information on their case-files, they must be able to find a department able to provide the information in the court itself – a special unit, for example. Most of the studies conducted in various European countries show that many complaints would go no further if a simple response could be provided by the court concerned. The lack of a response is what fuels public criticism and loss of confidence in the justice system. When the person concerned fails to obtain a response, they consider that the service does not function properly. In the actual court concerned, there must therefore be a department capable of answering standard questions (such as what stage the case-file has reached or how long the proceedings might last), like a sort of reception unit or information desk. This presupposes that the head of court will have organised the court so that it can provide these replies⁷⁶. This initial level is important because, in the light of the questions asked, it may be useful to plan particular communication arrangements so as to anticipate questions.

On the other hand, complaints may concern a more complex issue connected with the whole mode of operation of the court. In that case, it would be helpful to set up a complaints department in the court or the judicial

75. See the above-mentioned recommendation by the Ombudsman of the Grand Duchy of Luxembourg.

76. See the survey conducted at the Grasse Regional Court, on the postal replies sent to litigants within in a specified time-limit; on this experiment, M.-L. Cavrois and M. Cardoso, « Des démarches qualité en juridiction et au casier judiciaire », in M.-L. Cavrois, H. Dalle, J.-P. Jean, *La qualité de la justice*, op. cit., p. 119, especially p. 121.

district – a joint judges' and prosecutors' department acting as "complaints manager"⁷⁷". The complaints manager cannot fully act as ombudsman⁷⁸, since in this case, the head of this department would have to be part of the justice system and be a judge. The complaints manager must simply be easily identified by anyone either inside or outside the system. He/she therefore functions inside the institution, with the task of receiving all complaints and ensuring that they can be acted on: either the complaints manager deals with the complaint immediately, if it is inadmissible or non-specific, or, if action must be taken on it, he/she turns to the head of court to seek information or pass on the case-file so that the head of court may contact the judge concerned and try to find a solution. The advantage of a system of this kind is that the complainant has only one point of contact, which reduces the time taken to process the complaint and the risk of lack of jurisdiction if several institutions were empowered to deal with complaints. As a judge, the complaints manager would have to be appointed by the head of court for a specified time, on the basis of his/her personal qualities (communication skills, ability to handle conflicts, ability to adapt to a very wide range of situations etc.) and would have to be exempted from numerous other tasks.

This approach reflects a desire to make justice a quality-oriented public service. Processing inside the system has an obvious advantage for members of the public who consider they have been wronged, since they have a single point of contact with which they lodge their complaints and from which they await a reply; the judge appointed handles the internal processes him/herself and processing is usually faster. This close contact allows the complaints manager to be regularly informed and confers a real responsibility on him/her. Internal processing provides the local court with immediate feedback, since awareness, monitoring and processing of complaints give it an opportunity to react and alter its internal processes, and therefore avoid further malfunctions, while bearing in mind what might termed "ombudsnorms"⁷⁹", which in practice mean, in the strict sense, principles for the proper administration of justice or good practices. Lastly, a further advantage is that this system provides an overview of the judicial public service; complaints against malfunctions in the judicial system are dealt with by the system itself, which binds together processes, procedures, decisions and responsibilities. This leaves the unitary approach to the functioning of the justice system intact, although it probably means losing the

77. See the studies conducted in Belgium.

78. All definitions of the ombudsman very clearly and persistently emphasise that this institution lies outside the justice system.

79. The term used by the authors of the study in Belgium. They consider that the decision to declare a complaint well-founded depends on ombudsnorms: active service, administrative precision, efficient motivation, proper processing, serious analysis, good oral communication, clear correspondence, adequate consultation rights, high-quality interpreters, reasonable processing time, respect for privacy, ease of access, exhaustive file etc.

advantage of an outside view, which is the distinctive feature of the ombudsman.

This system does not obviate the need for national processing; it is essential that at some point the complaints recorded should reach a national body designated for the purpose, which can take a comprehensive view of the complaints lodged, the responses given, the timeframes in which they are given, the changes made to the functioning of the justice system and so on, if only to maintain overall consistency throughout the system and thus avoid contradictory responses. This national authority could also act as an appeal body for persons who consider that their complaints have not been properly dealt with or who are dissatisfied with the response provided. It might be a council for the judiciary, whose tasks in this area would have to be clearly defined. Or it might be a special committee of the council for the judiciary, or an external committee, which would have both advantages and disadvantages. This national body would act as ombudsman, which would require it to use mediation procedures while remaining completely independent of the judicial system and parliament. Its powers would have to be clearly determined, including the power to make recommendations and to follow up those recommendations (follow-up to responses from the courts or the minister), together with the obligation to inform parliament by means of an annual report. It would be able to assess both the complaint and the way in which it was dealt with at local level, and could ask for information, take an investigation further, etc. If this system is adopted, the council or competent authority deals with the complaint on the merits and in a way repeats the process. This second examination of the complaint will inevitably be perceived as a review of the first-level processing. There is consequently a risk that judges will want this to be done by a judicial rather than an outside body, but also that there may be some confusion between the different roles and reviews. The best idea might be to introduce this second level as a regulator or judicial quality manager⁸⁰: it centralises processed complaints and considers whether they are admissible; it could check whether a second reading is possible and refer the matter back to a first-level complaints manager. This would confine it to the role of judicial manager rather than that of decision-maker.

Irrespective of the model chosen, it is essential that these systems and processes should be well known, that information about them should be clear and accessible and that the accent should be placed on transparency in both processes⁸¹ and institutions. The end product would be an annual report describing the complaints, the time it took to process them, the follow-up, the solutions provided and, more generally, the lessons drawn from them for the functioning of the judicial system as a whole.

80. This concept is known to carry some risks; see A. Vauchez, L. Willemez, *La justice face à ses réformateurs*, PUF, coll. Droit et Justice, 2007, p. 98.

81. On the need for transparency, see W. Voermans, « Judicial transparency furthering public accountability for new judiciaries », *Utrecht Law Review*, vol. III, Issue 1, June 2007.

Efforts to apply these principles to the French judicial system come up against the fact that the large number of institutions likely to intervene, the lack of clear texts and the weak role and powers of the High Council of the Judiciary make it difficult to establish clear machinery. A preliminary draft institutional law tabled by the Ministry of Justice in 1999 provided for the setting up of a national commission to examine litigants' complaints⁸². It was to be able to receive complaints from anyone who considered that they had been wronged by a malfunction in the justice system or by an act that could be classified as a disciplinary offence committed by a judge in the performance of his/her duties. It would have been empowered to ask heads of courts for any useful item of information, and would then have dropped the complaint if it considered it ill-founded or referred it to the Minister of Justice or the head of court concerned. It would normally have been required to follow up the matter with the complainant and to draw up an annual report. However, the bill was soon dropped because the commission was given no coercive means of action and was in an ambiguous position in relation to the High Council of the Judiciary and the Judicial Services Inspectorate⁸³.

The High Council of the Judiciary is the disciplinary body for members of the legal service, and has different powers in relation to judges and prosecutors. But it can be asked to deal with questionable behaviour by judges about whom litigants have complained. At present, only the Minister

82. On this point, see R. Errera, *Colloque de la Cour de cassation*, 2003. The Minister of Justice, Elisabeth Guigou, had proposed setting up a filtering authority to enable members of the public to render judges liable under civil law (*JO, débats*, AN, séance du 15 janvier 1998, p. 8).

83. See the system set up at the Versailles Court of Appeal; V. Lamanda, « Les plaintes des justiciables à la première présidence de la Cour d'appel de Versailles », *BICC*, 15 July 2000. The report states that all the complaints received at the office of the first president from members of the public are registered and specifically followed up. Between 1997 and 1999, 350 applications from 301 different persons were inventoried, which means a total of about 120 complaints per year; 16% were from lawyers and the remainder from members of the public. The report shows that the complaints were either referred by the Ministry of Justice, or received directly by the court, or (and/or) received by the presidents of the first-instance courts. The subjects of the complaints are interesting: of the coherent complaints (therefore excluding those obviously sent by unbalanced individuals), some did not criticise a judicial service and 55% concerned the functioning of a court; of the complaints that proved well-founded (126 altogether), 76 concerned delays in deliberation, 34 procedural delays, 10 malfunctions in the registry, 3 judges' behaviour to litigants and 3 procedural malfunctions. As regards the outcome of the complaints and the action taken on them, the report states that an acknowledgment of receipt was first issued for each complaint; the complaint was then referred, if appropriate, to the head of the court concerned with a request for a detailed report within a specified time-limit; it might then be dropped or, if it was well-founded, the head of court was asked to take the necessary steps to remedy the malfunction. If the complaint concerned the conduct of a particular judge, it could be taken into account in his/her appraisal. A judge could also be withdrawn from the promotions list, be given a warning or be the subject of disciplinary proceedings.

of Justice and the heads of courts can refer disciplinary matters to the High Council of the Judiciary⁸⁴. In most cases this is done on the basis of an inspector's report, then of a document drawn up by the Judicial Services Directorate, describing the breaches of professional ethics and the disciplinary offences⁸⁵. Two main solutions can be considered.

The first possibility would be to place the High Council of the Judiciary at the heart of the system: complaints continue to be dealt with at the first level; dissatisfied members of the public or litigants can lodge complaints with the court concerned, about malfunctions or criticisms relating to a department, judge, a legal professional, a registry official, a lawyer etc. Complaints can be examined by designated staff if they are mere requests for information, but the local complaints manager sorts them and shares them out. Once registered, a complaint is referred to the High Council of the Judiciary, which can then take several different steps: either the complaint concerns the conduct of a judge, and the Council then deals with it directly, requesting the Judicial Services Inspectorate to conduct a preliminary investigation if necessary; or it concerns a malfunction relating to a judge, and the Council then informs the head of court concerned, requesting him/her to find a solution and following up the complaint; or the malfunction concerns a legal professional in the broad sense of the term, and the Council can then inform the professional organisation concerned. The ombudsman-type function described here involves linking up several institutions, the High Council and the legal professionals' professional organisations; this would in fact mean dealing comprehensively with a malfunction in the public service, without necessarily focusing criticism on a judge or department, since a malfunction can be due to several factors (such as the excess workload of a lawyer, the poor organisation of a hearing and the absence of a registrar).

This scheme would call for several major reforms to give the High Council of the Judiciary a mandate worthy of its name: the Judicial Services Inspectorate would have to be placed under the Council's authority rather than that of the Minister of Justice; the new Council would also have to be empowered to determine the internal processes needed for the courts; for the time being, its only statutory power is to lay down ethical principles. The Council might be empowered to determine the rules governing complaints and the procedures for registration and follow-up, and ultimately to draw up a consolidated report and recommendations on court management, resources, efficiency and so on, since processes, procedures and professional ethics are sometimes closely connected. This would also mean placing the judicial public service on a completely separate footing from the traditional administrative authorities, but treating it as a whole, ie in combination with all the legal professions, and withdrawing all powers in this

84. Heads of court have been empowered to do so since Institutional Law No. 2001-539 of 25 June 2001.

85. See J.-P. Jean et D. Ludet, « Discipline des magistrats, plainte des justiciables et prérogatives du médiateur de la République ».

area from the Ombudsman. This renewed High Council of the Judiciary would in fact partly act as an ombudsman. It would doubtless be helpful to assign it central responsibility for all the areas ensuring the consistency of the system⁸⁶.

A second possibility would be to make the Ombudsman the linchpin of the system. Complaints could be lodged with the Ombudsman either under the present arrangements or on a broader basis. He/she would sort the various complaints by subject and would have to turn to different partners depending on whether the complaint concerned a judge (High Council of the Judiciary), another legal professional (professional organisation or equivalent) or a malfunction in a court (head of court). The problem is that a malfunction is very rarely due to a single factor, and this can cause difficulties if the Ombudsman is at the heart of the system. The distinction between a malfunction (to be dealt with by the Ombudsman), an error in the judicial process (to be dealt with by the court and its complaints manager), a procedural error (to be dealt with through the traditional legal remedies) and a difficulty due to failure to comply with ethical principles⁸⁷ (to be dealt with by the High Council of the Judiciary) is theoretically attractive, but difficult to apply in practice. An investigation and prosecution service could be set up in the High Council of the Judiciary⁸⁸.

The number of complaints from litigants or users of the judicial public service is likely to grow steadily as the demand for quality from the service increases. Given the specific features of each country's justice system, there is no requisite model for the processing of complaints, but it is essential to look into ways of making the system coherent and truly legitimate.

Court administration and management are undergoing profound changes in Europe. Twenty years ago they were still regarded as secondary to actual judicial functions, but they have now become a focal point of discourse on judicial reform. They underpin a discussion of the quality of the justice system, its efficiency and its capacity to meet the demands of litigants and their lawyers. There are several models in Europe, controlled either by

86. Consideration would have to be given, for instance, to the powers of the Commission on Access to Administrative Documents, which often decides whether or not documents relating to the judicial public service can be communicated. Should it retain this power or, conversely, would it be preferable to spread this approach more widely under a new system?

87. It does not seem a good idea to increase the number of institutions; the High Council of the Judiciary should simply assess the conduct of a judge in the event of a disciplinary offence; on other points, the matter would be regarded as a malfunction. The Canadian Judicial Council is known to have a particularly sophisticated process for dealing with complaints, which can result in the dismissal of a judge: a complaint is lodged in writing; a Judicial Conduct Committee examines it, asks the judge concerned for information and may instruct a sub-committee to conduct a further inquiry; an Inquiry Committee can be set up and a report is then transmitted to the Council; the procedure ends with a recommendation to the minister.

88. See J.-P. Jean et D. Ludet, *op. cit.*

the executive, or by an independent body, or more rarely by the courts themselves. Decentralisation or a degree of autonomy for the judicial system seems to be a guarantee of efficient justice; when courts are required to draw up a court plan and sign a targets contract with the ministry or the council for the judiciary, they assume responsibility for themselves and seek to comply with the time-limits for deciding cases and the general rules governing procedure and conduct. In a sense, they are responsible for their choices and results. This culture is not established everywhere, which seems logical, since the contexts differ widely. But the core issue remains the boundaries of the administration of justice; in any event, improving the quality and efficiency of the justice system depends on making profound changes to some methods of administration. The processing of complaints is one of them, since it is important for the judicial authorities to respond to inquiries and requests if there is to be a relationship of trust between the justice system and the public. The quality of the justice system also depends on the quality of its treatment of members of the public and on the quality of its responses.

Conclusion

The quality of justice is based on efficient administration and management together with the guarantee of complete independence. This study has attempted to highlight two factors calling for detailed research:

- Contracts are widely used in judicial systems, but under very diverse arrangements and for very different purposes; yet they are one of the mainstays of quality (eg objective-setting contracts between supreme court and other courts or between the courts and the council for the judiciary; procedural contracts; performance contracts). A comprehensive study of this aspect would be of great interest, comparing them with data on the administrative courts where this exists.

- Dealing with complaints from members of the public is the second main factor, since it points to the fact that the quality of justice depends on listening to litigants' views; if the quality of justice is to improve, a relationship of confidence must be restored with the public, and there again, replies vary widely because the concepts are not always the same.

The issues are far-reaching and this comprehensive ad hoc study has only outlined them. Monitoring CEPEJ data and updating research would serve to gauge the progress made in countries' thinking in this area (for example with a seminar every two years).

Appendix

Relevant questions for the study

Question 10 : Bodies formally responsible for budgets allocated to the courts (Ministry of Justice, Other ministry, Supreme Court, Judicial Council, courts...)?

Question 20: Are there official internet sites/portals (e.g. Ministry of Justice, etc.) for the following, which the general public may have free of charge access?

Question 21 Is there an obligation to provide information to the parties concerning the foreseeable timeframe of the proceeding?

Question 28: Is there a system for compensating users in the case of excessive length of proceedings?

Question 29: Does your country have surveys on users or legal professionals (judges, lawyers, officials, etc.) to measure public trust and satisfaction with the services delivered by the judiciary system?

Question 30: Are there surveys at national level or at court level?

Question 31: Is there a national or local procedure for making complaints about the performance of the judicial system?

Question 32: Mechanism of dealing with the complaint and efficiency measurement?

Question 45: What is the status of prosecutors?

Question 47: Who is entrusted with the individual court budget Management Board, Court President , Court administrative director, Head of the court clerk office?

Question 51: Are the courts required to prepare an annual activity report?

Question 52: Do you have a regular monitoring system of court activities concerning the number of incoming cases, the number of decisions, the number of postponed cases, the length of proceedings...?

Question 53: Do you have a regular evaluation system of the performance of the court?

Question 54: Concerning court activities, have you defined performance indicators, targets and who is entrusted with?

Question 55: Which authority is responsible for the evaluation of the performances of the courts (he High Council of judiciary, the Ministry of justice, an Inspection body, the Supreme Court, an external audit body...)?

Question 56: Does the evaluation system include quality standards concerning judicial decisions?

Question 57: Is there a system enabling to measure the backlogs and to detect the cases which are not processed within an acceptable timeframe?

Question 59: Do you monitor and evaluate the performance of the prosecution services?

Question 86: Types of disciplinary proceedings and sanctions against judges and prosecutors?