Quality of Judicial Organisation and Checks and Balances

© 2007 G.Y. Ng

CRC prepared by: G.J. Wiarda Institute for Legal Research, Boothstraat 6,
NL-3512 BW Utrecht

A commercial edition of this PhD-thesis will be published by Intersentia in the Ius Commune Europaeum Series, no. 63, under ISBN 978-90-5095-649-9.

Quality of Judicial Organisation
and Checks and Balances

Kwaliteit van de rechterlijke organisatie
en *checks and balances*
(met een samenvatting in het Nederlands)

Une évaluation normative
de la qualité de l'organisation judiciaire
(avec un résumé en français)

PROEFSCHRIFT

ter verkrijging van de graad van doctor
aan de Universiteit Utrecht
op gezag van de rector magnificus, prof. dr. W.H. Gispen,
ingevolge het besluit van het college voor promoties
in het openbaar te verdedigen op
woensdag 14 maart 2007 des middags te 4.15 uur

door

Gar Yein Ng
geboren op 21 februari 1978
te Oxford (Engeland)

Promotor: Prof.dr. J.B.J.M. ten Berge

Co-promotor: Dr. Ph.M. Langbroek

ACKNOWLEDGEMENTS

This thesis would not have become what it is now without the help and support of many colleagues and friends, and of course, my family.

On the professional side, I must first thank Dr. Philip Langbroek for his open-door policy. Without it I would not have had an outlet for or a challenge to my many ideas; I would not have had a place to complain and a friendly ear to listen; and I would not have had somebody laughing at me at least twice a month.

Secondly, I must thank Professor Gio ten Berge for his encouragement and many insights into my work. I would also like to thank him for his advice and support throughout the more difficult times.

Next, I would like to thank the Wiarda Institute for providing great organisational support and an entertaining time throughout. The Wiarda provided a great working environment for me, and people for me to bother: my thanks (and apologies) go especially to Corrie, Lloyd, Frans and Willemien. Furthermore, the Wiarda Institute has played host to many other PhD candidates such as myself, with whom I have had many coffee and lunch breaks. In this regard I would particularly like to mention Tamara Lahovski, Tammy Takàcs, Tom Scheirs, and Judith Leest.

To this list of thanks, I would like add the IRSIG-CNR in Bologna, for providing me with space to work and feedback on my thesis, in particular thanks to Marco Fabri, Francesco Contini and Marco Velicogna.

There are also many friends to thank in and out of the Netherlands. Outside, my thanks go to Mr. Archer, Susanne Ahrens, Nina Galle (and family) and Silke Schaefer for your friendship throughout these years. Also to Dr. Michael Grant, without whom, I would never have mapped my way to an academic life. Inside the Netherlands, my thanks go to Alexey, Melissa, Despi, Dario, and Bastian for your friendship and support.

To Bart-Jan, all those Sunday lunches really helped me through… to Ka-Chun… who has been a great friend in his way… and to Esther… for forcing me to speak Dutch when I was far too lazy to… I would like to thank all three of you for taking on the

enormous task of being my paranymphs, and helping me to organise the final celebrations for my thesis.

Finally, my thanks go to my family: mum, thanks for all the late-night typing; dad, thanks for cooking all my favourite dishes when I came home; and Gar Maan, for inspiration at the most unexpected times.

TABLE OF CONTENTS

Acknowledgements v
List of abbreviations xv

PART I: INTRODUCTION 1

Chapter 1: Introduction 3

1.1. Professional bureaucracy 3
1.2. Article 6(1) European Convention on Human Rights 5
1.3. Concept for a thesis 7

Chapter 2: From constitutional theory to quality norms: A theoretical framework 9

2.1. Introduction 9
2.2. Constitutional theory 13
2.2.1. Separation of powers and checks and balances 13
2.2.2. The new judiciary 15
2.3. Legitimacy and the judiciary 19
2.4. Organisation and the judiciary 22
2.5. Quality theory 25
2.5.1. Quality organisations 25
2.5.2. Quality defined 28
2.6. Quality of the judiciary: Main problem question 29
2.6.1. Introduction 29
2.6.2. Main problem questions 33

Chapter 3: Research methodology 35

3.1. Research decisions 35
3.2. Relevance of research 36

3.3. Research design 37
3.3.1. Literature research 37
3.3.2. Research methodology design 38
3.4. Interviews 40
3.5. Interview methodology in the Netherlands 42
3.6. Interview methodology in France 45
3.7. Analysis methodology of interviews 48
3.8. The interview process and respondents 49
3.9. Transcription and analysis 50
3.10. Comparison and conclusions 50

PART II: THE NETHERLANDS 51

Chapter 4: Constitutional law and practices 53

4.1. Power defined 53
4.2. Trias Politicas 54
4.3. Judicial independence and integrity 58
4.4. Conclusions 62

Chapter 5: The institutional context of the Dutch judiciary 65

5.1. Courts in the Netherlands 65
5.1.1. Competences 65
5.1.2. Separate jurisdictions 67
5.2. Members of the judiciary 68
5.2.1. Training and selection 68
5.2.2. Judicial career 71
5.3. Conclusions 72

Chapter 6: The organisers and policy 75

6.1. Recent history of organisational change 75
6.2. Central administration in relation to local court administration and recent measures taken 77
6.2.1. Local court administration 77
6.2.2. Judges versus managers and politics 78
6.2.3. Council for the Judiciary 78
6.3. Finance 79
6.4. Planning and control 81
6.5. Policies 83
6.6. Conclusion 85

Chapter 7: Responsibility of judges: Micro level analysis 87

7.1. The roles and responsibilities of judges in the courts 87
7.1.1. Introduction 87
7.1.2. Main role and responsibility of judges 88
7.1.3. Legal quality: Measurement and assurance 90
7.1.4. Individual judges within the court organisation 91
7.1.5. Analysis: Roles and responsibility of judges in the courts 92
7.2. Managing judges 93
7.2.1. Introduction 93
7.2.2. Managing judges 93
7.2.3. Organisational instruments to aid judges in their responsibility 95
7.2.4. Analysis: Managing judges 99
7.3. Judicial independence and accountability 100
7.3.1. Decision making 100
7.3.2. Organisational autonomy 101
7.3.3. Accountability 103
7.3.4. Analysis: Judicial independence and accountability 105
7.4. Conclusions 106

Chapter 8: Court organisation: Meso level analysis 109

8.1. Introduction 109
8.2. Integral management 110
8.2.1. Introduction 110
8.2.2. Judge manager and integral management 110
8.2.3. The court sector and integral management 112
8.2.4. Success? 114
8.2.5. Analysis: Integral management 116
8.3. Quality of organisation 117
8.3.1. Case management 118
8.3.2. Quality pilot projects 131
8.3.3. Communication 146
8.3.4. Analysis: Quality of organisation 148
8.4. Conclusions 149

Chapter 9: Administration of Justice: Macro level analysis 153

9.1. Courts and judicial organisation 153
9.1.1. The Council for the Judiciary 153
9.1.2. Finances 157
9.1.3. Lamicie model 158
9.1.4. Judicial independence and organisational autonomy 162
9.1.5. Analysis: Courts and judicial organisation 165
9.2. Ministry of Justice 167
9.2.1. Role of the Ministry of Justice 167

9.2.2. Ministry of Justice and the Council for the Judiciary 168
9.2.3. Finance 171
9.2.4. Quality policy 175
9.2.5. Analysis: Ministry of justice and Council for the Judiciary 179
9.3. Council for the Judiciary 180
9.3.1. Role of the Council for the Judiciary 180
9.3.2. Council for the Judiciary and the courts 181
9.3.3. Council for the Judiciary and the Ministry of Justice 182
9.3.4. Financing 183
9.3.5. Quality of justice 189
9.3.6. Analysis: Council for the Judiciary 193
9.4. Conclusions 193

PART III: FRANCE 197

Chapter 10: Constitutional law and practices 199

10.1. Historical development of the judiciary in France 200
10.2. Powers defined 202
10.3. Trias Politicas 204
10.3.1. Ordre judiciaire 204
10.3.2. Ordre administratif 207
10.4. Judicial independence and integrity 209
10.5. Conclusion 212

Chapter 11: Institutional context of the French judiciary 215

11.1. Basic organisation and structure of the courts 216
11.1.1. Ordinary jurisdiction 216
11.1.2. Administrative jurisdiction 222
11.1.3. Separate jurisdictions 224
11.2. Members of the judiciary 224
11.2.1. Training and selection 224
11.2.2. Careers 225
11.3. Conclusion 227

Chapter 12: The organisers and policy 229

12.1. Central administration in relation to local court administration and recent measures taken 229
12.1.1. Local court administration 229
12.1.2. Judges versus managers and politics 232
12.2. Finances 233
12.2.1. National policy 233
12.2.2. Planning and control 236

12.3. Policy 237
12.3.1. General policy 237
12.3.2. The judiciary as a public service? 240
12.3.3. Policies 242
12.4. Conclusions 247

Chapter 13: Responsibility of Judges: Micro level analysis (ordinary jurisdiction) 249

13.1. Main role and responsibility of judges 249
13.1.1. Introduction 249
13.1.2. Main role and responsibility of judges 250
13.1.3. Legal quality: Measurement and assurance 251
13.1.4. Individual judges within the court organisation 254
13.1.5. Analysis: Main role and responsibility of judges 256
13.2. Instruments to aid judges in courts 257
13.2.1. Introduction 257
13.2.2. Assistent de justice 258
13.2.3. Clerks 258
13.2.4. Greffier assistants de magistrats 259
13.2.5. Other instruments to aid judges in their work 260
13.2.6. Analysis: Instruments to aid judges 262
13.3. Judicial independence 263
13.3.1. Decision making 263
13.3.2. Organisational autonomy 264
13.3.3. Accountability 265
13.4. Conclusions 266

Chapter 14: Court organisation: Meso level analysis (ordinary jurisdiction) 269

14.1. Introduction 269
14.2. Court management 269
14.2.1. Introduction 269
14.2.2. Management of the court: Who? 270
14.2.3. Management of the court: Normative basis 273
14.2.4. Quality of management 274
14.2.5. Analysis: Court management 276
14.3. Quality of organisation 277
14.3.1. Case management 277
14.3.2. Analysis: Case management 283
14.4. Quality measures and indicators 284
14.4.1. Introduction 284
14.4.2. Quality indicators 285
14.4.3. Quality measures 289
14.4.4. Communications 292

14.4.5. Analysis: Quality of organisation 293
14.5. Conclusions 294

Chapter 15: Administration of Justice: Macro-level analysis (ordinary jurisdiction) 297

15.1. Administration of justice 297
15.1.1. Legislator and courts 297
15.1.2. Ministry of Justice and courts 298
15.1.3. Courts of Appeal and Courts of first instance 301
15.1.4. Analysis: Administration of justice 304
15.2. Finances 305
15.2.1. Distribution processes 305
15.2.2. Process 306
15.2.3. New financial law 308
15.2.4. Analysis: Finances 310
15.3. Conclusions 310

Chapter16: Responsibility of judges: Micro level analysis (administrative jurisdiction) 313

16.1. The roles and responsibilities of judges 313
16.1.1. Introduction 313
16.1.2. Main role and responsibility of judges 313
16.1.3. Legal quality and efficiency 315
16.1.4. Individual judges within the court organisation 318
16.1.5. Analysis: The roles and responsibility of judges 319
16.2. Managing judges 320
16.2.1. Introduction 320
16.2.2. Managing judges 321
16.2.3. Organisational instruments to aid judges in their responsibilities 323
16.2.4. Analysis: Managing judges 327
16.3. Judicial independence 329
16.4. Conclusions 330

Chapter 17: Court organisation: Meso level analysis (administrative Jurisdiction) 331

17.1. Court management 331
17.1.1. Quality of management 331
17.1.2. Court managers 332
17.1.3. Analysis: Court management 334
17.2. Quality of organisation 334
17.2.1. Case management 335
17.2.2. Analysis: Case management 339
17.3. Quality managers and indicators 340

17.3.1. Local courts and quality policy 340
17.3.2 Policy on quality inthe courts 342
17.3.3. Analysis: Quality of organisation 343
17.4. Conclusions 343

Chapter 18: Administration of Justice: Macro level analysis (administrative jurisdiction) 345

18.1. Separation of powers 345
18.1.1. Horizontal separation of powers 345
18.1.2. Vertical separation of powers 346
18.1.3. Analysis: Separation of powers 347
18.2. Administration of justice: The Council of State and the courts 348
18.2.1. Analysis: Administration of justice 350
18.3. Finances 351
18.3.1. Process 351
18.3.2. Financial processes and judicial independence 353
18.3.3. Analysis: Finances 355
18.4. Conclusions 355

PART IV: CONCLUSIONS 357

Chapter 19: Comparative analysis 359

19.1. The role and responsibility of judges 359
19.1.1. Operation of judicial independence and accountability 359
19.1.2. Implementation of quality measures 362
19.1.3. Conclusions 365
19.2. Quality of court organisation 366
19.2.1. Policies 366
19.2.2. Quality assurance 367
19.2.3. Total quality management 370
19.2.4. Quality standards and learning organisation 371
19.2.5. Conclusions 372
19.3. Judicial organisation and the separation of powers 373
19.3.1. Judicial organisation 373
19.3.2. Political level 375
19.3.3. Conclusions 377

Chapter 20: Conclusions 379

20.1. Introduction 379
20.2. The role and responsibility of judges: problem questions 381
20.2.1. How does judicial independence and accountability operate at the level of the judicial office? 381

20.2.2. What can be done to improve the performance of judges, both in terms of productivity, efficiency and quality? 383
20.2.3. How does this affect judicial independence and accountability? 384
20.3. Court organisation: problem questions 384
20.3.1. In what way have quality theories affected the court organisation? 384
20.3.2. What steps are being taken to bring the organisation closer to the people through quality policies? 387
20.3.3. Do quality standards breach judicial independence at the level of the court? 388
20.4. Administration of Justice: problem questions 389
20.4.1. How do separation of powers and judicial independence operate at the institutional level? 389
20.4.2. Can quality theory be applicable at this level to facilitate hard political accountability? 391
20.5. Conclusions 391

Samenvatting 395
Résumé 401
Bibliography 407
Index 417
Curriculum vitae 425

LIST OF ABBREVIATIONS

AWB	Algemene wet bestuursrecht
BFR	Besluit financiering rechtspraak
CAA	Cour Administrative d'Appel
CALRM	Commissie Aantrekken leden Rechterlijke Macht
DAGE	Direction de l'Administration Générale et de l'Equipement
DSJ	Direction Service Judiciaire
EEC	European Economic Community
EFQM	European Foundation for Quality Management
Fte	Full time equivalent
GALA	General Administrative Law Ace
GUG	Guichet Unique de Greffe
ICT	Information, communication and technology
INK	Instituut Nederlandse Kwaliteit
ISO	International Standards Organisation
LOLF	Loi Organique de Loi de Finance
MACJ	Magistrats de l'administration centrale de la justice
NVVR	Nederlands Verenigign voor Rechtspraak
PVRO	Project Versterking Rechterlijke Organisatie
SAR	Service administratif Regional
SSR	Stichting Studiecenturum Rechtspleging
TA	Tribunal Administrative
TGI	Tribunal de Grande Instance
TI	Tribunal d' Instance
TQM	Total Quality Mnanagement
WODC	Wetenschappelijk onderzoeks- en documentatiecentrum
RAIO	Rechterlijke ambtenaren in opleiding

PART I: INTRODUCTION

Chapter 1

1. Introduction

When one thinks of the judiciary in a democratic country, instantly the constitutional principles that will spring to lawyers' and legal academic minds will be judicial independence. Judicial independence is the central theme in constitutional law, in international treaties relating to human rights and a fair trial, and is also a focus of international organisations in developing judiciaries in member countries. It is a key concern for all parties and lawyers coming before the bench to argue their case: will this judge decide my case without bias? In constitutional courses at university relating to the separation of powers, judicial independence is also a central issue.

And until the late 1980s, European democracies had not given much thought as to how access to justice was organized because it was taken for granted that if judicial independence were guaranteed, then access to justice would also be guaranteed.

When the Woolf Report came out in England and Wales in 1996 it highlighted organizational barriers to justice and the inequalities faced by many parties who had no recourse to justice because of the costs of lengthy and inefficient litigation. Looking at the Leemhuis Committee report in the Netherlands, the issue of organizational barriers through failures of the judicial organisation to limit backlogs growing in the courts and inefficient organisation was highlighted. Next to these reports was also the growing caseload of the European Court of Human Rights dealing with cases against member states for unreasonable delays in the courts based on Article 6(1) of the European Convention on Human Rights.

This introduction will therefore go on to give a brief description of how courts have been seen to be organised to deliver justice. After this, I will give a brief description of the role of Article 6(1) of the European Convention on Human Rights.

1.1. Professional bureaucracy

Judiciaries can be classified as 'professional bureaucracies'.[1] According to Mintzberg, a professional bureaucracy is an organisation that hires people who have been through

1 J.B.J.M. ten Berge, 'Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)' in *De Onafhankelijkheid van de individuele rechter*, J.B.J.M. ten Berge and A. Hol (eds), The Hague 2006, p. 6-9.

a process of intensive training to turn them into 'specialists'.[2] These professionals then become part of the operating core that has control over the production and quality assurance process (i.e. the organisation). On the one hand, he says that

> '… the complex work of the operating professionals cannot easily be formalized, or its outputs standardized by action planning and performance control systems.'[3]

On the one hand, quality is assured through extensive educational programmes, which provide the potential professionals with the skills and knowledge needed, and then

> 'stability ensures that these skills settle down to become the standard operating procedures of the organisation.'[4]

The literature would suggest that under these circumstances, the training programme and experience are generally of a high standard and provide the skills needed that go toward guaranteeing quality and that inspire trust. If the mechanism works, quality is assured and consequently quality assurance is not a high priority. Even if it were not sufficient, experience in the literature would seem to suggest that trying to measure the outputs in such conditions is difficult and expensive.

There are two conclusions to come from this that can be applied to a judiciary from an organisational point of view. Firstly, quality control should not be an issue because of the highly qualified members of the organisation (i.e. the judges). However, what is also being said is that basically judges are difficult to manage and access to justice cannot be so easily programmed around them because of their nature as professionals, and because of their control over productivity.

According to Mintzberg's description, such an organisation relies on the following situational factors to survive:

> 'Complex, stable environment, nonregulating, nonsophisticated technical system …'[5]

Therefore, judges are traditionally seen as independent both in their decision-making and within the court organisation.[6] In fact, the court building can be considered to be only a building where they work and not as part of the institution of justice (a concept that may be reserved to describe judges only). However, because they are judges, they

2 H. Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design', *Management Science* 1980, vol. 26, p. 322-341, p. 333.

3 Ibid., p. 334.

4 Ibid., p. 334.

5 H. Mintzberg, '*Structure in Fives: Designing Effective Organisations*', New Jersey 1983, p. 189.

6 J.B.J.M. ten Berge, 'Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)' in *De Onafhankelijkheid van de individuele rechter*, J.B.J.M. ten Berge and A. Hol (eds), The Hague 2006, p. 1.

do operate within a certain legal framework, even though it is usually their expertise that is required to interpret that framework.

Furthermore, according to Mintzberg, such an organisation has a small administration department to take care of everyday management issues in terms of finances and personnel, but it is small and technocratic, with little or nothing to do with the operating core of the organisation.

Having looked at how judiciaries in democracies are usually seen in terms of the way that they are organised, it is now time to look at one of the regulations that judges as members of a constitutional institution are subject to.

1.2. Article 6(1) European Convention on Human Rights

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.'

Public hearings go to the fairness of a trial and are an established practice in democratic countries. One will also find a very strong framework of laws based on the independence and impartiality of judges in hearing cases in all democratic countries. A concern since the late 1980s for many countries has been achieving 'reasonable time' expectations of parties and the European Convention on Human Rights.

In a preliminary draft report to the Council of Europe's Committee on the Efficiency of Justice, Langbroek and Fabri attempt to define court delay as is practised across various jurisdictions in Europe, then to further define reasonable delays as set out in the jurisprudence of the European Court of Human Rights on this clause. According to this report, delay

> 'In the court environment means that a case does not move as fast as it could, because of problems that generally are recognized as court problems – this does involve judges, public prosecutors and their administrative organisations, as well as lawyers and their offices.'[7]

This in itself directly links the ability to decide cases without delay to factors other than an independent judge, such as the courts' organisation and external players. However, the framework developed by the European Court of Human Rights on the reasonable delay clause further described by Lanbroek and Fabri takes on a more societal angle:

7 P.M. Langbroek and M. Fabri, '*Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*', Council of Europe, Committee on the Efficiency of Justice, 2003, p. 2, see also C.H. van Rhee, 'The Law's Delay: An Introduction' in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, C.H. van Rhee (ed), Intersentia, Antwerp 2004, p. 5.

> 'There has to be an end to every dispute, so that everybody's life can go on. On the other hand, parties should also be given enough time to prepare their defence – timeliness requirements are not directed towards speed alone.'[8]

The human rights element comes from

> 'The idea … that citizens are entitled to legal certainty… parties and suspects should not be left in uncertainty about their case endlessly.'[9]

However, according to this report, delay is very difficult to define. On the one hand,

> 'Usually delay deals with expectations and subjective perceptions of the 'local legal culture', which is different in every environment. A delay that could be acceptable in one community could be unacceptable in another one.'[10]

Due to this difficulty in defining unreasonable delay therefore,

> 'the framework of the court does not contain any fixed time limits… [it] depends on external boundaries of applicability of the 'reasonable time' clause and on case-related criteria'.[11]

Therefore, the European Court has offered up no real solutions or definitions to the problem of unreasonable delay. It offers only the possibility to redress and order damages to be paid to parties deemed to have suffered an unreasonable delay in court proceedings.

8 P.M. Langbroek and M. Fabri '*Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*', Council of Europe, Committee on the Efficiency of Justice, 2003, p. 4.

9 Ibid., p. 3.

10 Ibid., p. 2; see also C.H. van Rhee, 'The Law's Delay: An Introduction' in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, C.H. van Rhee (ed), Intersentia, Antwerp 2004, p. 1.

11 P.M. Langbroek and M. Fabri '*Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*', Council of Europe, Committee on the Efficiency of Justice, 2003, p. 4.

1.3. *Concept for a thesis*

Unreasonable delays, though difficult to define, have always been a problem and are still regarded as such according to van Rhee.[12] The question dealt with next to definition is how to tackle them. Van Rhee points out that

> 'Various measures have been suggested over the centuries to fight delay. Some of them aim at preventing litigation altogether.'[13]

However, in looking at the factors named in contributing to unreasonable delays, they can be summarised into: 'actors involved in … litigation, court organisation and budget'.[14]

The title for this thesis is 'Quality of Judicial Organisation and Checks and Balances'. When I first read the proposal for this thesis, I was shocked. It talked about applying quality theories and standards to court organisations, and indeed as a legal academic my first thought was geared towards the protection of judicial independence. In such a professional bureaucracy, the professionals themselves control quality, either through appeals or through collegiate hearings. The thought of applying organisational solutions through applying quality standards and management to the courts had not occurred in the Woolf Report, for example. Many procedural changes were recommended in that report. In reading van Rhee's piece, he also recommended alternative solutions to the problem of undue delay. Even when he referred to court organisation, it did not refer to judicial administration, and his solution to organisational problems was to invest more resources in the courts.

This thesis looks at whether it is possible to for judges to work in an organisation that is not defined as a professional bureaucracy. It looks at whether the organisational autonomy enjoyed by judges is connected to the judicial independence of decision-making. Can a judicial organisation be subject to the same principles of management and governance within the constitutional framework? Can organisational solutions of quality theories help the judicial organisation face the problems of growing unreasonable delays, and consequent legitimacy problems of transparency and accountability? Whilst the reasonable delay clause of article 6(1) European Convention on Human Rights provides a legal impetus for change, quality of justice also considers questions of service quality, the comportment of judges, and the transparency of the organisation. The remainder of this PhD thesis will be dedicated to addressing these issues.

12 C.H. van Rhee, 'The Law's Delay: An Introduction' in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, C.H. van Rhee (ed), Intersentia, Antwerp 2004, p. 3.

13 Ibid., p. 18-20.

14 Ibid., p. 6-17, see also P.M. Langbroek and M. Fabri '*Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*', Council of Europe, Committee on the Efficiency of Justice, 2003, p. 4-7.

Chapter 2

2. From constitutional theory to quality norms: A theoretical framework

2.1. Introduction

Mechanisms of accountability are pivotal to a good working democracy. These are in order to ensure that no one body, be it a state institution, a private organisation or person, has power to dictate the lives of the communities they serve without justification based on the rule of law.[1] There are two ways to hold an organisation to account for its actions.[2] One is where the citizens are passive, whereby the organisation must take steps to ensure the transparency of decision-making and service provision. The other requires action by citizens in their capacity as clients of public services, where they have the right to demand answers for actions taken (maybe in a court of law or through an internal complaints mechanism) and to demand the stopping of such actions.[3]

It is easier to create mechanisms of accountability for private organisations, for they have to survive in a market economy, in which customers can choose whether or not to use the services or buy the products.[4] Given the laws on monopolies and oligopolies for Europe, the US, other free market areas and members of the World Trade Organisation,[5] it is not easy for one company to take over any part of the market. The story is however different for the state, which holds the monopoly over the exercise of the

1 M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund Indianapolis 1998, p. 3; P Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, ch. 9; U. Rosenthal 'Macht en controle op de macht: de dringende behoefte aan publieke controle', *Nederlands Juristenblad* 2000, vol. 34, p. 1703.

2 M.A.P. Bovens, '*The quest for responsibility, accountability and citizenship in complex organisations*', Cambridge University Press 1998, ch. 3.

3 For more on the concept of participation see: P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 314-318.

4 P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, (eds), 2000, p. 96-98.

5 See for example: J.H Jackson, '*The World Trading System: law and policy of international economic relations*', MIT press Cambridge, Massachusets 1997.

power of governance. Vile has chartered the evolution of democratic political accountability for state institutions from before the French Revolution, when the separation of powers within a democracy was merely ideas on paper, up to modern times, where there are demands for greater accountability of government action, beyond the legitimacy of the franchise.[6] Selznick has emphasized in his work that mechanisms of accountability must be more sophisticated in order to turn a basic organisation, a bureaucracy aimed at providing specific services within a strict framework of rules and nothing more, into an active and responsive part of the community. Post,[7] in his work, discusses the relationship between community, democracy and management, seeking to find a way for the survival of community values in a society oriented towards efficiency and effectiveness. Hasenfeld maps out theories about human service organisations, and how to operate them with efficiency and effectiveness, whilst being closer to the people they serve.[8]

The main difference between theories for private organisations and theories for public ones is that public organisations act within a framework of duty. They have been mandated on a democratic basis, and are thus legitimated to provide services, such as health care, education, communications networks, justice and so on, to society. Nowadays citizens vote for a certain political manifesto on social, political and economic issues, and expect that such manifestos be fulfilled through legislation (by parliament), administration, and that the law is upheld by the judiciary. In many countries, this expectation is further enforced by a written constitution (which provides a basic minimum expectation of behaviour from the state towards the citizen).

Previous to the 1980s, it was sufficient, for both legal and organisation theory, that bureaucracy fulfilled these tasks. The Weberian system of organising actions of the state and checks and balances within the constitution was sufficient.[9] After the 1980s however, there was a greater demand, from taxpayers and voters, that the state be operated more efficiently and less at the expense (both emotional and financial) of the people. Van Gunsteren describes three ways in which this demand was to be evaluated in a study conducted in the 1980s:

> 'In our first category of cases the focus is primarily on the individual civil servant's actions and only secondarily on the conditions (organizational, political, cultural, constitutional, etc.) that make such actions possible. In the second category the focus is primarily on the actions, official and unofficial, of (parts of) the state or its apparatuses, and only secondarily on the individual civil servant's contribution that helps to make such actions possible.

6 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector : the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, p. 266.

7 R. Post, '*Constitutional domains: Democracy, community and management*', Harvard University Press Cambridge, Massachusetts 1995.

8 Y. Hasenfeld, '*Human Service Organizations*', Prentice Hall Inc. Englewood Cliffs, N.J. 1983, ch. 2.

9 Ibid., ch. 2.

> A third category of complaints concerns bureaucratic ineffectiveness and inefficiency. Since it's bureaucracy as a whole that is being condemned it is difficult to understand to whom the ethical accusations are directed. That they are of an ethical nature cannot be doubted. 'Look at what 'they' are doing with our money and with the constitutional authority that was entrusted to them'[10]

From this perspective users and policy makers see bureaucracy as an old and monstrous machine, with much red tape, and in need of much repair. Furthermore, it was often impossible for people to know who was responsible for what, which made having to go to the state with their issues time-consuming and frustrating. This made the state distant from and non-transparent to the people.[11] In the 1980s, there was a wave of privatisation initiatives in Western governments based on liberal-economic theories from the Chicago school of economics, which stated the idea that since private organisations operate more efficiently as they are profit-oriented, and supply services only as demanded, the state should also organise itself based on a similar philosophy.[12] This led to a proliferation of semi-private organisations providing public services, which, whilst increasing the efficiency of the provision of state services, and which may or may not have increased effectiveness, at the same time decreased transparency.[13] Even though private organisations took over some of the tasks of public bureaucracies in certain respects, the public still did not know who was responsible for doing what.[14] Ministers and government could no longer be held to account for the way that public services were managed, but neither could managers of these private organisations be held entirely politically accountable for the decisions that were taken.

Towards the end of the 1980s and the beginning of the 1990s theories of new public management were espoused. New public management stemmed from ideas about quality organisations, learning organisations and quality indicators from organisation theories.[15] Theories about quality in organisations have as their impetus the idea that not only should an organisation be able to fulfil its tasks in an efficient and effective

10 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis' in *Guidance, control, and evaluation in the public sector : the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, p. 267.

11 Ibid., p. 266.

12 William Frazer, '*The legacy of Keynes and Friedman*', Praeger Publisher Text Westport, Conneticut 1994.

13 L.F.M. Verhey and T. Zwart (eds), '*Agencies in European and comparative perspective*', Intersentia, Antwerp 2003, p. 1.

14 D. Woodhouse, 'The reconstruction of constitutional accountability', *Public Law* 2002, p. 73.

15 J-E. Lane, '*New Public Management*', Routledge London 2000; A. Hondeghem (ed). '*Ethics and accountability in a context of governance and new public management*', IOS Press Ohmsha, Amsterdam 1998 ; P. Senge, '*The fifth discipline: the art and practice of the learning organisation*', Doubleday currency, New York 1990; S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press Buckingham, Philadelphia 1994; W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997.

manner, but it should also be customer or client-oriented.[16] The organisation should adapt to the needs of the client, in terms of the quality of the service or product. Additionally, it should be available to account for the quality of the service or product. Finally, service attitude should be one of respect, and one to make the client feel that she/he would be welcome back. The general idea behind this movement is that quality in services and products will lead to satisfaction of the clients/customers/citizens.[17] It has been suggested that such satisfaction could in turn lead to public trust.[18] For private organisations such satisfaction could lead to the creation of long-term loyalty in the use or purchase of products. For state institutions such satisfaction could lead to legitimacy of government.[19] Examples of quality innovations in the state organisations towards the citizen include creating citizen charters, which state explicitly the goals of the organisation and what citizens can expect in terms of service attitudes and results of the organisation.

New public management is an ongoing development. The process not only assists public services in adapting to the needs of the customer/client/citizen, but also re-orients the public services to reorganise their technologies towards such an adaptation. This is especially through the use of information technology, different management methods, and by creating a working environment conducive to productivity. Therefore quality measures in new public management give an impulse not only to improve the organisation internally, but also externally.[20]

Selznick has described these developments as a 'shift in governance'. The movement from the traditional bureaucratic method of doing things to the newer methods, according to him, is a necessary condition for an organisation to evolve from being a basic organisation, to being an institution, to being a part of the community. Institutionalisation is associated with the operation of values and the forming of groups and practices. Institutions are more than the pieces of paper that declare them to be institutions. They stem from the 'fabric of social life'.[21] The shift from being a group or practice into an institution has been described as developing:

> '…through growth and adaptation, it takes on a distinctive character or function, becomes a receptacle of vested interests, or is charged with meaning as a vehicle of personal satisfaction or aspiration. A developed institution is not

16 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P. M. Langbroek, K. Lahuis and J. B. J. M. ten Berge (eds), W.E.J. Tjeenk Willink (G.J. Wiarda Instituut) Deventer 1998, p. 29.

17 EFQM '*Mission*' http://www.efqm.org/Default.aspx?tabid=60.

18 G. Bouckaert and S. van de Walle, *Government and trust in government*, at EGPA Conference Finland 2001.

19 Ibid.

20 P. Senge, '*The fifth discipline: the art and practice of the learning organisation*', Doubleday currency New York 1990, ch. 17; W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration Florida 1997, p. 93-100.

21 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 232-233.

> readily limited to narrowly defined goals. It is valued for the special place it holds in a larger social system. Institutions endure because persons, groups, or communities have a stake in their continued existence.'[22]

Survival is the key issue for ***all*** organisations, be they public or private.[23] In both sectors, moves have been made to legitimise their existence by focusing on the customers and users alongside their own profits or goals. They have attempted to incorporate the values of the community into their own and by doing so, steadily become a more legitimate part of that community.

This thesis looks at the moves of the judiciaries in both the Netherlands and France not only to survive, but also to become again effective institutions of their societies and communities. On the one hand, it is necessary to look at the constitutional theory that forms the basic normative framework for the operation of judiciaries in these two countries. On the other hand, it is also necessary to develop a theoretical framework on quality organisation and norms in connection with the constitutional ones. Whilst these two theories are central to this thesis, a third one, that of legitimacy will form the bridge between them. This third theory shows the nature of the gaps in constitutional theory on the one hand, and on the other, opens the possibilities for quality criteria and norms to fill the legitimacy gap.

2.2. *Constitutional theory*

2.2.1. Separation of powers and checks and balances

Quality policies have only in the late 1990s and early 2000s been introduced to the judiciary.[24] Due to the separation of powers, and the way in which accountability is organised for the judiciary, judicial independence is a very strong institutional value in abstract academic theory. Judges are set apart as impartial and independent in constitutional theory to offset unjust laws being passed or unjust actions by government and administration. On the one hand there are mechanisms to protect judicial independence by protecting judges legal status, for example through independent and transparent appointments, personnel policy,[25] and salary. On the other hand, there are

22 Ibid., p. 233.

23 N.Z. Mayer and P.D. Wallace, 'From evangelism to general service: The transformation of the YMCA', in *Qualitative studies of organisations*, J. van Maanen (eds), Sage Publications, Thousand Oaks, California 1998, ch. 9, p. 223.

24 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (G.J. Wiarda Instituut) Deventer 1998; P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, 2000; M Fabri, P.M Langbroek and H. Pauliat (eds), '*The administraiton of justice in Europe: Towards the development of quality standards*', Lo Scarabeo, Bologna 2003.

25 P. Albers and W. Voermans '*Councils for the Judiciary in EU Countries*', Council of Europe, Strasbourg 2004.

also laws to protect the function of the judge from retribution (physical or otherwise) from the other state powers and from the parties that seek before the courts.

The general role set out for them in the theory is to protect the citizen from arbitrary action, and to that end, some judicial accountability is also set out in constitutional theory. Such accountability finds its forms classically in public hearings, publication of judgements and the possibility to appeal against a judgement to a separate and higher instance.[26] More stringent forms of accountability of judges are usually found in disciplinary procedures and ethical codes of practice.[27]

Constitutional theory has been engineered so that each power of the state is operated within the rule of law, independently from each other (to a certain extent) with a view to protecting the human rights of the citizens. The separation of powers is about institutional and theoretical separation of powers between the legislative, executive and judicial powers in order to ensure that power is not concentrated in one place. According to Vile an element

> '… in the doctrine is the idea that if the recommendations with regard to agencies, functions, and persons are followed then each branch of the government will act as a check to the exercise of arbitrary power by the others, and that each branch, because it is restricted to the exercise of its own function will be unable to exercise an undue control or influence over the others… it is just here that the greatest theoretical difficulty is to be found. The theory does not indicate how an agency, or the group of persons who wields its authority, are to be restrained if they do attempt to exercise power improperly by encroaching upon the functions of another branch.'[28]

Therefore, in order to maintain the separation of powers, checks and balances must exist.[29] Following Vile's line of thought:

> '…theories were used to import the idea of a set of **positive** checks to the exercise of power into the doctrine of the separation of powers. That is to say that each branch was given the power to exercise a degree of **direct** control over

26 P.M Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 406.

27 For the Dutch example, chapter 4 Constitutional law and practices, section 4.3 Judicial Independence and Integrity. For the French example see chapter 10 Constitutional law and practices, section 10.3.3. Judicial Independence and Integrity.

28 M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund Indianapolis 1998, p. 19.

29 Ibid.; J. Madison, A .Hamilton and J. Jay, '*The federalist papers: A collection of essays written in support of the constitution of the United States: from the original papers of Alexander Hamilton, James Madison, and John Jay*', Doubleday New York 1966; K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate publishing Aldershot, Dartmouth 1999; P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001; R. Stevens 'A loss of innocence? Judicial independence and the separation of powers', *Oxford Journal of Legal Studies* 1999, vol. Autumn, p. 365-402; C.J.H. Brunner 'De rechterlijke macht en de ministerie van justitie', *Nederlands Juristenblad* 2001, vol. 24.

the others by authorizing it to play a part, although only a limited part, in the exercise of other's functions.'[30]

In most democratic countries one will find legislative competences shared (often strictly) between the legislature and executive branches of the state, with parliament at anytime being able to check government power. Where a written constitution allows, the judiciary is given the power to nullify legislation if it is felt to be against rights set out in the constitution (as with the American or French constitution), or if it is felt that the relevant power did not have the right to make a certain type of law (as with the European Union or Germany). All democratic countries will allow citizens legal recourse to the courts for judicial review of government decisions.

However, the judicial institution has no democratic mandate as with the legislative and executive branches of the state (unless election procedures are used, which is rare in most democracies[31]), and yet the judiciary possesses a great deal of law and decision-making power over people's lives. In theory, Montesquieu never meant for the judiciary to actually have a role in the separation of powers beyond being a mouthpiece of the law. Therefore, a democratic mandate may not have seemed necessary. The next section aims at providing a framework of legitimacy for the judiciary to correct this democratic gap.

2.2.2. The new judiciary[32]

In a report from the WRR[33] about the future of the rechtsstaat[34] in the Netherlands, it was recognised that due to increasing globalisation the judiciary would have a growing role to play in dealing with norms and rules from international treaties. With an increase in cross-border crime, the difficulty of public policy to reduce national crimes even; with more individuals demanding their rights be fulfilled; with increased activities of government in general, the courts have an ever-increasing role in society.

Accountability for the judiciary has been mostly organised around constitutional principles of the separation of powers. The judiciary, according to Montesquieu, is the mouthpiece of the law. Judges state what the law is in any given situation to resolve a dispute, be it in civil, criminal or public law.[35] Whilst Parliament and Government

30 M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund Indianapolis 1998, p. 19-20.

31 See for example the election procedures of judges in certain states of the United States of America: A. Hanssen 'Independent courts and administrative agencies', *Journal of law, economics and organisation* 2000, vol. 16.

32 Taken from the title of the book: K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing Aldershot, Dartmouth 1999.

33 WRR, '*De toekomst van de nationale rechtsstaat*', Wetenschappelijk Raad voor het Regeringsbeleid, The Hague 2002.

34 The rechtsstaat is a mainly German notion that goes to engineering and structuring the state and its organisations, carefully setting out all competences, trying to leave little room for error, see P.M. Langbroek, 'Developing a Public Administration Perspective on Judicial Systems in Europe', in *The Challenge of Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha Amsterdam 2000, p. 15.

35 M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund Indianapolis 1998, p. 95.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

have a tendency to consult interested parties in making laws or decisions, the judiciary has to deal, in the private and public domain, with the consequences of those laws and decisions for those affected by them. Two principles are therefore most important when dealing with accountability for the judiciary: Judicial independence and impartiality.[36]

Judicial independence is the key check against the other powers of the state. To that end, one can identify independence in the training of the judiciary, independence in the appointments system, protection from arbitrary dismissal (in fact, judges cannot be removed from office unless they die or are proven to have committed a crime).[37] Independence can also mean that judicial decision-making should not be interfered with in any way by the legislature or executive, especially where either have a stake in the case, and should be based upon the rule of law.[38]

Second to this is the concept of impartiality, which means that the judge should not show bias in any case. In order to protect the rights of both parties before them, judges should always declare any special interest (economic or otherwise) in the case and declare him/herself unfit to judge the case.[39] The principle of impartiality also means the protection of judges from corruption, coercion and physical threats of violence in retaliation for judgements made. This is worked out in the principle of a fair trial,[40] in which the parties (including judges, litigants, barristers and clerical staff) are protected from accusation of corruption and foul play by rules of due process (if followed properly).

Fair trial also encompasses the law of due process, and the possibility of an appeal to a higher court. The right of appeal to a higher court ensures that law is applied evenly and therefore justly throughout a system. It is also a method to make judges at all levels accountable for their judgements.[41] All hearings must be held in public, unless there is a security or civil liberties reason to hold them *in camera*.[42]

Due process enforces certainty and transparency in the way in which civil servants deal with people, even though certain situations require discretionary discrimination. Due process should however be distinguished from procedural rules they are attached

36 P.M. Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 406.

37 See the constitutional texts of various democratic countries.

38 P.M. Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 406.

39 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate publishing Aldershot, Dartmouth 1999.

40 It has also been brought to my attention that criminal law is used in the Netherlands to guarantee a fair trial and the rules of due process are not the only way to protect independence and impartiality. My thanks to Dr. Oswald Jansen for his comments.

41 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing Aldershot, Dartmouth 1999, p. 72; M.F.J.M. de Werd, 'De openbare uitspraak', *Nederlands Juristenblad* 2001 vol. 2, p. 67, p. 67-74; M. Fabri and P.M. Langbroek (eds), '*The challenge of change for judicial systems, developing a public administration perspective*', IOS Press Ohmsha, Amsterdam, Washington 2000, p. 17.

42 For example, where there are children/minors involved in horrific crimes, or a case of national security is involved.

to per se, as very often, procedural rules can be complicated and set out in such a way that they are non-transparent and uncertain.

However, these forms of accountability are mainly to protect the human right of fair trial (found also in article 6 of the European Convention on Human Rights), and have been deemed inadequate to hold the judiciary as a whole to account for its exercise of power.[43] Malleson's main complaint is that initiatives to develop more elaborate mechanisms of accountability for the judiciary have been limited by judicial independence. The effect of this has been to keep the judiciary insulated from forms of accountability which apply to other public bodies and services (such as new public management and accountability for efficiency and effectiveness, accountability to parliament and so forth). According to her, the main roles of accountability are to explain, legitimate and justify decisions made (for all activities of the judiciary) at the same time as being able to make amends where the decision has caused harm or injustice.[44] She describes two sorts of accountability: hard political accountability and soft accountability.

Hard political accountability, such as removal from office, accountability towards the legislative body, and civil or criminal liability for damage done as a result of a decision, is not applicable to the judiciary because of the principle of judicial independence. This position has been traditionally defended by the fact that court proceedings have an open nature; that there is a structured appeal process; and that judgements are public and reasoned according to the law. Reference to Langbroek can add to this list: the quality of training and capacity of judges, the competence of the courts to apply procedures from registration to judgment, the possibility of professional commentary on the decisions, and, finally, the communication between the formal legislators, courts and the assessors of the decisions.[45] However, this position has been criticised as not properly incorporating aspects of external accountability. Another criticism is that the lines of accountability for the overall running of the judiciary are unclear to the public that they serve. Processes, especially for the appointments system, and the budget system, are controlled by the judges themselves, which make them unaccountable to the public.

Soft accountability on the other hand, deals with openness, and representation.[46] This type of accountability demands procedural transparency at the same time as sensitivity towards different interests and a changing social environment. This is a two-way process whereby courts must be more explicit with the community, at the same time as being more responsive towards their values and needs (social accountability). The concept of soft accountability has been developed to fill the deficit left by not being accountable in a hard political way.

43 M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund Indianapolis 1998, p. 383-384, K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing Aldershot, Dartmouth 1999 .

44 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing Aldershot, Dartmouth 1999, ch. 3.

45 P.M. Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 406.

46 Ibid., p. 408.

Openness can serve as a function of accountability, if it is treated as being more than simply stating formal decisions to a forum in which people already have access. Openness demands that decision-makers engage with the community they serve, either directly or via the media, in a way that does not compromise impartiality in any given case. Langbroek has also made the distinction between what he calls 'publieke verantwoordelijkheid'- public responsibility- (Malleson's terms: soft accountability) and 'politieke verantwoordelijkheid'-political responsibility- (hard accountability). For him, political responsibility is connected to the democratic state institutions. The responsibility of elected authorities goes hand in hand with working openly, which can lead to further public debate. At the end of the day, these people can be held to account because they are supposed to be representative. Political responsibility is the last resort for a system where public trust will be enforced by the good functioning of elected bodies and supportive services. In other words, public responsibility is implicit in political responsibility.[47]

Malleson further criticises the traditional school, which states that disengagement from society is necessary for reinforcing judicial independence. The idea that justice is blind is no longer feasible in today's society, which frowns upon racial, religious, gender and age discrimination. To that end, society requires that public servants (including judges) are not biased or have known prejudices. Knowledge and understanding of the social environment in which the law is expected to operate is also expected of judges.

Malleson identifies various other factors, which have increased the demand for accountability. Firstly, there is a general political move to enhance the position of the public as 'consumers' of public services, such as citizens' charters, increasingly open complaints processes, and laws opening up access to information. Secondly, there is a greater public pressure for increased representation of decision-makers. Thirdly, with an increased political role and scope of power in general for the judiciary, there has been a corresponding increase in public scrutiny of the views and background of judges, and a closer look at the quality of decisions. Lastly, the increased spending power of the courts has not come with political accountability for that spending, and concerns are expressed by the taxpayer as to how the money is spent, and whether it is used efficiently and to make an effective judiciary.

In this sense, Langbroek's public responsibility (soft accountability) is instrumental in achieving the political responsibility (hard accountability) of justice. This, according to him, should be restricted, because of judicial independence, to organisational conditions for an efficient and effective delivery of justice. From this distinction, public responsibility for justice goes not only to organisational conditions but also to the judgements themselves, whereas political responsibility would only be for the organisational conditions. Public responsibility for judgements would not be towards the body of elected officials (legislator), i.e. responsibility for judgements would remain within the realm of traditional checks and balances.[48]

47 Ibid., p. 408.

48 Ibid., p. 408.

2.3. *Legitimacy and the judiciary*[49]

It may be argued that as the judiciary has a monopoly over adjudication in criminal and administrative matters (civil if the courts are chosen as a forum for dispute settlement) from the constitution, and is an important check against the other state powers, that legitimacy is a moot point. However, given the inadequacy of mechanisms of accountability and the increasing role of the judiciary in society as described above, the legitimacy of judicial authority is an ever-increasing issue.

The necessity of judicial power within the constitution and for the survival of the rechtsstaat is not in dispute. The WRR report readily admits to the necessity of having a well functioning judiciary to good governance.[50] What is in question, however, is the legitimacy in the way in which the judiciary operates within that framework. Having looked at the position of the judiciary in the constitutional framework, and seeing how the mechanisms of accountability are inadequate, it is time to look at the concept of legitimacy.

Legitimacy in Western democracies finds its voice through the idea of consent. The decision makers in legislatures and governments are very often directly elected, based on party manifestos, party loyalty or both. Selznick, on the point of legitimacy, states as an opening line that,[51] *'authority presumes consent'*. The consent element of legitimacy forms, for the most part, the definition of participation in a democracy.[52] Some construe the franchise as forming the ultimate consent to government policy and legislative action, and therefore legitimising state power and the rule of law.[53] This is a more traditional point of view stemming from past theories about democracy, the rule of law, and Weber's bureaucracy.

However, more modern theories on democracy and organisation speak of a higher level of participation, in which the citizen gets more of a say in whether and how things should be done.[54] The idea is that legitimacy by consent, especially for organisations and public bodies, which have been mandated through the franchise, is no longer enough. Selznick points out that:

49 Parts of this section have been published in: M. Velicogna and G.Y. Ng, 'Legitimacy and Internet in the judiciary: A Lesson from the Italian Courts' Websites Experience', *International Journal of law and information technology,* Oxford Journals, Oxford University Press 2006.

50 WRR, '*De toekomst van de nationale rechtsstaat*', Wetenschappelijk Raad voor het Regeringsbeleid, The Hague 2002.

51 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 267.

52 R. Post, '*Constitutional domains: Democracy, community and management*', Harvard University Press Cambridge, Massachusetts 1995, p. 286.

53 A.V. Dicey, '*Introduction to the study of the law of the constitution*', Liberty Fund Indianapolis 1982, p. 17.

54 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector : the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, p. 266.

> 'Legitimacy is primitive when it speaks only of the gross justification of a claim to authority'[55]

The fact that judicial power is mandated by the constitution set up by the people and for the people cannot, from Selznick's point of view, *'sustain justification'* of the use of judicial authority.[56] The system of operation for both the judiciary and judges may have been legitimate 150 years ago at the conception of democracy. However, society has changed in all countries in terms of demographic make-up, the ethnic make-up of a country, and the class structures, thereby changing values and the nature of those who use the courts. The courts must be able to legitimate the exercise of their authority under the changed conditions, to their users, not only through reasoning and transparency of decision making, but by showing true social empathy, and not simply interpreting the letter of the law without considering the context and consequences of their judgements. For this one must look to who is responsible for the running of the judiciary and check that the basis of its operation is according to a modern interpretation of the constitution, and that it reflects the needs of the society it serves. Whilst ***accountability*** mechanisms are needed to maintain the basis for legitimacy, they are not the only tools used.

Representativeness in justice is important so that one class of society does not feel dominated and forced to live by another's values. This means that the judiciary should not be seen to represent or be dominated by one single group in society. The ***representativeness*** of the judiciary has been commented upon, and even acted upon in some countries, for example some states in the US elect their judges. There is an ongoing debate about how the representativeness of the judiciary should best be structured. Many believe that, in order to maintain judicial independence and prevent the type of corruption often associated with political elections to parliament (in terms of funding, and 'compromising' on political issues), elections should not be held for judicial offices.[57] There has been a policy towards employing women in the judiciary in England & Wales over the last twenty years, whilst many countries in Europe already have a female-dominated judiciary (such as in the Netherlands, Austria and Romania[58]). Magistrates (justices of the peace) in England & Wales are taken solely from local communities and drawn from across the ethnic and professional spectrum, so that they can use their knowledge and experience of the local community to make judgements.[59]

55 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 272.

56 Ibid., p. 273.

57 A. Hanssen, 'Independent courts and administrative agencies', *Journal of law, economics and organisation*, 2000, vol. 16.

58 M. Fabri, J-P. Jean, P.M. Langbroek and H. Pauliat (eds), '*L'administration de la justice en Europe et l'évaluation de sa qualité*', Montchrestien, Paris 2005, and M. Fabri, P.M. Langbroek and H. Pauliat (eds), '*The administraiton of justice in Europe: Towards the development of quality standards*', Lo Scarabeo, Bologna 2003.

59 F. Gibb, 'Magistrates will be packed off to vast justice factories in large urban centres', in *The Times*, July 02, 2002, and J. Killah, 'In the past nine years, 110 local courts have shut', in *The Times*, July 02, 2002.

In the US, the Supreme Court of Justice is made up of judges appointed on a political basis, and much depends on which party has a majority in congress.[60] The letter of the law as interpreted by judges would be accepted as being legitimate if they were interpreted in light of the conflict and environment in which they were bought to the court.

Selznick further points out that legitimacy is directly linked to the principle of ***legality*** (rule of law) based on the idea that official acts should be justified

> 'For reasons invite evaluation, and evaluation encourages a quest for objective standards of accountability. At the same time, implicit in the fundamental norm that reasons should be given is the conclusion that where reasons are defective, authority is to that extent weakened and may even be destroyed'.[61]

This speaks to the idea that legitimacy of state power can only work if the citizen is free to challenge that power within the rule of law, and if the judicial power is receptive and responsive to such challenges (i.e. making it possible and feasible to challenge decisions in an independent court of law, and creating an effective complaints mechanism in which realistic steps are taken to correct an unjust decision or the treatment of cases within a reasonable time).

Attached to this is the question of competence. The judiciary is responsible for the interpretation and hence development of the law, in a given situation. Most law comes from parliament (as in the UK), codes of civil and criminal law (Continental European law), or have been well developed by courts of law. In modern times, parliaments legislate on a wide range of issues, but cannot do so for all issues. When it occurs that parliament has not legislated upon an issue of conflict in court, the court has two choices: to adjudicate on the matter and develop a principle if they can find a law under which to adjudicate, no matter how vague that law is; or exercise judicial restraint, deeming the issue too political to touch. In the Netherlands, for example, the courts developed the law of euthanasia from principles found within the criminal code on murder in 2001. Until that time, the Dutch parliament had not approached this difficult issue. After a series of court cases in the Netherlands, and the concern it caused with the public, they decided to simply codify the judgement of the courts. An example of judicial restraint can be found in the field of recognition of same-sex relationships, where the judiciary has been very reluctant to step on the toes of legislative power. In a number of decision, the courts have said that this would be a task for Parliament and is not a task for the judiciary.[62]

60 D.S. Rutkus, '*Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*', Congressional Research Service, Washington DC 2005.

61 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 272.

62 I. Curry-Sumner, 'It's marriage Jim, but not as we know it! The differences between civil partnership and marriage. Is the ban on same-sex marriage still justified?', *Irish Journal of Family Law* 2006, vol. 41, p. 2-10.

Further to this, the principles of transparency and certainty of decision-making have been developed to fulfil the expectations that consent carries with it (i.e. fairness and equity of decision making). March and Olsen point out that

> 'Legitimacy is established by showing that the decisions accomplish appropriate objectives or by showing that they are made in appropriate ways.'[63]

Next to the idea of open procedures of decision-making, information should be easily and quickly accessible, both before and after the decision is taken. Information should also be free about the fulfilling of obligations of the state, and the how and why of actions explained. Within theory up until the 1980s, these principles applied to official functions only. For example, within the judiciary, transparency of decision-making is reflected through procedural laws and the open nature of proceedings, and certainty is to a limited extent guaranteed through the publication and possibility of appeal against judgements of the court. Transparency and certainty have not applied to the organisational functioning of state institutions, for example in spending. Increased accessibility to information would make it possible and easier for wider participation from society.

2.4. Organisation and the judiciary

Thus far, legitimacy of the judiciary has been based on a mixture of accountability, representativeness, legality, and transparency. It has been shown that consent is insufficient to fully legitimate power in general. The other elements of legitimacy, however, require the citizens to be passive (except where they can challenge the legitimacy of certain decisions), whereby the accountability, legality and measures of transparency of the judiciary are sufficient to legitimise their power towards the public.

However, within the organisation of the judiciary, the citizen can have a greater scope for participation as long as it stays within the framework of the principle that judges must remain independent and impartial and does not influence the outcome of cases for either party. Such participation could include being able to complain about comportment, or being able to complain about the speed of the process and so on. Van Gunsteren has described this as being *'couched in ethical terms'*.[64] On the one hand this

> '… poses an acute problem for the responsible and democratically minded civil servant [who] knows from experience that systematic bureaucratic responses to precisely such messages are notoriously inadequate.'[65]

63 J.G. March and P.O. Olsen, '*Rediscovering institutions, the organizational basis of politics*', Free press (division of Macmillan Inc. NY, Collier Macmillan Publishers London) 1989, p. 49-50.

64 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector: the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, see p. 266.

65 Ibid., p. 266.

On the other hand it means that the citizen has little say in the way the litigation process goes (i.e. speed, comportment of the staff of the court, the service of the court and the accessibility thereto) and pays much in financial and emotional terms to that process. This makes the accountability mechanism of the judiciary inadequate; especially as the judiciary is not directly accountable to those they are in contact with everyday.

Due to the manner in which procedural law was set out to reflect Weberian principles of transparency, certainty and compliance with clear steps, the judicial organisation was set up to deal with procedural law in a way that was conducive to these principles. Weber surmised that the power relationship between the ruler and the ruled should be based upon the rule of law (*legal authority/rechtstaat*). To Weber, people accept authority because it is exercised in a manner which is fair and equitable according to them and the authority (legitimacy). The organisation of such a legal-rational authority is for him therefore the bureaucracy, which is

> '…derived from legal-rational rules and the pursuit of maximum efficiency'.[66]

Whilst most organisations of the greater part of the 20th century have been based on the bureaucratic system of doing things, Weber's theory failed to reflect the true nature of organisations (although it was not his intention to reflect the truth), and organisations failed to take into account the theory's setbacks. As such, the attempt to comply with the pure bureaucratic structures led to problems with the functioning of organisations, such as red tape, a narrow view of bureaucrats as having little imagination in solving problems, the non-solving of problems, and no clear lines of responsibility and accountability.[67]

Selznick has also questioned the moral worth of bureaucracy.[68] He argues that redirecting bureaucratic organisations towards effective criticism and participation is hindered by its rigid nature. It must be remembered that, for Weber, the bureaucracy was the purest form of legal authority.[69] For Weber, efficiency and effectiveness were not the core values of his theory. Selznick deduced that the true lesson to be had from Weber's theory is that

> 'Bureaucratic organization is most useful when **values**, as distinct from **purposes**, are of uppermost concern'.[70]

66 Y. Hasenfeld, '*Human Service Organizations*', Prentice Hall Inc. Englewood Cliffs, N.J. 1983, p. 14-18.

67 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector: the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, p. 266-267.

68 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 273.

69 Ibid., p. 277.

70 Ibid., p. 279.

Selznick identifies a twofold source of criticism towards the way accountability is organised in a bureaucratic organisation. From a technocratic point of view, bureaucracy obstructs the 'rational pursuit of administrative goals'.[71] This could be viewed through the dichotomous relationship of professionals in organisations.[72] Moral criticism looks more at bureaucracy as 'domination', threatening freedom and democracy. The most dominating aspect of such organisations is that they produce a 'people processing culture in which persons are treated as administrative objects and their special needs and circumstances are ignored'.[73] This limits the aspect of free participation in decision-making.

Court organisations easily fell into a bureaucratic system of working and easily divided labour within the organisation based on rules of procedure.[74] However, they came across problems when they started to see a steady rise in caseload and increased complexity of law without being able to deal with the cases organisationally. This has meant backlogs, uncertainty in the law, failures to enforce the law effectively and general inefficiency in the organisation. These organisational problems lead to a problem of access to justice by people in society.[75]

In this, the judiciary fails in achieving its goals as set out in constitution theory. On the one hand, judiciaries are not accountable for the effectiveness and efficiency of their organisation, and for the fact that people are not having their cases solved quickly enough to have any bearing on their problem. On the other hand, they are also not accountable for the uncertainty in law that the situation can cause. If the judiciary is not close to the people they serve, the situation creates a larger legitimacy gap for them.

In sum therefore, one can identify at this point that the traditional forms of accountability, as set out in the theory of separation of powers, is inadequate for modern demands on the judiciary. Additionally, the way that judiciaries are traditionally organised, i.e. bureaucratically, does not fulfil enough criteria in terms of the theory of legitimacy: it is not representative of the people; it does not operate transparently; and because it does not operate transparently, one cannot be sure that the principle of legality is protected.

According to Langbroek, certain organisational and societal developments that have brought the courts into closer contact with policy makers and society itself, have meant that the functioning of justice cannot rely upon traditional legal dogmatism, legal academic commentary, legislative proposals and laws. A discipline of judicial organisa-

71 Ibid., p. 284.

72 M.E. Guy, '*Professionals in organizations, debunking a myth*', Praeger Publishers, New York 1985.

73 P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press Berkley, California 1992, p. 286.

74 H. Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design', *Management Science* 1980, vol. 26, p. 333.

75 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 21.

tion is needed to identify and implement quality standards in judicial organisation and in justice.[76]

As noted earlier, new public management theories and quality management have been the basis for organisational change in public administration internationally, but have only been introduced to the judiciary and organisational policies in the late 1990s and early 2000s. The next section will therefore outline the quality theories and management currently in the literature. After that will come the problem question of this thesis, which will combine the three theories: constitutional, legitimacy and quality.

2.5. *Quality theory*

2.5.1. *Quality organisations*

This leads to more modern ideas for organisation theory, especially quality management and indicators and treating participants (both external and internal) as consumers. The basis for legitimacy in such theories shifts from consent to ***active participation***. This requires greater involvement by all actors of an organisation to act together, for the benefit of the organisation, and its goals. This ultimately benefits the participants (internal and external) as well.

The focus of such organisation theories is to create organisations in which power is shared horizontally as well as vertically. Verticality in organisations is inevitable, if only to know who is ultimately responsible for an organisation. Horizontality in an organisation emphasises that all participants share the responsibility for the quality of services and products of an organisation (including consumers).[77] Organisations should, theoretically, continuously learn, and therefore grow based on constant developments in technology, and changing quality perceptions from participators, thereby inducing satisfaction in services, and a possible amount of loyalty.[78]

These new quality theories for organisations originated from Japan. These theories were focussed on the **survival** of private organisations in light of the rebuilding of a shattered postwar Japan. These theories, throughout the 1980s and 1990s, have been in turn developed for public institutions and organisations, which have been perceived by the public as having a democratic deficit, through New Public Management. The judiciary was exempt previous to the late 1990s from most of these new initiatives in New Public Management because of judicial independence.

Quality theories have come in various shapes and sizes, starting with a list of attainable goals by an organisation to help not only increase efficiency and productivity, but also to improve the quality of the service or product to the satisfaction of clients

76 P.M Langbroek, 'Naar een rechtsplegingskunde', *Trema* 1995, p. 327.

77 W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997, p. 20; S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press Buckingham, Philadelphia 1994, p. 4-8; P. Senge, '*The fifth discipline: the art and practice of the learning organisation*', Doubleday currency New York 1990, p. 277.

78 G. Bouckaert and S. van de Walle, *Government and trust in government*, at EGPA Conference Finland 2001.

and customers. Lindsay and Petrick provide a comprehensive model for service quality:

> '1. **Time** - How much time must a customer wait?
> 2. **Timeliness** - Will a service be performed when promised?
> 3. **Completeness** - Are all items in the order included?
> 4. **Courtesy** - Do front-line employees greet each customer cheerfully and politely?
> 5. **Consistency** - Are services delivered in the same fashion for every customer, and every time for the same customer?
> 6. **Accessibility and convenience** - Is the service easy to obtain?
> 7. **Accuracy** - Is the service performed correctly the first time?
> 8. **Responsiveness** - Can service personnel react quickly and resolve unexpected problems?'[79]

Similar lists exist for manufacturing products.[80] Such lists bring about the concepts of quality control and assurance. Picard makes a distinction in the introduction of his work, which is fundamental to this thesis. For him quality control

> '… relies on inspectors performing both in-process and final inspections to ensure a quality product'.[81]

Whereas

> '… quality assurance refers to a quality program built around a manufacturing process or processes that, when properly controlled by the production work force, will produce a quality product'[82]

This is fundamental to this thesis because it emphasises the responsibility of the organisation in guaranteeing quality, at the same time as ensuring that there is a mechanism of control and hence accountability (top-down and bottom-up approach – horizontality if you will). When an organisation gives product control to one part of the organisation and the administration to another part of the organisation, it compromises the quality of the product of the organisation. The idea behind Picard's concept

79 W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997, p. 55.

80 Ibid., p. 54; L.G. Picard, sr, '*The Fundamentals of quality control*', ASQC Quality Press Milwaukee, Wisconsin 1992, p. 2.

81 L.G. Picard, sr, '*The Fundamentals of quality control*', ASQC Quality Press Milwaukee, Wisconsin 1992, p. xvii (Introduction).

82 Ibid., p. xvii (Introduction); see also: P.M. Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 407.

is that a whole organisation must partake in the quality of its service or product as well as its administration.

However, creating a set of attainable goals, and giving responsibility to the organisation for overall quality means very little unless motivated leadership is installed. This is something that is emphasised by the idea of total quality management.[83] This has been defined as

> '… a people-focused management system that aims at continual increase in customer satisfaction at continually lower cost. TQ is a total system approach (not a separate area or program), and an integral part of high-level strategy. It works horizontally across functions and departments, involving all employees, top to bottom, and extends backwards and forwards to include the supply chain and the customer chain.'[84]

Picard emphasises in his book, the need for management to take initiative and set an example of the way that total quality should operate.[85] Murgatroyd and Morgan give a case study of how total quality management operates within a school setting.[86] Theirs is an interesting story because schools and education, not unlike courts and justice, have many instilled values from participators. What they do emphasise is the implementation of total quality management in an organisation

> '… can only come about from a concerted, integrated and dynamic effort'[87]

This ideology requires constant training and learning within an organisation. Lindsay and Petrick state from the outset that a learning culture needs to be created and cultivated,[88] as does Picard,[89] and Murgatroyd and Morgan give the need for a learning culture a practical setting.[90] Senge goes rather deeper into the learning culture of organisations, emphasising that learning culture is necessary for an organisation to

83 S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press Buckingham, Philadelphia 1994, p. 59-63; W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997, p. 20-22.

84 W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997, p. 54 reference to J. Rampey and H. Roberts, *Perspectives in total quality*, at Total Quality Forum IV Cincinatti, OH 1992.

85 L.G. Picard, sr, '*The Fundamentals of quality control*', ASQC Quality Press Milwaukee, Wisconsin 1992, ch. 3.

86 S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press Buckingham, Philadelphia 1994.

87 Ibid., p. 188.

88 W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997, p. 9.

89 L.G. Picard, sr, '*The Fundamentals of quality control*', ASQC Quality Press Milwaukee, Wisconsin 1992, p. xiii-xiv.

90 S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press Buckingham, Philadelphia 1994.

survive and adapt to innovations in technology, shifts in markets, and changing needs of clients.[91] The learning culture is the most important, and yet the most difficult part of changing an organisation into a quality organisation, as it challenges set structures and mind-sets.[92] The relevant resources and tools must always be available next to the right attitude of management. Without the resources and tools to back up change, people within and without the organisation will become disillusioned and change will fail. The learning culture is also a challenge because, according to van Gunsteren:

> 'Performance evaluation of bureaucratic actions is a good thing – in principle. It is feedback that invites learning. Learning, however, is not always for the better. One may learn to do evil. Thus, a commitment to performance evaluation leaves the question of what it is that is being learned unanswered. Whose voice is being listened to and who is ignored? Which signals, messages, are heeded, which values and routines determine their routing in the bureaucratic system? In terms of what values is the outcome of bureaucratic learning conceived? Do bureaucratic actions, as a result of learning, become more efficient, more adequate, humane, professional, just, democratic?'[93]

Next to quality organisation theories and learning organisation theories, there also exist models of quality, both nationally and internationally. Models of quality, such as the EFQM (European Foundation for Quality) model for quality and excellence, ISO norm, and other agencies for standards, provide a practical resource (mostly information) and methods to achieve a certain standard, giving a minimum standard of excellence to be reached. ISO gives a relatively straightforward definition of standards:

> 'Standards are documented agreements containing technical specifications or other precise criteria to be used consistently as rules, guidelines, or definitions of characteristics, to ensure that materials, products, processes and services are fit for their purpose.'[94]

2.5.2. Quality defined

Quality is a very difficult concept to define. If such is the case, why is it used to describe standards that organisations should try to reach in terms of product and

91 P. Senge, '*The fifth discipline: the art and practice of the learning organisation*', Doubleday currency New York 1990.

92 Ibid., p. 8-9; see: N. Woolsey Biggart, 'The creative-destructive process of Organizational Change: The case of the Post Office', in *Qualitative studies of organizations*, J. van Maanen (ed), Sage Publictions, Thousand Oaks, California 1998.

93 H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector: the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter Berlin 1986, p. 266.

94 ISO, 'www.iso.org'.

service? Pirsig has done much work and philosophising on the concept of quality.[95] The most striking and consistent idea throughout his work is that quality is about care in that one should have the right attitude and be fully involved in what it is one is trying to achieve. For Pirsig, quality is an issue of morality or working ethic if you will. There is always a minimum that can be achieved in what one does, but quality is about achieving the full potential that one is capable of with the resources one has. This philosophy goes to the idea that one can be efficient whilst maintaining the values and principles behind what one does.

Van der Kam states in her thesis that quality is relative and connected to time and space.[96] Based on this idea, she further argues that quality has a dynamic character and cannot therefore be a fixed norm. I would argue, on the other hand, that standards are relative and have a dynamic character as values and principles change over time. As one can see from the definition of standards given by ISO, its dynamic character is reflected in the idea that they are 'documented agreements', which can be updated and changed over time. That goods and services should be 'fit for their purpose' is also a relative term, as purposes of objects can evolve and lapse. The principle advocated by Pirsig, unlike the concept of standards, can work anywhere and at anytime. Therefore, whilst standards may change, quality, based on the idea of achieving maximum standards, will not. This gives rise also to the notion that an organisation, if it follows the quality principle, will be constantly alert, and constantly changing to times, places, and opinions, and hence it will survive longer than organisations that do not follow such principles.

2.6. Quality of the judiciary: Main problem question

2.6.1. Introduction

The judiciary has an ever-expanding role in societies today due to the

> 'dramatic expansion of the legal system and, hence, of the scope of decision-making by judges. Today there is virtually no area of social life totally immune from public regulation, and thus no area which can be excluded from judicial intervention...'[97]

Furthermore, there is an increasing role of the judiciary in the law-making and administrative decision-making processes. This situation has led to questions of legitimacy of judicial decision-making in academic circles, and an examination of the separation of powers from a competence point of view. However, one of the biggest and current problems facing the judiciary is its ability, in each individual country, to respond to the

95 R.M. Pirsig, '*Zen and the art of motorcycle maintenance: an inquiry into values*', Bantam Books, New York 1984; R.M. Pirsig, '*Lila: An inquiry into morals*', Bantam Press, London 1991.

96 E. van der Kam, '*Kwaliteit gewogen, verschillende perspectieven op kwaliteit van civiele rechtspleging*', Boom Juridische Uitgevers, The Hague 2000, p. 11-12.

97 C. Guarnieri and P. Pederzoli, '*The Power of Judges*', Oxford University Press, Oxford 2001, p. 6.

needs of society and demands by the other state powers that the organisation of the judiciary be more efficient.

The need for change has had various organisational impulses, according to ten Berge.[98] On the one hand, the demand for justice has increased in the last 20 years, and the tendencies toward the longer duration of cases, administrative faults, and a lack of teamwork, have also grown. Furthermore, the judicial organisation was not affected by the organisational developments described in the quality organisation section above. This was happening in other public institutions because of a movement towards independence of administration, and less centralised decision-making. In order for institutions and organisations to make their own way independently, the policy for accountability was through quality control.[99]

Ten Berge goes on to summarise problems at that time with the organisation structure of the judicial organisation, such as the dual structure operating within the courts with legal staff, on the one hand, and administrative staff on the other. There was also too much individuality or loyalty to the smallest unit within the organisation. This particular characteristic makes it difficult to implement quality measures effectively for a whole organisation. There is also a lack of leadership within the organisation itself that brings about uncertainty as to the leadership role of the presidents, and administration in general.[100] Langbroek, in answer to this dilemma, recommends a doctrine of control (bewakingsdoctrine), whereby accountability for the organisation is horizontal rather than vertical (going up or down), giving everybody, including judges, some political (hard) and public (soft) accountability.[101]

Additionally, one cannot approach organisation change as if all court organisations are the same. There are other difficulties also with managing the quality of work, which can mean managing judges, which no one appears to want to do because of the professional and independent nature of judges.[102]

The lack of hard political accountability for spending and organisation, i.e. accountability towards parliament, or mandate through elections, and the limits of softer accountability,[103] i.e. the public nature of court proceedings, and the publication of

98 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J. B. J. M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 21-23.

99 Ibid., p. 21-22.

100 Ibid., p. 23-25.

101 P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, vol. 54, 2000, p. 109.

102 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 24; J.B.J.M. ten Berge, 'Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)', in *De Onafhankelijkheid van de individuele rechter*, J.B.J.M. ten Berge and A. Hol (eds), Boom Juridische Uitgevers, The Hague 2006.

103 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing Aldershot, Dartmouth 1999.

judgements, has meant the existence not only of an accountability deficit, but also a deficit in democracy. This consequently leads to a deficit in legitimacy for the judiciary.[104]

The very idea that the use of quality indicators in management and organisation should be used to fill in the vacuum left by the accountability gap, should in itself pose no danger to judicial independence. Due to the nature of quality indicators and theory, the quality of the judicial organisation and also of the functioning of the office and institution can be self-determined by the court organisations, judges, and judiciaries themselves in cooperation with the communities they serve.[105]

Quality indicators can be used to strengthen independence and impartiality, in a way that does not compromise the quality of the legitimacy under which the judiciary traditionally operates. The literature has reflected that the use of quality indicators is a matter of choice and morality. As far as what is changed, and the extent of that change, can be a choice of the organisation in question, i.e. the judiciary. Therefore, judicial independence is better protected. Impartiality is protected where people do not have the opportunity to influence the outcome of the case through threatening behaviour, and where judges are isolated from incidences of bribery and partiality. Such mechanisms already exist. Questions of comportment cannot be allowed to influence the outcomes of cases, but under quality theories, testing comportment should be possible through complaints procedures that do not influence the outcome of cases. Such procedures should be transparent and information should be made available at all times.

From a constitutionalist perspective, however, the idea that the courts should shift their focus from maintaining (passive) consent of the public to (active) satisfaction, is in and of itself a precarious road. It could lead to difficulties in the comportment of judges, increased corruption in decision-making, which is based on popularity rather than fairness. This subsequently leads to the questioning of judges' impartiality.

> '... there is a certain **critical threshold** beyond which aversion and dissatisfaction for the administration of justice can be very dangerous for a country that bases its legitimacy on popular consensus.'[106]

Furthermore, according to Langbroek, because justice does not operate in a market economy setting, but is an official state institution, the market is a poor metaphor to describe, create norms, and judge the use of authority within the court organisations. They are not dependent upon the market but upon the state organisation. Justice is a public function with demands made upon it by the private domain. However, its public character and demands of judicial independence mean that courts cannot act

104 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 30.

105 Ibid., p. 26.

106 M. Fabri, 'Selected Issues of Judicial Administration in a Comparative Perspective', in *The Challenge for Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000, p. 190-191.

like private corporations in reaction to the needs and demands of the private domain, for fear of loss of legitimacy. This does not mean, however, that no demands can be made of the courts in their dealings with parties and lawyers. Such demands are a public issue, which is why public methods and standards should be applied when courts deal with parties.[107]

However, there is also the court organisation point of view, espoused by ten Berge, on what areas can be affected by quality policy. At the level of the case, there are issues of case management, and procedural and organisational accessibility. There is also research by the court in cases, in the application and development of law, the hearing and judgement phases that affect the quality of decisions by judges. The level of organisational support needed according to the need for a reasonable delay is also something that can be dealt with by quality policy for judges and case management at the decision-making level.[108]

At the level of the court, there is the need to ensure the uniformity of law, the professional behaviour of judges and support staff, and the use of experts in its responsibility in handling cases. From a public service perspective, the court needs to deliver information transparently and efficiently, to develop a policy on customer service, and consider implementing quality systems.[109]

At the level of the judicial organisation as a whole, there is apparently growing consensus for an administration organ for the courts on a national level, in order to represent its membership and needs at the political level. According to ten Berge, this organ should pay attention to various quality policies for the judiciary, such as: legal uniformity, research in the field of justice, training, the creation of policy on the use of experts in court, in terms of mobility and flexibility, the development of criteria for legal quality (of judgements), and finally an argument for an independent (and efficient) complaints mechanism such as a judicial ombudsman is put forward.[110]

Lastly, at the political level, the national organisation to deal with judicial organisation, they should also facilitate policy to deal with all of the issues discussed at case, court and judicial organisation level. For this they should be able to present legislative proposals or policy proposals and be able to determine for themselves what resources they need (and receive it as an equal institution of the rechtstaat/state). In addition, they should be given the responsibility for creating a transparent and efficient administrative structure within and without the court, as well as creating a comprehensive

107 P.M. Langbroek, 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 407.

108 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak,', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 31-35.

109 Ibid., p. 35-37; see also P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, 2000, vol. 54, p. 107-108.

110 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J. B. J. M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 37-39; see also P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, 2000, vol. 54, p. 107.

framework of process and ethical rules within which individual judges can clearly identify their rights and obligations.

2.6.2. Main problem questions

This PhD thesis will therefore focus upon anchoring quality ideas into the constitutional principles of checks and balances. The final questions I wish to attempt to answer are whether quality measures have a place in the traditional constitutional values of checks and balances? Furthermore, what role can quality measures have in making the judiciary an integral part of society and thereby increase its legitimacy?

I identified three levels of legitimacy (following on from ten Berge's structure[111] and the Leemhuis committee report structure)[112] to be observed for the judiciary in order to assess the hypothesis. The problem setting is shaped accordingly:

- At an institutional level, the question arises as to whether it is constitutionally viable to implement quality standards in response to the expansion of judicial power and the lack of an adequate response to political/public requirements?[113]
  - How does judicial independence operate at the institutional level?
  - How do separation of powers operate at this level?
  - Are quality norms and criteria applicable at this level, in the way described above, to facilitate hard political accountability?[114]
  - Is some form of quality management or standards recommendable for the judiciary bearing in mind the checks and balances operating in that system?
- The next level is the court organisation: Given societal demands and the expanding powers of its members, what can be/has been done at this level to improve court performance as a whole?
  - In what way have quality norms and criteria affected court organisation?
  - What steps are being taken to bring the organisation closer to the people through quality policies?
  - Do quality standards breach judicial independence at the level of the court?
- The third level is that of the individual judge (the office and competences), who stands traditionally, and equally independent, unaffected by social (i.e. demographic and cultural) and technological changes, but where the education and appointments procedure is closed to the public and controlled by his/her fellow professionals. The question that arises here is what can be done at this level to

111 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 31-40.

112 J.M. Leemhuis-Stout, '*Rechtspraak bij de tijd*', Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis), 1998, p. 12-13.

113 P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen*, 2000, vol. 54, p. 108-109.

114 Ibid., p. 98.

improve judges' performance in terms of productivity, whilst ensuring effective quality control of decisions (including an independent and impartial judge)?

- How does judicial independence and accountability operate at this level?
- What can be/has been done to improve the performance of judges, both in terms of productivity and efficiency? (i.e. can the quality theory operate at this level?
- How does this affect independence and accountability?

The next chapter looks primarily at how these questions will be answered. A research design and decisions will be explained, along with the methodology used.

Chapter 3

3. Research methodology

Having designing a theoretical framework for the judiciary based on constitutional theory, quality theory and legitimacy, and conceiving various problem questions, it was then necessary to plan a research methodology to answer those questions. This chapter looks at the research decisions taken, and designs the methodology followed in the research path of this thesis. It will start from basic research decisions such as the countries chosen for comparison, and the method of data collection, to the analysis of that data and the way in which conclusions have been made for this thesis.

3.1. Research decisions

The Netherlands has been chosen as one country for comparison, as it is the country of origin of this thesis. The Netherlands was in any case a good country to study because it enacted legislation between 2002 and 2005, which drastically altered the structure and governance of the judicial organisation.

France has been chosen as the second country for comparison. France was a valid choice because the implementation of new public management and quality norms and criteria was beginning to come to the fore of policy discussions there. On the one hand, there were academic discussions on the application of quality norms such as ISO 9001.[1] On the other hand, discussions were also focussing on how the judiciary would implement new financial laws in 2006 that would give greater budgetary freedom yet

1 V. Fortier, D. Gatumel, R. Lachenal, S. Navarro and H. Pujol, '*Système de gestion de la qualité et décision judiciaires: applicabilitéde la norme ISO 9001*', Institut de Recherche et d'Études pour le Traitement de l'Information Juridique Université Montpellier I, Montpellier 2001; V. Fortier, 'L'applicabilité de la norme ISO 9001 à l'activité judiciaire', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française Paris 2002; E. Breen, M. Bacache, C. Bargues, J. Cantegreil, E. Chantrel, L. Cluzel, S. Ferey, R. Giraud, S. Guibaud, C. Pham, A-L. Sibony and T. Tirbois, '*Mesurer la justice? Élaboration d'indicateurs de qualité de la justice dans une perspective comparative*', Ecole Normale Supérieure, Institut des Hautes Etudes sur la Justice, Paris 2001.

demand greater accountability for spending.[2] Whilst the institutional setting in France and the Netherlands is quite different in some respects, the discussions and concerns regarding judicial independence and managerial experiences are very similar.

It is also a practical choice of country because it was very representative of the way in which other continental European judiciaries are organised. Like the Netherlands it is a unitary country (as opposed to federal), a civil law country (as opposed to an Anglo-Saxon common law system), and is geographically practical as it is close to the Netherlands. However, as a contrast to the Netherlands there have been apparently few institutional changes since the mid-twentieth century; and a ministry model has remained for the governance of the courts (unlike the Netherlands, which has given most of its governance tasks to the Council for the Judiciary).[3]

At the beginning of the research, when thinking about the concept of this work, there were some basic choices to be made (including, of course, the countries for comparison). From the start, it was very clear that the following concepts were central to this theme: constitutional law and theory of, on the one hand, judicial independence and, on the other, of institutional transparency and access to justice (i.e. judicial accountability); organisational theory and practices, on the one hand looking at the way the judiciaries are organised, and on the other hand, how judicial values are operated within that structure; with legitimacy as an end goal for the operation of both concepts in the judiciaries.

The idea was to choose one or two elements (or indeed all) of those described above, and then to look at their relationship as the foundation for the research. It was decided to research all of these concepts, and to investigate how they operate and interrelate in the Dutch and French judicial systems and organisations. A conceptual chapter connecting the concepts for this thesis and problem questions followed from the literature research. The next choice was in terms of research methodology.

3.2. Relevance of research[4]

While a large amount of material has been found on each individual concept and country, at the time of this thesis was being written there was little academic research available on combined aspects such as the operation of quality in the judicial organisa-

2 R. du Luart, '*La mise en oeuvre de la LOLF dans la justice judiciaire, rapport d'information no. 478 (2004-2005)*', Commission des finances, sénat, Paris 2004, refer also to chapter 12 The organisers and policy, section 12.2. Finances.

3 Originally, I had also chosen Denmark as a country for comparison due to the fact that they had also set up a Council for the Judiciary with management tasks. However, for practical reasons, it was not possible to follow through this research.

4 J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998, p. 94-95.

tion (with the exception of one thesis,[5] some European projects[6] and government reports[7]). Any research that has been conducted has been based on an analysis of new laws with a lot of speculation as to consequences and many arguments for and against judicial independence based on doctrine, but there is not much by way of empirical research.

This research examines the operation of the quality concept (as developed in the theoretical framework) in these two organisations and to develop conclusions from the comparison. It is also important for this research to examine the operation, from the interviews in the judicial organisations, of the constitutional principles of judicial independence and accountability. The central point is whether it is useful for legitimacy reasons that quality, as an operational concept in the judiciary, is constitutionally compatible. Issues such as disciplinary law and judicial appointments are dealt with as background issues, to give the reader a general framework of constitutional law regarding judicial independence and accountability in each country. The empirical part of this research is to add to the limited body of knowledge on approaches to judicial organisation, and to develop the notions of judicial independence and accountability further.

Given the way the two judicial organisations function, I was mainly curious to see how, if at all, the constitutional and quality concepts, developed in the theoretical framework, operate in the judiciary at three levels: at the institutional level, organisational level and in judicial office. An analysis of this operation will then go on to indicate whether or not quality standards/ideas on the one hand are compatible with constitutional theory, and on the other, whether it has helped the judiciary to become closer to the community it serves (i.e. the users).

3.3. Research design

3.3.1. Literature research

Having formulated the problem questions, and decided on which countries to focus, it was time to formulate the research problem. It was then necessary to study literature and attend conferences[8] on the countries' legal and organisational backgrounds.

5 E. van der Kam, '*Kwaliteit gewogen, verschillende perspectieven op kwaliteit van civiele rechtspleging*', Boom Juridische Uitgevers, The Hague 2000.

6 M. Fabri, P.M. Langbroek and H. Pauliat (eds), '*The administration of justice in Europe: Towards the development of quality standards*', Lo Scarabeo, Bologna 2003; M. Fabri, J-P. Jean, P.M. Langbroek and H. Pauliat (eds). '*L'administration de la justice en Europe et l'évaluation de sa qualité*', Montchrestien, Paris 2005.

7 '*Kwaliteitsrapportage Pilot Project Kwaliteit*', Rechtbank Amsterdam, Amsterdam 2003; A.M. Sturm, W.D. ten Have and M.M.E. Donders, '*Eindrapport: Uitkomsten Pilot Project Kwaliteit Rechtbank Roermond*', Roermond 2002.

8 Lecture: J. Robinson: Adjudication of evidence in Civil litigation - The US adjudication of factual disputes
Ius Commune Conference: Common law of Europe (judicial procedures, fair trial)
Lecture: 26.10.2001: Civil law harmonisation (constitutional competence)
Seminar: Leiden: constitutionalism and free market (Prof. Asser)

In terms of country literature research, both articles and books on constitutional theory, new public management and quality were gathered, using search engines from the Internet and the university library. Policy and legislative documents were easily found on the government websites of France and the Netherlands. It was possible to download annual reports from both organisations off internet sites. For the chapters on France, even though literature was available at the local university library and off the internet, it was felt to be prudent to also conduct literature research at the library of the Ecole Nationale de la Magistrature in Paris (National School of the Magistracy). From this literature research, chapters were written describing constitutional law from the angle of the judiciary; organisation (and policies) of the judiciary; and the organisers of the judiciary at the local and central level of both countries.

3.3.2. Research methodology design

The next step in the methodological process was to find the answers to questions that emerged, not only in the theoretical framework and problem question, but also in the nature and design of the organisations described. Given the gaps in current knowledge, it was necessary to expand more precisely on what knowledge was needed.[9] This is a matter of formulating the research design.[10]

Given the limits in the current literature, it had been decided that finding answers through interviews was the most appropriate method. A step in that direction was to study the relevant literature on interview methods in social sciences. This was in order to select the interview technique/s, which would deliver the kind of information required to best explore this field of research.[11] Processes and analysis techniques were

Congres: De Taakopvatting van de rechter (Leiden) 01.02.2002 (Prof. Scheltema, Buruma)

Conference: May 26-27 2003: The administration of justice and the evaluation of its quality in Europe (research participant)

Seminar: February 6-7, 2004: Research seminar on allocation of cases to courts

Seminar: April 30-May .2004: Caseflow management, performance assessment and ICT in judicial systems.

9 J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998, p. 101.

10 C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, '*Research methods in social relations*', Holt, Rinehart and Winston, New York 1966, p. 9.

11 J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998, chapter 7; I. Maso, 'The interview as a dialogue', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996, p. 7-14; C.A.B Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 83-83; R.W. Shuy, 'In person versus telephone interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 537-555; C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, '*Research methods in social relations*', Holt, Rinehart and Winston, New York 1966, chapter 7.

also taken into account in this phase.[12] Due to the fact that this field research was an area where relatively little field research has been conducted (at the time this research was conducted), the choice was oriented to the selection of an exploratory[13] research methodology with semi-structured interviews.[14] Mazeland and ten Have describe three advantages of using semi-open interviews:

> 'They are, firstly, descriptive or demonstrative of the life world of the speaker. They re-tell his or her experiences or re-express his or her viewpoints… secondly, they have a local relevance, within the interview situation, i.e. as answers to questions. And thirdly, they are used as input in a research project, as materials for analysis'[15]

The use of this approach also allows one to be able to cope with new information in a structured way. It is also sufficiently flexible so that one could ask for more information or the expert could recall his/her experiences that would not have been accounted for in the questionnaire. However, a fully structured questionnaire would not have provided one with such a possibility (and flexibility).[16] Given the complexity and novelty of the issue at stake the postal questionnaire was ruled out. With postal questionnaires, there is a great possibility, especially if sent out indiscriminately, that they will not be answered. The idea of a telephone questionnaire was also discarded. Even though it allows more discrimination, interaction and flexibility than the postal questionnaire, it does not afford a similar interaction as one-on-one interviewing. Interviewing will allow the interviewer and the respondent to relax into the interview, so that one can prompt and the other answer more readily.[17] Furthermore, channels

12 F. Wester, 'The analysis of qualitative interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996, p. 63-85; C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, '*Research methods in social relations*', Holt, Rinehart and Winston, New York 1966, chapter 11; J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998 chapter 8.

13 C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, '*Research methods in social relations*', Holt, Rinehart and Winston, New York 1966.

14 C.A.B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications,Thousand Oaks, London, New Dehli 2001, p. 86; H, Mazeland and P. ten Have, 'Essential tensions in (semi-) open research interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University Press, Brussels 1996.

15 H. Mazeland and P. ten Have, 'Essential tensions in (semi-) open research interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University Press, Brussels 1996, p. 87.

16 L.A. Dexter, '*Elite and specialized interviewing*', Northwestern University Press, Evanston 1970.

17 C.A.B .Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001 p. 98; R.W. Shuy, 'In person versus telephone interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 540-547.

different from the voice convey much of the meaning and information. A face-to-face interview allows one to follow facial expressions, body language, and the sense of humour particular to the profession to be a form of information, all of which gives a deeper understanding, which is particularly useful in this context.[18]

Having decided to use semi-structured interviews, a target was made of selected appropriate respondents.[19] It is important to discuss these concepts with people who work with them on a daily basis, i.e. experts, rather than a representative sample of the relevant population, which would not have provided the same good results. Given time and budget constraints and the nature of the project a small sample of experts was also felt to be more suitable. In a new field research, and using methods of exploratory research, one will get better insights by interviewing experts in the field.[20]

3.4. Interviews

In order to do this, the topic list for the courts was created around the five basic themes. The purpose of such a list is to gain a clearer picture of how court and case management has been organised around the concepts of judicial independence, accountability and quality (similar lists have been created for governance-level interviews – i.e. ministry of justice, and court management level - i.e. courts' services or councils). The following questions constitute a general topic guide, and more/less can be asked during the interviews.

The following list represents the core questions used as a guideline for the interview at all levels:

1. Roles and responsibilities of judges within the courts
   a. In terms of efficiency and legal quality, how do you balance your responsibilities? Are you able to do both or do you see them as being incompatible?
   b. From procedural law do you have wide discretionary powers to dismiss poorly organised cases, or to judge multiple similar cases at once (e.g. a class action: a group of citizens could sue the government at one time against the same decision)?
   c. From an organisational point of view, how has the court dealt with an increase in similar cases, an increase in the complexity of law and an increasing number

18 R.W. Shuy, 'In person versus telephone interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 541-545.

19 J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998, ch. 7.

20 C.A.B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J. F. Gubrium and J. A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 83: 'Interview participants are more likely to be viewed as meaning makers, not passive conduits for retrieving information from an existing vessel of answers… the purpose of most qualitative interviewing is to derive interpretations, not facts or law, from respondent talk.'

of similar yet simple cases (i.e. divorce, simple administrative decisions, drunk driving etc.)?
   d. What kind of role do you have in training younger and less experienced judges? Do you see training as a tool to set the modernisation programme in concrete? (Do you even think that the modernisation programme should be set in concrete?)
   e. Do you feel that the case management system is more accountable and transparent to the court's users (both workers and parties alike)? Do judges sense an improvement?
2. Judicial Responsibility for court organisation
   a. Do you feel that integral management works to help the throughput of cases? Has integral management been successful in your court?
   b. In what other way, do you think, could the court adapt its organisation to increase the efficiency of case management?
   c. Do you trust the definitions of productivity used to prioritise budgets?
   d. How have the projects of the council continued to aid your case management systems?
   e. Does ICT aid you in your responsibilities for the organisation?
   f. Do you trust ICT to aid the productivity of the court, and to aid in writing judgements?
   g. (For courts which have conducted the quality pilots) How well did the quality standards operate within your organisation? Did they hinder or assist? What further benefits have accrued to your organisation with the quality standards?
3. Quality of court management
   a. Have judges in managerial positions taken the quality concept seriously? And if so, how?
   b. Has the quality concept been fully communicated to them, in terms not only of requiring cooperation, but also in terms of training (ICT, time management etc)?
   c. Do all judges participate in the modernisation of the case management system, or just those with managerial positions? And if so, how?
   d. How have tasks been divided between managers and chairpersons? Is it divided by law, or by personal negotiation? How is this controlled?
   e. How do you motivate your need for resources to the national governing body? Does the new system work, or must the president still negotiate money for the courts?
4. Communication
   a. What do you see as the main strengths and weaknesses of the new system in terms of the way information flows?
   b. Do you think that organisation of case management should be made transparent? If not, why not? If so, why & how?
   c. Do you think that the organisation of case management should be used as a tool to hold the court to account for its spending? If not, why not? If so, why& how?
   d. Do you see the information gathered from the financing system and from the quality standards pilots as an opportunity for self-improvement (as desired by policy makers at a centralised level)?
   e. Must your organisation make yearly reports (or other kinds of reports)?

   f. Does the management team make use of information about performance? If so why & how? If not, why not?
5. Judicial Independence
   a. How far does a quality system implemented in the courts assist the judge in completing his/her docket?
   b. Do you feel that, if you do not receive the requested money, the national governing body has not sufficiently motivated itself in refusing the money?
   c. Do you feel that you have a sufficient say in the development of policies on the organisation of the judiciary and the courts?
   d. Do you think that there should be a training programme for management in the courts? If so, how would you work the concept of judicial independence into it?
   e. Have you received suitable training with the ICT system functioning in your organisation to manage both your sector and your judgements independently?

This question list is the basis for interviews conducted in France and the Netherlands. The adapted versions presented in the following pages take into account language, organizational and conceptual differences for each individual system. Whilst this list acts as a foundation, making it easier to compare the answers, adapting the lists to the countries also help to highlight differences in approach, which are as equally interesting as the similarities.

3.5. Interview methodology in the Netherlands

The background chapters deal with the position of the Dutch judiciary in the constitution, the policy on organisation of the judiciary, and its financial policies. These essentially looked at how the judiciary in the Netherlands should operate within the framework of various laws. Given that in 2002 the Judicial Organisation Act came into force, it was interesting to see in the course of the research, on the one hand, in which direction the judiciary was being led policy wise, and on the other hand, which direction the judiciary was actually going. To that end, based on the framework provided by the background chapters, and the framework provided by the theoretical concept, a semi-structured interview was adapted from the one above:

Topic list for the Dutch courts

1. Op welke punten wordt verantwoording gevraagd van individuele rechters? (What responsibilities have individual judges been asked to take upon themselves?)
   a. In terms of efficiency and legal quality, how do you balance your responsibilities? Are you able to do both or do you see them as being incompatible?
   b. From procedural law do you have wide discretionary powers to dismiss poorly organised cases, or to judge multiple similar cases at once (e.g. a class action: a group of citizens could sue the government at one time against the same decision)?
   c. From an organisational point of view, how has the court dealt with an increase in similar cases, an increase in the complexity of law and an increasing number

of similar yet simple cases (i.e. divorce, simple administrative decisions, drunk driving etc.)?

d. What kind of role do you have in training younger and less experienced judges? Do you see training as a tool to set the modernisation programme in concrete? (Do you even think that the modernisation programme should be set in concrete?)

e. Do you feel that the case management system is more accountable and transparent to the court's users (both workers and parties alike)? Do judges sense an improvement?

2. Via welke instrumenten wordt verantwoording gevraagd van individuele rechters? (Which instruments were used to give responsibility to the judges?)
   a. Do you feel that integral management works to help the throughput of cases? Has integral management been successful in your court?
   b. In what other way, do you think, could the court adapt its organisation to increase the efficiency of case management?
   c. Do you trust the Lamicie[21] model and the definitions of productivity that have resulted?
   d. How have the projects of the council (previously known as PVRO) continued to aid your case management systems?
   e. Does ICT aid you in your responsibilities for the organisation?
   f. Do you trust ICT to aid the productivity of the court, and to aid in writing judgements?
   g. (For courts which have conducted the quality pilots) How well did the quality standards operate within your organisation? Did they hinder or assist? What further benefits have accrued to your organisation with the quality standards?
3. In hoe verre wordt hun handelen in de gaten gehouden? (In how far are they controlled in their organisational duties?)
   a. Have judges in managerial positions taken the quality concept seriously? And if so, how?
   b. Has the quality concept been fully communicated to them, in terms not only of requiring cooperation, but also in terms of training (ICT, time management etc.)?
   c. Do all judges participate in the modernisation of the case management system, or just those with managerial positions? And if so, how?
   d. How have tasks been divided between managers and chairpersons? Is it divided by law, or by personal negotiation? How is this controlled?
   e. How do you motivate your need for resources to the Council? Does the new system work, or must the president still negotiate money for the courts?
   f. Have working processes improved through cooperation with the Council for the Judiciary? And if so, how?
4. Wat wordt met die informatie over uitvoering gedaan? (What is done with the information?)

21 See chapter 6, The organisers and policy, section 6.3 Finance.

a. What do you see as the main strengths and weaknesses of the new system in terms of the way information flows?
b. Do you think that organisation of case management should be made transparent? If not, why not? If so, why & how?
c. Do you think that the organisation of case management should be used as a tool to hold the court to account for its spending? If not, why not? If so, why& how?
d. Do you see the information gathered from the Lamicie system and from the quality standards pilots as an opportunity for self-improvement (as desired by policy makers at a centralised level)?
e. Must your organisation make yearly reports (or other kinds of reports)?
f. Does the management team make use of information about performance? If so why & how? If not, why not?

5. Hoe wordt op die punten de individuele rechterlijke onafhankelijkheid gewaarborgd? (How is individual judicial independence safeguarded (as opposed to professional autonomy)?)
   a. How far does a quality system implemented in the courts assist the judge in completing his/her docket?
   b. Do you feel that, if you do not receive the requested money, the Council for the Judiciary has not sufficiently motivated itself in refusing the money?
   c. Do you feel that you have a sufficient say in the development of policies on the organisation of the judiciary and the courts?
   d. Do you think that there should be a training programme for management in the courts? If so, how would you work the concept of judicial independence into it?
   e. Is there still the element of choice in whether or not to participate in the pilot test for quality standards?
   f. Have you received suitable training with the ICT system functioning in your organisation to manage both your sector and your judgements independently?

These interviews were conducted in 2003 between July-October; soon after the background chapters were completed.[22] The choice of respondents was based on a variety of factors. There was a time constraint, and limited resources to conduct interviews; it was felt to be prudent to limit the aims. The decision was taken to restrict interviews to management teams of judge-managers and coordinators in the sector of administrative law, in one large court, one medium sized court, and one small court.[23] It was possible to restrict the target of interviews to one sector because the new laws focussed new managerial powers at the level of the sector rather than the whole court, giving sector managers essential control over finances.

22 In order to conduct research within the courts, an application for permission had to be submitted through the Council for the Judiciary first (in order that the same research not be conducted twice).

23 This is an arbitrary distinction not based on statistics of the court organisations. The interviews of management teams were conducted in three different sized courts, and in order to hide the identity of the respondents, I have referred to the courts as small, medium and large (relative to each other).

In all but one court, it was possible to interview the whole team. In that one court, the team had decided between them, having looked at the interview questions, that the judge-manager (chairman) would be able to answer the questions sufficiently by himself. During the interviews, I discovered that the respondents' experiences, both as judges and judge-managers, were larger than that of just administrative law. This meant that they were able to provide some insights into how management worked in other sectors too.

By interviewing these people, it would be possible to observe the operation of quality management[24] at sector level, and how judges managed and were managed. The administrative law sector was chosen simply because the starting point of this thesis is at the department for public and administrative law.

Next to this sample of respondents, the choice was also made to talk to people in charge of operating the quality system pilot in various courts. These respondents consisted of both judges and legal staff of different sectors. These were chosen in order to see how the quality system was operating and how well it was received in those courts. This brought a wider range of experience from the work floor, as well as from judges. These judges also brought a wider perspective on the court organisation to the interviews, as they came from different sectors of the court.

Outside of the courts, it was also necessary to talk to somebody from the Ministry of Justice and the Council for the Judiciary about the direction of the policy and policy execution for the judiciary, and the separation of powers at a central level. Interviews at this level were conducted in 2003 and 2006.The focus of the questionnaires was on organisation policy, financial policy and the separation of powers. Beyond this structure, the respondents were allowed to tell of their experience in these issues.

3.6. Interview methodology in France

The background chapters dealt with the position of the French judiciary in the constitution, the judiciary's policy on organisation, and its financial policies. These essentially looked at how the judiciary in France should have been/be operating within the framework of various laws. In recent years, the French judiciary has been coming more and more in the eye of the press, most recently in the case of the French paedophile miscarriage of justice case,[25] which has led to challenges in the way French judicial affairs are conducted. Furthermore, the French state has seen a recent change in its finance law,[26] which has also affected the French judicial organisation.

This situation has forced them to look more carefully at quality standards and indicators in the judiciary, and at creating more objective ways of measuring the

24 As described in chapter 2 From constitutional theory to quality norms: A theoretical framework, section 2.5 Quality theory.

25 Cécile Vigour ,'Réformer la justice en Europe. Analyse comparée des cas de la Belgique, de la France et de l'Italie', *Droit et Société* 2004, vol. 56-57, p. 291-325.

26 See chapter 12 The organisers and policy, section 12.2 Finances.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

product and productivity of the judiciary.[27] Whilst there does not exist a framework similar to the one in the Netherlands on the operation of quality standards in the judicial organisation or for its product, the courts and the overall governance of the judiciary in France are involved in individual projects to operate certain areas of quality. However, France also has Codes, which form the framework to operate the judiciary. To that end, based on the framework provided by the background chapters, and the framework provided by the theoretical framework, semi-structured interviews were adapted from the original to find out, on the one hand, how the French judicial organisation operates, and on the other hand to find out the extent to which quality is operated there.

Topic list for the French courts

1. Efficacité du système judiciaire
   a. Sur le plan de l'efficacité et de la qualité judiciaire, comment faites-vous pour équilibrer ces deux types de responsabilité (efficacité et qualité)? Pensez-vous que les deux responsabilités soient compatibles ou incompatibles?
   b. À votre avis, les juges pensent-ils qu'il soit difficile de trouver le juste milieu entre ces responsabilités?
   c. En matière d'organisation, de quelle façon le tribunal a-t-il réagi à la croissance d'affaires similaires, à la complexité croissante des lois et au nombre croissant d'affaires similaires et simples en même temps (concernant par exemple le divorce, les décisions administratives simples et la conduite en état d'ébriété etc.)?
   d. Quel rôle jouez-vous en ce qui concerne la formation de juges qui sont plus jeunes et qui sont moins expérimentés que vous? Pensez-vous que cette formation puisse être utilisée pour moderniser le système judiciaire en France?
   e. Estimez-vous que le système de gestion d'affaires soit transparent pour les «clients» des tribunaux (aussi bien internes qu'externes)?
2. Résponsabilité des juges
   a. Quelles sont les techniques de gestion que vous utilisez au tribunal?
   b. L'organisation d'affaires est-elle efficace? (Est-ce qu'il y a des retards ou des délais?)
   c. Est-ce que vous avez confiance dans les définitions de productivité qui ont été utilisées pour l'attribution des moyens?
   d. Des projets comme la téléprocédure du Conseil d'Etat contribuent-ils à l'efficacité du tribunal? Est-ce qu'il y a d'autres projets émanant soit du Conseil d'Etat, soit du tribunal?
   e. Quel rôle l'informatique joue-t-elle pour vos résponsabilités et pour la productivité du tribunal? Est-ce que vous-avez confiance dans l'informatique?

27 X. Bioy, 'L'institution judiciaire sous la Ve République: entre autorité constitutionelle et service public', *Revue de la Recherche Juridique*, Presses universitaires d'Aix-Marseille, Faculté de droit et science politique d'Aix-Marseille - *Droit prospectif* 1999, vol. 4, p. 1093-1095.

Est-ce que vous et votre personnel avez fait des stages de formation dans le domaine de l'informatique?
   f. Est-ce que le tribunal se sert de « benchmarking » et de « normes de qualité » pour l'organisation (par exemple de normes ISO)?
3. Qualité
   a. Pensez-vous que la qualité dans votre organisation soit importante? Votre avis est-elle partagée? Comment organisez-vous la qualité de l'organisation? Est-ce que vous-avez une bonne qualité de service pour les clients?
   b. Est-ce que les juges sont formés en matière de gestion du temps?
   c. Est-ce que les juges participent à l'organisation (modernisation, dialogue etc.)?
   d. Utilisez-vous des information sur la productivité des juges et sur le tribunal pour des objectifs de gestion?
   e. Comment le tribunal est-il organisé?
4. Finances et responsabilités
   a. Comment motivez-vous vos besoins de moyens et ressources vis-à-vis du Conseil d'État?
   b. Comment demandez-vous au Conseil d'Etat la motivation de leur rejet de votre demande?
   c. Voyez-vous le système financier comme un système qui contraint les tribunaux à assumer leurs responsabilités? Voyez-vous le système financier comme un système qui entrave votre indépendance?
   d. Trouvez -vous que l'organisation d'affaires soit comme un système de responsabilité?
5. Indépendance judiciaire
   a. Est-ce que les juges profitent des changements au niveau de la politique d'organisation des tribunaux et au niveau de l'organisation d'affaires?
   b. Trouvez-vous que vous avez suffisamment voix au chapitre en ce qui concerne l'organisation judiciaire?
   c. Existe-t-il des stages de formation en gestion de tribunaux?

These interviews were conducted in November 2004. The choice of respondents, as with the Netherlands, was based on a variety of factors, mainly aims, time, and resources. However, as there was no way of knowing who was conducting experiments in the field of quality in the judiciary, it was necessary to talk to a contact in the French judiciary. This contact put me in touch with various members of the ordinary as well as administrative jurisdiction.

From the ordinary jurisdiction, there was a member of the Ministry of Justice, two members of the Service d'Administration Régional (SAR) in Paris, one judge-manager at a court of appeal, one chief clerk of a first instance court, and four presidents of various sized first instance courts for major cases (tribunaux de grande instance-TGI). For the administrative jurisdiction, there were two members of the Council of State (Conseil d'Etat), two presidents of courts of appeal for administrative law, and three presidents of administrative courts at first instance (tribunaux d'administrative- TA). These people were all recommended, on the one hand, based on their managerial roles, and on the other hand based on their interest in improving the quality of their organisations and their participation in various national projects to that end. They were

considered therefore to be experts in the field with managerial experience, and participants in the modernisation of the French judiciary. These respondents were thus best placed to talk about the operation of quality in the French judicial organisation, both for the ordinary and administrative jurisdiction.

These respondents would bring a very different story about their organisation than the ones in the Netherlands. There is no focus on sectors in this instance, because French courts focus managerial powers at the level of the court. Judges who work for the ordinary jurisdiction are specialised in criminal and civil law, and those working for the administrative jurisdiction are specialised in administrative law. At the ordinary jurisdiction, in the smaller courts, judges will be expected to decide cases in both criminal and civil cases, and in larger courts, there can be many chambers specialising even more narrowly than civil law and criminal law. It was therefore clear that the managerial power was with the president of the court, rather than the presidents of individual chambers. This is the same for the administrative courts. The analysis in the meso level focuses here at court level rather than at sector level (as with the Dutch analysis) because that is where the managerial decisions take place.

Outside of the courts, it was also necessary to talk to somebody from the Ministry of Justice and the Council of State about the direction of the policy and policy execution for the judiciary, and the separation of powers at a central level (for both jurisdictions). Financial and organisation policy and the relationships between the institutions in the framework of the separation of powers were discussed. Beyond this structure, they were open interviews, allowing those with experience in these issues to tell their stories.

3.7. *Analysis methodology of interviews*

Given the diversity of respondents and their experiences within the courts, and the open nature of the interviews outside of the courts, it was natural to find that the interests of each respondent varied. This meant different emphasis was put onto different questions and different subjects. In the interview analysis, in spite of a consistent structure, an attempt has been made to emphasise this somewhat. This has been done by quoting citations directly from the interviews themselves. According to Patton,

> 'Inductive analysis means that the patterns, themes, and categories of analysis come from the data; they emerge out of the data rather than being imposed on them prior to data collection analysis… A good place to begin inductive analysis is elucidation of key phrases or terms used…'[28]

Therefore, the advantage of citing quotes directly (as opposed to summarising interviews) is that it gives a stronger foundation to any conclusions that result in the

28 M.Q. Patton, '*Qualitative Evaluation and Research Methods*', Sage Publications, Thousand Oaks, California, London, New Dehli 1990, p. 390.

analysis. Furthermore, this method has the advantage of allowing the reader to familiarise herself with the language of the respondents.

> 'Description and quotation are the essential ingredients of qualitative inquiry. Sufficient description and direct quotations should be included to allow the reader to enter into the situation and thoughts of the people represented in the report.'[29]

A further advantage of such a technique is that it enables one to follow an evolution of thought and mentality on judicial organisation over the next years.

A description of what was said during the interviews has been given within a framework of analysis. An interpretation of this analysis follows. This structure follows the hierarchical organisation of both judiciaries, looking at the smallest unit of the judge at micro level, the court organisation at meso level and the governance of the courts at macro level.

The micro level deals with the independence of individual judges, and the position of judges in the court organisation itself. The meso level looks at the independence of the courts to organise themselves, and the quality of that organisation. Finally, the macro level is divided into two parts: firstly, the relationship between the courts and the council for the judiciary in the Netherlands and the Council of State and ministry of justice in France and the position of judges in the judicial organisation as a whole. Secondly, there is the relationship between the judiciary and the Ministry of Justice.

During the analysis, a description of the 'believed' state of affairs and research interpretation shall be separated for clarity. The structure itself will incorporate extra titles within the main ones of micro, meso and macro. These extra titles reflect the issues emphasised within all of the interviews.

3.8. The interview process and respondents

The choice of respondents has been guided by the fact that this is an exploratory research, and that a small number of experts in the field would provide better information for an in-depth analysis of the reality than a representative sample. For this reason, in order to select the experts that could better provide the information sought, different selection approaches have been used for the Dutch and French systems. Next to the other advantages, this also allowed the taking into account of organisational and doctrinal differences between the two systems.

I have conducted all interviews in order that the respondents could answer in their mother tongue. This allowed them to better describe their experiences with the concepts in their original language, which 'allows to take into account **linguistic and cultural assumptions**'[30] and helped in realigning the different usages in both countries (which provides raw data of better quality and free from errors introduced by the

29 Ibid., p. 429-430.

30 C.A.B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 97.

differences in concepts in different languages and the limits of the language knowledge of the respondents).

3.9. Transcription and analysis

Notes were also taken during the interviews, which were taped. After the interviews tape recordings, notes and observations were put together in thick descriptions (keeping specific terms used only by the systems in their original language). As regards the analysis of the interviews, the main difficulty has been mainly with regard to the construction of an analytical structure, and connecting it to the theoretical framework itself.

3.10. Comparison and conclusions

A broad comparison has been made of the operation of the constitution at judge level, the quality of the courts' organisations, and the separation of powers. Then the main features were examined and the main differences were highlighted. Finally, in the conclusion, the lessons from this research are discussed, and linked back to the original problem questions. The thesis ends by describing what has been found to be the place of quality in constitutional law, whether or not there is a place for it in the checks and balances theories, and whether or not it goes to increasing the legitimacy of the judiciary in theory.

PART II: THE NETHERLANDS

Chapter 4

4. Constitutional law and practices[1]

This project deals directly with the acceptance of quality standards for the Dutch judicial organisation as part of the constitutional norm of checks and balances. It is important therefore to provide some brief background information on the Dutch constitution from the point of view of the judiciary, in relation not only to its own duties and obligations towards the citizen, but also in light of its relation towards the executive and parliament. Constitutional law and legislation dealing with the organisation and legal position of the judiciary and government form a framework of checks and balances.

4.1. Power defined

The approach to the separation of powers in the Netherlands is unique in Western democracy in that its drafters did not give clear definitions of the three branches of power in the constitution, but rather set out responsibilities of each more clearly through a series of checks and balances.[2] Under article 112 of the constitution, the function of adjudicating disputes between citizens is given to the judiciary, as is the power to sanction legal persons (within the law) under article 113. According to article 112 (2) other disputes, e.g. disputes of an administrative nature, may be given to courts either belonging to the judiciary or not belonging to the judiciary. The separate jurisdictions of various administrative tribunals have evolved from the early 20th century onwards. It was not until recently in 1994 that the judiciary was given the responsibility of determining the legality of administrative action and decision-making at first instance.[3] The administrative appellate courts still do not belong to the judiciary.[4]

1 P.P.T. Bovend'Eert and C.A.J.M Kortmann, 'Het Courtpacking plan van het kabinet Kok', *Nederlands Juristenblad* 2000, vol. 36, p. 1769-1775.

2 C.A.J.M Kortmann, '*Constitutioneel recht*', Kluwer, Deventer 2001, p. 286.

3 General Administrative Law Act 1994.

4 Here a clarification is needed on the term 'judiciary', as the Dutch have a distinction between 'rechterlijke macht' (civil and criminal justice) and administrative justice. Administrative justice, whilst not considered to be a part of the rechterlijke macht, is considered to be part of the judicial organisation.

As stated in Chapter 2, section 2.2.1., judicial accountability can be found in the form of public hearings and the publication of judgements. This can be found in article 121 of the Dutch constitution. Whilst articles 112 and 113 set out the function of the judiciary, article 121, states that:

> 'Except in cases laid down by act of parliament, trials shall be held in public and judgements shall specify the grounds on which they are based. Judgments shall be pronounced in public.'

This clause can result in the protection of judges from undue influence, to guarantee the independence of function and political influence by ensuring that judges and procedures at court are open to scrutiny. The idea behind the constitution is to protect human rights through a clear division and specification of state powers. As regards checks and balances it means that judges should not be seen to be influenced by political considerations from government or parliament. However, where there is influence, it should be clear due to the transparency of procedures (and the media's close attention to such matters). The idea behind publishing reasoned judgments is to reflect the impartial nature of the judge's motivation and the legal basis for the decision, which should be a contributory factor towards protecting the citizen against arbitrary power. Furthermore, the possibility to challenge the decision based on the correct application of the law to the facts and on the independence of the tribunal is also a contributory factor towards protecting the citizen against abuse of judicial power.

Article 121 of the constitution of the Netherlands also goes to guaranteeing a fair trial, as stated under article 6 of the European Convention on Human Rights (ECHR)[5] (and most recently the Charter of fundamental rights of the European Union – article 47). The constitution of the Netherlands, the rules of procedure and the legal practices of the judiciary are in conformity with the requirements of a fair trial, those being a fair and public hearing, an independent and impartial tribunal that is established by law, and publicised judgments (or judgements given in public). The main restrictions on this are that they are not allowed to order capital punishment, or to review the constitutionality of legislation. Judges can, under international law, declare statutory acts incompatible with directly applicable rules of international treaties, but the Netherlands does not have a Constitutional Court like Germany or France.

4.2. Trias politicas

As part of the democratic state machinery, the judiciary is the most undemocratic power of the three, as members are appointed rather than elected. Hence there are democratic reasons to protect people from an abuse of judicial power (not only by the judiciary itself, but by the other two powers). The practical thing is to ensure a balance

5 Article 6 ECHR is treated as a directly applicable provision under article 94 Constitution, and the courts now apply the case law of the European Court of Human Rights.

between the powers to ensure that one does not overstep one's boundaries. To that end, provisions have been made within the constitution itself giving power to parliament to organise the judiciary (but not to interfere in the judicial function). The government and parliament are responsible for providing an independent judiciary of outstanding quality to the country and to ensure that laws are created through which that goal is achieved.[6] An example of such a law is the Judicial Organisation Act 2002. Before January 2002 the day-to-day operations of the courts in terms of financing and organisational management were the responsibility of the Minister of Justice. However, even though the Judicial Organisation Act 2002 transferred responsibility for the finances and organisation of the courts to the Council for the Judiciary, the Minister of Justice has retained political responsibility for the judicial organisation (under article 42 of the constitution which leaves ministers responsible to parliament), which includes financing and the administration of justice under the Financial Orders 2002 and 2005.[7]

In order to understand the nature of the relationship between judicial independence and ministerial responsibility, it is important to understand the nature and scope of ministerial responsibility towards parliament as regards the functioning of the judiciary. As stated already, the judiciary is regulated by acts of parliament, which involves approval by both the government and parliament. The Minister of Justice has a general responsibility for overseeing the running of the justice system in the Netherlands after the Judicial Organisation Act 2002, which created the Council for the Judiciary, which now has the responsibility for the judicial organisation. In practice this means that the Minister of Justice must present information to parliament on the organisation of the judiciary, which means, in turn, that the Council for the Judiciary must provide the Minister with the demanded information.[8]

The creation of the Council for the Judiciary, that started its operations in 2002, was done bearing in mind the need for judicial independence at state level, i.e. institutional independence.[9] However, the Council for the Judiciary does not, at the time of this research, have constitutional status although it represents a strengthening of institutional independence for the judicial organisation.

Furthermore, due to the protection of judicial independence within the separation of powers (including an independent governing institution for the judiciary), government should not go straight to parliament without first consulting judges about changes to their organisation. The usual practice is for government to set up a commit-

6 Article 116 GW; P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 78.

7 Besluit financiering Rechtspraak, 2005.

8 Ibid.

9 Refer to chapter 2 From a constitutional theory to quality norms: A theoretical framework, section 2.6.1 Introduction (main problem question); refer also to chapter 6, The organisers and policy, section 6.2.3. Council for the Judiciary.

tee,[10] the committee will research the policy matter at hand, consult the relevant actors, and then make recommendations in a final report. After such recommendations are made, the government will write an answer in response to the recommendations. Then policy will be turned into draft legislation, the draft legislation will be sent for comments to the organisations with an interest therein and eventually the bill will be sent to the Lower House with or without adaptations to the comments. Annexed to the Bill are the grounds for the proposed law. The Lower House will then discuss it, question the government, amend it accordingly and pass or reject it. If passed, it will then go on to the upper house, which will reject or accept it. The Upper House has no power to amend a bill. If either house rejects the bill, then it is all over. The same bill cannot be sent back and forth for correction. If government (or whoever initiated the bill) wishes to see the bill passed, then it must be reintroduced again into the Lower House.

Parliament can indirectly influence the process of change in the judiciary in two other particular ways. According to article 105 of the constitution it can approve or amend the budget laws for a particular year, and based on article 68 of the constitution it can question government about certain problems and issues. Each year government presents the budget to parliament via a bill, which must be passed in the same way as other acts of parliament. Given the recent changes in the judicial organisation, and the money needed to finance those changes during the next few years, this is a powerful tool against the judiciary. The power to amend and reject finance bills is also a way for parliament to control government policy, and to ensure that government acts as closely with parliament (i.e. the democratic representatives of the population) as possible.[11] On the other hand, however, article 68 of the constitution gives parliament less political clout. It has been highlighted by Elzinga et al. that:

> '…Parliament cannot call a minister to account if no responsibility exists and … the presence of responsibility does not automatically mean that this responsibility will be activated and a minister actually called to account'[12]

A distinction must be made here between the obligations under ministerial responsibility and the obligation to answer questions from parliament. Article 68, it has been argued,[13] is a broader duty to provide information. A minister must answer a question unless parliament is questioning action or inaction in a subject-matter in which he/she has no competence, whereas ministerial responsibility focuses on competence concern-

10 For example, the Donner committee, which looked at changing the structure of the public prosecutor's office; the Hoekstra committee, which looked at the administrative structure of the judicial organisation; and the Leemhuis committee which looked at creating a way to modernise the judicial organisation.

11 D.J. Elzinga, F. de Vries and H.G. Warmelink, *Developing trends of parliamentarism in the Netherlands*, at Fourteenth International Congress of Comparative Law, Athens 1994, p. 260, C.A.J.M Kortmann, '*Constitutioneel recht*', Kluwer, Deventer 2001, p. 194.

12 D.J. Elzinga, F. de Vries and H.G. Warmelink, *Developing trends of parliamentarism in the Netherlands*, at Fourteenth International Congress of Comparative Law, Athens 1994, p. 266.

13 My thanks go to Dr. Leonard Besselink for his comments here.

ing action and inaction. Politically speaking, article 68 can be a weapon for parliament in conjunction with that of ministerial responsibility under article 42.

After January 2002 the nature of ministerial responsibility for the organisation of the judiciary did change. All organisational competences were transferred to the Council for the Judiciary, from arranging the budget, to providing computers. On top of organisational matters, the Council also acts as a buffer between the judiciary and politics, giving a unified voice to judges' interests. However, the Minister of Justice did retain political accountability and can still act to improve the capacity of the judiciary.[14] For example, the report by a commission for interdepartmental policy research for the management of justice (IBO)[15] states that the Ministry of Justice, in conjunction with other ministries, still has an important part to play in developing policy for capacity within other areas of the judicial system to alleviate the courts, such as the immigration and naturalisation service, and the public prosecutors office.[16] The IBO suggests that the ministry is important also for monitoring and updating the legislation on the judicial organisation. Whilst the new structure of the judicial organisation makes the judiciary responsible for its own productivity and quality of service, the minister can still call the Council for the Judiciary to account for the efficiency and legality of the administration of the judiciary as a whole.[17]

On top of the function of holding the Council for the Judiciary to account and maintaining legislation in the area, the other specific competences of the Ministry are now: the funding of the judiciary; the control of the performance plans of the Council for the Judiciary according to a procedure determined by the Ministry; questioning the Council for the Judiciary on the management of the judicial organisation on a regular and incidental basis; the evaluation of the information provided by the Council for the Judiciary on efficiency, legality and quality; providing policy guidance for the management of the judiciary through legislation and other rules and the constant checking of these guidelines; and recommending members for the administration of the Council for the Judiciary as well as members for the judiciary for appointment by Royal Decree.

Verhey[18] suggests that parliament, at the end of the day, is responsible for maintaining a balance between ministerial responsibility and judicial independence. The ministry, as has been pointed out, has not placed all responsibility with the Council for the Judiciary, but has the task of monitoring and improving through legislative proposals. Through the legislation, parliament can control how far judicial independence is or is not imposed through new organisational structures.

14 P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001, p. 51.

15 R. Meijerink, '*Recht van spreken*', Interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak, 1999.

16 Ibid., p. 38.

17 Ibid., p. 39.

18 P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001, p. 55.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

4.3. *Judicial independence and integrity*

The prevention of corruption cannot be considered as a concept to be governed only by law. Usually a mixture of legal rules, an excellent legal status, and the socialization of judges in organizational court cultures enhance the personal moral integrity of judges.

The constitutional provision for preventing corruption is found within article 121 of the constitution, stating that court hearings are public and that judicial decisions must be reasoned. Article 117 of the constitution gives rules for the legal status of judges. Judges are appointed for life. Such appointments also usually come with a relatively high income and pension, and with opportunities for promotion to higher courts. The legal status of judges is arranged by special acts of parliament, including their salaries. Moreover, when appointed, Judges have to swear an oath in which they declare not to have given or not to have received anything for their appointment as a judge, and in which they promise not to accept any gifts from persons likely to be related to proceedings they are (going to be) responsible for, and to behave as good, unprejudiced judges (article 5).

The rules for the removal of a judge are also based on article 117 (3) of the constitution, which makes dismissal possible by the Supreme Court. The relevant act of parliament is the Judicial Organisation Act articles 11-14e. Outside of illness, there are three basic conditions for removal: 1) unsuitability of the judge for the function; 2) the acceptance of another position which is in conflict with the judicial function; and 3) the loss of Dutch nationality. Unsuitability may amount to an irrevocable conviction for committing a crime, bankruptcy, or behaviour that severely damages the proper functioning of justice or the confidence attributed therein.

There are legal arrangements for a judge to ask to be excused from a case if s/he has an interest therein. There are also legal arrangements for parties to challenge a judge if they suspect prejudice or bias.[19] The first such legal arrangement is a recusal (verschoning) where the judge declares his/her interest in the case, and asks his colleagues to be removed from it. The other is challenging a judge (wraking). This is where the advocates can challenge a judge's standing to hear a case because they feel there would be undue prejudice or bias, or that the judge has an indirect interest in the case.

The protection of judges from corruption is done by creating transparency[20] around the judicial function, thereby making it difficult for judges to be biased (and corrupt).[21] In 2002 the Dutch journal for the judiciary *Trema* published a special issue on the impartiality of judges and debated the value of a conduct and recusal code (gedrags/verschoningscode)[22] to dictate when a judge should seek to recuse herself from trying a case due to bias, or the value of creating a hearing to challenge the judge

19 Articles 512-519 Code of Criminal Procedure, articles 29-36 Code of Civil Procedure, articles 8:15-8:20 GALA, article 7 Central Appeals Procedure Act, article 8 on the Council of State, article 8 Regulatory Industrial Appeals Procedure Act.

20 M.F.J.M. de Werd, 'De openbare uitspraak', *Nederlands Juristenblad* 2001, vol. 2, p. 67-74.

21 Articles 116 and 117 also look to protect judicial independence and impartiality.

22 *Nemo iudex in causa propria* which sets out the principle that no man shall be a judge in his own case.

appointed to a case. This special issue of *Trema* looked at the work of the working group of the Dutch Assocation for the judiciary (NVvR)[23] and the research carried out by the Research and Documentation Centre of the Ministry of Justice (WODC)[24] into forming a conduct and recusal code. What eventually came about from the research of the WODC and the work of the Dutch Association for the Judiciary was a set of guidelines for impartiality in 2005 (Leidraad Onpartijdigheid). These guidelines consist of a limited number of recommendations, with an explanatory annex, consisting of a literature list, articles of legislation, jurisprudence and codes. These were designed to give direction to defining the concept of impartiality more concretely. In this way, the recommendations have been described as giving assistance to individual judges in judging their impartiality in an actual case and to decide whether or not to seek to recuse themselves from hearing a case.[25]

The debate on creating a code looked, on the one hand, at the need to create a framework for transparency around the functioning of judges, and which can also lead to the consistent application of rules for recusals and challenges.[26] On the other hand, it looks at whether it is entirely necessary to create a new code due to the already comprehensive framework in Dutch constitutional law and international norms on this issue.[27] However, there has been growing concern, not for the main body of sitting judges, but for the temporary and part time judges and their external interests.[28]

If no declaration or challenge is made then the case goes on as usual. In terms of the demands made by article 6(1) of the European Convention on Human Rights, all parties to a case have a right to have their hearing by an independent and impartial tribunal. The fact that there is a responsibility upon advocates to challenge a judge who appears to be biased goes some way to protecting clients. Also the fact that a case can be appealed on a point of law goes some way to preventing biased judges from sitting on certain cases.

With the necessity of publicising legal reasoning for judgements, and the possibility of appeal, it is also difficult to swing a judgement in a certain direction. However, a few incidences of corruption in modern times can be cited for the judiciary.[29] The integrity of judges has been felt to be something which has been neglected by the discussions on the quality of the judiciary. Ruijs, a prominent court watch activist, has identified an integrity issue within the judiciary, especially where judges have taken up other positions at the same time as their judicial ones (for example, members of a board of directors, or as a member of a government committee). He states that the judicial power has turned a collective blind eye towards the fact that extra judicial functions

23 Nederlands Vereniging voor Rechtspraak.

24 Wetenschappelijk Onderzoeks- en Documentatiecentrum.

25 G. Vrieze, 'Zijn rechters zonder gedragscode nog wel te vertrouwen? (1)', *Trema* 2005, p. 146-147.

26 A.F.M. Brenninkmeijer, 'Naar een gedragscode voor de rechter?', *Trema* 2002 p. 91.

27 Ibid,. p. 85-90.

28 J.A.Z. Hooft Graafland, 'Is een verschoningscode wenselijk?' *Trema* 2002, p. 92-95.

29 Of course, this is no assurance that corruption does not exist, but if it exists, then it is very well hidden. For a debate, see Het klankbord '*Corruptie in Nederland*' http://www.het-klankbord.vuurwerk.nl/recht.htm.

of judges could affect their independence, and more importantly their impartiality in concrete cases. The main criticism is that the actual obstructions that citizens encounter when asking about extra judicial functions, judgements, and their own procedural dockets stand in stark contrast to the judiciary's claim to transparency.[30] The Integrity of the Judiciary report (Integriteit Rechterlijkemacht, otherwise known as Terpstra Tukker of 1996) stated that judges should take more care to be self-critical on this issue and that they should be aware that they are not completely immune from accountability.

The public nature of judges' work leaves them open to scrutiny by the public. However, because of judicial independence, public criticism, uttered in newspapers and other media, is often ignored. Judges must maintain impartiality in all cases and must not let their judgements be clouded by outside views. Whilst the public nature of hearings and judgements goes part of the way to protecting the public from corrupt and incompetent judges, it is, on the other hand, rather difficult to scrutinise the judiciary and even more so the behaviour of individual judges.

There are various formal measures to complain about the functioning of justice, for example, within the framework of organisational change; since 2001, however, there has been an internal uniform complaints regulation for all of the courts.[31] Since the 1980s it has been possible to complain to the Supreme Court about the comportment of members of the judiciary under the National Ombudsman Act and now under the Judicial Organisation Act.[32] Furthermore, it is now possible to complain about the support staff of the courts under the National Ombudsman Act to the ombudsman itself (as opposed to the Supreme Court).[33] There is also the right of cassation to that Supreme Court under article 118 of the constitution.

The judiciary, as a state organ, has been given the duty of protecting people within the rule of law, which begs the question of who is watching the watcher. The government took the opportunity to discuss this issue when they were busy with changing the overal structure of the judicial organisation in general, and Prof. Bovend'Eert took up the discussion in his article in the special edition of Trema in January 2002 on 'wie bewaakt de bewakers?' (who guards the guardians?).[34] There were various options under discussion at the time: firstly, the national ombudsman could be responsible for handling complaints about the comportment of members of the judiciary; secondly, an

30 P.P.M. Ruijs, '*Wij zien u wel in de rechtszaal: klassenjustitie in Nederland?*', Aspekt, Soesterberg 2001; S. de Jong, 'Interview met Paul Ruijs', in *HP/De Tijd,* 16 April 2004.

31 P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 78.

32 Wet op de rechterlijke organisatie, 2002, see articles 14a-14e; P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 78.

33 Wet Nationale Ombudsman, 1981; P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 82.

34 P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 78-83.

independent judicial ombudsman could be developed to handle complaints by parties;[35] and, lastly, it was an option to keep the existing rules under article 14a-14e to allow the Supreme Court to deal with complaints (also in connection with the internal complaints regulations within the courts themselves).[36] However, there was a lack of consensus as to who actually should watch the watchers, thus the Judicial Organisation Act 2002[37] stuck to the original rules.[38] However, given the new organisation structure within the courts and the responsibilities of judges for management, it was no longer possible to reasonably separate the complaints mechanisms for judges and support staff.[39] Whilst the literature would indicate that there has been an ongoing debate since 2003 about finding a solution to this, nothing within this particular framework of rules has yet changed since 2002.

However, by becoming more transparent, nobody needs to be 'formally' on guard (soft accountability). If they leave themselves open to constructive criticism, they can develop themselves to adapt to modern-day needs. Recent initiatives taken include putting information, communication and technology systems to better use to engage with the public. A detailed web site has been set up about the Dutch judiciary (www.rechtspraak.nl). There is information about all of the courts, where they are situated, who is who, and who does what, court schedules and also summaries of judgements.[40] Additionally, the operation of the guidelines for the impartiality of judges can also be seen as a framework of transparency within which the judges can act.

The judiciary has been under a great deal of media scrutiny over the last few years, especially as the judiciary has had such a grave impact on issues such as euthanasia and the drugs policy, and the media have a major interest in criminal cases. However, reacting to the media is a danger, especially in individual cases. If judges allow themselves to be influenced by the media's views, then that is a breach of their impartiality and that goes against the rights of the parties to a case.[41] All district courts do

35 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut) Deventer 1998, p. 37-39.

36 P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 79.

37 Wet organisatie en bestuur gerechten, 2001.

38 P.P.T. Bovend'Eert ,'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 79; M.T.A.B. Laemers, 'Een wijs man gebruikt de klachten van zijn tegenstanders als een spiegel: Klachtenregeling ten aanzien van de rechterlijke macht', *Trema* 2003, p. 411-415.

39 M.T.A.B. Laemers ,'Een wijs man gebruikt de klachten van zijn tegenstanders als een spiegel: Klachtenregeling ten aanzien van de rechterlijke macht', *Trema* 2003, p. 413-414.

40 M .Velicogna and G.Y. Ng, 'Legitimacy and Internet in the judiciary: A Lesson from the Italian Courts' Websites Experience', *International Journal of law and information technology,* Oxford Journals, Oxford University Press 2006.

41 M. Fabri, 'Selected Issues of Judicial Administration in a Comparative Perspective', in *The Challenge for Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000, p. 190-191.

have press judges (persrechters) – members of the judiciary who deal with the press. If a television crew or newspaper journalist wishes to cover a certain case, then they must apply to the press judge. These judges also take the time to explain the legal reasoning behind the judgements of the courts, something that journalists or court-appointed press-secretaries are not qualified to do.

4.4. Conclusions

Whilst the actual power and responsibility of the judiciary regarding adjudication remain unchanged, the accountability of justice has expanded in two ways: firstly, in terms of organisation and, secondly, regarding the impartiality in judging cases. These changes have come about after a great deal of academic research and political debate dating from the 1980s, resulting in the creation guidelines for impartiality and the setting up of the Council for the Judiciary to deal with organisation and financial matters. These two results are unrelated except for the fact that they are a result of political debate and public scrutiny of the functioning of justice, which is an important and ongoing activity given the expansion of the power of justice discussed in the theoretical framework.

In dealing with the first change concerning organisation, one can see formal changes to the accountability of the judiciary especially with the creation of the Council for the Judiciary. This has changed the checks and balances between the legislature, executive and judiciary, especially regarding the operation of ministerial responsibility for the judicial organisation. On the one hand, the instigation of an independent body of judges and managers familiar with the judicial organisation to manage finances and support the organisation means that parliament and government have the opportunity to scrutinise and challenge methods used in the organisation of justice within the framework of checks and balances in the constitution, especially given the responsibility of parliament to deliver justice. On the other hand, it also means that the judiciary has responsibility for its own organisation in support of its judicial function. They can set their own priorities and have a choice as to how money is spent. This is a new responsibility, and will be discussed further in the following chapters. At this point the most important issue is that the creation of this institution has changed the nature of checks and balances.

Concerning the second change to the guidelines on impartiality, this affects the doctrine of judicial independence and impartiality. The literature shows that there are ongoing debates on the issue and, furthermore, there is an evaluation of the operation of the guidelines every two years. The operation of these guidelines reflects the continued concern for the functioning of justice itself. The fact that they were set up by the Dutch Association for the Judiciary shows that one of the sources of concern came from within the judiciary itself. That a report from the research and documentation centre of the Ministry of Justice (WODC) was a contributory factor reflected that the other source of concern came from political debate and public scrutiny.

In general, these changes in aggregate can be seen as a sign that serious assessments are being made of the functioning of justice within the framework of constitutional law. Formally, the judiciary has become more independent with the organisational changes made in the Judicial Organisation Act 2002. Alongside the greater independence of the

organisation, accountability in the form of the transparency of the organisation of justice (soft accountability) has been developed. This has been done in such a way to avoid negatively affecting or breaching the judicial independence of deciding cases. In being careful not to affect judicial independence in deciding cases in organisational reform, it was necessary to also examine the operation of judicial independence, especially impartiality in deciding cases. Whilst this examination was taking place at policy level, there also appeared to be greater concern from the legal professionals and parties themselves concerning the impartiality and the transparency of the functioning of justice. This means that there was a bottom-up impetus for change.

The ability to change the organisation of the judiciary and to crystallise the doctrine of impartiality reflects that the Dutch constitution is a flexible legal document subject to broad interpretation. Furthermore, that the judiciary has allowed these changes to take place shows that it recognises the importance of public participation in its own functioning. This further shows that the judiciary in the Netherlands is in the process of becoming part of the community it serves, thereby attempting to enforce its legitimacy in the framework of law and society.

Chapter 5

5. The institutional context of the Dutch judiciary

The question to be addressed here is how the Dutch judiciary is organised. This is important to show how the demands of the constitution as regards the judiciary are realised as regards access to justice, and due process. This area is separated into three areas: the courts' competences and jurisdiction, and the training and careers of members of the judiciary.

5.1. Courts in the Netherlands[1]

5.1.1. Competences

A basic requirement of the judicial institution is that it must be accessible, and it must also be probable that everybody can physically reach a court within a reasonable time. Territorial jurisdiction is called relative competence.[2] The Netherlands has 19 district courts (gerechten), 5 Courts of Appeal (gerechtshoven), and one Supreme Court (Hoge Raad). Before January 2002 there were 61 sub-district courts (canton courts). In 2002 there were 1,880 fte judges working in the Netherlands, with 1,293 working full time and 587 part time. There was a total of 6,138 support staff.[3] At the end of this research in November 2006, the numbers published on the website of the judiciary were for 2004, 2200 judges (including part time, but excluding temporary replacement judges), with 260 people in training.[4]

1 C.A.J.M. Kortmann and P.P.T. Bovend'Eert, '*Dutch constitutional law*', The Hague, London, Boston 2000, p. 130; for more on the numbers, see www.rechtspraak.nl.

2 P. Albers, C. Boonstra, F.C.J. van der Doelen and L. Mos, 'De territoriale verdeling van rechtsmacht in Nederland: bevindingen naar aanleiding van de CEPEJ expertmeeting van de Raad van Europa op 6 oktober 2003 te Den Haag', *Trema* 2004, p. 16-23, p. 16.

3 Juridische infrastructuur in internationaal perspectief – criminaliteitsbeheersing, p. 51; my thanks to the Council for the Judiciary, public relations department.

4 http://www.rechtspraak.nl/Gerechten/RvdR/De+Nederlandse+rechtspraak+in+cijfers/Personeel+Rechtspraak+2004.htm The statistical data for support staff is not in terms of the number of staff, but rather in terms of

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

After January 2002 the Judicial Organisation Act merged the sub-district courts with the district courts organisationally. There were several reasons for this change in the organisation of the courts. Originally, the sub-district courts were set up to deal with the simpler civil and criminal cases. As they were deemed to be a lower court than the district courts (which are also first instance courts dealing with civil and criminal cases – but of a more serious nature), any appeals also went to the district courts. Thus to normal people using the courts, the system was rather confusing. The second (less formal) reason for this change, is that sub-district court judges would work relatively isolated for long periods of time. Although some sub-district courts engaged in cooperation with other nearby sub-district courts, there was, generally speaking, very little feedback on the functioning of the sub-district court judges and their staff.[5] With the new organisation, it is possible for judges of the sub-district sectors to rotate within the district court itself to one of the other sectors. A third reason, mentioned by the IBO, is that the sub-district courts as they were, were too small organisationally to implement integral management.[6]

The next sign of efficiency after the distribution of jurisdiction following geographical factors is efficient case management. The most basic way to filter cases is according to the type of law they fall into, i.e. criminal, civil and administrative law. This form of efficiency is called 'absolute competence' in Dutch law. On top of these three sectors, some courts have military and tax sectors under articles 54-55 of the Judicial Organisation Act 2002.

The five appellate courts and the Hoge Raad also have similar divisions, but only for tax, criminal and civil cases. The Hoge Raad hears appeals only in cassation (i.e. on points of law and not fact). All the other courts beneath the Hoge Raad can hear cases on both points of law and fact.

The organisation of administrative jurisdiction is somewhat complicated in the Netherlands. The General Administrative Law Act (GALA)[7] instituted the present first instance administrative law court sectors as part of the district courts in 1994. Before that, legal protection against administrative decisions evolved during the last century separately for different fields of government activities. A variety of administrative tribunals existed. Also the Council of State had an important role in legal protection against the government; in this respect it gradually evolved from a body giving advice only to the Crown in certain cases (e.g. spatial planning and environmental decisions) into a full administrative court, nowadays called the 'Judicial Division of the Council of State'

In the period up until 1986, ninety nine per cent of the time government followed the advice of the administrative conflicts division of the Council of State, until the European Court of Human Rights ruled that such a system went against judicial

'working years' (arbeidsjaren). In 2004 there were approximately 5,000 working years charged to the Council for the Judiciary for the support staff in terms of financial planning.

5 P.H.M. Kuster and T.J. de Geus, 'Rechterswerk', *Trema* 2003, p. 315-318, p. 315-316.

6 R. Meijerink, '*Recht van spreken*', Interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak, The Hague 1999, p. 18.

7 Official translation for Algemene Wet Bestuursrecht (AWB).

independence, required under article 6 of the European Convention of Human Rights.[8] Now each district court has an administrative law sector so that a judge can rule upon the legality of governmental action in relation to citizens and organizations. From there on, there are three possibilities to appeal. The first is to the Administrative Law Division of the Council of State (Afdeling bestuursrechtspraak Raad van State) – a High Institution of State (Hoog college van staat)[9], the second is the Central Appeals Tribunal (Centrale Raad van Beroep) (for the public service and for social security matters) and the third is the Trade and Industry Appeals Tribunal (College van Beroep voor het Bedrijfsleven). This structure has been criticised as being contrary to the principle of the uniformity of the law and the application thereof.[10]

Following on from the jurisprudence of the European Court of Human Rights, under the GALA 1994 and the Council of State Act, the Council of State may no longer advise the Crown in cases where there appears to be a conflict between government and a party (a natural or legal person); the administrative conflicts division has ceased to exist. However, the Council of State still advises on draft statutes, and on other cases requested by government, but in these cases it does not fulfil a judicial function.[11]

5.1.2. Separate jurisdictions

Administrative law

Administrative law is governed by the GALA 1994.[12] This act established competences for the 19 district courts to review administrative acts by government and its agencies. It governs the relations between government and individuals (citizens or organisations), government actions, the method by which government policies are implemented, the method by which individuals can challenge government orders, and the way to lodge appeals against administrative decisions with the courts. However, the courts do not cover every administrative decision or government order. Such decisions and orders must fulfil certain criteria. An 'administrative body ' must make a 'decision' on specified subjects; otherwise another channel of appeal is through the civil courts. For non-legal complaints the National Ombudsman may be addressed.

Criminal law

Criminal law is governed by the Code of criminal law and the Code of criminal procedure. The state actors in criminal law are the police, the public prosecution service (openbaar ministerie), the examining magistrate, and the criminal court itself. There

8 Case number: 1/1984/73/111, *Benthem* v. *The Kingdom of the Netherlands.*

9 There are many other High Institutions of State, for example, the Lower House and the Senate of the Dutch Parliament, the National Ombudsman, the Auditor, and the Supreme Court.

10 G.J.M. Corstens ,'Reorganisatie van de rechterlijke macht', *Nederlands Juristenblad* 2001, vol. 3, p. 124.

11 Although this can still be considered to be a delicate and fragile balance conceptually, as the separation between advisory and judicial tasks is incomplete.

12 J.B.J.M. Ten Berge, '*Bescherming tegen de overheid: stand van zaken na invoering van de Algemene Wet Bestuursrecht*', Zwolle 1995, ch. 1.

also exists in the Netherlands the position of an examining magistrate (rechter comissaris). This is a judge who leads the investigation into cases where a public prosecutor has to conduct a more detailed investigation. The examining magistrate does not play a part at the trial stage.[13]

In the Netherlands, as with all other democratic states under the rule of law, a suspect is innocent until proven otherwise. She has a right to legal representation, and if she cannot afford this, then legal aid will be provided, with a small contribution from the suspect herself. If the case is a summary case (a minor offence – for example, speeding) then it will start in the sub-district sector of the district court, and an appeal will lie to one of the courts of appeal, and, if necessary, further to the Supreme Court. If it is a normal criminal case (a serious offence, like murder), then it would start at the criminal sector of the district court, and an appeal would then lie to one of the five courts of appeal, and if necessary, on to the Supreme Court.

Civil law

The codes of civil law and civil procedural law govern the relations between legal persons (this includes not only people, but also government agencies and private companies). An action at civil law can begin at the sub-district sector or civil law sector of the district court, depending on the value at stake. The sub-district sector deals (amongst other subjects) also with conflicts concerning rents and labour contracts. Appeals go to one of the five courts of appeal, and finally to the Supreme Court. The first instance courts establish the facts of the case and what went wrong (if it is contract law). Once they have weighed the facts of the case, they will come to a judgement. The court of appeal acts in the same way. The Supreme Court, however, (as stated above) only examines the law and not the facts of the case. Litigants going to the Supreme Court must be legally represented, and all representations must be in writing.[14]

5.2. *Members of the judiciary*

5.2.1. *Training and selection*

In order to become a judge, one must have a law degree from a Dutch university, with an emphasis on Dutch civil (procedural) law, criminal (procedural) law, and administrative (procedural) law. The degree should meet the national requirements to become a member of one of the judicial professions, except notaries. Next to this formal requirement, other personal characteristics are looked for, for example, analytical skills, juridical insight, decision-making skills, an ability to work well under pressure, good communicative skills, and clear judgment techniques.

Generally, there are two ways to become a judge, one for law school graduates – the RAIO track – and one for experienced lawyers – the external track.

13 G.J.M. Corstens, '*Het Nederlands strafprocesrecht*', Deventer 2005.

14 P.A. Stein, '*Compendium van het burgerlijk procesrecht*', Deventer 2005.

The RAIO track
After graduation one may apply for an assignment as a judicial trainee in the *RAIO*[15] training programme. The recruitment and selection programme takes about 8 weeks. There are approximately 250 trainees at any given time, and training takes in principle six years. The first four years of training are done as internships within the judiciary itself, at a court and a public prosecution service, and the final two years are spent in the legal field outside of the judicial organisation. Whether one gets a place on this training programme is dependent upon two factors: firstly, the results of the selection procedure, and, secondly, the number of places available (the minister of justice decides on this number every year according to the need).

Next to the internships, the Training and Study Centre for the Judiciary (Stichting Studiecentrum Rechtspleging - SSR) provides a broad range of courses.[16]

The SSR itself went through a reorganisation in 2002, the same year that the Council for the Judiciary began its operations. As a teaching organisation, it is mostly responsible for training people to become judges, with about 1200 lecturers. According to Didde,[17] the most important reform was that the institution was no longer under the leadership of a director from the hierarchy of the Ministry of Justice. Even though funding still comes from the Ministry of Justice, which is responsible for management,[18] much of the administrative influence has now gone. Furthermore, the organisation's internal teaching organisation has changed, whereas before it focused on the three areas of the law in terms of civil, criminal and administrative. It was changed to having a layer of five middle managers from different departments, who together marked out the working field of the SSR: course organisation, teaching methods and programming. They are also responsible for management and JUSTEX (a database for commentary on administrative law jurisprudence).[19]

Next to the role of the SSR and the courts in training RAIOs in the first phase of their careers, some discussion was also held about the role of the Court of Appeal in the training of RAIOs.[20] This discussion was held at the conference 'Hovenconferentie 2002' with a main summary in the Trema December issue in 2002. The reason for involving the Court of Appeal in the process at all is twofold: firstly, all judges start at the court of first instance, therefore the Court of Appeal has a vested interest in having high-quality judges promoted to their instance. Secondly, promotions to the Court of Appeal occur so frequently that the courts of first instance are left without experienced judges to take their place, and are left with the workload. Furthermore, they must spend time and resources on training incoming judges from the RAIO track or the external track. By leaving his lacuna in the first instance courts, the Court of Appeal

15 Rechterlijke ambtenaar in opleiding (trainee judicial officer).

16 See E. Köhne-Hoegen, 'Over de socialisatie en (her)opvoeding van de raio', *Trema* 2006, vol. 5, p. 186.

17 R. Didde, 'SSR under construction. Een nieuwe wind in Zutphen', *Trema* 2002, p. 230.

18 Ibid., p. 230.

19 Ibid., p. 231.

20 See J.B.H. Röben, 'Hoven in opleiding', *Trema,* vol. 10, p. 508-511.

should make some investment in training incoming judges to the courts. Whilst this has not led to a general policy, the courts of appeal do play a role in training judges.[21]

The selection procedure is composed of the following steps: A preliminary look to ensure that a candidate fulfils the initial requirements (a law degree). Afterwards, the candidate takes an analytical/cognitive test. There is then a personal interview, and an assessment. If the candidate gets thus far, there will be an interview with the RAIO selection committee. Further tests are used to determine intelligence, analytical capacity and personality. Following all tests and interviews, the selection committee will write up their views and judgment on the candidate's application. The Training and Study Centre for the Judiciary (SSR) select RAIOs.[22] There is a limit to admission to this training, that of being not older than 30 years of age. It is however difficult to get qualified people for this training programme. Many of the applicants for the selection procedure are offered and accept other jobs before the selection period is finished.

A recent move to protect judicial independence and integrity was the combination of the Commissie Aantrekken Leden Rechterlkijke Macht (CALRM) (a Committee concerned with attracting members of the judiciary) with the RAIO selection committee. The Council for the Judiciary did this in order to make the selection process accessible and transparent. This means that persons other than those from the judiciary have a say in the selection process. According to Hooft Graafland, there are now 66 members of CALRM: 18 from the RAIO selection committee, 40 from the judicial organisation (including 5 from the public prosecutors office) and 26 external. That external members get to sit on the selection committee lends itself towards the legitimacy of the whole process.[23]

The external track

The alternative way of becoming a judge is via external candidate training. Lawyers with at least 6 years experience at the bar, in business, at universities or in government may apply for the external candidates training. The other formal requirement next to the 6 years experience, is that the candidate should have completed three of five examinations in the following legal areas: civil law, including civil procedural law, criminal law, including criminal procedural law, administrative law, including administrative procedural law, public law and tax law. One must be older than 30 to function as a judge, and older than 35 to function as a judge at an appeal instance (a raadsheer – a 'justice').[24] First of all, the candidate is invited to be interviewed by a preselection

21 There is at least one local policy at Den Bosch when new judges come to the civil sector at the district court; they go for training to the Court of Appeal for several months. My thanks go to Dr. Philip M. Langbroek for this information.

22 After 2002 the Council for the Judiciary also has a stronger role in recommending judicial appointments than the Ministry of Justice.

23 J.A.Z. Hooft Graafland, 'Beroepsethiek van rechters', *Trema* 2005, vol. 7, p. 290.

24 This is a tricky term to translate, as the system of appeals is different for each type of law. A raadsheer is someone who is a judge at a court of appeal (gerechtshof) or the Supreme Court.

committee, which gives advice concerning the possibility that the candidate will pass the following selection process. If the preselection committee gives the go-ahead, a psychological examination will follow as well as three interviews with two members of the committee. The result of these deliberations may be a rejection of the candidate, the suitability of the candidate for the position of a judge, or the recommendation that the candidate should receive some training at a court before she is suitable to be appointed as a judge. This training may take one year, sometimes longer. After successful completion of this training one may be appointed as a judge, but it may take considerable time before an appointment is effected. A difficulty is that this training takes place in the spare time of the candidate who still has to do her/his current job. Considerable personal investment is asked for, without the certainty of a positive result, and without any compensation whatsoever. Furthermore, the separate courts offer the necessary training and there is almost no co-ordination on a national scale concerning the requirements that candidates should meet after training. Overall, the current policy is to compensate for the shortage of inflow from the *RAIO* training by an influx of external candidates.

According to Röben, due to an expansion of the judiciary and the retirement of many older judges, it is estimated that in the coming years (from 2002 at least) a 1000 new judges will be needed.[25] According to Didde, only 60 people start the RAIOs training at the SSR per year (from 2002) to become either judges or prosecutors.[26] Furthermore, the shortage will be compounded by the fact that not all of these people complete their training to be judges. However, he also expresses the belief that with the shortage of judges applying for RAIO positions, there will be an increase in temporary judges, or judges coming from outside the system.[27]

Additionally, questions are being asked about the qualities which judges should have apart from the traditional judicial ones. The PVRO (The Judicial Organisation Reinforcement Project)[28] developed a project on personnel management. This included a programme for competency management. In 2000, the Ministry of Justice was considering a renewal of the recruitment and selection procedures for the judiciary.[29]

5.2.2. Judicial career

A judge usually starts his/her career in a district court, as a member of a three-judge chamber, and may later preside over hearings single-handed. From this position judges may become members of an appeal court, a vice president, or a sub-district sector judge. Sub-district court judges had a higher status compared to ordinary district court judges and they received higher salaries. Other positions in the hierarchy of the judicial

25 J.B.H. Röben, 'Hoven in opleiding', *Trema* 2002, vol. 10, p. 508.

26 R. Didde, 'SSR under construction. Een nieuwe wind in Zutphen', *Trema,* vol. 5, p. 230.

27 See E. Köhne-Hoegen, 'Over de socialisatie en (her)opvoeding van de raio', *Trema* 2006, p. 189.

28 This stands for Project Versterking Rechterlijke Organisatie: It was an initiative of judges and the Ministry of Justice before the new Judicial Organisation Act in 2002 to improve the quality of judicial organization. For more information, see chapter 6, part 6.2.3. Council for the Judiciary.

29 '*Derde voortgangsreportage PVRO, 1e halfjaar 2000, van landelijk naar lokaal*', PVRO, Amersfoort 2000, p. 35.

organisation are the offices of co-ordinating vice-president at the district courts, president of a district court, (vice) president at a court of appeal, member of the Supreme Court, and (vice) president of the Supreme Court. Similar positions can be obtained in the administrative courts not belonging to the judicial power. The positions of co-ordinating vice president and of president are management positions. Judges hold the view that the management of professionals should be done by their fellow professionals. Therefore, the leading management positions within the courts are to be held by judges.

These are not, of course, the only advancements possible. It is also possible to be promoted to the Court of Appeal. As discussed earlier, there is a vested interest by all concerned in having high-quality decisions delivered by judges. To that end, after a judge has been appointed, there will be continuous training provided by the SSR, either at Zutphen (home of the SSR), or the SSR will organise tailor-made courses for individual courts themselves.[30] Training and knowledge management are not the monopoly of the SSR in the judicial organisation. They will happily recommend the courts to use the services of universities and private consultants. The core activity is in the initial training of judges.

Until recently it was quite normal for members of the bench, lawyers working in industry, trade, government or universities to be appointed as substitute judges. In practice this would mean a substitute judge sits once per month. For the courts, this was a way to keep in touch with experiences and expertise in the outside world. In this way, some 1000 lawyers participated in the business of judicial decision-making. The courts must publish the secondary functions of all their judges on the justice website: www.rechtspraak.nl. Many substitute judges are lawyers at a law firm and only the appearance of bias by a judge towards a colleague of the same law firm is considered unacceptable.[31]

5.3. *Conclusions*

The institutional issues of court competence and the training and appointment of judges directly affect the quality of and access to justice. One can conclude that the courts and judges form the foundation of the institutions of justice. From an institutional point of view, there is clarity of jurisdiction, and thus there exist clear legal obligations on courts to hear cases at certain times and places. Furthermore, the rigorous training and testing of candidates to become judges reflect the aspiration of the programme to reach the highest possible standards to ensure high quality and independent and impartial justice.

30 See R. Didde, ‘SSR under construction. Een nieuwe wind in Zutphen’, *Trema* 2002, vol. 5, p. 231.

31 See Nederlands Vereniging Voor Rechtspraak, ‘*Leidraad Onpartijdigheid*’ Raad voor de Rechtspraak http://www.rechtspraak.nl/Naar+de+rechter/Landelijke+regelingen/Algemeen/Leidraad+onpartijdigheid+van+de+rechter.htm ; see also E. Bauw and F. van Dijk, ‘Conflicterende eisen hollen rechtspraak uit’, *Nederlands Juristenblad* 2003, p. 280-281, p. 281. For more information on the NVVR, please see chapter 4, part 4.3. Judicial Independence and integrity.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

The modernisation process that began in the 1990s in relation to increasing access to administrative justice, was a policy reaction to a ruling of the European Court of Human Rights. This is a sign that the Netherlands regards human rights seriously, and it also reflects that human rights and judicial independence are very much connected to organisation and therefore to the quality of that organisation. Whilst relative competence in terms of territorial distribution mirrors the political need for efficiency, one can also see that this is related to the quality of organisation and therefore affects human rights of access to (independent) justice.

If one recalls the description of Mintzberg's professional bureaucracy, the training and recruitment of judges is central to quality implementation and control of productivity, and for the protection of independence and impartiality (professional values). To that end, one can see in this chapter that the training and appointments procedures are very rigorous and thorough. However, transparency has become an important issue in the recruitment of judges, whether through the RAIO track or the external track. This is in order to inspire trust not only in the competence of judges, but also in their independence and impartiality. The following chapter will examine how the Netherlands has further built upon this foundation of courts' competences and the training and appointment procedures.

Chapter 6

6. The organisers and policy

It is important to understand the interaction between the different actors who are responsible for organising the Dutch judicial system. Any organisation on this scale requires co-operation, and co-ordination in terms of policy and action within the legal framework set out. It is also necessary to understand the practical and political issues behind the recent changes, especially in light of the requirement of judicial independence. Understanding interaction can offer some insight into these issues.

6.1. Recent history of organisational change

Before the change to the Judicial Organisation Act in 2002, the courts were organisationally in a state of disorder due to poor housing conditions and a dual structure of staff. Courts and their organisations were not really fit to deal with changing circumstances in society (e.g the increasing number of cases). The organisational structure was formally rigid, with one structure for the judges and their legal staff, and one for the directors and their support staff. The lack of structure for communication in the court meant that judges did not really know what was happening with the support staff, and the support staff did not know what the judges were doing. There was not even enough room in the court offices to give every judge a proper workplace. Hence there was a lack of structural integrity to the work in the courts and there was no office-related working ethic for the judges.

The president had overall responsibility for the running of the court, but, generally speaking, she was not selected because of managerial talents or experience. The chief-clerk of the court (griffier) was in charge of the day-to-day management of the court. She was functionally responsible to the president for the running of the court, but the court-administration was formally a part of the responsibilities of the Ministry of Justice. Many judges did not use their offices at the court buildings themselves and only used the courts to hear cases. Lack of resources meant that courts were not automated, which made work slow.

With the increasing number of cases coming into the courts, and the increasing complexity of the law, policies were implemented in order to help the judges cope. First of all, a building programme for new court buildings was set up in 1989 and

completed in 2000, when the last new court building was available in Utrecht.[1] Furthermore, the Ministry of Justice created an organisation development programme. It was recognised, even by members of the judiciary, that their organisation needed to change in order to adapt.[2] It was not until halfway through the 1990s that a small group of judges saw the need for far-reaching changes in the organisation of courts and judges, and started to work with the Ministry of Justice in the 'kick-off' for the organisational development of court organisations and the judiciary. They started by requesting that managers be sent to the courts to clean up their organisations. In the 1990s, government and parliament began to think of ways for the courts to remain adapted to their environment and organisational needs, without having to send in managers whenever things became difficult, and so they began to sponsor a series of investigations and reports into the matter of judicial organisation and how to keep the organisation efficient and effective (without breaching judicial independence).[3]

In 1997 the Stuurgroep ZM Toekomst (the steering group on sitting judges ('ZM') in the future)[4] published two books entitled 'Waar staat de ZM' (where do the ZM stand) and 'ZM op weg' (ZM on its way). Judges themselves were asked what they wanted to change in their organisations. The whole project was about developing the possibility of allowing the courts to administer themselves, but having to follow a certain standard or level of efficiency. Then in 1998 the Leemhuis Committee published a report 'Rechtspraak bij de Tijd' which outlined an idea for a Council for the Judiciary (Raad voor de Rechtspraak) and outlined a more general process of modernisation within the judicial organisation. The Committee also wanted, first, to integrate the position of director/manager of the court (directeur bedrijfsvoering) who is not a judge, and second, to develop the concept of integral management.[5] In 2001 laws were enacted to establish the Council for the Judiciary and to provide a legal basis for the operation of integral management within the courts.

1 Council for the Judiciary (Netherlands), '*Agenda voor de rechtspraak 2002-2005: Continuiteit en vernieuwing*', Raad voor de Rechtspraak, The Hague 2002, p. 6.

2 A.W. Koers, P.M. Langbroek, J.A.M. Vennix and J.M.M Austen (eds), '*Waar staat de ZM?*', Ministerie van Justitie 1997; P.M. Langbroek, *Changing the judiciary and judicial administration: the Netherlands and Guatemala*, at World Bank Conference: Empowerment, security and opportunity through law and justice, St. Petersbourg 2001, p. 10-11.

3 For an overview of such reports please refer to J.M. Leemhuis-Stout, '*Rechtspraak bij de tijd*', Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis) 1998, p. 69.

4 In the Netherlands there are two types of magistrates; zittende magistratuur (sitting judges) and the openbaar ministerie (public prosecutors).

5 More will be said about this part of the Leemhuis report in part 6.2.1.

6.2. *Central administration in relation to local court administration and recent measures taken*

6.2.1. Local court administration

The district courts themselves are organised into a maximum of five sectors (by law), but usually they have four sectors.[6] After January 2002, sectors became individual, organisational divisions, with responsibility to manage their budgets independently. The leadership in the sectors consists of the sector chairman (sectorvoorzitter – a judge) and the sector coordinator (a manager within a sector – a non-judge). Each court has a governing body (rechtbankbestuur) consisting of the president of the court, the sector chairs, and the director of the court (directeur bedrijfsvoering). Together the board takes collegiate responsibility for the organisation of the court as a whole and each member is appointed by Royal Decree for six years.[7]

The director of the court is formally supposed to assist the management board. However, as this position in the governing body is the only one which is, by profession, managerial, it was considered to be practical to make her equally responsible for the administration of the court. The director has the dual task of finding a way to give the judges the environment and equipment they need in order to do their work, and to ensure the quality and quantity of personnel support to the judges.[8] The sector chairs are accountable to the governing board of the court. Whilst the governing board has overall responsibility for the whole court, it works in conjunction with the sector leadership to maintain organisational standards. On January 1 2002, the Council for the Judiciary took responsibility for part of the court management and organisation.

The creation of integral management effectively created a separate function for the judges in terms of their judicial and managerial role, so that the role of president and sector chairman, whilst being managerial positions, do not materially affect their judicial roles.[9] Within constitutionalist circles, there have been arguments against this part of integral management, and placing such a strong emphasis on organisation and benchmarking for management in the courts for fear of a breach of judicial independence. A court, by being obliged to account for itself managerially and financially, shifts its focus away from its main business, that being adjudication. The question which has arisen is the following: could managerial and financial accountability put judges at odds with court managers and politics?

6 All courts have the main sectors: civil, criminal, administrative, and subdistrict (kanton). Some have another sector for youth and family cases, or a military court, for example, see National Regulations (landelijke regelingen: http://www.rechtspraak.nl/Naar+de+rechter/Landelijke+regelingen/).

7 Wet op de rechterlijke organisatie, 2002 article 15.

8 C. Slothouber, 'De Organisatie-aspecten van de verhouding tussen rechters en ondersteuning', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), Deventer 1998, p. 136-137.

9 P.P.T. Bovend'Eert and C.A.J.M Kortmann, 'Het Courtpacking plan van het kabinet Kok', *Nederlands Juristenblad* 2000, vol. 36, p. 1770-1771.

6.2.2. Judges versus managers and politics

Dealing first with the possible conflict between judges and politics, the Council for the Judiciary was set up especially to act as a buffer between the two, so that, organisationally speaking, the courts need only be concerned with the Council rather than with the Minister of Justice. Whilst parliament has constitutional responsibility for the organisation of the courts under article 116 of the Constitution, its work does not lie not in the details thereof, but to facilitate, through legislation, the good organisation of the courts.

On the other hand, the relationship between court managers and judges themselves can be described as being on a personal level (unlike the conflict between judges and politics), in terms of the daily interaction that they can be assumed to have. This can be assumed because they see each other on a daily basis, and it is clear to the judges who the managers are and because they are also colleagues. The Judicial Organisation Act that became effective on January 2002 is the provisional result of a period of 13 years of organisational change. This process of change was ongoing at the time this research was being conducted and completed. The professional managers have always been responsible for ensuring there was a good working environment for judges to do their work. However, under the Judicial Organisation Act 2002, they are operating within a different organisation, whereby there is one organisation for all employees (including judges). Integral management must now ensure that the resources are available to house and equip all those working at the court.[10] The differences underlined between the managing and judging functions of the court diffuse any potential conflicts between the judges and the managers, as the managers have always been known to respect the judges as professionals and not to interfere in their work. However, it became noticeable within the literature that judges began to learn about their organisations, and the number of judges taking responsibility for their organisation had grown considerably at the time this research was being conducted.[11]

6.2.3. Council for the Judiciary

The Council for the Judiciary was set up through changes to the Judicial Organisation Act 2002 (part 6). Its main tasks under article 91(1) of the Judicial Organisation Act are as follows: the preparation of the budget for the Council and the courts; to distribute the budget between the courts; to support the management of the courts; supervising the management of the courts; and to conduct national activities in the area of person-

10 C. Slothouber, 'De Organisatie-aspecten van de verhouding tussen rechters en ondersteuning', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut), Deventer 1998, p. 136-137.

11 J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak' in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut), Deventer 1998, p. 22; P.M. Langbroek, *Changing the judiciary and judicial administration: the Netherlands and Guatemala*, at World Bank Conference: Empowerment, security and opportunity through law and justice, St. Petersbourg 2001, p. 7.

nel policy. Under article 91(2), in order to conduct its main tasks, the Council is to pay attention to automation and information provision within the courts; housing and security; the quality of the work processes and the organisation of the courts; personnel matters; and general material resources. The foundation that gave the Council its initial footing was the Project Versterking Rechterlijke Organisatie- PVRO (The Judicial Organisation Reinforcement Project), a combined ministerial and judicial initiative, which was set up in 1999 to teach the local court organisations how to become more efficient and to provide better services. A model for quality was also created for this project based on the model of the Netherlands Institute for Quality (Instituut Nederlandse Kwaliteit), an EFQM-inspired[12] model.

Under article 84 of the Judicial Organisation Act 2002, the Council is composed of (a maximum of) five people appointed by Royal Decree for six years. Two of the members are non-judges. Responsibilities include preparing a budget for the courts, supervising spending and management of the courts, and promoting juridical quality and the uniform application of the law. It is competent to question court administrators and ask for information, to give general advice and guidance in management affairs, to suspend or annul decisions of court administrators and to terminate the contracts of court administrators for incompetence. More specifically, it creates the budget for the year for the whole of the judicial organisation, which is used in turn by the ministry in its budgetary proposal to parliament. It oversees the computerisation of the courts and information flows, providing court buildings and security; seeing to the quality of management and organisational working methods; personnel affairs; and generally providing the material needed to run a court organisation. The Council for the Judiciary takes on the extra responsibilities for creating goal-oriented work processes, the development of policies relating to quality, the division of a court's capacity to handle cases, and the uniform layout of judgements. In turn, the Ministry of Justice has similar competences to supervise the Council for the Judiciary.

6.3. Finance

Previously, the Ministry of Justice was responsible for centrally distributing money to the courts locally in accordance with the Comptabiliteitswet (Government Accounts Act).[13] The courts' service organisations, clerical staff included, were part of the Ministry of Justice. As a matter of fact, the ministerial court service and the boards of the individual courts had a shared task of management. Up until the time that some judges started to accept the inevitable need for organisational change, judges generally expressed a fierce independence, both in their function and their organisation. In this way, the separation of powers was maintained in that the clerical staff of the Ministry of Justice did not interfere in the decision-making process in cases. This separation maintained managerial accountability under the Government Accounts Act and

12 EFQM = European Foundation for Quality Management.

13 J.M. Leemhuis-Stout, '*Rechtspraak bij de tijd*', Adviescommissie toerusting en organisatie zittende magistratuur (Commissie Leemhuis), 1998, p. 16.

therefore also the nature of ministerial responsibility for providing efficient justice under the constitution.[14]

The modernisation process in general had as its impetus the drive to improve the quality of services, efficiency and communications within the judicial organisation. Parliament wished to see money being put to the 'modernisation' of the judiciary. The PVRO was a positive step in this direction and showed responsibility for spending for the organisation.

To further the accountability for spending within the judicial organisation, the new financing structure serves two purposes, first, to make the judiciary more transparent in its spending, and hence more accountable, and second, to act as a stimulus for higher standards in the operation of the judiciary. Whilst the budgetary roles between government and parliament are unchanged,[15] the role played by government in holding the judiciary to account for its spending has been altered, as has its role in creating the budget for the judicial organisation. The focus of change has been to make the judicial organisation itself, through the Council of the Judiciary and the courts' administration, more active in the budget-making and spending structures.[16]

The Minister of Justice is responsible for the administration of the budget for the judiciary based on article 16 of the Government Accounts Act. Before 2002 the ministry would distribute funds after individual consultations with individual courts. The law has never dictated how funds should be shared out and it was left to the discretion of the ministry.[17] Under the new Judicial Organisation Act, the Council for the Judiciary takes a central role in creating the budget for the judiciary, and also for the distribution of funds. Government is still responsible for submitting the budget bill to the Lower House of Parliament, and budgeting for the judiciary remains a part of the budget for the Ministry of Justice. The courts' administrations are responsible for submitting accurate and detailed budget plans to the Council for the Judiciary.[18] This is a process of consultation between the courts and the Council and between the Council and the Ministry of Justice.[19] The Council now has primary responsibility for budgeting, but the government may deviate from the advice of the Council. Such deviations however, should be discussed before the reasons for the budget are submitted to the Lower House.

In the policy motivation for the Judicial Organisation Act 2002, the Government considers the various reasons and standards for implementing a new financial model. One highlighted issue is the obligation under article 6 ECHR to provide independent and impartial tribunals and case handling within a reasonable time. It was recognised

14 Ibid., p. 16.

15 A.H.M. de Jong and D.L. Kabel, 'De rol van evaluaties in het begrotingsproces', *Justitiële Verkenning* 2005, vol. 31, p. 100-109.

16 H.F.M. Hofhuis, 'Financiering van de rechtspraak en werklastmeting', *Trema* 2003, p. 90.

17 P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001, p. 49-51.

18 A.F.M. Brenninkmeijer, 'Behoorlijke financiering van de rechtspraak', *Ars Aequi* 2004, vol. 53, p. 165.

19 See 'Memorie van toelichting 1999-2000 (Wet Rechterlijke Organisatie)' 27181, p. 17.

that this obligation, in the context of financing, causes tension between the need for legal processes to run within a reasonable time and to settle a certain number of cases within a year, as a matter of human right, and the requirement of the legal quality of the decisions themselves.[20] Much emphasis has therefore been placed upon improving the workload system (Lamicie system), calculating the amount of time spent on each case, trying to classify cases in order to speed up primary processes in the courts, and so forth. Such a system can be used to account for expenditure and to plan ahead for future budgets. However, the Lamicie system does attempt to calculate the amount of time and resources needed per case objectively. Court costs and overheads are financed separately from case handling. Therefore the basic costs are covered, guaranteeing at a minimum, the basic operation for the organisation.[21]

The basic elements of the rules set out are to ensure the objective measurement of the workload system at the courts, cover the expenses of the courts, give a regulatory framework in relation to the activities of the courts (including the workload system), make use of the experience of the previous spending year, in order to create a structured budgetary system for the courts and the Council.[22]

6.4. Planning and control

The planning and control cycle is the most important planning instrument for the court.[23] In order to ensure that accountability is adequate, obligations are placed on the courts, the Council, and the Ministry of Justice. The first stage of the cycle obliges all court administrations to determine a year plan as to management, with the aid of a framework budget that has been submitted to the courts. The plan must be sent to the Council within a time stipulated by the Council itself. This is usually the September or October in the year prior to when the plan is given approval.

Afterwards, the courts submit an annual report to the Council on how far the plan has actually been realised. This report includes a calculation and accountability for the financial administration of the court for the previous budget year, the way in which the necessary activities taken from the budget were carried out and an audit of spending. On top of the annual report, it is also possible for the Council to demand a report on the quality aspects in connection with their task of realising the quality of administration and organising the workload methods of the courts.

Once the courts have submitted their plans and reports, the Council evaluates how well the courts have followed the budget based on the previous year plan. This is where a possible conflict could arise between the Council and the judges, as the judges' productivity is a major influence on the success of the realisation of the planning and control cycle. However, there are factors beyond the control of the courts or the

20 See also A.F.M. Brenninkmeijer, 'Behoorlijke financiering van de rechtspraak', *Ars Aequi* 2004, vol. 53, p. 167-168.

21 H.F.M. Hofhuis, 'Financiering van de rechtspraak en werklastmeting', *Trema* 2003, p. 92.

22 P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001, p. 49-51.

23 'Memorie van toelichting 1999-2000 (Wet Rechterlijke Organisatie)' 27181, p. 31; A.F.M. Brenninkmeijer 'Behoorlijke financiering van de rechtspraak', *Ars Aequi* 2004, vol. 53, p. 166.

Council, especially in the predictability of the future. The new laws allow for a margin of error either way, and both the courts and the Council will use reports in making future plans. In order to level out the over or underproduction of courts in relation to planned production, the Council has a reserve. However, where the management boards of the courts make very serious mistakes in their affairs, the Council has the formal competence to give directions where it is deemed necessary for good court management under article 92 of the Judicial Organisation Act 2002.

The planning and control cycle also affords an opportunity for comparing results and learning from management teams, which make the court's work effective and efficient (benchmarking). Where problems arise because of internal and organisational problems in handling cases, the Council can step in to help find a solution through projects for improvement. Support can also have a financial character, but only in response to critical changes within a court.[24]

Between the Council for the Judiciary and the Ministry of Justice,[25] there is a protocol of information for the Ministry of Justice to be able to see how the Council handles the task of budgeting. The Council must also publish an annual report on its own operations and the respective courts' organisations. As major competences have been attributed to the Council for the Judiciary in the Judicial Organisation Act 2002, ministerial responsibility to parliament has changed. The Minister now submits the annual reports with a letter of explanation to Parliament. Parliament can discuss anything and a minister must answer questions as far as she is competent. This is important because the Council cannot represent itself to parliament, especially because the minister must ask parliament to vote for the Budget Bill for the justice department. The accountability mechanism for the Council towards the Ministry of Justice is therefore exactly the same as the accountability mechanism for the courts towards the Council.

Therefore, the accountability mechanisms are through the planning and reports themselves. These give objective accounts of how money will be spent, and where it goes for the most part. These could act as a stimulus for the courts to do better from one year to the next in order to fulfil the plans they make for themselves. Extra projects to help improve the management of the courts from the Council, or at least the possibility for applying for such projects, can also act as a stimulus for improvement. This situation helps the courts remain independent in their management and workload systems at the same time as transparent. On the other hand however, sanctions by the Council or even the Ministry can be seen by constitutional lawyers, academics and judges to be a breach of judicial independence.[26]

24 G.Y. Ng, 'Quality and Justice in the Netherlands', in *The administration of justice in Europe: Towards the development of quality standards*, M. Fabri, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 325.

25 C.J.H. Brunner, 'De rechterlijke macht en de ministerie van justitie', *Nederlands Juristenblad* 2001, vol. 24, p. 1121.

26 P.P.T. Bovend'Eert and C.A.J.M Kortmann, 'Het Courtpacking plan van het kabinet Kok', *Nederlands Juristenblad* 2000, vol. 36, p. 1772 and P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds). '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001, p. 50.

6.5. *Policies*

1999-2002
In 1999 the PVRO initiatives, whilst focusing on the courts as a whole, realised the importance of the sectors themselves. In order for the results of the PVRO to be shared effectively throughout the country, the methods at sector level must be comparable with each other, and therefore such methods must come into line with each other. Whilst it is very difficult to demand that all sectors across the country manage themselves in the same way, as sectors have a different culture and different demands placed upon them, it is not considered to be difficult to ask them to use techniques that can be measured. One method to ensure that such a comparable measure can take place was the creation of the National Council of sector chairpersons (Landelijk vergadering sectorvoorzitters). This body is composed of sector chairpersons from the 19 district courts (i.e. this assembly is separated into parts for penal, administrative or civil sector chairpersons). They come together to discuss management challenges, and juridical questions as well.

On top of such measures, there are also achievement criteria for management developed from the PVRO that courts should strive to fulfil each year. This acts as a positive form of accountability for the courts, to show that they have managed the minimum value in the efficiency and effectiveness of management. Quality indicators have been developed and experiments in the district courts started in 2003 on possible methods to implement these indicators.[27] Since 2002 all of the district courts have implemented this quality system, called RechtspraaQ. Since 2002 the Council for the Judiciary took over the work of the PVRO and has taken on numerous projects to help modernise the judicial organisation and courts.

All policies, at government and court level, recognised the importance of quality iindicators as an impulse needed for change and improvement. The courts had been working with PRISMA (a project organisation of the Ministry of Justice to improve the quality of court organisations). It has been an ongoing policy of the PVRO to create quality indicators that can be used to further the cause of improvement in court management and organisation.

In order to implement the above-described policies, the Council must make further policies to flesh out the general framework. This was initially done through the PVRO, which created several projects to improve court organisation in general.[28] The most important element of the project emphasised that all courts (except the Supreme Court and the Judicial Division of the Council of State) must participate in the programme. Each court created a team for the PVRO and models and instruments were created.

27 F.C.J. van der Doelen, 'Over de kwaliteit van rechtspreken, rechters en gerechten', *Nederlands Juristenblad* 1999, vol. 28, p. 1303-1304; A.M. Sturm, W.D. ten Have and M.M.E. Donders, '*Eindrapport: Uitkomsten Pilot Project Kwaliteit Rechtbank Roermond*', Roermond 2002.

28 C. Holleman and M.V.D Mortel, '*Oogsten om te zaaien*', Bureau PVRO, The Hague 2002, p. 52.

2002-2008

In its agenda from 2002-2005, the Council for the Judiciary called its agenda 'Continuity and Renewal' (Continuiteit en vernieuwing). In its introduction it stated that it would continue the work of the PVRO and went on to set eight policy goals for the judicial organisation. The first emphasis was placed on external orientation because of the fact that so much attention had been paid to the internal organisation. It said that in spite of the setting up of the website www.rechtspraak.nl and the creation of customer panels and complaints regulations, more had to be done to increase the transparency of organisation towards society. This meant opening themselves up to greater criticism and participation by the public.

The second was the development of personnel policy, paying attention to maintaining competences through training, and developing a career path for all staff of the courts.

The third policy described was the analysis and description of working processes. This is initially to provide data on organisation and working methods within the courts (something never done before). The intention was to use this data to lead to a certain uniformity of practice in the courts' organisations. The next policy goal was to improve information use through the use of modern technology within the organisation, especially for case handling in primary processes of the courts. This policy, like that of analysing and describing work processes, was to help deliver more information about primary processes,to adopt technologies and to adapt the organisation by creating a technical infrastructure.

The following policy was to develop an integral system for quality assurance based on the INK model (RechtspraaQ). On the one hand, they sought to develop iindicators for work processes, personnel policy, personnel and customer research, and also to develop iindicators for the judicial function. Indicators were developed on the independence and integrity of judges, expertise, uniformity of the law, comportment and speed and timeliness. In sum, this policy aims at improving the quality of justice, in its organisation and final product. Related to the quality of justice is the policy to structure and develop knowledge management. This policy relates to the availability and applicability of knowledge through consistent training and developing accessibility through a technological infrastructure.

The remaining two policies have a macro approach to the judicial organisation. The seventh policy deals with the expansion and improvement of court buildings. Next to the building programme completed in 2000, this refers to a consistent observation of whether the judicial infrastructure they have is sufficient to meet those demands. It also means examining the effects that technological adoption has on the organisation and how if affects the infrastructure. Finally, the last policy in the agenda from 2002-2005 deals with the evaluation and improvement of management and financial systems. This is important, as stated above, because financial rules govern the relations primarily between the Council for the Judiciary and the Ministry of Justice, but also between the Council for the Judiciary and the courts. The systems must be constantly evaluated in order to ensure that a good balance can be found to pay for cases completed at the same time as ensuring that judges have enough time to ensure the quality of judgements.

This is a very packed agenda and in the 2005-2008 agenda more restrictive targets have been set that narrow the goals for the judicial organisation. The reason given for this in the agenda was that it is not possible for the courts or the Council to fulfil all of these policy demands. Therefore, in narrowing the focus of policy, these are the goals of the agenda for 2005-2008: institutional guarantees of independence and impartiality and integrity; differentiation in case handling in order to create accurate norms for throughput times (related to financial systems evaluation and work process analysis), to enforce the unity of the law (related to the quality system RechtspraaQ), specialisation through concentration (related to expertise) and to increase transparency on the operation of justice in general.

These agendas show an ongoing commitment to the work started in the PVRO in 1999. The difference in complexity between the two agendas also shows that the Council for the Judiciary is finding its way in its policy-making role. This can be seen from the fact that the first agenda is broader and less focussed than the second, and can be said to be very ambitious. The second agenda is larger but more focussed and shows what it has learned from the execution of the first agenda.

6.6. Conclusion

Policy measures for judicial organisation, from the end of the twentieth century to the beginning of the twenty first century, have placed emphasis upon management in the courts, and transparency of judicial organisation and for its spending. The new structures reflect a judiciary dedicated to improving quality in the areas of management and organisation, in order to improve the general judicial function. There is a clear line of responsibility for organisation, which does not tread on the toes of judicial independence. Starting from the courts upwards, the courts take managerial responsibility for themselves. They create their own budgets and control spending within an annual plan. They are responsible for internal efficiency, effectiveness and service provision. The Council for the Judiciary takes partial responsibility for the court improvements, by assisting in projects for internal modernisation and improvement, creating and motivating a budget for the courts towards the Minister of Justice. The Council has responsibility in implementing policies for the courts, but also for ensuring that the Minister knows what is happening in the judicial organisation. The ministry is accountable to parliament.[29] The nature of the accountability has changed somewhat since January 2002, given that its administering competence has been transferred to the Council for the Judiciary. However, the minister is still responsible for submitting a budget bill to parliament and controlling the Council for the Judiciary.

The changes do, however, focus mainly upon the organisational needs of the courts and not the political needs of accountability. However, even though policy changes have been made to avoid treading on the toes of judicial independence, an increase in accountability can be identified as a consequence of the organisational changes. All in all, the courts do work with the Council to develop policy. This has improved their

29 Chapter 4 Constitutional law and practice', part 4.2. Trias politicas.

accountability politically speaking (in the 'soft' sense), and given them an increased amount of legitimacy.

Over the last 150 years the organisation of the judiciary has remained the same in spite of changes in technology, the expectations of users, and society in general. One of the main driving forces which has made organisation so much easier to modernise in light of pressure to speed up the throughput of cases has been information technology.[30] This drive will not only help with modernising the organisation, but with the uniformity of the law (also an organisational matter). Constitutional principles have been adapted to human rights jurisprudence to make sure that fair trial and reasonable times matter. Judges must fulfil the minimum requirements of judicial independence and impartiality, but at the same time fulfil the requirements of article 6 of the European Convention on Human Rights concerning adjudicating within a reasonable time. Thus there is not only practical and political pressure towards an efficient organisation, but also a constitutional drive for efficiency.

These organisational changes form an initially broad framework of accountability. From an institutional point of view, there is clarity of jurisdiction, and thus clear legal obligations on the courts to hear cases at certain times and places certainly exist. The framework for the budget is also shown to be an attempt to make spending structures more transparent and strict. Accountability for spending is clear.

The remainder of this part will be dedicated to analysing interviews conducted in the Netherlands.

30 A.W. Koers, '*Driemal is scheepsrecht, beschouwingen over de modernisering van de rechterlijke organisatie*', The Hague 1999, p. 32.

Chapter 7

7. Responsibility of judges: Micro level analysis

Whilst many subjects were discussed within the courts, both with management teams and operators of the quality pilots, at the micro level, there are three main themes. These themes are: the roles and responsibility of judges in the courts, the management of judges, and judicial independence.

The chapter 4 Constitutional law and practices deals primarily with the position and role of judges within a constitutional framework. This is a theoretical framework that looks on the one hand at the role and position of the judges and at the relationship between the judiciary as an institution and the other two state powers. On the other hand, it is a framework for the administration of justice in general. At the micro level, the role and position of judges, and the administration of justice at sector level will be examined to see how the courts and judges operate the norms found in the constitution.

The role and responsibilities of judges in courts examines more in detail how the judges operate constitutional norms within the court, whereas the section on managing judges looks more at the role of judge-managers in preserving judicial independence, at the same time as helping to deliver efficient justice. A critical look at how judicial independence operates and how it affects the administration of justice will be given in the part on judicial independence.

7.1. The roles and responsibilities of judges in the courts

7.1.1. Introduction

This section starts with a description of the main role and responsibility of judges, as perceived by the respondents. Some insight is then revealed as to how the respondents in these courts define legal quality (looking at measurement and assurance). This is relevant to the analysis of the role of judges as it tries to give some insight into how the work of judges is measured, thereby giving further definition to the role of judges (again, as perceived by the respondents in the interviews). After this, a part follows on the extra tasks that judges have taken on within the court organisation, as described in various interviews. Finally, a short analysis of the data will be presented.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

7.1.2. Main role and responsibility of judges

According to all of the interviews (both with the management teams and quality pilot teams), the role of judges is still to make decisions on cases that come before them.

> 'Judges are responsible for the content of their decisions'
> - Judge manager of management team at medium-sized court

All of them further elaborate upon this by emphasising the expectation that judges carry out this role with a high-level of expertise and quantity.

> 'Judges are responsible for the legal quality of their judgements'
> - Judge manager of management team at small court

Next to this, various people working on the quality pilot (and at least one management team) highlighted that the judges should have comportment in their hearings. Comportment is how a judge behaves towards parties, and how she treats a case during a hearing (i.e. whether she shows bias, appears prepared, doesn't fall asleep etc.).

> 'Judges have been made more conscious of aspects of work that they should pay more attention to: speedier judgements, their attitudes towards the parties, and the expertise they show in their handling of the cases.'
> - Member of quality pilot team

When asked about how judges fulfilled their roles (i.e. their working methods), all management teams were consistent in saying, on the one hand, that they left it up to the judges whether to work wholly independently, to delegate, or to work with others.

> 'Judges can do the work for themselves, but the support is there as an extra to aid judges in their workloads.'
> - Judge manager of management team at large court

On the other hand, a couple of respondents reflect clearly the wish to see judges more aware of their environment at work, and for organisational quality.

> 'They also need to be conscious of their environment and organisational quality in terms of efficiency'
> - Judge manager of management team at small court

> 'I am not worried that … judges .. ignore organisational issues, because the organisation has changed so much and it is easier for judges to see how important such issues are and participate in the organisation.'
> - Member of quality pilot team

Nevertheless, one judge from a quality pilot team expressed the opinion that even though organisation is important, learning to create high quality judgements should be a priority, especially for the younger generation of judges.

'Judges have to have a talent and affinity for management. However there are not many, and many who want to do it are not available to do it. We are very happy if the younger judges learn to do their jobs in terms of writing judgements… Judges from the official training programme are mostly in favour of management, are very enthusiastic about it, and have many plans. But they do not consciously train people during that official period of training on management.'

The management teams have found that working methods (i.e. whether judges work independently, delegate or cooperate) affect the capability of the judges to ensure high legal quality at the same time as working to a quota.

'There are judges who are perfectionists and try to get everything done themselves who have problems... It is a matter of character who has problems completing work and not a matter of age/gender.'
- Judge manager of management team at medium-sized court

All respondents believe that high legal quality and quantity are compatible. However, they are also of the opinion that it is a matter of balance, and that that balance is difficult to find. The main point that came from the interviews with management teams and also from judges working in the quality pilots was that judges are left to find that balance for themselves.[1]

'It is, however, an art to find the balance for each individual judge and legal secretary.'
- Judge manager of management team at medium-sized court

Therefore, if the judges decide their own working methods, and the choice affects their capability to complete the quota (where quality is high no matter what the circumstances), it should be the judges' responsibility to meet that quota. If the method affects their capability to complete the quota and (if) the judges decide which method to use (and consequently are responsible for the choice of the method), then she could be considered responsible.

Although the respondents said that legal quality and quantity is a matter of balance, there have been some discrepancies found in some of the interviews. In one of the interviews with a management team (of the large court), the respondents, whilst saying that it was a matter of balance and recognising the difficulty, at the same time did not believe that the amount of time spent on a case particularly affected the quality of the judgement. In another interview, a judge who worked on the quality pilot similarly described it as a matter of balance, also of some difficulty, and stated that if there were little time for him to decide a case then the minimum amount of work would be done to finish the case. However, according to him, even doing the minimum, the legal quality of judgements would be high. The same respondent claimed from analysis of the data from the quality pilot that 80% productivity at the court (of judgements) is bad

1 Whether they should be left alone or not is a different question and not within the scope of this thesis.

(under productivity), yet 120% was equally as bad because it affected the health of the staff at court (especially judges), thereby also affecting the quality of judgements. In yet another interview, a respondent from a different quality pilot stated that the balance was found by looking at whether one wanted a good or faster judgement, but that quality was always high.

Furthermore, in the opposite direction, another discrepancy has been found. At least several judges implied that timeliness is not very important after saying that it was a matter of balance.

> 'Personal experience teaches you to take each case as it comes, and you come up with a judgement that is complete and that you can take full responsibility for. If the case is not done in time, it is no terrible thing'.
>
> \- Judge of a quality pilot team

These discrepancies are important in this analysis for looking at how judges approach their responsibility and how this responsibility should be approached.
1) If what some say is true, and quality is always high, no matter how many cases you hear, then balancing legal quality and quantity is not a real issue: GO FOR QUANTITY.
2) On the other hand, if what they say is not completely true, and if quality decreases in a considerable way when productivity is increased, the fact that quality is always kept at a high level means that judges are not balancing the responsibilities of legal quality and quantity. Therefore the judges prioritise quality over quantity.
3) If the legal quality of judgements is high up to a 'certain point' (let us say somewhere between 100%-120% productivity) then the operation of legal quality and quantity is not a matter of balance, and that there is no conflict for judges up to that 'certain point'. If it can be proven that the quality of judgements is consistent up to that 'certain point', then it is rational to conclude that one can be productive up to that point without sacrificing legal quality, thereby justifying the use of quotas.

7.1.3. Legal quality: Measurement and assurance

However, in pointing out these discrepancies (and subsequent hypotheses), it is also necessary to see how the respondents of all the interviews measure (which includes their perception on) the legal quality of judgements. Both management teams and quality pilot teams consistently said that this quality was guaranteed traditionally through an appeal system, and by the fact that all hearings are held in public. One management team member (of a medium-sized court), when asked if he knew whether legal quality was going up in correspondence with efficiency, stated that:

> 'The only good way to tell is by looking at whether there is an increase in successful appeals, but in my mind, that has not happened.'

Some respondents (of both management and quality pilot teams) also described tools that were used in the courts to guarantee the quality of judgements. One such tool is a meeting on the uniform application of the law. However, according to one judge of the quality pilot team, this is a matter of balance between the judges' discretion to

apply and interpret the law in the light of the facts and judges' duty to apply the law consistently. According to the same respondent, this affects judicial independence in judges' responsibility toward parties; therefore it is a difficult tool to apply.

In a pilot project of one of the courts, they ran a project to measure the quality of all correspondence to the external users of the courts (including letters and judgements),[2] looking at language and comprehensibility. This also goes for the legal quality of the judgements, in that it highlights the importance of language to the transparency. This means that one of the conclusions of one of the quality pilots is that transparency is considered as part of the definition of legal quality. On the other hand, as far as I know, they did not ask lawyers or others (the general public and users) for their opinion. When asked if they received any meaningful feedback from lawyers as to the legal quality of judgements, the management team (from the medium-sized court) said no. The courts received feedback from lawyers through customer panels on the comportment of judges. No mention was made about the possibility to have feedback from the general public and users of the courts.

The approaches described here are very controlled, unilateral and show a self-centred approach to measuring legal quality. However, given that judges are accustomed to being the ones who are responsible for quality assurance and control in legal quality, this is not a surprising result.

7.1.4. Individual judges within the court organisation

On top of their main responsibilities of writing judgements, all respondents (of both management teams and quality pilot teams) have mentioned that all judges (to some extent) take on other tasks, and participate in the organisation itself. Such tasks include training younger judges; training to keep up to date with the law; and 'intervisie'[3]

> 'With all the cooperation and work on the PVRO project, all judges have been asked to take part. However they cannot be forced to take part in other projects outside of their main tasks.'
>
> \- Judge-manager of management team at medium-sized court

All of the respondents (from both management teams and quality pilot teams) said that judges were obliged to take on extra tasks or participate in the organisation. However, this obligation is limited by the fact that judges decide for themselves the tasks they take on or the amount they participate as a matter of preference. It is therefore natural to discover in these interviews that not all judges participate in the organisation and some take on a minimum of the tasks.

Management teams of all courts have said that they ask judges to participate in sector meetings and projects to improve the organisation of their sectors or courts. However, one judge, who is a member of the quality pilot team, said that this was

2 Correspondentieproject.

3 See chapter 7 Responsibility of judges: Micro level analysis, section 7.2.2. Managing judges.

difficult to apply to all judges, especially judges who worked part time and have little interest in organisational affairs.

> 'A lot of judges do not bother with trying to influence policy as they work part time. Women take up most part-time positions, and some only work three days a week. The disadvantage of this is that it is difficult to involve them in what is happening in the organisation.'
>
> - Judge member of quality pilot team

However, the belief that judges are not participants in the organisation is reflected in the following statement:

> 'Numbers are not something that judges themselves know. The numbers of cases that are supposed to be completed are based on the Lamicie norm, and that is a case for management and not for judges'.
>
> - Judge of quality pilot

7.1.5. Analysis: Roles and responsibility of judges in the courts

From the data gathered it seems that legal quality is a matter of subjective interpretation. Even though there appears to be some activity in creating tools to measure legal quality, these activities are not consistent and neither is there an agreement on what it constitutes. The judge appears to be the one who is really in charge of assessing the quality of his/her own judgements (although other methods exist i.e. appeals and public hearings). Judges assess the quality of the judgements, in a way that is ingrained in the working process, based on prior training and experience. This may be why the management teams express the opinion that only the judge can balance quality and quantity. This goes to enforcing judicial independence. That there does not appear to be a consistent way to measure and assure the legal quality of judgements simply makes it difficult to justify or prove the claim that legal quality is high in spite of the amount of time spent on a case.

There also appears to be a loose prioritisation on timeliness. However, this attitude does not mean that not writing judgements on time occurs consistently, nor does it mean that judges cannot meet quotas. It simply means that the legal quality of the work takes priority over finishing on time for some of the respondents involved in these interviews. Nevertheless, a question then arises for the management of judges: what if the judges do not balance quality and quantity?

The original reason for change in 2002 was that the public were no longer happy about the quality or quantity of the work done in courts. The changes, though, do not seem to have produced meaningful effects in the sense of its original goals in terms of the role and responsibility of judges at the micro level.

7.2. Managing judges

7.2.1. Introduction

In chapter 6 section 6.2.1. on local court administration, the new integral management position of judges at sector level was discussed in theory. The management of the sectors changed in 2002, and the chairman of a sector had a legal framework of responsibility. This framework included: ensuring there was a good working environment for judges to do their work; and to take care that the resources are available to house and equip all workers at the court (including judges).

It is now interesting to look at how it operates in these courts. Here, a distinction must be made between the management of judges as a 'micro' issue, and the management of the sector as a 'meso' issue. Section 6.2.1. discussed two aspects of the integral management position: judge-manager responsibility in the sector, and the judge-manager's relationship with judges in the sector. This section on 'managing judges' deals with the second aspect. The management of judges looks only at the relationship between managers and judges, and the instruments used by judge-managers to aid judges in the fulfilment of their roles in the sector. It deals with people and professional values. The management of the sector deals more with describing the framework within which judge-managers operate and the tools that are used to make their work and the sector as efficient as possible. Management of the sector is distinguished from managing judges because it deals with organisation and organisational values rather than people and professional values.

According to Longman's dictionary, to manage 'is to direct or control a business or department and the people, equipment and money involved in it.'[4] From the interviews with judge-managers of management teams and members of quality pilots, one could discern two aspects of the judge-managers' activities: the directing (or lack thereof) of judges, and controlling the equipment[5] in the effort of supporting judges' work. The first one deals with the actual management of judges, a) as perceived by the judge-managers interviewed and b) the various norms developed by the different judge-managers. The second one deals with directing organisational instruments to aid judges in their work.

7.2.2. Managing judges

All of the judge-managers said that they hold monthly meetings sector-wide and individually, to discuss activity and productivity. It is just that some mean it as an exercise in management, and others more in terms of guidance. This diversity of approach to managing judges has visible repercussions in the development and use of various tools and norms to manage judges. One judge-manager at the medium-sized court said that he sets quotas for judges to meet, and that these are individually monitored.

4 See Longman, dictionary of contemporary English. The living dictionary, fourth edition 2005.

5 In this context, equipment will include: people, training, and technologies that support the judges' activities.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

> '10 years ago, judges did not work to fulfil quotas, but now they do… For example, judges are supposed to complete 225 cases a year. Those who meet that or do more are fine. Those who don't must explain themselves in the annual performance evaluations (functioneringsgesprek).'
>
> - Judge-manager of management team at medium-sized court

In the small court, a judge-manager of a management team told me:

> 'It is challenging to find a balance between managing judges and respecting their judicial independence. I am trying to find a non-hierarchical solution to aiding judges with organisational problems.'
>
> - Judge-manager of management team at small court

The first tool, mentioned in the first quote, is the 'functioneringsgesprek'. It is intended to be a management tool where judge-managers can look at the activities of each judge in the sector for the year (including the number of cases completed, extra tasks and organisation participation). Here they also look at what problems judges have and the solutions that can be offered.

In further trying to develop a system of management, judge-managers have created various norms that apply in their own sectors only. For example, at least one judge-manager tries to ensure that all judges have an equal share of cases, which are weighed by difficulty.

> 'All judges have about the same amount of cases; work is more or less distributed evenly given the difficulty of cases, rather than in terms of numbers of cases. Judges are expected to conduct hearings for about 265 cases per year.'
>
> - Judge-manager of management team at large court

In this court, they also apply the principle of transparency by allowing open access within the sector to statistical results of productivity on an ***individual*** basis. This means that everybody can see what everybody else is doing.[6] This sector has very hierarchical and assertive management norms.

Whilst other judge-managers interviewed stated that they set quotas, at least one respondent explicitly objected to the idea of pushing judges to work harder.

> 'Judges had received a letter from the chairman of the sector… stating that they had to push productivity of the sector... That is something new… judges work very hard here and to tell them that they have to work harder is very dangerous.'
>
> - Judge member of quality pilot

At the same time this respondent also said that the judges ignore the pressure, whilst other judge-managers do not apply the pressure at all.[7]

6 Judge-manager of management team at large court.

7 Quality pilot team at small court.

Another management approach gleaned from the interviews is to discover the main organisational problems that judges have, and help them with solutions. One of the main problems that were discussed in one of the interviews with a judge member of a quality pilot team was that judges have less control than they would like over cases and hearings, especially in terms of adjournments and extensions by lawyers. However, he said:

> 'It is very difficult to make policies as regards the judges' control of their courtrooms, due to judicial independence. Whilst no policy can be made, the judges discuss between themselves the best ways to control and operate their courtrooms more efficiently, where it is in their power to do so. Most of the time, the judges are willing to try different things and listen to the experiences and suggestions of their colleagues.'
>
> - Judge member of quality pilot

Sanctions cannot legally be used against judges that do not work 'hard enough' because of judicial independence. Nevertheless, at least one judge mentioned that there are certain actions one could take, such as transferring judges

> 'I think that [sanctions] could have a function against judges who are dysfunctional. It used to be the case that dysfunctional judges got sent to the kantons (sub-district) courts to work, where individual productivity is more visible.
>
> - Judge member of quality pilot

The ultimate sanction, and a last resort, is that the president of the court can start proceedings to have a judge dismissed for unsuitability ('ongeschiktheid'). This is evidently not a daily tool to be used at sector level, and was only mentioned once, and only by a quality pilot team. Evidently it is unreasonable (and against judicial independence) to threaten judges with losing their job on a daily basis if they do not comply with the request/policy to work harder.

7.2.3. Organisational instruments to aid judges in their responsibility

Judge managers pointed out that organisational instruments exist to aid judges in fulfilling their responsibilities. This has been distinguished from 'managing judges', as it is more a matter of supporting judges in their role at the court by managing the court's resources. Although this might not be consistent policy, for example, when a member of a quality pilot team (who is not a judge) was asked how judges with organisational problems were aided, the reply was:

> 'Help is offered in terms of moral support, but nothing by way of organisational or material help'.
>
> - Member of quality pilot

There are three main instruments within the sectors that were pointed out in the interviews with both management teams and members of quality pilot teams: legal staff, training and 'intervisie', and ICT.

1. Legal staff

> 'Legal secretaries work for the judges to write concepts for cases. Judges don't have time to write concepts. They read the concepts, and go straight to court. Judges, who decide to write their own concepts, find themselves in trouble.'
>
> - Judge-manager of management team at medium-sized court

From the perspective of management, judge-managers consider the legal staff to be a necessary tool to help judges to be at the same time efficient and produce good quality judgements. Another judge-manager of a different team said:

> 'If the judge receives a well-prepared case, then he has more time to sit in a court, listen to parties, and write judgements.'
>
> - Judge-manager of management team at small court

However, judges are not obliged to use legal staff. Furthermore, not all of them use the legal staff available because they,

> 'are not comfortable with delegating their work, especially in heavy cases, where they prefer to do and read everything themselves. This is changing slowly.'
>
> - Judge member of quality pilot

At the end of the day, however, even though legal staff do the work of judges, judges are ultimately responsible for all judgements. Given the increased reliance upon legal staff in recent years, action has been taken to address the trust issue and the reliability of legal staff:

> 'The quality of support staff is improving. The court brings in more support staff from university education. It is not difficult to find legal staff with university education, as the market for lawyers is tight at the moment.'
>
> - Judge-manager at small court

Nevertheless, the problem of trust persists even though the quality of legal staff is high as:

> 'Judges take full responsibility for all work done by legal staff at the end of the day, because judges are responsible for the judgements.'
>
> - Judge-manager at small court

However, the issue of trust is not only related to the delegation of tasks to legal staff. In the opinion of the judge-managers and of judges of the quality pilots, it is also about the nature of the judges' work:

> 'Judges need not read every single detail in simple cases, e.g. from the charge sheet, the judge needs to check that the dossier is complete, that all formalities of procedure have been followed, look at whether the questions of the case are of evidence, and the statements that they need to be aware of. If the case has been well prepared by the legal secretary, then there is a gain in terms of efficiency.
>
> - Judge member of quality pilot team

Two further trends have been highlighted in the interviews about the legal staff. Firstly, this position seems to affect the nature of judges' work. This trend also varies across different sectors:

> 'Civil law judges write almost everything by themselves, which is inefficient, but in administrative and criminal law, judges are writing fewer cases.'
>
> - Judge member of quality pilot team

Reaction to this trend seems divided:

> 'Judges want to write judgements, but with increased reliance upon legal secretaries, they are writing fewer. Some judges do not mind this, whereas others, myself amongst them, find it a shame.'
>
> - Judge member of quality pilot team

However, even though some judges expressed the opinion that the parts of the job they like are being taken away from them, there seem to be ways to get around this, for example:

> 'That is why I've set aside the harder cases for myself to write'
>
> - Judge member of quality pilot team

The second trend is that even though hiring from university has apparently led to higher quality, it has also led to the increase in turnover of this type of personnel:

> 'The advantage is that they are very good; the disadvantage is that they do not stay very long. There used to be s-education for legal secretaries who were trained to become judges internally through the court.'
>
> - Judge member of quality pilot team

2. Training and 'intervisie'

In the first place, training is provided to keep judges up to date with jurisprudence and law. This training is organised through in-house lectures and organised seminars and workshops by universities and research institutes. Training is also compulsory for judges entering the profession for the first time. This is considered to be extremely important by a judge of one of the quality pilot teams:

> 'Once a person has been selected to become a judge, they are not required to continue training. They are relied upon to check the information for themselves, read up on current jurisprudence, but no more than that. In my opinion, that is too much freedom.'

They are placed under the wing of one senior judge. At one of the courts where a quality pilot was taking place:

> 'There will be an education chamber in each team. In this chamber the younger and less experienced judges will discuss how to deal with a real case.'
>
> \- Member of quality pilot team

Training can also be used for time management, to help judges control their workloads and stress. The judge-manager of the small court said that:

> 'All judges have an option to undertake training to aid them in managing their everyday caseloads. But this is to some extent voluntary. If it is very necessary, it will be requested that a judge undertakes training in time management.'

Close to training is 'intervisie', which are discussions on the content of cases and jurisprudence. This can take place between older and younger judges, but can also occur between experienced judges with particularly difficult cases:

> 'The 'intervisietraject' is where judges mutually coach each other in dealing with cases, and judicial conduct in and out of the courtroom. It's a way for judges to learn by experience and to interact with each other.'
>
> \- Member of quality pilot team

3. ICT

In the context of judges using ICT, computers have been described as a tool being used for writing judgements.

> 'Mostly it helps in the writing of cases; for example, they have developed ' bouwstenen' (blocks of text which are frequently used in judgements) into the computer so that it becomes faster to write judgements.'
>
> \- Judge-manager of management team at small court

> 'ICT is now essential to the speedy circulation of concepts. The things that one can do with Word documents such as making corrections in different colours is already of great help and an enormous improvement to the working conditions.'
>
> \- Judge member of quality pilot team

On top of writing cases, respondents from a quality pilot team have also stated that

> 'ICT is very important. Information technology also makes jurisprudence more accessible and easy to find.'
>
> - Member of quality pilot team

There is training available to those who wish to become more efficient and using new technology. In other places there is an obligation for judges to keep up to date

> 'with advances in technology, by following workshops and attending meetings.'

Judges have problems with technology in the same way as with legal staff, in that some judges simply will not use their computers, with a very few not knowing how to use a computer. It would appear that it is something that cannot be forced. When asked if judges at one of the sectors for administrative law trusted ICT, the judge-manager replied:

> 'Most of them do, but a few have problems.'
>
> - Judge manager of management team at medium-sized court

7.2.4. Analysis: Managing judges

One could use the term 'peer pressure' to describe the situation because 'managing' as described here in the first place does not fulfil even the simple dictionary term of management. At the time these interviews conducted in 2003, I concluded that there is no directing or controlling of judges' activities within the courts.[8] Secondly, there is no possibility of sanctioning if judges do not comply or conform. This system relies very much on talking and persuasion, and without the possibility of sanctions, they have very little, besides peer pressure, to give incentives to judges to comply.

Next to the fact that there does not appear to be a standard way of managing judges, judge-managers themselves also have a different outlook between them as to how to approach managing judges. This could be because they are from three different sized courts, and in a larger court, it is more useful to rely on a more assertive management technique, where a judge-manager at sector level may not even see the judges in his/her team on a daily basis. Whereas, in a smaller court, judge-managers may have to manage less based on statistical data because they are personally familiar with each of their performances. There appears to be more respect for the equality of judges as professionals by ensuring that they treat all judges alike by setting the same number of cases to be completed and weighing those cases by their degree of difficulty. This situation, again, may be a luxury of smaller courts, and of the administrative law sector.

The way that judge-managers organise instruments to aid judges provides a support system, which the judges do not necessarily have to make use of. That the belief was expressed that most judges make use of them is positive because it means that most then participate in the organisation. However, the support structure is something that management teams can organise, and they can do it to effectively support judges in their work. Whilst techniques to manage judges is not homogenous, and there is no textbook (yet) describing norms on how to manage judges, the support

8 With the exception of judge-managers distributing cases to them.

structure offers something to indirectly steer judges towards fulfilling the goals of the sector and therefore also the goals of the court more efficiently.

One cannot however conclude from these interviews that management has the upper hand over judges. Management is about steering and organisation towards a certain goal. Here the judges do not appear to be managed and are described as not being particularly easy to manage. Judges appear to have a strong sense of independence and professional responsibility for their work. Even though the respondents may have attempted to make a distinction between judicial independence and professional autonomy, the reality is that the two are still very much thought of as one and the same. On the one hand, some judge-managers give their fellow judges freedom to do as they see fit in their organisation; on the other hand, those who attempt to manage the judges in their sectors are faced with a barrier formed from judicial independence, a traditionally strong professional bureaucracy, and a lack of possible accountability to hold a management system together.

7.3. Judicial independence and accountability

The concept of judicial independence is considered in three different contexts, as described throughout the interviews by both management teams and quality pilot teams. Firstly, decision making in cases: It has been referred to here as regards judges' main responsibility. Secondly, organisational autonomy: here, judicial independence of decisions in cases has been distinguished from the autonomy that judges have in terms of working methods. Finally, organisational accountability: judicial independence has been referred to as a form of restriction from holding judges to account for their organisational behaviour.

7.3.1. Decision making

According to a mixture of respondents, both from management teams and from quality pilot teams, judicial independence is guarded in terms of judges' freedom to decide cases:

> 'The contents and opinions of judges in decisions are for judges to make and this is the safeguard of judicial independence'
>
> \- Non-judge member of quality pilot team

Whilst judicial independence is a concept that was created to safeguard, it appears from the interviews that it is for the judges themselves to decide if and when their independence is being threatened. Judicial independence is not a guarded building with automatic alarms, that when somebody breaks in, the alarms go off and security comes along. It appears to be a subjective concept:

> 'Generally, judicial independence has not been felt to be threatened. Judges know how to take care of themselves and what their limits are. It is a matter of personal experience and professionalism'.
>
> \- Judge-manager of management team at large court

The discussion in chapter 4 on the constitution regarding judicial organisation has led to the understanding that the separation of powers is very much fixed in terms of the powers that judges have.[9] This is especially so vis-à-vis the legislature in terms of judges' discretion to interpret law; judges' power to nullify or confirm acts of government; and judges' power to adjudicate cases in civil and criminal law. Chapter 4 gives an overall impression of how the limits set by the concept of judicial independence are delineated in the law (i.e. accountability). Theoretically, this shows that this legal framework is there to safeguard judicial independence. However, the interviews seem to suggest that the judges themselves are the guardians and interpreters of that independence. This can lead to the hypothesis that judicial independence, whilst protected in a constitutional framework, is operated and defined at the individual judge level.

7.3.2. Organisational autonomy

One can find two further distinctions within this heading. Firstly, at least one management team (of a medium-sized court) and two quality pilot teams distinguished between the judicial independence to decide cases and the autonomy that judges have in their working methods at the court. Secondly, the remaining management teams and quality pilot teams discussed managing judges and developing organisation policies whilst putting the independence of their colleagues as a central consideration.

The respondents who made the distinction between judicial independence and organisational (professional) autonomy were the ones who said that judges should work to the courts' schedules. This involves working to deadlines, working some hours at the office (accessibility) and working with computers. According to one management team:

> 'Organisational issues such as where the judge works are a completely separate issue. Judges are a part of a professional organisation and it is insane to believe that 55 judges can all choose their hearing times for themselves or to come in when they please.'
>
> \- Judge-manager of management team at medium-sized court

On the other hand, there are some who believe that managing judges in such a way would constitute a breach of judicial independence. This connects to the idea that judges are difficult to manage, and that peer pressure should be used as a tool for compliance (at the time of the interviews) rather than a proper framework of standard working methods and accountability:

> 'Judges cannot be forced to do something, but managers do appeal to their loyalty and reasonableness. There is also an element of democracy in that if a

9 See chapter 4: Constitutional law and pactices.

> majority of judges decide that something does not touch upon their independence, then one judge has no excuse not to follow.'
>
> - Judge-manager of management team at large court

A connected approach has been found to the balance between judicial independence and organisational autonomy. Judges should take responsibility for the choices that they make concerning working methods. One judge of a quality pilot team said that:

> 'The organisation trusts that judges are responsible for themselves, and most judges are. With the new system, the judges have lost their little kingdoms, and there is a possibility of creating one line, whereas before, judges all did things their own way'.
>
> - Judge member of a quality pilot team

There does not appear, from these interviews, to be a normative framework within which judges operate in the court. As the quotes suggest, the concept of judges working with the court organisation is not the norm at the time of the interviews. Furthermore, creating a normative framework could further be prevented by the belief by some of the other respondents that judicial independence also protects organisational autonomy. In suggesting this, one judge-manager (of a small court) stated:

> 'There is no hierarchical structure regarding judges in the court. I am a manager not a boss. I need to respect the independence and impartiality of my fellow judges.'
>
> - Judge-manager of a management team at a small court

The question then arises how judges are persuaded to work within the organisation in a way that does not affect their independence to decide cases. There have been a few ways suggested by both respondents of management teams and quality pilot teams. The same judge-manager, who made the quote above, suggests an approach one could describe as peer pressure:

> 'There are ways of illustrating to judges that they can do things differently. The legal staff also influence the ways in which the judges do things. The interactions between legal staff and judges have led to a more organised working pattern, for example there are more appointments and deadlines made to get things done.'
>
> - Judge-manager of a management team at a small court

In the context of organisational change, the following respondent suggests:

> 'Judicial independence is safeguarded because respect for colleagues is a fundamental principle in the court. The quality system was felt to work … because they never let judges feel threatened, and they took away any fears by constantly keeping judges informed and involved in the formation of quality standards.'

- Judge member of a quality pilot team

In the context of judges managing their cases, and choosing their working methods, the next respondent stated that:

> 'It is very difficult to make policies as regards the judges' control of their courtrooms, due to judicial independence. Whilst no policy can be made, the judges discuss between themselves the best ways to control and operate their courtrooms more efficiently, where it is in their power to do so. Most of the time, the judges are willing to try different things and listen to the experiences and suggestions of their colleagues.'
>
> - Judge of a quality pilot team

There appears to be various systems of peer pressure operating in the courts where interviews with management teams and quality pilots were conducted. One can see that a couple of management teams take an approach of creating a normative framework, and others use a system of peer pressure to avoid offending sensibilities of judicial independence.

> 'There have been problems with persuading judges around to this point of view, but now people accept, thanks to peer pressure, that organisation helps them to do more, and that it is not against judicial independence to work as a team to achieve something in the organisation.'
>
> - Non-judge member of quality pilot team

It was however reiterated that there is a minority of judges who do not care about the organisation:

> 'in every organisation and court there are black sheep.'
>
> - Judge member of quality pilot team

It would appear that there has been an attempt to make a distinction between judicial independence and organisational autonomy in the three courts where management teams were interviewed. Whether this distinction was made through a normative framework created by the management team, or a system of peer pressure, it is rough and uneven. There is very little to suggest that, even though the respondents make the distinction, individual judges actually do.

7.3.3. Accountability

From the interviews, there is a general belief that the 'functioneringsgesprek' (performance interview) between the judge-managers and the judges is the system of accountability, in terms of organisation for the judges. The functioneringsgesprek is an annual meeting between the judge and the sector chairman. Here they discuss the performance of the last year, and whether that performance is satisfactory. The standards they use are based on what they planned the previous year, and how the performance matches

that. Based on that performance, they make a new plan for the next year. Here they will also discuss any problems the judge might have with the organisation, or with his/her health, and if the chairman can offer any support to help the judge.

As with the attitude towards organisational autonomy, there are also two approaches by judge-management teams towards accountability. One is more in the spirit of hierarchical authority,[10] and the other more adhocratic.[11]
On the one hand:

> 'The quantitative aspect is discussed in the yearly 'functioneringsgesprek'. Whilst nobody has overtly said anything to me about the breach of judicial independence in terms of holding judges to account for the quantitative aspect of their work, I know that some judges have a problem with the newer forms of accountability.'
>
> \- Judge-manager of management team at large court

This quote would suggest that some judge-managers are more than willing to hold fellow judges to account for the quantitative aspects of their work. However, that is as far as it goes. They make the distinction between quantity and quality of justice deliberately, as the quality of justice is protected by judicial independence to decide cases, and is controlled through the traditional means of appeal and public hearing.[12] However, the general attitude expressed by the management teams is that:

> 'It is no longer acceptable to say that judicial independence protects judges from having to account for their productivity.'
>
> \- Judge-manager of management team at large court

This is confirmed by the fact that, in the large court, the management team hands out individual statistical results to its entire staff (of the sector), including judges. In this way, everybody can see who is being productive and who is not.

One judge of a quality pilot team even believes that there should be a mechanism of accountability for judges who do not function well in the court. The following quote would suggest that informal sanctions used to exist in the court against judges, but in the last years have not been used:

> 'They could have a sanction against judges who are dysfunctional. It used to be the case that dysfunctional judges got sent to the kanton (sub-district) courts to work, where individual productivity is more visible.'
>
> \- Judge of a quality pilot team

10 H. Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design', *Management Science* 1980, vol. 26, p. 332.

11 Ibid., p. 336-338.

12 See the above section 7.1. 'Role and responsibility of judges'.

On the other hand, a different position was taken in other interviews. The following quote gives an example of one judge-manager who is rather uncomfortable with the new management structure and with the idea that judges can be managed in general. He does this by describing a limit on this power to manage judges and hold them to account for their productivity:

> 'Once a year they have an evaluation. However, there is no hierarchical structure regarding judges in the court.'
>
> - Judge-manager of management team at small court

The lack of a standard management technique could be born from the fact that there are no rules as to how judges should manage their caseloads aside from that they should hear them within a certain time and with quality. There are also no possible sanctions because of judicial independence. Therefore there are no incentives for judges to act how management wants them to, and even if there were, there are no sanctions to hold them to account:

> 'There are no other formal sanctions against non-functioning judges. Other solutions can be discussed with the judge.'
>
> - Judge-manager of management team at large court

7.3.4. Analysis: Judicial independence and accountability

An observation can be made at this point that judicial independence appears to be a connecting theme at the micro level. On the one hand, it protects judges in their roles as decision makers. On the other hand, it affects their autonomy and thereby their place in the court organisation. Nevertheless, judges' autonomy to act appears to have a rather uncertain status and not well defined borders in the court organisation itself. The only thing that appears to be clear is that judicial independence applies to decision making in cases. In terms of working method and organisational autonomy, different judge-managers of management teams, and members of quality pilots have expressed different points of view and judge-managers have shown different ways of treating the situation. Some judge-managers take the proverbial bull by the horns and risk complaints of breach of independence (and go on to ignore them). Others are less tenacious, and every organisational decision taken considers judicial independence.

This can lead to the hypotheses that a) judicial independence is not an objectively defined concept within the Dutch courts where the interviews took place, and b) the only shared definition of judicial independence is connected to the decision making in cases and not to the way that judges work. It very much depends on the way that the individual judge operates it.

In many interviews, a distinction has been made between judicial independence and organisational autonomy. This appears to be in order to coordinate and regulate judges' choices of working methods. However, there does not appear to be a framework of accountability or management to reflect that, for fear of breaching judicial independence. There also appears to be very little incentive for the judges to give up any of their organisational autonomy. Furthermore, there appears to be no objective

definition of accountability for judges for quantity in the courts, and no way for sector level managers to deal with it in a standard way.

The only existing methods seem to be pretty extreme: on the one hand, suggestions and peer pressure, on the other hand dismissal:

> 'If a judge's performance is extremely bad, or if she is always late, then the sector chairman will come into the office and see what is going on. Even though judges have a position for life, they can be fired due to unsuitability (ongeschiktheid) but this is only as a last resort.'
>
> - Judge-manager of a management team at large court

7.4. *Conclusions*

At the micro level, an attempt has been made to describe how the independence of individual judges is operated, and the position of judges in the court organisation itself. This attempt was based on interviews with judges, judge-managers and administrative personnel; the resulting representation of the reality clearly reflects their perceptions and my interpretation of that perceived situation. In other words, it reflects the 'truths' (the espoused theories[13] of those who were interviewed and my interpretation of their meaning) rather than 'the' truth.[14]

The chapter was divided into three sections: the role and responsibilities of judges in courts; managing judges; judicial independence. The section 'role and responsibilities of judges in courts' examined in some detail how the judges operate constitutional norms within the court,[15] whereas the section on 'managing judges' looked more at the role of judge-managers in helping to deliver efficient justice, at the same time as preserving judicial independence. A brief examination of how 'judicial independence' operates and how it affects the administration of justice in courts' sectors was then described.

What came out of these descriptions?

In the first place, it would appear that even though decision-making in cases and responsibility for the quality and quantity of judgements is considered to be the main role of judges, it is not a well-defined role. In order to put the main role of judges into perspective, some description was given of the respondents' perceptions concerning quality and quantity of judgements. From the data gathered it seems that there are formal and informal ways of guaranteeing legal quality. Formally, there is an appeals system. Informally, even though there appears to be some activity in creating tools to measure legal quality, these activities are inconsistent. The judge appears to be the one who is really in charge of assessing the quality of his/her own judgements. In the second place, whilst there appears to be a loose prioritisation on timeliness, this

13 C. Argyris and D.A. Scön, '*Organizational Learning II: Theory, Method, and Practice*', Reading, Massachusetts etc. 1996, p. 13.

14 C.K. Riessman, 'Analysis of personal narratives', in *Handbook of interview research: Context and Method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 704.

15 See chapter 4 Constitutional law and practices, section 4.3. Judicial independence and integrity.

attitude does not mean that not writing judgements on time happens consistently. Nor does it mean that judges cannot meet quotas. It simply means that the legal quality of the work takes priority over finishing on time for some of the respondents involved in these interviews.

Without any standard definitions of what they mean by quality and quantity of judgements, and as, from what they say, it is a matter of balance, what if the judges do not balance quality and quantity? This question was then addressed in the section on managing judges.

It seems that there is no apparent directing or controlling of judges' activities within the courts, even though there are certain expectations.[16] For another thing, there is no possibility of sanctioning if judges do not comply with or conform to management policies. This system relies very much on talking and persuasion, and without the possibility of sanctions, judge-managers have very little, besides peer pressure, to give incentives to judges to comply.

Next to some attempt at managing judges, management teams can organise the support structure, and they can do it to support judges in their work. Whilst techniques to manage judges are not homogenous, and there is no textbook (yet) describing norms on how to manage judges, the support structure offers something to indirectly steer judges towards fulfilling the goals of the sector and therefore also the goals of the court more efficiently.

From the description and analysis so far, judges appear to have a strong sense of independence and convey a certain amount of stubbornness as regards the responsibility for their work. Even though the respondents explained that, to them at least, there is a distinction between judicial independence and professional autonomy, the reality is that the two appear to be operated as one and the same.

Judicial independence is a connecting theme at the micro level. On the one hand, it protects judges in their roles as decision-makers. On the other hand, it correlates with their organisational autonomy and thereby, as has been observed, their place in the court organisation. Nevertheless, judges' autonomy has a rather uncertain status and not well-defined borders in the court organisation itself.

It is likely that those respondents who made the distinction between organisational autonomy and judicial independence did so with the idea that there is a need to coordinate and regulate judges' choice of working method. However, there does not appear to be a framework of accountability or management to reflect that. The reason provided is the fear of breaching judicial independence. Yet, some judge-managers take the proverbial bull by the horns and risk complaints of breach of independence. Others are less tenacious, and every decision taken considers judicial independence.

16 With the exception of judge-managers distributing cases to them.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Chapter 8

8. Court organisation: Meso level analysis

8.1. Introduction

This chapter is rather more complicated than the analyses on responsibility of judges and administration of justice, because it attempts to describe in some detail how policies on judicial organisation and quality are operated at the sector level (by management teams) and the court level (by quality pilot teams). These policies were described in the chapters 5 Institutional context of the Dutch judiciary and 6 Organisers and policy. The Judicial Organisation Act 2002 made a structural change to the courts and sector by creating integral management. The operation of integral management will be described in the first part of this chapter.

The next parts all fall within the title headed 'Quality of Organisation'. As court organisations are directed towards dealing with the processing of cases at all levels, a description has been given as to how case management operates in the three specific administrative law sectors as well as at an appellate court where I followed a brief internship. The part on case management tries to highlight the quality policies outside of the pilot projects that have been implemented by management teams.

Following from this is the part on the operation of the quality standards. These pilots were also described in their policy form in chapter 5. Here I spoke to at least two members of three different pilot projects, some judges and some support staff. This part and the part on management (both of integral and case management) should give an indication of how well quality standards operate in these courts and how they are in reality accepted as part of the management of courts.

A section on communications follows from the quality of the organisation. Communication is a very important part of the quality perspective. Without effective communications, it is very difficult for the members of an organisation to learn from mistakes and to create change. Therefore a briefer look at how communication operates in these courts and the technology used to affect that communication is given.

8.2. *Integral management*

8.2.1. Introduction

As explained in chapter 6[1] after the Judicial Organisation Act of 2002 entered into force, the sectors became individual organisational units with their own financial responsibility. The management of each sector was given to a management team. The management team at the sector consists of a chairman (judge manager) and a coordinator (professional manager). In turn the sector chairman is part of the directing board of the court, which has collegiate responsibility for the organisation of the court as a whole.

Furthermore, it was decided in the policy that the managerial and judicial function be separated so that it would not materially affect the judicial position of judge-managers. Two aspects were highlighted in chapter 6 on this issue:[2] on the one hand, constitutional theorists feared that by putting such a strong emphasis on organisation and benchmarking in management and courts, that the consequence would be a breach of judicial independence. On the other hand, a court (or sector) by being obliged to account for itself organisationally shifts its focus away from its main business of adjudication.[3]

The interviews gave the opportunity to look at these issues in some depth. On the one hand, interviews with both management teams and quality pilot teams gave an insight into the operation of integral management in the sector beyond the management of judges. This included talking about the tasks of the integral manager, the effect that the law had on the relationship between the judge manager and professional manager. On the other hand, some insight was also given as to the positive consequences believed to have occurred in the organisation and problems with the position. Finally, some comment was given about the future success of the position.

8.2.2. Judge manager and integral management

Previous to 2002 there was no statutory framework for the judge manager's position, and therefore no statutory framework for the relationship between the judge managers and professional managers to manage the whole sector (integral management). In trying to understand what consequences this framework has for the sector, the initial question would be what the tasks of the judge manager are. Throughout all of the interviews, only one judge manager was able to describe in some detail what he believed to be his tasks in the new position of integral management. He believed that his

1 Refer to section 6.1. History of organisational change.

2 Refer to section 6.2.1. Local admininistration.

3 P.P.T. Bovend'Eert, 'Het bestuur en beheer van de rechterlijk macht in constitutioneel perspectief', *R.M. Themis* 1997, p. 229-240; I. Keilitz and M.L. Buenger, 'Courts and the Administration of Justice: The primacy of core values', *Public Administration and Management: An interactive journal* 1998, vol. 3, p. 4.

> 'main role is to create criteria and norms for the management of the sector, especially in terms of distributing cases. These norms are based on specialisation, expertise, involvement, and whether the case needs more than one judge. It is my responsibility to ensure that judges finish the cases that they have been given in a month.'
>
> - Judge manager of management team at small court

therwise it was left to two members of different quality pilots to give some more definition to the tasks of judge managers. On the one hand, a non-judge member of a quality pilot team said that the judge manager must have the goal of ensuring that parties do not wait too long for their judgements. On the other hand, a judge member of a different quality pilot team said:

> 'The position gives power to structure, to organise and systemise procedures in the sector, not the courtroom.'
>
> - Judge member of quality pilot team

Integral management in the sector is made up of two people: a chairman and a coordinator. This relationship varies from court to court. As mentioned in the introduction to the analyses, one judge manager felt that he knew enough about what was on the question list that the professional manager did not even come to the interview. In the medium-sized court, the coordinator commands the same respect from the whole sector as that of the chairman.

When asked if the working relationship between the chairman and coordinator had changed after the law came into effect, the overwhelming consensus was no. Two management teams said that whilst integral management was a framework of management within the law, the practice of having a judge manager and professional manager had been around for a while. Furthermore, they told me that nothing had changed between them after 2002, and that they have all kept the same division of labour: the judge manager remains 'in charge' of managing judges and distributing cases, whereas the coordinator remains the manager of the administrative staff. One said:

> 'It took five minutes for the interviewees to formalise current practice.'
>
> - Judge manager of management team at large court

The *management team of the medium-sized court* said:

> 'Why change something that already works well? Nothing much has informally changed between us. It's always been that they speak for each other towards their colleagues. We were joint bosses of the sector. The coordinator is taking care of all personnel affairs up to the judges, and the chairperson is responsible for all the judges.'

This second quote tells us something more about the task of the judge manager, which we could have already guessed from the 'Micro' section on 'Managing judges', and that

is that judge managers feel themselves to be responsible for 'managing' judges. In the *large court, the judge manager* said:

> 'In practice, judge managers leave most of the management work to their sector managers. The only thing that has changed since 2002 is that the judge takes final responsibility for the organisation of the sector, and because of that, I take more than an active interest in management, and keep an eye on what is going on in the whole sector, both legal staff and clerical staff.'

When asked what the philosophy behind the management technique of one judge-manager was, he said:

> 'I do not really have a philosophy behind my technique. I try to make sure that the people I am responsible for are okay and are working well. I make demands but I also try to ensure a relaxed working environment and a place where people can come to enjoy their work. As a manager I try to make a sector achieve more with less work.'
>
> - Judge manager at large court

A conclusion at this point in answer to the question stated above would be that this framework does not appear to have many consequences for the relationship between the chairperson and coordinator. It is quite clear that they have not changed the way that they manage the sector between them. That there appears to be some interest in the management of the whole sector by the judge managers is a rather encouraging finding. That these judge managers are all aware that they are accountable is then curious, because the concept of 'accountability' in this case does not appear to require any action on their part to manage the sector. Perhaps the accountability is obvious at court level with annual reports and the financial cycle.

8.2.3. The court sector and integral management

However, the integral management legal framework creates the line of responsibility and accountability for the sector by the judge manager, in that the judge manager is now accountable for the management of judges as well as legal and administrative staff. This has been done with the idea that the sector can be managed more efficiently because consolidating all powers to the judge manager means that she no longer needs to refer to the director of the court as regards decisions about administrative staff. It would appear that a consequence of integral management is the removal of bureaucracy from managing a sector:

> 'Earlier, when things went wrong, they were seen as being sector problems, and now more thought is given to what they can do about things, where can they influence events, and where can they make gains. I feel that it is my place as integral manager to decide on what the most important priorities are, as I am responsible for his sector.'
>
> - Judge manager of management team at medium-sized court

Another consequence is the shared responsibility for the sector, and the accountability being limited from the sector administration to the governing board of the whole court (of which the chairman is also a part):

> 'It is a self-contained unit both organisationally and financially, and its judge manager is a member of the administrative board of the whole court (the sector's own little 'club').'
>
> - Judge manager of management team at large court

The belief expressed in the quote above, that sectors have become small independent clubs, can be connected to the belief expressed by some of the respondents that judges are working more with other staff, with an increase in the feeling of teamwork and joint responsibility. Communication within the courts between administration and judges is an important point for the organisation. Without communication in any organisation, one can only assume what the other is trying to do or is doing. Both management teams and members of quality pilot teams have commented on this:

> 'Over the last 10 years there has been a closing of the gap between staff and judges. With communications being better it is easier to handle cases and find problems within the organisation.'
>
> - Non-judge member of quality pilot team

Nevertheless, whilst there is a consensus that this is a growing trend, it is also acknowledged that this is not true for all sectors of all courts.

> 'At the sector for criminal law, I feel that the gap between the two sets of staff is still big. The judges have meetings and make decisions without considering their support staff and there are no general and common discussions on the content of cases. At the administrative law sector, all that is different. There are more general meetings to include both the judicial and support staff, discussions are open and anybody can take part.'
>
> - Judge manager of management team at medium-sized court

A positive consequence, described by members of quality pilot teams, to have come from integral management for the independence of the sector, is that judges are encouraged and are starting to participate:

> 'There is a new awareness that judges work as a team to achieve greater efficiency of justice in the courts.'
>
> - Non-judge member of quality pilot team

What does this say about integral management in the sector? The first positive consequence that comes to mind is that the culture of sector organisation (at least in the case of administrative law) is changing. One can get the impression that all the single parts are starting to move together and to interact more. On the one hand, judges appear to

be encouraged to participate, and on the other they are beginning to be considerate towards the administrative and other legal staff in the way that they operate.

The odd thing seems to be that whilst judge managers are aware of their new accountability in the sector, the managerial responsibilities they have taken on do not really seem to reflect that awareness. The management tasks that have been defined here are rather vague, even though judge managers take time to set goals and make priorities.

This state of affairs also goes some way to confirming the belief expressed by one of the respondents that judges have relinquished their little kingdoms and become part of the court organisation. In his opinion by giving up their little kingdoms, judges appear also to have strengthened the autonomy of the sector.

Given the differences (though not large and spectacular) in practice and opinion on the integral management of the sector one could hypothesise that the operation of integral management positions, though given a statutory framework, is far from homogenous. This can lead to the hypothesis that the framework is either broad in this way to accommodate for local differences, or (more cynically) that the sectors and local differences are more important than the law and are therefore breaking the (spirit of the) law by not applying more defined roles and responsibilities.

8.2.4. Success?

In general, though, there have been positive beliefs expressed about integral management and a belief that positive consequences have resulted. For example, there is the opinion that:

> 'the increase in opportunity for judges to participate in the organisation has led to judges having better career opportunities, either in training and education or management.'
>
> \- Judge member of a quality pilot team

Furthermore,

> 'The career structure is for management positions now based on competence rather than age, in trying to ensure that the quality of the organisation is of priority to anyone applying.'
>
> \- Judge manager of management team at medium-sized court

There is additionally a belief that

> 'because of integral management, internal transparency has increased.'
>
> \- Coordinator of management team at large court

A consequence of these changes could

> 'allow the management team on the one hand to be accountable to its staff; on the other, to allow the management team to spot problems more quickly and to deal with them accordingly.'
>
> - Non-judge member of quality pilot team

Still another has suggested that

> 'the integral management framework has brought strong leadership and democracy to the sector-level organisation.'
>
> - Judge member of quality pilot team

However, there is also a problem associated with this position, namely that

> 'it is very difficult to find competent judges for management positions within the courts.'

Even though volunteers receive training for this position, it is usually after several years as a judge. It is not part of the official track to become a judge. Furthermore, due to this lack of training, the people who cover the position of judge manager are also considered to be unprofessional. An example of how unprofessional they are considered to be and how it affects the way this position is treated is indicated in the following quote:

> 'The current generation of managers has had very little by way of training. Some management positions are advertised but not all.'
>
> - Judge manager of management team of medium-sized court

There also appears to be a generation gap in the interest in organisation and management positions:

> 'It would appear that younger judges show a greater interest in organisation issues and have quite some ambitions.'
>
> - Judge member of quality pilot team

A judge member of a quality pilot team showed concern that younger judges learn to write good quality decisions rather than be concerned too much with organisation issues. On the other hand:

> 'Judges who joined the court from the outside track are usually not so interested in organisational matters, and joined for the sake of writing decisions.'
>
> - Judge member of quality pilot team

Another point of discussion was that judges who apply for management positions do not always have a natural talent for it. This, however, is a subjective test for them, as, when asked what natural talent meant, a judge member of a quality pilot said that

> 'one could tell the difference in the atmosphere at the sector. In my opinion, one needs a certain skill to manage judges, and without it, one should not apply. Furthermore, professional managers should manage the larger courts.'
>
> - Judge member of quality pilot team

Even though one judge manager of a management team at a large court said:

> 'It is more useful in such a large court that integral management works. There is now more understanding from judges about the work of administration.'

In the opinions of these two judges, integral management, though not appearing to be operated very well at the sector level in terms of judges taking on more managerial tasks, appears to have some utility in highlighting the importance of organisation to judges. One could believe that this would go to changing the lack of value of management by judges. At the large court,

> 'there have been attempts in some courts to build up a culture of management by creating much smaller positions such as team leadership.'
>
> - Judge member of quality pilot team

The last question on integral management was whether the respondents found it to be successful. Two judge managers of management teams from the small and medium-sized courts said that it was too soon to tell.[4] A judge member of a quality pilot team said that it was not always successful.

8.2.5. Analysis: Integral management

Is it reasonable to assume that there has been success as far as integral management is concerned? A problem with answering this question would be that, from the data anyway, there is no real definition or goal for integral management. Simply describing it as giving one line of responsibility for the organisation of the sector to the judges is too vague. Whilst the law has given them this responsibility, the description of what that entails is also rather vague. That there are beliefs expressed about positive consequences as a result of integral management may indicate that there is some hope.

In chapter 4 dealing with Constitutional law and Practices, the fears of constitutional theorists were described. These fears can be allayed, as there does not appear to be any evidence to bear them out. On the other hand, the fear that organisation is taking judges away from adjudication is a fear expressed by at least one of the respondents. However, given that, at the time the interviews took place, judge-managers appear to leave management up to the professional managers (with some holding on to the prerogative of setting priorities and goals), I conclude that the time given to that management has not materially affected judges' adjudication roles.

4 The interviews took place in mid-2003, one year after the Judicial Organisation Act 2002 came into force.

This legal framework appears to have put a great deal of organisational responsibility on judges, without actually giving them anything to do. Judges do not really appear to be ready for the responsibilities of management beyond keeping their eyes on things.

So why bother? The Judicial Organisation Act of 2002 gives this position a statutory framework, and therefore legitimacy. One may then ask: legitimacy of what? Given chapter 4 on constitutional law, one could answer legitimacy to take over the organisation of the judiciary, and therefore to realise a true separation of powers: both normative and organisational.

Or one could ask: legitimacy in the eyes of whom? One could say judges. Given that the conclusion of the analysis at micro level that judges are difficult to manage (if manageable at all), one could say that a statutory framework would give judge managers the legitimacy needed to enforce the way they want to manage judges. But this does not seem to be the case.

8.3. Quality of organisation

Chapter 3 on The Organisers discussed the legal and policy framework for the operation of quality measures and indicators in the judicial organisation (mostly the courts). The Council for the Judiciary is now responsible for the efficient running of the courts. To give them a head start in this, the Project Versterking Rechterlijke Organisatie - PVRO (The Judicial Organisation Reinforcement Project), a combined ministerial and judicial initiative, was set up before the Council, to teach local court organisations how to become more efficient and to provide a better service. The PVRO no longer existed by itself as of 2002, and there is a quality department at the Council for the Judiciary to continue its work on quality.

The policy of the PVRO was to improve the quality of services, efficiency and communications. Even though it focussed on the courts as a whole, a result that came about was the realisation of the importance of quality management in the sectors themselves. In order for the results of the PVRO to be shared effectively throughout the country, it was felt that methods at sector level had to be comparable with each other, and therefore should be in line with each other. Whilst it is very difficult to demand that all sectors across the country manage themselves in the same way, as each sector has a unique culture and different demands placed upon them, it is nonetheless reasonable to ask them to use techniques that can be measured. There are quality criteria for management developed from the PVRO that courts should strive to fulfil each year. Quality indicators were also being developed at that time and experiments at the district courts had been started on possible methods to implement these indicators at sector level.[5]

All policies, at Government and court level, recognise the importance of quality indicators as an impulse needed for change and improvement. The courts had been working with PRISMA (a project organisation of the Ministry of Justice to improve the

5 F.C.J. van der Doelen, 'Over de kwaliteit van rechtspreken, rechters en gerechten', *Nederlands Juristenblad* 1999, vol. 28, p. 1301, p. 1303; A.M. Sturm, W.D. ten Have and M.M.E. Donders, '*Eindrapport: Uitkomsten Pilot Project Kwaliteit Rechtbank Roermond*', Roermond 2002.

quality of the court organisations). It has been an ongoing policy of the PVRO to create quality indicators that can be used to further the cause of improvement in court management and organisation. In 2002 quality experiments were begun at various district courts.

This section will therefore look at the operation of the quality policy through certain aspects of court organisation. Interviews were conducted with members of quality pilot teams and management teams to see how well the pilots worked in the sectors. In looking at the quality of court organisations, various aspects of court organisation were examined: First of all, at the heart of any court activity is case management.[6] Secondly, as with the examination of any organisation, one needs to look at the operation of any quality indicators applied by the management of the courts (be it policy or management norms of the individual judge managers). Lastly, an important point in organisation quality is the communication, as this aspect shows how cohesive it is and how successful it is in achieving its goals.

8.3.1. Case management

From the interview with a quality pilot team, they specified that an important norm to bear in mind in some way, is whilst they have to keep an eye on waiting times when managing cases, they:

> '… must hold hearing[s] in a way that parties have their day in court rather than feeling as though they are part of an efficient and faster production line'.

This quote was the most universal principle on case management found in these interviews. This section will look at the primary processes of court management. Here I have incorporated my experiences during an internship at the Centrale Raad van Beroep (Central Appeals Tribunal (for the public service and for social security matters)). The following part will be devoted to describing the case management from the interviews with both management teams and quality pilot teams. The last part will look at the transparency (internal and external) of case management.

1. Internship

Case management is the central activity of the courts. All employees at the operating core and support staff of a court are involved in managing cases from the moment they enter the court process to the moment a judgement is enforced. During an internship that I followed at the Central Appeals Tribunal (Centrale Raad van Beroep), the whole process was described to me and a short tour of the route of cases was given.

As soon as the case file enters the appellate court, the administration builds up a file on the case, with a cover sheet (adviesblad) stating information such as the date of the judgement of the district court, the publication of the district court's judgement, and

6 D.C. Steelman, J.A. Goerdt and J.E. McMillan, '*Caseflow management: The heart of Court Management in the New Millenium*', National Center for State Courts, Williamsburg, Virginia 2000.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

the date of the application. Applications can also be dated from when they are received by fax. The case is given a number and the parties are also named. These details are all typed into BERBER. BERBER is a computerised case management system[7] that applies to administrative jurisdiction only. It maps out the course of a case during the whole court process, so that anybody who needs to can locate the case. Files are then colour coded according to the sector they need to go to.

At this stage, the administration is also responsible for checking to see if the parties have the right to file an appeal based on whether the process was started on time. Therefore the next piece of information they write on the sheet is whether or not the application came in time. The administrator will tick the appropriate box. If the application is not sent in on time, the administrator sends the file to the legal secretary, who checks to make sure that the actions of the administrator are correct. If the action is deemed to be correct, then it gets sent finally to the chairman of the sector, who closes the case. It is then sent back to administration, which informs the parties that their appeal is inadmissible because it was not submitted in time. This means that there are three gatekeepers of the court to ensure that justice is administered efficiently.

If the file is considered to be on time, then the court charges an administration fee to the party appealing. This must be paid within four weeks. If nothing is received after four weeks, a reminder is sent to the party making the appeal. If nothing is paid, then the legal secretary can declare that the requirements of the court's processes were not fulfilled, and the claim is then inadmissible.

However, if the charges are paid on time, then the court requests the file from the district court where the original judgement came from. Whilst it is waiting, the dossier is kept in the post room (where post is sorted in the mornings). All in-coming post that is relevant to the case is placed in order of receipt and filed as such. All envelopes are kept as proof of date of receipt. All documents are numbered in accordance to their order in the file. Once the file is complete, it is sent to the legal secretary for instructions.

When a case goes to the 'instructiekamer' (waiting room for cases), the administration enters the information onto BERBER. However, when the legal staff take the cases from the waiting room, they tell the registering clerk (Administratieve Juridisch medewerker) that they have it. The registering clerk then makes a note of it on the BERBER, and notes the code of the legal secretary who has it. That way, if post comes in for it, then administrators know where the file is located, and where to take the post.

However, before the instruction takes place, the legal secretary checks to make sure that the case has gone to the correct sector of the court. If it is in the wrong sector, it is sent back to the administration for refiling. If it is correct it goes to the waiting room for cases.

The legal secretary then takes a batch of cases from the shelves and begins the instructions for each case. An instruction contains the case number, the appellant's

7 Case management system is a generic term referring to the aggregate processes that a case goes through in a court, such as registration, primary processing, summary work, and decision making. Professionals in the field may make a finer distinction for other programmes running within the courts. My thanks to Marco Velicogna for his comments.

name and the city where she resides, and the respondent's name. It states which law the case deals with, alongside a rubric of the case (i.e. a one-sentence description of the argument). Then the legal secretary decides that the case should go to a hearing (or it may be that the legal secretary needs more information), and states that the case can be given a date for hearing. A summary description of the case is given (both facts and legal arguments are put forward). Finally, a consideration ('beschouwing') is given, whereby advice is given as to which way the legal secretary or auditor thinks the case should go.

This whole file is then sent to the Vice President of the court, who gives the case a date for the hearing. The file (or batch of files) comes back down to the legal secretary. The legal secretary then sends the files to the administration, which then informs the parties of the date of the hearing. The administration must receive these files 6 weeks before the actual hearing, and the parties must receive the information 3 weeks before the hearing. Therefore, the administration has 3 weeks to inform the parties. Then, based on all the dates given for all the sectors, the administration sets a timetable for all the cases for a certain week, giving names of judges, and the chambers they are sitting in and which sector the case belongs.

The case gets sent back to the legal secretaries. Whilst the case is waiting for its hearing, three copies of the original file are made and distributed to the three judges who will hear the appeal. The judges then have some time to prepare the case. The original file stays with the legal secretary, and goes onto a designated shelf waiting for the hearing. Come the hearing, the legal secretary takes the original case file to the hearing and acts as clerk to the court, taking notes of the verbal process.

After the hearing, the case is discussed in chambers ('raadkamer') and the three judges come to a consensus about how the case should go. Somebody writes the judgement (this could be the judge, the legal secretary or the auditor). One of the copied case files is returned to the legal secretary who puts it on the 'sitting complete'-shelf in the 'waiting for instructions'-case file room (as insurance in case the original file goes missing). Once the judgement has been written (fiat), it goes to the judges for any corrections, add-ons or both. Once it has made its round, it is sent to the typist. The typist makes corrections on the first copy, and returns it to the original writer, who checks it. This process can happen 3-6 times before it is considered good enough. Then copies are made and sent to the parties, the judges, and to the original court and is placed in court's files. Lastly, it is sent to the publisher, which is in charge of publishing it electronically and on paper. This is the final administrative stage of a case.

Officially, every movement of the case must be recorded. After the administration has built up the file and it is ready for instruction, it is then in the hands of the juridical staff. The juridical staff have limited access to BERBER and all movement must then be done through the legal administrator. Sometimes it happens that a case goes straight to a judge (to decide if it should be allowed to go through in spite of non-compliance, or for the agenda etc.); or it occurs that somebody from administration will take it for a morning in order to illustrate something to an intern; or to place incoming post which would take a couple of minutes. However, the main movements are always recorded, and it is clear where the case has been. The same holds true in principle for the judgement. The judgement itself gets a cover sheet, giving information about where that judgement has been (a list of names and dates, for example). Therefore it is clear where

a file has been, and for how long it has been there. In the file there is a checklist for process costs. The process should be transparent and can be traced from the first moment it comes into the court, to the last moment when the case is filed in the archives and the case is published.

This is basically the life of a case in one of the appellate courts for administrative law. One can see that it is a rather bureaucratic process, in which the administrative staff play the greatest role, and the judges the smallest one. The administrative staff have the greatest control over the process because they have the greatest amount of knowledge thereof. Case management in this instance is about administrative staff ensuring that all procedures have been followed (by all people involved) for a case from the beginning to the end. Legal secretaries are the second essential group to keep the process moving. They stand between the administrative staff and judges. They must keep the administrative staff informed about the movement of the case, and do the preparatory work so that judges can concentrate on the decision to be made in a case. The only judges who have to make any administrative decisions then are the Vice Presidents of the court, who ultimately decide on whether a case can go forward in spite of the fact that the process was not started on time; to set a date for the case; and the judges to whom the case should go. Aside from that, judges can be seen as part of the process rather than processors themselves.

Case management is supposed to follow certain procedural rules (procesreglement). The policy for handling cases here is 'first come, first served'. Since the procedural rules came into force in January 2002, the rule is that cases leave the court within one year after an appeal is made. But due to the heavy backlogs, all new cases must wait (at least two years after being accepted into the courts). In that time, more documents can be added to the case, or the case may have found its own solution. There are no sanctions against the lateness of the case in this court.

Problems

During the internship, various discussions revealed that the backlog was not going away in spite of new laws. The Council of State (Raad van State) has taken on more judges, and created two systems of case handling, one to deal with the backlog and one to deal with new cases. This has produced results. However, the Central Appeals Tribunal (Centraal Raad van Beroep) does not have the resources to simulate the same system, therefore 'first come, first served' is the fairest way. The argument that came up was that if the backlogs did not exist, cases would have no problems in being completed within the time stipulated. However, without the resources to hire judges, there must be a way to decrease the flow of cases coming into the courts. According to those working there, without the resources the process rules cannot be enforced. There is a working group on work processes. However, the effects of this working group do not appear to be strong enough to make an impact on the backlog of cases. Organisational solutions (i.e. hiring more judges) are only possible with sufficient resources. The problem is that once you hire a judge, she is there for life. Judges have tenure until they turn 70.[8] The point being that once you have reduced all backlogs, and the workload

8 See article 46h of the Judicial Officers (Legal Status) Act - Wet rechtspositie rechterlijke ambtenaren, 1996.

is at an amount where fewer judges are necessary, and then the overheads automatically increase because you have too many judges, who are a permanent cost until they leave. Otherwise you have to approach it from a procedural point of view and begin to restrict the number of cases coming in.

Quality
In this internship, they also said that there is also no productivity count for the legal staff. They do try to complete 110 cases a week. However, BERBER gives them some insight into the process. The idea is that each batch of cases contains around 6 cases. This is one sitting (morning). There is one sitting per week per chamber (three judges per chamber) per sector. There are 3 sectors, with between 3 and 5 chambers; some cases can sit with single judges. Therefore there are about 110 cases completed in a week. However, there are around 600 cases backlogged in one chamber, which is about 2 years worth of work. Therefore the chambers are aware that they should be putting through 110 cases a week. They further said that the quality here must be of the highest quality, simply because this is the final port of call for these types of cases. Judges work on cases for about a week (maybe more if it is a difficult case), and take into account what their legal secretaries have advised on the case. More cannot be done without compromising the quality of the work done.

2. Case management based on interviews

Primary processes
The procedure described above can be called 'primary processes'. This is a process that can be developed at the local level, and does not require national law to regulate (such as the working group for work processes described for the Central Appeals Tribunal). For example, at the larger court the management team of the sector is looking into creating a process manager to keep an eye on the throughput of cases. Its main responsibility is for case management in terms of primary processes. The thinking behind this is to create uniformity in the way that teams in the sector deal with cases.

> 'At the moment the process manager is the same person as the team leader. We are looking to separate the two functions and to create the position for one person to care for the primary processes of both teams in cooperation with the team leaders. This will allow team leaders to continue running their teams in their own style, but will ensure that the completion of primary processes is consistent.'

Primary processes are where the operation of procedural law is most transparent. One judge manager described procedural law as being

> 'national and therefore standard. There is also an automatic system and the formal handling of cases has been standardised across the courts/sectors e.g. dealing with parties.'
>
> - Judge manager of management team at medium-sized court

According to one judge member of a quality pilot,

> 'Most case management is structured in law and organisation.'

The same judge goes on to explain that procedural law is very broad and open to wide interpretation, thereby giving managers the discretion *'to interpret the law creatively to find workable solutions.'* Maybe due to this wider discretion, the judge managers and leaders have found it necessary to hold

> 'local meetings on the uniform application of procedural law, but not national. There are national meetings between judges of the administrative law sector on the uniform application of the national process regulations for administrative law, which encompass administrative procedural law and court procedures to deal with cases. There discussions are held on some procedural law issues in a global way, and there is some interpretation of the law that is a step in the direction of the uniform application of law, but it is not very effective yet.'
>
> \- Judge manager of management team at large court

Even though there are the national procedural rules that provide a framework for the primary processes to operate in, these have more to do with deadlines and payment by the parties towards the courts for certain costs. It is for the courts themselves to decide how to organise primary processes around national procedural rules[9] and there appears to be a movement towards uniformity between the courts, which can be seen in the national sector meetings. There is also a movement towards uniformity within the larger court with teams within sectors, which can be seen in the process leader position being developed in the large court.

The trends in the increase in cases; the increase in similar yet simple cases and the complexity of the law

So far, this description has looked only at the approaches taken to primary processes, and procedural law related thereto. However, case management has been complicated in recent years by certain trends: an increase in cases; an increase in similar yet simple cases; and an increase in the complexity of law that they have to deal with.[10]

Starting with the problem of an increase in cases, as we have seen in the description from the primary processes and the internship, some have dealt with this by attempting to change the working processes of the courts. However, according to one interviewee:

> 'It is not true that there has been an increase in cases for this particular sector. The sector has experienced a drop in the number of certain cases over the years.'
>
> \- Judge manager of management team at small court

9 For individual process rules adopted by the courts, see www.rechtspraak.nl.

10 WRR, '*De toekomst van de nationale rechtsstaat*', Wetenschappelijk Raad voor het Regeringsbeleid, The Hague 2002, p. 176 and p. 186-193.

Hence, for those who have perceived a trend of an increase in cases, they have reacted to this by re-engineering their working processes. Otherwise, there has been no perceived change, and therefore no need for any reaction.

As to the problem of an increase in similar yet simple cases, various reactions have been described. One of the management teams said that the difficulty they had with finding a solution to this was that

> 'The sector does not receive many bulk cases in the way that the sub-district sector receives cases. A third of the cases they receive at the sector are WAO cases.[11] Most cases can only be conducted individually and not collectively. Somebody almost always shows up in court, which means a lot of paper work. It is difficult to conduct these cases as if they were bulk.'

At the large court, the management team of the sector for administrative law has tried to react to this increase also by manipulating the primary processes. They have put together cases in which people have not paid the administration costs for the court.[12] They are also experimenting with cases in which they are certain that nobody will show up, such as people who live abroad, children or old people.

> 'However, these are standard cases of about 100 per year and cannot be considered as bulk cases.'

Even though there are cases which are similar, but which cannot be conducted in one go, the large court has tried to have hearings with one type of case in which judges can research different points that come up in all of the cases. However, in the end, even in cases which have some similar complaints, almost all cases will have differences. This means that judges must conduct the cases separately.

At the sector for administrative law in the medium-sized court, the management team has organisational discretion to deal with bulk cases independently:

> 'When cases come in, they are distributed to the various different legal areas, based on the organisation's own norms and not law.'
>
> - Judge manager of management team at medium-sized court

The philosophy behind the method that they use is to allow them to see when there is a situation of similar cases coming in bulk. The automatic system allows them to see how they can best organise themselves, so that when they discover a pattern of similar cases, they make one assignment to deal with them.

11 Wet op de arbeidsongeschiktheidsverzekering: Law on Disability and Work Insurance.

12 Griffierecht.

> 'One judge and one legal secretary can take on a project of up to 60 cases alone. Apparently, this is something that all the sectors of administrative law do in the country.'
>
> - Judge manager of management team at medium-sized court

In terms of the increase in the complexity of the law, the only real time when it is an issue for case management would be if new law were to be tested in the courts.[13] Very often, when there is a new law to be interpreted, cases come in bulk. The management team of the large court said that the judge manager of the sector has the discretion to decide whether or not to send a test case to the Court of Appeal. However, next to sending it to the Court of Appeal,

> 'We also have meetings at the sector once a month to discuss jurisprudence on administrative procedural and substantive law. Then one will find many different opinions, and the Court of Appeal will have to bring the jurisprudence together.'
>
> - Judge manager of management team at large court

At the small court, the judge manager there has dealt with the complexity of law through specialisation and delegation of work to legal secretaries. Otherwise, the complexity of law issue has been dealt with twice before in this analysis: firstly, in terms of legal quality, and that is a matter for judges to cope with and to guarantee, no matter what the level of difficulty of the case might be.[14] Secondly, in terms of managing judges, whereby the sector chairman guarantees equal case loads for judges based not only on numbers but also on the difficulty (i.e. complexity) of the case.

External influences on case management in the courts

The management team at the large court discusses to a slight extent the external factors that affect case management:

> 'I require judges to be strict with lawyers who ask for adjournments, especially lawyers who make a habit of it, as adjournments cause problems for the case management of the court.'
>
> - Judge manager of management team at large court

However, an interview with members of quality pilot teams, who also happened to have experience in the criminal law sector, gave a great deal of insight into the problem, and how the sector was, at that time, trying to deal with it. In criminal law, the case management system is bound to the **public prosecutor's** decisions to prosecute cases. The court is running a project, called the gatekeeper ('poortrechter'). The purpose of this project was to enable the criminal sector and public prosecution to plan cases together, especially when the cases required a multiple chamber to deal with the case.

13 Management team at the large court.

14 See chapter 7 Responsibility of judges: Micro level analysis, section 7.1.3. Legal quality.

> 'Now one judge per team looks at a case file and makes sure that all is in order, and that the case does not require the whole team to deal with it or the planning of the case. The bureau that organises this is called the 'Centraal -Appointerings Bureau'. It is a good system.'
>
> \- Judge member of quality pilot team

The team looks at whether the time plan for a case is realistic, and if the case is ready for an actual hearing. The aim here is to diminish the waiting list and reduce the tendency of prosecutors to request extensions and adjournments. According to the interview with the quality pilot team member, an advantage of this was also better cooperation and contact between the court and public prosecutor. The task of gatekeeper is limited to seeing whether or not the case file is complete enough to set a hearing date, and whether the prosecutor has planned enough time for the processing of the entire case. It is a purely administrative task and important for case management.

Due to the influence the public prosecutor has over the case management system, there is some flexibility built into the system. The rule of thumb is that the case is heard in the chamber that the prosecutor sends it to, i.e. either to the single-judge chamber or multiple-judge chamber. Due to the vast number of cases, the trend has been that the prosecutor sends them to the single-judge chambers, even if the complexity of the case requires a multiple-judge chamber.[15] The flexibility built in here is that if the judge in the single chamber decides that the case is too complex to decide alone, then she can transfer it to the multiple-judge chamber. However,

> 'If there is a backlog at the multiple-judge chamber, then there will be a meeting between the head of the criminal sector and the public prosecutors offices. In the event of severe problems, a discussion will take place between the Chief Public Prosecutor and the judge.'
>
> \- Judge member of quality pilot team

Another external influence that appeared from the interviews was **financial** (or political depending upon your point of view).

> 'Nowadays, there are certain demands made by the Council for the Judiciary in the annual planning of the courts and sectors that the court agrees to finish a certain amount of cases for a certain amount of money. So there is a predetermined amount of cases per year, which may or may not be sufficient.'
>
> \- Judge member of quality pilot team

When asked if he thought that the organisation of case management should be used as a tool to hold the court to account for its spending, the following respondent said:

> 'That's what the Lamicie does.'
>
> \- Judge manager of a management team at the medium-sized court

15 Non-judge member of quality pilot team.

It was not clear whether, even though this respondent understands that case management is a tool of accountability, he felt pressure from it to manage cases any differently. However, given that this is the same judge manager who said that the administrative law sector is already efficient, maybe not.
The next respondent stated:

> 'The Lamicie model has nothing to do with case management. The model is not useful to aid in the management of the sector, [therefore] they do not use the Lamicie model to make goals and plan case management. But the model is used for the whole court to distribute money, [and] at the sector it is more to do with … capacity distribution'
>
> - Judge manager of a management team at the small court

When asked if they would like to see the Lamicie norm developed to help file cases into court, two members of a quality pilot team said:

> 'We haven't really thought about it. What we do need is content categorising not based on simple, arbitration and difficult cases but directed at the content of a case.'

What can this tell us about the external influence of the Lamicie system on the case management systems in these places? It would appear from this data that the system is considered by these respondents to be untrustworthy, and based on criteria that are not shared by the respondents. It would appear also to be ignored where it is convenient to do so.

Even though the following section will look in depth at the operation of quality indicators and the pilots in the court, some space will be given here to the effects perceived by management teams that the quality pilots and indicators have had on case management as external influences.

When asked if the projects of the Council for the Judiciary (previously known as PVRO) continued to aid them in their case management, the management team of the large court said *'not really'*. However,

> 'We would like to see the Council continue to concentrate on certain aspects, which can be dealt with centrally, such as computerisation and the quality pilots. However, other things that should be dealt with by courts should be left to the courts, such as primary processes, as each court and each sector is unique and works in unique circumstances.'
>
> - Management team at large court

When asked the same question the next respondent said:

> 'The quality projects have done little or nothing in terms of making the case management more efficient. However, INK has done more with the sector in improving the working processes through training.'
>
> - Judge manager of management team at medium-sized court

The same question was asked at the small court, and the respondent said

> 'Yes. The projects also illuminated a number of norms and criteria that management can also use for steering and productivity.'
>
> - Judge manager of a management team at the small court

At a different court, the question was put to a member of the quality pilot team there, and he said:

> 'It was also well received by the managing judges, who found that it aided their management of cases.'
>
> - Quality pilot team

What does this say about the operation of quality in case management? There appears to be some positive influence on case management at the sector level. However, it cannot be ignored that the judge managers do look outside of the quality pilot system to aid them in improving case management within the court.

The clearest thing that came from the interviews on case management was that problems (trends) and external influences vary from sector to sector and from court to court. It was therefore quite natural to discover that different approaches have been used in different situations. Again, the main differences could have been because of the differences in size of the sectors where the interviews took place. Primary processes and the initial universal principle of letting people feel like they have their day in court were the only things that applied generally.

No general norms for case management stand out that can be comparable on a national level, as hoped for by the PVRO and now the Council. Rather there appears to be a lot of independence and autonomy in the way they manage cases. Even though judge managers meet at the national level to discuss substantive and procedural law to try to bring some unity, the process, at that time, did not appear to be effective in unifying the way that cases are processed. The external influences, though the same across the courts, have been met with different reactions by the management teams and the quality pilot teams. This could be an indication that any attempts to standardise policy on case management might well fail, simply because there may not be a standard acceptance of that policy across the courts and sectors.

3. Transparency of case management

The transparency of case management is important in two contexts at the meso level: internally, to judges; and externally, to parties. It is somewhat important to the Council for the Judiciary, but only in terms of productivity and case registration for the financing system. Assessing the internal transparency of case management is important in the first place to be able to see how it works. For comparative reasons, if it is quantifiable, then it is more easily compared with the case management systems in other similar sized sectors. On the other hand, if it is not working, then one can also see why, and find a solution.

Internal transparency goes to the accountability of the management to the judges, but can also be used to hold judges to account towards each other and towards management. In one court, the productivity is individualised and then published for all within the organisation to see. This allows the members of the court to see their own productivity in general; it allows the judges to compare their own performance with past performances and to see if it can be improved; and it allows them to compare against each other's performances. This however is not for all courts, much to the pity of one of the respondents, who does not believe it is possible to manage oneself or the sector without such information.

When asked why transparency is more important internally, a member of a quality pilot team said that:

> 'It is important to know where problems lie and how to find a solution. Whilst judge managers can identify problems and bottlenecks, they cannot change everything all at once. If judges do not receive sufficient support, nothing can really change as people already work 100-140%. If people work more there will be an increasing problem of burnout.'
>
> - Member of quality pilot team

Therefore, internal transparency is recognised as being important in giving an insight into workloads for judges, and to allow more effective individual and sector management. However, the following respondent said that:

> 'For the most part, judges are happy with the case management as it stands.'
>
> - Judge manager of the management team at the large court

Assessing the external transparency of case management is important to understanding the relationship between the parties and the process. If the parties see nothing, then it cannot in any way be said to be a part of that process, and is not included in decisions about it in spite of the fact that these decisions affect them the most. For another thing, if the system is indiscernible to the parties, there is no way for it to be accountable to them if anything goes wrong procedurally in the sector.

Externally, there appears to be little or no transparency towards parties. For one thing, there is a general attitude that parties are passive in the process, and they only wait and watch. According to the opinion of one judge manager of a management team at the small court (which is shared by the judge manager of the management team at the large court):

> 'Parties do not need to see the case management system. They are only concerned with having an independent judge hear their case. The parties will not notice that the organisation has changed formally within the court. The quality project for customer relations has nothing to do with case management. Accountability to parties for case processing has not changed with the operation of the quality system. Even though procedural rules guarantee a certain time frame for the handling of cases, it is for the judge manager to determine how that is organised within the sector.'

Even though there are procedural rules to dictate a certain time frame for the initial handling of cases, and a transparent framework for the parties, it does not seem to be effective. On the one hand, such rules do not say that how a case is managed should be transparent to the party, as long as the end result is just. On the other hand, the judge managers do not take their inspiration for case management from procedural rules and remain autonomous in the way they manage the cases that come to the sector. According to the next respondent case management is:

> 'Transparent externally, especially to repeat users, such as lawyers.'
>
> - Judge manager at the medium-sized court

This judge manager described a special process at the sector where citizens bringing suits against government decisions are not always represented by lawyers. For those who do not have lawyers, the respondent showed an understanding that these people would not necessarily be able to follow the proceedings. But having said that,

> 'The court makes sure that these parties are informed of the things that they need to hand in. Judges do give aid to such parties in the courtroom and comportment is generally considered to be good, although there are sometimes complaints. The language is generally closer to the people and more informal. There are training programmes for this. Much depends upon the judge as to whether she uses plain language or not.'

Here an interesting hypothesis could be made. From what I understand from these quotes on external transparency, if one can afford a lawyer, one does not necessarily need to understand or see the case management system of the court in which one's case is being processed. This means that as long as one can pay somebody else to understand and be responsible for it, one does not need to be bothered by such small details. Whereas if you have no lawyer, i.e. you have not spent the money or cannot afford that somebody else understands and is responsible on your behalf, then the court will take some time to explain the process to you. Therefore, in the opinion of the judge manager, external transparency only seems to matter if a party has no legal representation.

4. Analysis

Case management appears to be a rather large and more complicated process than appears at first glance. Firstly, just to allow a case to be processed in court, there is a substantial amount of people involved in gatekeeping, from the administrative staff that first receive the request for a process, to the managing judge to confirm the decision to accept the case. This is the first step in the primary process. For the remaining steps, administration appears still to have much control.

In terms of the challenges and external influences that the respondents face in terms of case management, there does not appear to be a homogenous way of facing them. There is no apparent national policy to help case management be more efficient or effective, and even if there were, there is no guaranteeing that it would be effective or efficient because the management of the sectors is so autonomous and independent.

It would appear that the main problems of backlogs are a smokescreen for a broader problem. Backlogs have not even been the main problem described by the respondents as regards case management. I would suggest at this point that further research is needed into the processes and influences that go into case management.

It may be that primary processes are much easier to describe and quantify than case management as a whole process. However, it is an insufficient way, if indeed it is the only way that they have used the process rules of the courts to be externally accountable for case management. These points can lead to the hypothesis that the changes to the judicial organisation have missed the main point, that being case management, and understanding and dealing with the challenges facing the courts.

It is now time to look at the way in which the quality pilot projects and quality indicators have operated in the sectors.

8.3.2. Quality pilot projects

In 2002 pilot projects were carried out in various courts to realise quality indicators for the management of the courts. Given that part of the focus of this PhD was to be on the operation of quality indicators and management, it was felt to be appropriate to conduct interviews with the people operating the quality system pilot in various courts. Questions about the operation of quality management were also posed to management teams.

The respondents from the quality pilots consisted of both judges and legal staff from different sectors. On one occasion, an interview was conducted with both a judge and legal secretary who were members of the quality pilot team. On four other occasions, interviews were conducted where there was either a judge or legal secretary who was involved with the quality projects. This brought a wider range of experience from the work floor, as well as from judges. These judges also brought a wider perspective of the court organisation to the interviews, as they came from different sectors of the court.

1. Challenges to the development of the quality pilots

The quality pilot project was the first of its kind in the Netherlands. In one of the courts where it was originally trialled, according to one of its leaders:

> 'It has a place in the court, and has received a positive reaction and was felt to be recognisable, mostly because the quality indicators came from the work floor and not from policy makers at government level.'

According to the legal secretary member of a different quality pilot:

> 'There are no longer any choices in terms of participating in the quality pilots, but there is a choice about the application thereof in individual courts.'

When asked if the participants talked to other quality leaders in other courts, this respondent said that:

> ‘We all meet twice a year to share our experiences of the operation of the pilots This is important for the courts to learn from each other and use some of the ‘Best practices’ discovered by other organisations.’
>
> - Member of a quality pilot team[16]

However, even though the courts listen to each other’s experiences of the operation of quality indicators,

> ‘there is no universal agreement on the benefit of applying the quality indicators to all courts and doubts still exist in the judicial organisation in the Netherlands, but no one is against it outright.’
>
> - Judge member of quality pilot team

Concerns brought up by other courts that some of the respondents of the quality pilots have to deal with are:

> ‘What issues are there in establishing a quality system for their organisations? How much time and effort will it take?’
>
> - Member of quality pilot team

The concerns, the doubts, and the fact that there was a choice as to the extent of application in individual courts could suggest doubts from the beginning that operating quality indicators in the courts would operate consistently. Furthermore, this casts doubt that courts would be able to cope with standardised adoption. That this should be so even though the indicators developed were at a court, would suggest that the courts operate very differently within different cultures. This also suggests a pragmatic approach in that the solution that is developed and adopted in one court can generate problems if adopted in another court. On the one hand, it makes sense to leave some discretion to the court as to the adoption process. On the other hand, it could lead to a refusal to use the new quality indicators that do not relate to the real needs or to adopt better solutions as it is often easier to stick to the old uses and not to innovate. A hypothesis could be developed at this point to suggest that courts, whilst they are all part of the judicial organisation, are not the same entities in spite of being called the same name and having the same mandate.

Mistrust between judges and managers, as has been seen in chapter 4, is usually an issue of judicial independence. Therefore, when asked how they safeguarded independence from their point of view, the two members of the quality pilot team said it:

> ‘is safeguarded because respect for colleagues is a fundamental principle in the court. The quality system was felt to work here because we never let judges feel threatened, and we took away any fears by constantly keeping judges informed and involved in the formation of quality indicators’[17]

16 Three participants of two separate quality pilot teams.

17 ‘Their trust in the quality system here is also to do with the fact that everything that has resulted from the quality pilot has been because of the work of the court and its staff.’ Quality pilot team.

From the outset there seems to be problems with the development of the quality pilot, starting with a shaky inception, to the policy not really being accepted across the board. However, all does not appear to be bleak. The participation is encouraging according to those whom I spoke to, and at the same time, whilst realistic, the respondents show a certain amount of optimism that the pilots will work out.

2. Operation of the quality pilot projects[18]

The pilot projects were executed at the courts by committees, which dealt with all the features of quality organisation as discussed in the theoretical framework. They adapted the themes to the judiciary, therefore timeliness has been dealt with as speed and timeliness; completeness, accuracy and consistency has been dealt with under expertise and the uniformity of the law; responsiveness has been dealt with under comportment. Accessibility and convenience fall within the remit of government to create new courts and court buildings. This can be seen in the court-building project of the Ministry of Justice between 1989 and 2000. However, they also decided to measure the quality of justice by including impartiality and integrity of judges, which extends to access to a fair trial - a legal rather than organisational quality standard.

The task of these committees was to give counsel to the court management on the results of the quality pilot and the appropriate action to be taken based on the results. One of the working groups at one of the courts included 12 people, 7 judges (out of 50), 4 legal secretaries, 1 administrative support and 1 policy worker.

At another court, a member of the quality pilot interviewed felt that the pilot was conveyed all over the court, and smaller project groups were created to share the task of making the pilot successful.

> 'I think that the pilot for quality sets a good example, as it was well organised, they made good points and some easy recommendations.'

At the same court, the next respondent said of the pilot that:

> 'When it was introduced to the court it was technically complicated.'
>
> - Judge member of a quality pilot team

Furthermore, he could not say for sure how well it worked in the sector as the results had only recently been published at the time of the interview.

At the third court where a quality pilot was being run, one of the members found it to

> 'have been very important, to make people aware of the organisation and the action taken to improve the organisation. I have also received much support

18 A.M. Sturm, W.D. ten Have and M.M.E. Donders, '*Eindrapport: Uitkomsten Pilot Project Kwaliteit Rechtbank Roermond*', Roermond 2002.

from the quality teams at the other courts. As project leader, I have contact with the quality section of the Council and there is a national meeting.'

The following respondent said that:

> 'The most important thing about the quality system for us is the awareness of quality as part of the process of production. They have to keep talking about it and making people aware of it.'
>
> - Judge member of quality pilot team

A lot of work has been put in to operate this pilot. Many volunteers have taken part, the President took part, ICT people took part and training was given for the audits. Apparently, however,

> 'It is too soon to see whether there has been an improvement and they will have to wait and see what the team comes up with. The results have been encouraging so far because people are more conscious of the aspects and concepts from it.'

In general, each team appears to have made a great effort to ensure that the process of operating quality indicators in the courts is transparent within the court itself. At one court everybody who did some work on the quality pilot participated in writing part of the overall report.

> 'Therefore it was not only a managerial perspective but also a work for perspective, so the influence of the annual plan is broader. This is a new development. These reports are published as part of the annual report in the whole court. The report is also available to anybody who wants to see it, e.g. the press, and other employees.'

At another court, the quality pilot team was active in ensuring that each sector knew what was happening with the pilot and had

> 'invited everybody to see a presentation of the project, how it worked, and an overview of the results. Three magazines with this information have been sent to everybody to keep people up to date and everybody received a copy of the final report.'
>
> - Judge member of quality pilot team

Conversely, they do not publish the scores of the quality system of the courts. There was a full description of the measuring system itself on the web, but it was felt that it was too early to publish the scores, but some enthusiasm was expressed about the idea and there are expectations for it in the future.[19]

19 Judge-member of quality pilot team.

At the initial pilot stage for the quality project, one can see that one of the aims was to ensure that everybody remained informed of its development, which has led to another aim to draw participation from the work floor from both judges and other staff. Establishing ownership of the project at the court level is deemed by these respondents to be more important than the actual results.

Another thing that was emphasised throughout the interviews was that even though the quality pilots had started running, other projects of the court itself were running alongside. One respondent said:

> 'I am aware of a couple of other projects running in the court: for example, the "wraking"[20] protocol, and integrity projects. But I don't know who is responsible for these projects.'
>
> \- Judge member of quality pilot team

Another respondent, along the same lines said:

> 'I am not aware of all the projects which were running through the court. More attention has been given to waiting times and continuances in actual case processing, but another project has been set up within the court to deal with work processes and policy for internal organisation and to deal with the public prosecutor's office and other lawyers.'
>
> \- Judge member of quality pilot team

It would appear, therefore, that projects have been developed independently of the quality pilot projects to modernise the court organisation. This may be a reason why courts appear to be reluctant to make a great effort in terms of applying the quality pilot.[21]

3. Meetsysteem and stuurhut

Meetsysteem and stuurhut refers to the measuring and data compilation from the quality pilots. The development of the measuring system started at one court.

> 'The first thing we had to do was to develop the norms of the quality pilot system, as the system was in such a state that they couldn't even measure performance.'
>
> \- Judge member of quality pilot team

The norms were developed to measure quality indicators at the court: speed and timeliness, comportment, expertise, uniformity of law; and independence and impartiality. After they developed their norms, they created a scoreboard. They would conduct research in each sector to measure performance based on the developed norms

20 This concept goes to ensuring the impartiality of a judge when she decides a case. If it is found that there is partiality, the lawyers can ask the judge to be removed from the case.

21 This would be a point that requires more research.

and then given a score. There are only three possible scores: red, yellow and green. Red means that performance in a certain area is very poor and the sector must take action to improve the situation. Yellow means that performance is not perfect and whilst it does not require immediate action, plans should be taken to improve that aspect. Green means that the performance in that aspect is fine, but they should put some effort into maintaining such a score. However,

> 'the measuring performance also consisted of conducting customer satisfaction research outside of the court. To that end we have interviewed lawyers, public prosecutors, and suspects. In the report we wrote down what all these people think could be done to improve the system and organisation.'
>
> \- Judge member of quality pilot team

The measuring performance within the court is sector-based only, and according to a member of a quality pilot team:

> 'The result of the audit within the court's sector is anonymous. People do not know who is responsible if the sector fails to improve or has improved considerably.'[22]

Based on this score, the committee advises the sector management. From the results of the measurement, the management team must choose three points of improvement, and form and plan for the next year. The idea is that it is an ongoing process until all aspects score in the green. Apparently, the operation of the measurement system is working to the extent that:

> 'All sectors try to maintain a green score for performance at the same time as improving the three chosen areas.'
>
> \- Judge member of quality pilot team

According to another member of a different quality team:

> 'There is also a sort of friendly competitiveness to ensure that the sectors produce good results in the audit.'
>
> \- Member of quality pilot team

To be able to compile and analyse the data from the measurement of performance, they developed a system called the 'stuurhut', which is a national instrument to record the measurements electronically. There are 4 parts to this: personnel, finance, production and quality. In terms of quality, they developed indicators for the independence and integrity of judges; the expertise of judges; comportment; the unity of the law; and speed and timeliness. For productivity, they developed some quantitative norms,

22 Anonymity made the pilots holistic in nature, which means that they measure activity in aggregate rather than individually. The anonymity was used to protect judicial independence, but it is difficult to improve at an individual level if one cannot see the problems one has (opinion of judge member of quality pilot team).

calculating the timeliness of cases; the percentage of continuances; the participation of judges in such activities as 'intervisie'; and the movement of cases in the process. Personnel issues have not been chosen as a subject of study in this thesis; and the financial system has been summarised in the Macro-level analysis of this thesis (the following chapter).

Each sector has a score of green, yellow or red for its performance and quality in each part of the stuurhut. Once a quarter of the members within each sector learn what their scores have been, they know whether or not they have improved in the various parts. It is also something which is used by administration to make plans and policies for the forthcoming year.

According to one of the respondents, improvement has taken place at two levels:

> 'On the one hand, at the normative level, organisational and managerial norms become better defined with time and experience, which leads to a better operation of the quality system. On the other hand, improvement occurs because people in the organisation now make the effort to implement quality in the various areas of the quality measuring system.'
>
> - Member of quality pilot team

4. Results of the quality pilots

The opinions on what the results of the pilots constituted varied throughout the courts where they were trialled. On the one hand, there had been concrete results based on the scores.

> 'That is made clear in the recommendations from the report on quality.
>
> - Judge member of quality pilot team

This particular report resulted in the creation of various policies within the courts: 1) intervisie 2) supervision 3) improved planning to reduce waiting lists and 4) consumer panels to stay in touch with the users of the court. A permanent education and training chamber for judges, not only for judicial and legal quality, but also for courtroom behaviour, listening skills and so forth was also a result of the pilot.

In terms of what the customer service measurement delivered, this varied across the courts. At one court where the pilot was tested:

> 'We found that customers were most angry about waiting times and about treatment in court.'
>
> - Judge member of quality pilot team

At another court,

> 'Quality research regarding party satisfaction is that the judgements are good, even for those who lose their cases.'
>
> - Member of quality pilot team

At still another court,

> 'There has been some progress, such as complaints procedures.'
> - Judge member of quality pilot team

According to a member of a different quality pilot team, the information from customer surveys taught them

> 'that there is a lot of misunderstanding by judges on the point of view of suspects and lawyers. For example, suspects often get the impression that judges are not more prepared because they keep looking into files during a trial. However, judges never go into court without being prepared. As a result of the survey, judges can now work on the appearance of being better prepared.'
> - Member of quality pilot team

Aside from conducting customer surveys and questionnaires, one team developed a different project:

> 'The correspondence project looks at improving the quality of letters to parties. It looks at whether letters are complete and if the language is understandable. We also look at judgements themselves, and there is a project dealing with the comprehensibility of administrative law judgements, which was one of the sector's improvement points.'

However, the pilots were not without criticism. For one thing, the pilots were independent from case management, which meant that case management itself did not have to be measured against any indicators. Another criticism of this was that court activity centres around case management and that the pilots could not be 100% accurate if they missed out this central activity.[23] Furthermore, when asked about a report by the NvVR[24] on poor working conditions for judges, and whether the quality pilot did anything to aid them in solving this problem, the respondent replied in the negative.

5. Management and the quality pilots

Those who were operating the pilot believed that the pilot and suggestions that came out of it were useful and well received. According to a member from a quality pilot team, the management team is, at the end of the day, in charge of choosing the points

23 Refer to chapter 8 Court organisation: Meso-level analysis section 8.3.1. Case management. opinion of judge member of quality pilot team.

24 Nederlandse Vereniging voor Rechtspraak: Netherlands Association for the Judiciary.

to be improved based on the results of the measurement, and for taking action.[25] In other words,

> 'Management needs to learn and use this information and to rely on it for future planning.'
>
> - Member of quality pilot team

According to the following respondent:

> 'The managers have so far followed the advice of the quality team and have seen positive results, which have made it easier to accept the quality pilots. These reports will not sit on the shelf and the quality team will watch over what happens.'
>
> - Member of quality pilot team

Furthermore, one of the legal secretaries interviewed said that

> 'A lot of questions and suggestions from other managers have been made and there have been good reactions from the court in general.'
>
> - Member of quality pilot team

However, this does not occur at every court.

> 'Judge managers try to take it seriously, but because of their duty to the sector and other duties, and their responsibilities as judges, it is not possible to work it out thoroughly. When there is no time it is difficult to aid in the growth and development of the organisation, especially when you can't ask for assistance from the other judges.'
>
> - Judge member of quality pilot team

In general, the interviews with judge managers reflect the positive response about judge manager participation in the projects. When asked how he felt about the projects, one judge manager said:

> 'It went quite well. It was applied seriously, and resulted in some other organisational projects for the courts, some of which were successful and some not.'
>
> - Judge manager of management team at medium-sized court

When asked if as managers they saw it as assisting in their work, the general answer was in the affirmative: Firstly,

> 'Through the projects you know what is important and you won't have the tendency to put it to one side; Secondly, many people work on the projects

25 It is expected by all of the respondents that management teams use the information given to them by the quality pilot teams.

> through the court, attention to it is spread around, and that is very important. As a manager, you can say that it is important to do something about consumer satisfaction, but people have to work on it. Otherwise nothing will happen, whatever we say.'

However, whilst this particular judge manager appears to be optimistic about the quality pilots, he also goes on to explain that whilst it is operating well, with a team in each sector to help the management make a decision as to what to prioritise,

> 'It is my place as integral manager to decide on what the most important priorities are, as I am responsible for this sector.'
>
> - Judge manager at medium-sized court

Another judge manager, expressing his optimistic perception described other positive elements from his experiences with the pilot:

> 'The project also illuminated a number of norms and criteria that management can also use for steering and productivity'
>
> - Judge manager of management team at small court

From the perspective of the judge manager at the large court,

> 'The system also allows the court to make more realistic goals by looking at the reality of how many people there are and how much each can realistically be expected to do in one year.'

The quality committee does not impose these choices on the sectors, but rather it gives support to the actions taken by the sectors to improve certain areas.

From these quotes by judge managers of management teams, in general judge managers not only appear to be aware of the existence of quality pilots running in their courts but most of them seem to be optimistic about the final result.

6. Lamicie and the Quality pilots

However, there is another indication of how well quality indicators operate with management values. Questions were asked as to the relationship between the information from the quality measurements and from the Lamicie scores. One member of a pilot team, when asked about this said that

> 'From a work floor perspective (i.e. non-management), it is difficult because we receive money from results based on Lamicie and not from the quality pilot. They can use the quality system very well as a mechanism of accountability, but they still need money and are dependent on Lamicie even though we don't trust it. The quality system can help more because it does contain certain quantitative aspects on speed and timeliness, but unfortunately they are not judged based on the quality system.'

One judge member of a quality pilot said that:

> 'Statistics created by the Lamicie system are not totally trustworthy, but in combination with the quality measurements, we can make some improvements from it.'

However, members of a different quality pilot went the furthest by saying that:

> 'The Lamicie model is a tool for management to be accountable for the productivity of the court. The quality model is for self-improvement and does not act directly as a model for accountability.'

From a different angle, when also asked if she sees the information gathered from the Lamicie system and from the quality indicators pilots as an opportunity for self-improvement (as desired by policy makers at a centralised level), one member of a quality pilot team replied positively:

> 'The results give you an insight into your own functioning, and you get a framework of reference for accountability. For example, if you do well with quality not quantity, you can see why from the results of the pilot. It is the same with the Lamicie norm, if you do well qualitatively but not quantitatively, you can see why, and learn to prioritise certain things while maintaining good performance in the areas you are doing well in.'

Another team was asked the same question and they both perceive the Lamicie and quality models,

> 'not only as a measure for accountability of the courts, but more so as systems for self-improvement. The court is accountable through the yearly reports at the end of the year, in which they describe improvements and how the quality system is working for the organisation.'

There is an oddity of not trusting the scores and criteria of the Lamicie at the same time as using them as tools for improvement (along with the results from the quality pilot). That, along with the varied utility value of the quality indicators by judge managers, would suggest also that the quality pilots have a way to go before they are ingrained into the management values of the courts. A judge member of a quality pilot was optimistic that

> 'it is important that when you have the quality system next to Lamicie, one can see that productivity is not the only important thing.'

In this perspective productivity is just related to quantity and not to quality. However, since 2005 and the implementation of the Order in Council for financing justice, the Council for the Judiciary is looking for a way to base the financing not only on the

Lamicie model, but also on the quality pilot now called RechtspraaQ. This will be elaborated upon in the Macro-level analysis.

7. Comparability

According to a judge member of a quality pilot:

> 'With the results, you can compare how quality works across the different courts. The quality of individuals compared with other individuals will provide a good educational tool. There could be transparency, not only for the organisation as a whole, but also for the individual judge.'

However, when discussing comparability between results in the different courts, a difficulty was raised. For one thing, two of the quality pilots were conducted for the whole court, whereas the third was only conducted in the criminal sector. However, the member of the sector quality pilot said that their plans had incorporated the experiences of teams from the other two pilots.

> 'Numbers on results from the pilots themselves cannot be compared, as the organisations are very different, in their environments, and the challenges they faced.'
>
> \- Member of quality pilot team

One of the quality pilot teams mentioned earlier in the section on operating quality pilots that, at that time, a pilot was being conducted across seven courts in terms of 'klantwaardering' (customer perspective), which is an instrument of measurement in the quality system. The scores are furthermore comparable between the courts.

At the time of the interviews, England & Wales had started to use league tables to record the performance of the courts. When asked what they thought of using league tables in the Netherlands, the respondents from a team of a quality pilot said that they had looked at the pros and cons of using them. The danger, they said, was that

> 'Anything that has statistics and numbers published in it always has an element of competition. There is nothing that you can do about that. Whilst you cannot compete with other courts for clients, you are competing with them at the level of resources from the Council for the Judi
>
> \- Quality pilot team

Additionally, in my interview with a policy maker at the Council for the Judiciary he said of league tables that

> 'they do not fit within the Dutch philosophy of court management.'
>
> \- Policy maker at the Council for the Judiciary

A problem that all pilot teams were experiencing at the time of the interviews was that the computer software was being upgraded, and therefore was not officially online.

> 'This has been taken over by the Council and they have been taking their time trying to sort that out. The only effect this has had has been on the comparability and possibility of discussion between courts and sectors.'
>
> \- Judge member of quality pilot team

A member of the same quality pilot team emphasised however, that:

> 'This does not mean that the court has not been paying attention to the quality measurements, simply that the data are not recorded on computer. This has led to a lack of transparency in the operation of the quality measurement system, and a lack of possibilities to compare results between different courts and different sectors. This is a shame, but I hope that the improved software will correct the situation.'

8. Analysis

The nature of the quality pilots is that at the time in which the interviews took place, it was a tool for self-improvement rather than accountability. The first step towards becoming a learning organisation, for all of those who conducted the pilots, was using them to create awareness, which then led to interest, and finally to participation. According to one of the teams, operating the quality pilot at the court

> 'was an 'eye-opening' experience.'

All in all, it appears that it was a learning exercise and a good first step towards operating quality indicators in the courts. One judge member of a quality pilot team said that

> 'The committee for quality has learned a lot about standards in the court. From the measurements, you can see that some things are not as good as you first think, and it makes you aware that things can be improved, and they try to work.'
>
> \- Judge member of quality pilot team

For most of the respondents, it was an important basis that the quality system is a model for self-improvement and not for accountability. However,

> 'Internal accountability and operation of the quality model is organisation-wide.'
>
> \- Judge member of quality pilot team

This would suggest that whilst these respondents agreed with the need for organisational change, they did not want to hang out their dirty laundry for all to see. However, in order that the quality pilots were effective, they needed to be transparent internally to draw as much participation as possible.

The experience does not appear to have been a negative one. On the one hand:

> 'In general, the points (see report) selected by the quality team to improve upon are improving.'
>
> - Judge member of quality pilot team

Furthermore, one of the quality teams discovered that

> 'the division between good quality and efficiency/productivity is a misleading one. Activities at the court need a certain time-limit, but time management itself is a part of the total quality.'
>
> - Member of quality pilot

Another team member of a quality pilot said that this was a good impetus for organisational change, and that she had already noted:

> 'that the organisation itself is more structured in terms of meetings, which have been organised differently, communication between employees has improved and more information is given about results for workgroups, and decisions of the administrative board about the organisation.'
>
> - Member of quality pilot

On the other hand, the implementation appears to have been rather complicated. Firstly, by having the policy of allowing courts to decide the extent to which they participate in the quality measuring system, I would expect this to complicate the comparability of performance. This policy also reflects that the system was, at the time of the interviews, not yet ready to be used to hold the courts to account for the quality of their organisation. However, given the possibility under article 91 Judicial Organisation Act 2002 for the Council for the Judiciary to amend organisational decisions of the courts' administration I can see a potential for RechtspraaQ quality measuring system on the one hand to hold the courts to account for their organisation, but on the other hand to reduce the need for the Council to make such decisions. In other words, RechtspraaQ can give further balance to the powers within the organisational hierarchy.

Following on from that, a second complication is in trying to increase the utility value of the measuring system and in trying to make it operate as consistently as possible. The difficulty in this is the autonomy that judge managers have in organising their own sectors, and the fact that it was not, at that time, coupled with the financial management of the court.[26]

This description indicates that the operation of the pilot requires consistent execution. In its starting stages it is clear that there is much potential in the pilot, but there also appears to be a slight need still to convince judge managers to use the reports and advice as well as applying it consistently across the courts and sectors. In addition, as

26 I understand from a new Order in Council that the financial governance of the courts will be coupled with the quality system. Find new order.

these pilots were based on a real work floor experience, they required constant attention and updating.

The original intention by having the quality measuring pilot trialled in a court was that it would apply to local problems rather than generic ones nationally. Courts would own their systems, and be able to learn from the results. All it required was participation and some initial effort. The descriptions of the processes of operating the pilots do not appear to be onerous or burdensome on the courts where they were being trialled, and the results themselves sounded positive. Aside from a couple of challenges and problems they ran into technically, there appears to be plenty of incentive to operate the system consistently throughout the country. The only thing that I would want to see, as a constitutional law researcher, is that if the courts have financial and organisational responsibility, there should be a system to account for that, other than financially. In her work, Malleson said:

> 'An underlying difficulty which gives rise to tension in this area is the fact that there is not, in practice a neat distinction between administrative and judicial functions. The… resources…adopted in the courts all have a direct bearing on the type of justice received. It's speed, the level of experience of the judge allocated to the case, the scope for appealing and the extent of legal advice and assistance can all be described as administrative decisions yet they are all factors which can affect the ultimate decision.'[27]

This citation accurately describes one problem that I have with using finances to hold the courts to account. There is no guarantee there will be no race to the bottom, i.e. how far will the courts compromise on the quality of judgements to earn as much money as possible (up to a certain point, quality will begin to diminish if judges have no time to write cases). It must be made clear at this point that it is not the intention of the financing system to create a competition for resources: financing is meant to be based on objective criteria. However, even though the policy of the Council for the Judiciary in distributing finances is to reduce the differences in productivity between the courts, the result is that courts governing boards perceive a competition for resources, and therefore become more competitive.

Furthermore, the change process that court organisations have been going through, whilst it needs funding to do so, should not only be based on financial incentives. I would like to see managerial (as opposed to financial) accountability used in creating legitimacy around the judicial organisation. There must be a balance found in which the courts are publicly accountable for the spending, but whereby managerial accountability is not based solely on spending, but whereby there is a genuine policy interest in knowing that the organisation is improving, and if not, then why not.

27 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Aldershot, Dartmouth 1999, p. 50.

8.3.3. Communication

As discussed in the introduction to 'Quality of Organisation', part of the PVRO's manifesto was to improve the quality of communication in the courts. However, the subject cannot be narrowed down to one section and, as has already been seen, communication has been touched upon in two different areas. Firstly, and advantage that has been felt to have come about with integral management is increased communication between support staff and judges, thereby closing the organisational gap between them. Secondly, communications have cropped up in the section on 'Transparency of Case Management' and how ICT is used by some in the delegation of work and (case) management in general.

'Communication' is a very broad term and, as such, reactions to questions are also quite broad. It can include channels of communication, looking at the methods and technologies applied to impart information. Next to this, 'communication' also includes 'who'; so the 'who' is then the recipient of information imparted. This can be divided into two parts: internal, i.e. judges and staff; and external, i.e. everyone else. This section will therefore go on to be divided into 'internal' and 'external' communications dealing with the 'who', the 'what' and the 'how' at the same time. Problems perceived (if any) by various respondents will be discussed also within these sections.

Internal Communications

Internal communication of information was assumed to mean within the court only. In terms of the 'how', in order to be as efficient as possible, the following respondent said

> 'we use ICT at the sector to communicate everything that is going on in the sector on a monthly basis from reports to people leaving the sector'
>
> \- Judge manager at medium-sized court,

Next to e-mailing, they also make use of

> 'paper memos and meetings to inform judges of important events and developments.'
>
> \- Judge manager at medium-sized court

According to the same judge manager,

> 'Judges are obliged to read their emails; however, it is not something that can be controlled.'

Therefore, even though information is available to judges, it is not sure that they always access it. This may extend to a slightly different problem that was pointed out by the next respondent:

> 'important information does not get filtered, so people get too much information, and more often than not information reaches people too late.'
>
> - Judge manager at a larger court

The next respondent said something similar:

> 'information flow is too weak… more has to be done in order to increase the reliability and regularity of information in the sector.'
>
> - Judge manager at medium-sized court

Even though there is information, and judges are obliged to keep abreast of events in their immediate environment, there does not appear to be a consistent policy on communicating the 'what' of information.

Therefore, with important information, they appear to work harder to ensure that important information was received at the sector for administrative law at the medium-sized court.

From the perspective of those working in the quality pilots, one judge member said that communication is the '*only standard by which to measure quality*'. Theoretically, this can be taken to mean that the foundation for a quality and learning organisation is quality of communication. According to the same respondent

> 'The courts should be masters at communication. Traditional top-down authorities should evolve into communicative organisations'

The quality pilot team at the same court emphasised the importance of communications in their court. They described that communication was so important that at one point there was a 'communications officer' at the court, but the position was removed due to downsizing. In that court it was evidenced that,

> 'there are a number of projects looking into how communications should be working within the court.'
>
> - Member of quality pilot team

At a different court, the legal secretary/clerk of a quality pilot has positive experiences with ICT development. On the one hand, all documents from minutes of meetings to case documents are available via the computer. On the other hand, it is also easier to '*find problems within the organisation*.' In the words of another judge member of a quality pilot,

> 'ICT is now essential to the court for communication as well as cases, and the speedy circulation of concepts.'

ICT development seems to be tied up directly with the quality of communications in the court sectors and quality pilots. When asked therefore about the available training for the use of information technology in the courts, everybody said that the training was available but not compulsory. At the same time, even though judges are obliged

to read their e-mail, it is difficult to control. It was not clear from the interviews that there was consistent use of ICT by all members of the courts for communications. To some, and to repeat something quoted earlier:

> 'There is much potential for computerisation in the courts but it could take five years for computers to work efficiently in the courts'.
> - Non-judge member of quality pilot team

External Communications

The information that came from the respondents about external communication is a little vague. It was already discussed to some extent in 'Transparency of Case Management' in terms of what information was deemed necessary for parties to know. According to a judge of a quality pilot team, his court had developed questionnaires for its users and there was/is also a customer panel (discussed in the part on 'Operation of Quality Pilots'). The same respondent is of the opinion that:

> 'Staff communication and goodwill are important and informality also creates good results, small things are important. The court should be conscious of its tone when dealing with people, external communications at the court could be improved.'

With the operation of the quality pilots across different courts, according to one quality pilot team, channels of communication have opened between them. This could be an indication that the quality of external communication at the courts is improving as a whole, and that the courts can take advantage of an infrastructure provided by the networking by the Council for the Judiciary.

Judge managers found ICT to be essential for external communication in many respects. For example, the judge manager at the smaller court found it important to communicate with lawyers where a case did not require a hearing; the judge manager of the large court found it very useful to monitor external correspondence.

External Communications therefore means a wider audience than the parties themselves, to include other courts and lawyers.

8.3.4. Analysis: Quality of organisation

From the information gathered here, and the analysis from other parts of this chapter, there appears to be a very broad definition of communications operating within the courts. It seems to be something rather taken for granted by management teams who described too narrow fields of external relations, and from the example of the court that had a communications officer but had to eliminate the position because of downsizing.

On the other hand, projects were being developed at the time within the quality pilot framework, but this appeared to come only from one pilot. Other members of different pilots were enthusiastic about the possibilities offered by ICT in communication, but showed no indication or even any hope that there would be further developments anytime soon.

With such broad fields of internal and external relations (and the media were not even mentioned), some sort of visible policy, either at court or central level, dealing with communications may be a good idea, especially if the courts are seeking to become quality and learning organisations.

8.4. Conclusions

From the individual analyses of each part of this chapter one can see quite clearly that the management team does not appear to use organisational principles in their management philosophy.

In terms of integral management, what one appears to see is that the policy states that there must be an official framework for judge managers to work in. This could have been done in this way in order to have some accountability for the judge manager position. However, if this was the case, then it has been frustrated. On the one hand, a judge manager's function is about final responsibility for the management of the sector. This does not really seem to go hand in hand with taking daily decisions on the management of the sector in terms of the administrative staff (which are left to the coordinator), or the judges (whom, we have already established, are not really manageable).

The constitutionalists fear that if you take a judge out of her legal function and put her into a management function that she will lose legal knowledge was not actually founded in these interviews. The bigger fear here was that putting the judge into management took away valuable resources from the actual judging process. Even if it were a founded fear, it was the choice of the judges, when consulted as to whether they wanted a professional manager or a judge manager, that they chose for judge managers for fear of losing judicial independence. Judicial independence appears, then, to be a higher value than having professional management in the courts. It is logical to suppose that if a judge is selected for a management position, that his time for judging will be limited. Basically, you cannot have your cake and eat it. And for those judge-managers who delegate most of their management work, they spend more time in judging. It very much depends on the judge-manager. This lack of interest in management indicates that there is also lack of focus on quality for management processes.

Case management is a science all by itself. Next to the primary process of getting the case into the court, which is a fairly simple yet thorough process in itself, there are many influences on cases, internal and external. Policies and legislation will affect the way that procedures are dealt with at the court; the public prosecutor also has a huge impact on the criminal law case management system; all sectors are influenced by the competence of parties' lawyers and the parties themselves to hand in documents and proof. In administrative law, the situation is simpler: there is a decision made by a government/public body, and the person who is subject to that decision disagrees with it, and has exhausted all channels available to contest the decision before going to court.

This is the tip of the iceberg. There are so many relations involved in managing cases, that I would suggest that it is not particularly easy to manage those relations unless the law provides mechanisms, and unless you are a veteran. An older more experienced judge may know very well how to handle all of these relations, whereas

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

a younger judge may not and may let the case drag on without an end in sight. From these interviews, it is apparent that case management means different things to different judge managers, and that judge managers are themselves part of the case management system, and that the case management system is not subject to management by the judge manager alone. Whilst in the US there has been more extensive research done in the field of case management,[28] it is quite clear that in the Netherlands, research needs to be done to help judge managers clear up backlogs. Even with a statutory framework to manage their sectors, and the training they receive initially and continually, judge managers may not be the best equipped to handle the situation of either personnel or case management.

Management of communication also appears to be rather inconsistent, especially as regards the choice of what information should be shared and how. As to the 'what', this varies. Some courts make no distinction as to what to send, so they send everything, thereby drowning out the 'important' information. Other courts do not seem to pay attention at all, and send things out every now and then. In terms of the 'how', e-mail seems to be the preferred choice. Some courts hold meetings, which can be an unreliable source if people do not attend. Others rely upon the fact that because they belong to a small court or sector, information will get around eventually. Whereas some at the bigger courts seem to be lost in a sea of strangers and events they do not know about. This is a problem for courts that desire real organisational change and to become horizontal and learning organisations. However, communication does occur. They have managed to organise themselves so that they can have training sessions for updates in the law, and jurisprudence meetings for the unity of the law. It is not so much that, internally, courts do not know how to communicate. It is more that they prioritise different information. If the goal is to become a learning organisation, they need simply to prioritise organisational information, and in a way that is not burdensome to collect or analyse.

However, the real question for the meso chapter is this: has the operation of quality standards and integral management affected judicial independence and the separation of powers. The answer is yes, but not necessarily negatively. On the on hand, one can indeed see that sectors have become small independent clubs[29] albeit with little accountability, and which sometimes seem to lack a coherent direction. The little club means that judge managers can run their sectors so that they are more efficient. Judges now have the opportunity to work together (if they so choose) to become part of a more efficient and effective unit. That they formally have a choice is part of the protection of judicial independence. A lack of accountability for organisational choices by judges also indicates an incidental protection of judicial independence.

Judge-managers have been described as being unprofessional and rather ill-equipped to run their organisations. What appears is that, even though judges have relinquished their own little kingdoms, their organisation has become even less transparent

28 D.C. Steelman, J.A. Goerdt and J.E. McMillan, '*Caseflow management: The heart of Court Management in the New Millenium*', National Center for State Courts, Williamsburg, Virginia 2000; P.M. Langbroek and M. Fabri, '*Case assignment to courts and within courts, a comparative study in 7 countries*', Shaker Publishers, Maastricht 2004.

29 Refer to chapter 8 Court Organisation: Meso level analysis, section 8.2. Integral management.

and accountable to the outside. The formal framework hides the way that judges operate, by hiding judges as a group and ensuring that statistical data gathered is anonymous. This means that judges are still considered to be organisationally autonomous externally, even if this is not the case internally. It also shields them from criticism, which can be because of judicial independence. This has an impact on the formal policy, which created the framework for the integral management position. One cannot say for sure from these interviews that the framework is being operated in the way that policy is written. This then impacts, furthermore, on the separation of powers between the judiciary and the legislature in that the legislature usually makes laws to be enforced by the judiciary. The judiciary, which ironically in this situation is the ultimate enforcer of the law, in the form of various sectors, does not appear to be following that policy in its spirit.

The fact that there is participation by a handful of people is minimalistic. They need clear management policies, training for judge managers to exploit the pools available to them (quality standards and ICT). Otherwise you simply see a transfer of organisation autonomy of single judges, to organisation autonomy of sector, which has little or no control over its judges.

The results of the quality system are not published externally, and cannot be used as a model of accountability, even though some have expressed a hope that this will take place in the future. However, the majority have been adamant that it should not be used as a tool for accountability. Given that this is the case, I cannot conclude that quality standards can in any way affect the judicial independence of the judge. And as it was not used as a means to assess the finances of the courts, it could also not be said that, at that time, the policy in any way infringed the organisational autonomy of the judiciary.

Courts have become financially independent, organisationally autonomous but unprofessionally managed. Judge managers receive basic training, but with such a complex organisation, with so much going on internally and externally, they should not have to rely only on experienced judges but also on substantial training and substantial research in the processes taking place in their organisation.

At this time, bearing in mind the original goals of the Judicial Organisation Act 2002, I would hypothesise that whilst there have been moves in the direction of making courts self-sufficient and learning organisations, there is a fair way to go in terms of standardising management policies and practices and sufficient training and equipment for judge managers at the time these interviews were conducted in 2003. There is nothing here to suggest that the quality standards have negatively infringed judicial independence, either of the judge or the organisation.

In fact, the whole framework seems to have left the judicial organisation more independent and without at the same time increasing accountability in 2003. From this it can be said that the courts' management formed a kind of shell around the judges actually performing the judicial work. The management accounts for the functioning of the courts, and thus protects the judges from too much inspection for their daily work. This means that there was no (soft/public) accountability for the way in which judges do their work, but there is however increased (soft/public) accountability for the way in which the courts operate at the time of the interviews. As judges also manage the courts, this leaves judges open to a certain amount of scrutiny in their

managerial roles. That the courts organisations have become more open to scrutiny, they are in some sense accountable for the expanded role that they play in the decision-making in cases discussed in the micro level analysis above on the role and responsibility of judges.

Chapter 9

9. Administration of justice: Macro level analysis

The macro level comes in three parts. The first part, focusing on interviews conducted in the courts, looks at the relationship between the Council for the Judiciary and the courts, both formal and informal. Here we also discussed the effects of the PVRO projects after they had been transferred to the Council, and the opinions of the respondents as regards the role of the Council. This part also looks at the Lamicie system,[1] which developed objective criteria to distribute resources. Finally, some observations will be made on the judicial independence of courts and judges in the judicial organisation.

The second and third part of the macro level looks at the relationship between the judiciary (now represented by the Council for the Judiciary), and the Ministry of Justice (which transferred much of its organisation duties and responsibilities to the Council). But here an examination of the quality and financial policies of both organisations have been given; how they regard their relationship with one another; and how they both adjusted to their new roles.

9.1. Courts and judicial organisation

9.1.1. The Council for the Judiciary

There were two possible lines of communication identifiable between the courts where interviews took place and the Council for the Judiciary. The first one is between the sector/court management and the second is from the quality pilot teams to the quality section of the Council.

Judge-managers and the Council

In terms of the line of communication between the sector/court and Council, there are a couple of aspects: on the one hand, the sector is transparent in its management techniques to the Council:

1 Refer to chapter 6 Organisers and policy, section 6.3. Finances.

> 'The sector makes its management reports to the Council and writes annual reports, which are published and available.'[2]
>
> \- Judge-manager of management team at large court

However, the Council is also responsible for developing court organisations and has several projects running to that end. From the perspective of the same judge manager, when asked how he viewed the work of the Council and its relationship to the court and sector, he said that:

> 'I would like to see the Council continue to concentrate on certain aspects, which can be dealt with centrally, such as computerisation and the quality pilots. However other things that should be dealt with by courts should be left to the courts, such as primary processes, as each court and each sector is unique and works in unique circumstances.'
>
> \- Judge-manager of management team at large court

When asked if the projects of the Council[3] continued to aid their case management systems, he said:

> 'Not really. I recognise that the projects have created a change in culture and attitudes of the judges, but not with case management. Some projects did not do so well at the beginning, the judges have been persuaded a little to work with the changes.'
>
> \- Judge-manager of management team at large court

At the medium sized court, the judge-manager mentioned that they had fewer positive experiences with the pilot:

> 'The quality projects have done little/nothing in terms of making the case-management more efficient. However, INK has done more with the sector in improving the working processes through training.'
>
> \- Judge-manager of management team at medium sized court

The judge-manager in this instance was in between moving from one sector to another to become the manager in the next sector. When asked if he thought that he could rely upon the Council and INK[4] to help him improve the new sector, or if he thought that he would have to rely upon his own experience to deal with the problems ahead, he answered

2 'We make use of information to explain to the board of the court how things are going on in the sector and to the Council.' Judge manager of management team at medium sized court.

3 Previously known as PVRO as discussed in chapter 6 Organisers and policy, section 6.1. Recent history of organisational change.

4 Instituut voor Nederlandse Kwaliteit: Dutch institute for quality.

> 'A combination will help. There are a number of issues from some quality projects that have come up on the agenda, which they have to deal with.'
> - Judge-manager of management team at medium sized court

Therefore for at least two of the three judge-managers, they did not feel that the Council projects for the organisation of courts were very effective, and one even went outside of the judiciary for developing their own projects.

Quality pilot teams and the Council

The experience of the quality pilot team with the Council for the Judiciary is a little more positive. According to one of the teams of a quality pilot:

> 'PVRO still works well. Communications are good, and we are satisfied with the accountability system and work together with the Council as colleagues.'
> - Member of quality pilot team

In terms of the PVRO projects, this opinion is not shared by all of the members of various quality pilots. For example, when asked how the projects of the Council continued to aid case management systems, one judge member of a quality pilot project said:

> 'I haven't seen much influence yet, and certainly not on case management. But on other issues, there has been some progress, such as complaints procedures. I am also aware of a couple of other projects running in the court: for example the challenging protocol (wrakingsprotocol), and integrity projects, but I do not know who is responsible for these projects.'
> - Judge member of a quality pilot

Another judge member of a different quality pilot, when asked the same question, said that

> 'I often see that many of the projects mean well, but have not had a lot of effect. Projects which are practical in application are useful, but some of the projects e.g. projects for the psychological well being of judges, are less useful and not always worth the money. I would like the projects to show people how to do what they are supposed to. The court is like the cookie factory in that we have to produce a lot of judgements and are under a great deal of pressure to do so.'
> - Judge member of a quality pilot

These quotes suggest several things to me. On the one hand, it is not always clear which of the projects in the court the Council runs. The projects clearly also do not have much impact or make much of an impression on most of these respondents. On the

other hand, this second quote would suggest that quality as it is operated here is not necessarily connected to productivity and efficiency of the courts.[5]

In terms of the relationship between the quality pilot teams and the Council, this also varied slightly. One judge member of a quality pilot said of the Council that

> 'It is too young to have any real effect. When one talks about courts, one sees a very strong movement on the level of the whole court, for example the Council for the Judiciary has an integrating function. There is more cooperation and interaction between the courts, and rather less interaction with the Council.'
>
> - Judge member of a quality pilot

This quote would suggest that the Council has less of a hands-on approach to court organisation, and has more of an integrating function. This facilitates a framework for sharing best practices between the courts:

> 'As project leader, I have contact with the quality department at the Council, and there is a national meeting three or four times a year. I have also received much support from other quality teams.'
>
> - Non-judge member of quality pilot team

In general however, courts have a greater tendency to be independent organisations with their own projects or initiatives, for example,

> 'Other bodies, such as meetings between civil sector managers in the country, have far more influence on the application of procedural law.'
>
> - Judge member of quality pilot team

Or

> 'The Central Appointments Bureau[6] project of the court was an internal project and was not a Council project.'
>
> - Judge member of quality pilot team

These quotes can lead to the hypothesis that the Council does not have the faith of these respondents to do the job of modernising their court organisations. This goes to the theory that there is a vacuum at central governance level as to how the judiciary is being run from the perspective of the courts. However, the creation of the Council appears to have also created a framework of cooperation and community between the courts, and the quality pilot projects. This creates horizontal sharing of ideas, rather than the imposition of policies from above (which does not seem to be succeeding

5 This may cause a problem for the new order in council that orders the courts finances to take into account the quality at the court.

6 In Dutch it is Centraal Appointerings Bureau. It is a project designed to help judges and prosecutors coordinate their time and efforts in large criminal cases. It has been described in the meso-level analysis in the description on quality pilots and projects.

anyway). The Council appears to be at the centre instead of above this network of courts. In this, it could be said that hierarchy is a non-issue.

9.1.2. Finances

According to the first respondent, in motivating courts' needs for resources,

> 'There are certain demands made by the Council for the Judiciary in the annual planning of the courts and sectors that they agree to finish a certain number of cases for a certain amount of money.'
>
> - Judge-manager of management team of large court

The next respondent says that

> 'The new system is better. The directing board has a financial expert, who puts forward professional arguments for the way planning and resource applications should be made. The new system also has space for negotiation.'
>
> - Member of quality pilot team

The following respondent said of the motivation process that

> 'The new situation is better and more transparent. It hasn't gone far yet, but that is because the distribution of funding and resources is still not proportional throughout the country. Some courts get too much, especially the small courts, and others too little. The planning cycle is also more relaxed now because they know at the beginning of the year what is available from the Council to distribute, whereas in the part, the Ministry was never really sure until the last minute.'
>
> - Judge-manager of management team at medium sized court

The next respondent said that

> 'This is not my field, but I do not feel that the system is transparent.'
>
> - Judge member of quality pilot team

When asked if the court did not receive the requested money, whether the Council motivated its refusal, this respondent said:

> 'Yes it does, but then it has to understand that if the court does not receive its money, backlogs are a greater threat.'
>
> - Member of quality pilot team

In relating these interviews back to the background chapters, I thought it would be interesting to see how the planning and control cycle operates next to the Lamicie model, especially as regards the motivation. As one can see, nothing has been said of the steps in the process itself, with the exception of the first respondent who said the courts have taken on experts to help to motivate the need for resources.

What comes from these quotes is that for most part, respondents feel that it is a more transparent, if imperfect system. This is probably because all courts need to motivate for their resources, and also that the Council motivates its rejections. This way, the courts can all see what the others receive as well as what the Council receives.

The rhetoric here, with the exception of the last two respondents quoted, is quite relaxed vis-à-vis the Council in its financial role. Most of the respondents appear to feel more relaxed now that their peers are controlling finances. The one exception that does not feel that the system is transparent can be explained by his lack of knowledge in the area. However, that this is an active participant in organisational change, one could surmise that his lack of knowledge is not at fault. One could hypothesise that within the courts themselves, those in a position to motivate for resources are the ones who sense the increase in transparency. Others may simply be happy that financial control is now in the hands of the judicial organisation itself, thereby completing the organisational separation of powers at state level. For the average judge or worker however, the system may not be transparent and nor may it represent organisational separation of powers. The last respondent for example, states a simple relationship, which is true whether the Ministry controls finances or the Council, and that is that the lack of resources will possibly lead to backlogs.

9.1.3. Lamicie model

Judge-managers and the Lamicie model

This model was developed as an instrument for management and as a tool of accountability for the court as a whole. There were some positive perspectives about it, at the bottom end of which was that 'it is better than the old system'.[7] Otherwise there were many problems associated with it.
In the first place, according to a sector chairman interviewed,

> 'The model lacks consistency, objectivity and clarity as regards the criteria for productivity used to distribute resources.'
>
> \- Judge-manager of the management team at large court

When asked if he trusted the Lamicie model and the definitions of productivity that have resulted, the next respondent said:

> 'The system is not accurate. The difficulty is that different courts and different sectors work differently. It is too general and does not take into account the different approaches taken by courts towards reducing their caseloads. For example some sectors are oriented towards having hearings and others are not, or that some courts use more legal secretaries to handle the case loads than others.'
>
> \- Judge-member of quality pilot project

7 Judge-member of quality pilot team.

On the one hand, this makes it untrustworthy. On the other hand, it makes it hard to compare and improve performance. In the second place, it is considered to be intransparent and incomprehensible to the respondents. One respondent went so far as to say that the

> 'Lamicie is a calculated guess, and therefore cannot be trusted very much'
>
> - Judge-manager of management team at small court

However, when asked the same question, the judge-manager of the management team at the medium sized court said:

> 'If I look only at the sector for administrative law, then yes, I trust it, however if I look at other sectors then I have some doubts. Research is being conducted on "tijdschrijven" (loggable hours). Hopefully, results from the research will give some clearer productivity definitions for the court, which will benefit Lamicie eventually.'
>
> - Judge-manager of management team at medium court

This particular quote suggests a couple of things. Firstly that Lamicie cannot be seen as a model that is universally applicable (if at all applicable). Secondly, that the court is putting effort into researching into the criteria used by Lamicie can lead to the hypotheses that a) there is room for developing the criteria, and that observing court practices is the best way to do so; b) (for the more cynical) the court is trying to undermine the current system; and c) the system looks only at the amount of time that is needed per case.

However, others have indeed put less effort than this into developing fairness into the model. The judge-manager at the larger court, when answering that he did not trust the model, also said:

> 'I have nothing better. I understand that a norm has to be developed to quantify productivity for money, but it should be more accurate.'
>
> - Judge-manager of management team of large court

There is also appears to be little satisfaction from the judge-manager at the larger court regarding the annual planning and control cycle:

> 'As the system stands, if the court completes more cases than suggested in their yearly plan, they will not necessarily receive more money. Basically, if a court does over perform in one year, they can use those figures in the planning for the next year, and receive money for that year based on the actual performance of last year.'[8]
>
> - Judge-manager of management team of large court

8 However, he acknowledges that: 'there is something in the financial structure for the courts to compensate them for extra cases completed (scheefgooiegeld).'

This quote actually goes further to enforcing the hypothesis that judges' responsibility to deliver high quality judgements at a high quantity is not a matter of balance. This states actually that quantity is fixed. Therefore, if what they said was true in the micro-level analysis, and quality is always high, and Lamicie fixes the quantity, there really is no issue of balance. Even judicial independence cannot really be breached, as the planning for the next year is based on judges' own performance and productivity in the last year. Lamicie is based therefore on the idea that the judges in aggregate will work consistently from one year to the next, and if they don't they either get more or less money depending on that performance. The only issue is then of the fairness of the model.

The judge-manager at the medium sized court, whilst not contradicting this entirely, had slightly more optimism:

> 'The new situation is much better and more transparent. The new system hasn't gone far yet, but that is because the distribution of funding is still not proportional throughout the country: smaller courts get too much and the larger courts too little. The planning cycle is also more relaxed now because they know at the beginning of the year what is available from the Council to distribute, whereas in the past, the Ministry was never really sure until the last moment what was available to them.'
>
> - Judge-manager of management team at medium court

One could say at this point that the way the Lamicie model works, even though being disproportionate between courts, cannot be said to breach judicial independence of the judge to decide cases. The fact that it is disproportionate and unfair to the large courts would suggest that the judicial organisation does not have complete financial and therefore organisational independence. That they do not have complete independence could be due to the need to hold the judiciary to account for their organisation at the state level that is also in accordance with the changes that came about in 2002. They were after all, quite large changes, and the judiciary gained much organisational independence. Such independence, from a constitutionalist point of view, should go with a suitable form of accountability. However, as the model is considered to be unfair by these respondents (and as we shall see later on, by the respondents from the Council and Ministry), one may venture to say that this is not an appropriate form of accountability.

Furthermore, given that the financial systems and increase in financial resources in the financial Order in Council for justice 2002 (Besluit financiering rechtspraak –BFR 2002) were developed also on the condition that the organisation improved, there is little here to suggest that these respondents consider it to be a priority at management level.[9] This leads then to the relationship between the quality pilot teams and the Lamicie model.

9 Refer to chapter 6, section 6.3. Finances.

Quality pilot team members and the Lamicie model

This section tries to examine the relationship between the operation of the quality pilots and the Lamicie model. Here one can see the practical application (if any) of quality standards in the Lamicie model, and also the effect that the Lamicie model (if any) on the quality pilots.

When asked whether they viewed information gathered from the Lamicie system and from the quality standards pilots as an opportunity for self-improvement, a quality pilot team said that

> 'We both perceive the Lamicie model and the quality system, not only as a measure for accountability of the courts, but more so as systems for self-improvement.'
>
> \- Quality pilot team

However, after saying that it was difficult to trust the Lamicie model, when asked how they compensate for the mistrust in the Lamicie with the quality pilot (quantity v quality), a member of a different quality pilot team said:

> 'It is difficult because we receive money from results based on Lamicie and not from the quality pilot. We can use the quality system very well as a mechanism of accountability, but we still need money and are dependent on Lamicie. It is still a discussion point that a certain amount of balance and fairness need to be built into the system. The quality system can help more because it does contain certain quantitative aspects, but unfortunately they are not judged based on the quality system.'
>
> \- Member of quality pilot team

On the issue of building fairness into the system, a member of yet a different pilot said that whilst the new system is a better system, and that the new system has some flexibility built in,

> 'I believe that the Lamicie model should be re-evaluated and changed every two or three years to adapt to discrepancies between the courts.'
>
> \- Member of quality pilot team

At the time of the interviews, the English judiciary had just started to publish league tables for the performance of their courts. It was therefore a point of curiosity to ask what the feeling was on league tables in the Netherlands. When asked, a member of quality pilot team said that:

> 'Such league tables have been discussed. A league table would have advantages and disadvantages. Anything that has statistics and numbers published in it always has an element of competition. There is nothing that you can do about

> that. Whilst you cannot compete with other courts for clients, you are competing with them at the level of resources from the Council for the Judiciary.'
>
> \- Member of quality pilot team

Whilst the Netherlands does not use league tables, each court must report on their productivity. In their planning they must motivate their need for resources. All of these contain statistical information of some sort. The implication from this quote would be then that the courts are competing for resources. This could also imply that a certain amount of pressure is put on the court to compete for resources, in spite of a certain amount of flexibility built into the system. Does this mean that the Lamicie puts the same pressure on all courts, and that all courts must comply? Is there a breach of judicial independence? The first question, whilst answered to some extent in the negative throughout this analysis, cannot be answered further without more research in the courts. The second question is to be looked at in the next section of the analysis. The next quote gives an idea of how finances play a role in the separation of powers.

> 'All courts receive a certain budget from the Council for the Judiciary. It is the job of the Council to make it clear to the politicians that the judiciary is important. It is hard for the courts to accept that there are no resources considering the amount of work put in by judges to deal with mounting case loads. The faults of the Lamicie norm are more the Ministry's faults than the Council for the Judiciary. I consider the Council to be a young organisation and it still has to find its way and is not yet responsible for budgeting crises.'
>
> \- Non-judge member of quality pilot team

This would suggest that at the time of the interviews, relationships around the financial processes, whilst being regulated by law, were uncertain in relation to the role of the Council for the Judiciary and the Ministry of Justice. It had to learn to deal with the demands by the courts for resources on the one hand. Yet on the other hand, the Ministry of Justice also demanded accountability for spending, something the judiciary had no experience of before, at the same time as not having sufficient funds to meet the demands of the Council and the courts.

9.1.4. Judicial independence and organisational autonomy

Judge-managers and judicial independence

At the level of the judge, the independence reflected through the influence on the judicial organisation as a whole, was acknowledged to be mostly limited to the courts themselves. At the small court, the judge-manager of the sector, when asked about whether he felt he had any influence on the overall direction of the judiciary, said:

> 'Not really. If there are sector meetings, they involve not only judges but also support staff, thereby broadening out the scope of influence of sector wide

> policies. But there are also meetings, which only include judges, thereby keeping certain aspects to a narrow field of influence.'
>
> \- Judge manager of management team at small court

When asked the same question at the large court, the judge-manager there said:

> 'For this court, yes, but for the rest of the country, no, it develops in its own way. There are too many players in the field to have a real influence and it is too difficult to sense the consequences of one's own influence.'
>
> \- Judge manager of management team at large court

During the interviews themselves however, this researcher did not really get the impression that this was an unsatisfactory situation for them. Furthermore, the judge-manager interviewed at the medium sized court said that

> 'The whole judiciary did it's very best to establish the judicial power in the run-up to the opening of the Council for the Judiciary'
>
> \- Judge-manager of management team at medium sized court

Operation of the quality pilots and judicial independence

In terms of the organisational independence of the courts themselves, a couple of respondents from the quality pilot teams believed that it is better to have a statutory framework of accountability through the judicial organisation act. On the one hand,

> 'We are satisfied with the accountability system and work together with the Council as colleagues.'
>
> \- Member of quality pilot team

On the other hand,

> 'We are also happy about the way in which the court is held to account by the law, because it has meant a greater distance from the Ministry of Justice.'
>
> \- Member of quality pilot team

In terms of the operation of the quality pilots themselves, and judicial independence, one team from a quality pilot said that

> 'Judicial Independence is safeguarded because respect for colleagues is a fundamental principle in the court. The quality system was felt to work because we never let judges feel threatened, and we took away any fears by constantly keeping judges informed and involved in the formation of quality standards.'
>
> \- Member of quality pilot team

A standard question that I asked was whether or not the respondents, judges and clerical staff, felt that they had a sufficient say in the development of policies on the

organisation of the judiciary and the courts. The following quotes give some idea on their sentiments:

> 'Yes. But there are some people who don't particularly care either way about the development and policy concerning the judicial organisation, but they are in the minority.'
>
> - Quality pilot team

> 'I sense that my influence is very small, but I also sense that things develop in a very independent way. I believe that I have the freedom to say and think what I like, for example I write a lot of memos in the court about organisation, even though they are not always effective. You can have influence if you have the ability to convince people of your ideas.'
>
> - Judge member of quality pilot team

> 'The individual judge feels that he has little say. The hierarchy in the organisation is very strong. At the bottom is the judge, after that is the chairperson and then the top is the directing board. There is an advisory organ: NVvR[10] but that is as far as individual influence can go in terms of national policy making.'
>
> -Non-judge member of quality pilot team

> 'If you really want to have influence, you could, at many levels. A lot of judges work in projects for the court, but they also can have influence at a legislative level through the NVvR or at the council. A lot of judges do not bother with trying to influence policy as they work part-time. The disadvantage of this is that it is difficult to involve them in what is happening in the organisation. However in general fewer judges are working from home now, which makes it easier to involve them in organisational changes.'
>
> - Judge member of quality pilot

> 'Everyone has a lot to say, which is encouraged. They have gained a lot more knowledge from the pilot they just completed in certain quality aspects, and I feel that my voice has been heard, especially when my recommendations were taken up.'
>
> -Non-judge member of quality pilot

These quotes would all suggest that the possibility to involve oneself in policy making or influencing the organisation is great, especially for judges. The fact that many judges appear not to bother, for whatever the reason, would suggest that they don't care. Next to this, the quotes by those who are not judges, would also suggest that, as members of the judiciary, they have a voice in the judiciary that is also heard. The judiciary and its organisation can therefore be said to consist of more than a body of judges, and that

10 Nederlands Vereniging voor Rechtspraak: The Dutch Association for Judges and Prosecutors is a trade association and union that negotiates working conditions, and defends and protects the legal status of its members. For more information see: www.verenigingvoorrechtspraak.nl

in looking at the independence of the organisation as a whole, some further research should be conducted on this issue.

How, the reader is probably wondering, does this question affect judicial independence? In the original problem question in this research was whether or not the operation of quality standards and the organisational changes that took place in 2002 would harm judicial independence. The possibility to have active influence in their organisation means that judges are not simply pieces to be organised passively. These changes did not ***happen*** to judges, judges were involved in making these policies. As has been consistently found in this research, judges know what their limits are and when to say no. According to one judge member of a quality pilot team,

> 'Independence is a very difficult concept. I find that independence is too often overemphasised. I think that I should be able to judge a case without fear of reprisal. However, I do not feel that independence gives me license to do what I like. Total judicial independence is impossible, because judges are part of a system and community. We have two loyalties: one to the organisation and the other to the community. This does not mean that we have to agree with everything. Sometimes, I find that my professional opinions do not match my personal ones. This can sometimes cause problems.'
>
> \- Judge member of a quality pilot team

There have been no substantial complaints here about judicial independence and the operation of quality standards. Whilst participation and influence varies throughout the organisation, and the relationship with the Council for the Judiciary is a little vague, one cannot say that with the Judicial Organisation Act 2002 and the creation of the Council, that judicial independence has weakened.

9.1.5. Analysis: Courts and judicial organisation

If one combines the outcomes of the meso level analysis with the outcomes of this part of the macro level analysis, it would appear that the Judicial Organisation Act 2002 has created an organisation in which the courts and judges are equally isolated as before the Council for the Judiciary was created, and which has an inadequate structure of accountability and financing. The opinions expressed in 2003 that the Council is too young and as yet inadequate leave a lacuna in centralised policymaking for the judiciary and for the accountability of the judicial organisation.

This situation leaves the courts isolated and without direction or guidance, as they might have had whilst the Ministry of Justice was still responsible, or not if the courts chose to ignore the Ministry. This can be seen where the new framework appears to have given courts organisational freedom without the training and mentality of judges to become managers. It could also be seen from the perspective that the courts are independently organised now, with a lack of interference from outside at the time of these interviews. This is confirmed by the meso level analysis that has shown how the legal framework gives courts autonomy in organising resources within the court. However, with the financial autonomy that has come with the Judicial Organisation Act 2002, there was the condition that the organisation of the judiciary improved.

Without an adequate monitoring of the situation and without highly qualified managers to improve the situation, neither of the two perspectives above suggests that the situation fits within the intentions of the Act.

This situation is also an indication that judicial independence at the centralised organisation is still undefined, vis-à-vis the courts, the Ministry of Justice and the legislature. It means that the definition of judicial independence is still dominated by practices and norms of all the judges in the courts, mostly related to decision-making in cases. At the level of the judge, questions of independence are now being related to whether or not the organisation can affect their independence, and whether participation can offset any problems in this area. Here the question really goes to whether organisational independence (i.e. financial) protects judicial independence in the separation of powers on the one hand, and whether the lack of organisational independence can actually affect the judicial independence of the judge in her decision-making.

On the first question, a constitutionalist would answer yes, organisational independence goes to the independence of the judiciary in the classical theory of the separation of powers. The judiciary now has its own staff, own budget, own governing body in the form of a Council. Whilst this is an improvement in the protection of the judiciary, the separation of powers is also about checks and balances between the three, and about protection of the citizen from an abusive Government.

From the point of view of Parliament and Government, the only check that they have against a now very independent organisation of the judiciary is its finances, and even this appears to be unsatisfactory from the point of view of the interviewees here. The judiciary can be considered to be truly independent from the Ministry of Justice in that the Judicial Organisation Act 2002 allows the Council for the Judiciary to apply for funding directly from Parliament where they feel that the Ministry of Justice has not given them enough. However, this means that the Council must be accountable to the Parliament directly rather than through the Ministry of Justice and ministerial responsibility. The relationship between the Council and the Ministry will be dealt with later. The framework for financial and organisational accountability in 2002 was through the 2002 BFR. This linked the financing of the courts to a workload model (Lamicie), creating case categories and product groups along with an average working time for judges and staff in case handling. Furthermore an information protocol was developed between the Ministry of Justice and Council for the Judiciary that specified what type of information needed to be placed in the Annual Reports, including projects taking place to improve the judicial organisation.

In 2005 a new financial Order in Council (BFR 2005) was made that described systems and models developed with current practices in defining work loads in the courts and for distributing resources more accurately. This made the financing of the courts more accurate than in 2002 (and as described by the respondents within the courts) and actually based on the Lamicie model itself rather than lopsided growth. However, in the BFR 2005 there is a more obvious connection to good governance of the courts than the complex financial models that they have developed and that is the initiation of an investigation into how the quality system RechtspraaQ maybe coupled with the financing system. On the one hand this brings the results of the operation of

the quality system into the public eye, and on the other, gives financial incentives to the courts to operate an organisation based on quality standards and ideas.

9.2. *Ministry of Justice*

9.2.1. Role of the Ministry of Justice

All interviews at the Ministry of Justice took place at the Directie Strategie Rechtspleging (what is known as Directie Rechtsbestel[11] since July 2006). In 2003, the responsibility of this department was

> 'for the formulation of policy regarding the judicial system in general. Ministerial responsibility for the judicial organization is to create proper conditions regarding the functioning of the judiciary. In order to do this they must formulate legal proposals in terms of both the organization and changes to legal procedures and court procedures. Secondly it is to allocate financial means to the Council for the Judiciary.'
>
> - Policy maker at Ministry of Justice 2003

According to the another policy maker at the same department in 2006,

> 'The Minister of Justice has final responsibility for the operation of the judicial organization. The Minister has to keep a broader eye on the operation, for example if there is a problem with the functioning of the judiciary the Minister will talk directly with the Council. This new department looks at issues of the number and size of (appeal) courts in the country, how their relationship is, and the quality of higher appeals. We look at whether the policies are still working in certain situations, such as whether we should reduce the possibility to go to appeal, the situation with settlements outside the court once the procedure has started, when cases should go to the sub-district sector and so forth.'
>
> - Policy maker1 at the Ministry of Justice 2006

When asked about the nature of the ministerial responsibility in 2006 given the responsibility of the Council for the Judiciary, the respondent said

> 'Along with the Annual Report of the Council of the Judiciary, the Minister sends a supervisory letter (begeleidingsbrief) to Parliament, which states what the Minister has found in the report and what he makes of it. However, ministerial responsibility goes further than this Report and letter. He is in general responsible and therefore may have to answer questions in Parliament at any time in the year.'
>
> - Policy maker1 at the Ministry of Justice 2006

11 'The entirety of legislative and organisational devices for rendering justice'. My thanks to dr. Philip M. Langbroek for his comments.

According to the following policy maker,

> 'This new department is responsible for questions about organisation in the judicial organisation, to include the judiciary, the public prosecutor, and the police. In general, the questions they will be dealing with will be cooperation between the courts, administrative fines, the CAO[12] of justice (working conditions), ICT development, improving the quality of higher appeal, concentrating on where specialisation is possible and useful in the courts, transparency and quality of justice. This means that the whole judicial chain is being dealt with in one department, rather than over many departments. This was done in order to increase transparency of the way the criminal justice system works, which is why the whole judicial chain was brought under one department. We will be able to create more efficient policy for the whole judicial chain, starting with the police through to the enforcement of judgements.'
>
> - Policy maker2 at the Ministry of Justice 2006

When asked if this had affected ministerial responsibility for the judicial organisations, the respondent said that:

> 'This does not really alter the ministerial responsibility politically speaking. However, the internal responsibility has changed in order to improve the working methods of the ministry only.'
>
> - Policy maker2 of the Ministry of Justice 2006

One can see that over the years the overall ministerial responsibility for the judicial organisation has not changed. Towards Parliament they have ultimate responsibility for the operation of the judicial organisation, although the law has given most of the executive power to the Council for the Judiciary. The policy-making tasks are also unchanged. The one thing that appears to have changed is the position of the judicial organisation in terms of the priorities of the Ministry. Instead of focussing the energies of one department on the judicial organisation, the judicial organisation is now dealt with as part of the entire legal chain and its part in the efficiency of justice as a whole. This is an indicator that the Ministry of Justice has relaxed its role for the Council for the Judiciary to operate more independently. This next section will look at the relationship between the Council and the Ministry over the last period.

9.2.2. Ministry of Justice and the Council for the Judiciary

According to the policy maker in 2003 at the Ministry of Justice,

> 'The Council for the Judiciary is responsible for the allocation of budgets to the courts, policy formulation on quality of justice, housing, ICT and personnel. The Ministry of Justice cannot directly interfere in the work of the courts, but only distant monitoring of general conditions To that end, protocols of supervision

12 Dutch term for Collective Labour Agreement.

have been created and the Ministry is attempting to create a model that can use objective means and clear definitions to allocate resources to the Council for the judiciary.'

- Policy maker of Ministry of Justice 2003

When discussing the issue of supervision and communications between the two institutions this respondent further said

'One person is responsible for receiving information regarding budget issues. Meetings between financial employees also take place. Another unit is responsible for changes in policy for the judiciary and works with strategy and development department of the Council. However, the two units do not really work closely together. This is because the Ministry deals with policies for the judicial system as a whole, whereas the Council formulates policy for the individual courts. However, there is a struggle of competences between the two institutions, and a clear lack of cooperation even though they have policy units mirroring each other. The relationship between the two is much like a mother organization trying to guide the daughter, but the daughter wishes to be independent and try things for herself first.'

- Policy maker at Ministry of Justice 2003

According to one of the policy makers of the department in 2006,

'There is a new Information Protocol (tool of accountability), which demands greater accountability through more data from the Council of the Judiciary when the Ministry of Justice requests it. However, this protocol is in development, and the ministry is still thinking about the best way to operate it. It was developed because the Ministry needs to know what is happening within the judicial organisation itself in order to be able to do its own job. In this, flexibility is needed in the way that information is exchanged. An example of the information they might request maybe to do with the projects of the Council to improve the quality of motivations in decision making within the courts themselves. Whilst these projects cost money, the projects do not necessarily affect finances. Less information is required to do with financing itself, but rather more to do with accounting for activity.'

- Policy maker2 at Ministry of Justice

In terms of communications, especially where there are conflicts, this same respondent says:

'Where there are conflicts, they try to resolve them in monthly discussions between the Director General of the department, and the members of the Council. If there is a really big conflict, then there will be a meeting between the Minister for Justice, and the President of the Council. It depends on the type of

> conflict. More often than not, the biggest conflicts are about money. There are often meetings between the Minister and President of the Council.'
>
> - Policy maker2 at Ministry of Justice

When asked if the Ministry asked for a lot of information from the Council, this next respondent said:

> 'In principle we can ask for any information we want. The Council makes an Annual Report and a budget report. There they write down all of their plans and what they have achieved in a year. However, beyond these reports and budgets, we do not really ask for much more information. There is an agreement between them as to what should go into an Annual Report and many other agreements. Officially we must go through the Council to get the information we need but sometimes we ask questions in the courts themselves. For broader information or statistical data we go directly to the Council itself, because they have much more data than we do of course.'
>
> - Policy maker1 at Ministry of Justice

When examining the relationship between the two institutions in terms of policy analysis, the same respondent said:

> 'The two institutions discuss most things with each other. We have joint working groups, and the Ministry listens to the opinion of the Council.'
>
> - Policy maker1 at Ministry of Justice

When asked how much time was actually spent on communicating with the Council, the respondent said:

> 'This is very difficult to say. Once a month there is a discussion between the Ministry's director general and director with the Council for the Judiciary for about 2 hours. Next to that there is a lot of contact between the department and the Council. There are all sorts of working groups, and telephone contact. There is also an official expert discussion with the Minister through the Council, in which others in the department attend.'
>
> - Policy maker1 at Ministry of Justice

There appear to be two developments in the time between the interviews. First of all on communications, there appears to be a lot more informal communication between the two institutions, whereby working groups common to both organisations communicate more on joint issues. The second development revolves around the reason for information exchange. In the 2003 interview, one gets an impression that information is needed in order for the Ministry to supervise the Council in its new executive role. The impression one gets from the interviews in 2006 is that there are now two purposes for information exchange. One would be in order that the Ministry of Justice can develop policies where it is competent to do so. The second appears to be that it is a way for the Council of the Judiciary to account for its organisational activities (in a way

other than financial). As stated by the second policy maker, the information protocol gives the Ministry the right to ask for almost any kind of information they want, even though it is clear that they have not yet formulated the most efficient way to operate this protocol.

9.2.3. Finance

This section on the perception of the respondents on the issue of financing the judicial organisation can be separated into two parts: financial process, and the Lamicie model.

Financial processes

According to the policy maker interviewed in 2003

> 'In the budgetary process, the Council formulates its annual budget with the help of a team of financial experts. The financial team of the department at the Ministry of Justice then looks at it and considers what money it has available to finance the judicial organisation. A problem for this financial process is that in political manifestoes, political parties usually prioritise criminal justice and therefore court organisation tends to be marginalized.'
>
> - Policy maker at Ministry of Justice 2003

Furthermore,

> 'Another problem is that budget proposals are not motivated enough. I believe that this is due to the traditional image of the judiciary as being independent and entitled to what they ask for, without consideration to other priorities of the State. I consider that it is important in any budget to have motivation based on accurate data about performance, and this is where the Council is weak in its motivation.'
>
> - Policy maker at Ministry of Justice 2003

The policy maker of the Ministry of Justice interviewed in 2006 adds that:

> 'The courts send their budget requests to the Council for the Judiciary. Courts also have to produce annual reports about their activities. The Council must make a detailed request for the money and resources they want. In a new development since 2002, the Ministry of Justice can ask for more data from the Council through an information protocol. Certain explanations are asked for on certain points. The Council for the Judiciary receives money from the Ministry of Justice, and then shares it with the courts. The Ministry cannot always give the Council the money it has asked for because of other priorities in Government and the Ministry itself.'
>
> - Policy maker2 at Ministry of Justice 2006

According to the other policy maker of the Ministry of Justice 2006, when asked about the Ministry's motivation on refusals, said

> 'This is an issue of negotiation with the Ministry of Finance. If we do not get the money, the Council will know about it and reasons will be given. They always ask for more than they can receive.'
>
> - Policy maker1 at Ministry of Justice 2006

On the issue of the lack of information as discussed by the policy maker interviewed in 2003,

> 'The way the Council motivates their needs and the courts control their own budgets, means that they have a lot of accountability now. When the Ministry of Justice had responsibility for financing the courts things were not always so transparent and insightful.'
>
> - Policy maker1 at Ministry of Justice 2006

Furthermore, the next policy maker describes to developments since 2003,

> 'Firstly, there is the Baten-Lastenstelsel (costs and benefits model), a new financing system that was applied to the judiciary a year later than the other public services. This actually reduces the need for detail in requests for money. Before they made their requests by giving information about the different types of cases completed in each court, and the cost per type of case. With this new system, they do not need to be so specific in their request. Next to this there is a new Information Protocol (tool of accountability), which demands greater accountability and therefore more data from the Council when the Ministry requests it. However, this protocol is in development, and the Ministry is still thinking about the best way to operate it. The financing of the judiciary is unambiguous (eenduidig) and the agreements are clearer.'
>
> - Policy maker2 at Ministry of Justice 2006

When interviewing the other respondent from the Ministry of Justice, the issue of trust between the Ministry and Council in terms of motivation for budget and annual plans was discussed. She said:

> 'Whilst it is true that the categories were reduced, there is still a great deal of information exchanged between the two institutions, even though it is less. We are further than we were 4 years ago. When the Council was set up in 2002 a lot had to be done, and discovered. Since then a lot more has been agreed upon and dealt with more concretely.'
>
> - Policy maker1 at Ministry of Justice 2006

The one consistency throughout the years would be that the judiciary never gets all the money it asks for. This consistency tells us that motivation is not entirely linked to the amount of money the judicial organisation will get. In fact, given the focus on informa-

tion in these interviews, motivation appears to be connected more to organisational accountability.

The first interview in 2003 suggested that the lack of information was a problem for the Ministry of Justice, which is confirmed by the second policy maker interviewed in 2006. This would suggest that, contrary to what was said earlier about the court having possibly greater guidance from the Ministry, the Ministry did not have sufficient data to carry out their tasks in managing the judicial organisation. In this time however, it appears that there has been a need to refine the type and amount of information received by the Ministry from the Council (Baten-Lastenstelsel- costs and benefits model). There has also been the creation an information protocol in order that the Ministry of Justice has a legal framework to ask for information from the Council of the Judiciary on organisational issues. That there is a legal framework for exchanging information suggests on the one hand that the relationship between the two institutions is still rather formal and tense. On the other hand, it suggests that there is growing accountability of the Council for the judicial organisation. This is somewhat confirmed when this policy maker said:

> 'The financing model based on objective criteria will go someway to controlling the judicial organisation. The Lamicie system is already implemented in the courts themselves, and as a supervision tool.'
>
> - Policy maker at Ministry of Justice 2003

A critical examination will now be given of the Lamicie model.

Lamicie model

The development of this model has been discussed in chapter 6, section 6.3, which gives a description of financial policy, and in section 9.1.2. which gives an interview analysis on finances from the perspective of the courts. This section will look at the development of the Lamicie model over the last few years from the perspective of the policy makers of the Ministry of Justice. The first policy maker interviewed in 2003 said that:

> 'The Ministry is attempting to create the Lamicie model that can use objective means and clear definitions to allocate resources to the Council for the Judiciary. There are 48 categories of cases, which assess how much time is spent on certain types of cases. When one combines this workload model with an idea of the number of incoming cases for a period of time, and the costs of the judiciary, then you get a reliable idea of how the budget for the judiciary should be. One problem is that, if it works, it generates the need for more money. However the Lamicie model is still unreliable because of the lack of uniformity in registering the amount of time spent on cases. Before the creation of the Council, it was difficult to collect unified data to compare the several district courts, as they all used different definitions. If the unification of registration systems is possible, then they can create benchmarks for comparison. There is a plan, that an objec-

> tive financing model based on uniform definitions will exist by 2005 at the national level.'
>
> \- Policy maker at Ministry of Justice 2003

As regards the problem with unifying definitions, the next policy maker at the Ministry of Justice said this:

> 'This has always been a problem: the courts have always said how we do things and what we do is up to us to decide; it is for us to determine whether we decide cases at 10 euros or 2 euros a case etc. This reasoning was the basis for the modernization process within the courts, and the setting up of the Council for the Judiciary. With this process, one can now see that this attitude is gone. The judges now understand that they have to be concerned with delivering productively.'
>
> \- Policy maker1 at Ministry of Justice 2006

Furthermore, when asked if he found that there is a conflict between the Lamicie model as a tool of accountability, and judicial independence, the next policy maker said:

> 'I don't believe that financial accountability affects judicial independence to decide cases.'
>
> \- Policy maker2 at Ministry of Justice 2006

According to the other policy maker at the Ministry of Justice interviewed in 2006, when asked the same question, she said:

> 'The judges now understand that they have to be concerned with delivering productively. This is no longer a problem/issue. That one must be accountable for productivity is now a set value. Only now, the problem is with the quality.'
>
> \- Policy maker1 at Ministry of Justice 2006

This leads to the next issue of the recent financial Orders in Council (BFR 2002 & 2005), which has tried to address the issue of recent claims of problems with quality. There have been arguments from judges that quality is suffering because of the attention paid to productivity. Therefore, the Ministry has said that they will couple quality standards for justice operating in the quality system in the courts to the financing process. However, as one could see in the meso level analysis this system is not fully or consistently operational. Therefore when asked if he felt that it is fair that the Order in Council has coupled finance of the courts with quality standards, this next respondent said

> 'The financieringsbesluit (financial order) is a very good idea, because it means that courts will get money for high quality of justice, and not just for the number of cases that they do. This way they can also see the improvements and develop

> indicators for it. The visitatierapport[13] deals closely with this issue. Whilst the Order makes a first step in coupling productivity and quality criteria, it is not so strong yet as to affect the way the courts are financed, and therefore will not affect the courts whilst they are still implementing the quality system.'
>
> - Policy maker2 at Ministry of Justice 2006

This leads to the next issue in this analysis, and that is the quality policy of the Ministry of Justice.

9.2.4. Quality policy

Quality measures

In discussing the development of a quality system for the judiciary, the policy maker interviewed in 2003 discussed the background to some extent:

> 'One of the key elements of the PVRO projects was to open up the judiciary and its working methods to public scrutiny, as it was felt that the judiciary was a very closed organisation. One of the ongoing debates is whether or not figures should be published about the quality of work. For the judges, the only 'quality' they are concerned about is judicial quality (i.e. judgements and due process), and not organisational quality. Although there are a small group of judges, about a 1/3 of all presidents of district courts, who are open to the idea that organisational quality is an important part of judicial quality.'

Furthermore, when asked how the Ministry of Justice evaluated success of the quality system in terms of its role in public accountability, the respondent said:

> 'We know by participating in the quality projects of the Council, and by formulating norms and criteria for the content of the quality systems. We have been using the approach of formulating 'meta quality', to ensure that the Council will develop a quality system based on solid ideas and good theories. We wish to use policy formulations to push the Council to give more information to the public about their performance. Additionally, publications such as accountability reports and annual reports sent to Ministry of Justice and Parliament are open reports. These reports are not only about financial performance, but about overall performance of the judiciary.'
>
> - Policy maker at Ministry of Justice 2003

This same policy maker goes on to explain that

13 The Mutual Evaluation report is a report based on research conducted by the Council for the Judiciary. Such research consists of people going into the courts and conducting interviews with all of the staff and the activities of the court: see Meijerink Commissie '*Visitatie Gerechten 2006*', Raad voor de Rechtspraak, The Hague 2006.

> 'The idea of experimenting with such indicators is to allow courts to present information in a way that they themselves can benefit. They can benefit from each other's experience, and they can see clearly where they have problems and where they need little effort to improve. Such a system would be internal to the courts themselves, and would not be used by the Ministry of Justice as a tool of accountability. The main idea for the work of this bureau therefore is to allow the courts to use the indicators as a motivation for change. We cannot create a control mechanism to sanction non-achievement of standards because of judicial independence. The quality system should therefore lead to comparability of results/information, and the use of appropriate quality instruments to improve the organisation of individual courts. Therefore the motivation to use quality systems is a positive one rather than a negative one.'
>
> \- Policy maker at Ministry of Justice 2003

Finally he expressed his fear that:

> 'It is not so much that the system being developed will be ignored, but rather it is difficult to sell the idea. Many presidents are not happy at the prospect of more work. Such a system requires a lot of work, even though it is easy to monitor, it takes time to implement and see any real results. It also requires a small group of active people in the courts to gather and present the work. It is not clear what the future of the quality system is.'
>
> \- Policy maker at Ministry of Justice 2003

However, this situation changed somewhat, as confirmed by the second policy maker when asked if he thought that organisational quality is important to the judiciary:

> 'Organisational quality is now very important to the judiciary and judicial opinion, whereas 10 years ago the only concern was for the quality of judgements only. There are still judges who think that organisational issues are nonsense and that they should not have to deal with these issues.'
>
> \- Policy maker 2 at Ministry of Justice 2006

When asked about how the Ministry assesses policies in action to increase the quality in the organisation of the courts, the second policy maker of the Ministry of Justice in 2006 said:

> 'In the last few years, little attention has been given to these issues within the Ministry of Justice itself. The Council for the Judiciary was set up for this kind of policy assessment within the courts. The Council also has a quality department of its own. The courts have responsibility for their own quality through the RechtspraaQ system. The Ministry itself does not have much to do in this area.'
>
> \- Policy maker 2 at Ministry of Justice 2006

However, he had also discussed some of the responsibilities of the Ministry of Justice in its policy-making capacity:

> 'In terms of facilitating cooperation between the courts, this is part of the Order in Council for auxilliary hearing locations and courts (nevenvestigingsplaatsen). This is where courts with too many cases for them to handle can move their cases to another court, which has the capacity to deal with more cases than are coming in. Parliament makes the law and the Ministry of Justice has a supportive role in this process of starting and maintaining this measure in terms of preparation. In the future, we will also use the information from the cooperation to look at whether they can close down courts in certain places and if the cooperation works well or not. This is linked to the number of cases, and specialization. However, this is a rather complicated issue, as there is a lot of local political interest in keeping courts open.'
>
> \- Policy maker 2 at Ministry of Justice 2006

In dealing with the issues discussed with the policy maker in 2003, one can address first the discrepancy between how policy makers view the definition of quality, and how the majority of the judges did. It is very clear that policy makers since the changes began for the judicial organisation, view the issue of quality of justice as an organisational issue, whereas judges view it as an issue of good quality judgements. The quality policies seen in operation in the meso level analysis in the court show that the quality system RechtspraaQ deals mostly with organisational quality rather than juridical (although issues of integrity, independence and legal unity are addressed).

Recent policies show, on the one hand from the financial analysis above, that policy makers are now taking up responsibility for quality of justice in terms of the RechtspraaQ system by attempting to couple it with the financial processes. Given that concern for judges is for quality of judgements, which is not dealt with by RechtspraaQ, this will force courts to develop indicators for the quality of judgements that can be paid for. This goes counter to normal judicial practice, whereby only peers, either through collegiality or appeal, can judge on the quality of decisions (because of judicial independence).

However, given that there are fears that the emphasis on productivity is eroding the quality of justice, and that the courts do not want to receive less money than they already do, this appears to be an odd sort of compromise. Policy makers appear to want to pay for what is tangible, i.e. productivity (even if the criteria to measure that productivity is still somewhat intangible). What appears to be happening then is that they are trying to make quality of decision-making tangible even though it is counter intuitive to judicial practices.

It is counter intuitive partially because of judicial independence in decision making that is guaranteed by the constitution, but also because the judicial organisation as a professional bureaucracy,[14] has an in-built system of quality, guaranteed through the legal education that judges receive, the collegial system of decision making, and of course the appellate system. One could put forward a hypothesis at this moment that developing such a policy goes counter to constitutional law in terms of the judicial

14 H. Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design', *Management Science* 1980, vol. 26, p. 322-341.

independence of judges to write decisions freely and without coercion. It is one thing to time them when they are writing decisions, but an entirely different thing to watch over their shoulders to make sure that they conform to a certain standard.

On the other hand, one can see from the perspective of the second policy maker that the majority of judges do see the importance of organisational issues, though they are trying to address the issue of quality of judgements. This is an interesting development because in the micro analysis, when looking at the balancing of legal quality and quantity by judges, one can see that there were strong arguments put forward by the respondents to say that quality of judgements was always high no matter what.

Another issue dealt with by the policy maker interviewed in 2003 was that the original intent of the quality system RechtspraaQ was never meant to be a mechanism of accountability, as they are trying to do now. However, from the interviews in the courts, there does not appear to be any objections to the idea of coupling it to finances. It was meant to be a system for internal change, and for most part, the Ministry of Justice does not appear to interfere in that process, as stated by the second policy maker. On the issue of being able to compare results, one can also see from the meso level analysis on quality policies that there have been problems with the operation of the computer system that allows courts to do this.

Even though it was never meant to be a mechanism of accountability, one can also see that a lot of the policies in finance and quality have been geared towards gathering information about the operation of the judicial organisation. These policies go to increasing the transparency, and therefore also the legitimacy of the judicial organisation (without directly holding the judicial organisation to account). This leads to the issue of measuring public trust.

Public trust

In this thesis, an important aspect of quality measures in organizations is in gaining public trust, which can lead to an increase in legitimacy (as discussed in the theoretical framework of this book). When asked what role the Ministry had in measuring public trust, the policy maker in 2003 said:

> 'Another part of the Ministry of Justice (voorlichting: public information), has an indirect role in measuring public trust of the whole justice system, from the criminal justice to judicial organisation. They use the Justice Issue Monitor and conduct standard telephone questionnaires that targets only 6 percent of the people who actually use the courts.'
>
> \- Policy maker of Ministry of Justice 2003

In asking the same question to the second policy maker of the Ministry of Justice in 2006, the answer came that

> 'The Ministry of Justice has the 'Justice Issue Monitor' to constantly measure public trust. Given the Minister's interest in lay justice, there is also more research being conducted in this area. There is the belief that if citizens or lay people become involved in the administration of justice, that there will be more

> public trust in the system. The Council also does a lot of customer survey research, but have started to deal more with journalists, young people and other interested people.'

Furthermore

> 'Given that the whole judicial chain is now in one place, it will also be easier to measure the trust in the whole system, and where there are problems. For example, if the statistics show that people do trust the police, the public prosecutor and the courts, then we will know that there is trust in justice as a whole, and not the performance of single parts.
>
> When we do have this information, there is not a lot that we can do in terms of policy to increase public trust. However, we can work to make the system transparent, we have open days at courts and other parts of the judicial chain to show people what it is that we do.
>
> Improving accessibility to the courtroom is also an idea for us, maybe through televising hearings. However, it is very difficult to do anything with such statistics. Public trust or lack thereof is usually connected to the large cases of public interest, such as the Schiedampark murder. There is often little they can do except for improving transparency of the way things work.'
>
> - Policy maker2 of Ministry of Justice 2006

Measuring public trust appears to be a consistent priority for the Ministry of Justice and a growing one for the Council for the Judiciary. As both policy makers have stated it is a rather grey area. Though they measure, it is not clear that the measurements will be accurate. Even if the results will show low public trust, there doesn't appear to be a lot they can or will do about it.

9.2.5. Analysis: Ministry of Justice and Council for the Judiciary

This rather long analysis has looked at four aspects of administration of justice from the point of view of the Ministry of Justice. Firstly the role of the Ministry of Justice, secondly the relationship between the Ministry and the Council for the Judiciary, thirdly there is the issue of finances, and finally the issue of quality policies for the judicial organisation.

The role of the Ministry of Justice is directly linked to ministerial responsibility towards Parliament for the quality of the judicial organisation. To that end there are two tasks performed by the Ministry: firstly to analyse certain policies and policy execution within their own remit, and secondly to make sure that information they deem to be necessary to have responsibility is available to them from the Council for the Judiciary. Looking back through the remainder of this part of the analysis, one could say that they have succeeded. They are now trying to refine the way that information is delivered and the type of information.

As for the relationship between the Ministry and the Council, it does not look so much like the 'mother-daughter' relationship described by the policy maker in 2003. However whilst the relationship looks easier than it used to, there are still certain tensions visible between them, especially in terms of finances and the information protocol.

For finance and quality, the situation gets at once simpler yet more complicated. On the one hand information regarding finances to the Ministry of Justice has become simpler because the Ministry does not need all the information they have been receiving the last few years. On the other hand, the need to pay attention to quality of judgements as highlighted by judges themselves has led to an odd situation whereby an attempt to create indicators for quality judgements maybe made so that they can couple it to the financing system. This means that there might be an attempt to create criteria for the judicial quality that can be objectively paid for. In my opinion, this goes against judicial independence in decision-making and the general judicial practice developed over time, whereby judges, based on expertise and integrity, are responsible quality assurance.

The role of the Ministry of Justice is however a passive one. They watch and see how policy execution goes. They present the reports of the Council to Parliament as part of the ministerial responsibility. The most active they are is in negotiating with the Ministry of Finance for funds for the judiciary, and even then, they have not appeared to have ever been successful in getting the funds applied for.

9.3. Council for the Judiciary

9.3.1. Role of the Council for the Judiciary

According to the policy maker at the Council for the Judiciary in 2003,

> 'The Council has two functions: Firstly, it has to negotiate with the Ministry of Justice for funding and then distribute it fairly across the courts, through the Lamicie model. Secondly it is to support the courts in organisational development, but it is not a control agency.'
>
> - Policy maker at Council of the Judiciary 2003

According to the policy maker interviewed at the Ministry of Justice in 2003,

> 'The Council for the Judiciary has responsibility for the allocation of budget to the courts. Policy formulation on housing, ICT, personnel, and quality policy also fall under the remit of the Council.'
>
> - Policy maker at Ministry of Justice 2003

The first respondent interviewed at the Ministry of Justice in 2006 said that

> 'The Council has responsibility for the work of operating the judicial organisation.'
>
> - Policy maker at Ministry of Justice 2006

The second respondent interviewed at the Ministry of Justice in 2006 said that

> 'The Council for the Judiciary was set up for policy assessment to increase the quality in the organization of the courts.'
>
> - Policy maker at Ministry of Justice 2006

When asked about the goals of the Council, the respondent interviewed at the Council in 2003 believed that

> 'It is too young to have one consistent direction. To that end, the Council needs help to take a consistent position on issues.'
>
> - Policy maker at Council of the Judiciary 2003

It would appear that the Council has formally taken over the executive functions of operating the judicial organisation from the Ministry of Justice in terms of finance distribution, policy assessment, and improving court organisation. From the previous section of this analysis, looking at the perspective of the Ministry of Justice, the most important aspect of these responsibilities is in collecting information on court performance. Gathering information is essential for distributing money; policy assessment and helping courts improve their organisation. One could hypothesise that the Council has had more success in gathering data than for the Ministry of Justice because the courts are more willing to cooperate with the Council than the Ministry. The idea that the Council for the Judiciary is a controlling organisation as expressed by Brenninkmeijer[15] does not seem to be borne out. There appears to be, from these interviews, a spirit of cooperation between the courts and the Council whilst the Council is still determining its own position in the judicial organisation and within the framework of the state powers.

9.3.2. Council for the Judiciary and the courts

The willingness of the courts to give certain information to the Council rather than the Ministry may be attributed to the fact the Council is representative of the judicial organisation and its interests, and may therefore be willing to cooperate better. As stated earlier, the respondent interviewed at the Council said that they were not a control agency for the courts, but rather

> 'an aide to development and to enhance performance. I believe that there has been a marked improvement in the judicial organisation in the time since the Council has taken over. Apparently, the courts are performing 10% better than predicted in their planning and control cycles, and some have reported the disappearance of backlogs altogether.
>
> - Policy maker at the Council for the Judiciary 2003

15 A.F.M. Brenninkmeijer, 'Behoorlijke financiering van de rechtspraak', *Ars Aequi* 2004, vol. 53, p. 167.

However, when asked more directly about the cooperation from the courts, she said

> 'This varies from court to court, but no courts would score a 1. However, a refusal to participate in giving information is seen as uncooperative behaviour.'
>
> - Policy maker at the Council for the Judiciary 2003

Furthermore, in terms of the relationship with the courts,

> 'the Council has five appointed Councillors who are each caretakers for a number of courts. These are people with a longstanding relationship with the courts. The courts themselves are operating increasingly transparently by publishing reports on the Internet. However, these are unilateral and are not intended to be interactive. On the other hand, the courts sectors now have the opportunity to develop their own organizations, and should do so.'
>
> - Policy maker at the Council for the Judiciary 2003

In discussing this issue with the financial policy maker at the Council for the Judiciary in 2006, when asked how much cooperation the Council gets from the courts, he said:

> 'With the planning and control cycle, courts have no choice but to cooperate. There are three administrative meetings in one year. The courts need to send a planning letter once a year. This brings the court very close to the Council. We often talk and they are very cooperative. So on a scale of 1-10 for cooperation, I would say 8 or 9. A member of the Council also sits in the national sector discussions. These discussions are mainly for unity of law, but there they can also discuss case distribution of immigration cases on a national basis. The member of the Council does not necessarily have to be a judge. Three of the five members are judges, but two are not.'
>
> - Financial policy maker at Council of the Judiciary 2006

It would appear that between 2003 and 2006 interaction between the courts and the Council has improved somewhat, with the courts handing over information that the Council deems necessary for them to do their work (especially in terms of financing). There appear to be two levels of communication: one at a formal level whereby Councillors each have responsibility for communicating directly with courts in discussing needs and organisation. At a policy level, there appear to be fixed appointments for departments such as the finance to discuss important issues and deadlines with the relevant departments within courts.

9.3.3. Council for the Judiciary and the Ministry of Justice

According to the respondent interviewed in 2003 at the Council,

> 'Based on hearsay, I understand that the Ministry is finding it difficult to discover its new role. The Ministry services dealing with the judiciary have experienced the new powers of the Council for the Judiciary as a loss to themselves.

> But the press has facilitated much communications between the Ministry and the Council, and the Ministry now has more freedom to openly discuss policy issues.'
>
> - Policy maker at Council for the Judiciary 2003

Furthermore,

> 'We are developing our new positions, but the Ministry appears to treat the Council like an executive service such as the prison service. The prison service has a chief who is an employee of the Ministry of Justice. However, the judiciary is a separate branch of power from the executive and the legislature. Judicial independence makes the judiciary an equal rather than an executive service.'
>
> - Policy maker at Council for the Judiciary 2003

Additionally,

> 'Even though the Ministry of Justice has mirroring units to deal with the same issues as the Council, there is no actual communication. This is a problem, and we need to start communicating better in order to take consistent positions on policy issues.'
>
> - Policy maker at Council for the Judiciary 2003

In the interview taken in 2006, the respondent discusses his department's relationship with the mirror department within the Ministry of Justice.

> 'What they do with the department is prepare the agreement with the minister. There is a policy section that cooperates with the financial and economic section of the department, in order that the overall budget of the judiciary fits in with the overall budget of the Ministry of Justice, but that is it. There is no doubling of functions between them. We talk with department for strategy about once a week. This is a work discussion, and is relatively limited.'
>
> - Policy maker at Council for the Judiciary 2006

It would appear from these interviews that communication between the two institutions is still relatively limited and possibly somewhat frosty. They communicate only when it appears necessary. Maybe they still need to rely upon the press in order to correspond with each other.[16]

9.3.4. Financing

This part can be separated into three further sections: processes and the Lamicie model and

16 Ibid., p. 166.

Processes

The processes in this section refer to the broader processes of creating policy in financial affairs of the Council and between the Council and the Ministry. According to the respondent interviewed in 2003 at the Council,

> 'There is no flexibility in terms of financing the court. Once the plans are set out, that's it. Moreover, if the Ministry does not have the money, the Council will not get the money. Given the competing interest on the Ministry's resources there is a legal possibility for the Council to appeal to Parliament for the money directly. Lobbying through Parliament has made the Ministry more cooperative.'
>
> \- Policy maker at Council of the Judiciary 2003

Between 2003 and 2006 however, there have been developments in the financing of the courts. The important one for the process part of financing is the implementation of the Baten-Lastenstelsel.

> 'With switching over to the Baten-Lastenstelsel (costs and benefits model) system in 2005, the information from the Lamicie system, under an agreement with the Ministry of Justice, was simplified. From the 48 categories of cases (which contain further categories of their own), 11 product categories were created which contained those 48 categories. In this way, the Ministry would get a broader/simpler overview. However, the agreement with the courts is that they maintain the 48-category system. This agreement has a place in the budget agreement with the Ministry but not with the courts.'
>
> \- Financial policy maker at the Council of the Judiciary 2006

This confirms what was said earlier in the section looking at the perspective of the Ministry of Justice in financial matters. The quality of the information given by the Council has been refined in terms of financial matters. This respondent further explained that

> 'all state organizations receive an annual budget, however they plan 4 years ahead. This is still the case for the judiciary. The only difference is that the system for the price component (Price * Quantity- P*Q) has been agreed for 3 years, and it started in 2005. From 2002-2007 we have already set the price. Following from this, based on the annual case flow prognosis, it will be decided how much money the judicial organisation gets. This is the same for all state budgeting. The system is therefore they get the P*Q budget. The Q (productivity) is updated annually based on the case flow prognosis.'
>
> \- Financial policy maker at the Council of the Judiciary 2006

When asked what this would mean for the courts budgeting process with the Council, the respondent replied that

> 'In principle, it is just a matter a matter of data presentation and details. The budgeting is still based on the Lamicie model. Only towards the Minister they have fixed prices and costs. Towards the courts, it's different. They have a sort of form, where they describe price per product.'
>
> - Financial policy maker at the Council of the Judiciary 2006

The respondent further explained what happens after the Council receives the budget plans from the courts:

> 'What they do with the Ministry is then to give the a) the price per product, and b) prognosis of case flow. This information is put into the budget proposal. The Minister then looks at this proposal, and gives his opinion on it, and whether or not he agrees with the prognosis. If he agrees, and if they all agree with the price per product for the three years, then they get the budget as is available at the Ministry, for their own budget.'
>
> - Financial policy maker at the Council of the Judiciary 2006

The process appears to have changed only as regards the information given to the Ministry of Justice for the budget planning, given that the price component has not changed since 2002. The information change is also only between the Ministry of Justice and the Council for the Judiciary. Therefore the financial process between the courts and Council has not changed, and neither really has the relationship between the Ministry and Council. However, one thing that has changed with the Baten-Lastenstelsel (costs and benefits model) would be the flexibility in funding courts that have finished more cases than they originally planned (before there was the scheefgroei system- skewed growth model). The respondent first explained how the scheefgroei system worked before there was an agreement for 3 years on the price component:

> 'Each year, they had a certain budget, and if they produced more then they would get a little more money. How it worked was that the courts got a budget from the Council, and from year-to-year the Council had something extra to spend. In the sharing out of that extra money, the courts that performed the best got the biggest share. It was a system based on performance. The scheefgroei was the difference between the Lamicie model based budget and the budget that they received in reality. What one saw was that the budget that they received was always lower than what they should have received. This was for the whole of the judicial organisation.'
>
> - Financial policy maker at the Council of the Judiciary 2006

However, during the implementation of the Baten-Lastenstelsel (costs and benefits model),

> 'We said to the Ministry that we've worked to create this great model, the Lamicie model with times, but we are not being financed on this. This was because the Minister always had an escape. The law also says that, **as far as the money is available**, the budget should be directed towards the judicial organi-

sation. This was before 2005. After 2005 however, the system works so that all courts get 70% of the price per category for everyone produced over the amount they planned. The system used to calculate the difference afterwards is called the 'egalisatierekening'. This is a fund that is set aside in order to finance possible increases in productivity of the courts. The courts are now accurately funded based on the Lamicie model. There is no longer a difference between the actual amount they get and the actual amount that they should get.'

- Financial policy maker at the Council of the Judiciary 2006

The process has changed therefore to fit with what the law demands from both the Ministry of Justice and the Council of the Judiciary in terms of financing the courts more accurately based on the price per component system.

Lamicie model

In 2003, the respondent interviewed at the Council for the Judiciary described the Lamicie model as

'a method for the courts to account for their performance, in that one can see where the backlogs are, and as a basis of funding for the courts, which get financed on a case-by-case basis.'

- Policy maker at the Council of the Judiciary 2003

However, when discussing problems with definitions in the Lamicie system, questions were asked about what was being done because of courts varying definitions of productivity and the consequence that standards differed, and money was being unfairly distributed (as discussed in the section above when looking at Courts and Administration of Justice in terms of financing). She stated that

'the definitions had been standardised by the department of development, and that it was no longer a problem.'

- Policy maker at the Council of the Judiciary 2003

Conversely

'The founders of Lamicie originally intended it to be a system for self-improvement, and now it is about financing courts on a case-by-case basis. It basically translates the number of minutes spent on a case by a whole court into money terms. There are a few objections to this, in that it rewards exaggerations, which can be corrected, and there are also objections by the financial people at the Ministry of Justice, and scholars who deal with this issue. However, judges do not object, and this is considered a normal way of testing court finances and performance.'

- Policy maker at the Council of the Judiciary 2003

The financial policy maker of the Council for the Judiciary interviewed in 2006, said that

> 'we have always had time registration that is now called 'Lamicie'. This deals with the work burden of the courts, which they have divided into 48 categories (Lamicie categories). For 10 years now, these categories of cases have been defined by the average time spent on certain cases for all of the courts in the Netherlands. For example, a case in a multiple judge chamber in criminal law is supposed to take a certain 'average' amount of time, as is a criminal case in a single judge chamber. These times are all based on research conducted on the time it takes for a court to complete certain cases (tijdschrijf). From this research, we get an average.'
>
> - Financial policy maker at the Council of the Judiciary 2006

This respondent goes on to describe how the product groups have been put together:

> 'There are the 48 Lamicie categories, some of which have been put together into one category. There is an assortment of categories, e.g. in criminal law, there is a certain percentage of single judge hearings (enkelvoudig) and multiple judge hearings (meervoudig), and then there are other categories. There is an average handling time per category. We have agreed to a certain number of minutes per case:
>
> Assortment mix x (influx, stock, production) (judges/staff) Average handlingtime x (judges and staff) minute tariff
>
> This then gives us a total, which is divided by the performance (number of cases). This then gives a price per case per product group.'
>
> - Financial policy maker at the Council of the Judiciary 2006

However, as the respondent explained, the criteria for the prices and the product groups are not static:

> 'We are busy with collecting and analysing data on the averages set per category. There are expert meetings taking place on a countrywide scale, to reset the averages. It is important because the way we calculate the average is on a national scale and all courts, big and small, must adhere to this scale. Therefore a multiple judge chamber case in Amsterdam should take as long as a multiple judge chamber case in Maastricht, and if they are going to keep using averages, they must be updated, in this case, every three years. It has been emphasised for this they will need new legislation. There is also an emphasis on the quality aspect of the work of the courts (i.e. judgements), which is a particularly diffi-

> cult issue being discussed at the moment, as they are also in negotiation with the Ministry of Justice for the next three-year period for the cost price of product groups.'
>
> - Financial policy maker at the Council of the Judiciary 2006

Furthermore,

> 'In that framework, the Council and the courts themselves calculate the average times. The Ministry does not deal with this at all. This means that they are also independent in the way that they decide if that a case should go into a multiple judge chamber and it is then reflected in the average times. The Ministry only negotiates with the Council based on the past year's performance of the courts, and nothing else.'
>
> - Financial policy maker at the Council of the Judiciary 2006

When asked if there was a difference between the times when new research was done and new averages were set, the respondent answered that

> 'Between the current and the new times, there are differences but they are not always recognised by everyone, which is what happened last year. We have brought in the experts to help develop new averages. This is a difficult area in which to research and gather information, and to find an average'.
>
> - Financial policy maker of the Council of the Judiciary 2006

What appears to come from this section is that developing the Lamicie model is an ongoing process, in which research must be consistent in order to create accurate criteria to find the right price per component. There is also much negotiation going on between each court and the Council. Otherwise it is a normative model by which they calculate the amount of money that the courts should receive for the amount of work they have done. Fairness has been added to this process with the Baten-Lastenstelsel (costs and benefits model) by paying each court consistently not only for achieving predicted productivity, but also for any extra cases that they complete.

Financial Accountability

During the interview with the financial policy maker in 2006, some time was given to the question of how have you been able to deal with the manipulation of the system to gain more money by the courts.

> With the new system in 2005 including the extra money for the extra work done, there is an external accounts controller for each court. This accountant has to give a report on the finances of the court. If the court writes that they have more/less productivity, the accountant has to say whether that information is trustworthy or not.

Additionally,

> 'It is part of the responsibility of the management of the court to produce an Annual Report that has been approved by the external accountant. This annual report is part of the management's responsibility for the organisation of the court.
>
> Another aspect is that there are registration rules (registratie voorschriften). It is written in these rules how to place the categories of cases within a court, e.g. multiple judge cases. These rules are the exit points for the courts to register their cases and one can see what the courts register and how they conform to the registration rules.'
>
> -Financial policy maker at the Council of the Judiciary 2006

When asked if the accountants were familiar with the work of the courts and the council, the respondent said:

> 'Yes. As a Council we have total responsibility towards the Ministry, and there is also a group of accountants to deal with a part of that accountability, called the 'group accountants'. The underlying numbers from the courts would also be put into an Annual Report per court. And in the Annual Report for that court there are the accounts, where there is also a declaration by the local accountant, who is external, that the information in the Annual Report is accurate and trustworthy. This is comparable to a private firm's annual report method.'
>
> - Financial policy maker at the Council of the Judiciary 2006

It would appear that they have some control mechanisms built in at the level of the Council and the courts for the financing. On the one hand the Annual Reports to the Council, which go on to the Ministry of Justice, form part of the ministerial accountability for the judicial organisation. These reports also have control mechanism through independent accountants to ensure that the results reported by the courts are accurate. These control mechanisms become more reliable the trustworthier the information from the courts are.

9.3.5. Quality of justice

There are two issues in the quality of justice dealt with in this thesis: firstly there is the quality of organisation. Secondly, and more recently at a policy level, there has been increased interest in quality of decisions in cases. The first issue deals therefore with policy and projects, and the second issue deals with the new financial policy connecting quality of decisions in cases with financial distribution (discussed in the section above on finances from the Ministry of Justice's perspective).

Quality of judicial organisation

The view expressed by the respondent in 2003 that the sectors now have organisational independence to develop reflects to some extent the quality policies discussed in chapter 6, section 6.5 on policies and discussed at the meso level analysis of quality policy. For most part the Council deals with organisational issues that can affect the whole organisation such as developing ICT, whereas the courts themselves can develop their own programmes for improving organisational quality. As quality policies within the courts themselves have already been discussed, here a brief look will be given to a couple of innovations of the Council in terms of quality of judicial organisation.
The respondent interviewed at the Council in 2003 said that, amongst other things,

> 'My team is now working on IT architecture, which includes a case management system. It is to incorporate BERBER and other systems being used in courts to control the movement of cases throughout the courts. It will completely automate some processes and will no longer need people to do anything, whereas it will simply aid human processes later on in the case management system.'
>
> - Policy maker at Council of the Judiciary 2003

Furthermore, she wanted to make it clear that

> 'From a societal point of view, the judiciary has a customer perspective, as many citizens do not go to lawyers. The customer perspective is considered quite normal.'
>
> - Policy maker at Council of the Judiciary 2003

At the interview held with the financial policy maker at the Council of the Judiciary in 2006, the policy of the flying brigade was discussed. The flying brigade is a group of judges formed to go to courts with problems reducing their caseloads. According to the respondent:

> 'It has been going very well, so well in fact that they will no longer be needed after this year. They will disband this year and the judges will return to the courts they came from. It means also that the courts are able to handle their own caseload.'
>
> - Financial policy maker at Council of the Judiciary 2006

When asked how projects of the courts are funded, he said

> 'In the negotiations with the Ministry, the cost of these projects is also included. These are also funded through the P*Q system. However, the courts fund their own projects with their own budget, but are funded nationally for national projects, such as ICT and training.'
>
> - Financial policy maker at the Council of the Judiciary 2006

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

It appears from these quotes that the Council and the courts share the burden to improve quality. The courts have their own projects (as discussed in the meso level analysis of interviews), as does the Council. There appears to be consistent movement towards improving the organisation, which appears to be a separate movement from finance being connected to improving productivity.

Quality of judgements

On issues of the balance between quality and quantity, the respondent considers that

> 'The demand for quantity is a contradiction to constitutional law. However, this depends very much on the definition of quality. If it is based on Article 6 of the European Convention of Human Rights, then there is no contradiction.'
>
> \- Policy maker at Council of the Judiciary 2003

This view would suggest on the one hand, that if quantity were part of the definition of quality as defined by the European Convention, then it would be constitutional to demand the courts be efficient. This view coincides with the views expressed by respondents in the courts on balancing legal quality with quantity.[17]

In the Order in Council 2005 it is stated that the financing of the courts should be coupled with the quality indicators from the RechtspraaQ. When asked how this was going to work, the respondent interviewed in 2006 at the Council said that

> 'The agreement that the Council has with the Minister is that there is a price from which the average time is the basis. In order to bring quality into the financing they are now busy developing quality indicators. In the framework of the upcoming budgetary negotiations, we wish to include the indicators as factors as part of the monetary aspect. On the other hand, this is also a move directed towards society, giving more transparency as to the operation of quality standards in the courts. Now the issue is how best to measure quality and how it can be calculated in the cost price.'
>
> \- Financial policy maker at Council of the Judiciary 2006

When asked then if the status of the financial order was law or policy, he answered:

> 'The law says that the judiciary should be accountable, period. The question now is how to go about doing that. Next to the financial aspect, they are also trying to be accountable for the quality, through indicators. This is part of the Commissie Dethmans evaluation project. They deal with how the quality of the courts can be enforced.'
>
> \- Financial policy maker at Council of the Judiciary 2006

In discussing the how of executing this Order, he further said that

17 See chapter 7 Responsibility of judges: Micro level analysis, sections 7.1.2 Main role and responsibility of judges and 7.1.3. Legal quality: Measurement and assurance.

> 'It has been emphasised for this new legislation will be needed, but then there is also an emphasis on the quality aspect of the work of the courts (i.e. judgements), e.g. at the moment, attention is being paid to motivations in criminal judgements. There is a certain amount of time needed for a judgement to be motivated in the criminal sector. The idea now is that a judgement needs to be better motivated, which needs more time. There are certain instruments to help ensure that the handling times of cases are properly calculated.'
>
> \- Financial policy maker at Council of the Judiciary 2006

The issue of this policy has been discussed in some length in the part above when analysing the perspective of the Ministry of Justice. To reiterate, the need to pay attention to quality of judgements as highlighted by judges themselves has led to an odd situation whereby policy makers are trying to develop indicators for quality judgements so that they can couple it to the financing system. In my opinion, this goes against judicial independence in decision-making and the general judicial practice developed over the years. When discussing the issue of judicial independence with this respondent, he said:

> 'This takes us back to what the courts can decide for themselves, such as which cases should go to multiple and which to single judge chambers, what they produce, and influence what the average time for a case is and the quality of their work.'
>
> \- Financial policy maker at Council of the Judiciary 2006

This however, also goes to the organisational independence of the court (meso level). In discussing whether there had been complaints about a breach of independence at micro level, he said that

> 'Not so much as the complaint that there has been too much focus on productivity, and completing cases, but rather more on the quality of the work being done. The Council is now trying to develop ways to enforce legal quality in the courts. I believe that the average times will begin to calculate in the time being spent to create motivated judgements and better quality. If the judges choose to work for quality, then this can be calculated into the averages, and taken to the Minister in negotiations.'
>
> \- Financial policy maker at Council of the Judiciary 2006

From a constitutionalist point of view, quality of judgements is traditionally the domain of the judge at the micro level of the judicial organisation. However, it has already been established in this thesis that the judge is no longer alone in taking responsibility for the quality of judgements. The provision of various instruments to aid and the management of the sector also have a role in ensuring the quality of judgements. It would appear from this respondent that policy makers also have a role and responsibility in ensuring the high quality of judgements. Whether or not this breaches judicial independence, is not possible to say without discussing this policy with judges in 2006.

9.3.6. *Analysis: Council for the Judiciary*

This analysis, in five parts deals with the role of the Council of the Judiciary in the judicial organisation, and its relationship with the courts and Ministry of Justice; and with the finance and quality of justice. What can be said of this part of the analysis? In the first place, from the interviews conducted in 2006 the Council appears to be more confident in its role since the first interviews took place in 2003, when it was considered to be younger and with less direction. The same can be said for its relationship with the Ministry of Justice. There seems to be a sense that it has grown in strength against the Ministry of Justice, and it can fulfil its role in representing an independent judicial power (both its organisation and members). There is no longer the rhetoric of an executive service from the respondent at the Council. There is less of a feeling that they are being controlled, and more a feeling that information delivery is become more efficient and effective thereby easing tensions between the two institutions somewhat. However, communications between the two appears to remain inefficient, in terms of their willingness to discuss policy issues.

In terms of finances much has occurred between 2003 and 2006, with the Costs and Benefits model (Baten-Lastenstelsel) and the equalisation of funding to the courts based on performance. This is a positive movement that seems to be approved of by both the Council and the Ministry, and appears to leave the courts with a fairer distribution of funds.

In terms of the quality policies, in chapter 6 this was described more in terms of the role of the Council in developing the projects from the PVRO and the RechtspraaQ system, which plays a significant role in developing projects to enhance the quality of the organisation. In the plans for 2005-2008, the Council has cut down on their role in terms of creating such projects and focussing more on certain themes in organisation and supporting the courts in theirs. This is also another possible sign that the Council is growing in confidence. The only difficulty is in connecting quality of judgements with finances, which has already been acknowledged as being a difficult issue.

9.4. *Conclusions*

This analysis has dealt with institutional competences and relationships, financial policies, and organisational change from three different perspectives: courts, the Ministry of Justice and the Council for the Judiciary.

Given that the courts now deal only with the Council nothing has been said of their lack of relationship to the Ministry of Justice. From what one can see in terms of how the courts view their relationship to the Council, they did not see the Council in a positive light as regards organisation modernisation, seen in light of commentary about various projects. The courts appear to wish to maintain independence in certain aspects of modernisation. However, the Council appears to have facilitated a framework of cooperation and communication between the courts. This makes hierarchy a non-issue between the courts and Council in dealing with organisational change.

The Ministry of Justice has been left with the task of policy analysis with a broader perspective on judicial organisation (within the broader framework of the legal chain). Ministerial responsibility is through presentation of Annual Reports to and answering

questions in Parliament. Since 2002, there has been no direct interference with the work of the courts and Council, but only a distant monitoring by the Ministry. The nature of this monitoring has changed between 2003-2006, going more from a supervisory role to refining information exchange, which can be seen in the creation of the information protocol.

The Council has taken over executive functions of the judicial organisation, distribution of finances and supporting the courts in organisational development. The Council has found that not all of the courts are cooperative, but they have opened up formal and informal lines of communication through the Councillors. Formal lines are set in the agenda for the year on finances and project deadlines, otherwise each court has been assigned to one Councillor of the Council for the Judiciary. Otherwise Councillors of the Council also take part in national sector meetings and the informal national Presidents' meeting (informal gathering). The relationship between the Ministry and the Council can be described as initially having teething problems, where in the beginning the Council felt as though they were being treated as an executive service. In the second round of interviews in 2006, communications appears to be improved but they also appear to still be finding a balance between them.

In discussing finances with the courts, the most prominent issue for those interviewed was in the fact that motivation was needed in applying for funding. However, the problem with the motivation was the most of the time the respondents did not view the criteria for motivation in a trusting light. There was generally more optimism expressed from the courts even though the system was not felt to be 100% trustworthy. In 2003 the respondent at the Ministry of Justice saw that motivation in the financial process was lacking in detail. However, it appeared that no matter what kind of motivation would be given, the amount of money asked for has never been given. It was explained that this was due to the lack of priority in Government spending in justice. The Council must produce budget requests and Annual Reports. Due to the amount of information given by the Council over the years in these budges and reports, there has been an overall feeling that the accountability of the courts and Council has grown.

The respondent at the Council for the Judiciary explained that the Baten-Lastenstelsel (costs and benefits model) changed the amount of information given to the Ministry of Justice, but that it was only a matter of presentation. The important point to come out of this part of the analysis was that next to motivation is the equalisation process so that cases produced over the planned amount are paid for fairly across the courts. For the courts, the Lamicie model lacked accuracy, consistency, clarity and objectivity. The chief criticism aimed at it was that there was no accounting for differences in the size of the courts or working methods. This made it hard to trust the criteria on the one hand, and on the other it made it hard to compare results across the courts. It was therefore felt to be unfair.

For the Ministry of Justice, the main purpose of the Lamicie model was to create objective means and clear definitions to allocate resources to the Council (and for the Council to further distribute to the courts). However, in 2003 the model was considered to be unreliable because there was no uniform way of registering the amount of time spent on case. The Ministry needed to gather more data to find uniform definitions. It was explained in one of the interviews that the courts felt it was within their rights to

decide how to register cases and where cases should be allocated. This was one of the reasons why the Council was set up, to protect that right of the judiciary to define for themselves the case categories. The other reason being to create uniform definitions needed to distribute resources. In 2006, there is a feeling that there is more cooperation from the courts on giving information, because there is a greater mentality that the financing system does not affect judicial independence. There is also now a greater effort to combine quality of organisation (RechtspraaQ) with the financing system, which is something that they had been moving towards since the pilot projects began. However, the desire to connect quality of judgements to the financial system is considered against judicial independence and general practice by this researcher.

For the Council, the Lamicie model requires constant research on average times to remove discrepancies and problems. This research is independently conducted by the Council and the courts but is considered difficult to do.

For overall organisational change there is a general feeling that influence on national policy is felt to be limited, but individual judges and workers have the possibility to influence outcomes in their own court organisations. However, those interviewed in the courts did not feel this to be against their judicial independence.

For the Ministry of Justice, the quality measures that formed part of the process of modernising the judicial organisation was to open the system up to public and political scrutiny. The idea was to make the judiciary a learning organisation and one capable of self-improvement. There was never an intention of creating a system of accountability from the quality measures. The idea was that by opening up the system there would be an increase in transparency on finances and organisation, and thereby increase legitimacy of the system.

In general, the Ministry is not involved in increasing quality of the judicial organisation. It has some tasks in measuring public trust but that is for the entire justice system. The Ministry is seeking to increase transparency and participation internally and externally.

Quality policies of the Council for the Judiciary are being developed for both the organisation and the quality of judgements. One can see more of a balance between the courts and Council in terms of sharing competences in supporting and creating quality projects for individual courts. One can identify a two-fold trend in developing the judicial organisation both nationally and locally.

In conclusion, institutional relationships at all levels are still developing, with communications improving and data collection becoming more efficient. Each institution is therefore also still finding their competences. As regards finances and quality policies, these are still developing and there is much movement, which is a positive thing because the organisation is not static.

PART III: FRANCE

Chapter 10

10. Constitutional law and practices

This project deals directly with the possibility to integrate quality standards and organisational norms into the French judicial organisation as part of the constitutional norm of checks and balances. It is important, therefore, to provide some background to the French constitution from the point of view of the judiciary. This is in relation not only to its own duties towards the citizen, but also in light of its relation towards the executive and parliament from an organisational point of view. Constitutional law, acts of parliament and governmental decrees dealing with the organisation and legal position of the judiciary all form a framework of checks and balances.

In the 1958 Constitution of the Fifth Republic of France, the separation of powers was clearly laid down, to the extent that competencies and relations between the parliament ('parlement') and the government ('gouvernement') were listed in detail.[1] However, when it comes to the judiciary's position, things are a little less obvious. Title VIII of the Constitution does not set out competencies for the judiciary in quite the same way as the constitution set out competencies for parliament and government. Rather, it emphasises the importance of judicial independence in relation to other state institutions and in relation to the citizen.

An important first point from examining the constitution is that the judiciary is considered an authority ('autorité') rather than a power ('pouvoir'). This distinction has been inherited from before the time of the Revolution in 1789, when judges would block the decrees of government. The revolutionaries reaffirmed this mistrust by government towards the judiciary, and sought to limit its competence to applying the law as it was written. This will be further examined in the part entitled 'Historical Development'.

Article 64 of the Constitution sets out the role of various institutions in protecting the judicial independence of the judiciary. The roles of the President of the Republic, the High Council for the Judiciary (High Council) (Conseil Supérieur de la magistrature), and the legislature will be individually discussed and placed in a framework of checks and balances. Article 64 is primarily a matter of efficiently safeguarding judicial independence through a series of checks and balances. This will be further developed later in the chapter in the part entitled 'Trias Politicas'.

1 Title V, articles 34-61 of the 1958 Constitution of the Fifth Republic of France.

One important aspect of the separation of powers between the legislature and judiciary is that the Constitutional Council (Conseil Constitutionnel) has a monopoly under Article 46 on deciding whether legislation is compatible with the constitution. Given that institutional laws must be passed by parliament regarding judges and organisation, and the very fact that the judiciary is an institution of the constitution, means that parliament and the Constitutional Council are also involved in protecting judicial independence.[2] This relationship will be examined further in the part entitled 'Trias Politicas'.

Article 65 deals more formally with the High Council, in terms of its composition and role in protecting the independence of judges and the public prosecutor's office ('procureur') at an institutional and grass roots level. Its composition as set out in article 65 is important in re-emphasising the role of other state powers as regards the judiciary. This will be discussed further in the section on 'Trias Politicas'.

Lastly, Article 66 deals more directly with the role of the judiciary. Here it is directly connected to the principle that:

> 'Nul ne peut être arbitrairement détenu'
> (No one shall be arbitrarily detained)

This part of the article summarises directly the rights of man as set out by the Declaration of the Rights of Man of 1789 and comes before:

> 'L'autorité judiciaire, gardienne de la liberté individuelle, assure le respect de ce principe dans les conditions prévues par la loi'
> (The judicial authority, the guardian of individual liberty, shall ensure the observance of this principle as provided by statute).

These two, together, set the judiciary both in an institutional setting and a societal one. It is institutional in that it sets out the role of the judicial authority as the mouthpiece for laws passed by parliament. However, it is societal as it has a key role in protecting the liberty of citizens. This part shall be further developed in the section entitled 'Powers Defined'.

10.1. Historical development of the judiciary in France

As far back as 1641, there was a struggle between the executive powers of the king and the judiciary. At every turn, the executive would be stopped in its tracks by judges'

2 T. Graffin, 'Le statut des magistrats devant le Conseil Constitutionnel: une défense discutable de l'unité du corps judiciaire au profit d'une exigence forte d'indépendance des magistrats', *Revue du droit public* 2001, vol. 117, p. 831-864; J-C ..Zarka, 'Sauf sur point, la loi organique du 25 juin 2001 relative au statut des magistrats et au Conseil supérieur de la magistrature est déclarée conforme à la Constitution', *La Semaine Juridique Édition Générale* 2001, vol. 31-35, p. 1575-1576; V. Lanisson, 'Constitutionalité de la loi sur le statut des magistrats et le Conseil supérieur de la magistrature', *Le Dalloz* 2002, vol. 24, p. 1947-1948.

decisions in courts.[3] Thus, when the revolution came along, the judicial power was trusted as much as the royal power, and had very little place in the scheme of the separation of powers, other than to be excluded:

> 'En 1789, les révolutionnaires redoutaient de la même manière que leur action ne fut paralysée par l'intervention des tribunaux.'[4]

However, the theory of separation of powers did not reject the judiciary outright. Merryman states in his essay that the French attempted to 'make the law judge proof'.[5] Judges would be relegated to the role of applying the law only as it was written. Under no circumstances would they be allowed to make interpretations of the law, or follow the judgements of previous cases with similar facts.[6] Thus the judicial role in the separation of powers was somewhat neutralised.

However, over time, this situation could not possibly be sustained. Given that parliament could not possibly hear every grievance of the populace against the government, the Council of State (*'Conseil d'Etat'*) developed legal protection and recourse for the citizen.[7] In the same way, it was not possible for parliament to make such detail in their laws as to make application easy for the judges.[8] Initially, the Court of Cassation (*'Cour de Cassation'*) was set up in order to protect the integrity of parliament by ensuring that they were the only ones who could interpret vague laws. These interpretations would then have to be followed by the courts.

The important point concerning these developments is that, formally, the judiciary still holds a weaker position compared to parliament or government. It is still, technically speaking, not possible for any court in France of either jurisdiction to declare a law passed by parliament to be illegal or invalid. However, the Constitutional Council may be seen as a jurisdiction and it may declare that a law passed by parliament does not comply with the constitution under article 61 French Constitution. Moreover, the Council of State in the case of Nicolo 29 octobre 1989[9] also decided that where a law was incompatible with the Treaty of Rome (EEC Treaty), that it could not be applied.

3 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica, Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 15; See also M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 5.

4 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica, Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 16.

5 J.H. Merryman, 'The French deviation', *The American Journal of Comparative Law* 1996, vol. 44, p. 109.

6 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica, Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 18; J.H. Merryman, 'The French deviation', *The American Journal of Comparative Law* 1996. vol. 44, p. 109-119, p. 111.

7 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica, Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 19.

8 J.H. Merryman, 'The French deviation', *The American Journal of Comparative Law* 1996, vol. 44, p. 109-119, p. 114.

9 No. 108.243, 20 octobre 1989 of the Council of State and Tribunal des Conflits: http://doc-iep.univ-lyon2.fr/Ressources/Documents/DocEnLigne/CE/arret-nicolo.html.

Furthermore, the Court of Cassation in the case of Jacques Vabre 24 mai 1975,[10] declared that a law could be illegal if it does not comply with an international convention ratified by the French state under article 55 French Constitution. There is a continuous debate as to whether the administrative jurisdiction is considered to be part of the executive branch rather than the judiciary.[11] However, the protection afforded to the administrative judge in terms of judicial independence to decide cases, and recruitment processes, is equal to the protection afforded to the judges in the ordinary jurisdiction under constitutional law. In spite of this formality, legal powers have been more evenly distributed between the three institutions through the practices and customs of the courts themselves, and the relenting of the other two institutions since the Revolution.[12] Even though the 1958 Constitution only attributes authority rather than power to the judiciary, practices imply that the judiciary is a power which is equal to the other two state institutions. The constitution has attributed an important role to the judges in protecting civil liberty in France. Their job is to protect the principles of liberty within the law as set out by Parliament.

10.2. Powers defined

Two important things can be implied from the principles set out in Article 66. 'No one may be arbitrarily detained' is a principle in article 66 and ***implies*** to me that the judiciary is responsible for providing a fair trial based on the rule of law. This right was further elaborated in 2004 in a decision of the Constitutional Council, which deduced from the principles found within the Declaration of Human Rights 1789 that:

> '.. le jugement d'une affaire pénale pouvant conduire à une privation de liberté doit, sauf circonstances particulières nécessitant le huis clos, faire l'objet d'une audience publique' (Décision 2 mars 2004- 2004-492DC).

This states in basic terms that, with certain exceptions where a closed court is required, all judgements must be pronounced in public regarding criminal trials. However, without further explanation within the constitution itself the French have turned to another source of constitutional law for standards of a fair trial,[13] which is the European

10 L .Argentiéri, 'Le Conseil constitutionnel, "militant forcé"de l'intégration communautair'. Note sous la Décision no. 2004-496 DC du 10 juin 2003 relative à loi pour la confiance dans l'économic numérique', *Revue de l'actualité juridique française* 2004 , p. 1.

11 Y. Laidié, 'Les juges administratifs: fonctionnaires ou magistrats?', *L'actualité juridique - Fonctions publique* 2004. vol. 4, p. 178.

12 J.H. Merryman, 'The French deviation', *The American Journal of Comparative Law,* 1996, vol. 44, p. 117.

13 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France' in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Montchrestien Paris 2005, p. 227.

Convention on Human Rights (ECHR). Article 6 of the ECHR provides for, along with other things, a 'fair and public hearing'.[14]

Also implied in Article 66 and the principle of a fair trial are the independence and impartiality of judges. The impartiality of judges as a principle can be found in the government order ('ordonnance') 58-1270.[15] Article 9 of this government order deals with the incompatibilities of the judicial function with an elected position in Parliament, the European Parliament or the economic and social council. It also refers to incompatibilities where one is connected to the office of a senator or deputy (other functions are named). Article 9-1 goes on to say that judges are also prohibited from exercising the professions of lawyer (advocate or solicitor), notary, and bailiff, amongst other things. These two articles ensure a fair trial by an impartial tribunal in France by ensuring that judges have no political bias or personal interests. Article 10 of the same government order forbids the judiciary from any political deliberations and article 11 protects judges from harm, the threat of physical harm, or any other threats that might block the judicial function. These two articles ensure that the case is not swayed by force.

In protecting judicial independence, which is linked directly to protecting individual liberty, Title VIII is actually rather political and quite ingenious. At a procedural level, parties are protected from partiality by the procedure of recusation. However, on the political level, where laws are being made on the status of judges and the judicial organisation, the legislator must be careful not to breach judicial independence, because in the eyes of the constitutional lawyer, it breaches individual liberty too.

Nothing else is mentioned of the wider role played by judges within the ordinary jurisdiction, let alone the administrative one. However, Title VIII of the constitution does not refer exclusively to the judiciary. Article 34 of the constitution also refers to it in terms of the competencies of parliament to create law that determine rules. Specifically, it says:

> 'La loi fixe les regles concernant:
> …. La creation de nouveaux ordres de juridiction…'
> 'Statutes shall determine the rules concerning:
> … the establishment of new classes of courts and tribunals…'

This article is explained to some extent by Guinchard et al when discussing the constitutionalisation of civil law and procedure.[16] Here one sees an examination of the competences between Parliament and Government to make laws in the first place, and regulations in the second on article 34 of the constitution for civil matters.[17] As regards

14 Laboratoire Ceras, '*La qualité de la justice: une analyse économique exploratoire*', EDJ , Université de Reims Champagne Ardenne. GIP Mission de recherche Droit et Justice, Paris 2001.

15 Ordonnance 58-1270 portante loi organique relative au Statut de la Magistrature, 1958.

16 S. Guinchard, M. Bandrac, C.S. Delicostopoulos, I.S. Delicostopoulos, M. Douchy-Oudot, F. Ferrand, X. Lagarde, V. Magnier, H.R. Fabri, L. Sinopoli and J-M. Sorel, '*Droit processuel: droit commun et droit comparé du procèes*', Dalloz, Paris 2005, p. 276.

17 Ibid., p. 274.

the competence to establish new classes of courts and tribunals, the reference in this literature is to tax cases. It is stated that the attribution of competences to hear tax cases in the ordinary jurisdiction is given by law (i.e. parliamentary power)[18] because it has been associated with the fundamental guarantees of freedom accorded to citizens in a decision of the Constitutional Council. However, article 34 has also been referred to more recently in the creation of the Justice de Proximité, in which a Constitutional Council decision demanded that the French Parliament pay greater attention to the status of judges in the new class of courts, rather than leaving it to government regulations.[19] Whilst article 34 is mainly about the competences between the French Parliament and Government, the power to create a new class of courts or tribunals has to do with the duty to provide efficient and effective justice.

Therefore, in order to know where else judges exercise their authority, one needs to look to another source, more specifically the judicial organisation code ('Code de l'organisation judiciaire'). Here one can find every jurisdiction that is part of the ordinary courts (as opposed to administrative), as well as the source of law for the specific competencies of those jurisdictions. For example, the courts for criminal law such as the court of cassation and the court of appeal section for criminal law are organised and created within the judicial organisation code. However, the code also refers to other codes regarding the handling and disposition of cases, such as the code for criminal procedure and code for criminal law. The same applies to the civil jurisdiction, which creates the first instance courts at the same time as referring to other sources for the competencies and authority of the judge.

10.3. Trias Politicas

10.3.1. Ordre judiciaire

Whilst Article 64 is composed of four simple lines, and describes in simple terms, the roles of those involved, it actually reveals a much more complex relationship developed to protect judicial independence. Firstly, Article 64 gives responsibility to the President of the Republic for guaranteeing judicial independence (to be assisted by the High Council). In practice this has meant that he/she is placed at the head of the High Council (Article 65) along with the Minister for Justice, who can make decisions on his/her behalf. The institutional law ('loi organique') LO 94-100, in Article 13, has reinforced this.[20] Title II, section 1, Article 15 defines more clearly the role of the President of the Republic:

> 'Pour chaque nomination de magistrat de siege à la Cour de cassation, de premier président de Cour d'Appel ou de président de tribunal de grande instance, la formation compétente du conseil supérieur arrête, après examen des dossiers

18 Ibid., p. 276.

19 Décision no. 2002-461 DC: Loi d'orientation et de programmation pour la justice, Conseil Constitutionnel, 29 August 200, no. 11-13.

20 Loi Organique sur le Conseil Supérieur de la Magistrature, 1994.

> des candidats et sur le rapport d'un de ses membres, la proposition qu'elle soumet au Président de la République'.

This states that the President has a say in who gets to become the heads of jurisdictions and courts. As it is part of the constitution, it is going to be part of checks and balances to ensure that no one interest is too highly represented in the courts. The implication is that politics has a role to play in the appointments of heads of jurisdictions. This could simply be a formality, and the President consents to whoever is presented in the list to him/her. It could also be a way for the President to push through his/her (the party's) political agenda for the judiciary, by appointing somebody sympathetic to his/her (their) policy.

Article 65 of the Constitution further elaborates on the composition and competence of the High Council, which has been transposed directly in institutional law LO94-100. The High Council is composed of nine people, five of whom are judges,[21] one a councillor of State ('conseilleur d'Etat') selected by the general assembly of the Council of State ('Conseil d'Etat'),[22] and three respectively selected by the President of the Republic, the President of the National Assembly ('Assemblée Nationale'), and the President of the Senate ('Sénat').[23] The diverse interests reflected in the way that members of the High Council are chosen shows the complexity of checks and balances within the separation of powers regarding the judiciary. There is a connection between the High Council and other state institutions, which gives a certain transparency and accountability to the Council's work.

The High Council[24] has two responsibilities: that of nomination and of disciplining judges. In terms of nomination, one can see that the judiciary is not wholly independent in that it involves also the interests of parliament, government and the President of the Republic. This may well be seen as a way to legitimize the position of members of the judiciary, who are not directly elected to their positions. This, added to the fact that they are described as an authority rather than a power, may have been the intention of the drafters of the constitution to reduce the need to legitimize them as an institution of State in a similar way as the government or legislature.[25] These two articles, along with the institutional act, so far show that the four players (judges, parliament, government, and president) act together to safeguard independence in the appointment of judges. The President of the Republic and the Ministry of Justice play no role in the High Council's function as a disciplinary body.[26] This goes to guarantee-

21 Ibid., Article 1.

22 Ibid., Article 5.

23 Constitution, Article 65.

24 P. Ardant, '*Institutions politiques et Droit constitutionnel*', Librarie générale de droit et de jurisprudence (LGDJ) Paris 2004, p. 592-594.

25 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France' in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P. M. Langbroek and H. Pauliat (eds), Montchrestien, Paris 2005, p. 222.

26 Loi Organique sur le Conseil Supérieur de la Magistrature, 1994, Article 18.

ing that there are no political motivations behind disciplinary action against judges. This also guarantees the independence and impartiality of judges in deciding their cases.

Given that institutional laws must be enacted regarding the status of members of the judiciary, and that the judiciary is an institution of the constitution, means that parliament and the Constitutional Council is also involved in protecting judicial independence.[27] On the one hand, as regards the members of the judiciary, the decisions of the Constitutional Council have protected their careers (especially in terms of the irremovability of judges) and developed on the principle of equality found in Article 6 of Declaration of Human Rights 1789.[28] The irremovability of judges has been extended to ensuring that judges are not moved or promoted to other courts without their consent. On the other hand, protection has also been extended to create a more flexible career path within the hierarchy of the judiciary whilst protecting their rights to a family.[29] This can also be considered as part of the checks and balances to ensure that making unpopular yet legally correct decisions will not mean a transfer against the judge's will, thereby influencing the behaviour of judges. The role of the Constitutional Council itself can be seen as part of the checks and balances of the French Constitution, to protect judicial independence even though it is not a part of the judiciary.

The Ministry of Justice is answerable to the National Assembly ('Assemblée Nationale') via Article 48 for the good administration of justice through question time. An agenda is set, which is controlled by the assembly itself. Here the checks and balances work both ways. On the one hand, the Ministry of Justice represents the interests of the judiciary in parliament. This is a true reflection of those interests given the ministry's role in the High Council, and its role in organising justice in France. On the other hand, the ministry is also held to account for the operation of justice to parliament. To some extent, the operation of justice is made transparent through a political forum.

However, within the legislative process itself changes are made with a process of consultation within the country. Changes are usually made in consultation with judges

27 T. Graffin, 'Le statut des magistrats devant le Conseil Constitutionnel: une défense discutable de l'unité du corps judiciaire au profit d'une exigence forte d'indépendance des magistrats', *Revue du droit public* 2001, vol. 117, p. 831-864; J-C. Zarka ,'Sauf sur point, la loi organique du 25 juin 2001 relative au statut des magistrats et au Conseil supérieur de la magistrature est déclarée conforme à la Constitution', *La Semaine Juridique Édition Générale* 2001, vol. 31-35, p. 1575-1576; V. Lanisson 'Constitutionalité de la loi sur le statut des magistrats et le Conseil supérieur de la magistrature', *Le Dalloz* 2002, vol. 24, p. 1947-1948.

28 T. Graffin 'Le statut des magistrats devant le Conseil Constitutionnel: une défense discutable de l'unité du corps judiciaire au profit d'une exigence forte d'indépendance des magistrats', *Revue du droit public* 2001, vol. 117, p. 831-864; Loi organique relative au statut des magistrats et au Conseil supérieur de la magistrature (2001-445DC), Conseil Constitutionnel, 19 juin 2001 2001; J-C. Zarka, 'Sauf sur point, la loi organique du 25 juin 2001 relative au statut des magistrats et au Conseil supérieur de la magistrature est déclarée conforme à la Constitution', *La Semaine Juridique Édition Générale* 2001, vol. 31-35, p. 1575-1576; V. Lanisson 'Constitutionalité de la loi sur le statut des magistrats et le Conseil supérieur de la magistrature', *Le Dalloz* 2002. vol. 24, p. 1947-1948.

29 J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press, Oxford 1998, p. 67.

in the Council of the Judicial Organisation ('Conseil de l'organisation judiciaire').[30] This organisation is composed of the minister of justice, judges of both the ordinary and administrative jurisdictions, and various other ministry interests. On top of this, given new speedy forms of communication, it is now possible to efficiently involve judges in participating in policy making through forums of discussion and questionnaires. One such questionnaire was used by the committee set up to reflect on the ethics of the judiciary,[31] at the end of which, in March 2005, a report was published analysing the results of the questionnaire that reflected the opinions of over 2400 judges. The report finally led the committee to making 10 proposals for legislative reform.

In article 64 of the constitution, judges cannot be removed. This has two implications. Firstly, judges' positions are permanent unless disciplinary action is taken to remove them.[32] In the 1958 government order, this was elaborated upon by stating that the principle includes that judges may not be transferred without their permission, against their will, or receive a promotion without their consent.[33] Secondly, the fact that this guarantee is in Article 64 along with other institutional safeguards, suggests that this is a safeguard within a safeguard, a real separation of the judicial authority. This is something that only reforming the constitution can change. The President of the Republic, as the guardian of judicial independence assisted by the High Council, cannot alter this (with the exception of disciplinary measures), the legislator cannot change this in ordinary laws or institutional laws, and for sure, there is no way for the Constitutional Council to decide against it. It is this guarantee that is the clearest of all constitutional protections found in articles 64 and 65.

Finally, in practice another guarantee of independence is that, whilst the High Council is budgeted directly by the Ministry of Justice, judges' salaries are fixed by a decree ('décret') of the Council of Ministers ('conseil des ministres'). This indicates that withholding judges' salaries is not an option for controlling behaviour.

10.3.2. Ordre administratif

The Council of State, in its administrative capacity, acts as an adviser to government ministers.[34] The government has the obligation to consult the Council of State for all the draft laws it wishes to present to Parliament. This does not mean, however, that government must follow the advice counselled by the Council of State. When government has power under article 37 of the constitution to draft a 'décret réglementaire', it again has the obligation to consult the Council of State. It is free to ignore that advice again; however, if the law is passed, the judicial section of the Council will feel free to

30 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica, Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 320, see Décret 58-1281 articles 9-12.

31 http://www.justice.gouv.fr/publicat/rapport/rapportcabannes.htm.

32 Ordonnance 58-1270 portante loi organique relative au Statut de la Magistrature, 1958, Article 45.

33 Article 4.

34 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 64-65.

ignore the décret if it was originally deemed illegal in the advice to government.[35] Delegated legislation that is expressly authorised by Parliament to fill out the details of a parent statute also requires consultation with the Council of State.

The Council of State acts through its general assembly (except where there is urgent legislation, then it acts through its 'commission permanente'). All advice to government is confidential, and the general assembly will only act after it has received a report of the appropriate section within the ministry or part of the Council of State. The government is always free to consult the Council on any matter. Where consultation is constitutionally required, the décret will say 'un décret en Conseil d'Etat'.[36]

Due to the role of the Council of State in advising government, the authority of the judicial section has been challenged in the past based on its lack of independence. However, even though members of the judicial section must sit as part of the advisory sections, they have become detached and independent over the years. This is proven in its body of case law.[37]

The independence of judges of the administrative jurisdiction has been guaranteed through a decision of the Constitutional Council,[38] which stated that in the law of 24 May 1872, the independence of the administrative jurisdiction was guaranteed as well as the specific character of their functions, which cannot be encroached upon, neither by the legislator nor the government. Furthermore, it is not for the legislator or government to censure the decisions of the courts, to put an injunction on their activities, and to put themselves in the position of the courts concerning judgements in litigation within the competences of the courts. Additionally, in another decision of the Constitutional Council, the administrative jurisdiction is competent, in principle, to annual and reform *decisions taken in the exercise of the administrative prerogative of public power, by the exercising authority of the executive power, their agents, regions with a measure of autonomy of the Republic, or the public organs placed under their authority or their control.*[39]

These decisions of the Constitutional Council are interesting in light of the fact that, according to Favoreu et al., there has been an absence of a strong judicial power since the French Revolution and the first constitution of the Republic.[40] This was due to the fact that even before the Revolution, judges had too much power in the ancient regime, and the new government did not want to be blocked by the judiciary in its reforms.[41]

The Conseil Supérieur des tribunaux administratifs et cours administratives d'appel (High Council for administrative tribunals and courts) was set up in 1987 along with

35 Ibid., p. 64-65.

36 Ibid., p. 64-65.

37 Ibid., p. 80.

38 Décision no. 80-119 DC - Loi portant validation d'actes administratifs, Conseil Constitutionnel, 22 July 1980 1980; see also D. Turpin, '*Droit Constitutionnel*', Presses Universitaires de France, Paris 2003, p. 223.

39 Décision no. 86-224 DC - Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence, Constitutional Council, 23 January 1987, paragraph 15.

40 L. Favoreu, P. Gaïa, R. Ghevontian, J-L. Mestre, O. Pfersmann, A. Roux and G. Scoffoni, '*Droit constitutionnel*', Dalloz, Paris 2005, p. 365.

41 Ibid., p. 365.

the courts of appeal for administrative law.[42] This body has the same competencies as the High Council in the ordinary jurisdiction. It makes proposals on nominations for the position of the government representative in the courts ('commissaire du gouvernement'), on external recruitment; and on transfers and detachments. It must be consulted on all matters affecting the status of its judges in the lower courts. Finally, it acts as the disciplinary body for its members in the courts, except for the Council of State in its judicial capacity.

The High Council for Administrative Tribunals and Courts is composed of 12 members. It is presided over by the vice president of the Conseil d'Etat. There are three representatives of administration, five elected representatives of the members of the lower courts, a councillor of state, who has a permanent commission as the inspector of the lower courts, and, finally, three members respectively nominated by the President of the Republic, the president of the National Assembly, and the president of the Senate. Each member serves for a term of three years, which is renewable. The Secretary-General of the Council of State, who acts on behalf of the Minister of Justice, manages the High Council for Administrative Tribunals and Courts. The High Council for Administrative tribunals and courts therefore provides the same guarantees of judicial independence as is given to the ordinary jurisdiction.[43]

Following from a strict separation of powers in France, the High Council for Administrative Tribunals and Courts is not an institution of the Constitution, and neither are the tribunals, courts or Council of State considered as parts of the judiciary. It is an important point of history that no courts from either jurisdiction, at any level, can overturn parliamentary legislation or officially overturn government action, except in cases where such a law breaches international treaties signed by the Republic of France.[44]

10.4. Judicial independence and integrity

With so many guarantees for the protection of judicial independence, it is necessary within the context of a constitutional democracy, especially for an institution without a democratic mandate, to be accountable within the constitutional framework. The constitution does provide for disciplinary action to be taken by the High Council, but the actual sanction and procedures are fixed by the government order of 1958 (58-1270) under chapter VII. Article 43 of the government order says:

> 'Tout manquement par un magistrat aux devoirs de son état, à l'honneur, à la délicatesse ou à la dignité, constitue une faute disciplinaire.'
> 'All breaches of discipline by a judge of his duty to his status, of honour, of tact or dignity, constitute a disciplinary fault.'

42 Ibid., p. 88; Debasch, p. 714.

43 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 88.

44 See also article 10 LO58-1270.

This article states quite clearly that a 'breach of discipline' is a subjective matter.[45] According to Renoux,

> '… la notion de faute disciplinaire telle qu'elle est définie par le statut de la magistrature, dépasse amplement le simple manquement, par le magistrat, à ses obligations professionnelles.'[46]

Here the definition of a breach of discipline goes beyond professional obligations. The same author argues that this covers both the judges' private and professional behaviour. This places judges under extreme scrutiny and a higher moral obligation to behave in a way that befits his/her office.[47] This is all the institutional law says about the conditions for a disciplinary breach. It is very vague, and there is a lack of information on the number of breaches investigated and disciplinary proceedings started at the time of this research.

Beyond this, the procedure for a disciplinary procedure starts with an investigation by the inspectorate general ('inspecteur général des services judiciaire').[48] If, at the end of disciplinary proceedings, a judge is found to be in breach of disciplinary standards, there are seven possible sanctions found within article 45 of the government order, from a simple reprimand to dismissal.

Disciplinary measures are a last resort, however. There are other forms of accountability to be found in the law. In civil law, it used to be the case that a judge could be civilly liable for their cases if they were found to be fraudulent or if they had made a very bad professional mistake.[49] This was changed in 1972 and now the 1958 government order protects the judiciary from civil liability for mistakes made in the line of duty. However, in the code of the judicial organisation, Title VIII, book VII, article L781-1, there is a provision that the state pays for any damage caused by a miscarriage of justice.

Judges also have a responsibility to recuse themselves from a case where they have a personal interest or connection to a case.[50] Linked to this aspect of impartiality is the responsibility of judges to report an intention to take part in extrajudicial activities in their private capacity, which may affect their functioning, to the Ministry of Justice.[51] If the Ministry of Justice decides that certain private actions are contrary to the judicial

45 T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984, p. 214.

46 Ibid., p. 214.

47 Ibid., p. 214.

48 See LO 58-1270, article 45.

49 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France,' in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 223-224.

50 See article L-731-1 code of the judicial organisation.

51 See article 9-2 government order 58-1270.

function, he/she may start disciplinary proceedings under article 50 of the same government order.

All of these issues of discipline and responsibility fall into a category called 'éthique et déontologique' i.e. ethics and working practices. In the Grotius II Quality Project, the French report mentions this to some extent both at national policy and court level.[52] They discuss how at a national level, the first civil chamber of the Court of Cassation and the High Council have tried to assure an evolution of ethics and obligations of judges by trying to construct a system of civil responsibility and discipline.[53] At the level of the courts, much responsibility is given to the heads of the courts of appeal with the Inspectorate General of the Central Administrative Services ('Inspection Générale des Services Administrative Regional') to report on their activities.

Another point to mention is that there is no code of practice in France. In 2005 a report was published on the findings of a commission set up to reflect on the ethics of the judiciary.[54] This report was based on an analysis of answers returned following a questionnaire sent out to 2545 judges throughout France. Questions were asked on three main areas: firstly, the will to improve the transparency and efficient application of a working practice code; secondly, the wish to have a real protection of the rights and liberties of judges; and lastly the demand for 'autoregulation and protection'. The issues covered extend from impartiality and independence to the training of judges in ethics and working practices. This analysis ultimately resulted in 10 legislative proposals. Firstly, they change the oath taken by judges at the beginning of their tenure to include a promise to be impartial and diligent in carrying out their duties. Next, they recommend setting up a council within the High Council to deal with issues of ethics and update the country on any developments. This leads to the third and fourth propositions in recruitment and training, that there be initial training in ethics during training, and continuous training afterwards. It was however noted that in the contract management ('contrat d'objective') between the Ministry of Justice and the national school for the magistracy, that they specify the enforcement of ethics and working practices in the training system for the judges. Next, they wish to change the system of incompatibilities to also include cases involving spouses, common law marriages and 'PACS' (civil solidarity pact for couples who wish to register their partnerships rather than marry, under the law passed in 1999: 'pacte civil de solidarité') amongst other things. Proposition six enforces the role of the heads of courts and jurisdictions in terms of discipline, and especially giving more resources to the courts to deal with ethics and working practices. However, the accountability of these heads is also re-emphasised in the role of the inspectorate general of the regional administrative services and the responsibility given to them in article R213-29 judicial organisation code for the good administration of the jurisdiction. Propositions seven and eight deal with the evaluation of judges. Proposition seven deals more with the psychological

52 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France,' in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 223.

53 Ibid., p. 224.

54 http://www.justice.gouv.fr/publicat/rapport/rapportcabannes.htm

evaluation of judges with more challenging specialisations (for example, child law) (even though the majority of judges rejected the need for psychological evaluation as to whether a candidate was fit for the job) and proposition eight deals with the evaluation of performance. Proposition nine recommends the setting up of a new council within the constitution to deal with special situations in working practices in ethics. Finally, the last proposition deals with the protection of judges against unjustified criticism of their judicial decisions. The recommendation proposes that the courts publish any measures taken to ensure the transparency of decision making, at the same time as ensuring the integrity of judges.

Finally, there are also more traditional forms of accountability through the publication of judgements (even though deliberation is conducted in secret) and, of course, there is the right of appeal in all cases. In civil and criminal law there is also the opportunity to overturn a judgement on appeal to the Court of Cassation, which can rule in the parties' favour, but only to the extent that the appeal courts will retry cases. In the retrial they can follow the original ruling of the first instance court or the reasoning of the Court of Cassation.

10.5. Conclusion

This chapter shows that the judiciary has a rather complex place in French constitutional law. Amongst all the institutions and rules protecting judicial independence, very little has actually been said about the judiciary, its organisation, or even its wider role in society, beyond protecting civil liberties.

Even though the 1958 Constitution only attributes authority rather than power to the judiciary, practices imply that the judiciary is an equal power to the other two state institutions. For one thing, the complex checks and balances afforded to judicial independence described here gives a strong indication that the judiciary is no longer simply a mouthpiece of the law applying the words of parliament directly to the situation at hand. For another thing, institutionally, the judicial independence of judges is protected in the way they are nominated, by the High Council of the Judiciary, in government, both houses of parliament and the president. Whilst the High Council and mechanisms provided protect the judicial independence of the individual judge, they do not have a direct role in creating and executing policies for the judicial organisation.[55] Furthermore, the status of judges is also protected from parliament by an independent body ensuring that laws are constitutional and fair to judges (constitutional council). With increasing power, there is a growing need for proof of legitimacy and competency to wield that power.

Beyond this however, nothing is said in the constitution about the organisation of the judiciary, beyond the fact that parliament is the institution responsible for creating

55 See also R. du Luart, '*La mise en oeuvre de la LOLF dans la justice judiciaire, rapport d'information no. 478 (2004-2005)*', Commission des finances, sénat, Paris 2004, section E, 3, a. (2): le CSM « qui n'exerce aucune responsabilité dans la gestion administrative de l'institution judiciaire, se voit en réalité confier par la Constitution un mission de régulation sui generis. Cette mission n'est analogue à aucune autre fonction exécutive ou judiciaire car elle se situe à la croisée des deux ordres de pouvoirs concernés ».

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

courts. In order to understand the place that organisation norms and quality standards has in improving legitimacy and trust, it is therefore important to look next at the organisation of the judiciary, and who is accountable for it.

Chapter 11

11. The institutional context of the French judiciary

The question to be addressed here is how the French judiciary is organised. This is important to show how the demands of the constitution as regards the judiciary are realised. This field is separated into three areas: basic organisation, jurisdiction, and financial arrangements.

As described in the constitutional chapter on France, the 1958 constitution of the fifth Republic of France concentrates on the institutional protection of judicial independence and personal freedom. Very little is said on the organisation of the judiciary per se, or how access to justice should be organised. It is difficult to say, in the case of the French, that the judicial organisation reflects constitutional demands of access to justice, such as those found in the Constitution on the protection of liberty, or under Article 6 of the European Convention on human rights regarding fair trial.

On the other hand, the Ministry of Justice has used principles of justice developed in the legal system over the years as a basis for the organisation. These principles include (free) access to justice; independent and impartial judges; a double degree of jurisdiction (i.e. the possibility to appeal); controlled application of the law; publication of and of the grounds for decisions; and, finally, due process. These principles can all be found on the French Ministry of Justice website.[1]

The following parts describe the judicial organisation for both the ordinary jurisdiction (civil and criminal law) and the administrative jurisdiction (*'ordre administratif'*). Next to looking at the organising practices and principles of the judiciary, there will follow a part on the members of the judiciary, their training, selection and careers. Financial arrangements and the responsibility of the judiciary follow from that. Finally, a conclusion will highlight the main features and difficulties of the French judicial organisation.

1 http://www.justice.gouv.fr/justorg/principes.htm.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

11.1. *Basic organisation and structure of the courts*

11.1.1. Ordinary jurisdiction

Physical access to justice is based on two principles: territorial and legal jurisdiction. Territorial jurisdiction is based on the county or region.[2] In France, the ordinary jurisdiction has 35 Courts of Appeal (*'cours d'appel'*),[3] 181 courts of first instance for major cases (*'Tribunaux de Grande Instance'- TGI*),[4] and 473 courts of first instance for more minor cases (*'Tribunaux d'Instance'- TI*).[5] In total, there are 64,000 people working to support the judicial organisation, 7,000 judges in the ordinary jurisdiction, 981 judges in the administrative jurisdiction, and 8,499 clerks (both chief and normal).[6]

The jurisdiction of 'proximité' was created by the law of 2002-1138 of 9 September 2002 and was completed in the institutional law 2003-153 of 25 February 2003, which defined the status of the judges working within this jurisdiction. It came about as a result of growing public pressure to improve the efficiency of justice and to bring justice closer to the people.[7] This is a jurisdiction that is distinguished from the other first instance courts of ordinary jurisdiction, and is supposed to be a first attempt to mediate between parties, and if that fails, then the case is heard. The law transfers certain competences to this jurisdiction from the first instance courts for minor cases. It deals with civil law cases with a value of 1500 euros, and has certain competences set out in a decree of the Council of State.[8] Even though this jurisdiction is distinct from the others, it is to hear its cases in the first instance courts for minor cases. The first instance courts for minor cases have also been given responsibility for the administration of this jurisdiction.[9] The procedures are all oral and legal representation is unnecessary. The seats of these courts are fixed by a decree of the Council of State.[10] What sets this jurisdiction apart from the others is the status of the judges, being temporary (5 years) and not trained as judges, but being professionals in the legal field.[11] In 2003, the government announced that it would recruit 3300 judges for this jurisdiction. However, there have been criticisms levelled at this new form of judge by the Syndi-

2 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 14; J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press, Oxford 1998, p. 37.

3 R. Perrot, '*Institutions judiciaires*', Montchrestien Paris 2004, p. 136; for general principles of territorial organisation, see also http://www.justice.gouv.fr/justorg/courappe.htm the French Ministry of Justice website for numbers.

4 Ibid., p. 90 see also http://www.justice.gouv.fr/justorg/tgi.htm the French Ministry of Justice website for numbers.

5 Ibid., p. 100; see also http://www.justice.gouv.fr/justorg/ti.htm for numbers.

6 http://www.justice.gouv.fr/justorg/justorg3.htm.

7 D. Gasset, 'La réforme de la justice de proximité', *Regard sur l'actualité* 2003, p. 79-86, p. 80-81.

8 Ibid., p. 81.

9 Ibid., p. 85-86.

10 Ibid., p. 83.

11 Ibid., p. 83.

cats, which are based on the fact that the new judges do not have the same guarantees as the main judges do.[12]

On the basis of special jurisdiction, France has one court of Cassation,[13] which deals with appeals on principles of law only. Where it feels that a judgement is not based on a sound interpretation of the law, it may only overturn the judgement and refer it back to a court of appeal (not to the court which first judged it) or more exceptionally, to a court of first instance of last resort in a case.[14] Other special jurisdictions are also divided on a territorial basis. There are 271 industrial tribunals (*'Conseils de Prud'hommes'*); 191 commercial courts (*'tribunaux de commerce'*); 139 youth courts (*'tribunaux juge des enfants'*); 116 tribunals for Social Security (*'tribunaux des affaires de sécurité social'*); and 431 rural courts (*'tribunaux paritaire des baux ruraux'*). All of these courts belong to the ordinary jurisdiction.

The ordinary jurisdiction was set up, in principle, to govern relations between private persons. Under French law, therefore, criminal law is not considered to be public law because it is a matter of dealing with a criminal act of one person against another in the private sphere.[15] Therefore the ordinary jurisdiction has two competences: civil law and criminal law. Civil law mainly deals with contracts (non-commercial), family law and the law of torts (*délit*),[16] whereas criminal law covers 'contraventions' (minor infringements), misdemeanours (*'délits'*), and felonies (*'crimes'*).[17] The courts themselves are arranged according to categories of law. However, judges can sit at the whole court, and alternate between the two forms of law, depending on the size of the court. However, the general rule is that judges rotate or alternate.[18]

According to Perrot, the first instance courts for minor cases do not necessarily have to correspond to the administrative districts.[19] A general rule is that each court serves multiple cantons, but it depends upon various factors, such as the number of cases and demographic factors.[20] To enable each court to be flexible in handling cases and to become closer to the people, the regulation part of the Code of the Judicial Organisation allows the courts to arrange for extra hearings within the district of the region that the court is in (*'audiences foraines'*). This is important because French jurisdictions are usually considered to be sedentary.[21]

12 P. Doucet, 'Carte judiciaire: La vérité est dans les détails', in *Le Figaro Magazine*, Friday 25 March 2005, p. 49; P. Doucet, 'Délais, lenteurs, effectifs: Les réponses de Dominique Perben', in *Le Figaro Magazine*, Friday 25 March 2005, p. 52-53.

13 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 57-61.

14 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 175.

15 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 4.

16 Ibid., p. 38-41.

17 Ibid., p. 41-43.

18 Ibid., p. 37-38; J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press Oxford 1998, p. 45.

19 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 102.

20 Ibid., p. 102.

21 Ibid., p. 103.

Each hearing of the first instance courts for minor cases is by a single judge (*'juge unique'*).[22] Judges of the first instance court for minor cases belong to the first instance courts of major cases of the 'ressort' they are in. They are simply detached for three years within the region.[23] In civil law, the first instance courts for minor cases are competent to deal with movables, private lawsuits, cases without the right of appeal up to 10,000 euros, and cases of property seizure and rent claims.[24] In criminal law, the 'Tribunaux de Police' are situated at the first instance courts for minor cases and are tried by judges of the first instance courts for minor cases.[25] These are competent to judge infractions requiring up to two months imprisonment.[26] The first instance court for minor cases is also invested with a number of other administrative functions such as seals, notary services and certificates of nationality.

There is usually one first instance court for major cases per 'département', but there can be more than one in the bigger cities (such as Paris). The general rule however, as with the courts of first instance for minor cases, is that they do not have to correspond with the administrative districts.[27] All of them have at least one president and two judges, but most have more (Paris has 350 judges). If the first instance court for major cases has more than five members, the court can divide itself into separate chambers based on specialisation.[28] Administrative tasks are split between the President of the court, who has the responsibility for internal administration, distributing cases between the chambers and managing judges,[29] and the general assembly, which is composed of all judges. The general assembly meets at least once a year to discuss organizational issues (especially the schedule order) that affect them, behind closed doors.[30] Furthermore, the head of the public prosecution (the procureur de la République) may have administrative tasks as well, for example to allocate cases in correctional hearings there is a common decision between the President and the procureur de la republique, and one talks of 'dyarchie' in this case.[31]

The civil law competence of the first instance courts for major cases is part of the common law (*'droit commun'*) of France, and has competence over the civil status of parties, and immovable property.[32] It usually sits in collegiality (three judges to a case) to ensure the high quality of judgements. However, a single judge can hear a case under special circumstances.[33] All the first instance courts for major cases also have a

22 Ibid., p. 100.

23 Ibid., p. 104.

24 http://www.justice.gouv.fr/justorg/ti.htm.

25 http://www.justice.gouv.fr/justorg/tpolice.htm.

26 Ibid.; and J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press, Oxford 1998, p. 43.

27 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 93.

28 Ibid., p. 97; see also M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 39.

29 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 96.

30 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 39.

31 Article L311-15-1 Code de l'organisation judiciaire (legislative part).

32 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 39.

33 Ibid., p. 11.

'commission d'indemnisation des victimes',[34] to calculate civil losses by victims in order to sue the person convicted of a criminal offence against them. This can happen with certain infractions. Since 1958, the civil sector has also had competence to interfere in child welfare where there is concern for the child's health, safety, morality, or a concern that the child's education is being compromised (or all of the above).

At the criminal sector ('*chambre*'), there is the examining judge (juge d'instruction). This judge is appointed by decree. There can be more than one at a court, and in smaller courts, but they can deal with other matters as well. This examining judge is usually competent to prepare a case for eventual judgement. She is obliged to prepare a case where a felony is involved; it is optional where a misdemeanour is involved; and it is exceptional where a minor infraction is involved. The case is normally instituted by the '*procureur*' of the Republic (the public prosecutor), however, in the larger courts, the president can also start proceedings. The criminal court usually sits as the '*tribunal correctionnel*' with three judges in collegiality. Exceptionally, the court can also sit as a single judge, but only for minor infractions. For more serious crimes, there are always three judges.[35] The '*tribunal correctionnel*' has the normal jurisdiction of the first instance court for major cases in criminal law.

The youth sector of the criminal court is for delinquent behaviour. This court sits in collegiality, headed by the juvenile judge ('*juge des enfants*') assisted by two assessors ('*assesseurs*'). The Ministry of Justice appoints these assessors for four years. These are people who have attained the age of 30, of French nationality, and competent deal with children. The last part of the criminal court, the 'juge applications des peines', is the judge who supervises the execution of sentences, especially custodial sentences. There has been reform concerning this subject, whereby the judges for the execution of sentencing (juges d'application des peines) have jurisdiction to authorize family visits for detainees, and may decide on a partial release in certain cases.[36] There is, since 2004, also a judicial parole board (*tribunal de l'application des peines)* with three judges to decide on conditional parole, for example,[37] and there is a chamber de l'application des peines which is a specialised chamber of the court of appeal which is composed of the President of the chamber and two Councillors of the Court of Appeal.[38] Since 1958 this position has been a part of the first instance courts for major cases, and is a position determined by a decree for three years (renewable).[39]

The Court of Appeal provides the possibility of an appeal against facts and law from the decision in a particular case. Each court has several chambers, divided between civil law and criminal law. They stretch over several departments.[40] Administration is the responsibility of the first president, the chief prosecutor and the general

34 J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press, Oxford 1998, p. 135.

35 Code de l'organisation judiciaire L311-7.

36 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 493.

37 Ibid., p. 493.

38 Ibid., p. 493.

39 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 42.

40 Ibid., p. 43.

assembly of the court. The first president and the chief prosecutor form a diarchy to administer the first instance courts for major cases in their region.[41] The administrative regional service assists them and the chief clerk of the service is responsible to them for creating the budget for the region, and distributing clerks throughout their region.[42] The diarchy is responsible for distributing judges throughout their region and negotiating contract management (*'contrat d'objective'*) with the Presidents of the first instance courts for major cases. They are also responsible for signing performance contracts with the Ministry of Justice. The organisation of the Court of Appeal is governed by the judicial organisation code (Livre II).

The court of cassation stands outside the ordinary jurisdiction. It is not a court of appeal at third instance. However, all decisions of the courts of ordinary jurisdiction are susceptible to an appeal to the court on a point of law only. They have no power to investigate the facts of cases. Their main tasks are to verify that the legal qualification given to the facts are exact and correct; and to investigate whether the legal consequences deduced in the decision are appropriate. Therefore the judges of the court are judges of law, not fact. The court can also reopen criminal cases in the light of new evidence. Given the possibility of a miscarriage of justice for the condemned, the Ministry of Justice can demand a special commission be set up within the court of cassation.[43]

The organisation of the court of cassation is quite complex. The head of administration is the first president, who is responsible for the good functioning of the court, for assigning councillors (*'conseilleurs'*) – not judges – to the sections, and distributing cases between the sections. The 'bureau' of the court has some administrative functions in the criminal jurisdiction. It is composed of the first president, the presidents of the chambers, the chief prosecutor, the chief advocate general, and the chief clerk. This bureau has created a national list of experts, and also designates instructions to the criminal court for members of Parliament, government, and the judiciary (*'Haute Cour de Justice'*). Lastly, the general assembly meets to deliberate over subjects submitted to it by the first president, and the bureau, and is subject to consultation by the Ministry of Justice.[44]

The court of cassation itself is composed of five civil sections and one criminal section. These sections are presided over by the oldest councillor. For a normal judgement, a court of five judges (sometimes seven or three) is established. The first president runs the court at her discretion.[45] The Court of Cassation is also subject to the principles found in the judicial organisation code, (Livre I).

41 Ibid., p. 43.

42 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 219.

43 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 57.

44 Ibid., p. 59.

45 Ibid., p. 60.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

A difficulty in the functioning has been noted, however.[46] There is an increase in the number of unreasonable delays in terms of deciding cases. They have tried various reforms to counter this trend: increasing the number of sections; increasing the number of younger judges to deal with adjudication and legal work; creating a better service of documentation; and increasing the powers of the first president in administering the court. They have also attempted to reduce delays by decreasing the collegiality from seven judges to five judges, with exceptionally three judges; and reducing the need to read all the files by reading some summaries created by assistants.

The judicial organisation code has already been referred to several times throughout this chapter. It is a code that contains the governing principles for organising the ordinary jurisdiction. Each book sets out the institution, competence, organisation, function and the layout for each jurisdiction and instance within the order. It sets out the mission statement for the organisation of Justice in 'titre XII; maison de justice, article 7-12-1-1:

> 'Il peut être institué des maisons de justice et du droit.. elles assurent une présence judiciaire de proximité et concourent à l'accès du droit…'
> '… houses of justice and law may be instituted… they assure the close presence of Justice and concurrently, the prevention of crime, to help victims, and increase access to justice…'

Another important point from the code is that it sets out the general framework for the organisation, but it leaves some detail to be determined by the Council of State, for example the seat and 'ressort' of the Court of Appeal to be fixed by such a decree under article L212-1 (also for the first instance courts). This gives the government a great amount of say in the physical access to justice in France.

This is an issue of a judicial map (*'carte judiciaire'*) for France. For the last 50 years (since 1958), there has been a great deal of debate surrounding the judicial map, especially in trying to reduce the number of courts in France.[47] On the one hand, there is a need to ensure that everybody who needs access to justice actually has access to justice. On the other hand, there is a need for organisational and administrative efficiency. The financial law of 2001 (reinforced by the law of 2003) had, as one of its goals, to rationalise the judicial map for the sake of administrative efficiency. However,

46 Ibid., p. 61.

47 J. Commaille, *L'enchâssement de la carte judiciaire dans les traditions de la société française bilan du passé, schémas d'un avenir*, at Du juge de paix au tribunal départemental 1995; J. Commaille 'La déstabilisation des territoires de justice', *Droit et Société* 1999, vol. 42/43, p. 239-264; J. Commaille, '*Territoires de Justice: Une sociologie politique de la carte judiciaire*', Presses Universitaires de France, Paris 2000; B. Brunet 'La départementalisation de l'institution judiciaire (juin 1991-janvier 1993)', *Droit et Société* 1994, vol. 26, p. 95-107; T. Deschamps, C. Mouhanna and V. Michel '*La specificité de l'administration Française de la justice: première approche*', Institut International d'administration publique, Paris 2001, p. 29.

this has been met with resistance by both local concerns and the bar association of France.[48]

11.1.2. Administrative jurisdiction

The judicial branch ('section contentieux') of Council of State heads the administrative jurisdiction, which is headed by one president. Next to that there is a membership of three presidents adjoint, a number of councillors, maîtres de requêtes and auditeurs. Sub-sections of a section are given responsibility for preparing cases for judgement. The more complex the case, the more judges there are.[49] Furthermore, in the administrative jurisdiction, there are seven Courts of Appeal, and 35 Courts of first instance.

In certain cases the Council of State has jurisdiction at first instance, i.e. for certain governmental decisions where there is no clear territorial jurisdiction,[50] or where certain governmental acts or decisions require a judgement from the highest possible court. Where this happens, the Council of State is the only possible court, and there is no option to appeal. In 1987 a law created the Courts of Appeal for administrative law.[51] They were created to deal with all appeals, in order to alleviate the delays at the Council of State.[52] However, the Council of State still deals with three types of appeal: the guarantee of municipal elections, regulations, and the excessive use of power. The Council of State also has a role in appeals on cassation. It is competent to judge the regularity of decisions from the following appellate courts: the court of appeal for administrative law, the court of accounts and other disciplinary instances. There is a commission of the Council of State to deal with the admissibility of cases to avoid an excess workload or overburdening.[53]

The court of appeal for administrative law is comparable to the Court of Appeal for the ordinary jurisdiction. Its 'ressorts' and seats are also fixed by a decree of the Council of State. The first president of each court holds the rank of a councillor of ordinary service. They are administrators at the courts of appeal for administrative law, and deal with urgent cases only.[54] The president also has the task of dividing cases between the sections. For each judgement there is a rapporteur who writes the instruction for the case, maybe one councillor from another chamber, two councillors and the

48 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 243.

49 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 64.

50 Ibid., p. 65.

51 Ibid., p. 67-68; L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press Oxford 1998, p. 53; C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 216; C. Debbasch, '*Droit administratif*', Economica 2002, ch. 5 p. 713.

52 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press ,Oxford 1998, p. 51.

53 Ibid., p. 52-53.

54 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 78.

president of the chamber. The court of appeal for administrative law is competent to deal with appeals against decisions from the courts of first instance for administrative law, except those reserved to the Council of State.[55]

The courts of first instance for administrative law are composed of a minimum of one first president, and three judges. For decision-making, they can use the single judge or sit with 3 judges in collegiality. The first president has responsibility for the administration of the court in terms of managing the services, internal disciplinary matters, and organising hearings.[56] In her judicial function as a judge however, the first president of the court acts as the *'juge des référés administratifs'*, which means that, in urgent cases, it is possible to apply for a rapid decision before the president of the court.[57] All courts deal with the following sectors of administration: social security, public works, tax law, and electoral law.

The special characteristics of judges of the administrative order are that they can hold judicial functions or administrative functions after training. This gives them an insight into the world of administration, which can also give them legitimacy when deciding cases. On the other hand, it can also raise questions of judicial independence, and ask whether members are in fact judges or civil servants.[58] In his article, Laidié establishes that even though the Council of State and the Constitutional Council have not acknowledged officially that members of the administrative jurisdiction are judges, a certain revolution has taken place.[59] The most important movement has been the law created to guarantee the independence of judges through granting them the same irremovability as judges of the ordinary jurisdiction. This applies only so long as they are judges, and have not moved on to become civil servants or administrators in government. However, this is not quite the same, as it is not as strong as the constitutional protection offered, in that such a law could be revoked or changed more easily.

The administrative jurisdiction is also governed by principles found within a code (*'Code de Justice Administrative'*). Like its counterpart, the first thing one finds is a sort of mission statement in the preliminary title (which has 11 articles). One can split this mission statement into two parts: access to justice through the guarantee of independence and the transparency of decision-making; and organising principles, to ensure the quality of justice. This code is far bigger than its counterpart in the ordinary jurisdiction. Next to containing similar organising principles for every instance, it also contains governing principles on recruitment and nominations, discipline, on the staff who are hired to assist the courts, and the competences of each instance within the jurisdiction. The code also establishes the High Council for the Administrative Jurisdiction *('Conseil Supérieur de la tribunal administratif et cour administrative d'appel')*. This body is equivalent to the High Council for the ordinary jurisdiction, and also has similar competences in dealing with the recruitment and careers of its members. Lastly,

55 C. Debbasch, '*Droit administratif*', Economica 2002, p. 713-714.

56 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 222.

57 Ibid., p. 222.

58 Y. Laidié, 'Les juges administratifs: fonctionnaires ou magistrats?', *L'actualité juridique - Fonctions publique* 2004, vol. 4, p. 176-178.

59 Ibid.

and very importantly, the code provides for the principle of recusation, to enforce the impartiality and independence of judges.

11.1.3. Separate jurisdictions

The separate jurisdictions are set out quite clearly in both codes for the ordinary jurisdiction and the administrative jurisdiction. Next to these are various other codes and procedures for setting out legal principles and actions more clearly for the citizen/ lawyers. On the one hand, there are the codes of civil and criminal procedure and the code of civil law and code of criminal law. The administrative sector has similar codes of procedure parallel to government departments and competences.

The interesting and important body as regards keeping the jurisdictions separate is the *'Tribunal des conflits'*. As its name suggests, this body is competent to settle disputes between jurisdictions where there is a conflict, where both jurisdictions claim the power to decide on a case; where both have refused jurisdiction in favour of the other; or where there is a conflict between decisions, on the same issue but with different outcomes. This body is composed of equal parts from the Court of Cassation and the Council of State. Usually a total of eight judges sit on the tribunal, four members from each court.[60] This is what the French call a 'paired' court (*'tribunal paritaire'*). Brown and Bell explain that with such a paired court there is the risk to the court of being split down the middle, however this very rarely happens and when it does, the casting vote goes to its titular president, the minister of justice.[61]

11.2. Members of the judiciary

11.2.1. Training and selection

For the ordinary jurisdiction, there are three admittance procedures in the form of competitions to enter the judiciary. The first competition is for candidates with a degree and training for at least five years after one has achieved a bachelor's degree.[62] This method offers the most places. However, this way also highlights the average age of candidates (at least 27), the level of recruitment, the amount of experience in the field. This way is called 'concours étudiants'. The second category is reserved for candidates from the civil service, the military or agents of the state, who have served the state for four years or more. The third way is for people who have been professionals for more than eight years (younger than 40 at the time of the competition); people who have served as members of local councils; or people who have served the jurisdiction, but not professionally.[63]

60 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 149.

61 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 71-72.

62 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 292.

63 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and

Once a candidate has been accepted, she becomes an 'auditeur de justice', and receives professional training from the National School for the magistracy. Training lasts for 31 months, and candidates alternate between the courts and the school. Once they finish their training, they can be nominated as a judge by a decree of the President of the Republic, on a recommendation by the Ministry of Justice, after consultation with the High Council for the judiciary. Each newly appointed judge is then assigned within the 'corps judiciaire unique' (which includes both prosecutors and judges).[64]

For the administrative jurisdiction, at the Council of State, there are two ways to enter: by examination or by invitation.[65] One third of all recruits come by invitation (*'au tour extérieur'*). These are people with a distinguished record in public administration, and therefore enter at a higher rank of Councillor or Maître des Requêtes. However, these people are recruited subject to an examination at the National School of Administration (*'Ecole National de l'administration'*). The National School of Administration was instituted in 1945 to provide further training for public administration staff who wished to achieve a higher-ranking position. Nowadays, admission for judicial training is by competition, and once one has passed the competition, there is a two-year period of intensive study. Graduates are arranged in order of merit, and then get to choose from possible appointments based on their merits. If one has an appointment to the Council of State, one enters as an 'auditeur de seconde classe'. One is then assigned to someone more senior, who will act as a guide and mentor.[66]

This approach to recruitment from the outside and from the National School means that the mixture of experience and high intellectual quality is ensured. Given the success that the Council of State has had in its recruitment methods, the lower tiers of the admission of jurisdiction are recruited in the same way, except that all recruits to the courts and tribunals have a one-year stage at the Council of State first.[67]

11.2.2. Careers

The structure of careers is very limited for judges in the ordinary jurisdiction. A very pyramidical hierarchy makes it very difficult for them to get to the top.[68] There are a limited number of managerial positions, and positions at the Court of Appeal. Judges

H. Pauliat (eds), Lo Scarabeo Bologna 2003, p. 231-232; See also R. Perrot, '*Institutions judiciaires*', Montchrestien Paris 2004 p. 292.

64 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 231-232.

65 C. Debbasch, '*Droit administratif*', Economica 2002, p. 705-706, p. 714; M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 81-82.

66 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 82-88.

67 Ibid., p. 86-87.

68 J-C .Müller, 'Actualité legislative: le point sur la reforme du statut', *Le nouveau pouvoir judiciaire* 2001, vol. 356, p. 4-5; Union Syndicale des Magistrats, 'Reconstruction de carriere', *Le nouveau pouvoir judiciaire* 2002, vol. 360, p. 28.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

may also detach from the jurisdictions to work at the Ministry of Justice at the 'chancellerie' there.[69] There, judges work on policies of the judicial organisation, procedural laws, the budget, and ICT innovations such as the Ministry of Justice website: http://www.justice.gouv.fr/. Most judges are also detached from the court of first instance for major cases for three years to work at the court of first instance for minor cases in their regions. The High Council is responsible for the careers and promotions of its members.

The career structure of the administrative jurisdiction is more varied. At the Council of State's judicial section, there are three basic grades:[70] the Conseiller (highest grade); the maître des requêtes (intermediate); and the auditeur, which can be split into first and second class (and second class is where people begin after being appointed). After that, there are some special positions of responsibility. Firstly, there is the commissaire du gouvernement.[71] This is not like the public prosecutor who initiates a case. In reality, its only function (which is still important) is to present observations regarding the judgement in the case before the court, as to whether the judgement is in conformity with the law. This position is not a principle party to the case, neither as a plaintiff or defendant, and is neither a judge nor a representative of government. Then there are the managerial functions of the section: the presidents of the subsections, the presidents and vice presidents of sections and, of course, the vice presidents of the Council of State (the highest rank). The President of the Council of State is the Prime Minister of France, who is represented by the Minister of Justice on the rare occasions that she has the right to preside.[72]

Promotion within the Council of State is based on seniority (a guarantee of independence). However, promotion to managerial posts is based on merit only. An administrative unit in the Council of State called 'le bureau' discusses issues of promotion, assignments and detachments. This is composed of the vice president, six presidents of the different sections, and the Secretary-General.[73]

In 1953, reforms to the law made members of the tribunals for administrative law normal judges of first instance in administrative disputes. This enhanced their careers in terms of pay scales and promotion to the Council of State. In 1987 the courts of appeal for administrative law were set up. This required many positions to be filled, and at the time they did not have the manpower to fill them. So they held a special competition to recruit new members to the tribunals for administrative law and promoted more senior and experienced judges to the new courts of appeal for administrative law. This left a gap between experienced and inexperienced judges.[74] However, this did provide an extra career option within the structure of the administrative

69 T. Deschamps, C. Mouhanna and V. Michel, '*La specificité de l'administration Française de la justice: première approche*', Institut International d'administration publique, Paris 2001, p. 12-13.

70 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 75-77.

71 R. Perrot, '*Institutions judiciaires*', Montchrestien Paris 2004, p. 412.

72 L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998, p. 83-86.

73 Ibid., p. 88.

74 Ibid., p. 53.

jurisdiction, as there were not enough judges to fill the new places. Even to this day, the courts of appeal appoint judges from the lower courts, leaving the lower courts with places to fill.

The year 1987 also saw the creation of the High Council for the administrative jurisdiction. This brought the first instance and appellate courts for administrative law under the responsibility of one body, under the administrative responsibility of the Council of State, which is also responsible to the Ministry of Justice for administrative issues in the judicial part of its work. This means that the Council of State is responsible for the distribution of judges and resources throughout the administrative jurisdiction, unlike the other jurisdiction, in which the Courts of Appeal have that responsibility. The High Council for the administrative jurisdiction, like its counterpart, has responsibility for the careers, promotion and recruitment in the courts and tribunals. The Minister of Justice sits *ex officio* on the High Council for the administrative jurisdiction.[75]

Lay judges staff the commercial courts of the ordinary jurisdiction.[76] The rules for electing commercial judges can be found in the judicial organisation code, book IV, chapter III. The people involved in electing judges are drawn from the region in which the court operates. A college is formed in order to elect judges. It is composed of existing members of the commercial courts and the chamber of industry and commerce within the region. Former members of the court and chamber are entitled to vote, but must register. Certain conditions are also imposed for candidates to be eligible: they must be at least 30 years old and registration is for at least five years in commerce. If candidates are subject to liquidation or bankruptcy procedures, then they are ineligible for office.

All recruits have to undergo compulsory training. On the one hand, there is a compulsory course for those who have just taken office. On the other hand, there is continuous training for judges already in the post. The National School for the Magistrature arranges all training.

11.3. Conclusion

From this chapter it would appear that the structure of the French courts is very logical, and there appears to be comprehensive protection of the legal status of judges. Three major changes have occurred to deal with the challenges facing both jurisdictions. Firstly, there is the setting up of a centralised court service in 1995 and the creation of the new jurisdiction of proximity in 2002 for the ordinary jurisdiction and the creation of courts of appeal for administrative law in 1987.

Whilst it is clear who is responsible for management and organisation of the courts from various legal codes, it is clear that there is very little legal accountability laid

75 Ibid., p. 87-88.

76 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 232-233; M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 49-51.

down in the law or the constitution for the organisation of the judiciary by the courts themselves. There are no clear sanctions for those in the courts providing an inefficient and/or ineffective judicial organisation. Furthermore, they are subject to governance in a strict hierarchy, which has little flexibility and few resources. This restriction ***may*** in itself be due to the fact that there is a lack of accountability for the organisation.

Accountability for finances is also far from clear, beyond the ministry's responsibility to Parliament, the Ministry of Finance and the court of accounts. It is very difficult, if not impossible, to hold managing judges to account for their spending or management of the courts.

Moreover, the changes that have occurred have not addressed the problems of the judicial map in terms of reducing the number of courts or the need for organisational and administrative efficiency. Nor do the changes address the need for creating further career opportunities for the members for the ordinary jurisdiction.

The institutional context described here forms a traditional framework of accountability. There is clarity of jurisdiction, and thus clear legal obligations on courts to hear cases at certain times and places formally exist. The framework for the budget is also shown to attempt to make spending structures more transparent and strict. With the new finance law coming into force, courts may also find themselves fulfilling a new form of accountability for the productivity of their courts.

Chapter 12

12. The organisers and policy

It is important to understand the interaction between the different actors who are responsible for organising the French judicial system. Any organisation on this scale requires co-operation, and co-ordination in terms of policy and action within the legal framework set out. It is also necessary to understand the practical and political issues behind the process of change, especially in light of the requirement of judicial independence. Understanding interaction can offer some insight into these issues.

12.1. Central administration in relation to local court administration and recent measures taken

12.1.1. Local court administration

At the local level, the courts (of appeal and of first instance) are managed under a diarchy composed of the first president and the chief prosecutor of the court in question.[1] This diarchy is responsible for the case distribution between judges and prosecutors. Next to these, the chief clerk (*'greffier en chef'*) has responsibility for the general administration of the court in terms of human resources and budget management.

According to a report on the administration of justice, the principle of independence has prevailed over administration because of the separation of powers:

> 'D'un point de vue institutionnel et originel, l'indépendance a prévalu sur l'administration, du moins pour ce qui est des autorités judiciaires, du fait du principe de séparation des pouvoirs'.[2]

However, in France it is not extreme enough to prevent giving administrative tasks to judges. If this were the case, the system would be paralysed, as nobody would be able

1 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France', in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Montchrestien Paris 2005, p. 218.

2 T. Deschamps, C .Mouhanna and V. Michel '*La specificité de l'administration Française de la justice: première approche*', Institut International d'administration publique, Paris 2001, p. 23.

to manage the other judges. Even though there is an official distinction between administrative management (*'gestion administrative'*) and jurisdictional management (*'gestion juridictionnel'*) at the courts, they fall under jurisdictional policy (*'politique juridictionnel'*).[3]

This diarchy is not a relationship of consensus and is not fixed in law as such. Both the judge and the prosecutor have different points of view on management, and the effectiveness of the team depends very much on the personalities of its members. The divergences of the points of view are concerned with the permanence of the system, the compatibility between administration and judicial independence and the judicial role of judges. From the report, the researchers discerned that prosecutors are viewed as assistants by the judges within the diarchy. However, the prosecutors themselves view the diarchy as a system that guarantees their independence from a discretionary management (*'gestion discrétionnaire'*). Some judges would like to see a split from the prosecutors because of their participation in making public policy at the level of the local government. Judges argue that the court needs to be independent based on article 6 of the European Convention on Human Rights, and that the prosecutors' involvement in local politics can compromise that.[4]

Judges also view their management positions as part of the guarantee of judicial independence. On a more practical basis, they consider themselves to be appropriate for the management position because they have a global vision of their jurisdiction. The judges also see themselves as having primary responsibility within the diarchy.[5]

Another problem for the diarchy is the fact that judges and prosecutors are insufficiently trained in the art of administration, let alone the administration of courts. Therefore the aid of the regional administration services and clerks are considered to be indispensable, but judges oppose the role of others in the administration of justice:

> 'Si les magistrats du siège et du parquet s'accordent à penser qu'ils ne sont pas suffisamment formés à la gestion des juridictions et que l'aide du service régional d'administration est indispensable, ils s'opposent sur les rôles des uns et des autres dans l'administration des juridictions.'[6]

The report further points out that this diarchy is not only responsible for the good management of the court, but is responsible to a broader public. Included in this public are civil society such as NGOs and user groups, administrative and political authorities. The 'public' perceive that the more judges take on administrative functions, the more they blur their own public image and mar their impartiality. However, the public prosecutor as a manager of the court can protect judicial independence and buffer the perceived consequence of judges having management positions and tasks. In reality though, there is a trend towards judges having more influence in the diarchy.[7]

3 Ibid., p. 24.

4 Ibid., p. 25.

5 Ibid., p. 26.

6 Ibid., p. 25.

7 Ibid., p. 27.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Next to judges and prosecutors, there are also various forms of assistance within the courts. The main one is the clerk. The report states that there has been a trend to increase their tasks.[8] Even though the judicial assistants (*'assistants de justice'*) are given the task of assisting judges in their judicial function,[9] clerks have also been given more tasks to aid judges.[10] Increased competencies of assistants and new technologies within the court have raised questions about jobs that should be the domain of judges:

> '… le recours croissant aux assistants de justice et aux nouvelles technologies de l'information fait émerger un 'concurrence'dans l'accomplissement des missions plus proprement juridictionnelles.'[11]

The position of the chief clerk has seen an increase of responsibility within the courts, and is seen as the third 'leg' of management, thereby creating an unofficial triumvirate of management at the court. However, his/her task is only to provide good administration within the court and therefore he/she has no judicial tasks.[12] Chief clerks are accountable for the management of finances to the court of accounts. However, his/her autonomy to manage the court is also restrained by the judicial independence of judges:

> '… ces outils de gestion constituent des moyens de contrôle des dépenses et investissements qui pèsent sur la liberté d'action des magistrats, d'autant plus que l'exigence du respect du cadre des marchés publics. Rappelée par la Cour des comptes, restreint la marge d'autonomie. Les chefs de juridiction, habitués à un système antérieur beaucoup plus souple, reconnaissent les mérites d'un mode gestion plus encadré, mais peinent à accepter toutes les contraintes qui en résultent.'[13]

Even though they only have administrative tasks with some minor judicial tasks, Rassat states that the clerks of the ordinary jurisdiction follow the same rules of judicial independence or are covered by the rules of independence and the same obligations as judges.[14] The clerks of the administrative jurisdiction are a part of the civil service of the whole governmental organization. Their job is different from those of the ordinary jurisdiction in that they work to increase the transparency of the organization in dealing with cases.[15]

8 Ibid., p. 43.

9 Ibid., p. 43.

10 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 220.

11 Ibid., p. 43.

12 T. Deschamps, C. Mouhanna and V. Michel '*La specificité de l'administration Française de la justice: première approche*', Institut International d'administration publique, Paris 2001, p. 44.

13 Ibid., p. 45.

14 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 92-93.

15 Ibid., p. 93-94.

12.1.2. Judges versus managers and politics

According to Gasset, successive governments since 1958 have sought to evolve an ancient judicial organisation with societal changes and to be responsive to the expectations and needs of citizens.[16] Since the 1960s, one can see an evolution in central court administration.[17] In 1964 the Direction Administration Générale d'Equipment was set up within the Ministry of Justice to deal with questions of budget and infrastructure of the judicial organisation. In 1965, the position of the clerk was created to assist in the administration of courts.[18] In the 1970s, central administration took responsibility for the judicial map and developed judicial infrastructure until the mid 1980s. In 1987, the responsibility for finances was transferred to the central administration from local collectives. In 1996, the regional administrative services were created to assist the diarchy at the courts of appeal in their role in managing their regions. The courts of appeal are responsible for the distribution of resources (judges) between the courts in their regions by means of contract management. This contract sets out the aims of local courts in terms of their performance in relation to their resources and performance during the previous year.[19] The regional administrative service is responsible for distributing clerks and resources, and the chief of the regional administrative services is responsible for gathering the relevant data and creating an overall budget based on the budgets gathered from all the first instance courts in the region plus that of the court of appeal.[20] As between the members of the diarchy, the relationship between them and the regional administrative services also depends on their personalities.[21]

However, the separation between the administration and judges is not so clear-cut at the national level, where judges head various departments within the Ministry of Justice, such as the Direction Administration Générale d'Equipement, and the Direction Service Judiciaire. The latter prepares bills on the organisation of the judiciary, distributes resources to the jurisdictions, and manages personnel. However, there are also

16 D. Gasset, 'La réforme de la justice de proximité', *Regard sur l'actualité* 2003, p.79.

17 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France', in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Montchrestien, Paris 2005, p. 217; J-P. Jean, 'Justice. Quels modes d'administration et d'évaluation pour un service public complexe qui doit rendre des décision en toute indépendence?', in *The Challenge of change for judicial systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000, p. 49.

18 R. Perrot, '*Institutions judiciaires*', Montchrestien, Paris 2004, p. 371.

19 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France', in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Montchrestien, Paris 2005, p. 244.

20 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 219.

21 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991, p. 31-34.

a few professional civil servants and managers working at the department.[22] Therefore, one can see how independence as a principle has a higher place in the hierarchy of norms than administration.

There is a mechanism at the Ministry of Justice to hold this advantage in check, and that is the inspectorate general of the judicial services. This body was originally set up to investigate judges at the start of a disciplinary proceeding. It is now also competent to report on thematic issues, such as the report of 2003 on the evaluation of regional administrative services, and the functional reporting of courts' activities. These reports, in general, are available to the public.[23]

For the administrative jurisdiction each court has one first president, and presidents for each chamber. The management of the court depends solely on the president with the aid of the chief clerk of the court.[24] The president of the court deals only with the Council of State when signing the performance contract.[25] The secretary-general of the Council of State is responsible for the judicial organisation and distribution of resources within the administrative jurisdiction. The secretary-general is responsible to, but independent from, the Ministry of Justice for the organisation of the courts in the administrative jurisdiction.[26]

12.2. Finances

12.2.1. National policy

Over the last 40 years, there has been a recurring debate over the resources for justice. The debate has basically centred on the fact that there are not enough resources, and what they get is insufficient to enable them to meet the needs of the citizens.[27] The lack of priority for spending in justice can be explained by prioritising social and economic affairs from the 1950s onwards. In France, Millet describes that a conservative judiciary, which does not trust politics, have also made it difficult to respond to their needs. However, over the years, government has responded to demands by trade unions and

22 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), IL Scarabeo, Bologna 2003, p. 217.

23 Ibid., p. 218.

24 Ibid., p. 220.

25 Conseil d'Etat, '*Contrats d'objectifs des cours administratives d'appel de Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes et Paris*', Conseil d'Etat, Paris 2002.

26 M-L. Rassat, '*La justice en France*', Presses Universitaires de France, Paris 1991; C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003.

27 D. Millet, 'Quarante ans de budget de la justice', in *Justices: ce qui a changé dans la justice depuis 20 ans*, (ed), Dalloz, Paris 1999, p. 133.

the media to increase spending; to modernise the judiciary; and to respond to the needs of the citizen.

The major changes that did occur, happened mostly in 1958-59, which saw an increase in powers for the High Council to protect the independence of judges, especially through the appointments system; a reform of the organisation of justice, which reduced the number of courts of the judicial organisation by 150; and an increase in the competencies of the courts of appeal. 1964 also saw the creation of a department of general administration at the Ministry of Justice, which had centralised responsibilities for managing the facilities of the judicial organisation and creating a budget (Direction de l'Administration Générale et de l'Equipement (DAGE)). However, for many years, the lack of priority for government to make any convincing moves towards change was reflected in the late start by the Ministry of Justice in gathering data and compiling statistics on the activities and effectiveness of the judiciary.[28]

For over 40 years, Millet has noted three tendencies in the budget for justice: firstly, that there has been an increase in the budget; secondly, the number of employees has increased three fold; and lastly, the methods of distribution have changed in time due to an increased need for facilities and technologies to run the judicial organisation. Next to these tendencies, Millet also noted an evolution in the sectors of activity for the Ministry of Justice. Most recently, the regional administration service has been set up, which has stabilised and centralised the administration of the courts, giving the judiciary greater responsibility for its own organisation. Secondly, prison services have also increased a great deal, also increasing their need for resources. Lastly, the jurisdiction to protect juveniles in France has also grown. However, there has been no real increase in spending in these areas. Millet explains that this is due to the fact that most of the increases have gone towards paying for pensions. Therefore the percentage of spending has not increased per se on the judicial organisation, but rather there has been an incremental increase in the budget for justice over the years.[29]

Instead of increasing spending in the areas of the regional services for courts, the prison services and youth protection services, the government has looked at alternative and cheaper ways of providing justice, such as mediation, or increasing the use of fines instead of custodial sentences.[30] Therefore, even though there has been an increase in spending and resources for the judiciary, it does not also mean that there has been an equivalent improvement in organisation and capacity.

The creation of the regional administration services, however, marks an increase in the objectivity used to examine the activity of courts. The Ministry of Justice and the French judiciary now try and run the organisation according to the techniques of management, especially in the use of information technology, and by adapting rules

28 Ibid., p. 134, J-P. Jean, 'Justice. Quels modes d'administration et d'évaluation pour un service public complexe qui doit rendre des décision en toute indépendence?', in *The Challenge of change for judicial systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000, p. 49.

29 D. Millet, 'Quarante ans de budget de la justice', in *Justices: ce qui a changé dans la justice depuis 20 ans*, (ed), Dalloz, Paris 1999.

30 Ibid., p. 137-138.

of procedure. With his objectivity, there also comes the debate on the quality sacrificed by judges in the hurry to finish all the cases during the year.[31]
Finally, financial policy is now connected to the legitimacy of the judiciary:

> 'Si ces réorientations peuvent légitimement tirer argument de l'impasse à laquelle conduit la première politique…elles doivent pour fonder leur crédibilité démonter leur opérationnalité et leur moindre coût'.
> (.. If these changes are to be legitimate, their credibility must be based on their operability and efficiency and low cost).

The new finance law (*'Loi Organique sur la loi de finance'*), which came into effect in January 2006, reflects this. This law devolves financial responsibility back to the local authorities and to different state bodies. However, Philip has highlighted an important feature in his analysis of the constitutional council decisions on the constitutionality of the law:[32] the 'sincérité de budget' section ('the honesty of the budget'). The honesty of the budget clause is based on the government's past failures to inform parliament of information on activities concerning European institutions. This new law also tries to hold government to account for the fact that they did not present any information on the budget execution and whether or not it conformed to the Council decision in 2003 (including the justice department).[33] This principle still applies in the new finance law.

The finance law that entered into force in January 2006, whilst devolving financial responsibility, also demands that those who hold the power to spend are also accountable for it.[34] It will mean that budgets will be distributed based on productivity within the courts. This act applies to all public services. There has been an ongoing debate within the judiciary itself regarding the responsibility of judges in terms of productivity and reducing delays, whilst at the same time ensuring that their judgements are of high quality.[35] At the moment, the Ministry of Justice and the regional administrative services of Paris are busy trying to create standards by which to measure the productivity of the courts in an equitable way. The information section of the new finance law demands that the budgets be based on the productivity of the previous year.[36] The criteria for productivity in the courts has been developed by judges working at the

31 Ibid., p. 145-146.

32 Loïc Philip, 'Décision no. 2003-489DC du 29 décembre 2003, Loi de finances pour 2004, JO 31 décembre 2003, p. 22530', *Jurisprudence du Conseil Constitutionnel* 2004, p. 122-126.

33 Ibid., p. 123.

34 P. Biju-Duval, J-F. De Montgolfier, A-M. Desgranges and O. Le Clercq de Lannoy, 'Judicial Electronic Data Interchange In France', in *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends*, M. Fabri and F. Contini (eds), Lo Scarabeo, Bologna 2003, p. 220.

35 A. Garapon '*Les responsabilité du juges*', Ecole Nationale de la Magistrature http://www.enm.justice.fr/ centre_de_ressources/dossiers_reflexions/responsabilite/annexe3.htm.

36 LOLF, title V, p. 22-27, C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 242-245.

regional administration service in Paris, who cooperate with the Council of State as regards creating objective criteria to measure the productivity for their jurisdiction.

12.2.2. Planning and control[37]

The finance law for the year encompasses budgets for all state spending. The Minister of Finance is generally responsible for this, under the authority of the Prime Minister (who arbitrates between the different ministries and the Ministry of Finance).[38] The preparation of the budget is based on the services during the previous year, and new measures, which could be positive or negative. Here they distinguish between the fixed costs of the state and its institutions, and special projects to help improve the running of the state. The finance law can also create a programme for several years.

At the start of the budgetary year, in the spring, the Ministry of Finance is busy with gathering economic and financial data, which will later be used for the Parliamentary debate on the one hand, and, on the other, to prepare the budget for every Ministry. In May, based on a framework letter (*'lettre de cadrage'*) to each Minister, the budgetary conferences take place to negotiate the budget for each section. This allows the Prime Minister, at the beginning of summer, to write a ceiling letter (*'lettre de plafond'*), which describes the amount of credit in the budget, and a direction for use which is relevant to each Ministry. The detail of the budget is assigned in this way to each Ministry, which is then affirmed by that Minister. Then a copy of the budget, accompanied by some complementary information required by the process, is printed and annexed to the draft law ('projet de loi') and is called a 'bleu budgétaire'. This takes place in August and September.[39]

The budgetary draft is then presented to the French Parliament. The process for passing the law takes a total of 70 days to go through both houses of Parliament. The budget is examined before a commission of Finance of each house. In the case of the Justice budget, a 'rapporteur spécial' is assigned to investigate the budgetary package presented to Parliament.[40]

The budget then goes before Parliament to be debated and questions may be directed at the various ministers. Once the law of finance has been passed (after a semi-systematic control demanded of the constitutional council), the government makes a decree for distributing the resources between the ministers. The 'bleu budgétaire' then becomes the 'vert budgétaire', which is the main instrument for the work of the services (travail des services).[41]

The Ministry of Justice then distributes the budget to its territorial representative services, to the heads of court. Even though the budget has been passed by Parliament, it is still subject to amendment by the Ministry of Justice as regards the spending process by the courts. Furthermore, the Minister of Finance and the Prime Minister

37 Based on É. Douat (ed). '*Les budgets de la justice en Europe*' 2001, La documentation Française, Paris.

38 Ibid., p. 111.

39 Ibid., p. 112.

40 Ibid., p. 113,

41 Ibid., p. 113-114.

may also reassign responsibility for a budget to another ministry or change the intended purpose of the budget.

Those actually responsible for the execution of the budget are called 'ordonnateurs' (officials with the power to authorize expenditure). At the ordinary jurisdiction, the Minister of Justice is the primary ordonnateur. For the administrative jurisdiction, the main ordonnateur is the vice-president of the Council of State, and the secondary ones are the presidents of the first instance and appellate courts for administrative law. There are also 'comptables' (in this context there is a distinction in public law between ordonnateurs which authorize spending and comptables which control the spending) who are attached to the Ministry of Finance and control the regularity and habits of spending.[42]

The internal control of the budget is by the Ministry of Finance through a series of inspections by its inspectorate general; and the court of accounts, which sends an annual report to Parliament on the execution of the budget. It is also associated with the court budget discipline, and is competent to fine or charge public agents who are found guilty of irregularities in the spending of the budget. Finally, Parliament can set up a commission to investigate state funding. However, its main power lies in being able to vote for the budget.

12.3. Policy

It is necessary to understand the political issues behind the policy determined for the judicial organisation, in terms of how it deals, on the one hand, with preserving judicial independence, yet on the other, ensuring that the organisation of justice is accessible to all citizens. The following section will give some insight into the background to recent policy changes on public services in general, and then a description of the framework policies will follow, looking at whether the judicial organisation is in line with that background. Afterwards a general description will be given of the 'filler policies' to execute the framework policy. The conclusions will examine how far the policy is successful in turning the judicial organisation into an institution for the community, and how far it relates to its constitutional setting.

12.3.1. General policy

Over the last 20 years, France has seen a reorganisation and modernisation of its public services in general.[43] Based on the analysis of 2001 from an economic exploration of justice, the report states that quality theories are founded on two determinants:[44] first,

42 Ibid., p. 115.

43 J. Chevallier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 189-205; A. Cole 'The service public under stress', *West European Politics* 1999, vol. 22, p. 166-184; D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 152-169.

44 Laboratoire Ceras '*la qualité de la justice: une analyse économique exploratoire*', EDJ, Université de Reims Champagne Ardenne. GIP Mission de recherche Droit et Justice, Paris 2001, p. 6.

there is the process of production, organisation, structure, procedures and rules; and secondly, the comportment of actors, their strategy and motives. Control and sanction are tools to help the organisation learn and adapt. The authors of the report go on to discuss various studies conducted on the quality of justice, and find it to be mostly user-oriented research. In general, there is a lack of a definition of quality. There are no global objectives either nationally or locally. Furthermore, there is a lack of differentiation concerning or knowledge on effective quality and perceived quality. Lastly, there also appears to be an absence of regulating objective quality (i.e. the management of information and statistics from the organisation). In spite of the lack of any clear policy framework for the quality of justice, the author of the report suggests that there is a right to justice as a public service.[45]

Public service or 'service public' and access to those services form part of French citizenship.[46] According to Cole, public service has three main features: that it is delivered by a 'public person' ('a public authority, or any organisation acting in a public capacity'[47]), that a public service is actually provided, and that it is protected by a special legal status.[48] These public services also respect the following organisational and political principles: continuity of service provision, equality of access to all public services, and organisational adaptability to the evolution of society.[49] Public service was developed after World War II, when the French government decided that it was better placed to develop the economy and provide essential services than the private sector.[50] General interest was the other reason government took over providing services, also believing that it was better placed to provide services that were accessible to all.[51] In spite of this however, the notion of public service is very vague and ambiguous. Cole suggests that it is a metaphor for general interest that forms part of the modern version of the social contract between the state and its citizens; whereas Clark describes it as a legitimising myth for the power of the state. Either way, the public service reflects certain political traditions, which Chevalier explains as being the guarantee of social cohesion for the nation, equal access to all of the larger services, promoting respect for the rule of law, and the defence of French interests in the world.[52] These traditions and definitions reflect the flexibility and adaptability of the concept of French public service.

45 Ibid., p. 166.

46 J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 189-205.

47 A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 167.

48 Ibid., p. 167; see also J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 189.

49 A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 167.

50 Ibid., p. 169.

51 Ibid., p. 168; D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 164.

52 A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 168; J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 190.

This is not to say that public services have evolved smoothly since the Second World War. Due to state traditions, it has turned out that all political parties find that safeguarding public services is essential.[53] Due to these traditions, France also finds it very difficult to privatise or free the market for telecommunications and other such companies under their responsibility as per European rules of competition and the free market. Clark names other barriers to change such as the ' regulatory principles of public law, the normative framework of public policy, which continues to maintain a distinctive role for the strategic state in orchestrating public policy networks: the public's strong attachment to public services; and the defensive strength of public-sector trade unions…'[54]

In saying that however, it is also important to point out that there is a distinction between public service and public sector, where public sector is a small part of public service, and public service is governed by a broader (and rather vague) definition. Public services can also be split into services of protection and services of progression.[55] Services of protection cover national defence, the police, justice, the prison administration, civil protection and fire fighting. These all have a constitutional status (1946 constitution preamble). Services of progression deliver education, research, culture, communication, and economic development. The services are not necessarily delivered by the public sector, but are regulated in the public sphere, thereby allowing the government to retain a sense of control over their provision.

Finally, another important barrier to change is the fact that the public service forms an employment category of its own.[56] The public service regulates the labour conditions of all civil servants. As we have seen in chapter 10 constitutional law and practices, the constitutional council has had a large role to play in extending rules of the public service labour market to the status of the position of judges as regards irremovability.

Chevalier states that administrative modernisation has sought to deconstruct the technocratic and statist model of government whilst trying to retain the core principles of Republican public services.[57] This movement has a policy of promoting enhanced responsibilities towards the user of public services. The reform of the civil service itself has been seen to, on the one hand, strengthen human resource management, and on the other, devolve executive power from the central ministry to the territorial field.

53 A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 166-184, J. Chevalier 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 169.

54 D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 166.

55 A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 169.

56 Ibid., p. 169.

57 J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 194.

Finally, the changes sought to introduce the policy of evaluating government performance.[58]

In 1992, the French government introduced the 'Charte des Services Publics'.[59] This charter introduced four sets of public service principles: transparency and responsibility; simplicity and accessibility; participation and adaptation; and confidence and trust.[60] These principles were also introduced to give a new lease of life to the concept of legality and due process in relation to providers and users. This highlights an idea that the charter forms

> '… part of a consistent, long-term approach to modernising French public services by balancing the respective rights of the citizen and the state in the system of administrative justice, rather than as a set of measures to improve service quality…'[61]

Thus far, this part has attempted to provide a brief outline of the context or environment in which judicial reform has had to take place. I will go on to describe the framework policy and actual policies executed for the judicial organisation, and how far the change process has been effective up until now.

12.3.2. The judiciary as a public service?

> 'À l'instar de tout service public, les cours et tribunaux doivent répondre à un certain nombre d'exigences ou d'attentes légitimes centres sur l'usager du service public.'[62]

This quote states that following all other public services, courts and tribunals must also respond to a certain number of demands by users. In 2002 an orientation law was created to provide a framework of policy goals for the judicial organisation. This framework was found in the annex of the law itself, and the most pertinent parts of this annex are parts I and IV. Part I deals with improving the efficiency of justice at the service of the citizen; and part IV deals with improving efficient access to the law and justice. Next to this framework, there are also a series of themes on which laws are

58 D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 155; see also J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 194.

59 J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 196.

60 D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 155.

61 Ibid., p. 168.

62 H. Dalle, 'Introduction', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation Française, Paris 2002, p. 14.

passed. Finally, the institutional laws that are customary to the judiciary also have value when dealing with policy.

Part I of the annex to the law of 2002 deals with improving the efficiency of justice at the service of the citizen. This is further split into five different sections: the first priority is to aid justice in facing an increasingly heavy burden, and the development of its mission. This includes reducing delays in the civil and criminal jurisdiction, and a better control of public policy (especially by the public prosecutor) calling for judicial intervention. Secondly, there is a policy of bringing justice closer to the citizen through creating 'justice de proximité'. Thirdly, the policies seek to strengthen administrative law justice by augmenting the workforce, strengthening resources, and engaging in reform. Fourthly, policy seeks to develop the efficiency of administration in the ordinary jurisdiction, by strengthening the efficiency of the central services; increasing services of training and administration in the ordinary jurisdiction; and improving treatment and progress of the careers of agents. Finally, policy seeks to arm the judicial organisation with improved tools and material resources (especially ICT) of the ordinary jurisdiction. This focuses on taking into account the needs of judicial buildings (that buildings are situated and built to reflect the service provided by the courts); ensuring consistency in the good functioning of the judiciary; and, finally, having a developed path of ICT adoption for the judiciary. There is a new décret that authorizes the transmission of writs and other documents by email, but after 2009 except for certain experiments.[63]

In this framework policy, one can distinguish between the aims of improving organisational quality, at the same time as putting the issue of user satisfaction on the judicial map. This is further highlighted by part IV of the annex, which seeks to improve citizen access to law and justice. This includes improving aid to victims by ensuring that they are a part of the process, and well informed about the cases. Next, it facilitates access to law in terms of physical access to buildings and information. Finally, it seeks to give effective access to justice by ensuring that those who need it, receive legal aid and other help. Thus far, this framework policy appears to be consistent with the reform of public services in France, in focusing upon users' needs and strengthening the use of resources.

Aside from this framework policy, there are a series of themes on which the government has a certain policy. Firstly, the judicial map, which deals with controlling the number of judges per court, the number of chambers, clerks, and the removal of courts. Next is access to law and justice, which deals with the creation of courts, legal aid, the simplification of procedures, and institutional architecture. This theme has been renovated by the framework policy set out above. Finally, there are the costs or overheads of justice, which fall outside of the budget laws and are part of the accountability mechanism under the responsibility of the court of accounts. These main themes are all part of the innovative framework laws. One can conclude from these that there are three features of quality policy: firstly, that of public services of accessibility, user

63 Décret relatif à la procédure civile, à certaines procédures d'exécution et à la procédure de changement de nom, 2005, titre XXI.

satisfaction, service quality and resource provision; secondly, there is the efficiency of justice, focusing on organisational quality, economic and ICT development.

All of the above deal with the quality of the public service of the judiciary in organisational terms. In order for policy to be complete, there must also be some focus on the judiciary as a constitutional organ with values of independence of justice, accessibility, reasonable delay, impartiality and competence of judges. Whilst all policy must respect the independence of the judiciary as a whole, these principles have also to some extent to be dealt with by the framework from above. Without effective policies to also rejuvenate these institutional principles, can the judiciary deliver an effective public service as an organ of the constitution? This question is important because the policies can be used as a measuring stick between the judiciary and the citizen, and also to see how far such constitutional principles (though not altogether explicit in the French Constitution 1958) can be reflected in the organisation itself and how far the citizen can perceive this. In this way, public policy can help to rebalance the relationship between the judiciary and the citizen with public service policy, at the same time as addressing the balance between the independence and accountability of the judiciary and its members. The next step is therefore to analyse the actual policies themselves, and to answer the question of how far, in aggregate, the policies go towards turning the judiciary into a public service whilst remaining true to constitutional law.

12.3.3. Policies

The aims of any policy are to create a process of change, and for this to happen, information used to be shared in such a way as to ensure that this change process starts and continues. If the policy is an issue of long-term rebalancing of citizens' rights and the state, rather than the newest trend to be dropped when a new government comes into power, then the logical place to start is with legal education. According to Komesar,

> '… institutional analysis is the way to teach doctrine and legal skills as well as providing new lawyers with an analytical framework useful in making a buck or saving the world. It also provides the legal community with a way to replace the standard ideological categories that now define people and positions.'[64]

So what is it that legal educators face? In France, it has been identified that judges themselves are evaluated on quality in relation to their judgements and the parties (including lawyers). In relation to the parties, citizens demand good access to justice at a low cost to themselves, and a good response to their queries, be they informative or decisional, in that they are explicit, fast and useful.[65] At the quality level all the

64 N.K. Komesar, 'Reflections on the Essence of Economics, the Character of Courts, the Role of Ideology, and the Reform of Legal Education', *Law and Social Inquiry: journal of the American Bar Foundation* 2004, vol. 29, p. 295-296.

65 M-L. Robineau, 'La formation au service de la qualité de la justice', in *La qualité de al justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation française, Paris 2002, p. 113.

actors such as judges, clerks, prosecutors, and lawyers are all competent to deliver on these demands. However, if it is not the habit for these things to be considered, then they need to be institutionalised.

Therefore, the National School for the Magistracy has also responded to the reform in policy direction. On top of the initial and formal training the judges receive, the school also provides for further training to provide the skills needed in the performance of one's function. Even though further training is not obligatory, the actual numbers participating in such training reflects the conscientiousness of the judges concerning the pressure on them to be productive, to deliver quality judgements and to be aware of a wider context of their comportment (social, economic and public service reform). The school always looks to improve professional practices, knowledge and competence in the judiciary and its functioning. They try to ensure that training reflects a sense of the job, and highlight the connection between judges' duties and their power.[66]

Furthermore, the school has been encouraged to help improve relations with other professionals associated with the execution of justice, and the improvement of daily functioning, especially in terms of efficiency and effectiveness. As a result of the activity of the school, judges have become more aware of social and economic climates, and there has been a development of know-how concerning the organisation of the judiciary. The ultimate aim for the education programme within the framework of policy change is:

> '… il permet encore de principe de la mesure de l'indépendance qui ne va pas sans responsabilité'[67]
> (…to preserve some measure of independence at the same time as ensuring the accountability of justice).

Following on from that is the courts' response to the policy demands. According to Cavrois and Cardoso, the public service of the judiciary is based on the response to demands and complaints of people requiring services.[68] However, there is an inadequate response, due to the incapacity of judges to apply their legal knowledge to organisational challenges.[69] In spite of this however, they map out various local and court initiatives, such as at the court of first instance for major cases at Sens. There they had a programme to develop special training for judges dealing with family cases, and to develop a network of professionals to work more closely together with regard to family cases (i.e. family lawyers, social workers, and psychologists). Other courts developed a programme to reflect specific organisational issues. One pilot project of

66 Ibid., p. 115.

67 Ibid., p. 116; Although there is a debate at the moment because of the Outreau case that criticises the magistrates' school, see http://usma.apinc.org/article.php3?id_article=173 for key issues of the Outreau case and the reforms being discussed for the whole judiciary because of it.

68 M-L. Cavrois and M. Cardoso, 'Des démarches qualité en juridiction et au casier judiciaire', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation française, Paris 2002, p. 119.

69 Ibid., p. 120.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

a court initiative had a big impact on national policy and that was the 'Guichet Unique de Greffes.[70] This was created in order to enable users to do certain tasks at court as efficiently as possible. To that end, a central point of reception was set up, which meant that there was only one point of procedural entry. This itself reduced the bureaucracy, red tape, and the need to send everybody to different points of the court. This pilot was eventually government funded and became very successful.

Following on from this is the category of evaluation of quality.[71] According to Dalle this has two aspects: firstly, creating indicators to measure and evaluate the quality of justice; and, secondly, the quality of the information itself and how it is developed and managed. In terms of indicators themselves, they should give a clear picture of the activities of all courts, enable a comparison between courts, and allow the courts to evaluate their own performances by ensuring easy dissemination of information; and allow a fairer distribution of resources based on indicators of activity and performance.[72] Many of these elements have been introduced in section 12.2. in describing the new finance law. Whilst it is clear from the new finance law that its purpose is to ensure a system of resource distribution based on indicators of performance, it is not clear if courts will be in a position to use information gathered in any other way to improve the quality of their functioning in line with national policy change and constitutional law.

However, indicators are not necessarily the only way to go about evaluating justice. In 2000, the Ministry of Justice started to research into the needs of citizens of the judicial organisation and justice system.[73] They started to look at the compatibility of ISO 9000 norms, which deal with quality management geared towards the clients. Certain commentators have debated the practicality,[74] in spite of indications of the compatibility of the norms with the organisation[75] of the research. There was also some expression of cynicism that it would simply be a publicity stunt. In 2001, a user satisfaction survey was developed based around five themes: the institutional inde-

70 The expression of guichet unique is used in other public services to mean a unique reception of public services. In this case, it is a unique reception for the public of services by the clerks of the court – certain notary services.

71 H. Dalle, 'Les méthodes d'évaluation de la qualité de l'activité d'un tribunal de grande instance', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002, p. 171; C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 237.

72 H. Dalle, 'Les méthodes d'évaluation de la qualité de l'activité d'un tribunal de grande instance', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002, p. 172.

73 V. Fortier, 'L'applicabilité de la norme ISO 9001 à l'activité judiciaire', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002, p. 197.

74 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 238.

75 V. Fortier, 'L'applicabilité de la norme ISO 9001 à l'activité judiciaire', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002, p. 199.

pendence of justice, accessibility, rapidity, impartiality and competence of judges.[76] Even though the judiciary is the last 'public service' to conduct such self-studies, the fact that national policy uses citizen perspective to improve the quality of justice meant that, eventually, the courts would have to start paying more attention to the needs of their users.

Despite the policy of paying closer attention to the needs of users, it is interesting to note that (in 2001) there is not an efficient complaints system against the comportment of judges. All complaints go to the Chancellery of the Ministry of Justice, which are then passed on to the High Council. When the idea of a more efficient complaints system was aired, judges protested far too strongly for the idea to become actual policy. However, some first instance courts have conducted some research in this area.[77]

The second aspect of Dalle's definition of evaluation is the management of information, in terms of differentiation and managing. Before the ICT platform took off, the sharing of information was criticised as being vague and often secretive. However, the creation of the intranet is considered more appropriate as it allows the constant updating of information and is fully available.[78]

> 'La justice n'échappe pas aux demandes croissants d'information des citoyens sur le fonctionnement du service public…'[79]

The Ministry of Justice itself believes that ICT development allows the opening up of the service to the outside and the public. They have set up a web site, which gives a certain amount of information. The Ministry also believes that the intranet allows greater participation in discussion forums inside the organisation itself. This has created a more horizontal organisation and affected relations within the hierarchy.[80] The Senate believes that ICT can be used as a management tool to establish indicators to improve the allocation of resources and the quality of public services by the judiciary.[81]

76 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 237.

77 Ibid., p. 238.

78 H. Dalle, 'Les méthodes d'évaluation de la qualité de l'activité d'un tribunal de grande instance', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002, p. 179.

79 Ibid., p. 179.

80 C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003, p. 235.

81 Ibid., p. 235-236.

The judicial electronic data interchange paper from France[82] describes in greater detail the ICT development there. The policy is to ensure internal access in providing every judge with an e-mail address, and access to the intranet; to provide external access to citizens; and, finally, to ensure the development of ethical directives concerning the proper use of ICT in relation to data protection.[83] Even though the policy to develop ICT exists, there appears to be quite a lot they have not dealt with yet. Web sites have been designed primarily to inform users of legal rules rather than on the progress of their cases and so there is no interactive service with the public.[84] This means that information they may not necessarily be interested in, nor even understand, is offered to them, whereas practical information is not (this is not the case in administrative law, where parties can follow their cases on line).

The main problem is that there seems to be an absence of a foundation for developing ICT in the judiciary. For one thing, they cannot decide who should take responsibility for content, the local or the national level.[85] For another thing, there is no legislation on how ICT affects the relations between the courts and users. Lastly, ICT developed as a management tool, rather than a communications tool.[86] According to Biju-Duval however, the main barrier to developing ICT as a communications tool is that only a small percentage of the French actually have or use computers.[87] Given the lack of data on the use of computers in general over the years, it is hard to say whether or not this situation has changed since the report by Biju-Duval was written.

What of the issue of delay? There are legal definitions and sanctions created by the court of cassation and the Council of State, which follow the rulings of the European Court of Human Rights on Article 6 and the right to a judgement within a reasonable time. The aggregate of policy so far seems to move towards evolving the judicial organisation to become more efficient and effective, and thereby to render their judgements within a reasonable time. The contact management policy discussed in the financial policy in section 12.2. goes some way to ensuring that the courts adhere to their certain standard. However, there is no way of saying whether or not a case heard in that particular year is 10 years old or 12 months old. Procedural law itself has been adapted in order to be simpler and the courts must try certain cases within a certain period of time. Again however, there is no guarantee that the courts will perform to the standard set out by law. Nor are there any effective sanctions against the courts performing badly.

82 P. Biju-Duval, J-F. De Montgolfier, A-M. Desgranges and O. Le Clercq de Lannoy, 'Judicial Electronic Data Interchange In France', in *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends*, M. Fabri and F. Contini (eds), Lo Scarabeo, Bologna 2003.

83 Ibid., p. 221.

84 Ibid., p. 212.

85 Ibid., p. 213.

86 Ibid., p. 219.

87 Ibid., p. 222.

12.4 Conclusions

All in all, even though the framework policy provides quite clear guidelines as to which way policies should go, there appears to be a lack of concrete policies to execute that framework. What is clear is that there is a focus on user needs and satisfaction; a focus on ensuring the participation of judges in the process of change; and better management of the organisation in general. On the one hand, it is rather surprising given the clarity of the framework policy, and the public service reform background, that there does not appear to be a cohesive strategy in improving the quality of the whole organisation. On the other hand, it is quite encouraging that there is movement towards balancing the rights of the parties and the duties and obligations of judges and the courts.

There appears to be a division of labour in policy making and execution. The Ministry of Justice has taken charge of long-term policies for encouraging user participation, and ensuring a fairer distribution of resources between jurisdictions. The fact that judges work also at this level of policy making ensures that policies are representative and therefore to some extent legitimated. This can furthermore develop accountability for the institution within that framework, whereas 'community' in French tradition is truly a local cultural issue, which is why it could have been left to the courts themselves to develop their relationship with the citizens in their region. The modernisation mission of the Ministry of Justice also encourages local initiatives and gives support where it can. This reflects the devolution of governance from the centre to the territorial field as described earlier. One can observe in the literature and research many local initiatives of this type such as at the first instance court at Sens.

Whilst the appearance of the policies themselves are not particularly encouraging, if one looks carefully at the activities of the courts at the local level, and the interaction between organisers at the national level, one can see a very slow, obscure movement towards a quality organisation that is closer to the community it serves and an institution which reflects the institutional principles of the constitution.

Whether or not this reflects a long-term balancing of citizens rights and state obligations depends very much on how far these policies actually work, and how well the interaction works between judges and administrators at all levels of the organisation. This is a question to be answered in the further analysis of interviews conducted in France.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Chapter 13

13. Responsibility of judges: Micro level analysis (ordinary jurisdiction)

Having conducted the Dutch interviews and written the analysis, structuring the French interviews and analysis in a comparable way was important to the methodology of this work. Therefore, the French analysis at the micro level follows the Dutch analysis, and discusses the same three main themes. These themes are: the role and responsibility of judges in the courts, the management of judges, and judicial independence.

Chapter 10 Constitutional law and practices of France deals primarily with the position and role of judges within a constitutional and historical framework. This is a theoretical framework that looks, on the one hand, at the role and position of the judges and at the relationship between the judiciary as an institution and the other two state powers. On the other hand, it is a framework for the administration of justice in general. At the micro level, the role, activities and position of judges, and the administration of justice at court level will be examined to see how the courts and judges operate the norms found in the constitution.

The role and responsibilities of judges in courts examines more in detail how the judges operate constitutional norms within the court, whereas managing judges looks more at the role of judge-managers in preserving judicial independence, at the same time as helping to deliver efficient justice. A critical look at how judicial independence operates and how it affects the administration of justice will be given in the part on judicial independence.

13.1. Main role and responsibility of judges

13.1.1. Introduction

This section starts with a short description of the main role and responsibility of judges, as perceived by the respondents. Some insight is then given on how legal quality is defined and operated within the courts where the interviews took place. As with the Dutch case, such an insight can give further definition to the role of judges. Following from this, a part follows on the extra tasks that judges have taken on within the court organisation, as described in various interviews. Finally, a short analysis of the data will be presented.

13.1.2. Main role and responsibility of judges

From the interviews with presidents of first instance courts for major cases, it would appear that judges are mainly concerned with the speed and quality of judgements. According to one president:

> 'All judges are concerned with the efficiency of the judicial system and its quality.'
>
> - President TGI1

According to another president:

> 'There is a permanent concern for speed limits and quality in rendering a judgement.'
>
> - President TGI2

> 'The obligation is to render cases without too much delay. We try to deliver a case within six weeks of receiving it. If a case takes longer than two months, then it goes to the first president.'
>
> - Councillor of Court of Appeal

The Councillor of the Court of Appeal clarifies this position when he says:

> 'One can see that quality judgements are about good jurisprudence, and equally that they judge as rapidly as possible.'

Yet another president develops further on the responsibility of judges when he says that:

> 'It does not come from an economic rationale. It comes from weighing work in terms of the mechanics of the decisions and development of the law.'
>
> - President TGI4

These statements take us more into the definition of the responsibility for quality and quantity. However, before going into that debate, it is important to continue with the role and responsibility of judges in looking at how judges take responsibility or are accountable for their work in court. How the judges take responsibility for their productivity varies from court to court, and as only two of the presidents dealt with this directly, there are only two extreme methods represented here. On the one hand, one president stated that:

> 'The way in which norms of productivity are defined means that a judge produces a certain number of cases each year. And since this is the case, it is possible that a judge could be forced to justify himself for not producing the standard norm.'
>
> - President TGI4

At the other extreme, another president found that there are:

> 'risks to pressurising judges to finish a certain number of cases. For example, the president of a court once suggested that the court should handle a certain number of cases. So the judges started picking the simple cases to meet goals. But after some years, they had a backlog of very hard cases to get through. As a president, I prefer not to set a minimum amount of cases to get through.'
>
> \- President TGI4

The same president does however go on to say that:

> 'Judges are evaluated (non-rigorously) every two years.'
>
> \- President TGI4

These two extreme ways for judges to take responsibility for productivity suggests that productivity norms are not a standard (principle) in French courts. On the other hand, this might suggest that accountability of judges depends vastly on the presidents' willingness to hold judges to account for productivity, or to set benchmarks. According to one of the presidents, as:

> 'there is no standard measure, I post certain benchmarks of my own to work towards, without giving them a general norm on which to base it.'
>
> \- President TGI

Whilst it can be established that the presidents of the courts (who are judges themselves) believe that the judges' role is concerned with delivering rapid and quality justice, so far there is little data to show that there is consistent accountability for the productivity side of their work.
On the more practical side, according to one president:

> 'There is no legal limitation to the hours judges work. They must be available at any time, and they may not strike.'

These are important limitations to the judges' status as defined by law. The right to strike is considered as an international Labour right, and a limitation on hours worked is also considered an essence of Social and Labour law, in France and Europe. The fact that judges are protected by neither would suggest that their responsibilities are too heavy and the public duty too important. (Find quotes)

13.1.3. Legal quality: Measurement and assurance

This then leads on to how judges take responsibility for the legal quality of their judgements. One president of a court basically states, in various ways, that judges are responsible for ensuring the quality of their own work. On the one hand, judges:

> 'must undertake continuous training to stay informed on new legislation. To do this, each judge has 15 days available to him for such training.'
>
> - President TGI1

On the other hand,

> 'Judges receive bulletins of jurisprudence from the court of cassation, and have access to the jurisprudence of all the chambers of the court of cassation via intranet-justice, which allows them to evolve their own jurisprudence.'
>
> - President TGI1

In spite of leaving judges to take responsibility, the same president also described a couple of instruments used at the court to measure quality:

> 'Quality of judgements is indicated by the number of appeals made by parties against original judgements, and by statistics, which describe the average duration of a case, and the average age of a backlog.'
>
> - President TGI1

This quote suggests two things: firstly, that this respondent believes that the definition of quality is linked to the party's definition of quality. Secondly, that quality is linked to efficiency. This is further developed by another president of a first instance court who states that:

> 'Quality and efficiency are compatible. Efficiency is integrated with quality and is the criterion of judicial quality. A decision should be founded on legal principles and should be rapidly rendered.'
>
> - President TGI2

However, when asked later on whether he thought that the pressures of efficiency affected quality, the same president answered:

> 'It is less beneficial for doctrine, but better for the parties. There are fewer argumentations and motivations in the judgements, but they are more direct. Less than 5% go to appeal.'
>
> - President TGI2

These two quotes further link efficiency to the definition of quality. What also appears to be interesting in these quotes is that, on the one hand, the emphasis is placed on the fact that judgements should have legal quality in terms of being motivated based on legal principles, and on the other, quality is linked to the needs of the parties. From these quotes, and the quote above, the latter appears to be the prevailing value.
The third president said that in order

> 'For a judgement to be efficient it needs to be durable and acceptable to all parties, otherwise they will go and look for other ways to get what they want. Therefore to have efficiency one needs quality. I wonder whether the question

> should be reformulated to ask about reconciling rather than balancing the two values.'
>
> \- President TGI3

This quote is very important as it takes the use of the concept of quality further than either of the other two presidents so far quoted. The first part of this quote links quality to legitimacy. The concern for durability suggests that the law be correctly applied and executed consistently, and in a way that can be applied in other similar cases. That it should be acceptable, would suggest the need for motivation. That he does not want parties to go elsewhere is also an aspect of legitimacy: the judiciary works to serve the public in upholding the law. When pressed further on the issue of the quality of judgements, the same president said that

> 'Quality also means that a judgement is not delivered too late. For me, the following characteristics represent a court judgement: 'delais utile', which is different for each case (this is the delay that is reasonable given the resources available); and motivation of the judgement'
>
> \- President TGI3

The quotes from these three presidents would suggest that the pressure for efficiency affects each court differently, affects each president differently, which further affects the type of pressure put on judges, and it affects quality differently. In the first place, the source of pressure differs between them. For the first two presidents quoted in this part, one can see that they take the pressure to be efficient from parties very seriously. Whilst the first one does not mention that this pressure affects the quality of judgements, one should note that quality, in his opinion, is the responsibility of the judges. This is reflected in the fact that he mentions the number of appeals against original judgements as a possible indicator for quality, rather than the number of successful appeals.

For the second president, on the other hand, quality is adapted to party satisfaction, even though it entails a reduced demand for motivation in cases. Again, his calculation is also based on the percentage of appeals. In neither of these cases can one actually determine that the cause is legitimacy, whilst with the third president the basis of his definition appears to be that of producing judgements that are legitimate. The legitimacy of judgements in his definition is concerned with both quality and efficiency.

The fourth president of the first instance courts for major cases, on the question of balancing quality and quantity, said that:

> 'Part of the answer is to find the right length of cases. However, I prefer to see quality decisions than quantity. This does not mean that I will not want to increase performance.'
>
> \- President TGI4

This can be linked to this president's understanding of principles of quality related to justice (as opposed to general principles of organisation). To this president:

> 'Specific principles can be found in Article 6 (1) of the European Convention on human rights, like an equitable process, and impartial judges, reasonable delays, quality judgement and process.'
>
> - President TGI4

The basis of this president's definition of quality is therefore also legitimacy. Though not in the same sense as the third president, this one places more emphasis on legal principles of an international treaty. However, the vagueness in the quotes would suggest that the operation of quality in judgements in this instance is less concrete. The other president dealing with quality as an issue of legitimacy has ways of determining the 'delais utile' in his court. He uses questions such as:

> 'Is that delay too long? If so, is it an urgent case? Do they need extra support and how do they get it? Will this bring the chamber back to the point of 'delais utile'?
>
> - President TGI4

In this one case, the operation of the definition of quality appears to be managed, whereas the fourth president does not follow up as to how he manages quality in his court.

Based on these four diverse interviews, one could possibly say that the operation of quality in judgements is diverse, as are ways to measure that quality. One could also surmise that these judge-managers all consider efficiency to be a part of quality, in spite of what one of them says about finding a balance. This is offset by the fact that he considers Article 6 (1) to be a part of his definition of quality. The fact that these definitions all vary at senior levels of courts, also affects the way judges will be given responsibility for judgements in each of those courts. I will go on next to look at the responsibilities that judges take in their own organisation.

13.1.4. Individual judges within the court organisation

Within the French courts there appear to be official forums of participation in the organisation for judges. For example, there is the General Assembly of the court, which, according to a president of a first instance court for major cases, has

> 'an administrative role in the court.'
>
> - President TGI1

A Councillor of the Court of Appeal described in a little more detail:

> 'Judges are obliged to sit in the General Assembly. There they discuss organizational issues. They sit once or twice a year.'
>
> - Councillor of Court of Appeal

According to the next respondent

> 'Judges can express their opinions on the hearing schedules and the operation of the court in the General Assembly.'
>
> \- President TGI1

As official forums go, this one appears to have a rather vague mandate, and meets rather rarely. It may be for this reason that there are commissions set up to deal with various administrative and organizational issues. The president of one court of first instance says that:

> 'Outside of the General Assembly, there is a commission of judges and functionaries, who are consulted on projects and events affecting the courts. There is also an 'organe de concertation' of the Court of Appeal, where syndicates and functionaries can participate, who meet to examine all interesting questions on life in the jurisdiction within the resort of the Court of Appeal.'
>
> \- President TGI2

Another President of a first instance courts says:

> 'The court has commissions created by election (by judges), which discuss the administration of the court.'
>
> \- President TGI3

The Councillor of the Court of Appeal states that

> 'A panel of people is elected by their colleagues, who meet regularly with the first president of the court, to talk about the organisation of work. They are representative of the General Assembly. These people are much more active and interested than the members who sit in on meetings at the assemblies once or twice a year.'
>
> \- Councillor for Court of Appeal

Furthermore, the Court of Appeal has organised various other official forums to include judges in the organisation of the court:

> 'There is a "réunion service", where the first president meets regularly with all the presidenst of the chambers to discuss organisation. Next, there are regular meetings between the public prosecutor, the chief clerk and myself to deal with management issues. Lastly, there is also the commission of judges and lawyers who reflect on certain cases to ensure that lawyers spend as little time in court as possible.'

Outside of the official forums, according to one president of the court,

> 'As president, I decide which hearing I schedule to which judge and at what rhythm, and after that how I share the cases out. I have a discussion once a year with the judges to discuss case distribution. We discuss whether the distribution

> is good. Afterwards, I decide the number of audiences and the number of cases per hearing.'
>
> \- President TGI1

However, when asked if the judges participated in the organisation, the same president said:

> 'They do not participate. It is not an essential part of their job. They are more occupied with jurisdictional work i.e. decision-making. Apart from the president and chief prosecutor, the judges are not involved in the organisation.'
>
> \- President TGI2

Another president of a different court almost plaintively states that:

> 'The distribution of cases is decided in consultation with the judges. It is difficult to discuss these issues all at the same time simply because of the number of judges at the court, but it is obligatory.'
>
> \- President TGI3

Lastly, the chief clerk of the court described judges' participation in the court organisation in that they

> 'work with clerks to improve the organisation and they propose certain changes.'
>
> \- Chief Clerk of TGI

The Councillor of the Court of Appeal also attends to the judges' participation in projects affecting the court's organisation.

Unlike the main responsibility of judges in writing quality decisions with a certain amount of efficiency, the expectation that judges participate in the organisation is slightly different. Whilst there is the General Assembly, not much detail was given, such as the amount of participation or the numbers that show up to such meetings. Some of these courts appear to have elected commissions of judges to deal with the organisation issues that come up. One cannot say that judges do not participate at all, but the nature of the participation is rather open and vague, even though there are no general complaints on the lack of participation.

13.1.5. Analysis: Main role and responsibility of judges

In terms of the main role and responsibility of judges, it appears that the main expectation of judges from the respondents is that they deliver quality judgements in a reasonable or rapid period of time. Accountability for this appears to be lacking, however. There are only two cases where the president will give responsibility to the judges, otherwise it does not appear to be the case that judges must account for the quality and quantity of cases. This lack of responsibility for the quality and efficiency

of judgements may be linked to the constitutional framework within which the judiciary operates.

The accountability in constitutional law would suggest that the quality of judgements is linked to the moral duty of the judges to be impartial and independent.[1] Even a breach of a moral duty can lead to various disciplinary measures. Accountability for judgements themselves, however, is through the publication of judgements and the possibility to appeal. Quality of justice is guaranteed through two forms of appeal: one to the court of cassation and the other to the court of appeal. That there appears to be a couple of presidents willing to hold judges to account for productivity, would suggest that efficiency, as an organizational norm, is becoming part of the definition of the integrity of the operation of justice. Currently, however, the accountability of judges is limited to this aspect of their work:

> 'Justice is important, but judges cannot be pushed much faster than they are already going.'
>
> \- Councillor of the Court of Appeal

The definitions of legal quality that are used might also suggest some way to go before the French are able to develop quality standards for judgements. On the one hand, many of the uses found in these interviews incorporate efficiency. However, the consequence of this is unclear and different in each case. Furthermore, in some instances, legal quality appears to have an element of service quality in it, in that some respondents link it to what parties would be satisfied with. More interesting are the respondents who link the quality of judgements with the legitimacy of justice. These are two very different issues, and in my opinion, the first trend is more worrying. These varying definitions can lead to the hypothesis that judges' responsibilities in courts as regards quality and efficiency, outside of the constitutional framework, vary considerably, according to what the president of their court demands of them (or not, as might be the case).

In terms of judges' responsibilities in the organisation, there are various official and unofficial ways that they can voice their opinions on the organisation. For the most part, however, it would appear that participation is vague and open. As regards the General Assembly, it is suggestive of democracy in the organisation. However, as with all democracies, participation is optional.

13.2. Instruments to aid judges in courts

13.2.1. Introduction

There is quite a depth of information provided on various instruments to aid judges. For the most part the aid appears to come in human form, in the shape of, firstly, 'assistent de justice', secondly clerks, and thirdly 'greffier assistent de magistrats'. On

1 Refer to Chapter 10 Constitutional law and practices (France).

the other hand, ICT plays a big role in helping judges produce more, faster. Training is also considered to be an instrument to aid judges.

13.2.2. Assistent de justice

In terms of this position, it appears to have different job descriptions in different courts. In the first court, the respondents said about them that:

> 'They work in urgent measures in civil law, on the one hand. On the other, one of them works with me, to prepare and research the jurisprudence.'
>
> - President TGI2

When asked about the quality of the work done, and whether judges trusted this position or not, the respondent replied that:

> 'There is no problem with the quality of the 'assistant'. They are now integrated into the equipment of the court.'
>
> - President TGI2

At another court, the 'assistant' has a slightly different assignment. According to the President:

> 'Each chamber has a judicial assistant at their disposal. They help with research in law and with more repetitive cases. There are two others who are assigned to the library and are dedicated to keeping the court up to date with changes in the law.'
>
> - President TGI3

Other respondents mentioned this instrument in passing, including the Councillor of the Court of Appeal:

> 'Judges work with the judicial assistants, who are older students, and help the judges with research. The judges have confidence in them.'
>
> - Councillor of the Court of Appeal

Even though rather inconsistently used across the courts, this instrument appears to give some real aid to judges in helping them ration their time by doing the research for simpler cases. There appears to be no problem of mistrust, and judges appear to be willing to work with them.

13.2.3. Clerks

Next, there is the clerk's position (greffier) at the court. As judges are now typing out their own judgements, clerks have more time on their hands. When asked what they do with this time, one respondent said:

> 'The clerks do more preliminary research, summarise case files, and prepare judgements for simple cases.'
>
> - President TGI2

The chief clerk interviewed said:

> 'Clerks stay busy with dealing with parties, managing files, sitting in hearings and going through judgements typed out by judges.'
>
> - Chief Clerk of TGI

This is a rather odd switch to my mind. The judges type out their own judgements (and in some places they are read through by clerks for typing errors), which give them less time for judgements. Whereas, the clerks have taken on some of the tasks of judges in terms of preliminary research, case summarizing and, in some places, preparing actual judgements in very simple cases. Why does this seem odd? Well, the judge has taken on some of the clerk's duties, in typing out judgements, and clerks have taken on judicial duties. When asked what happens if the job of the clerk changes and they need further training, the chief clerk responded that:

> 'Two things can happen: they can receive training on site by the chief clerk, or they can receive training at the level of the 'département'. There a group of clerks from the region will come together to be trained as a group at the Ecole Nationale des Greffes at Dijon.'
>
> - Chief Clerk of TGI

In general, clerks are trained at the Ecole Nationale des Greffes at Dijon (National School for Clerks). Prior to such training they must attend university, pass a highly competitive test, and then follow and internship. This kind of training goes to ensuring the high quality of assistance to judges.

13.2.4. Greffier assistants de magistrats

On top of the 'assistants de justice' and clerks, two of the places where interviews took place were conducting experiments with a new position: Greffier assistants de Magistrats. In the first place, they are described as:

> '... clerks who are especially trained to do the work of the 'assistants de justice'. I believe that they will eventually come to replace the 'assistants de justice' position. Their main task is to make the judgements which are very simple and pose no difficulties for the judgement.'
>
> - President of TGI2

At the Court of Appeal, the Councillor interviewed said that:

> 'This position was created to collaborate more closely with judges. They can do very simple research under the responsibility of one of the judges. It is difficult to say whether judges have faith in them or not.'
>
> - Councillor of the Court of Appeal

On the one hand, this position acknowledges the current practices that clerks already appear to assist judges in this way. On the other hand, it provides these clerks with further training to handle the higher responsibility. This would appear also to be a more efficient position than the 'assistants' position, as an assistant can only work twice a week, and only older students are appointed (which at the same time implies a higher turnover rate of staff, as students tend to graduate and move on to full-time jobs).

13.2.5. Other instruments to aid judges in their work

ICT

This leads to the non-human instruments to aid. Firstly, there is ICT. One of the respondents considers it to have:

> 'an essential role in the augmentation of the productivity of courts. Every judge types his own judgements and work is transmitted between judges and clerks via 'intranet-justice'.
>
> - President TGI1

Another respondent considers that:

> 'It is very important for treating texts. It is faster and a small revolution for everyone's role. Now, everything is done on a computer. With this change, there is a gain in productivity, the quality of the decision, in summarising, and in terms of the quality of research on the internet'.
>
> - President TGI2

Other respondents, who are also presidents of TGIs, mention the role of ICT as a tool in passing. However, some elaboration is provided by the chief clerk and the Councillor of a Court of Appeal. In the first place, the chief clerk said:

> 'Increasingly both judges and clerks are receiving training for ICT to keep up with software and hardware developments.'
>
> Chief Clerk of TGI

In the second place, the Councillor said:

> 'Everyone works with a computer and all services use ICT. There is software at every phase of case evolution. All judges are available by e-mail. During the 31-month initial training period, judges are given laptops to use.'
>
> - Councillor of the Court of Appeal

When asked if all judges used the computers, the Councillor went on further to say:

> 'It varies. There are 3 judges who refuse to use the technology. Some are well trained to use computers, and others use them less well. Some think it is only for typing judgements but it is much more than that. Others simply find it difficult to use.'
>
> \- Councillor of the Court of Appeal

Training

After ICT, training is another possible instrument to help judges in their functioning. On the one hand, judges get continuous training in order to keep up to date in the law.

> 'The training of judges is an important element of their independence because they must be informed of new legislation to be able to apply the law'.
>
> \- President TGI1

On the other hand, another president of TGI says that:

> 'once judges have completed their training, they can receive more specialised training afterwards. Once they have completed their initial training of 1 ½ years, they can receive more specialised training within the court, with older judges.'
>
> \- President TGI3

Furthermore, next to training for ICT:

> 'Judges can choose to undertake training in time management through the school for continuous judicial training, but I don't really know the numbers.'
>
> \- President TGI3

The chief clerk points out on this issue that

> 'Judges are beginning to receive training on their time management. At the moment however, it is mostly the clerks that receive that training, I take some time to teach at the ENM (National School of the Magistracy) to train judges on certain aspects of management.'

The Councillor from the Court of Appeal adds his opinion when asked if judges receive training in time management:

> 'No, because the work of each judge and the time it takes depends upon the nature of cases. Therefore it is unnecessary to give training in time management. Plus, time management is too limiting. There is no permanent pressure to watch the time. People work from home, in the evenings and weekends. There is constant pressure, and no time to reflect on time at work.'
>
> \- Councillor of the Court of Appeal

13.2.6. Analysis: Instruments to aid judges

There appears to be a rather comprehensive array of instruments to aid judges, even though it also appears that they are inconsistently utilised in various places. One could say that the most consistently utilised 'equipment' would be the clerks, although that position also appears to be rapidly changing and evolving to do more than clerical work.

However, in each case, all instruments seem to be managed with flexibility according to the needs of the organisation. This fits with the national policies on clerks as described in earlier in that the clerks' role is expanding within the courts.[2]

The flexibility in the use of the equipment appears to be quite broad. Whilst the assistants de justice position is set out in the law, it appears to be utilised in various ways across the courts. The changing role of clerks also appears to be beneficial in the management of the courts' organisation. The courts have modern technology available to them, and training. This forms a positive support structure for the judges to work in. Due to the lack of trust exhibited towards new technologies and assistance, judges appear to be reluctant to use them.

From this data, one cannot discern much evidence of judges themselves being managed in a daily organisational setting. Going back to Longman's definition, one needs to look for elements of directing or controlling a department and the people, equipment and many involved in it. This section looks only at directing people and equipment.

In terms of people, one cannot find a pattern of directing. It would appear that judges do things in their own way, with or without the president's encouragement. Responsibility for the way they work was mentioned only once, and in relation to the hearing schedule.

Evaluation systems for judges do not appear to be operating as a matter of policy in these courts. Where there is a system mentioned, the respondent himself does not appear overly impressed at its impact. In terms of judges' daily performance, one can hypothesise that judges have near total autonomy in the way they work. The only condition would be that they conform to the hearing schedule, and be willing to work very hard (without the protection of the right to strike or legal working hours). Nobody has said anything about sanctioning judges for poor performance in the organisation. Even informally, one cannot say that peer pressure to conform is present. The picture basically presented is that judges are working so hard that management is either unnecessary or ineffective.

Any problems that judges have would be discussed first, and the solution found. Yet the manager of the court will throw resources at the problem before reducing the work of that judge. It would appear to be a last resort because they must consult all judges before redistribution takes place. This somehow gives the impression that redistributing can be a rather bureaucratic and inflexible solution. It also gives the impression that there is no flexibility in managing judges. Given this impression, the

2 Refer to chapter 12 Organisers and policy, section 12.1.1 Local court administration.

ability of presidents of chambers and courts to redistribute equipment according to the needs and priorities of the court is understandable.

However, where judges are managed is in their decision making in cases. A few respondents stated that presidents of chambers follow the evolution of cases quite closely. This would suggest that quality control is far more important in organisational terms, than the working methods of professionals within the organisation. One could put forward the hypothesis that presidents of chambers act as quality controllers more than managers.

Two possible hypotheses can come from this: firstly, that an informal distinction between judicial independence and organisational autonomy exists. Organisational autonomy is there simply based on the fact that judges do not really appear to be managed, and there are no sanctions for poor performance. Judicial independence, oddly enough, is highlighted by the fact that judges' decision-making process can be, and in some cases is followed closely by the presidents of their courts or chambers. This leads to the second hypothesis that judges are not managed, but judge-managers do manage the quality of work that goes through, and the court organisation itself assists the judges in their daily functioning. This enforces, on the one hand, the organisational autonomy of judges, but tries to enforce high-quality judgements through management. These hypotheses mean that judicial independence applies not only to the judge but also then to the organisation.

13.3. Judicial independence

As has been established already in the Dutch analysis, judicial independence operates in three different ways at micro level: firstly, it operates in the context of decision making in cases. Secondly, it operates in terms of the way in which judges function at the level of the organisation. Lastly, it operates in a relationship with judicial accountability.

The odd thing as regards the interviews at the ordinary jurisdiction in France and the issue of judicial independence at micro level is that there is only indirect reference to it. It will be possible to infer how judicial independence operates based on these references and that is described as regards decision-making, organisational functioning and judicial accountability. For the sake of consistency, and also to give some concrete ideas as to how judicial independence operates, this section will follow the structure of the Dutch analysis.

13.3.1. Decision making

According to Article 64, judges are independent and exercise independent judgement. Next to this, one could hypothesise that the definitions of quality and quantity/efficiency operating in some French courts form a framework in which judges operate independent judgement. However, no tangible measurement or quality indicators exist that judge-managers use to enforce high quality of judgements, aside from the traditional measurement of counting appeals.

One could also say that the protections set out in law, especially in the government order 1270, the code of the judicial organisation and the recent concerns for the ethical

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

framework of the judiciary form a formidable framework in which judges work. Given the extensive training and socialisation process, one could say that they are the professional bureaucrats under Mintzberg's definition, and that they operate within the value system they have been trained in.

However, one practice from some of the courts would suggest that the decision-making of judges is controlled. That practice is where presidents of chambers (or in the case of small courts, first presidents) follow the evolution of cases and sign off on all completed judgements. This practice does not appear to be consistently exercised. Where this occurs, judicial accountability is greater than independence, but only among peers. This would bring the independence of individual judges under the protection of the independence of the president of the chamber, who has taken on the responsibility of controlling the quality of work.

In order to gain a clearer insight into the operation of judicial independence in decision-making, further research needs to be conducted, firstly in the way in which judges are trained and educated. An outline framework is insufficient for this task; one needs to look in-depth at the curriculum and practical training received. Secondly, research within the courts and with judges needs to be conducted, asking judges personally how they protect their independence in decision-making, and asking presidents how they protect the independence of the judges in their chambers.

From the information gained from the interviews conducted, one can infer a framework of norms, but these are vague and, at times, undefined. On the other hand, no concern was expressed either for the quality of work or for the independence of judges. Whether or not these are even issues can also be a point of investigation.

13.3.2. Organisational autonomy

One can infer a conceptual distinction between judicial independence and organisational autonomy in the references and quotes from the interviews when discussing working methods, and organisational participation and decision-making. As regards working methods, only one president interviewed had any demands: on the one side, judges need to conform to hearing schedules, and on the other they need to produce a certain number of cases a year. Next to this, judges do not appear to be managed in any of the other courts where interviews took place. Where judges have problems, presidents, both of chambers or courts, will try to boost support to them, discuss the problems and see what solutions are possible. Beyond this, judges are not managed in terms of the time they work, nor sanctioned for poor performance. In effect, they appear to have near total autonomy in the way they work.

Regarding participation, all judges participate in organisational decision-making (especially case allocation) in the General Assembly. It is here that the workloads of judges are fixed throughout the year. On the one hand, it is a democratic process to ensure an equal or at least fair distribution of work. The inflexibility in distributing cases is also a guarantee of independence in that it enforces the rule of immovability of judges without their consent (as set out in Article 64 of the Constitution).[3] This goes

3 Refer to chapter 10 Constitutional law and practices, section 10.3.1. Ordre judiciaire.

to enhancing the professional bureaucracy of courts and judges in France, whereby there is a lack of distinction between judicial function of decision-making and organisational autonomy in working method.

Such organisational participation also goes to enforcing organisational autonomy. Organisational autonomy and judicial independence do not appear to be connected in the interviews. What one can infer is that presidents are sometimes reluctant to manage judges for practical reasons. For example, one president described the anecdote whereby judges were given easy cases to reduce the backlog; however, the backlog, in the end, only consisted of difficult cases. On the other hand, the Councillor of the Court of Appeal said that judges were working to full capacity and could not be forced to work any more.

The inference of a relationship between the two concepts could only come from the participation in the General Assembly. The possible hypothesis at this point would therefore be that judges also enjoy near total organisational autonomy.

13.3.3. Accountability

Given that the hypotheses in the last two parts amount to near total independence and autonomy, the only thing one can say is that, in practice at least, there appears to be a deficit of accountability for decision-making and organisational functioning. In terms of decision-making, that there is quality control at the level of the chamber or court, would suggest that there is an informal framework of accountability between judges and presidents before the final decision is published. After this, one must rely upon the legal and constitutional framework, wherein all judgements must be made publicly, and are all subject to appeal at a separate and higher instance. The latter is an indicator used by some presidents, but it was not really told what had been indicated in terms of successful appeals. The willingness of several presidents to take into consideration the needs of parties indicates a willingness to be more transparent and therefore accountable for the way in which the court operates, rather than the way individual judges operate.

In terms of accountability, there were also no complaints or problems directly highlighted. This could again come from a rather strict framework founded in law and the constitution discussed in the chapter 10 as regards ethical behaviour and disciplinary measures on the one hand,[4] and the law on appeals and public hearings on the other.[5] The data from the interviews do not make it possible to make more assumptions or hypotheses at this point. The hypotheses developed here have been, for the most part, inferred from certain practices described or indirectly discussed. Again, one would have to conduct further research on the way judges are trained in ethical issues to understand the operation of accountability at this level. In terms of discipline, appeals and public hearings, a look at statistical data (if any) could give some indication of how well these mechanisms operate effectively as mechanisms of accountability.

4 Refer to section 10.4 Judicial independence and integrity.

5 Refer to chapter 11 Institutional context of the French judiciary.

13.4. Conclusions

At the micro level, a similar attempt as in the analysis of Dutch interviews has been made to describe how the independence of individual judges is operated, and the position of judges in the French court organisation itself. This attempt was based on interviews with presidents, a clerk, and a councillor of a court of appeal. Similar to the Dutch analysis, the resulting representation tries to clearly reflect their perceptions and my interpretation of that perceived situation. In other words, it reflects the 'truths' (the espoused theories[6] of those who were interviewed and my interpretation of their meaning) rather than 'the' truth.[7]

The chapter was divided into three sections: the role and responsibilities of judges in courts; managing judges; judicial independence. The section 'role and responsibilities of judges in courts' examined in some detail how the judges operate constitutional principles within the court,[8] whereas the section on 'managing judges' looks more at the role of presidents in helping to deliver efficient justice, at the same time as preserving judicial independence. A brief examination of how 'judicial independence' operates and how it affects the administration of justice in courts was then described.

What came out of these descriptions?

On the one hand, it would appear that the main responsibility of judges is to render decisions in cases with quality and as fast as possible. However, there is no structure of accountability in place in the situation where this does not happen. In order to put the main role of judges into perspective, some quotes were given from the interviews concerning the quality and quantity of judgements. From the data gathered it seems that legal quality is a matter of practice and therefore also to some extent a matter of subjective interpretation. There are no tools to measure legal quality, and neither do they appear to be actively creating tools to measure legal quality. Judges seem to be responsible for writing judgements, but then the president of the court or chamber has further responsibility for checking the work and adding his signature to the decision. This practice varies depending on the personality of the president in question, i.e. whether he is controlling or not.

In the second place, whilst most of the respondents have prioritised the rapidity of rendering judgements, there is no real activity that supports this. Very few of the respondents set quotas for the judges to meet, and there is no form of reprimand if judges do not meet these quotas. On the other hand, there also did not seem to be much of a feeling of urgency as regards the workload of the courts where interviews took place. Given the activity in controlling the quality of work rather than managing judges, there is an indication that the legal quality of the work takes priority over finishing on time for some of the respondents involved in these interviews.

6 C. Argyris and D.A. Scön, '*Organizational Learning II: Theory, Method, and Practice*', Addison-Wesley Publishing Company, Reading, Massachusetts 1996, p. 13.

7 C.K. Riessman, 'Analysis of personal narratives' in *Handbook of interview research: Context and Method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, London, New Dehli 2001, p. 704.

8 Judicial independence and accountability as described in the chapter on Constitutional law.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Given that the definitions of what those interviewed meant by quality and quantity of judgements varied, this is also an indication that quality does not have a set standard in the courts, and that it also depends on the standards of those in management (and of course the presidents). For those with the users or clients in mind, quality might simply mean writing a judgement in a way that the clients will understand and keeping it as brief as possible without too much reasoning. On the other hand, for those who connect quality with legitimacy, there may be a tendency to give as much reasoning as possible in the judgements, regardless of whether the clients understand it (which is what lawyers are paid for – interpretation of judgements and making appeals if necessary).

It seems that there is no apparent directing or controlling of judges' activities within the courts, except for case distribution, and even that is not fully controlled by the president of the court. For another thing, there is no possibility of sanctioning if judges do not comply with or conform to management policies. However, judges' membership of the General Assembly or the commission that represents the General Assembly means that they participate in the administrative decision-making of the court and therefore have some incentive in complying.

Presidents of the courts can organise the support structure, and they can do it to support judges in their work. Given the consistent advance in technology, the development of the positions of clerks and judicial assistants, and the availability of training, there is much that a president can do to steer the court, if not the judges, towards certain goals.

From the description and analysis so far, judges appear to have near total autonomy in their work, both in terms of the way they work and in their decision-making. Here, there is a distinction between judicial independence and organisational autonomy, because in the first place constitutional law controls under what circumstances a judge makes a decision (i.e. rules of impartiality), and, in the second place, the president of the chamber or court may take responsibility for controlling the quality of the decision. On the other hand, judges are not managed in the way they work. They are completely organisationally autonomous. However, judicial independence is limited by constitutional law and the presidents of the courts.

Chapter 14

14. Court organisation: Meso level analysis (ordinary jurisdiction)

14.1. Introduction

In following the meso-level analysis of the French interviews, I shall look at court management as an issue by itself; the quality of justice, which deals with case management of the courts, quality measures and indicators operating at court level; and finally communications. As the interviews do not seem to have delivered much by way of data on communications, externally or internally, I have left it as part of the quality of justice section. Finally, some conclusions will be given, reflecting on the quality of the organisation in terms of management and external relations.

The policies and organisers described in chapter 12 shall be referred to again throughout this analysis in order to give a snapshot of the framework in which these organisations are operating.

14.2. Court management

14.2.1. Introduction

In chapter 12 a framework of theory and policy on who organises the judiciary was given. Certain key themes could be identified: firstly, there was the 'politique juridictionnel', which is a collective term for both administrative management (gestion administratif) and jurisdiction or management. Secondly, the relationship between the President of the court and the Chief Public Prosecutor is highlighted, with further attention given to the role of the Chief Clerk in this management team. The concern for the quality of the management is reflected upon when thinking about the education and training the diarchy receives in order to effectively manage the court. Further attention is given to quality management with the demand for transparency. Finally, the constitutional condition of the judicial independence of judges is dealt with as a reason for a judge as president to take on an administrative role and the analysis that follows will reflect these issues to some extent.

In terms of the 'politique juridictionnel', this has been dealt with to some extent in the Micro section on 'managing judges'. It shall be further divided into the management of the court, and case management (which will be discussed in the part on quality of organisation). In this section on court management, I will also include various

respondents' beliefs concerning the connection between the judicial independence of judges and the management of courts.

Unfortunately, whilst something has been said about the relationship between the first President, Chief Public Prosecutor, and Chief Clerk in various places, it is not substantive enough to add very much to the debate which is ongoing in France, though it is enough to give an outsider a snapshot of the situation. On the issue of quality of management, more substantial information has been given about training and recent measures to enforce some transparency in the operation of courts. The final analysis in this part will hopefully give some insights as to how well policy operates at court level.

On a comparative note, the structure of the French analysis follows that of the Dutch analysis; however, the French have not created a position of integral manager in the courts. The judge manager with the most influence in the courts in France is then the president at the level of the court rather than the 'sector'. The French courts also do not necessarily follow the same structure as the Dutch courts, with much depending on the size of the court, thereby making court-level management of comparable interest within this thesis. In this section, the courts of first instance for major cases (Tribunal de Grande Instance) will be referred to as TGI.

14.2.2. Management of the court: Who?

According to the President of a TGI,

> 'the court is managed by the President, the Chief Public Prosecutor and the Chief Clerk. Furthermore, there is a commission, consisting of both judges and civil servants of courts, which is consulted on all projects and events affecting life at the court'.
>
> \- President TGI1

According to another President of a TGI,

> 'the management of a court is an extremely collective activity. In France, there are three people responsible for the management of the court: the President, Chief Public Prosecutor and the Chief Clerk'
>
> \- President TGI2

According to a third President,

> 'next to the President's managerial role, there is a General Assembly, which also has an organisational role in the court'
>
> \- President TGI4

In accordance with the policy described earlier on, there is indeed a diarchy described here between the President of the court and the Chief Public Prosecutor. However, that the Chief Clerk is mentioned twice as a position responsible for the management of the court, could imply that in two of these three courts, a triumvirate is operating to steer

the court, rather than simply the Chief Clerk having an assistant role, as implied by the policy description. This could also go to confirming earlier research, which suggests that the practice of a triumvirate rather than diarchy is taking responsibility for the courts' organisations.

Whilst these three have the main responsibility for managing the court, the representative body of the General Assembly and the commission gives a certain democratic nature to the direction of the court, in that judges (both sitting and prosecution) and civil servants have a say in how the organisation should be managed. The elevation of the Chief Clerk as having equal responsibility in the court may also be down to representation, given that there are often more civil servants and judges, and to form an essential part of the functioning of the court.
According to a Chief Clerk:

> 'Whilst the President is responsible for the court, he or she cannot be charged with mismanagement. He or she is responsible for the work and productivity of the judges.'

In the general introduction to his interview, the Chief Clerk gave some background information about his position and the court itself.

> 'This is an administrative position, which is mainly concerned with managing the budget and finances of the court and all of the clerks (276). I am also responsible for managing and organising or procedures at the court in civil and criminal law. Management of the whole court is done with the President and Chief Public Prosecutor.'

This is quite a large range of administrative tasks at the court. This respondent goes on to elaborate on all of these tasks. In the first place, and concerning budget and finances,

> 'I am responsible for all of the budget at the court and am accountable to the Cour de Comptes and the Ministry of Justice. I am criminally liable for mismanagement of the court.'

This could point to the idea that, even though the President is the head of the court, the Chief Clerk has the highest responsibility for managing resources and the budget, especially in light of criminal liability and the lines of accountability towards the Cour de Comptes and Ministry of Justice. This is another indication of a triumvirate rather than only a dyarchy operating to manage the court. This could also be an indication that the distinction in 'politique juridictionnel' between 'gestion administratif' and 'gestion juridictionnel' can no longer be strictly adhered to. It is not simply a distinction any more between those who manage judges and prosecutors and those who manage administrative staff. The management of resources is important to the whole court and affects the quality of justice, and as one President said:

> 'The material resources given to judges constitute an important element of their independence. The judge must be financially independent, and must use an

> office at the Palace of Justice and resources in order to render justice in complete 'serenité'.
>
> \- President TGI1

As regards the management of clerks,

> 'I prefer the rest of the clerks to take responsibility for their work, and I believe that each service reflects this. However, I am responsible for training clerks in law, ICT and I am responsible for their work. There are nine other head clerks at the court for each chamber or service. We meet once a fortnight to discuss any problems. This way, any solutions taken are transparently made and they understand the priorities of the court.'

This indicates a team effort to manage the courts, and that the Chief Clerk does not take the burden on to his own shoulders. Another indication of teamwork in the court is that

> 'myself, the Chief Public Prosecutor and President meet once a week to discuss organisational issues between us. There are sometimes conflicts between staff, but nothing serious. In general, judges respect the management of clerks by head clerks.'

This would be an indication, perhaps contrary to earlier indications, that even though the distinction between 'gestion administratif' and 'gestion juridictionnel' is no longer really useful in court governance, it might still be part of the mentality between judges and clerks. This is an important insight, because even though a triumvirate can be seen to have responsibility for the management of the court, in fact there may still be two (or even three, if one considers the prosecutors) organisations operating separately in the court: administrative and judicial. Ultimately, in a climate where courts are seeing a lot more work, this is considered to be an ineffective way of working.[1]

Finally, as regards the issue of organising procedures at the court, the Chief Clerk expands upon this, when he says:

> 'In my unique position of understanding legal procedures and principles as well as management, I have a say in legal developments and court organisation in France. I can discuss new procedures with government and can say if I find certain procedures inefficient or cumbersome. I am part of the committee to ensure the smooth adaptation and application of new rules at the court.'

If done right, this would help the court maintain a certain quality in its organisation, at the same time as being able to contribute to an ongoing discussion on the efficiency of procedural justice in France. However, one of the challenges faced by the courts, according to one of the Presidents

1 Refer to theoretical framework on organisation quality and learning organisations.

> 'The courts are not always given enough time to adapt and enforce new procedures and rearticulate functions. It is a problem of organisation e.g. with the recently introduced 'comparution', judges still need to ensure that defendants understand their rights, have had access to lawyers, and have understood the agreement.'
>
> \- President TGI3

That the Chief Clerk has many responsibilities in implementing new procedures suggests that judges also have a role to play, depending on the nature of the procedure. This might suggest that the nature of procedures like the organisation of judges and administrative staff is between primary processors and more complex processors that are the judges' responsibilities.

14.2.3. Management of the court: Normative basis

The question then arises, if the President cannot be charged with mismanagement, how does he or she perform his or her tasks, and on what basis. Starting with the court, there are a couple of interesting quotes available. According to a President at a first instance court of major cases,

> 'One cannot separate the function of judging and management in a court. The management of the court is the utility of service to the functioning of the judge. This would explain why the administration should be placed under the responsibility of the President of the court, who then delegates in practice the function of management to the Chief Clerk.'
>
> \- President TGI1

In a different court, the framework for managing courts by judges does not come from the same angle. There the President said:

> 'Courts are organised by the Code for the Judicial Organisation. This Code tells you how many chambers one court can have, who works in those chambers, and how they are distributed. However, this Code is very difficult to understand, is very old and very old-fashioned in the way it works.'
>
> \- President TGI4

On the one hand, the first quote suggests that giving management responsibility to judges through the presidency and the General Assembly safeguards judicial independence. On the other hand, the second quote would suggest that there is a rather stricter limitation on how the President may manage a court. The role of the General Assembly can also be said to have a limiting role if it operates properly.

Beyond these normative frameworks, not too much has been said by the various Presidents on management techniques. The President who talked about the Code of the Judicial Organisation continued to talk about the developments in judicial organisation and the questions raised that must be dealt with by the management of the court.

> 'In the last 15 years, questions have arisen over quality: i.e. what does it mean to have it? These have also raised questions on the economy of justice, such as the efficiency, and the management of resources. Certain aspects of the functioning of the judiciary are comparable to other public services. In terms of quality of organisation, on the one hand there are general principles of organisation such as ensuring an adequate welcoming area for the parties, accessibility for handicapped people, comportment of judges etc.'
>
> - President TGI4

Whilst this is still within the realm of the hypothetical and theoretical, it is suggestive of the techniques and concerns of this particular President.

On a more practical note, the President of a different TGI says, when asked whether they have had to deal with an increase in cases,

> 'No, but we have seen an increase in our productivity through reorganisation and reprioritisation.'
>
> - President TGI2

This particular President, in his introduction, had told me that he had only recently started in this position, when his predecessor had moved up to the Court of Appeal. With the terms 'reprioritisation' and ' reorganisation', in a situation where there is no increase in cases but rather a large backlog, it occurred to me that it was possible that the success of the court in terms of dealing with cases depended very much on the techniques and leadership of the President. When confronted with this issue, he said

> 'It often depends on the President, because it is a working method issue.'
>
> - President TGI3

Another President said that the use of their ICT systems allowed him to use

> 'statistical information from each chamber, and to act accordingly with the knowledge of the situation at the court.'
>
> - President TGI3

In the same way, the President above also exploits the ICT systems in managing the court and cases.

14.2.4. Quality of management

One of the issues that came up in the policy discussion was the concern that judges were not trained in administration, and therefore may not be sufficient for the task. One of the Presidents asked about this issue, answered that

'The School of the Magistracy offers initial and continuous training for the administration of courts. Increasingly, judges are becoming familiar with administrative questions.'

- President TGI1

The next President asked about this went into some more detail

'The School offers a module of two to three days every two months. There are plans for training in the areas of: managing information, management of the court in general through new techniques. There has also been training organised on LOLF. This has been targeted at the President, Chief Public Prosecutor and Chief Clerk, as a priority for management.'

- President TGI2

Similarly the next President affirms, without detail, that there is training for the management of courts. The Chief Clerk said that the

'The School gives a course to help the President, Chief Public Prosecutor and Chief Clerk learn to work together as a team to govern the court.'

Finally, the Council of the Court of Appeal states that

'There is training for the heads of Courts of Appeal and first instance courts with the Chief Clerks. They have a very rich training programme at the School.'

This data suggests that training is given and well received by those in management functions at the courts. That training is given to the diarchy and the Chief Clerk is again an indication that in practice a triumvirate manages these courts, and the training policy has been adapted to that end. At the end of the day however, Presidents are still primarily judges rather than managers. However, as has been discussed already, the successful management of a court depends upon the President and his or her working effort.

However, the quality of management is not only a question of training, and developing a blueprint of activities, it is a matter of accountability and transparency. To that end, the new financial law was implemented. According to a President of a TGI, this law will be a

'budgetary revolution, which will be more rigorous in demanding accountability and efficiency from all public services including the judiciary. It will also give more autonomy in terms of finance, operation, and management aspects.'

At the Court of Appeal, the councillor interviewed there gives more detail on the nature of the accountability under LOLF. On the one hand,

'we are engaged to complete a certain number of cases a year for the supplementary resources were receive.'

On the other hand,

> 'The limitation of LOLF is that the courts are now responsible for the total cost of justice and distributing finances for themselves. The Ministry of Justice used to pay for the cost of justice. With LOLF, everything is paid for in one block for the courts to be self-administered. With a limit on the costs of both civil and criminal law, there is the problem that judges may not be able to make all the inquiries they need to, for example the use of DNA in criminal cases, or phone calls etc. because it costs too much. I feel this obligation may breach judicial independence. There is a gap between the right economy for the quality of justice and the resources they receive to dispose of. This is a big constraint and a disadvantage to society if they cannot prosecute suspects. The LOLF is something that the First President and the Chief Public Prosecutor (Procureur Generale) are currently working on.'

However, it is newly implemented, so I will not be able to draw any hypotheses as to the success of the new financial system. More will be said about LOLF later on in the Macro analysis of interviews.

14.2.5. Analysis: Court management

Court management has one clear feature, and that is the development of the triumvirate of the First President of the court, Chief Public Prosecutor and Chief Clerk. I use the term development, because whilst it is clear that the Chief Clerk takes on heavy responsibilities for the court and works with the other two in training to manage the court together, they still deal with a court which appears to be conceptually separated into judges and administration. Furthermore, it cannot be said that only this triumvirate operates in terms of management. The General Assembly and other committees representing the General Assembly also have an influence in the management of the court.

These parties to management also have to operate within normative frameworks of procedural law, the Code of the Judicial Organisation, and of course protecting the constitutional law on judicial independence. There is now the framework provided by the new Financial Law. One cannot say that there is a gap between the policies described in chapter 12 and this short description of court management. However, one can also not say for sure that the policy and legal framework gives direction to court management that the President can find in any way useful. What one can say is that successful court management does not necessarily depend on following certain policies, but rather depends upon the personality and competence of the President and his/her relationship with the rest of the triumvirate.

As regards the quality of management, one can also not guarantee, based on this data, that resources in training and LOLF will be sufficient to enforce the quality of management by judges. It is a positive element that the training programme has been developed, and that LOLF has been implemented for the courts, as it brings the courts' performance to the attention of the public.

14.3. Quality of organisation

This section will look at case management, quality indicators and measures. Case management is a core activity of all courts and can provide a basic measuring stick for quality in the courts of the ordinary jurisdiction in France. As this thesis is about the relationship between constitutional values and quality measures and indicators, the role of quality measures and indicators in these courts will also be examined.

14.3.1. Case management

Introduction

As with all other judicial organisations, case management is of course a core activity of the French courts. In this instance, I identify it as being the third part of the 'politique juridictionnel', the other two being the 'management of judges' (discussed in the Micro section), and court management. Whilst not directly mentioned, case management is also a target for national policy to be improved, especially in terms of the Orientation Law 2002, which seeks to arm the judicial organisation with the improved tools and material resources, especially ICT. The priority and aim here is to aid justice in dealing with increasingly heavy burdens. It can be inferred that this means a greater burden of cases in the courts (for whatever social or political reasons not discussed here).

All courts, French or Dutch, will have primary processes in dealing with cases, especially in terms of registration. As I have not carried out an internship in France to understand the more specific nature of these processes, or the technologies they use, I cannot give a similar description as with the Dutch case. Also, in this instance, the Presidents interviewed did not focus on discussing primary processes in their courts. However, one should assume that in France cases go through some sort of registration procedure before being placed in the judges' hands. Whether these procedures are universally formatted or not, and if they are efficient, will need to be looked at in a different research project.

This section will start, therefore, by looking at the approaches of Presidents of courts to case management. The word 'approaches' already suggests that they will not be the same in the different courts where interviews were carried out.

Courts in France, like the Netherlands, have also faced an increase in simple cases, an increase in simple yet similar cases, and an increase in the complexity of the law.[2] Some responses to these issues will also be given in this section. Furthermore, there will be a look at how transparent the case management system is externally to parties and citizens.

Finally, a brief analysis will be given at the end looking at whether there is a method and direction to case management in France; whether it is receiving resources

2 P.M. Langbroek, 'Developing a Public Administration Perspective on Judicial Systems in Europe', in *The Challenge of Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha,. Amsterdam 2000, p. 2-3.

and is being developed so as to be more efficient; and, finally, what the priorities of case management appear to be.

Approaches

The one tool that has been consistently used in all of the courts for case management is

> 'The dashboard for statistics of activities in civil and criminal cases'
>
> \- President TGI1

According to another President of a TGI, they have

> 'Automated certain follow-up procedures and created a dashboard, which allows us to follow delayed cases and the general flow of cases through the court.'
>
> \- President TGI4

The Chief Clerk of the above court confirms the use of this tool:

> 'The court itself has a dashboard, which tells management what is happening with the flow of cases and the stock of cases.'

The question that now arises for me, is what do they do with all of this information? According to this respondent,

> 'The presidency of the jurisdiction comes together once a year to look at the rules that define how to distribute their resources within the court, the distribution of cases to the different chambers and so forth. The Code of Judicial Organisation does not conform to the European Convention. In other countries, the distribution of cases is set out in the constitutions and must be predetermined by law following the concept of 'juge naturel'. In France it is less rigorous in that Presidents of the courts have more flexibility to distribute cases. In this they are flexible enough to comply with the ECHR. With case flow being recorded more accurately at court it is possible to see the state of affairs, the number of cases coming and going, the average duration and so forth.'
>
> \- President TGI4

This is an indicator that information from the dashboard is used to create a flexible situation for the President of the court to distribute cases in a manner which is constitutional.[3]

However, this President is the only one who appears to act on this belief. According to a different President, case management is

3 P.M. Langbroek and M. Fabri, '*Case assignment to courts and within courts, a comparative study in 7 countries*', Shaker Publishing, Maastricht 2004.

> 'under the authority of the President of the court. As President, I set the hearing schedules. The criteria used are the quality and specialisation of the judge, the workload of the judge, and the pace at which she can work, and the importance of the case. Furthermore, beyond deciding which judge receives which cases and at what rhythm, I also distribute the cases into hearings.'
>
> - President TGI2

In order to do all of this, the dashboard is useful to give him the information necessary to decide on all of these issues. Here, one can identify two directions in the use of information by management. On the one hand, one of the Presidents is very concerned that the case management in his court is a system that is seen to be compliant with constitutional law, whereas the other is simply concerned with the efficiency and quality of judgements at his court. At this point, I would say that the differences in these two approaches are instructive, in that one is normative whereas the other is practical. Further to information management, the President with the practical approach to information management has taken to further initiatives. Firstly they,

> 'Tried to engage lawyers to find a scheme of procedure in civil law, to reduce delays. Thus we have an arrangement about procedural delays, looking at the time necessary for each party to deliver conclusions on their opinions, and are therefore able to plan the use of time at the court to come to a satisfactory conclusion i.e. quality judgements'
>
> - President TGI2

This is an external arrangement, however. Internally, the same President has different measures in place, regarding the distribution of work between a collegiate hearing and a single judge hearing (juge unique).

> 'A point of difficulty at the court is that most of the judgements, mostly in civil cases, are rendered by the single judge for reasons of efficiency. Many judges complain about this, and wish to see a reversal whereby a collegiate court sits more often to decide a case. Occasionally, I do assign a case to a collegiate court where it is warranted. Many colleagues believe that a court of three has better quality than one. Personally, I am more sceptical. There is a deresponsibility of judges where a case is decided in collegiality, because one does not know who writes what. A single judge hearing a case has greater responsibility. Therefore, there is nothing to say that quality is not as good, and there is, furthermore, a gain in efficiency.'
>
> - President TGI 2

The Chief Clerk interviewed added that

> 'it needs to be well organised, cases should be completed within a certain time-limit, and if there is a delay, it should be reasonable. To this end, my responsibility is to organise the clerks to get the cases out as fast as possible.'
>
> - Chief Clerk of TGI

According to the following respondent,

> 'The obligation is to render cases without too much delay. The clerk keeps an eye on the progression of cases and sends them on to the first president if they become overly delayed.'
>
> \- Counsellor of Court of Appeal

The theme of a reasonable delay in cases has been discussed before when looking at the responsibility of judges in terms of legal quality and efficiency. In this section, one can see the approaches used to try and bring cases to completion within a reasonable time. The approach varies from organising external relations, to having someone check a case if it is taking too long (something which could, on reflection, be done by the computerised dashboard). There is here no obvious universal pattern or approach to case management. It is not particularly obvious in what way these Presidents use the information from the dashboard. This analysis has inferred possible ways in which they do use this tool from the activities described. Following from this section, I will look at their response to the increase in simple cases, the increase in salary in simple cases, and the increase in the complexity of the law.

Trends in the increase in simple cases, the increase in similar yet simple cases, and the increase in the complexity of the law

As with case management in general, the reactions to these trends have also been quite diverse. Starting with the reaction of one of the Presidents, he said:

> ' If activity at the court increases or the delays for rendering judgements is too long, the President of the court may create supplementary hearings, or may recalibrate the set hearings differently to deal with more cases in one sitting.'
>
> \- President TGI1

At the Court of Appeal, the counsellor said that the reaction of the court had been threefold:

> 'Firstly ICT implementation, there is software at every phase of this evolution; secondly, the creation of specialist chambers; and, thirdly, the continuous training of judges.'
>
> \- Counsellor of Court of Appeal

One President responded that there had been no increase in cases (the same one who emphasised reorganisation and the new priorities in case management). Another President responded to two separate trends, firstly the complexity of the law, and, secondly, the fact that there are more procedural laws.

> 'The procedures are changing more and more to reflect political concerns for human rights and rights of the defence. The courts are not always given enough time to adapt and enforce procedures and rearticulate functions.'
>
> \- President TGI3

Next, he deals with the issue of the increase in simple cases.

> 'We have adopted the use of software (TRAM), which helps to identify simply cases earlier on, and which sends a case directly to a streamlined procedure. These are cases where the law is known, but the facts are disputed. The single judge deals with these cases. Otherwise for more complex cases, there is a collegiate court.'
>
> \- President TGI3

From these quotes, one can find a small pattern of ICT implementation to assist the court in dealing with certain trends. Another insight into the activities can show that Presidents have a certain flexibility to deal with changing situations, contrary to what was said about the situation of the Code of Judicial Organisation.

External influences

However, one can also identify that there is also activity on the legislative level, which attempts to help courts (although not always successfully, as already stated). The Counsellor of the Court of Appeal merely identifies that the legislature is really trying to simplify procedures:

> 'changes in law deliver bigger benefits to judges, especially nowadays; the legislature is busy with some procedures to take less time.'
>
> \- Counsellor of Court of Appeal

More specifically, another President describes a law from 2004,

> 'the procedure of 'comparution' (plea bargaining), which recognises the validity of the guilty plea, which is proposed to the accused by the public prosecutor. This plea is then confirmed by the President of the court, who can also annual the agreement between the accused and the prosecutor.'

This system is meant to avoid hearings. However, as one President pointed out,

> 'it could help speed up the process a lot, but I have doubts as to the cost to justice that people accept pleas for lesser crimes. However, the fact that judges still need to read through case files to ensure proper procedure has been followed is still part of the workload.'
>
> \- President of TGI1

These quotes look at the relationship between the efficiency of procedural justice and case management in the courts of justice, of Presidents towards case management, but procedural justice does not appear to have had much of an impact. Next to procedural law, one President described the impact of processes and change from another court:

> 'The Court of Cassation can serve as an example of a court that has helped modernise procedure. They adapted their work to the complexity and reality of subjects, and managed to eliminate practically half their caseload. The simplification of procedures helped them to avoid a complete explosion of cases.'
>
> - President TGI3

To some extent, the impact of lawyers has been discussed on case scheduling, and how one President has attempted to reduce the chances of unreasonable delays coming about as a result of lawyers or parties being late. The greatest external influence from these data would appear to be the lawyers, as at least one President has described the process of adaptation to reduce delays caused by lawyers. However, without more in-depth discussion or research, it is very difficult to say whether or not procedural change has any impact.

One of the main issues of looking into how things work is related to transparency, and therefore accountability. The following part will deal with the transparency of case management.

Transparency

There are two forms of transparency, external and internal. However, seeing as judges participate in the distribution of work through the General Assembly, the transparency of case management within the organisation can be assumed to be a given. External transparency is a different story, however. According to one of the Presidents interviewed:

> 'The citizens do not have direct access. They must address a lawyer or bailiff.'
>
> - President TGI1

The next President to be quoted elaborates on why there are problems of transparency:

> 'it is a real problem because of the complexity, the different competencies in different courts and the formation of the agenda for hearings is not made publicly. But the agenda between judges and lawyers is clear.'
>
> - President TGI2

Another President, when asked about external transparency, added that

> 'I think that people with lawyers have fewer problems understanding the processes of the court than people who choose not to be represented by legal counsel. The court then tries to help such people with a better reception, a centre

> for access to the law to help people find information and to try to give them access to the free consultation of a lawyer.'
>
> - President TGI3

Whilst the President believes that those without lawyers have a disadvantage in this respect, he ensures that the court tries to compensate by trying to ensure that parties are on a level playing field (access to justice). However, according to the Chief Clerk interviewed,

> 'users are concerned about the transparency of hearings and that they receive a decision as soon as possible. They are less concerned about internal processes of the court.'
>
> - Chief Clerk of TGI

This quote, I think, rather misses the point of the transparency of court and case management. The quote above deals with the issue exactly, and that is that people entering court for the first time probably do so only once (in civil law at least) and, as with any bureaucracy, can find it daunting, especially if at the end there is a life-altering decision. Transparency gives a form of assurance, that even though they cannot affect the process; they can at least follow it. As with the Dutch case, this should not have to depend solely on retaining the services of a lawyer.

14.3.2. Analysis: Case management

Although there is a national generic tool for gathering statistics and data on case flow in these courts, there appears to be a discrepancy in the way in which these judge-managers exploit it. It would also appear to be the case that different presidents have different philosophies behind their methods of case management, one emphatically constitutional, and the other more efficiency-oriented. To that extent it is not surprising to discover that they also appear to have different tactics in controlling the way cases move through their courts, and the interaction with those external to the court, yet influential on its systems, such as lawyers.

The direction to case management seems to be multi-focal in approach and philosophy (priority). One can see in the way that these respondents describe reactions to trends in increases in cases and the complexity of law, that there appears to be some attempt at arranging cases as efficiently as possible and in a way that tries to guarantee high quality.

As to the question of whether courts are receiving resources and are being developed so as to be more efficient, there is the development of ICT to deal with changes. However, it appears to be dynamic though not generic in its use. The only hint as to available resources comes in the form of the complaint made by one of the Presidents about not having the time and resources to adapt the court to new procedures, which come fast and often. Otherwise there are no other clues in this section as to whether there are resources to develop the efficiency of the system.

As for transparency and external relations, these do not appear to be a top priority for the courts where interviews took place. External relations only seemed to be

important where they affect the operation of case management. The relations between the judges and lawyers, from the data provided, are the most efficient. For the rest, there are some programmes here and there which have been set up to deal with the public in the front office, with only a couple mentioning the Charte Marianne (the new public service charter for the reception area of public services, such as the courts).

One could say that the direction is polarised between efficiency and constitutionality, but there is no real direction towards the citizen. The next section goes on to look at the quality measures and indicators used in the courts of ordinary jurisdiction.

14.4. Quality measures and indicators

14.4.1. Introduction

There is no official programme in France, as in the Netherlands, for implementing quality indicators and benchmarking for services in the courts. However, in January 2006, the new Financial Law that bases its resource distribution on results and productivity was implemented. This means that there are now criteria set for productivity, and this section of the analysis will look at the opinions of those interviewed on the new criteria, and also what they themselves use to indicate the productivity of the court. Here I will only discuss the indicators and criteria of LOLF. In terms of its effects on checks and balances, that should wait until the Macro section.

Whilst there do not appear to be benchmarks operating nationally, various people have described some measures concerning service quality. Here, I asked questions about implementing ISO norms. However, many also consider certain measures to improve the operation of the court as quality measures. Included in this section will be measures taken nationally as a matter of policy, such as GUG and the electronic criminal records database.[4]

Even though Communications is considered as a separate part of the quality of organisation in the Dutch analysis, there is simply not enough data gathered to give it this honour in the analysis of French interviews. However, much attention has already been given in terms of external transparency in court management and Case management. The data indicate here that certain measures have been taken to improve communication within the courts themselves, and to speed up communications with professionals external to the court itself. Communications will therefore be considered as part of quality measures in the court.

Finally, an analysis will be given of the overall picture of quality indicators and measures. This will form a snapshot of the overall quality measures being taken in France in the courts of ordinary jurisdiction. Following on from this come the final conclusions for the meso chapter in general. Here I will provide a summary of insights gathered throughout the chapter, and provide some possible hypotheses on the quality of judicial organisation in the French ordinary jurisdiction.

4 Refer to chapter 12 The organisers and policy, section 12.3.3. Policies and section 14.4.2 Quality indicators.

14.4.2. Quality indicators

Productivity and LOLF

> 'Starting from 1 January 2006, indicators of productivity for judges, in the civil and criminal domains, will be implemented. The Ministry of Justice will use them to distribute human resources or money in the tribunals, based on the results of obetained'.
>
> - President TGI 1

This new measure refers to LOLF, the Financial Law regarding the way that resources are distributed to French public services based on productivity. To this end, they must create benchmarks to ensure certain fairness in distribution. However, these indicators face a severe restriction. When asked how the quality of work was measured (in a statistical manner), the same President said:

> 'the quality of work in the court can be judged through the number of appeals lodged by parties against the judgement rendered, at the same time by statistics which calculate the average duration of cases or the average age of the backlog.'
>
> - President TGI 1

I would say, about this particular data, if this is the information that the courts deliver to the Ministry of Justice as a basis for resource distribution, that these are very rough indicators. However, in 2004, when these interviews were conducted, it could be speculated that the respondent did not know very much about LOLF at that time. However, it must be emphasised that this is simply a speculation.
The next President confirms that LOLF

> 'is a modification to the budget law, which creates indicators.'

It is this President's belief that the issue of balancing efficiency and quality of justice

> 'is a recent preoccupation of the Ministry of Justice in general. They must reflect on this balance in light of the new financial laws. As a result we must integrate efficiency and productivity into judicial norms.'
>
> - President TGI 2

These quotes would suggest that, in 2004, the judiciary was still in its reflecting stage as to how to create indicators to quantify the productivity of justice. On the other hand, there also appears to be movement towards incorporating values of productivity and efficiency into the quality norms of justice. When asked if he had confidence in the new indicators, he said:

> 'yes, the Minister of Justice has made huge progress. Since three to four years there have been tools in place to calculate the work of justice. But they are still busy with defining indicators of work, the performance within the framework

> of the new finance laws, which are objectives based on distributing resources to productivity. One can see that these evaluations are correct, therefore I have confidence.'
>
> - President TGI 2

What appears to be said here is that even though the indicators are still being defined, this respondent nonetheless has confidence in them. This can be rather interpreted as him having confidence in the process that it takes to define the indicators in this apparently ongoing process. The Chief Clerk who was interviewed confirmed what this President said:

> 'the Ministry of Justice has its own criteria, which they used to distribute resources across France. I believe the system is improving, in that they are beginning to develop more realistic norms. At the moment, the criteria ignore the nature and difficulty of cases, and the different types of cases that different sized courts receive in France.'
>
> - Chief Clerk TGI

The Counsellor interviewed at the Court of Appeal further confirms this. He adds that, whilst he has confidence in the figures and statistics used by the Ministry of Justice,

> 'the numbers are not exact yet, but they do effectively reflect the reality of the situation. In justice, this is very difficult as files are not always comparable, some cases require longer than others, therefore the numbers are not yet sufficient to describe the activity of the court. Much also depends on the population, economy and demography.'
>
> - Counsellor of Court of Appeal

On the other hand, when interviewing a different respondent, he answered the following when asked about the operation of quality indicators

> 'there are no definitions or indicators of productivity. At the moment, the Ministry of Justice has very rough indicators, which allow it to measure and compare productivity between the courts. They only look at the number of cases completed by the judge without accounting for the difficulty of cases. It is very rough.'
>
> - President TG3

Clearly, this respondent does not trust the indicators, as, for him, they do not reflect the reality of judicial activity. However, when asked if he believed that quality was important in his court, he said

> 'measuring quality is important but difficult. Everybody has difficulties, even the Americans, who have a comprehensive measuring system. Plus, there is the

> added difficulty that lawyers, parties, and others will have different expectations of quality from the court.'
>
> \- President TG3

This quote would suggest that whilst this respondent values the idea of quality measurement in the court, he has a vague idea of how to approach it. This would also suggest a lack of policy guidance, either from other courts or the Ministry of Justice on this issue. This reaction is also very different from the others, in that he does not refer to LOLF.

The opinions of the following President on the issue of quality have already been discussed to some extent when discussing legal quality and court organisation.

> 'In terms of the quality of organisation, on the one hand there are general principles of organisation and, on the other, there are principles specific to the judiciary itself (i.e. quality and the public service and quality as an institution). Examples of general principles of quality would be to ensure an adequate welcoming area for the parties, accessibility for handicapped people, the way people are treated in court, and the transparency as regards what goes on with their cases. Specific principles can be found in Article 6 (1) of the European Convention on Human Rights , like an equitable process, an impartial judge, reasonable delays, the quality of judgement and process.'
>
> \- President TGI4

However, what he says next is also important and very different again from the others:

> 'In France, no measurement has been made and as far as I know I am the only person developing quality standards for the judicial organisation. I have proposed a method that I believe is better than the Dutch one. My method measures all the functions of a judge through a questionnaire. I will propose a norm based on the measurement I made which, in turn, is based on the answers from 3,000 judges. It is an unofficial method that had been piloted in the Paris region and submitted to the Ministry of Justice.'
>
> \- President TGI4

The odd thing here is that the process he has started does not appear to be connected to the LOLF:

> 'There will be a budgetary revolution in 2006, which will be more rigorous in demanding accountability and efficiency from all public services including the judiciary. It will give more autonomy in terms of finance, operation, management aspects, but it will also demand more accountability.'
>
> \- President TGI4

Furthermore, the Chief Clerk interviewed also does not connect measurement with LOLF:

> 'the new system will change things as of the first of January 2006, the goal being to be able to justify all costs, being more objective and oriented towards results.'
>
> - Chief Clerk of TGI

However, when I talked to the policy maker at the Ministry of Justice, and asked about criteria for distributing resources, he said:

> 'The objective elements for measuring the activity of the courts are population, the activity of the court, the level of information technology and the area of the court expected to be managed.'
>
> - Policy maker at Ministry of Justice

In talking to the policy makers at the regional administrative services, they said that:

> 'LOLF creates a budgetary system, based on objective results and defines indicators that quantify the quality of the functioning of justice, such as economizing in criminal cases, savings made, delays, and the electronic criminal records database, which is used to indicate the dysfunctioning of justice. It is a register of convictions, sentences and possibly other judgements of other jurisdictions, which can be accessed by parties with legitimate interests in receiving such information. The service uses this to see where sentences or judgements are correct and based on current law. The percentage of wrongly judged cases is an indicator of the quality of justice. We are therefore working to create indictors for both the quality and quantity of justice.'
>
> - Policy makers at Regional Administrative Services

ISO

When asked if any of these courts implemented the ISO norms, most replied in the negative. However, almost all gave some sort of expansionary comment as to why not. One President said:

> 'not yet. We have only just started to use indicators and statistics in a modern way.'
>
> - President TGI1

Another President only confirmed that ISO or other forms of benchmarking did not operate in his court. The next President quoted described a pilot to implemented ISO norms:

> 'There was a pilot conducted at the chamber of social law at the Court of Appeal in Montpellier, for the ISO norm, but in my opinion ISO is not useful in the French system as they have already adopted these norms as well. Whilst the French are not benchmarking using ISO norms, they do have questionnaires for the users.'
>
> - President TGI4

The Chief Clerk interviewed said that

> 'we do not apply ISO quality norms at the court. It is an interesting question for us, however. This is a very busy court without much time to implement such a system for our organisation, but we are trying to develop such a notion.'
> - Chief Clerk of TGI

Aside from the pilot described above, the Counsellor of the Court of Appeal described a pilot operating at his court:

> 'we are measuring quality with the ISO norm 2001 for the enterprise of service in judicial cases. The idea is for the control of quality to surpass the numbers for judicial activity and budget, i.e. to make activity and service quantifiable.'
> - Counsellor of Court of Appeal

All of these quotes would suggest that applying ISO quality norms is not part of the national policy of France in terms of governing the courts. However, two pilot projects would imply that the courts might take on certain projects of their own volition, and maybe receive funding from the Ministry of Justice. This way, reports must be published and information will benefit policy development in the field of implementing quality indicators. Still the range of reactions from sceptical to interest, yet lacking in time and resources for development, would suggest that if there were ever an intention to make quality indicators in service a national policy for judicial governance, then it should come from the top rather than relying solely on courts' initiatives.

Given that France, in late 2004, was still developing its norms for productivity indicators, and given the little faith shown in these indicators, there is an implication that the process is still in its early stages, and much more information still needs to be imparted to all of the courts. That indicators and benchmarking are not really part of the culture of managing courts would suggest also that the ISO norms will take some time before they can become part of national or local policy of court management and governance.

Having looked at the implementation of quality and productivity indicators, and the place they have in policy and practice, I shall now go on to look at various quality measures which these courts have taken to improve their services.

14.4.3. Quality measures

Most of the quality measures taken in the court have been to enhance service to the users and/or to measure user satisfaction. Aside from a couple of measures from the national policy such as GUG and the electronic criminal records databases, others are from courts' own initiatives. I will start with comments about national policy and then move on to local courts initiatives.

National policies

One national policy, the GUG was already described in some detail in the chapter 12.[5] Only two of the six respondents at court level responded to questions on quality measures with GUG. The first, a President of a court, said of GUG that

> 'it helps a lot, but it only started on 1 September 2004 and is very new.'
>
> - President TGI2

This is a vague and cautious comment on the operation of GUG in his court. Another respondent, the Chief Clerk, said that

> 'it is part of the court, which provides notary services that users can acquire without the need of their lawyers. The court is trying to place all of the clerks in one place in order to respond to various service requirements under GUG in one office at the court, making it easier and more efficient to find and operate.'
>
> - Chief Clerk of TGI

The policy maker interviewed at the Ministry of Justice said of GUG that it serves the following purpose:

> 'In the first instance courts, for people without a lawyer, and for cases that do not require a lawyer, there is a GUG, which gives all of these people one point of access to the court.'
>
> - Policy maker at Ministry of Justice

The national policy, even though it only appears to be mentioned in these three interviews, is an attempt at centralising services within a court. At the time of these interviews, it was newly operating in the courts, and therefore no hypothesis can be made on its success. This is however operated on a court-by-court basis, and it is the court's responsibility to implement it. In very similar terms, concerning the Charte Marianne on the quality of the reception area of public service providers, only one respondent said anything at all about it, and it was not particularly flattering:

> 'it is a gadget, it is not serious. It is for amusement only.'
>
> - President TGI2

As he was the only one of this jurisdiction who mentioned it, and it is a rather unflattering comment, one cannot therefore really hold a positive outlook on the current or future status of this charter in the courts.

The last national policy quality measure to appear to have been implemented is the 'cassier judiciaire' (electronic criminal records database). Again, only the Chief Clerk interviewed appears to have said anything about this tool at court level:

5 Section 12.3.3. Policies.

> 'It allows certain access, within the rules of data protection, to certain criminal files, either fully by the convicted parties themselves, or possible employers who wish to know about the nature of the crimes committed. The fact that it is computerised allows people to access the database online. It also holds judgements from civil and administrative jurisdictions.'
>
> - Chief Clerk of TGI

The policy maker at the Ministry of Justice said that:

> 'This database allows potential employers to access criminal records of a person who has been convicted of a serious crime.'

This is therefore a national database that would be added to by all courts. Again, as none of the others have mentioned this, I cannot hypothesise or infer anything about opinions on its operation, or concerns they might have.

As some of these policies have been mentioned in chapter 12, it was interesting to see how they are being implemented in the courts. There appears to be a gap in knowledge in the area. Not many people have said much about it. It may also be that the majority do not see these measures as adding to the quality of the judicial organisation. The next part will describe various measures within these courts to improve service quality.

Service quality in the courts

The first thing that I realised upon rereading one of these interviews was that creating services costs money:

> 'Projects of the court, such as creating a centralised reception of the Palace of Justice forms part of the budget request.'
>
> - President TGI1

The fact that a centralised welcoming area is not standard in the French courts is actually rather surprising, and a little strange from a public service perspective. From this one can infer that the judiciary does not see itself as a public service or providing one. The same President who commented on the Charte Marianne, did mention a new innovation in measuring user satisfaction:

> 'We have a new operation in evaluating the satisfaction of users. We have formulated a questionnaire for the very first time, but there is no official system for measuring the quality of services to users.'
>
> - President TGI2

In another court, the President there has created measures for situations where the users have not retained the services of a lawyer:

> 'the court tries to help such people with a better welcoming area, a centre for access to law to help people find information and try to give them access to the free consultation of a lawyer (maison de justice).'
>
> - President TGI3

This quote confirms a little of what I suspected earlier, that a central welcoming area is quite a new phenomenon to the courts. This would also suggest that courts are most used to dealing with lawyers and less with parties. One could infer that courts are truly not used to thinking of themselves as providing a public service that needs to operate in a transparent and accountable manner, not only from a constitutional perspective, but also from a quality organisation perspective.

In terms of other ways of measuring public perception of the judiciary, one President described a telephone study:

> 'There was a telephone study in France on the quality of Justice from the point of view of the users. They compared the results with a similar study conducted in Switzerland. In Switzerland, justice was seen as operating well, but not in France. For example, the losing parties in France were not happy with the system, whereas in Switzerland, the losing parties were happy about the way in which their cases were handled.'
>
> - President TGI4

However, there does not appear to be a complaints mechanism within the court itself:

> 'if the parties wish to complain about the handling of their cases at the court, either by the clerks or by the judges, they can bring an action against the State but not directly against the judges. The court has developed a questionnaire for users to fill out.'
>
> - President TGI3

The movement here for creating a service towards the clients and users of the courts is bottom up. The only thing for which the courts rely on the Ministry of Justice is funding for the development of these projects. There does not appear to be any policy guidance in this particular area. However, it may be that the courts need to develop a sense of public service and quality organisation before further national policies are created.

14.4.4. Communications

The issue of communication has already been dealt with in terms of managing courts and cases, and now it is being dealt with in the quality of the organisation in terms of transparency and external relations. This part will deal with what little has been said on the issue of communication with professionals, internally and externally. It is only linked to advances in technology. One of the Presidents who said anything on this issue said:

> 'Information technology plays an essential role in augmenting efficiency of transmitting work between judges and clerks through intranet–justice.'
>
> - President TGI1

The other respondent who linked communication with technology was the Counsellor at the Court of Appeal:

> 'ICT is also important for communications over the Internet, as it speeds things up, for example imagine a system to exchange documents between lawyers, tribunals and the Court of Appeal. A few years ago, in Paris there was a convention signed between the Ministry of Justice and the Chambre Nationale des Avocats.[6] This is a piece of procedure about ICT and the Court of Appeal creating an automatic signature. Versailles and the Paris family law chambers are experimenting with this. This will enable them to deal with files electronically. This system has already been developed in Belgium, and is being adapted for French use. The Court of Appeal no longer uses paper to communicate internally between the staff. All judges are available by e-mail.'
>
> - President TGI4

The use of technology appears to be an issue of national policy. However its potential in terms of communicating and interacting with the world outside of the courts does not appear to be fully appreciated. For example, looking at the French Ministry of Justice websites, there do not appear to be any websites for individual courts. However, basic information such as visiting addresses, telephone and fax numbers are given for the Court of Appeal for each region. Contact details do not seem to be available.[7]

Whilst there are pilots occurring on automatic signatures and other advances in technology, there is no indication that it is being used to improve external relations with users. This is again and indication that the courts do not have a public service mentality or that they see themselves as a public service. Improving the quality of the organisation seems to be a top priority as far as adopting technology is concerned.

14.4.5. Analysis: Quality of organisation

One can see both national policies and court projects creating a certain impetus for the development of a quality organisation in the judiciary in France. As regards national policies such as the new Finance Law that creates criteria of productivity for distributing funds, or the Charte Marianne, one can see that these are not yet functioning effectively in the courts. In the definition of criteria, approved of in almost all interviews that discussed LOLF, there was a recognition that it would be an ongoing

6 Lawyers of the Courts of Appeal.

7 The importance of communication and the transparency of courts through the website has been explored in an article: M. Velicogna and G.Y. Ng, *'Legitimacy and Internet in the judiciary: A Lesson from the Italian Courts' Websites Experience',* International Journal of law and information technology, Oxford Journals, Oxford University Press 2006.

process to define the criteria, and that as it was, the criteria were not sufficient to reflect the activities of the court. As for the Charte Marianne, seeing as the only thing that was said was dismissive, it goes to reaffirming my perception that the courts do not (or at least at that time, did not) see themselves as public service organisations.

However, innovations like the Guichet Unique de Greffe and the electronic criminal records database show an understanding of certain public service needs for the coherence of organisation and efficient access to data to the courts. These innovations reflect change in the organisation and willingness by those in charge to develop their organisations and follow national policy.

This is also reflected in the service quality in the courts. One cannot identify any national polity or guiding force to develop any services to the public. However, at various instances there is acknowledgment that users who are not professionals or repeat players need assistance from the court itself, and have a right to it. Nonetheless, this is also a slow development, and it is clear that these courts are not doing all they can to improve services to the users. This again reflects the idea that courts do not see themselves as public services.

In discussing ICT innovation and communication, if one combines this with what one knows for the innovation in the courts and the Charte Marianne, one could say that ICT is being developed to improve organisational quality only and external communication and service quality have not been taken into account in ICT development for the judiciary.

14.5. Conclusions

What has been attempted here is a general description of how quality policy at central level[8] has been operated in court organisations. From this analysis one can see the operation and development of 'politique juridictionnel', i.e. the management of judges, the administration of courts, and case management. As the management of judges was already dealt with in the micro level, the meso level then deals with the management of the court and cases.

In terms of court management what one appears to see is the development of the diarchy between the President and the Chief Public Prosecutor into an informal triumvirate with the Chief Clerk. Whilst in practice, a triumvirate operates to manage the court, formally, it is still the diarchy, and the mentality towards clerks by judges in some places reflects this. As regards policy, there is only the Code of Judicial Organisation, which, according to one of the respondents, is outdated. Beyond that, there is a belief that a judge holding a management position at the court will protect the judicial independence of the judges. There is no indication that quality management is a priority for the respondents interviewed. There is also no indication of any accountability for poor management of the courts. What appears to be the case is that Presidents try to manage the court so that what comes out is quality judgements at a reasonable pace. This involves, on the one hand, managing the quality of judgements, and on the other, setting up a support structure that enables the judges to work more efficiently.

8 As described in chapter 12 The organisers and policy.

This is an ongoing process, and once one starts to adopt technologies and create new positions, these always need refining to fit with the needs of the courts, just as the courts need to reshape around new technologies.

There are many influences on case management, external and internal. Externally, it is recognised by various respondents that policies and legislation will affect the way that procedures are dealt with at court. The public prosecutor also has a huge impact on the criminal law case management system. Furthermore, all courts are influenced by the competence of the parties' lawyers and the parties themselves to hand in documents and proof. Internally, it is essential to understand the role of the General Assembly in influencing the distribution of cases, as well as the need for flexibility when judges become ill or retire early. However, Presidents have access to various tools that influence the approach to case management, mostly in relation to ICT adoption. The approach appears to be rather simple: get the cases finished as quickly as possible without compromising quality (not so different from the definition of quality and quantity used in defining the role of judges).

As the French do not have a programme for implementing quality indicators and measures in the courts, it is difficult to ask the same question as in the Dutch analysis: has the operation of quality indicators and integral management affected judicial independence and the separation of powers? The more appropriate question is: Are quality indicators and measures being taken in the courts? If so, does it affect judicial independence and the separation of powers?

On the first question, one can answer in the positive. The quality indicators, even though they are considered to be rough, are being used for the new Financial Law. It is only criteria for the productivity of the courts that are used when deciding how much resources a court should receive. One could say that this affects the separation of powers, and negatively so. It is negative because the courts are being held to account for productivity based on definitions that are inaccurate, and therefore, it may be considered unfair to hold the courts to these indicators. These indicators also do not account for the quality of the work and the importance of other factors, such as the size and nature of cases and courts.

There are also quality measures being implemented in some courts to improve service to clients and users. This is not a national programme per se, but depends very much on government spending. If the Ministry of Justice does not encourage the implementation of such measures by providing funding, the measures would not take place. Does the implementation affect the separation of powers? My answer would be no, not between the judiciary, government and legislature. However, from a constitutionalist perspective, there is greater transparency towards the citizens, and therefore more accountability, which can be seen to lead to greater legitimacy towards the citizens within the general concept of democratic legitimacy of the courts as discussed in the theoretical framework of this thesis.

With the new Finance Law, courts have become financially independent and accountable. Presidents get basic training from the School of Magistracy, but with such a complex organisation, with so much going on internally and externally, they should not have to rely only upon experienced judges, but also upon substantial training and research in the processes taking place in their organisation.

At this time, I would hypothesise that whilst there have been moves, both bottom up and top down, in the direction of creating quality policies, there is a long way to go in terms of understanding management techniques used in the courts in order to standardise practices and provide sufficient training and equipment for Presidents.

There is nothing here to suggest that the quality indicators have negatively infringed upon judicial independence, either of the judge or the organisation. In fact, the whole framework seems to have left the judicial organisation more independent whilst increasing accountability, even though the manner of accountability needs further refining.

Chapter 15

15. Administration of justice: Macro level analysis (ordinary jurisdiction)

As with the analysis of the interview held in the Netherlands, the macro-level analysis of the interviews in France will focus on institutional relationships in terms of how the separation of powers operates. Comments have been given on lawmaking on the one hand (parliament) and law enforcement on the other (judges), which are issues of separation of powers. However, in constitutional theory, there are always aspects of checks and balances, and this is most notable in the role of judges at the governance (as opposed to decision-making) level, i.e. their participation at the level of the Ministry of Justice, and regional administrative services. Next to this, the issue of financial effects on the relationship between the three powers is examined, and the opinions of various respondents voiced on these issues. Finally, an analysis of the operation of judicial independence at this level will be given.

15.1. Administration of justice

15.1.1. Legislator and courts

This issue came up when various respondents answered questions about how they tackled the problem of increasing cases, and increasingly simple cases. One president said that

> 'In response to increasing cases, new procedures have been created, in particular in the criminal domain, to reduce the need for public hearings.'
>
> - President CA1

The implication of this is that the lawmaker has an active role in assisting the courts to reduce their workloads. The other implication is that courts do not have organisational autonomy. These implications are further enforced by the replies of another president to the same question.

> 'The procedures are changing more and more to reflect political concerns on human rights and the right of defence. Furthermore, the courts are not given enough time to adapt and enforce new procedures and rearticulate functions.'
>
> - President TGI3

This quote not only goes to enforcing the implication that the legislator has an active role, but also connects the enforcement of procedures and the management of court organisation to human rights in a similar way that the constitution connects judicial independence with human rights. However, the gap between law and enforcement indicates a problem of organisation. The question then arises, can human rights be breached by poor organisation? The question is a resounding 'yes', as has been answered by the European Court of Human Rights, on its judgements about Article 6 of the European Convention on Human Rights and reasonable delay.

However, the enforcement gap is not always there, and this is due to a different method at a different court, as described by the chief clerk interviewed. As examined in chapter 12, the chief clerk has a unique position in the court as he is trained in the law and organisation/administration.

> 'In this unique position, I have a say in legal developments and court organisation in France. I can discuss new procedures with government, and can say if I find certain procedures inefficient or cumbersome. Usually a law passes through parliament, and government makes decrees to execute the law. I am part of the commission to ensure the smooth adaptation and application of the new rules at court.'
>
> - Chief Clerk of TGI

This would suggest that procedural laws are changed with advice from the work floor, where they need to be enforced. The practicalities of enforcement are dealt with within the court itself. This is contradictory to what the earlier quote said, and also indicates that there is no uniform way for the courts to enforce changes in procedural law. An enforcement gap would suggest that not all courts are consulted about procedural changes, and that government is unaware of enforcement problems. This indicates a lack of efficient communication between the three state powers.

15.1.2. Ministry of Justice and courts

Next to the legislative efforts in making the courts more procedurally efficient, is the issue of administration of justice. As discussed in the background section, the Department for Judicial Services at the Ministry of Justice deals with the overall governance of the courts. The Presidents and Chief Public Prosecutors at the courts of appeal are responsible for the day-to-day governance of the courts in their region, whereas presidents are responsible for the day-to-day running of their organisations at the first instance courts. As I have already dealt with the issue of the day-to-day running of local court organisations, the focus here will be on the role of the Ministry of Justice and the Court of Appeal.

In the interview at the Ministry of Justice, some background information was given about the role of the Ministry and the relevant department dealing with judicial governance. The relevant department is the ' direction des services judiciaire' (Department for judicial services), and it

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

> 'is managed by the judges of the 'magistrats de l'administration centrale de la justice' (MACJ – judges of the central administration of justice). They are not part of any court, and they work for central administration for two to three years. The Department distributes resources to the courts, both money and personnel. The Court of Appeal further distributes resources to the courts of first instance for major cases in their regions.'
>
> \- Policy maker at Ministry of Justice

On the administration of justice, the biggest issue is that of the judicial independence of courts to organise themselves. However, there is a wide range of opinions on the operation of judicial independence. One president asked:

> 'What independence is there when a tribunal cannot decide to create positions for judges of civil servants, and which, in order to obtain satisfaction for resources, must ask the Ministry of Justice?'
>
> \- President TGI1

Furthermore, according to the same president, independence of organisation

> 'does not exist because administration of the courts is placed under the authority of the chiefs of the courts of appeal, who themselves are under the authority of the Ministry of Justice.'
>
> \- President TGI1

Another President states the opinion that

> 'the only way I can improve our working conditions and performance is with adequate resources, but I do not see any lack as threatening judicial independence. However, any requests for extra judges goes to the Ministry of Justice, but I have to accept yes or no answers. To me, this affects judicial independence because there is no dialogue.'
>
> \- President TGI3

Finally, the Councillor of the Court of Appeal adds another affirmative opinion:

> 'there is frustration because there are not enough judges to deal with the cases. I feel that there is a breach of independence because we are constrained from doing our jobs properly by external norms and budgets.'
>
> \- Councillor Court of Appeal

At this point, two things can be said: firstly, that judicial independence is a link, in practice, to organisational autonomy. Secondly, that this is applies to both the Ministry of Justice and the courts. Dealing with the first point, it is quite clear that presidents believe that their inability to create new posts to deal with more cases goes against their independence as presidents of the courts. There also appears to be some resentment that there is a hierarchy of court governance, which is headed by the Ministry of Justice, then the chiefs of the Courts of Appeal. This is a logical complaint simply

because the one with most responsibility and knowledge of the local court organisation is the president of the court (notwithstanding the lack of training in management and organisation issues).

However, at the second level it can be said that judicial independence is protected by the fact that judges are in charge of the Department for Judicial Services. Given that members of the judiciary form part of the hierarchy that governs the judicial organisation, one can say that organisational decisions are somewhat legitimate due to representation. It may be that representation is felt to be insignificant if there is no dialogue, or no other possibility to participate beyond the limits of one's own court organisation. When asked if he felt he had a sufficient voice in the judicial organisation, the same president who voiced the opinion that the lack of dialogue in applying for more judicial positions affected judicial independence, said that:

> 'I do not believe that I have much of a say as regards the organisation of the judiciary. There is a lot of politics involved in the organisation of Justice, based on the fact that local politicians fight hard to keep their courts open. I think that there could be a better use of resources in the region.'
>
> - President TGI3

From this analysis, one could hypothesise that there are some presidents who feel that they lack the necessary autonomy to manage their courts, and that they lack a voice in the overall development of the judicial organisation. I say some, because there was at least one president who had a different opinion as to how judicial independence should operate:

> 'independence is used in taking judicial decisions. I have a judicial position, which is autonomous, technically and financially.'
>
> - President TGI2

When asked if he felt that he had enough voice in the judiciary, he said:

> 'Yes, because there is a formal consultation, and no, because the expected reforms do not come about. There is a problem of the 'carte judiciaire' (judicial map), that is irrational. When they try to effect reform, it goes very slowly.'
>
> - President TGI2

This president says something slightly different than the others. He believes that he has organisational autonomy to manage the court, but that his participation in the judicial organisation is superficial at best. This goes to confirming what has been said in the conclusions of chapter 11 that the judicial organisation is highly pyramidical, in spite of having judges in managerial positions at every level. It is clear that representation is insufficient to protect the judicial independence of presidents to operate their courts. The process of participation and the transparency of decision making in the development of the judicial organisation also appears to be found wanting. Having looked at the position of the Ministry of Justice at the head in relation to the first instance courts

at the bottom of this seemingly pyramidical organisation, it is now time to look at the role of the heads of the Court of Appeal in the court organisation.

15.1.3. Courts of Appeal and Courts of first instance

The Courts of Appeal are managed, by the first president and chief public prosecutor.[1] According to the respondent from the Ministry of Justice:

> 'in order to be nominated as a President or Chief Public Prosecutor, there are no professional examinations. The High Council for the Judiciary proposes a good lawyer, but does not take into account the need for good quality managers. It is not a criterion that is prioritised for this choice. These chiefs administer the Courts of Appeal and all the other courts of first instance concerning major cases. They have use of a professional management tool, called the regional administration service. At the head of the service there is a chief clerk, who works under the authority of the first president and chief public prosecutor. The chiefs of the court manage the jurisdiction and judges together.'
>
> - Policy maker at the Ministry of Justice

This calls into question the quality of management in the judicial organisation. The job description here implies the need for teamwork, leadership skills, and management skills. First of all, judges, by nature, are solitary creatures, as was explained in the micro level analysis when examining the position of the judicial assistant.[2] Even though many cases are decided in collegiality, on the one hand, there is no telling how far the judges work together as a team, and, on the other, there are more cases being heard by single judges. In terms of leadership and management skills, it has been clearly stated here that it is not a matter of priority for the High Council for the Judiciary. Whilst it has also already been stated that Presidents and the Chief Public Prosecutor have received management training upon appointment, the quality of the training and the effect it has is unclear.

When asked if case management was efficient, the respondent at the regional administration services responded that:

> 'it depends on the courts and service, and the resources available to them. We try to bring about a spirit of corporation between the clerks and judges at the court. The Presidents of the chambers need to have a global point of view to deal with the organisation of the court and work more efficiently with the clerks. It is still the case in most situations that judges will work to write decisions and the clerks will take responsibility for the rest. The relationship is not yet perfect and steps are being taken in both organisation and management to work more closely together.'
>
> - Judge member of regional administrative services

1 Refer to chapter 12 Organisers and policy, section 12.1.2. Judges versus managers and politics.

2 Refer to chapter 13 Responsibility of judges, section 13.2.2 Assistant de justice.

This quote goes towards confirming what was said earlier about judges and teamwork. It is interesting that they require an external stimulus to work together as teams (and that by default they do not see the necessity of working in teams). It is also interesting to hear that chief clerks take most of the administrative decisions without having the final responsibility. This indicates a possible hypothesis that the administration of courts is not conducted in the way that is set out in law. Whilst the formal structure is very hierarchical and pyramidical, informally, the data collected would suggest that the majority of judges themselves have very little to do with the day-to-day management of court affairs, whereas the role of the chief clerk has grown.

The Councillor interviewed at the Court of Appeal elaborates further on the managerial role of the President and Chief Public Prosecutor. On the one hand

> 'we have signed an objective contract with the Ministry of Justice. In this contract, the Court of Appeal is engaged to complete a certain number of cases a year for the supplementary resources they receive.'

On the other hand,

> 'the Court of Appeal is also empowered to govern the tribunals in their regions in terms of the fact that they sign and negotiate an objective contract with them, and then follow the progress of the execution of that contract.'

In the first place, the court is obliged to complete a certain number of cases if it wants extra resources. This is controlled and monitored by the Ministry of Justice. Whilst it is the policy to use these contracts between the Ministry of Justice, the following question arises at this point: are they management tools or tools of accountability in the constitutional sense? This debate goes to whether organisational autonomy and judicial independence operate independently in the judicial organisation. Given that the stance of the French judiciary is less clear than the Dutch, arguments can be put forward for both.

For those who see judicial independence as affecting decision-making in cases only, the objective contract will be seen as a management tool only. There is, after all, according to the Councillor interviewed at the Court of Appeal,

> 'a limited state budget'
>
> \- Councillor of the Court of Appeal

As a management tool, the Ministry of Justice pays for the performance of the courts, hence the name ' objective contract'. There will be no sanction in a situation where the court does not complete the number of cases it was contracted to take on. They simply would not receive the supplementary resources. Furthermore, this is a way for the Ministry of Justice to gather relevant data and statistics on the performance of the courts, and to try to understand from them, what policies need to be adjusted or created to help improve performance.

However, it would be perceived as a tool of accountability, where there is a belief that judicial independence and organisational autonomy are one and the same thing, that organisational autonomy goes to protecting judicial independence where

> 'they are constrained from doing their jobs properly by external norms and budgets.'
>
> - Councillor of the Court of Appeal

By not giving them supplementary resources due to the fact that they underperform, it could be said that it is a form of accountability, and possibly a breach of independence. If it can be shown that this system adversely affects the judicial independence of judges to decide cases, it can be argued that there is a breach of judicial independence. From the perspective of this research, formally, I believe the contract is a management tool, but in practice, those lowest down in the pyramid perceive it as a tool of accountability. This is so between the Ministry and the Court of Appeal, but the question now arises, is it so between the Court of Appeal and the first instance courts in the regions?

The interesting thing in this situation is that, according to the respondent of the Ministry of Justice,

> 'only the heads of the courts sign objective contracts with the Department for Judicial Services. Until now, there are no contracts between the Court of Appeal and the first instance courts in their regions.'
>
> - Policy maker at the Ministry of Justice

This implies that the contract described earlier between the Court of Appeal and the first instance courts of its region is not a part of national policy. From this, one can hypothesise that it acts also as a management tool. The question now arises, does it make a difference that it is judges rather than the Ministry signing the contract? From the analysis, the answer to this would be no. The argument by the Presidents of the courts of first instance is that they know what they need in order to have an efficiently working organisation. They know the locality, the capacity of their court and so forth. The Court of Appeal's interference with the financial and personnel affairs of the first instance courts takes away organisational autonomy in the courts.

Furthermore, the fact that extra judges have to be requested through the Ministry of Justice is also felt, in practice, to infringe upon the judicial independence of courts to organise themselves. Therefore one can say that whilst it is not a system of accountability, there is felt to be a breach of judicial independence. This would then lead to the theory that maybe this management tool should be used rather as a tool of accountability. It would make it more official that the courts are being held to account for their performance, and that courts' performance is an important part of the quality of justice.

15.1.4. Analysis: Administration of justice

From this analysis, one can distinguish two forms of separation of powers: organisational and classical (being the type of power an institution can exercise). Furthermore, these can be divided into vertical and horizontal separations. These forms will give structure to the way that the judicial organisation is administered and the separation of powers protected.

As regards the horizontal (classical) separation of powers, one can see that there is a strong distinction at this level between the practice of judicial independence in decision-making and the organisational autonomy of the judicial organisation. For example, there is a clear horizontal separation of powers in that parliament legislates on procedure, budget and policies for the organisation; the government makes decrees, distributes resources and sets criteria (with consultation) for productivity; finally the courts, much like other public services, implement procedures and government decrees and regulations. This is in accordance with the law and the constitution. The judiciary is considered to be an authority rather than a power, and the Ministry of Justice and Parliament are constitutionally responsible for setting up the courts, and distributing funds.[3]

However, given the implementation gaps due to the lack of time and resources, somewhere in the process, there is a problem of communication with the work floor, and a certain inefficiency of procedure when it comes to policy making. Again the respondents either say that adaptation to new rules and procedures is efficient, or they shrug it off as not really being a/their problem. The operation of this form of separation of powers does not appear to be totally efficient.

Secondly, there is the vertical separation of powers which is purely organisational, in which a pyramid shape of organisation functions to govern the courts. At the head of this is the Ministry of Justice (for the President, article 64 Constitution), in the middle are the Courts of Appeal, and at the foundation are the courts of first instance. In this structure of separation of powers, one can see less of a distinction between judicial independence (of the judges in decision-making) and organisational autonomy in the judicial organisation. One can see this in the fact that a body of judges heads the Department for Judicial Services of the Ministry of Justice. It can also be seen in the fact that it is not a court service but rather the heads of the Courts of Appeal (who are judges) who govern the courts in their regions. Moreover, there are more opinions expressed that the operation of judicial independence is directly linked to the organisational independence of the courts to manage themselves.

Therefore, one can observe two breaches of constitutional law (according to French constitutional law). On the one hand, the courts appear to find it difficult to always apply the laws created to reorganise them, rendering governance that is the responsibility of the Ministry of Justice and Parliament at times ineffective. On the other hand, the very hierarchical structure in organising the judiciary is felt to breach judicial independence at the court level, especially when the courts are immobile in reacting quickly to local situations.

3 Refer to chapter 10 Constitutional law and practices, section 10.2 Powers defined.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Having given the analysis on issues of separation of powers and administration of courts, it is now time to look at the laws and processes regarding financial arrangements for the courts.

15.2 Finances

This section is a mix between what criteria the Ministry of Justice uses to distribute resources and how they come to those criteria on the one hand. On the other hand, a critical examination will be given as to the process of applying for funding by the courts. Finally, something will be said about the effects of the situation and the new financial law on the separation of powers and checks and balances (namely judicial independence, organisational autonomy, and institutional relations).

15.2.1. Distribution processes

According to the respondent at the Ministry of Justice, when asked if the distribution of resources was accurate, he answered that:

> 'the objective elements for the activities of the courts are the population, the activity of the court, the level of equipment for information technology, and the size of the area of the court that has to be managed. There are statistics for measuring productivity and the activities of the courts. We measure the number of cases written and the subject of the file dealt with by each judge. There is a difference in activity between civil, criminal and commercial law.'
>
> - Policy Maker at the Ministry of Justice

However, the

> 'central administration always has a reserve of money to help the Court of Appeal to deal with an unexpectedly difficult situation.'
>
> - Policy Maker at the Ministry of Justice

The Councillor of the Court of Appeal said of the use of statistics and objective criteria:

> 'the Ministry of Justice is using statistics to follow the progress and evolution of cases in the Courts of Appeal and the courts of first instance for major cases. With these statistics, they can see the performance of the courts in general and look at their needs.'
>
> - Councillor of the Court of Appeal

This somewhat establishes that the art of distributing resources to the courts is not a matter of chance, but should be a matter for objective criteria. Now that this has been established, the next issue to look at would be the process by which they arrive at these criteria. According to the respondent at the Ministry of Justice,

> 'every year there is a discussion (budget conference) which allows the Department for Judicial Services to confront the local point of view. The objective criteria are negotiated at local and national level.'
>
> - Policy maker at the Ministry of Justice

This implies that there is a system of negotiation before the budget is distributed. However, given the final form of accountability for refusals for budget requests by the Ministry of Justice, the participation by the courts in the negotiation process and the process of application by the courts for resources may well be considered superficial exercises.

15.2.2 Process

For those who did describe the process of applying for resources, they did so somewhat vaguely. The first president to be quoted here stated that

> 'every year, each court makes a budgetary request for overhead and needs for certain projects. Every year the chancellery notifies the Court of Appeal of the global budget, including personnel salaries and costs of justice, which is then passed on to the courts.'
>
> - President TGI1

The next President provides an even shorter description:

> 'The court applies for resources every year. The Court of Appeal analyses each request, which is detailed for extra ICT, furniture, offices or buildings.'
>
> - President TGI2

According to the Chief Clerk interviewed,

> 'we make two separate applications for two types of resources. Myself, the President and the Chief Public Prosecutor each make a separate budget for our separate sections, and then we meet in order to create one general budget, which is then submitted to the Court of Appeal. The second type of resource is personnel, requests for judges go to the Ministry of Justice.'

So far, what one can see is that the courts participate in negotiating on the criteria used in resourcing the courts, and then put effort into creating a budgetary request. We know that they use what they take away with them from those negotiations, because, according to the respondent from the Ministry of Justice,

> 'the Court of Appeal delivers budget requests which are very long.'
>
> - Policy maker at the Ministry of Justice

According to the respondent from the regional administrative services,

> 'the courts are motivating their needs more and more precisely; for example in Paris, one court, which has an airport within its jurisdiction, has been able to apply for extra resources based on the fact that illegal immigrants come that way. The courts write down problems specific to them in motivating their resources.'

Aside from the suggestion from these quotes that the criteria these courts are trying to achieve are long lists for more precise demands, the point would be the need for motivation as the central method for obtaining resources. They have participated and spent energy in creating budgets and in motivating them. What happens, then, if there is a refusal to provide everything they have requested? For the first President quoted earlier,

> 'if the Court of Appeal cannot satisfy the requests of the court, most often the explanation is that there is insufficient funding.'
>
> \- President TGI2

The next President said,

> 'we meet with the heads of the Court of Appeal to discuss why we didn't get the requested funds'
>
> \- President TGI3

According to the Chief Clerk

> 'a refusal is rare, but if there is one, it will be for a lack of resources.'
>
> \- Chief Clerk at TGI

According to the Councillor of the Court of Appeal,

> 'we demand no explanation for a refusal of resources from the Ministry of Justice.'
>
> \- Councillor of the Court of Appeal

The respondent from the regional administration services answered, when asked how they request an explanation for a refusal for resources:

> 'there is no motivation. At the level of the Ministry of Justice, there is an increasing dialogue. However, today there is no obligation to explain refusals. Some things are explained, others are not.'
>
> \- Judge member of the regional administrative services

In answer to the initial question of what happens if there is a refusal for resources, apparently the answer is: not very much. Which is surprising, considering the lengths to which the courts participate in the process of a) negotiating on the issue of criteria

for activity in the court, and b) applying for resources. At the end of all this participation, not much seems to happen… there is no sense of outrage, no sense of disappointment, no drama, there appears to be just a simple acceptance. The question following from this would be then, why bother?

The answer is simple, it is a step towards becoming a learning organisation, whether voluntarily or guided by the Ministry of Justice. In order to learn, one needs data or information to know what is happening. The first president quoted says so himself:

> 'the Ministry of Justice uses indicators of productivity to distribute resources. Distribution is based on results and data obtained from the indicators.'
>
> - President TGI1

Therefore, even though there may be a lack of resources to satisfy all budget requests, there is information to indicate how the judicial organisation is performing, and the results every year are comparable to the last, and therefore it can tell the Ministry where the problem areas are. This is also a useful management tool for the president of the courts themselves to use. However, it was not obvious from the interviews that this was how the information was being used in the courts.

An externality of all this information being written down is that it is also available to others for viewing, including Parliament in its budgetary debate, and by extension therefore also the public. This would increase the transparency of the operation of the judicial organisation; a step in the direction of increasing legitimacy. When asked if he believed that the system was a system of accountability for the courts, the respondent at the Ministry of Justice said

> 'yes, because in determining resources for the courts, the courts themselves are forced into a dialogue about management.'
>
> - Policy maker at the Ministry of Justice

Furthermore, on the issue of transparency he also said:

> 'reports and publications are online via the Internet. The policy of transparency demands that reports are made public. There are also the reports of the Inspectorate General of the Judicial Services, and the 'chiffres de la justice' (the figures of justice), which reported the annual activities to parliament (budgetary document).'
>
> - Policy maker at the Ministry of Justice

15.2.3. New financial law

This leads to the new financial law that came into effect on January 1, 2006.[4] The respondent from the regional administrative services said of the new financial law that it

4 Refer to chapter 12 Organisers and policy, section 12.2.1. National policy.

> 'creates an objective-based budgetary system; it is based on results, and defines indicators that quantify the quality of the functioning of justice, but not to quantify the quality of decisions of cases.'
>
> - Judge member of the regional administrative services

Immediately, one can see a distinction between the organisational autonomy and judicial independence to write a case. This implies that accountability for the two of them can and should be kept separate. According to the next president,

> 'there will be a budgetary revolution in 2006, which will be more rigorous in demanding accountability and efficiency from all public services, including the judiciary. It will also give more autonomy in terms of finance, operation, and management aspects.'
>
> - President TGI4

This is further enforced when the Chief Clerk interviewed said that:

> 'the financial system only demands that courts be more efficient in their use of resources.'
>
> - Chief Clerk of TGI

Also, the Councillor at the Court of Appeal says:

> 'The new financial law gives a new method of distributing resources to administrations in France, not just the judiciary. Until the new law comes into force, the Ministry of Justice will continue to deal with the costs of justice, for example buildings, maintenance, equipment etc.'
>
> - Councillor of the Court of Appeal

Aside from the continuing trend of using objective criteria for resourcing the courts, two other things can be gleaned collectively from these quotes. First of all, that the courts are considered as public services, or at least are considered enough of a public service that they are funded like one. This can be supported by what the respondent from the Ministry of Justice said:

> 'judicial organisation is principally a governmental activity.'
>
> - Policy maker at the Ministry of Justice

It appears that the courts are not only financed as though they are a public service, they are also governed that way too.

Furthermore, it has been pointed out that the new financial law gives greater autonomy to the judiciary (and other administrations), yet demand greater accountability for spending. Given that it was already general practice at the time of the interviews for there to be reports, and more detailed motivations for resources, the accountability demanded of them from the new financial law would not have come as a big surprise. The essential question for this researcher from all of this, and this refers back to the Meso-level issues, is can the heads of courts handle this autonomy and the

responsibilities it brings with it? Especially considering the quality of management in the courts at the time of the interviews, was enough done to prepare these judge managers for the extra responsibility? These are essentially questions for future research, as this thesis ends as the new financial law is just coming into force.

15.2.4. Analysis: Finances

This analysis of interviews on financial matters follows on from the administration of justice and the separation of powers. An essential (though brief) examination has been on the new financial laws and the effects they might have on the judicial organisation.

Firstly, the last line of the last analysis on administration of justice says the lack of autonomy meant that local courts were unable to react to changes in situations quickly. To that end, there has been some frustration expressed that the lack of resources hinders judges from doing their jobs properly, i.e. through using forensic expertise if it is felt to be necessary. For example, some concern was voiced at the new fast track procedure in criminal law giving increased powers to the public prosecutor to negotiate sentences with the accused, and that it is still the job of the court to ensure that the human rights of those accused are protected. This is where the majority believe that judicial independence of decision-making and its connection to organisational and financial autonomy is the most important: on the work floor itself, where the judges must deal with live cases, and not just statistics. The concern expressed is a legitimate concern. They want more independence over their finances so that they can ensure that justice is done at their level.

The new financial law gives them (along with all other public services) greater autonomy in financial matters. This will then give them the freedom to act more independently in organisational issues, and to react to situations as they emerge. However, the price of this autonomy is greater accountability. Whilst they have the freedom to spend what money they get (even if it is lacking), they must account for their spending. On the one hand, this is done by achieving certain goals set out in indicators and standards in the new financial laws, and on the other, reporting their spending habits and priorities to the public, via Government and Parliament. In the first place this protects judicial independence in the pyramidical hierarchy, especially at the foundation. On the other hand, it strengthens the separation of powers giving a greater check against the judicial organisation and its spending.

15.3. Conclusions

In this section, a description has been given of how the separation of powers, the administration of justice and the financing of the courts operate at the level of governance. These issues are at once complex and simple: simple because alone these are all relatively simple matters. One can see simple structures set up in the separation of powers and the hierarchy of governance of the French ordinary judiciary's organisation.

In the constitution and other laws, it is the responsibility of the Ministry of Justice and Parliament to govern the judicial authority, on the one hand to guarantee judicial independence and, on the other, to deliver effective justice to the people (carte judi-

ciaire). The pyramid organisation set up to govern the judiciary in practical day to day affairs is also rather simple with the Ministry at the head, the Courts of Appeal in the middle and the first instance courts at the base. The bottom two levels deliverer justice, and therefore the management there are best placed to know what resources they need. Those heading the department responsible for policy making at the Ministry are also judges, and are therefore representative of the needs of the organisation in general.

Where it becomes complex is in the implementation of policy and financial procedures, because these directly affect the organisational autonomy of the courts, and, therefore, some believe it affects the judicial independence of judges by extension. This is furthermore believed to affect the protection of the citizen's human rights. It is also complex in the sense of understanding the relationship between judicial independence and organisational autonomy at the separation of powers level, where the judicial organisation is under the care of Parliament and Government.

The fact that procedures cannot always be implemented efficiently, or the fact that first instance courts are demanding greater autonomy because of the idea that it affects the quality of justice go to altering the formal structure of the separation of powers and of the pyramid structure. The judicial organisation is a complex organisation, with a special purpose that requires independence to be protected and to that end greater autonomy has been given to the courts (at both levels). The accountability demanded in return, whilst still in its development stage at the time of the interviews, is not so far from what they currently practice. Due to the fact that judicial independence operates based on the belief that organisational autonomy is directly connected to it, one is therefore able to hypothesise that judicial independence has increased with the autonomy, and therefore there should be fewer concerns about the quality of justice and the protection of human rights.

Chapter 16

16. Responsibility of judges: Micro level analysis (administrative jurisdiction)

16.1. The roles and responsibilities of judges

16.1.1. Introduction

As with other jurisdictions and analyses, this part will look, on the one hand, at the perceptions of what the core responsibilities and role of judges are at the administrative jurisdiction in France. On the other hand, it will look at the perception of the core values operated by judges, namely the relationship between quality and efficiency. Next to these aspects, a brief examination will be made on the participation of judges in the organisation. Finally, an analysis shall be made, linking these issues back to the theoretical and policy framework, to give a picture of how that framework has been operated (if at all) at the level of the judge. In this analysis, the courts of appeal for administrative law shall be referred to as CAA, and the courts of first instance for administrative law shall be referred to as TA.

16.1.2. Main role and responsibility of judges

In the first interview to be cited here, the main goal and responsibility of judges is not described in terms of constitutional law, but rather organisational performance. According to the respondent:

> 'Judges have an annual meeting with their presidents to discuss the past year's performance, and fix goals and objectives for the next year.'
>
> \- President of CAA1

When asked if time management training was offered to judges to help them cope with their workload, this respondent said:

> 'No, judges are free within the organisation to work as they please, as long as they do the work. Comportment within the court varies. Even if someone were to request training, it would not be possible anyway.'
>
> \- President of CAA1

The following respondent said that even though difficult,

> 'Judges need to find a balance between quality and efficiency. With experience they find this balance. It is demanded by the Ministry of Justice and the Council of State that they achieve a certain level of productivity.'
>
> - President of CAA2

The next respondent elaborates more on what he feels to be the main role and responsibility of judges.

> 'Before 2002, the only focus was for judges to write a quality judgement, examine case files thoroughly and be able to analyse everything. From 2000, there was an increase in cases, requiring judges to work faster. All the judges at the court are obliged to judge a predetermined number of cases every year.'
>
> - President of TA1

Further to this obligation, the judges also apparently have to be

> 'Responsible for their own workloads. It is for the judges to come forward and state that a case is difficult. As President, I will then confirm this by reading through the case, and then adjust the workload of the judge accordingly.'
>
> - President of TA1

After these responsibilities,

> 'On the issue of comportment, judges must have good relations with the parties, in and out of hearings.'
>
> - President of TA1

According to the following respondent,

> 'Judges' work is based on the principle of having a public service obligation. There is a basic norm which obliges judges to write a certain number of judgements within a determined amount of time. In other courts, the norm is to write seven judgements in 15 days; in reality, however, they write more because decisions differ in difficulty.'
>
> - President of TA2

Again, the next respondent confirms that

> 'Judges do not receive time management. However, there is a course that can be offered, but it is not compulsory. Judges are obliged to produce results.'
>
> - President of TA3

Finally, the last President of an administrative tribunal interviewed said of judges' responsibility that:

> 'Quality and efficiency are expected of judges by the parties. To me, this means rendering judgements within a reasonable delay, and with a quality response. This response includes that the judges study all elements of the case file and make a necessary analysis, and giving them the freedom to come up with diversifying views.'
>
> \- President of TA4

However, in spite of these expectations of judges by the respondent and the parties, the same respondent goes on to cast doubts on the attitude of judges, and subsequently their ability to meet these expectations:

> 'Traditionally, judges prioritise rendering quality judgements. They are not always conscious of the importance of efficiency in treating cases. They feel that productivity goes against their status.'
>
> \- President of TA4

In terms of the role and responsibilities of judges one can identify various trends from these quotes. In the first place, there is an emerging trend of structuring the work of judges so that they must meet a certain quota. However, given this trend, the judges appear to be given organisational autonomy to complete these quotas. There is no standard way of giving them this responsibility. All of a sudden there are quotas, and not even training in time management is offered (in all but one of these interviews). This could be indicative of the fact that the amount of cases they have to deal with is not much more or equal to the amount of work that they had before. Or it could be indicative of the fact that the management have faith that judges can handle their quotas and the stress that comes with them.

The other trend one can identify from this analysis is that there is an expectation that judges learn to balance their responsibilities of quality of judgements and efficiency. This would go hand-in-hand with the policy of quotas for judges. It has been acknowledged by most that judges find this balance difficult to find. In the end, however, organising judges' work is the judges' responsibility. This indicates a great deal of organisational autonomy, in spite of quotas. The expectation appears to be that judges continue to deliver at a high standard, and take the steps that they are supposed to take, but to be more efficient about it.

The picture painted here shows that, on the one hand, judges are expected to fulfil quotas of cases (a new form of accountability), whilst maintaining a high standard of quality, and, on the other hand, they have the same organisational autonomy as before, at the same time as finding this responsibility difficult to balance.

16.1.3. Legal quality and efficiency

At this point the next issue to be addressed is how the respondents perceived the two values that the judges find themselves having difficulties with balancing: quality and efficiency. At the level of policy, one respondent from the Council of State, who was responsible for matters pertaining to jurisdiction management, said that

> 'Quality is becoming increasingly important. There is an expectation that both the quality of service and judgements improves. Where a case takes too long, i.e. five years, it will not be considered as a quality judgement.'

At the level of courts where this policy is expected to be executed, this respondent said that at his court:

> 'Conciliation between quality and efficiency is found in the system of collegiality. This is a system whereby three to five judges render a judgement together. All cases are also to be examined by an independent party: the 'Commissaire du Gouvernement'. The quality of justice in administrative law is fundamentally important because, unlike the ordinary jurisdiction, one party is always the same: the Government. Because of this, courts need to ensure the stability of decision-making as it affects decision-making of administration in France. Collegiality guarantees quality of decisions, and efficiency comes from the fact that decisions are stable, i.e. certain and durable.'
>
> - President of CAA1

To this same respondent, management of this balance is possible

> 'As long as there is constant dialogue between myself and the President of each chamber. It is necessary to have dialogue in order to discuss cases with particular problems. It doesn't take up too much time, and it is a further guarantee of stability of justice.'
>
> - President of CAA1

For the following respondent,

> 'Quality is about examining and going in-depth into all questions of the case. Efficiency is to do with the time it takes the case to leave the court. On average it takes three years to decide the case, but most take four to five years. All cases demand quality and that decisions are well thought out. However, the case has no quality if the decision has been too well thought out but has taken too long. Efficiency is part of quality. It is a necessary combination.'
>
> - President of CAA2

The next respondent said:

> 'Whether or not we consider cases to be unreasonably delayed depends on a number of factors, such as the number of judges, the number of cases, the type of procedure that the case must go through and the amount of time it takes for parties to exchange and respond to documents.'
>
> - President of TA1

Furthermore,

> 'After 2000, the first concern was still to render quality judgements. However, the parties also wanted to have the judgements faster and more efficiently. To me the two qualities are compatible.'
>
> - President of TA1

According to another respondent:

> 'The quality and quantity balance depends on situation to situation, e.g. at the Council of State the norm is longer. However, there is always quality in judgements. Quality will not be compromised for speed. There is a code of practice that cases are examined two or three times by the rapporteur, the President of the chamber and the judges themselves.'
>
> - President of TA2

In terms of balancing these norms, this same respondent said of the delays the court was having that:

> 'Most cases are finished within two years. This is not a particularly good scenario, but it is not a catastrophe either. All cases are done on the basis that all cases are taken first. In other places, the norms are fixed for the judges, but here, in each chamber we examine each case and discuss what is a reasonable delay in such cases.'
>
> - President of TA2

To the final respondent,

> 'Efficiency is not always a conscious issue for judges in dealing with cases. It is felt to be a preoccupation of productivity and statistics. To me it is not about rendering as many cases as possible, but about reducing delays in rendering judgements and improving service to clients.'
>
> - President of TA3

From this part of the analysis one appears to find a strong and collective definition of what quality of judgements entails, especially in terms of ensuring that cases are properly examined, that the proper amount of time is expended and that the right number of people are involved. There is a clear message that in no way will these respondents compromise on quality.

However, the same cannot be said for efficiency. In the first respondent's quote, the number of cases does not even feature in the perception or definition of efficiency given. Others have tried to factor it in as a part of the definition of quality, claiming that judgements that take too long lack quality. The problem there is that no clear definition is given as to what 'too long' means. It is clearly left as a subjective test for the courts to decide for themselves. Some courts, it can be established, fix a norm (maybe through quotas), whereas other courts define on a case-by-case basis what a reasonable delay means. Only one respondent factored in case management issues in dealing with the definition of reasonable delays. This recognises that judges operate

in a broader organisation that must also handle the same cases, and that other factors other than the judges themselves will affect the definition.

With no clear definitions of what efficiency means in this jurisdiction, it is logical that there will also be uncertainties as regards the role and responsibilities of judges, and especially that they will find the balance difficult to achieve. Given the lack of a clear definition from above, it is not surprising that little guidance can be offered by the presidents to the judges. This is indicative of why judges have so much organisational autonomy. Eventually, after much experience from the work floor, a best practice structure may be established and followed.

Having looked at the main role and responsibility of judges and the perceptions and definitions of the values of quality and efficiency, it is time to look at the role that is demanded of judges in the court organisation itself, outside of writing judgements.

16.1.4. Individual judges within the court organisation

When asked if judges participate in court organisation in terms of organisational issues, outside of decision-making, the first respondent said:

> 'Yes, in three ways. Firstly, there are at least two sessions of the General Assembly a year to discuss all the managerial decisions that affect judges' work. Secondly, there are two trade unions (syndicates) at the court, which enter the dialogue regularly. Thirdly, there is a form of democracy in all chambers in that the President and judges meet every week to discuss work.'
>
> - President of CAA1

The following respondent says that:

> 'There is an annual meeting of the General Assembly to discuss the optimal speed of decision-making. [Furthermore] the General Assembly meets twice a year to discuss the more important organisational issues. There is a meeting with all the presidents of the chambers.'
>
> - President of CAA2

However, according to the next respondent:

> 'Judges do not participate so much in the organisation. There is the General Assembly, which is a body composed of all judges at the court. It sits in session once a year to discuss all the problems of the court and any possible solutions. All judges can propose solutions or suggestions for improvement to the organisation of the court.'
>
> - President of TA1

Along similar lines, another respondent said that:

> 'The presidents of the chambers and I come together once a week to discuss organisational issues. As concerns the judges, there is a General Assembly three

> times a year. There they discuss the organisation, and issues of caseloads and resources; for caseloads they create a non-urgent list. They also discuss career and promotion issues.'
>
> \- President of TA2

The last respondent on this issue states that:

> 'It is rare for judges to participate in the organisation unless they are presidents of chambers. Judges' participation is in writing judgements.'
>
> \- President of TA3

These respondents for the most part indicate that there is a structure for judges to participate in organisational issues and voice concerns on proposals. This structure is the General Assembly. In all but one of the courts, this operates at least once a year and at most three times a year. The difference between courts in terms of the number of other times the General Assembly meets is indicative of the size of the court, or maybe that in some courts judges are more concerned about organisation than others. In two of the courts, the respondents specifically point out that the General Assembly is involved in case management: In one case in prioritising the order of cases to be judged, and in the other to find the optimal speed of decision-making (again indicating a service objectivity and democracy in deciding the norms on efficiency).

Beyond this structure of participation a couple of times a year, several of the respondents pointed out that it was rare for judges to take part in the dialogue on organisation at court level. It could be because, as pointed out by one respondent, they are busy writing judgements. It could also be because judges do not work at court level but at chamber level, where weekly discussions are held between the presidents of the chambers and the judges.

16.1.5. Analysis: The roles and responsibility of judges

To me, the most important guiding principles on the main role and responsibilities of judges can be found in Article 66 which states that no one shall be arbitrarily detained, and the declaration that the judges as guardians of liberty shall fulfil their duties in the framework of the law.[1] Even though judges of the administrative jurisdiction are not institutions of the Constitution, the principle of protecting human rights and citizens from arbitrary governmental decisions follows the same principle of protection. In terms of actual fulfilment, one can see from the parts that follow, that this framework of laws and principles is based on impartiality and independence, and of course that judges base their decisions on legislation or codes. Very little in this background section pertains to the current expectations that quality must be high and decision-making must be efficient. The only hints that this might be expected of them would be in Article 6 of the European Convention on Human Rights. This article stipulates that judgements must be rendered within a reasonable delay. As one can see a couple of respondents follow this particular rhetoric, but not all do.

1 Refer to chapter 10 Constitutional law and practices, section Powers defined.

However, this need for high quality and efficiency can be said to fit within the vague constitutional framework. As several respondents said, a judgement that takes too long has no quality. Justice is difficult to administer legitimately if decisions are no longer valid. This could be because the situation has either evolved or has been blown out of the proportions of the original situation in which the case went to court: justice delayed is justice denied. If justice is denied then human or individual liberties are at risk. Within the constitutional/legal framework, high quality is well- defined, yet reasonable delay and efficiency are not.

This could be because these terms are part of public service language rather than constitutional. One can see that France has a very strong tradition of providing public services,[2] and that, recently, both jurisdictions are being reoriented along these lines. It can be seen that policymakers are trying to change the internal perception and operation of the judiciary towards a public service mentality.

From this analysis, however, it can be hypothesised that the priorities for judges are still for high quality, which in most cases will not be compromised. Some will strive for a reasonable delay, but barring any real definition of policymaking level, this is also not a very clear criterion. One can also hypothesise that the decision-making process in cases is not interfered with in any way. Judges have organisational autonomy in their working methods to make decisions. This organisational autonomy even extends to participation and the right to consultation in the courts through the General Assembly. Very little has actually been written about the General Assembly,[3] but in order to make the change process as efficient and effective as possible, it is necessary to have a process of consultation and participation to legitimate organisational decision-making at the level of the judges. Furthermore, whilst judges may not appear from these interviews to be enthusiastic participators at court level, there appears to be some indication that there is participation at the policy-making level, in terms of committee work and research i.e. bottom-up participation. This indicates that judges find the policy-making level a greater threat to their status as judges than the organisational decision-making in their own courts.

16.2. Managing judges

16.2.1. Introduction

This section looks at the way in which judges themselves are managed within the structure of their main role and responsibilities. The respondents answered questions as to the techniques and policies they used to manage judges under their responsibility and what management means to them. Next to this, I shall look at the way in which resources are managed to aid judges in their responsibilities. Lastly, an analysis linking what I will examine here to the policy background will be given, painting a picture of how policies operate in administrative justice.

2 Refer to chapter 12 Organisers and policy, section 12.3.1. General policy.

3 Refer to chapter 11 Institutional context, section 11.1.1 Ordinary jurisdiction.

16.2.2. Managing judges

One of the respondents of the Council of State, a policymaker for the judicial branch, said of managing judges that:

> 'There is an annual meeting between presidents and judges for an hour or two. There they set a number of cases to be completed and look at the necessary training. In setting the quota, they compare the previous performance of the judges.'

When asked how judges felt about the quotas, the same respondents said:

> 'Judges are not really happy about the indicators, but increasingly happy about the annual meetings with the presidents of the courts.'

According to the first respondent at court, when asked what he did for judges with problems, he said

> 'If the judges are lazy, then I will demand that they start to work harder. If the judge is incompetent, and I have only seen this happen once, then I will encourage the judge to leave the jurisdiction and transfer to administration. There is a tradition in France that allows this transfer between courts of administrative law and government. It is rare that it happens, but it does.'
>
> - President of CAA1

Beyond this however,

> 'Judges are free within the organisation to work as they please, as long as they do the work. As a manager I am able to follow the activities of every judge and the development of urgent cases.'
>
> - President of CAA1

The next respondent said, when asked the same thing, that:

> 'Firstly, every year I have a discussion with the judges and write a formal evaluation of their performance, before sending it to Paris. Secondly, I also have meetings with judges to set new targets for the next year, based on the performance of the last. A table of progress is also used as a tool for assessing performance.'
>
> - President of CAA2

On the whole though,

> 'The court does not have a hierarchical structure and judges take responsibility for their work.'
>
> - President of CAA2

When asked what happened if the judges persisted in having problems, the same respondents said that

> 'If there is really nothing more I can do for them, I will start official disciplinary proceedings, which could eventually lead to the revocation of a judicial post. In the 40 years I have been a judge, four of which I have been president, I have only seen this happen three times. It is a very exceptional measure.'
>
> \- President of CAA2

The following respondent said that

> 'I use information on productivity to assess judges' performance throughout the year. However, it is not used to pressure judges into working harder. In such a small court, there is also internal peer pressure amongst them to work harder.'
>
> \- President of TA1

Nevertheless, when a judge has problems,

> 'This is my responsibility as President. I am responsible for distributing cases. All judges must have roughly the same workload. Whilst unfortunately we do not have training for their management, and even though there has been an increase in cases and some increase in pressure at work, the judges are not more stressed than they can handle. I try to ensure that judges take proper breaks and holidays.'
>
> \- President of TA1

Furthermore, to aid judges in their responsibilities, this respondent

> 'Tries to help facilitate different methods of work, for example specialisation, which helps with efficiency of case handling.'
>
> \- President of TA1

One of the respondents never actually discussed the management of judges directly, but mentioned a couple of issues, which hinted at how judges are managed. On the one hand:

> 'There is a basic norm which obliges judges to write a certain number of judgements.'
>
> \- President of TA2

On the issue of time management training,

> 'There is no course that can be offered. If judges have problems meeting the quotas, then I will discuss it with them and look for a solution, but the level of work is very high. Therefore I am not really concerned about providing training to judges to manage their time.'
>
> \- President of TA2

Finally, the last respondent also does not say very much about her managing techniques as regards judges:

> 'Where judges have problems, I will talk to them to try and convince them to work harder, and longer, i.e. at weekends.'
>
> \- President of TA3

From these respondents, one cannot say that there is a practice of actually managing judges. Returning to Longman's dictionary definition, to manage ' is to direct or control a business or department and the people, equipment and money involved in it.' Focusing for now on the aspect of managing people, mainly judges, the main expectations by these respondents are that judges fulfil their quotas. There is no real further management. For the most part it is believed that judges are able to cope with their workloads, and stress is not an evident problem. Where stress is an evident problem, not much appears to be done, except to exert more pressure (either peer or otherwise) to work harder. None of these courts provide time management training. Many of the respondents are, on the one hand, disappointed by this, but on the other hand, again their belief that the judges do not suffer from stress seems to negate any disappointment felt by not being able to provide training. The autonomy given to judges in this management structure is very great.

The only real sanction discussed was dismissal and transfer of administration, both of which are extremely rare, and therefore not really considered as a possible management tool. The only real tool they have in policy terms is the annual meeting with judges, where they discuss past performance, quotas and other problems. Given that there are no sanctions, peer pressure is the only available possibility to get judges to comply with their quotas.

16.2.3. Organisational instruments to aid judges in their responsibilities

Given the lack of actual management of judges to lead them in achieving their working goals, it is essential to understand the role of the President in distributing resources in the court and knowing what instruments are available to aid judges in their work. In line with the ordinary jurisdiction, there are human resources and technological resources.

Legal assistance

The first respondent describes the human resources at his court to relieve the burden on judges:

> 'There are 50 clerks and six judicial assistants. Some of the clerks do exercise some judicial function, but they are not trained in legal procedure. The assistants prepare and write up judicial rulings, and the Presidents of chambers will sometimes give them simpler cases to prepare.'
>
> \- President of CAA1

For the younger judges, who may have some problems with the workload,

> 'They are helped by the advice of other more experienced judges and the Commissaire du Gouvernement.'
>
> - President of CAA1

The following respondent describes the functioning of the judicial assistants' position at his court as:

> 'Increasing the productivity of each judge, without compromising quality. However, judges' culture is to work alone, and therefore having the judicial assistants is an enormous change, and not entirely accepted, but they are adapting. Eventually they will become part of the organisation's culture.'
>
> - President of CAA2

Also at this court, there is a position that was not described by the first respondent, namely the

> 'Assistent de Contentieux, who helps to prepare cases. Furthermore, there are also clerks at the court, who deal with processing cases, typing judgements, and ensuring that the right files are in the right places. It is also their job to work with parties and lawyers.'
>
> - President of CAA2

At the next court, the respondent says of the judicial assistants that:

> 'We use them here to help find the balance between quality and efficiency. They prepare case files, research jurisprudence, and write up judgements. The judges and I have confidence in them; however, all of their work is double-checked by judges.'
>
> - President of TA1

At the next court, the respondent says that

> 'I ensure that judges have sufficient work resources that are as efficient as possible, for example by providing assistance that is competent and efficient.'
>
> - President of TA2

To that end, this respondent describes three types of legal assistant positions:

> 'Firstly, there is the judicial assistant's position, which is held by law students and has a two-year contract. They help judges to prepare decisions in simpler cases. Secondly, there are also the assistent de contentieux, which is a clerk' s position. Lastly, there are the actual clerks of the court, but they have a different role than usual. Normally they organise the court hearings, but with a certain type of training, they can work the files.'
>
> - President of TA2

The last respondent on the issue of instruments says briefly that the role of the

> 'Judicial assistants are taking on some of the burden of judges' work.'
>
> - President of TA4

One can see that these human resources instruments to aid judges are not consistently utilised across these courts. Take, for example, the position of the judicial assistant; in two places this position is considered as a tool to help balance the values of quality of justice and efficiency, but in others it is viewed with a certain amount of mistrust. Furthermore, this is a part-time position for law students, which may make relying upon them in the long run difficult.

As for the assistent de contentieux, they do not even seem to appear in all of the courts. The utilisation of clerks is also varied across the courts, with some relegated to organising hearings and processing cases, whereas others take part in helping to prepare simple cases. It can be said therefore, in terms of organising human resources in aiding judges, that courts have autonomy in how they do distribute people, based on local needs.

Training

There are various reasons why a consistent policy should be developed for further training in the courts. For this first respondent, in terms of keeping up-to-date with the law, there are three ways at the court:

> 'Firstly, there is training; secondly, they read official journals; and lastly, lawyers inform them during cases.'
>
> - President of CAA1

The following respondent gives this opinion on the issue of training,

> 'All judges of the administrative jurisdiction follow a six-month internship at the Council of State, but it is true that this is insufficient. Today, the Council of State organises further training for judges after following the internship. Judges can choose one per year from a catalogue. As President, I will discuss with each judge the training I think they need, but it is not obligatory. It is more efficient to provide training when it is needed.'
>
> - President of CAA2

According to the next respondent, when a new judge comes to work at the court:

> 'He or she will follow another experienced judge and will work with that judge on four or five cases. The more experienced judge will do the practical work of checking and controlling judgements. This is the person chosen to integrate younger judges into the court.'
>
> - President of TA1

At another court, they use training as an integrating system for younger judges whereby:

> 'The Presidents of chambers also revise the files, and in this way can act as teachers to the younger judges.'
>
> - President of TA2

In terms of training, there is also a highly fractured policy across the courts, with some offering training, and one even saying that there is a whole catalogue available. The availability of this catalogue would seem to negate what several respondents said on the lack of availability. Be that as it may, those who offered training do not appear to force it on judges, which gives the overall impression that not many people actually take part in further training. However, the initial training of judges within the court itself is considered to be very important and training and guidance is obligatory for all new judges by more experienced judges. This not only acts to integrate new judges, but also as a quality check on their work.

ICT

On the other hand, there are also non-human resources available to help judges, mainly information technology:

> 'The role of ICT is central to the main tasks of every court. All judges work with computers for word-processing, and to access documents online, including all of the judgements of the Council of State. Research has become simpler and more reliable.'
>
> - President of CAA1

When asked about training for ICT at the court, this respondent said:

> 'The clerks and secretarial personnel received training in the use of ICT. However, they do not really have so much money in the budget, which makes it difficult to train everybody. Judges are given on-the-spot training, with things being explained to them as they require it, by people who have had training.'
>
> - President of CAA1

As for the use of ICT at this following court:

> 'Certain ICT projects have made life more efficient for judges, especially in terms of electronic files for research in data. We also have a project to sort out jurisprudence by subject-matter. It is much faster and more efficient to research at the court. This also reduces the amount of paper used at the court as well. They do receive training for ICT and problem solving.'
>
> - President of CAA2

The next respondent describes the use of ICT in his court:

'There are two types of use: in the first place, judges have access to the database, which allows them to find solutions to their cases, e.g. ARIAN for fiscal law, provided by the Council of State. These are accessible online, on CD-ROM and paper form at the library. In the second place, there is the writing of judgements. All judges have a computer that allows them to prepare the judgements and access their files by typing in names of parties. All judges of the younger generation use the computers. For all the judges, it is a big issue to adapt. The secretaries and clerks show them how to use various programmes of the computer. It is also much faster for correcting files and judgements.'

- President of TA3

The following judge discusses the role of ICT for the work of judges:

'ICT is indispensable to judges to make judgements and access principal sources of law. However, it is not a tool to manage their caseload, but I expect this situation to improve. In any case, ICT does not actually reduce the amount of work that needs to be done, especially in terms of more difficult cases. Also, not all judges use computers and ICT at the court, mostly the younger judges use this tool. Furthermore, the software and training are insufficient for the needs of the court.'

- President of TA4

Regarding ICT the consistency here would seem to be that it is available for use, it is just that not all judges use it, and not all seem to know how to use computers. However, the direct access to sources of law and files does seem to ease the workload of judges in general. One of the problems highlighted was that software was considered to be inappropriate to use. Even for essential things like ICT training does not appear to be available for judges.

On a general and positive note as to what has been said about all of the instruments to aid, it can be inferred that there do exist quite a framework of tools, and that the respondents do seem to manage them to their utmost efficiency according to the needs of the court.

These are all very sophisticated instruments; however, the inconsistent manner of use, and the mistrust surrounding them at the level of the work floor points to the idea that these tools are not efficiently used, which may require greater guidance at the policy level.

16.2.4 Analysis: Managing judges

In dealing with the management of judges of the administrative jurisdiction (who by decree of the Constitutional Council have the same rights and duties as those of the ordinary jurisdiction), one needs to look at the code of administrative justice.[4] To recap, the High Council for administrative tribunals and courts has a similar mandate to its counterpart in the ordinary jurisdiction in terms of nominations, discipline and career

4 Refer to chapter 11 Institutional context, section 11.1.2 Administrative jursidiction.

issues. However, the status of judges is not set out in the constitution and therefore one has to rely upon the more detailed code. The important point for this section would be the fact that jurisprudence has developed to protect administrative judges by offering also the protection of immovability. However, much like the other jurisdiction, the actual criteria to take a managerial position (i.e. presidential position) at the court are unclear.

From these interviews one can see that excellent legal skills are required because they act as quality controllers rather than as managers of judges. One can also see that some managerial skills have been developed to reorganise the courts' resources around the needs of the judges. There therefore appears to be not a lack of skill in management, but rather a lack of willingness to manage judges. Furthermore, the immovability of judges in this jurisdiction also means that sanctions and discipline are seriously limited as possible tools of accountability. In theory, presidents as managers do not have the policy weight to manage judges. There are no possible sanctions for organisational misdemeanours; if judges do not wish to use their computers, they do not have to. Similarly, where judges do not fulfil their quotas, there is not much they can do about it other than talk to the judges and invest more resources to solve the problem (if that can solve the problem and if they have the resources available).

However, there is a very strong informal code of conduct, which the state is trying to legislate upon (at the time of the interviews). Whilst this has not been discussed in the interviews, it may be a reason why these respondents do not seem to be too concerned that judges have so much organisational autonomy that they are difficult to manage.

In terms of the instruments to aid judges in their responsibilities, all of them are part of national policy. Clerks have been reported to have taken on one third more of tasks, which is consistent with what the respondents have said.[5] The newer position of the assistant is given the task of assisting judges in their judicial function. The vagueness of this policy gives room for the presidents to assign tasks to the assistants as necessary. It is therefore not surprising that there is a wide and varied use of them in the courts where interviews took place.

ICT has also been the focus for policy, as discussed in the part looking at the judiciary as a public service. There was a policy to try to improve the use of ICT in the courts, and also for training. There appears to be a gap in terms of the suitability of software and courts, as well as a lack of training in its use. As for training in other areas, there also seems to be a gap there. It would appear that there is a policy of providing training through the Council of State programme, and although it appears to be available to everybody, it does not seem to be offered everywhere.

Without a clearer mandate to manage judges, the presidents of the jurisdiction are left to reorganise what resources they have to help judges fulfil their tasks. This leaves judges with a lot of organisational autonomy, although quality is guaranteed as the presidents of each chamber read through all decisions. This is indicative of the fact that they are chosen for being good lawyers rather than good managers.

5 Refer to chapter 12 Organisers and Policy, section 12.1.1. Local Court Administration.

16.3. Judicial independence

As with the other jurisdictions, judicial independence can be separated into three categories: decision-making, organisational autonomy, and accountability. From chapter 10 on constitutional law, one can see that judicial independence and disciplinary measures are linked entirely to decision-making, especially where a judge may not be impartial in a case. However, not much can be said from an organisational perspective in chapter 12. It can be inferred that the separation of powers between the state powers in terms of nominations, discipline, policy and finance is enough to protect judicial independence in decision-making. According to this respondent

> 'In terms of writing decisions, judges are completely independent.'
>
> \- President of TA1

What is a little odd here is that, as in the ordinary French jurisdiction, nobody linked quality decisions to judicial independence. The expectation of timeliness is linked only to the way judges work in court, not in the way in which decisions are made. There has been some implication that some judges are not happy with the use of quotas and indicators, even then no one has claimed that they breach independence. This would mean that the role of decision-making has expanded from not only having the obligation to be impartial, but also to balancing quality with efficiency and to including organisational demands of timeliness and a reasonable delay. To counter any hostile reactions to this movement, legislative proposals have been discussed to enforce judicial impartiality whilst also enhancing resources and powers to the courts to strengthen their working practices and to evaluate performances.

However, the idea of having an actual code of practice or evaluation runs counter to the situation within the administrative courts, where judges have near total organisational autonomy. From this analysis so far, one can see that judges are not managed, except maybe once a year, where they meet to evaluate previous performance to set new goals. Even if the performance of judges is poor, there are no sanctions. Only under disciplinary measures can a judge be dismissed or maybe suspended. These measures are related only to their impartiality in judging cases. Therefore without a code of working practices or ethics, the presidents at the court only have peer pressure to operate a quota system.

Finally, in terms of accountability, nothing is overtly mentioned in the interviews. Again, it is directly linked to decision-making in chapter 10, namely to the impartiality of decision-making.[6] It may be a subject that is taken for granted because of such a strong legal framework. In either case, accountability has not been discussed at this level, even in terms of the traditional forms of appeal, and public hearings or the publication of judgements.

6 Refer to chapter 10 Constitutional law and practices, section 10.4 Judicial independence and integrity.

16.4. Conclusions

The three main themes analysed at this level deal exclusively with judges in the court of administrative jurisdiction. It has been stated in chapter 10 that the law has been developed to protect judicial independence of judges in the administrative courts even though the constitutional court and the High Council have not acknowledge their status as constitutional institutions.[7] The practice is therefore that judges have the same rights and obligations as their counterparts in the ordinary jurisdiction and are subject to similar policy changes at government level. Therefore the same three themes have been followed: the role and responsibility of judges, managing judges, and judicial independence.

In terms of the role and responsibility of judges, at this jurisdiction they too have a mandate to protect French citizens from arbitrary decision-making. However, one can see at this level that this is insufficient to describe the actual role of the responsibilities of judges. There is some public service rhetoric seen in some of these quotes, which expands the role of decision-making from impartiality to include balancing quality with efficiency. However, this expansion leaves quality and efficiency undefined and therefore also some difficulty for judges in coping with the new balance. The amount of judges' participation in organisation goes to the legitimacy of organisational decision-making within the court itself. Nevertheless, there does not appear to be much except for the General Assembly a couple of times a year to legitimate these decisions. However, that judges participate at the policy-making level suggests that they believe that their organisational interests would be better served there.

As regards the management of judges, it has been established that judges are not managed on a day-to-day basis. Judges have complete autonomy plus various instruments to aid in completing their quotas. On the other hand, it appears that they have not yet altogether adjusted to having quotas or instruments to aid, so it does occur occasionally that judges will be unable to fulfil their quotas, or that they will be reluctant to use judicial assistants due to a lack of trust, or to use computers because they have not received the training. Although it appears that policies are providing what these courts need, the judges do not yet appear to be using these things efficiently.

Finally, regarding judicial independence, there is a gap or at least vagueness in the legal framework between the way it is set out and its operation. It appears to be rather subjective and based on the action of judges to protect it for themselves. It could be hypothesised that presidents will not manage judges on a daily basis as to them, organisational autonomy is synonymous with judicial independence.

7 Refer to chapter 10 Constitutional law and practices, section 10.3.2. Ordre Administratif.

Chapter 17

17. Court organization: Meso level analysis (administrative jurisdiction)

In this section an analysis shall be given on court management; and the quality of justice, which deals with case management, as well as quality measures and indicators operating at court level.

17.1. Court management

17.1.1 Quality of management

In terms of the quality of management, the first respondent, when asked if he had received training in management, said:

> 'There is no training in the management of courts. However, there is an intention to create a programme for the President and Chief Clerk, but needs developing.'
>
> - President CAA1

The next respondent, when answering the same question, said:

> 'There is no case management training. Presidents are nominated for being good judges or lawyers.'
>
> - President CAA2

The following respondent also said:

> 'There is no training for court management, which is a shame. It is needed, and the Council of State is considering it. However, before becoming President at the court, I followed some management courses first, and I have experience in management from another jurisdiction.'
>
> - President TA1

According to the next respondent,

> 'There is no management training for the courts, but it would make sense to start a programme. There are various techniques and tricks that I have learnt. I was also able to learn some things at a bizarre once. In my opinion, psychology of management and respecting one's colleagues is very important.'
>
> - President TA2

The last respondent on this issue said that

> 'There is no training for court management, but I regret this. I did read some literature about management and coaching before becoming President. I understand that there are some small courses available to the Council of State. Whilst I have had experience as President at a different court, the challenges are different because of the difference in size.'
>
> - President TA3

On the issue of the quality of management, it is quite clear that there is no structured training to teach Presidents how to organise their courts. One cannot conclude from this alone, however, that management is of poor quality. There are a couple of points in these quotes which lead to the hypothesis that management and organisation skills are not important criteria at policy level.

Firstly, one respondent points out that the criterion of becoming President is to be a good lawyer or judge. The fact that management training is felt to be unavailable yet still being considered is also a sign of a lack of priority. However, even though policy-makers have not prioritised on these issues, it is quite clear that some of these respondents feel the lack, with some taking the initiative by reading books or following courses.

They have also gained experience from previous administration work, as it is the policy that

> 'Judges can only be nominated as President if they have had two years in administration'
>
> - President CAA1

However, this does not seem to be a sufficient basis for becoming President. This all leads to another hypothesis that the role of President is expanding to include not only juridical talent, but also organisation and management skills, such as personnel, financial and resource management.

17.1.2. Court managers

As for what Presidents actually do regard as management, only three of the respondents said anything about their jobs. On the one hand, the first respondent said

> 'I take management on a step-by-step basis. I base it on my experience as a manager for two years at the Conseil de Concurrence.'
>
> - President CAA1

On the other hand, one respondent said

> 'I do not find management to be an overly burdensome task, and I delegate a lot of responsibility.'
>
> - President CAA2

The third respondent gives a more detailed description:

> 'In such a large court, I find that coaching is very important in communicating organisational decisions that I make to the judges. Otherwise I find that coaching judges is very important to help them combat fatigue and stress. My management aims are to help balance legal quality and efficiency at the court and to mitigate the negative repercussions of not having enough judges.'
>
> - President TA3

Only this last respondent gave any sort of indication of her managerial duties at court, and they appear to be exclusively dealing with coaching judges and organising the court to meet high-level quality and efficiency (as far as it is possible). From what we have seen in the Micro section analysis of interviews, this involves managing human resources and technologies around the activities of the judges.

However, Presidents are not the only people involved in the management of courts. According to this first respondent

> 'the Chief Clerk is the Secretary-General at the court and is responsible for managing all non-judicial staff.'
>
> - President CAA1

The next respondent said that:

> 'The Chief Clerk renders most services to the users of the court. The Chief Clerk is also the Secretary-General of the court, and manages not only the service, but also the buildings, the budget and paying employees. Furthermore, I meet with the Presidents of the chambers to discuss organisational issues.'
>
> - President CAA2

The following respondent says that

> 'the General Assembly can give input into possible solutions for organisational problems.'
>
> - President TA1

This next respondent said that

> 'General management of the court is between the President and the Chief Clerk. The Chief Clerk meets regularly with the clerks to deal with personnel and

organisation issues and I, as president, meet frequently with Presidents of chambers to discuss organisation.'

- President TA2

The last respondent said that

'the Chief Clerk has the task of coaching clerks in their daily work.'

- President TA3

The majority of these quotes suggest that management is not a holistic concept within French administrative courts (appeal and first instance). There is a sense that Presidents focus on judges (from the Micro analysis this can be said to be true), Chief Clerks manage the practicalities of the daily operation of the court, with Presidents of chambers representing the organisational needs of their own units in weekly meetings with the First President. The General Assembly even gets an honourable mention, but the actual impact on court management cannot really be found from these quotes.

17.1.3. Analysis: Court management

s things with these interviews in mind. Firstly, it is part of policy that Presidents are administrators of the courts.[1] Given that this is policy (or at least generally understood to be policy), it is odd that no training is provided for them to be administrators. They have all the legal skills they need to be judges, yet in management, there has not been much confidence experienced in these respondents' skills. Moreover, there appears to be a strong demand for training in management.

For the rest, the Code of Administrative Justice is very vague on the managerial tasks of the Presidents of the administrative courts, except that there must be one, and what their status is. It does set out the legal framework of the Secretary-General in article L235-5 in section 4, which means that on the surface at least, the courts do follow a specific policy in the staffing of their organisations.

In its mission statement the Code mentions that it sets out to lay down organising principles to enforce the quality of justice. They do this through the traditional methods of how many judges hear cases, and laying down rules of impartiality and independence. The meaning of quality in this instance does not appear to cover organisation and management: just legal.

17.2. Quality of organisation

This section will look, on the one hand, at case management, as it is a core activity that everyone is involved in on the work floor. The operation of any quality measures and indicators will also be examined, in order later to be able to examine the relationship between quality standards and constitutional values.

1 Refer to chapter 11 Institutional context, section 11.1.2. Administrative jurisdiction.

17.2.1. Case management

General

There are different techniques for case management espoused by these respondents. In the first place, this respondent said

> 'As President I set certain targets and priorities for the court. My target is to have all cases finished within four years of their entering the court. My priorities are for the oldest cases then the most urgent cases. Up to about 20% of the cases are settled out of court.'
>
> - President CAA1

For the same respondent, there are a few basic principles of case management:

> 'where the law is clear in the case, I will give it to any single judge to decide the case. Where the law is irreversible, I will reject the appeal upon application.'
>
> - President CAA1

In the second place, the respondent said

> 'I distribute based on specialisation of chambers. I take no account of difficulty in cases, because judges are capable.'
>
> - President CAA2

In the third place, the respondent said that

> 'I distribute cases according to age (oldest first) and urgency. In a small court where there are only two chambers, such as this one, it is impossible to specialise according to the chambers, but some of the judges do specialise in certain fields, making distribution easier. However, I have no means of differentiating between difficult and easy cases. All judges have the same workload.'
>
> - President TA1

In the next court, the respondent says:

> 'At this court we have a severe shortage of judges because they have been promoted to the appeal courts; this has reduced the number of judgements being produced, at the same time as seeing an increase of 27% in incoming cases. To deal with this increase, I look at which cases can be dealt with in bulk. Furthermore, the ICT system Skipper allows me to follow the status of cases at the court. In order to judge the state of case flow I have several criteria. Firstly, I look at the number of cases heard in a year in relation to the backlog at the court. Secondly, I look at the amount of time spent on each case per year to

> gauge the average performance of judges. Finally, I look at the level of urgency of cases judged.'
>
> - President TA2

According to the last respondent:

> 'My objective is to clear old cases, to try to treat cases through themes or series, and to deal with the large number of immigration cases that have recently flooded the court. To do this, I have set up a group called 'presidents de formation des jugements'. This is a group of six people who, on an annual and trimester basis, organise and plan registration and hearings. This group also observes the movement of cases.'
>
> - President TA3

These quotes indicate the consistency of 'first come, first served', unless the cases are urgent. Distribution is usually based on specialisation: of chambers if the court is large, or of judges if the court is small. No effort is made to differentiate between cases' difficulty, usually because judges are felt to be capable of handling the job.

Where there is felt to be a shortage of judges and an ever-present backlog, the aim will then be to control its growth rather than to eliminate it, simply because of a lack of resources. These quotes have provided a simple outlook on dealing with case flow and backlogs.

The trend: an increase in simple cases, an increase in similar yet simple cases, and the increasing complexity of the law

For the first respondent, the response to this trend is to

> 'increase the specialisation of chambers, especially in terms of case categorisation. This will allow us to follow changes in the law, and allow judges to decide cases more quickly.'
>
> - President CAA1

In the second place, the respondent said

> 'We have a national series to identify similar cases. Occasionally we will also send test cases to the Council of State's judicial branch on new laws. However, even when there is a series of similar cases, the differences in fact and the possible application of more than one law in the case means that judges still have much work to do, and differences of opinion on the application of one law may emerge.'
>
> - President CAA2

For the next respondent,

> 'We have a system called a series that deals with strictly similar cases. Sometimes we will send test cases to the Council of State's judicial branch in the

situation where many cases will have to apply new laws which have entered into force. I also assign a lot of simple cases for judicial assistants to prepare.'

- President TA2

According to the last respondent,

'This court, in recent years, has received a large influx of cases in immigration law. This created the possibility of dealing with cases en masse, whilst still being able to differentiate between cases. In terms of an increase in other categories of similar cases, however, this court did not react appropriately. There was a lack of any relation between human resources and the increasing cases at court. Given the fact that there weren't enough judgements decided, we went from a backlog of one case in 1999 to 3000 in 2004. I have found that ICT is unhelpful in identifying similar cases. After exploring the backlog, I decided to follow both national policies in dealing with such cases: firstly, sending test cases to the Council of State; and, secondly, by creating a series. Within a series, I created further sub-series to identify cases with further similarities. As regards complexity, there is not much I can do other than provide training.'

- President TA3

From these interviews there seemed to be consistent reactions, such as the creation of a series for the courts at national level, and sending test cases to the Council of State; something that both the first instance and appellate courts do. These appear to be national policies. One of the policy makers of the Council of State confirmed the use of the series as a tool for managing cases. Only two people mentioned the role of ICT in case management, where one found it useful and the other one not. The other tool identified as helping case management was specialisation as a technique of distribution.

Transparency of case management

Here I will examine both the internal and external transparency of case management in these courts. For this first respondent

'I have work planned out one year in advance. The Presidents of the chambers are responsible for distributing cases. Judges receive a list of choices, and then go on to confirm the list at the General Assembly.'

- President CAA1

Furthermore, as a manager

'ICT allows me to follow the progress of cases.'

- President CAA1

The following respondent said that

> 'internally, everybody understands the process of case management.'
>
> - President TA1

Externally, however,

> 'I am not sure that parties understand everything. On the one hand, lawyers act as the gateway for parties to understand the processes of the courts. On the other hand, E- SAGACE was set up so that parties can access their cases online, and follow the progress and agenda. Each court is responsible for the information online and for maintaining the system.'
>
> - President TA1

According to the next respondent:

> 'internally, everything is transparent. A programme called skipper produces productivity statistics for management, but it also allows me to follow the progress of cases.'
>
> - President TA2

Furthermore,

> 'externally, SAGACE allows parties to see the status of their case in court.'
>
> - President TA2

Finally, the last respondent says of internal transparency that

> 'I cannot envisage an organisation where the workers lack understanding of the basic processes.'
>
> - President TA3

Externally,

> 'on the one hand, total transparency is not possible, especially as it needs to be reconciled with the judicial independence of decision-making. However, there is an experiment to allow parties to have online access to their case files in order to follow progress.'
>
> - President TA3

Internal transparency appears to me to say two things: Firstly, that judges and other workers understand what is going on in case management even though they may only deal with small parts of the process. This is a rather large assumption, and if this is the assumption they act upon, it is not truly surprising that the case management process is inefficient as this reflects a lack of communication between the different parts. Secondly, from a managerial perspective, it also appears that the Presidents are able to follow the progress of cases.

There are various ways to ensure that parties understand what is happening to their cases at court. The most prominent method appears to be through E- SAGACE that allows online access to case files at the court. Another method mentioned was through lawyers, who should explain processes to the parties.

A barrier to complete transparency, according to one of the respondents, is judicial independence. This refers to the fact that cases are deliberated in secret, which is a matter of law not policy (see the Code Administrative Justice).

17.2.2. Analysis: Case management

Nothing at all has been mentioned of primary processes of case management. Even in the background chapters, the organisation of cases is only in terms of the quality of justice i.e. the number of judges to sit in certain cases.[2] There appears to be a lot of freedom in case management at policy-making level (although the series and the juge referé form part of national policy and practice).

On the issue of increasing cases and the complexity of the law, there does not seem to be a strong organisational reaction to stem the backlogs in terms of more resources. Specialisation appears to be the standard answer to many of the problems facing case management. Only one of the respondents has adopted a truly proactive way of controlling backlogs, and even she is hampered by a lack of resources. Technology does not appear to be exploited in the management of cases, except by the President to keep an eye on progress.

In terms of transparency, internal transparency appears to be taken for granted. There is an assumption that everyone knows what is happening in case management. At this point, I would say that this is a dangerous assumption to make, especially as it is not known from these interviews how well judges interact with the rest of the workers in the case chain.

External transparency appears to be quite good, with parties able to access their own cases online and to follow progress. If they have only questions about the process, then it has been indicated that they should ask their lawyers. This new technology, whilst opening up the process to the parties, at the same time however, seems to set a communication distance between court personnel and parties.

At this point, I would like to say that more research needs to be conducted within these courts to find the best and worst practices in case management. Information on the lines of communication within and outside the courts on case management should also be sought. Finally, Presidents who move from managing small courts to large courts should be given some sort of training in dealing with backlogs in an organisationally viable way.

2 Refer to chapter 12 Organisers and policy, section 12.3.3. Policies.

17.3. Quality managers and indicators

17.3.1. Local courts and quality policy

According to the first respondent:

> 'The Courts of Appeal for administrative law were created in 1994 to improve the functioning of administrative justice.'
>
> \- President CAA1

When asked about specific projects at policy level to improve the quality of the organisation, such as the Council of State's téléprocedure or the national policy to implement Charte Marianne in all public services, this respondent said:

> 'The téléprocedure is at an experimental stage and is for lawyers and functionaries. It is not a useful tool for the courts. As for Charte Marianne, this court will not implement it. I do not know much about it.'
>
> \- President CAA1

When asked if his court has implemented ISO norms, this same respondent said

> 'no, but this is a regrettable situation for the users.'
>
> \- President of CAA1

The next respondent says of implementing Charte Marianne,

> 'this is not for the courts.'
>
> \- President of CAA2

Furthermore, when asked about implementing ISO norms, he said

> 'we do not apply ISO here, because procedural law defines public service standards.'
>
> \- President of CAA2

In asking about indicators of productivity, this respondent answered that

> 'the General Assembly sets the optimal speed of decision making.'
>
> \- President CAA2

When discussing the idea of indicators with the following respondent, he said

> 'there are no quality indicators for the decisions themselves, as it is very difficult to create them for writing judgements. On the other hand, the productivity indicators that I use as a manager are very rough and based on numbers only. I do not take account of the different nature and sizes of cases.'
>
> \- President of TA1

When asked about policies to enhance quality in the courts, he said:

> 'Charte Marianne is for reception only, not for judgements. Every two to three years the Inspectorate for the courts conducts an inspection. The reports coming from them are very important for quality.'
>
> \- President of TA1

For the next respondent, on the issue of indicators:

> 'they exist, but the indicators used by the Council of State are not objective yet. Furthermore, delays are subjectively defined in the courts.'
>
> \- President TA2

He went on to talk about implementing some policies to improve the quality of the organisation:

> 'as regards Charte Marianne, we do not implement it here. But I did receive some information, and I am interested in applying it to the reception area. Plus, the SAGACE[3] deals at the same time with the quality of public services and legitimacy issues.'
>
> \- President TA2

The last respondent is of the opinion that

> 'the quality of organisation is very important, although this sentiment is not always shared. However, the lack of resources makes it hard to measure quality. I initiated an engineer's report, which looked at possible methods of internal reorganisation in order to rationalise personnel management, case instructions and a new system of archiving. This report also looked at the external relations with lawyers and the possibility of simplifying presentation and procedure.'
>
> \- President TA3

When I asked about the implementation of ISO norms and the téléprocedure this respondent said:

> 'I do not implement ISO norms here, and I ignore such benchmarking systems. As for the téléprocedure this is an experimental project at the Council of State only. I imagine it will benefit legal professionals.'
>
> \- President TA3

In terms of official policy measures such as Charte Marianne, these are not being very well implemented across these courts. Nobody sees any benefits to the téléprocedure for the courts, though they understand the benefits that will accrue for professionals

3 Discussed in external transparency of case management. It is a programme that allows parties to follow the progress of their own cases online.

in the field. As regards indicators, there appear to be references to two types: quality indicators of decision-making and productivity indicators. As for quality indicators for decision-making, there are none. According to one of the respondents, they would be too difficult to create. Regarding productivity criteria, there are some at court level and policy level, but they are criticised for being too rough on both levels. The criticism is that they look only at numbers and not the nature or size of cases. However, something that is considered to be important at this level are the reports from the inspections conducted in the courts.

17.3.2 Policy on quality in the courts

The former policy worker at the Council of State suggests that

> 'legislative reform can help with the quality of organisation in the courts, such as the recent law on the reform of Referés Administratif on the 30 June 2000.'

The policy worker at the Council of State who I spoke to gave the example of

> 'a decree of 2005 that allowed the use of ICT in procedure, waiving certain rules to adopt technology.'

Furthermore, however,

> 'there is a demand to use objective criteria for all public services. To that end, there is an Inspection every two to three years, where the inspectors talk to all the staff about the court organisation.'
>
> \- Policy maker at the Council of State

Whilst internal organisation is important,

> 'public trust, whilst important, is difficult to measure. The more people make requests to use the courts, the more the question arises over confidence in the courts.'
>
> \- Former policymaker at the Council of State

National policy for quality comes from legislation, government decrees and various projects that apply to both the ordinary and administrative jurisdiction. However, there do not appear to be so many. Furthermore, courts themselves do not appear to take the initiative in the direction of improving the quality of their organisations, with the exception of one.

Questions of public trust arise, and with the exception of the inspectorate every two to three years, very little concrete action appears to have been taken to measure public trust in the administrative jurisdiction.

17.3.3. Analysis: Quality of organisation

The annex of the Orientation Law 2000, discussed in the background section on organisers and policies, gives a framework (related to quality) to gear public service of the court of administrative jurisdiction towards client orientation, and to improve organisation quality. From these particular quotes, one can see that no organisation reform has taken place. The few national projects there are to improve even reception have been rejected by most respondents.

Organisation quality does not appear to be a priority at most of these places, although there are a couple of Presidents who take some initiative in improving their organisation. They do not apply any benchmarking systems, either for customer service, or for decision-making. On the issue of benchmarking for decision-making, this appears to me to be an odd attitude to have given that the Presidents of the chambers (if in a large court), or the President of the court (if in a small court) must read through all cases to control quality. This paradox may simply exist because judges feel that their peers and fellow professionals are the only ones who can judge them. The productivity criteria are thought of as being crude and lacking in objectivity. This is an issue that I will deal with later on in the Macro analysis in terms of implementing the new Financial Law based on objective results and productivity.

One cannot say that quality as an official management tool or concept operates in these courts. Even at policy-making level, one cannot see a comprehensive framework to create a quality organisation but only to modernise it.

17.4. Conclusions

In conclusion, these three basic issues of court management, and quality management (in terms of case management and quality indicators and measures) do not leave a good impression. In the first place, for court management, there is a quality gap because Presidents are not trained to be managers, no matter how much experience they gain in a two-year internship in administration. With increasing organisation challenges, and a lack of mandate for chief clerks to take full responsibility for the organisation, there appears to be a need for training in the management of courts, in terms of personnel and resource management. There appears to be no set technique in managing the courts except to play it by ear. Some people set aims, whilst others take things one step at a time. Nothing has been said about best practices, or communications in this part.

Regarding quality management in terms of case management, there also appears to be very little activity in setting standards or doing things one way or another. The only consistencies appear to be to deal with old cases first then urgent cases. Only one respondent seemed to take a proactive role in sorting out the backlog in her court, whilst the others seemed to look on a little helplessly at the growing amount of work their courts faced.Internal communications is something that these courts also seem to take for granted in terms of case and court management. It is very important to have clear lines of communication in order for an organisation to learn to deal with its problems. External communication also requires some work, and even though the SAGACE is very important in this way, it may not be sufficient for parties to have

communications to the courts through a computer only. Some human interaction may seem necessary to them at some point in the procedure.

In terms of quality measures and indicators, the ones that are there are not being implemented very well (if at all), and indicators that are used are not considered to be objective. At this point, I get the general impression that the implementation of quality measures and standards in the courts are not a real priority at either court or policy level.

Chapter 18

18. Administration of justice: Macro level analysis (administrative jurisdiction)

This analysis shall examine what has been said in the interviews about the separation of powers. Following on from that, a look will be taken at what has been said about the organisation of administrative justice, which precedes perspectives on financing administrative justice.

18.1. Separation of powers

18.1.1. Horizontal separation of powers

One of the respondents, a former policy maker at the Council of State, distinguished between two powers and the administrative jurisdiction. On the one hand:

> 'The Minister for Justice is responsible for the organisation of justice, especially for preparing the budget for Parliament to vote on, distributing funding, personnel and other resources. Within the administrative jurisdiction, the Minister's responsibility is limited only to giving a global budgetary packet to the Council of State. The Council of State is then responsible for distributing all resources between the courts.'
>
> \- Former policy maker at the Council of State

On the other hand:

> 'The Minister for Justice has no responsibility for the content of judgements. He manages the administration of ordinary justice only, with budgetary competences within the administrative jurisdiction.'
>
> \- Former policy maker at the Council of State

This respondent goes on to describe the organisation of responsibilities in the Council of State:

> 'The Council is responsible for the administration of justice through the Service for First Instance Courts and the Court of Appeal for Administrative Law (Service des Tribunaux Administrative et Cours Administratifs d'appel). This

> service is under the authority of the President of the Council of State. It is also responsible for the inspections every two or three years, and visiting the courts and talking to everyone. Therefore administration is very autonomous.'
>
> - Former policy maker at the Council of State

When asked about how the Council was accountable for the organisation of the administrative jurisdiction, this respondent replied:

> 'Accountability of the Council of State is through providing information to the Ministry of Justice about the objective contracts and supplementary resources provided through them.'
>
> - Former policy maker at the Council of State

A brief analysis at this point of what has been said here suggests a complete separation between the ordinary and administrative jurisdictions. Furthermore, the Council of State appears to have near total organisational autonomy, save for budgetary matters.

18.1.2. Vertical separation of powers

In terms of communication and participation within the administrative jurisdiction, this is a top-down and a bottom-up issue. When the former policy maker at the Council of State was asked about communications and solutions to conflicts, he answered:

> 'The whole service is responsible for communicating with the courts. One office deals directly with judges and another directly with clerks. Communication is constant. As regards conflicts there are none. The Council of State is responsible for governing the courts and therefore decides on all issues. Courts have to accept the decisions, and even though they could be unhappy, there won't be conflicts.'
>
> - Former policy maker at the Council of State

A policy maker interviewed at the Council of State also said that:

> 'The Council of State has the final say; if we say no, it will be accepted and no conflict will rise.'

In the courts themselves, the first respondent said that:

> 'I feel that I had a sufficient voice in the organisation especially in procedural law, for example I participated in creating the law on urgent cases.'
>
> - President CAA1

The second respondent said:

> 'I believe that I have a voice in the organisation, especially in proposing changes for procedural law and initiating local court projects.'
>
> - President CAA2

The third respondent said that:

> 'I do not feel that I have a sufficient voice when it comes to setting up new courts, whereas I do believe that I have a sufficient say in procedural issues, for example I sat on the commission for dealing with urgent cases. In a hierarchical organisation like this, it is normal that decisions are taken centrally. However, as there is some democracy and this gives me some voice, I believe that I have a sufficient say in the organisation.'
>
> - President TA2

The last respondent said:

> 'I believe that I have a sufficient say in my own jurisdiction. I have also been able to sit on commissions for various policy issues.'
>
> - President TA3

From the quotes from the Council of State, one gets the impression of a highly hierarchical structure. One does not get the idea that there is much room for participation in the governance of the courts by those in the courts. However, having said that, the respondents from the courts themselves do not seem to complain about the situation. They feel that their participation in procedural law is important, possibly more so than in governing the courts.

A possible reason for the lack of conflict or even a lack of feeling for a situation in which the courts appear to have little say, could be due to the amount of communication that takes place informally, ensuring that, even though the courts may be unhappy with certain decisions, they will implement the decisions anyway. Another probable explanation is that these respondents are not particularly interested in what is going on at that level anyway.

In chapter 11, there is nothing about the relationship between the courts and the Council as regards communication, only formal obligations and duties in terms of governance. Given that this framework is by itself extremely vague, it is a natural consequence, then, that the actual relationship described in these interviews is also very vague.

18.1.3. Analysis: Separation of powers

From this analysis, it would appear that there is an emphasis on the separation of powers at the horizontal level. It is a classical belief that separation between the judiciary, legislature and government will protect judicial independence of judges based on what has been described in the theoretical framework of this thesis. Here however there is an added protection, as the Council of State and the administrative

courts started out as part of the administration in France, of a separate service within the Council of State that deals with organisation and finances of administrative justice. It can be said that this classical belief is still held where the respondents interviewed within the administrative courts did not appear to mind that the possibility to participate in the organisation of administrative justice is limited. This can also be seen in what is described as a lack of conflict. However, the amount of informal communication taking part within the hierarchy of the organisation described here possibly reduces the chances of open conflict. On that note, it is time to examine the administration of justice in this jurisdiction.

18.2 Administration of justice: The Council of State and the courts

According to the first respondent,

> 'For the management of the courts, there is the objective contract. This contract is signed between the Council of State and all of the courts. The last one was signed in 2002 for the duration of five years. In this contract, they fix the number of cases to be completed by each court. We agreed to finish 2,950 cases in 2004 but reached 3,067. This contract also specifies the amount of personnel we can also have at the court.'
>
> \- President CAA1

The following respondent says of the objective contract that:

> 'The new financial law has added extra elements of productivity to the objective contract. However, I do not trust the criteria because they do not take into account the differences between the courts. Nor do I approve of national standardising procedures.'
>
> \- President CAA2

Furthermore, this respondent goes on to say that:

> 'The objective contract deals with staffing the courts, and this year we will negotiate for four more judges and three more clerks. We have operated understaffed for a year and I feel that this is unreasonable. We will write down everything we need and discuss it with the Council of State, and usually it does not pose a problem.'
>
> \- President CAA2

For the next respondent,

> 'In terms of organisational independence, we have none. We are dependent on the Council of State for resources, which does not really have a system for organising resources for the courts.'
>
> \- President TA1

The next respondent says that:

> 'In each county or district, the resources distributed for the running of the courts, and for the training of judges is different, especially where a district has two jurisdictions, a Court of Appeal and a first instance court, such as this district. The government had decided that the backlogs at the Court of Appeal were insupportable, so they signed an objective contract with the Council of State for extra judges on condition that they reduce the backlog. However, this meant that judges were taken from my court to be transferred to the Court of Appeal, and they have not been replaced. I do understand the criteria used to transfer the judges and I know that it is objective and reliable and not to arbitrarily punish my court.'
>
> \- President TA2

According to the last respondent interviewed at court, at the time of the interview:

> 'There is no signed objective contract between this court and the Council of State. In the first place, this is because there has been a recent inspection of this court, which produced a report that will help create a plan of action. In the second place, the Ministry of Justice received a new budget, and lastly there is a new first instance court set up to reduce the burden on this court. Since 2002, the courts in the administrative jurisdiction have been governed based on the orientation and programme law to improve resources and organisation. However, in 2004, Parliament decided to reduce the promised resources by half in the fourth year of this programme. Whilst we lacked resources and have no contract, this court is running mostly on hope.'
>
> \- President TA3

At the policy-making level, the policy maker at the Council of State said of governance of the administrative jurisdiction that:

> 'On the one hand, there are inspections every two to three years, which involves on-site interviews with all the staff. On the other hand, due to the fact that there has been an increase in cases in the last years, the court has needed to rethink its organisation and working methods, as the public does not accept delays. To that end the orientation law was created in 2002 for five years that increased the budget each year, allowing for more supplementary resources and finances.'
>
> \- Policy maker at the Council of State

There appear to be two main tools for the Council of State to govern the courts in the administrative jurisdiction: the objective contract and inspections. Focusing, first, on the objective contract, the aim seems to be to link supplementary resources (i.e. extra staff) to the productivity of the court. However, there appear to be a few criticisms of the methods. On the one hand, there appears to be mixed feelings about the criteria used to judge productivity. One of the respondents does not like standardisation, whereas another does not seem to mind too much that the criteria has left him short-

handed in his court. The other criticisms appear to be that the courts are left with no organisational independence, or a clear framework operating at the Council of State for organising resources to the courts. This can be seen in the example where the court has no contract.

Furthermore, the fact that Parliament has decided not to honour the orientation and programme law, and to reduce the promised resources by half, leaves a certain gap between policy and policy implementation. This leads to further uncertainties in the way that the courts are governed. The situation appears to be that laws are inconsistently applied, and that contracts are signed depending on the context, therefore one can hypothesise that, as one respondent complained, *there is no comprehensive framework for organising resources to courts, which leads to the fact that they have no organisational independence*.

18.2.1. Analysis: Administration of justice

What has been said about the separation of powers between the government and administrative justice and between the two jurisdictions is consistent with what was said in chapters 10 and 11 on the separation of powers and organisation. The separation in policy is to do with the organisational independence of the Council of State to govern the courts through the use of contract management and inspections. The orientation law also gives a framework to improve the resources to the administrative jurisdiction. This framework, in addition to the overall public service rhetoric in chapter 12 organisers and policy, section 12.3.1. on general policy, reflects, to some extent, how the administrative jurisdiction is being governed.

However, in looking at these interviews one can spot a few problems. On the one hand, there is an inconsistency in the way that the orientation programme law has been implemented, especially since the withholding of resources by Parliament. The most concern has been shown for the way that contracts are signed and implemented. For one thing, there appears to be a discrepancy between the way in which the contracts are signed with the Courts of Appeal, whereby their supplementary resources (judges) come from the courts of first instance. The courts of first instance are then left short-handed, as there are not enough new recruits to fill the vacuum.

Furthermore, the inconsistency in signing contracts, and the dependency on the contracts by the courts for supplementary resources means that organisational independence is difficult to hold onto within this hierarchical structure. Therefore their ability to manage their own courts is difficult. This will also mean that these courts, in the same way as the other jurisdiction, will have difficulties in adapting to rapidly changing circumstances.

Finally, the public service rhetoric does not appear to shine through in these interviews. Even though the contracts require a certain number of cases to be dealt with every year, it is in exchange for supplementary resources, and not necessarily as a public services issue. It could ultimately benefit the public in terms of reduced delays, but it does not seem to be discussed in the same way that court management at the meso level discusses it.

18.3. Finances

18.3.1. Process

The former policy maker at the Council of State described the financial processes within the administrative process:

> 'The financial process itself is very simple. In October, all of the courts must give their budget plans to the Council of State. The Council of State then goes on to examine those plans, comparing them to one another, the budget they receive from the Ministry of Justice, and the budgets from previous years. The Council sets aside a small percentage of the budget for small projects or extra buildings. The objective contract is a tool for the courts to motivate their needs for budgets based on productivity, i.e. it connects productivity to distribution. Each contract is of a five-year duration, and for every year the courts improve their performance, they receive an incremental increase in resources. The indicator used for productivity is the number of cases completed by the judge.'
>
> - Former policy maker at the Council of State

According to the policy maker interviewed,

> 'The new financial laws affect the objective contracts by allowing the Council to demand that more cases be completed for supplementary resources. Furthermore, it changes the basic way in which budgets are motivated, based on indicators of productivity, amongst others the number of judgements per judge, and the condition that organisation must improve. In making the decision to (re)distribute judges to courts, the Council of State looks at the number of judges and the backlogs of cases that a court has. The distribution is evidently based on numbers only; there is no differentiation between the size and the nature of cases. The Council only looks at the productivity of courts.'
>
> - Policy maker at the Council of State

It is within the policy framework described by these two respondents that the respondents of the courts described their perception of the financial processes. The first respondent says of the process that:

> 'The Council of State receives the budget proposals for the next year, in which the courts motivate their needs and overheads, but the Council automatically covers certain costs. There is never a rejection of financial requests and I am quite satisfied with the system. Even though there is limited flexibility in financial management at policy-making level, there is a secondary fund available to compensate for extra results in a year.'
>
> - President CAA1

The next respondent does not go into so much detail about the process itself, but says that:

> 'There is no demand for motivation for a rejection because there is usually no rejection'
>
> \- President CAA2

According to the following respondent:

> 'I do not know the overall budget that goes to the Council of State, and therefore I do not know if I will receive the finances I requested. The system of distribution is not transparent. My motivation for the budget is based on the backlogs of the court, the number of cases entering the courts and the number of judges. I cannot demand clarification, I can only wait to see what happens.'
>
> \- President TA1

The next respondent says of the process that:

> 'I look at the resources and productivity of last year in comparison to the current year, and look to see what the court needs, for example extra office space. Overheads themselves are a matter of repetition. Generally the Council of State gives this court enough to operate for one year. Therefore I do not consider that there is a rejection. I believe that this process is transparent enough.'
>
> \- President TA2

The last respondent at the courts is of the opinion that:

> 'The process itself has no format for demanding resources. Overheads are generally repeated annually. The objective contract has not been signed in this instance because of budgetary constraints, but it is usually signed on the condition that the court reduces its backlogs to one year. In the process, there is no demand for an explanation about refusals, as I am in regular contact with the Council of State, so I know why I do not receive resources that I request. As regards productivity criteria used for distribution, I do not trust them therefore I ignore them. Distribution of resources between the courts is extremely disproportionate. In the small court where I used to be President, there was a backlog of 2,244 cases, with an average delay of 10 months, with 15 judges and 22 clerks. This court has a backlog of 14,600 cases with an average delay of 2 1/2 years, with 30 judges and 35 clerks. If the criteria were proportionate, this court should have 97 1/2 judges.
>
> \- President TA3

There are two perspectives represented on the financial process in these interviews: firstly, where it is considered simple; secondly, where it is considered to be lacking in structure, transparency and fairness. In the first place, where it is considered to be simple, the respondents in general do not see any problems and are quite satisfied. Those who considered the structure of the process to be vague have complained about the lack of transparency in the way in which the budget is distributed, in terms of why they do not receive the resources they ask for, and in terms of the indicators and

criteria used in distributing resources. The pattern would appear to be that the courts of appeal expressed more satisfaction with the process than the courts of first instance. This could be to do with the fact that:

> 'The Courts of Appeal in the administrative jurisdiction are special because the presidents have the status of Councillors of State, and are therefore equal to members of the Council of State. Therefore there is no need to demand motivation for refusals.'
>
> - President CAA2

This goes somewhat to confirming what has been said in criticism of the lack of structure in the financial process. It indicates that the special relationship described between the Council members and the presidents of the Court of Appeal contribute to the lack of structure, and possibly also to bias in the distribution of resources because of it.

However, in thinking about the signing of the objective contract, and of section 12.2. of chapter 12, that indicate the need for an improvement of the organisation, and the subsequent injection of resources, one would have expected to see a transparent process of financing from the Council of State to the courts. The information delivered in an objective contract should contain evidence of organisational improvement. Given that not even all of the courts here have signed a contract, there would be difficulty in trusting data from the contracts in general.

Another interesting point is that given the orientation law, briefly discussed in the interviews, but given slightly more depth in chapter 12 section 12.3.2. judiciary as a public service, the lack of any described aims at all for the organisation beyond ' improvement' and ' reduce backlogs to one year' is quite odd. Looking back to the meso-level analysis and the lack of the use of quality standards for the organisation and the lack of any will to implement them, one must wonder, in fact, what concrete steps are being taken at policy or court level to improve the organisation of the administrative jurisdiction. Throwing in extra resources without a solution leads me to believe that policy makers are of the opinion that this is a sufficient move towards a quality organisation.

18.3.2. Financial processes and judicial independence

According to the former policy maker at the Council of State, the financial process cannot be unduly used against judicial independence because:

> 'The Ministry of Justice is not involved in the affairs of the administration of justice and it is this that protects the judicial independence of judges. Furthermore, the signing of the objective contract is unrelated to the content of decisions. This is the domain of judges, and therefore judicial independence is again protected. Additionally, no judges have ever raised this as an issue. Maybe it is a problem in the ordinary jurisdiction.'

In discussing this issue with the first respondent at the court, I asked also whether or not he considered the financial system to be one that held him to account for the organisation of his court, and whether or not he felt the system breached judicial independence. His reply was:

> 'I do believe that this is a system of accountability, and it forces one to be conscious of productivity. However, it does not breach judicial independence, why would it? I receive the budget, and as President, I manage this budget at my own discretion. This on the one hand gives me an interesting responsibility, yet on the other protects judicial independence. Ten years ago, when the prefect managed the budget, it was considered to be against judicial independence.'
>
> - President CAA1

The following respondent said:

> 'I cannot say for certain that the financial system is one of accountability. We shall have to wait and see how the new financial laws operate. I do not believe that there is any breach of judicial independence.'
>
> - President CAA2

Another respondent said:

> 'I do not believe that there is any breach of independence at all. The resources received are proportionate to the productivity of the court. However, I do not feel that the objective contract plays a role in creating more efficiency at court.'
>
> - President TA2

Finally, the last respondent said:

> 'Organisational independence has been severely hampered by the lack of staff in the face of the responsibilities of the court. However, judicial independence is unaffected, as members protect it, individually and collectively, and the legal framework that is in place also goes to protecting it.'
>
> - President TA3

From these quotes one can identify two schools of thought regarding judicial independence. The first school, espoused by the former policy maker and the President of the third first instance court separate the judicial independence of writing judgements from organisational independence. The second school is where organisational independence is linked to judicial independence. It also cannot be said that the financial system holds these courts to account for the organisation or for productivity. One can hypothesise from this that whilst a strong and traditional legal framework has been developed for judicial independence, no real thought has been given to strengthening the framework for organisational autonomy and accountability. This can go hand-in-hand with the conclusions in the meso-level analysis on the quality of management, whereby judges who are managers have not in fact had sufficient training to be

managers. Without a legal framework of organisational independence and accountability, without a clearer structure of policy aims, it is not clear which direction the organisation of the administrative jurisdiction is heading.

18.3.3. Analysis: Finances

In the background section on finance, various factors are important to this analysis. Firstly, the regional administrative services to the ordinary jurisdiction have the task of examining the activities of courts, and are therefore able to gather data to help improve the efficiency of the courts. The important factor here is that there is no equivalent organisation in the administrative jurisdiction. Furthermore, it is noticeable that the principles that make up the basis of the new financial laws, such as operability, efficiency and low cost (to increase the legitimacy of government), have also not been described at this level of analysis. Accountability for finances based on productivity appears to have been operated in a minimalist manner with criteria and indicators being very roughly based on numbers, with no attempt to differentiate between courts in terms of size or in terms of the nature or size of cases.

The orientation law also provides a comprehensive framework for change in this jurisdiction. Indeed it is undeniable that more resources, human and technological, have been injected into the system. As regards human resources, one has seen that the injection is not fast enough, as judges who are being promoted to the Court of Appeal are not being replaced in the first instance courts. From these interviews, one cannot find any clear policy goals at the policy-making level on the orientation law.

In terms of autonomy of organisation (i.e. financial) there seems to be none. These courts are completely dependent on the Council of State for finances and resources. The process appears to be simple, but the simplicity appears to hide an informal, none transparent and inconsistent way of distributing resources. The process does not demand any formal amount of accountability, but neither does it respect the organisational autonomy of the court. However, some of the respondents considered that the autonomy which they have to manage their own budgets is either sufficient or insignificant in protecting judicial independence.

From the policy and legal framework set out in the background chapters, one can see that in theory there is a framework for organisational and financial independence and accountability, it just does not appear to be operating in this jurisdiction.

18.4. Conclusions

This macro analysis has examined perceptions, top-down and bottom-up, on the separation of powers, the governance of the courts, financial processes and judicial independence. I understand that whilst the conditions for independence are met for the administrative jurisdiction from both the ordinary jurisdiction and government, this strictly hierarchical organisation does not appear to have a direction. The whole organisation seems to take things on a day-to-day basis, rather aimlessly, in a patch-up mentality, rather than a planned reorganisation or focusing on improving the quality of the organisation – as planned in the orientation law.

In terms of financial processes, the process appears to be ‘do not ask, and you will not receive’, thereby reducing disappointment (and conflicts) to a minimum. If you do ask, do not expect to receive everything, or an explanation. The contract management system also does not appear to operate efficiently. One court at the time of the interviews had not even signed a contract. At another court, one respondent did not believe that it was an effective tool for improving efficiency in the court. Only one person saw the system as one of accountability.

There appears to be no viable framework structure for organisational autonomy or accountability beyond inconsistently applied contract management, and an inspection every two to three years. The presidents, as we saw in the meso analysis, do not have sufficient training to guide their organisation independently. For sure, though, there does not appear to be more accountability demanded of the courts than they can provide.

PART IV: CONCLUSIONS

Chapter 19

19. Comparative analysis

19.1. The role and responsibility of judges

This first section of the comparative analysis looks at how judicial independence and accountability operate at the micro level (role and responsibility of judges). I will then look at what quality measures have been taken to improve the performance of judges in terms of quality and efficiency. Finally in the conclusions of this comparison, I will assess how these measures may have affected judicial independence and accountability. This comparison will attempt to show how the judge, the court organisation and the judicial organisation reconcile the need to protect judicial independence to decide cases at the same time as applying organisational principles to achieve access to justice.

19.1.1. Operation of judicial independence and accountability

This part on the operation of judicial independence and accountability examines on the one hand the classical view of judges' responsibilities in terms of decision making in cases. This has a direct connection to the legal and constitutional framework for judicial independence and impartiality in decision making. However, in looking at the possible transition from professional bureaucracy to quality organisation in the judiciary, this part also looks at the responsibilities that judges have taken on within the organisation itself, and whether or not there is any connection between the organisational role and judicial one. The level of organisational participation itself could be seen as an indicator for how far a court has moved from being a professional bureaucracy to being a quality organisation.

Decision making in cases

For the Dutch respondents, the responsibility of decision-making involved ensuring independence, quality through expertise, comportment, and timeliness. One of the main questions that came up was whether judges felt that there was a threat to the quality of judgements and judicial independence due to increasing expectations of timeliness by management. Two conclusions came from the analysis on decision-making. Firstly quality and timeliness were not really felt to be an issue of balance because respondents stated that quality of work was always high. Given that quality

is always high, a hypothesis was made out that judges should aim for quantity. However, given the lack of definition for quality, quantity or timeliness by these respondents, it is difficult to conclude that it is not a matter of balance or that these concepts are compatible with each other. Secondly, whilst some of the respondents hinted that there was a small minority of judges who felt that the expectations of timeliness breached their independence, the majority did not. Given that decision-making is the judges' responsibility, judicial independence is also theirs to safeguard, within the framework of laws on independence and impartiality. It is a subjective issue for the judges and parties to decide for themselves whether or not there has been a breach, rather than a brick wall protecting them.

At the ordinary jurisdiction in France, it was stated that judges were most concerned about efficiency of justice as a matter of constitutional principle under article 66 of the French Constitution, which states that no man shall be arbitrarily detained. This summarises directly the rights of man as set out by the Declaration of the Rights of Man of 1789 that the judicial authority, guardian of individual liberty, shall ensure the observance of this principle as provided by statute.

Therefore, efficiency of justice in the French ordinary jurisdiction, it was hypothesised, is considered to be part of the definition of quality of justice in order to fulfil the judicial duty of guarding liberty. To that end, some of the data suggested that in this jurisdiction, judge-managers were willing to reduce the juridical approach to maintain high quality of judicial doctrine, and to take a more practical approach to ensure that cases were completed within a reasonable time. However, even though judges may have had little time to finish a case, the data also suggested that timeliness was not the only factor in guaranteeing quality of justice. There is also the fact that the latest law and jurisprudence is available faster to judges.

Furthermore, there was a consistent practice that judge-managers in the ordinary jurisdiction read and signed all judgements from the chambers, if it was a large court or the First President, if it was a small court. This indicates further that in the French ordinary jurisdiction, the quality of justice does not rely only upon the judge deciding the case. On the one hand, quality of justice is guaranteed through management, and in this instance, judicial independence is guarded not only by the deciding judge, but also by the judge-manager of the court.

At the administrative jurisdiction in France, decision-making can also be associated with the protection of human rights within the constitutional and administrative legal framework.[1] There was a basic understanding throughout these interviews that timeliness is also very important in rendering justice. However, as those managing judges within the jurisdiction did not define timeliness, reasonable delay and efficiency, it could be concluded that judges are autonomous in their working methods in this jurisdiction. At this point of the description of the interviews, no further elaboration was found on balancing on quality and quantity or on judicial independence.

From this, one can see that judges' role or responsibility for decision-making in cases is consistent with the role defined for them in constitutional theory, with or

1 Décision no. 2006-539 DC – 20 juillet 2006, Loi relative à l'immigration et à l'intégration, Conseil Constitutionnel, 2006, see p. 2, 2a).

without the implementation of quality theories. The expectation of judges within all three jurisdictions is the same: independence and impartiality in decision-making and high quality through expertise and timeliness. Even though none of these respondents gave a clear definition of any of these expectations, one could identify certain quality measures to fulfil them, such as in France, where the judge-manager signs all judgments. This can lead to the conclusion that the judge in the Netherlands is the one responsible for protecting her own independence (within the legal framework on impartiality and independence), whereas in France's ordinary jurisdiction both judges and judge-managers are responsible. Judicial independence of decision-making is not a fixed concept, but very much depends upon the judge, and the case. Others within the court than the judge, such as the judicial assistants and the presidents, as can be seen in the French ordinary jurisdiction, can also deal with quality of justice and guaranteeing judicial independence.

Organisation participation

The other role and responsibility of judges found in these jurisdictions was of organisational participation. In the Netherlands, participation is through projects for organisation and quality of justice, and maybe some training duties. Some form of participation is compulsory and will be evaluated in an annual meeting on performance with the sector chairman.

In the ordinary jurisdiction in France, there are official forums for participation such as the General Assembly and possible committees attached to that. Within the chambers of the courts, judges are expected although not obliged to take part in projects and events. One hypothesis that came from the analysis was that the right to participate through the General Assembly indicated a democratic and horizontal organisation even though its conservative membership is seen to block change.

In the administrative jurisdiction in France, organisation participation is through the General Assembly that provides a process of consultation on organisation issues in the court. Furthermore, there is a possibility to take part in the judicial organisation outside of the courts at policy-making level in committee and research work. The data indicated that judges preferred to participate outside of the courts. This lead to the conclusion that judges felt that it was better to protect judicial independence from policy makers than from court management. This indicates that participation in the courts protects judicial independence.

In the conclusion on the issue of participation in the organisation, I link the possibility to take part and organisational autonomy. Organisational autonomy goes to defining judges' working methods and can therefore go to defining the concept of timeliness, efficiency and reasonable time. In the Netherlands one has seen a change in that there has been an expansion of duties in the organisation, as a matter of obligation. In France however, the nature of participation in both jurisdictions indicates a more political agenda to control change and organisational decision-making. One can hypothesise therefore that participation can contribute towards maintaining organisational autonomy, but it can also go towards defining the concept operating in the courts.

At the level of decision-making it would appear that in the Netherlands (in 2003), the judges still work in a professional bureaucracy. Quality of judgements and their methods of working are still judges' own responsibility. However, the obligation of organisation participation and the level of participation indicate that they are becoming part of the organisation, rather than above or outside of the organisation, as is the case with professional bureaucracies. From this it can be seen that the core activity of judges in deciding cases and the independence attached to that can be protected even though judges work as part of the organisation.

At the level of decision-making in the French ordinary jurisdiction, quality of justice is deemed as important as judicial independence, in that judge-managers are involved in guaranteeing the quality of justice, which could include judicial independence. This suggests that the core activity of deciding-cases is not considered to be a purely individual issue. However, in the professional bureaucracy, whilst it is difficult to measure outputs, professionals are managed by their peers. In this case, management also includes managing the quality of judgements. However, the level of organisation participation in both the ordinary and administrative jurisdictions, or the end result of organisation participation in these jurisdictions suggests a strong and independent professional group who are well informed and know that participation in decision-making in organisation can and does protect their choice of working methods. This indicates that the French jurisdictions are still professional bureaucracies without any clear movement towards becoming a quality organisation.

19.1.2. Implementation of quality measures

However, organisation participation goes in two directions. On the one hand, there is the situation described above. On the other hand, there is the court's responsibility towards the judges. This has been dealt with in the analyses in two themes: Firstly, in terms of managing judges, and secondly in terms of instruments to aid judges.

In the Netherlands, the integral manager position was given a legal framwork in 2002. This position is where a judge is appointed to be responsible for the management of the sector organisation within a court. The system of appointing peers to management position is consistent with a professional bureaucracy. Within this organisation, I have found that there have been inconsistent policies in managing judges throughout the Dutch courts. Even though these are judge-manager positions, those who take the positions do not think of themselves or the court in a hierarchical situation. There are no possible sanctions or tools for managing judges. In fact, what I found was a system of peer pressure (going both ways). This has in fact led to questions about the quality of the judge-manager in terms of training and competence to 'manage' fellow professionals.

Next to this, judge-managers in the Netherlands are able now to direct resources towards supporting judges. I have named these resources instruments to aid. These instruments seem to be very well developed within the courts. Firstly, there are human resources, which include legal secretaries and clerks. It has been found that both have taken on more tasks in legal research and writing summaries for judges. Secondly, there is training provided to judges and legal staff alike to ensure that the application of law is current and accurate. This training can be from the SSR (training school for

judges) or 'intervisie', which is a form of peer training within the sectors. Lastly is ICT adoption for the judicial function, i.e. writing judgements, and researching jurisprudence and laws.

The fact that peer pressure tactics rather than management principles are used with judges has not lead to chaos in the Dutch courts. On the contrary, the data indicates that judges do participate in the organisation and have taken some responsibility for the way they work. This suggests that this group of professionals are conformist in nature. It may also suggest that they can be managed even though the evidence indicates that they are not.

The instruments to aid judges developed over the last few years, especially human resources and intervisie, suggests that the responsibility of judges for decisions has extended to the organisation (in a similar way to that of the French ordinary jurisdiction). One can see this where there is a framework that enables judge-managers to enforce quality of judgements by organising training, intervisie and access to information through ICT. It is also visible with the demands for higher quality legal secretaries. However it is not only a matter of quality of justice that the court appears to take responsibility for, it is also timeliness, which can be seen in measures to adopt ICT to speed up the work of the judge in writing judgements and research. From this one can say that integral management of the court is about managing quality of justice and efficiency. Principles of judicial independence and accountability have therefore been extended to also include the courts organisation. The judge is not solely responsible for the quality of decision-making in cases. In fact, in tracing certain practices, one can say that the individual judge never was solely responsible for the quality of judgements because the courts arranged as many multiple chamber sittings as possible, to enforce quality. Now that the courts have increased the number of single chamber sittings, 'intervisie' has to some extent replaced the collegiality lost to efficiency.

The organising principle for the management of judges in the French ordinary jurisdiction is formally the President within the diarchy with the Chief Public Prosecutor. The Presidents that I spoke to about managing judges said that they manage judges' workloads rather than methods, which reinforces this strong image of a very autonomous professional. Presidents will assign judges to where they think the judges will be best suited, but there are no possible sanctions in this jurisdiction either.

In the French ordinary jurisdiction there was also strong evidence of a peer pressure tactics rather than the use of management principles. This also led to the question on the quality of management, to which the general reply was that as they mostly manage quality, which means that judge-managers must be good lawyers. This means that especially at the level of the chamber, the President does not have the same framework of legal responsibilities in management as her Dutch counterpart at the sector level, or that the law does not expect the management of judges in the French ordinary jurisdiction to the same degree as in the Dutch jurisdiction.

Here there was also evidence of a strong framework of instruments to aid. Human resources came in the form of judicial assistants (a position set in law), legal secretaries and clerks, with indication that all positions were being exploited as far as possible to assist the judge in her function. There has also been adoption of ICT but less programmed than in the Dutch courts. Training in law was also organised by the courts to reinforce the need to apply current laws accurately.

There is also evidence here to support the idea that the organisation has adopted some of the judges' responsibilities, but it is not as strong a movement as in the Dutch courts. Judges' responsibility for the quality of judgements is already shared within the organisation. It is less evidenced here that judges work with the organisation. It may therefore be harder to gage what judges need in terms of instruments to aid (or if they need any).

For the administrative jurisdiction in France, it is again different. There is a First President who is a judge, and a Chief Clerk, who is the secretary general of the court. In terms of the quality of management, the First President of the court can only be appointed on the condition that she has spent two years in administration. However this appears to be in order to equip her with skills needed to manage the organisation (along with the Chief Clerk), because at this jurisdiction, there also appears to be some difficulty in managing judges. Like the other jurisdictions, there it is impossible to sanction judges for organisational problems. From the background chapters an informal code of conduct exists, but the word 'informal' indicates the need for peer pressure tactics as with the other jurisdictions. This goes to enforcing the picture of an organisationally autonomous judge.

There is, much like the Dutch situation, a programme to improve the quality of justice in the administrative jurisdiction found in the Orientation Law discussed in the organiser and policy chapter (12) and in the interviews themselves. This jurisdiction has also benefited from the creation of the judicial assistant position to take on some judicial tasks regarding research and writing concepts. Evidence also shows that clerks have taken on more judicial tasks. The Orientation Law also indicates the need to adopt and update the use of ICT and computer technology in the administrative jurisdiction. However, a cut in spending in the programme has caused disruptions to the implementation of some of these policies.

In this jurisdiction there is far less evidence of the organisation taking on or supporting the responsibilities of judges than in either of the other two jurisdictions. There are fewer quality measures being implemented and change does not appear to be occurring that the same pace as the other two.

Conclusions

There does not appear to be quality management in any of the jurisdictions vis-à-vis judges. In fact, judges appear to be autonomous within these organisations, free to work in any way they choose. However, the court organisation around the judges in the Netherlands has developed a framework of instruments to aid the judges in their role in terms of decision making. The data collected would suggest that even though judges are not managed within the court or sector, that there is conformist behaviour and that they do in fact utilise this framework of instruments. Whilst the programming for the development of instruments to aid can be said to be less aggressive in the French jurisdictions, there are nevertheless such frameworks in operation there. There is also evidence to suggest that judges in the French jurisdictions are also utilising these frameworks (though with a little more suspicion attached).

This all suggests on the one hand that the court organisations are taking a bigger role in supporting the judges in their role and responsibilities and ensuring that all

tools are available to them. This further indicates an expansion of judicial responsibility to include not only judges, but those offering judges support. One could also conclude that judges can maintain judicial independence in an organisation other than a professional bureaucracy.

19.1.3. Conclusions

In summary, in the Netherlands, a clear movement can be seen here by judge-managers to organise the court to enforce quality and efficiency of justice. At the same time there has been a marked increase in participation of judges in the organisation itself. In the ordinary jurisdiction of France, one can see a similar, if slower, impetus to adapt the organisation in support of the role of the judge, at the same time as having quality control by presidents within the courts. These differences would suggest that strong lawyers in the sense of legal expertise are needed in the French ordinary jurisdiction to ensure a high quality of justice, but **stronger managers** are needed in the Netherlands. By **strong managers** I mean judges competent, willing, and capable of managing fellow colleagues and peers within the courts. In the French administrative jurisdiction, even though there was the Orientation Law to modernise the organisation, the impetus seen in the other two jurisdictions is less obvious here. This could be due to the lack of resources to complete the programme. However, a strong conservative stance may also be behind the slow pace of change in a similar direction.

From this comparison, where there is a strong programme of quality measures one can see two movements. One is whereby judges are socialised to work within the court organisation rather than autonomously. The other is where, as the judge becomes more integrated with the courts, the court is able to adapt to the needs of the judge in her role and responsibilities. Where this is the case, one can see an extension of the operation of judicial quality to cover not only the judge in her decision-making role but also the court organisation where it has an increasing role to play in guaranteeing the quality and efficiency of the decision-making process. That judges participate in this growing impetus in the Netherlands is indicative maybe of the need to control that process to ensure the 'proper' operation of judicial independence. In the background chapter (5) on Institutional Context for the Netherlands, I described this impetus as a constitutional drive for efficiency. However it also means that the court organisation is becoming an institution of justice, and the judicial independence should no longer only be associated with the judge, but the whole court itself.

It cannot be said that the implementation of quality measures at this level breaches judicial independence of the judge to decide cases. It appears to have had an opposite effect in strengthening judicial independence in the Netherlands and to some extent in the French ordinary jurisdiction. The back offices of courts are becoming institutions of justice rather than just a place where judges work and decide cases independently.

Also where this impetus can be seen, there has also been a broadening of accountability for judges in terms of efficiency of decision making. This can be seen throughout the jurisdictions, although where there is a legal framework, it gives the impression of stronger accountability rather than depending upon the nature of the judge-manager to demand accountability of judges. Accountability of individual judges is not strong as sanctions are not possible in any of these jurisdictions. It maybe possible to also then

extend accountability to the part of the court organisation dedicated to working towards guaranteeing quality and efficiency or timeliness of justice. In my opinion it is necessary to develop consistent and realistic forms of accountability within the court organisation for both judges and court staff.

19.2. Quality of court organisation

In the part of on quality organisation in the theoretical framework, there are 5 steps to achieving a quality organisation: a list of goals, quality control and assurance, total quality management, and a learning organisation through use of performance evaluation through standards, and most of these steps are elaborated upon by ten Berge. Here he suggested that issues of case management, procedural and organisational accessibility were issues that could be positively affected by quality policies.[2] This comparative analysis will look at in what way quality theories have affected court organisation. This part of the comparison looks essentially at what steps are being taken to bring the organisation closer to the people through quality policies, and whether or not there is evidence to support success of such policies. Following the list of 5 above, I will look first at the policy goals set for the court organisation in the three jurisdictions, and then I will look at quality assurance. Quality control for justice has already been discussed in the comparison above on the role and responsibility of judges, and is not a court organisation issue per se so it will not be dealt with here. Following from quality assurance will be a look at whether courts apply a total quality management technique. Finally I will examine the application of quality standards and the extent to which these jurisdictions are learning organisations.

19.2.1. Policies

In the Netherlands, policies for changes to the court organisations have emphasised self-management by judges, especially in creating budgets and controlling spending. However, along with this autonomy in spending, there has been an added condition that the courts improve their quality of management and organisation. To that end the Council for the Judiciary was set up in 2002 to assist in projects to improve the courts' organisations initiated by the PVRO (projects to enhance the judicial organisation). Furthermore it was given responsibility for distributing finances between the courts and motivating the budget to the Ministry of Justice. Next to the creation of the Council, the Judicial Organisation Act also gave a legal framework for the integral management position. This position was created in law to reflect a formal change in accountability for the courts' organisations from the Ministry of Justice to the courts themselves. What this meant was the previously, when the Ministry of Justice took some responsibility for the quality of judicial organisation, there was a split in the organisation with judges and legal staff on one side, and administrative staff on the

2 Refer to chapter 2 From constitutional theory to quality norms, a theoretical framework, section 2.6. Quality of the judiciary: Main problem question.

other. With the changes, theoretically, this division should no longer exist and there should be one organisation within the courts only.

In France, the quality policies for the ordinary jurisdiction are based on the Orientation Law. This law aimed at improving efficiency of justice at the service of the citizen by reducing delays, creating 'justice de proximité' (justice in the neighbourhood) and to strengthen the courts' services and material resources. Furthermore, it aims at providing efficient access to law and justice, assessing physical access to buildings and information. It was noted in the background chapter (12) on Organisers and Policy that the policy reflects a certain public service mentality of the French administration in general. This mentality has meant that a movement whereby there is an attempt to balance the rights of parties and the duties of the courts and judges can be seen. In practical terms, this movement can be seen in national quality measures taken to improve service to the citizen, such as the Electronic Criminal Records Bureau, or the GUG, which is a unique reception of clerks for the parties, to deal with certain legal issues within one office.

In the administrative jurisdiction in France, the same Orientation law is the basis of quality policy. However, the policy aims are less clear than for the ordinary jurisdiction. It basically aims to strengthen administrative law justice by augmenting the workforce, strengthening resources, and engaging in reform. That it is part of the overall reform package for justice in this Orientation Law means that the policy aims described above for the ordinary jurisdiction in terms of efficient and accessible justice are also applicable to the administrative jurisdiction. This can be seen where certain quality measures that have been taken apply to both jurisdictions such as the creation of the judicial assistant's position, or the implementation of the Charte Marianne (applies to all public administrations, not just the judiciary). Furthermore, as the administrative jurisdiction was born out of administration, there is a stronger sense of public service.

The Dutch approach to implementing quality policies to strengthen the judicial organisation has led to institutional changes, giving a clear line of accountability for the judicial organisation to the judges. It is about improving the quality of the whole judicial organisation, and giving responsibility to the judges for it. The French approach is a policy approach, to show that Government and Parliament are taking their responsibilities towards delivering efficient justice seriously. This shows a commitment to injecting more resources, and putting a focus on the user's access to justice. However this is not the responsibility of the judges and judicial organisation per se. The French approach already makes it difficult to see any quality in these policies, especially as it excludes accountability of the main actors involved in delivering justice.

19.2.2. Quality assurance

In the section on quality in the theoretical framework, quality assurance was described as a quality programme built around processes within the organisation, whereas quality control was for the processes directly related to the end product. Quality assurance is to take steps to guarantee the quality of the end product. As the decision making of cases is the end product of court processes, and has been discussed already in relation to the role and responsibility of judges, it will not be discussed here. In my

research, I chose to look at quality of case management, and organisational accessibility in terms of communication.

Case management

In the Netherlands, case management was found to be a shared responsibility within the court due to the number of people involved in case handling both in primary processes and decision making processes. In administrative law, the basic norms applied to case management were specialisation of the judge or unit, delegation as much as possible to legal staff, and cooperation with other judges. This last norm is important for the quality of justice in light of the fact that fewer cases are being judged in collegiality. Furthermore, case management involves quality management, and often the courts will send test cases for new legislation to the courts of appeal. In criminal law, there is more programming to organise cases, for example the project Centraal Appointerings Bureau (central appointments bureau), which liases with the public prosecutors office on large cases to set out timelines and deadlines between the two organisations. ICT is also being developed to assist in case management processes.

It was found in the interviews that there is no effort made for external transparency of case management to parties especially. There is an attitude that takes parties for granted and believes that people are content to wait. There is also an attitude that the courts believe that parties rely upon their lawyers for the information they are looking for. However, politically speaking, there is accountability for case management through the budget cycle (which connects the workload model with the resources the courts receive) and the annual report, which says how much work a court has completed within a year (hard accountability).

In France, in the ordinary jurisdiction, the First President is responsible for case management in terms of distribution and instruction. This is part of the 'politique juridictionnel' along with court management and managing judges, which is why it is the responsibility of the president. Within the court itself, the various respondents have applied some basic norms to case management, such as balancing the workloads of the judges and the hearing schedules. There are more single judge hearings than before, that puts a strain on both judges and hearing schedules. The president tries to work flexibly to achieve efficiency and a reasonable delay. The one legal norm that was mentioned in scheduling cases was that of anonymity of who would be presiding over proceedings. This is in order to ensure that lawyers do not forum shop for judges.

External transparency of case management is also taken for granted in this jurisdiction. There is the assumption that lawyers can make the courts processes understandable to the parties. Internally, there is the working schedule but also the General Assembly that takes part in affirming the working schedule set out by the President.

One can see a national implementation of programming for case management, for example in criminal procedure, there is now a law that allows the public prosecutor to accept a plea bargain with an accused suspect, on condition that the judge reads the case. In civil procedural law, divorce procedures have also been simplified. There is a tool for case management implemented at national level and that is the dashboard (tableaux de bord) that allows judge-managers to follow the progress of cases within the court.

In the administrative jurisdiction in France, the First President is responsible for case management. There were no standards or best practices discussed within these courts. The basic norm of case management was that the oldest cases have priority and then urgent cases. However, in one discussion, where a President had paid consultants to research into the case management at the courts, she said it was possible to develop a more efficient system for sorting and archiving at her court.

As regards transparency of case management, the administrative jurisdiction has implemented a system called E-SAGACE, which allows parties to see the progress of their cases on line during the process itself. However, little else was said on the relationship between the courts and the parties, and whether or not court personnel were available to discuss the status of cases.

Communications

In the Netherlands, regarding communications of the courts in general, there was found to be a greater effort externally through the use of customer panels and questionnaires. Internally however, the communication process varied from one court to another. However, I got the impression that there was a poor effort in managing information within the courts, and people either received too much information or not at all.

Internal communications were the only type discussed in the French ordinary jurisdiction. It was stated that internal communications has become much easier with the implementation of the intranet in the courts. That external communications was not discussed is also reflected in these respondents' attitudes towards the Charte Marianne that deals with the quality of reception to public services, which showed no prospect of being implemented in any of the courts where interviews took place.

It was concluded in the interview analyses that communications internally and externally were taken for granted. There was an assumption internally that people knew what was happening within the organisation. Externally, it was taken for granted that people could rely upon their lawyers to keep them informed.

Conclusions

In comparison, one can see that in the Netherlands some form of programming is occurring to help assure quality in case management and procedures, especially in criminal law and the adoption of ICT. The case management norms used take into account the need for quality in judgements as efficiently as possible. In the ordinary jurisdiction in France, programming only occurs in procedural simplification at the legislative level. However, there are simple norms adhered to in terms of workloads, but these do not apply quality of justice to the process, which maybe because of the level of quality control in decision making by judges. At the administrative jurisdiction, I found no programming towards quality assurance in case management, with the simplest case management norm based on the oldest files first.

Quality assurance for case management, the most important process in a court, does not appear to operate in any of these courts.

The Netherlands has made an initial step, and appear to want to do this step-by-step, but one cannot identify a quality approach. This can be seen in the lack of care to be transparent. Even the application of norms differs from court-to-court. At the ordinary jurisdiction, they have applied national programming through procedures. However, one can see throughout these interview analyses that each court is individual and must apply a quality assurance programme of its own. The application of norms in case management is very important to programming, but it is a step only. Transparency is also something taken for granted at this jurisdiction, and shows the lack of actual quality assurance towards the parties and users of the courts. The administrative jurisdiction in France showed no signs of norms or quality assurance programming, but had made more effort at transparency towards the parties by implementing an online software programme that allows parties to follow the progress of their cases. This is a public service approach to users, but it should belong to a wider quality assurance programme, which it doesn't. When one combines the lack of management of judges concluded in the role and responsibility of judges, micro level analyses, with the fact that there is little or no programming for case management, one cannot really express surprise that backlogs can come to a point where parties must wait from 2-5 years (if not longer) for a case to be heard.

19.2.3. Total quality management

In the theoretical framework, total quality management is an important part of applying quality theories to the courts. Having looked at the attainable goals through the policy's, and quality assurance in the courts, the next step is to look at whether total quality management operates in the court to the extent that it involves all employees, and the whole supply chain and the customer chain. This goes to giving a solution to the problems summarised by ten Berge: dual structure operating in the courts with legal staff and administrative staff; too much individuality and loyalty to the smallest unit; and the lack of leadership.

In the Netherlands, integral management was given a legal framework in 2002 in the courts. This meant that organisational decision making became localised at sector level. The judge-manager took responsibility for the sector organisation with the aid of the professional manager. This made the sector easier to manage, as administrative decisions would not have to be referred to the director of the organisation first. However, there is a problem associated with this step, namely that there is no management culture in the courts. Judges are not trained to be managers and do not have that mentality. Whilst training is compulsory for judges who take on a management position, it has not been felt to be comprehensive enough to tackle the challenges of court organisation. Furthermore, there are insufficient volunteers to take up the positions, as most judges join the courts to decide cases, not manage the court.

At the ordinary jurisdiction in France, the Code of Judicial Organisation states that a diarchy of First President and Chief Public Prosecutor manages the courts. However, in practice, a triumvirate between the First President, Chief Public Prosecutor and Chief Clerk manage the courts. The First President has ultimate responsibility for the court, but the Chief Clerk is criminally liable for mismanagement and finances. Whilst the relationship between the three varies from court-to-court, I found that there was

generally speaking a spirit of cooperation where the issue was discussed. However, in spite of this I did get the feeling that there were three organisations in one, meaning that a total quality approach was not visible in the management of the courts. Furthermore, this jurisdiction suffers from the same problem as the Dutch, namely that judges are not trained to be managers. In fact, in the nomination to become a president, managerial or team skills are not required. Strong legal skills are far more important. Whilst training is available to judge-managers, they do not always feel that they need it.

At the administrative jurisdiction in France, a diarchy also manages the courts under the Code of Administrative Courts and Tribunals. It is composed of the First President and Chief Clerk. In order to become a President, the candidate must have spent two years in administration. Training for management position seems to be available, but not everybody knows it, or relies upon other forms of training (e.g. books). Further than that, no management practices were explained.

Conclusions

From this comparison, one can see two essential things that are needed to ensure the operation of total quality management: firstly, reorganisation of the court so that instead of two or three organisations, there is one. Secondly, in bringing the organisation into one line, one needs competent managers in place, which requires training and volunteers. In looking at the Netherlands, one can see that this process started with reorganisation that has lead to a closer working relationship between the staff and the judges, but the success of integral management depends very much on the quality of the judge-manager in terms of competence and training to manage the court organisation. In the ordinary jurisdiction in France, one can see that the practice of the triumvirate operating the courts is a step towards total quality management, but more is required in terms of creating a framework of responsibility for management of the courts, and also for the quality of management, also in terms of competence and training. For the administrative jurisdiction, total quality management is less in evidence, even though there are policies to improve the jurisdiction.

19.2.4. Quality standards and learning organisation

It was established in the theoretical framework in the section on quality organisation that a learning culture is necessary for survival and to adapt to innovations in technology, shifts in markets and changing needs of clients. Furthermore, van Gunsteren said that performance evaluation is good because it gives you a chance to learn from mistakes and solve problems found in that evaluation. In quality organisations, performance evaluation is done through setting quality standards or indicators. This section will therefore compare how each country has applied quality standards and how far they are able to learn from them.

In the Netherlands, a quality system called RechtspraaQ was piloted in 2002. It is a system that measures quality in the courts in four parts: quality of justice, productivity, finance and personnel. The measurements create a score, which is then the basis of improvement and the learning organisation. Each sector chooses three aspects that are not scoring well to improve, and try to maintain a high score in the future. In 2005, the

financial order in council has ordered research be done to link this system to the financing of the courts. In other words, they are looking into whether the courts can be funded based on the quality system. There were problems associated with this system during the interviews: it is a system that requires constant attention, and it does not always measure the important processes of the court (such as case management).

In France there is no benchmarking for either service quality or organisational quality in either jurisdiction. However, in one of interviews with the policy maker from the regional administrative services, she said that they used the Electronic Criminal Records Bureau to check the quality of justice by seeing how many cases are based on incorrect law, but not appealed. The new finance laws have also created objective criteria for productivity, but this has not been linked to the quality of the organisation, only to the number of cases completed per year.

Whilst one can see an impetus towards a learning organisation in Dutch courts, the mentality to use it efficiently is not there. There has been reluctance to follow advice or to see it through. Furthermore, the degree of implementation is at the discretion of the courts. In principle the framework is there to create a learning organisation. In France, the only place that the learning culture is visible is at policy-making level.

19.2.5. Conclusions

I have compared the activities of these courts based on the five criteria towards a quality organisation: list of goals (policy), quality assurance (and control), total quality management, and learning organisation through performance evaluation using quality standards. This has been to see if it is possible to evaluate whether there is delivery of efficient justice and to see if the courts are becoming more transparent to the people they serve and politically transparent.

In the Netherlands one can identify one line of policy to develop the judiciary into a quality organisation. However, one can see problems with implementation, especially with the quality of management. The structures are in place for the Dutch courts to be quality organisations.

In France the policies do not go towards creating a quality organisation, but rather look to strengthen the courts and modernise technology, at the same time as creating an organisation with a public service mentality. Neither the structures nor the policies are there to turn either jurisdiction into quality organisations. The efforts by one or two participants are insufficient in this case to say otherwise.

A quality organisation should enable an organisation to react quickly to any new situations internally and to be evaluated externally on performance. None of the organisations in these jurisdictions, based on the quality theories themselves, can be evaluated externally. Internally, the structures are available to the Dutch courts to react quickly, but the data suggests that the quality of management will mean that they possibly wont know how to react. In France, there are no policies to implement quality theories, and judge-managers themselves do not practice total quality management. The initiatives taken locally and usually individually are not sufficient to be counted as policy, and without national support and implementation, will likely fail.

19.3. Judicial organisation and the separation of powers

Referring back to the introduction of the main problem question in the theoretical framework, there was a two pronged approach to applying quality to the judiciary at the level of governance and the separation of powers. This part of the analysis deals with organisations external to the courts. At the level of governance of the judicial organisation, it was suggested that the national administrative organ examines quality policies in the judiciary, such as for legal quality and uniformity, research in justice, training and the use of experts in the courts. At the same time, this should be a body that represents the members and their needs to the political class. Furthermore, an independent complaints organisation (such as an ombudsman) was needed to deal with the complaints of the citizens and parties.

On the other hand, on the political level in the separation of powers, the national administrative organ should facilitate policy in quality for the whole judicial organisation, i.e. at the level of the judge and the court organisation as well as the judicial organisation. This should be facilitated through the possibility of the organisation proposing legislation and policy. Furthermore, it has been suggested in the main problem question that this organ takes responsibility for creating a transparent and efficient administrative structure for the judicial organisation. This involves being able to determine the resources they need and being able to control spending. Lastly, it was determined that such an organ be able to determine a framework of process and ethical rules for judges to be able to identify their rights and obligations.

This leads then to the questions: How do separation of powers operate at this level? Can quality theory be applicable at this level, in the way described above, to facilitate hard political accountability?[3] In order to answer these questions, I will look first at whether or not there is a national organ for the judicial organisation to fulfil the tasks suggested above. After, I shall look at whether or not at this level the judicial organisation is sufficiently represented to fulfil the political functions of creating policy and managing finances.

19.3.1. Judicial organisation

In the Netherlands, the policies developed in the Judicial Organisation Act 2002 gave emphasis to transparency of judicial organisation, especially to improving management and organisation, and to spending. To that end, the Council for the Judiciary was set up to help improve the courts' organisations by assisting and funding court projects. Furthermore it was given the responsibility of motivating the budget for the whole judicial organisation in its remit to the Ministry of Justice on the one hand. On the other hand, it was also tasked with distributing that money between the courts.

3 Hard political accountability refers to mechanisms such as removal from office, accountability towards the legislative body, and civil or criminal liability for damage done as a result of a decision, whereas soft accountability refers to deals with openness, and representation. This type of accountability demands procedural transparency at the same time as sensitivity towards different interests and a changing social environment. See theoretical framework.

From the analyses, one can a series of checks and balances between the Council and the Ministry of Justice based on information protocols developed between 2002 and 2005. These have been developed in order to create as much transparency as possible on the operation of the courts. In 2002 it was on productivity of the courts. In 2005 the emphasis was more on the quality of the organisation and management of the courts. From the Council to the courts, one can see that it is possible for the Council to develop policies assist in the improvement of court organisation. The only real question was how it should do this. It was found that creating projects from the Council towards the courts was not so efficient, and supporting courts in their projects was maybe a better way. It seems to be that the Council, during the writing of this thesis, is still searching for its place in the judicial organisation. Not quite a policy maker yet not quite an executive service, it has a limited mandate to help develop courts organisations, but cannot do so forcefully because of the independent nature of courts.

On the other hand, in looking at how else quality can be implemented at this level, the Council does deal with quality of justice issues in terms of legal unity and also conducts research to that end. Training is dealt with still by the SSR-training centre for courts, but it is done in consultation with the Council and the courts. Whilst the courts are developing their own relationships with the parties, there is still no judicial ombudsman for the judicial organisation, and formal complaints must still go through the Supreme Court. Lastly, the Council for the Judiciary is meant to be an administrative organ. There is another organ that represents the judiciary, and that is the Dutch Association of Judges and Prosecutors.

In the ordinary jurisdiction in France, the policies developed from the Orientation law of 2002 were to improve management and organisation, and to focus on user needs and satisfaction. At the head of the judicial organisation for the ordinary jurisdiction is the Ministry of Justice. Within the framework of constitutional law, it is responsible for governing the judicial authority in order to guarantee judicial independence and deliver effective justice. Within the framework of the Orientation Law it is tasked with the long term policies for user participation, and ensuring a fairer distribution of resources between jurisdictions. Furthermore, the modernisation mission of the Ministry also encourages and supports local court initiatives. The ordinary jurisdiction is in fact represented within the Ministry itself through a small group of judges (without jurisdiction) who form the head of the Department for Judicial Services.

The courts of appeal and the courts of first instance are concerned with quality of justice dealing with uniformity as they are the main instances delivering justice. In practice, there is a connection between judicial independence and organisational autonomy because the courts have a special purpose. This special purpose gives greater autonomy to the courts of appeal and the first instance courts. This connection is in order to protect human rights and the quality of justice. The question that arises here is that, what happens if judicial independence is protected with the full force of the law and organisation, yet quality of justice and organisation diminish? An answer to this could be that only protecting judicial independence is insufficient to the task to protecting human rights and delivering efficient justice.

Furthermore, there is the High Council for the Judiciary, which is tasked with protecting judicial independence through training, appointments, and discipline. These are all important points of quality of justice. Furthermore, it is the representative body

of the judiciary at the organisation level, more so than that of the head of the department for judicial services at the Ministry of Justice.

The quality policy for the administrative jurisdiction of France come from the Orientation Law to improve the organisation and inject resources to the system. The national administrative organ responsible for quality of administrative justice is the Council of State. It deals with both training and research into the quality of justice. At this jurisdiction in France, judicial independence is connected to organisational autonomy as it is in the ordinary jurisdiction. Here there is also a representative body through the High Council for Courts of Appeal and Courts of first instance, which is responsible for training, appointments and discipline. There is no judicial ombudsman in France to deal with complaints of parties.

What one can see from the analysis is that there are several organisations for all three jurisdictions that have, on the one hand, administrative tasks, and on the other, representative tasks. One can see that as an administrative organisation, the Council for the Judiciary is still finding its feet. It appears to be most comfortable in its role in developing the RechtspraaQ quality system, and has found itself to be most effective in supporting courts in their projects rather than developing too many of its own. Further than that however, it has less to do with legislative or policy proposals, although the Ministry of Justice works in consultation with the Council. The ordinary jurisdiction in France does not have its own administrative organ, although it may be content to have representation within the Ministry of Justice itself. There has certainly been no debate about creating a national organ to administer the judicial organisation. The administrative jurisdiction in France does have its own administrative organ in the form of the Council of State. This deals with quality of justice and distribution of finances, although no real programme to improve the organisation was found within the interview analyses themselves. The only organisation that appears to work towards implementing quality theories in its work is the Dutch Council for the Judiciary.

In terms of representation of needs and membership, each jurisdiction also has its own body. In the Netherlands, there is the Dutch Association of Judges and Prosecutors, although it does not have the same competences as the others. In France, the ordinary jurisdiction is represented by the High Council for the Judiciary, and the administrative jurisdiction is represented by the High Council for the Administrative Courts of Appeal and Courts of First Instance.

Judicial independence appears to be a consistent theme in the judicial organisation, not only in regard to organisational autonomy but also in regard to quality of justice. Whilst the protection of judicial independence is absolutely essential to the quality of justice, I believe these analyses show that it is no longer the only factor that can be considered in delivering effective and efficient justice. Factors such as good governance and management also appear to be important foundations for delivering justice.

19.3.2. Political level

The political level looks at the separation of powers in terms of competences between the different organisations. In the Netherlands, the Ministry of Justice is tasked with analysing policies and their effectiveness, to ensure that the judicial organisation operates transparently by being able to demand certain information from the Council

for the judiciary. It also has some policy execution on certain structural issues such as closing down courts. The Council for the Judiciary is responsible for determining the resources needed by the judicial organisation. They base this on the information received throughout the year and the models for distributing finances (which they helped develop in order to create some equity in the way that justice is funded).

In the interview analysis one can see that the Council has grown in confidence against the Ministry of Justice and is better able to determine what it needs and how to get it. As to the question of whether or not it is creating a transparent administrative structure, one can say yes, because of its efficiency in collecting data from the courts (something the Ministry was never able to do), they have been able to make a clearer picture of how the judicial organisation works, and determine what areas need assistance to improve. This indicates that the judicial organisation is more transparent after the institutional changes in 2002. Whether it is able to help with the improvement process through facilitating policy and legislation depends very much on political priority for spending and programming change for the judiciary.

At the ordinary jurisdiction in France, the Ministry of Justice is tasked with creating policies for the quality of the whole judicial organisation and justice and for financial distribution. Financial distribution is based on objective contracts that require courts to finish a certain number of cases and the new financial laws, which developed a series of objective criteria on which to base financing of the courts. Next to this, the Courts of Appeal and the regional administrative services manage all the courts and resources for the region. This way there is a certain amount of administrative discretion and autonomy from the Ministry.

Whilst this structure appears to be transparent and simple in theory, in its operation it is not. This is because of the questions arising over the quality of the judges in their policy and managerial roles, especially in terms of competence and training. Whilst representation is important when dealing with administration, competence is also very important. It maybe that representation is what has been blocking changes to the judicial organisation in France since 1958, rather than guaranteeing the efficient delivery of justice. As the structure stands, it is too rigid to respond quickly to changing circumstances.

The administrative jurisdiction in France appears to be the most organisationally autonomous of the three jurisdictions. This maybe considered an odd thing to say due to the Council's relationship as advisor to government, or that execution of policy for the judicial branch depends very much on the funding they receive, which further depends upon the Ministry of Justice. However, the accountability for spending to the Ministry of Justice is through objective contracts, which cannot be considered to be a very strong tool. This maybe why, for both jurisdictions, the new financial laws apply objective standards. Given that there is not the same level of information exchange between the two organisations described as between the Dutch Council for the Judiciary and the Ministry of Justice, one can say that the French administrative jurisdiction has a more autonomous position.

Nonetheless, the Council of State is responsible for distributing funds between all of the courts, not only to the Courts of Appeal but also to the first instance courts. Furthermore, they are responsible for facilitating policies on the organisation of administrative justice. Whether or not it delivers efficient and effective justice is open

to debate. The interview analyses would suggest not. This can be seen where there is inconsistent practices in signing objective contracts; or where judges are promoted to courts of appeal yet not replaced in the first instance courts, leaving those courts short handed.

All three judicial organisations have representation of some sort in the process of creating policies for quality of justice and for creating a transparent and efficient organisation. Only two of them, the Dutch and the administrative jurisdiction in France have their own national administrative bodies to throw weight behind such policies. However, it is very important to note that all three jurisdictions now have autonomy in their spending, with only an annual report or contract to hold them to account.

19.3.3. Conclusions

I asked two questions at the beginning of this section: How do separation of powers operate at this level? Can quality theory be applicable at this level, in the way described above, to facilitate hard political accountability? Dealing with the separation of powers first, one can see the operation of the classical checks and balances between government in the form of the Ministry of Justice and the judiciary (sometimes with its own administrative organ). Here one sees a struggle for the Ministries of Justice in both countries to hold these organisations to account in a way that would satisfy conditions for legitimacy set out by their respective constitutions. On the other hand, especially with the Dutch and ordinary jurisdiction in France, one sees a struggle between them and the Ministry of Justice over competences and relationships in terms of accountability, with both believing that the other should be accountable to them.

As for the separation of powers within the judicial organisation itself, in the Netherlands, by law, the courts are answerable to the Council for the Judiciary, to the extent that the Council may annul an administrative decision of the courts. How far this actually has happened is not clear as the interviews took place the year after the Council was set up. As for the judges' responsibility for decision making, this is isolated from the judicial organisation, yet with the whole court organisation supporting that very activity. How far interference in the courts' administration could disrupt that support and affect quality of justice is an interesting question for another research project.

In the ordinary jurisdiction in France there is no institutional separation in court governance. It is a rigid and pyramid shaped hierarchical organisation, with the few governing the many. Judicial independence however is very much connected to organisational autonomy in the organisation, making judges very powerful and without much accountability for the organisation of the courts.

As to the second question, this deals with holding the judicial organisations to political accountability. In the theoretical framework, a doctrine of safeguarding judicial independence yet demanding transparency and representation was recommended in the literature. One can see this happening to some extent in the Dutch system where there is an information protocol that allows the Ministry of Justice to ask for information about any aspect of the judicial organisation. Annual reports and budget motivations are also considered as a form of political accountability for spending.

In the ordinary and administrative jurisdictions in France, the objective contracts and the new financial laws hold courts to account for their spending by agreeing to do a certain number of cases in a specific amount of time. However, the new financial laws uses objective criteria to hold the courts to account for productivity and spending. The Council of State has no organisational accountability to anybody.

As to the question of whether quality policies can be used to make the judicial organisation accountable, I would say yes, it is possible. Performance evaluations and quality assurances in the same processes can help these judicial organisations. However, one can see that there are limitations to hard political accountability for the judicial organisation.

Chapter 20

20. Conclusions

20.1. Introduction

This PhD thesis focuses upon anchoring quality ideas into the constitutional principles of checks and balances. In the introduction to this thesis, I stated that I would examine whether it is possible for judges to work in an organisation that is not defined as a professional bureaucracy. It looks at whether the organisational autonomy enjoyed by judges is connected to the judicial independence of decision-making. Can a judicial organisation be subject to the same principles of management and governance within the constitutional framework? Can organisational solutions of quality theories help the judicial organisation face the problems of growing unreasonable delays, and consequent legitimacy problems of transparency and accountability?[1] Furthermore, can quality theories help the judicial organisation tackle other problems that have been identified as falling under the legal quality umbrella within this thesis, such as the uniformity of law?

I have discovered during the research process and the analysis of interviews that constitutional principles apply at three different levels of judicial organisation: judicial office, court organisation and administration of justice; and from two different perspectives: constitutional and public administration. In the list of problem questions set in the theoretical framework the order goes from institutional, to courts' organisation, to the judge, whereas the analysis itself goes from the other way around. This is due to the fact that at law school one deals with institutional questions in constitutional law, for example on checks and balances, one looks at the relationship between the executive, legislature and judiciary. Coming from this mentality therefore, it was quite natural to set the questions from a top-down perspective in terms of the organisation, i.e. from institutional to organisational to judge.

However, as the research progressed it became more natural to think of justice as being operated from the bottom up: the judge, the courts' organisation and the governance of the courts. It became more obvious that the things learned in law school about judicial independence and impartiality of decision making applied at the level of the judge, and that this research was to see how that operation fits within the framework

1 See chapter 1 Introduction section 1.3. Concept for a thesis.

of a changing court organisation and how the court organisation has incorporated the principle of judicial independence. In the same way, one could then see how judicial independence was incorporated as a value at the level of governance of judicial organisation. However, in order to do this, the organisational framework also needed to be examined, especially looking at the incorporation of quality standards and management, and how these values have interacted (if at all) with those of the judiciary. In other words, looking at the theoretical framework, this thesis looks at whether it is possible for judges to work in an organisation that is not defined as a professional bureaucracy, and whether it increases the legitimacy of the judiciary to incorporate quality standards and management.

Therefore, the final questions I wish to answer are whether quality measures can have a place in the traditional constitutional values of checks and balances? Furthermore, what role can quality measures have in making the judiciary an integral part of society and thereby increase its legitimacy?

In the theoretical framework, the description given to the individual judges is someone who is seen to stand traditionally independent, and unaffected by social (i.e. demographic and cultural) and technological changes.[2] Furthermore, the education and appointments procedures are considered to be closed to the public and controlled by fellow professionals. With this background in mind, the question that arose was: what can be done at this level to improve judges' performance in terms of productivity, whilst ensuring the effective quality of decisions (including an independent and impartial judge)?

First of all, from the research conducted one can conclude that the background of judges' training and selection was originally conceived to operate as part of the legal framework to protect judicial independence. From the background chapters on the Netherlands and France one can see that issues of education and appointments were closely controlled by institutions strongly representing the judiciary. However, one can also see a move in both countries to make the processes more open and transparent.

In terms of social effects, one can see this mostly through media attention, in France with the criticisms of the handling of the paedophile cases in 2006, and in the Netherlands with the coverage of the Schiedammerpark murders. Additionally, one can see from the research that policies are being implemented to affect technological changes in the judicial organisations and that the organisations are changing to accommodate such technologies.[3] Bearing in mind, therefore, this shift in perspective on the operation of judicial independence and the need for an appropriate form of accountability for organisational issues, I can now attempt to answer the main questions I set out in the theoretical framework.

2 See: Chapter 2 From constitutional theory to quality norms: A theoretical framework section 2.2.1. Separation of powers and checks and balances.

3 See: Chapter 6 The organisers and policies section 6.4. Planning and control; and also chapter 12 Institutional context of the French judiciary, section 12.2.3. Policies.

20.2. *The role and responsibility of judges: Problem questions*

20.2.1. How does judicial independence and accountability operate at the level of the judicial office?

Decision making in cases

At first sight, judicial independence operates at this level as it has in constitutional expectations that cases are decided independently. The legal frameworks in both France and the Netherlands are quite strict on what constitutes impartial behaviour. Judicial accountability operates through public hearings and publications of judgements. However, what has been identified in this thesis is that judicial independence operates not as a generic concept, but rather on a case-by-case basis, allowing the judges and parties to decide for themselves whether judicial independence has been breached. It is only generic in the sense that it is an expectation within academic circles, legal practitioners and those seeking justice in the courts.

Judicial accountability has been found to be unaltered in the responsibility of judges to enforce the law to the highest standards. This includes not only judging cases independently, i.e. impartially, but also ensuring accuracy in the application of law. In this thesis, it has been found that this is checked by the publication of judgements or the pronouncement of judgements in public, and the possibility to appeal cases.

The central idea in this thesis, however, is that judicial accountability in the traditional sense is no longer sufficient, given the amount of organisational power held by judges. The idea of soft or public accountability dealt with in the theoretical framework has a part to play here. Soft accountability deals with openness, and representation, and demands procedural transparency at the same time as sensitivity towards different interests and a changing social environment. Whereas hard political accountability deals with removal from office, accountability towards the legislative body, and civil or criminal liability for damage done as a result of a decision. It is not applicable to the judiciary because of the principle of judicial independence. This is then only connected to the democratic state institutions. However, the responsibility of elected authorities goes hand in hand with working openly, which can lead to further public debate. At the end of the day, these people can be held to account because they are supposed to be representative. Political responsibility is the last resort for a system where public trust will be enforced by the good functioning of elected bodies and supportive services. In other words, public responsibility is implicit in political responsibility.

Therefore, in looking to enhance the soft accountability of judges in their functions as managers and policy makers, the quality projects have been an effective tool in highlighting other areas that attention must be paid to by judges, such as comportment, speed and timeliness. Whilst the measurement of these criteria (along with independence, impartiality and legal uniformity) does not hold individual judges to account, it does open up these issues for the judiciary for self-examination. At the time of this research (2006), policy makers of the Council for the Judiciary are seeking to establish

the quality system RechtspraaQ as a tool of accountability for the judicial organisation, by attempting to connect it to financing.[4]

One thing that has been discovered in this thesis is that whilst judges must be impartial in coming to a judgement on a case, it does not mean that they work alone in making a judgement in a case. Whilst this is not usually the perception of judges, one can see that this is so through the traditional operation of a collegiate court, whereby three to five judges can hear a case. From this research, one can also see that it is not only judges who take responsibility for the quality of justice. There are also legal secretaries and clerks who are expected to be involved in researching and writing cases. This relates to the fact that more cases are being decided by single judges in that the organisation is better able to support the judge and help her to maintain a high quality of justice, in spite of the fact that she has less time to do so. Furthermore, providing more support staff to the judicial function goes to increasing the efficiency and effectiveness of justice.

Judges and organisation

The essential question for this thesis is whether or not organisational autonomy is connected to judicial independence. Judges' participation in the judicial organisation, be it the courts or politically, is very much connected to their status as independent professionals in the literature and in practice, which fits within Mintzberg's definition of a professional bureaucracy. However, organisational autonomy is about judges' working methods and can therefore affect timeliness, efficiency and reasonable time.

Given the recent changes in organisation in the Netherlands, the emphasis has been on prioritising issues of timeliness and efficiency, and therefore more about managing judges' work. In the change process, policy makers, from both the ministry of justice and the judiciary, have been careful to emphasise the need to preserve judicial independence in decision-making. This thesis shows an increasing trend towards the breaking down of the professional bureaucracy operating within courts. Professional bureaucracy can be used to define the traditional organisation of justice, whereby the judges control the quality control and assurance in the production process and final product (i.e. decision-making in cases), and by extension, therefore, also the organisational processes.

However, the greater demands for accountability for organisational processes and for greater efficiency and effectiveness means that there is an increasing mental separation between the profession to judge and decide cases independently, and organisational autonomy of judges. This means that managers of the courts are showing a trend in trying to manage judges (at the time this research was being conducted in 2003) in terms of working methods and case management. Judicial independence is however protected as the managers are judges, and the case management process is controlled by peers who are independent of the professional manager. This process of mentally separating the profession of judges and their organisational autonomy started before the changes occurred in 1999 with the PVRO projects, and whilst the separation

4 See chapter 6 The organisers and policies, section 6.5. Policies.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

between independence in judicial decision-making and organisational autonomy can be identified in theory, it has been identified in this thesis that in reality (at the time of the interviews), courts in these jurisdictions are essentially still professional bureaucracies, even though one can identify a movement away from such organisation. This means that judges are still organisationally autonomous in their working methods, as judge-managers are ill-equipped (at the time of the research) to manage their peers.

This transition from the organisational autonomy of judges to judges working within the organisation indicates a trend towards a quality organisation, whereby all staff are involved in the organisation and organisational decision-making. In this research, it has been found that the possibility to participate also goes some way to compensating for the fact that the organisational autonomy of judges has dissipated and greater responsibility is asked by judge-managers of the courts from the judges in their working methods.

20.2.2. What can be done to improve the performance of judges, both in terms of productivity, efficiency and quality?

In France and the Netherlands, there are policies operating to assist judges, not only in their productivity and efficiency, but also in terms of the quality of their work. A framework of instruments to aid has been described in all three cases. Firstly, human resources in the forms of clerks and various grades of legal secretary were described. These functions are given tasks in researching, summarising cases and writing concepts for judgements. It has been described that there are growing expectations from such functions and that steps are being taken to ensure the high quality of work, including hiring from university and further training of staff felt to have the potential to do the work, such as researching law for cases, sometimes preparing summaries for simpler cases. The type of work that legal staff and clerks will do appears to depend very much on how much the judges (i.e. judge-managers) are willing to delegate to them. This innovation of hiring qualified staff to take on some of the simpler tasks for judges has created more time for judges to judge cases and preside over hearings.

Secondly, in all three jurisdictions there is further training (though to varying degrees) available to all judges and staff on advances in law, either through an educational institution of the judiciary, or universities. There are also policies operating to ensure that judges can interact and discuss their cases with one another.

Lastly, the adoption of new technologies has enabled the courts, on the one hand, to access data faster, enabling judges to keep up with changes in the law and jurisprudence. The Council for the Judiciary has had various initiatives to develop legal databases and the intranet to ensure that all judges and their staff can access the jurisprudence of higher courts. This means in general that judges and their staff do not have to spend time going through books and photocopying data and can access material they need to decide cases from behind their computers in their offices. This, next to further training, helps to ensure a high standard of quality in judgements concerning uniform application of the law, enabling judges to produce cases more efficiently and speedily. On the other hand, the technology has meant that judges are doing more work in less time. Word processing allows judges to write their own judgements more efficiently, which also frees up the time of clerks to assist judges in

collecting and researching data for other cases. The adoption of new technologies, although not always perfect in these jurisdictions, has been intended to help the efficiency of the courts.

20.2.3. How does this affect judicial independence and accountability?

The traditional and constitutional understanding of judicial independence in decision-making and judicial accountability through a fair trial are still applicable here. What has changed is the position of the judge as regards the court organisation, in that she has become more accountable for her working methods and productivity. The way that it has been arranged in both countries is that the accountability for working methods is internal only. This protects the status of the judge in that no one can use managerial data about performance against her in her function in judging cases. The role of the judge as regards decision-making is therefore unchanged. The responsibility of the judge, although maybe not classed as a constitutional responsibility, has expanded to include efficiency in the workplace.

The efforts made by the court organisation to offer support to the judge in her role indicates an expansion of the judicial role to include not only judges, but also those offering judges support. This changes the nature of judicial independence in deciding cases from the judge to the court in that the judges are not the only ones taking part in the decision-making process in cases. This highlights the role of legal secretaries and clerks to the extent that they must be impartial in their tasks, whether they are researching or writing summaries about cases. It also highlights the need for management to provide help to judges in a fair way to bring the quality of justice into line for the whole organisation, and not in favour of one judge.

From this one can conclude that the court organisation itself can be seen as an institution of justice, a term usually reserved for the courtroom and the judge, and not only as a place that offers office space for judges to work in (instead of working from home). These efforts can be classified as quality measures, which also change the nature of the organisation, which means that one could also conclude that judges can maintain judicial independence in an organisation other than a professional bureaucracy.

20.3. Court organisation: Problem questions

The next level is the court organisation. In the theoretical framework, the following questions were asked based on the following question: Given societal demands and the expanding powers of its members, what can be/has been done at this level to improve court performance as a whole?

20.3.1. In what way have quality norms and criteria affected the court organisation?

The comparative analysis examined the operation of the 5 steps to achieving a quality organisation as set out in the theoretical framework: a list of goals, quality control and assurance, total quality management, and a learning organisation through the use of performance evaluation through standards. A list of goals in the form of programming

policy was found for both countries to varying degrees towards improving the efficiency of the courts, even though the approach varied. The biggest difference in approach was the amount of responsibility given to the judiciary in these five steps. On the one hand, in the Netherlands, it is clear that the Council for the Judiciary had responsibility for creating the list of goals through policies, in consultancy with the courts and Ministry of Justice. On the other hand, in France, it appears that government has responsibility for making a programme of improvements for the judicial organisation. Furthermore, the Dutch appear to have taken a holistic approach, dealing both with the modernisation of the organisation and supporting the decision-making role of the judge, which is something traditionally reserved for the judge. In order to do this, they have started institutional changes within the courts and created a Council for the Judiciary to monitor administration and distribute finances. The French policy-makers on the other hand, have not taken an institutional approach in modernising the organisation, but have also focused on increasing support for the judges' role.

Quality assurance

Quality control has to do with controlling the quality of the final product, in this case the judgement. Given that I have already attempted to establish that this is still the role and responsibility of the judge and the court as an institution of justice, it is only necessary here to look at quality assurance, i.e. a quality programme built around the processes of the court organisations.

The central process discussed in this thesis is case management, and therefore I paid special attention to this subject during the research on the implementation of quality methods. However, I found that a general policy for quality assurance did not appear to exist for case management in any of the jurisdictions examined. However, one can see throughout these interview analyses that each court is bearing its own separate organisational responsibility, especially for case management. The important conclusion here is that the term 'court organisation' can also not be treated as an entirely generic term. Each court faces its own challenges and has its own unique set of staff. Quality assurance can only be programmed at a national level; to a certain extent, however, enforcement is difficult within the courts as the focus until recently has been only on quality control for judgements.

Total quality management

The following step is implementing total quality management. From this thesis, one can see two essential things that are needed to ensure the operation of total quality management: firstly, the (formal or informal) reorganisation of the court so that instead of two or three organisations of judges, clerks or prosecutors (and others), there is one and it is managed as one. Secondly, in bringing the organisation into one line, one needs competent managers in place, which requires training and volunteers (and internal bureau politics). The experience in these two countries is that there is a tendency to implement one line of management in a team of leaders who used to manage their own branch of staff, be it judges, clerks or prosecutors. In the Netherlands, this tendency relates directly to the organisational and financial sectorisation of

the courts (in addition to the already existing jurisdictional sectorisation), as the Judicial Organisation Act 2002 gave the sectors the power of spending and management within the courts (and the sector chairmen then form a collegiate board of governance for the whole court, ensuring that there is no polarisation of interests as far as the court's interests are concerned). A condition of this change was that the sector chairmen (with the aid of a professional manager) were accountable within their managerial function for the good organisation of their sectors.

However, the main problem found with implementing total quality management at the time this research took place was the competences of judges to manage the courts in this way. It was found that judges are not trained to be managers and are not always felt to be the appropriate ones to manage the courts' organisations. The logic behind having judges as managers is that as members of what is felt to be an independent institution, it was felt that judges are best placed to protect the independence of the court. However, without training, judges do not have the mentality of managers, and it was found that quite often they were reluctant to manage their peers and colleagues both in France and the Netherlands.

Learning organisation

Whilst one can see an impetus towards a learning organisation in Dutch courts, the mentality to use it efficiently is not there. There has been reluctance to follow the advice of quality projects or to see them through within the courts. Furthermore, the degree of implementation is at the discretion of the courts. In principle the framework is there to create a learning organisation. In France, the only place that the learning culture is visible is at the policy-making level of the Ministry of Justice for the ordinary jurisdiction, and at the Council of State for the administrative jurisdiction. The learning process is then filtered into the policy-making process. The data used in these processes comes mainly from inspections by the inspectorates general for both jurisdictions. However, it must be noted that judges also play a role in policy-making, bringing their experience to help the organisation improve. This role can be through an administrative position at policy level, or in policy-specific committee work.

A quality organisation should enable an organisation to react quickly to any new situations internally and to be evaluated externally on performance. None of the organisations in these jurisdictions, based on the quality theories themselves, could be evaluated externally at the time of this research. Internally, the structures are available to the Dutch courts to react quickly, but the data suggests that the quality of management will mean that they possibly will not know how to react. In France, there are no policies to implement quality theories. The initiatives taken locally and usually individually are not sufficient to be counted as policy, and without national support and implementation, will likely fail. I believe this to be so because organisational change in such a conservative organisation is difficult without money and interest to create the moment for the policy. Furthermore, if one organisation implements quality standards to work to, but not others, it creates an imbalance in the provision of services, whereby some will benefit, but not all. Additionally, it cannot be considered as a quality policy for the whole organisation, if the whole organisation does not implement it. Quality theories are inclusive and do not target specific services within an organisation without

thinking about other parts of the organisation. The judicial organisation is a sum total of all courts.

One can conclude from this thesis that quality theory started to germinate as an idea within these judicial organisations towards the end of the twentieth century and the beginning of the twenty-first century. The conditions for implementing it in a complete form were not there in either country at the time that this research took place. However, there are indications that the conditions for implementing quality in the judicial organisations in these countries are being developed. One such indication is the programming by policy makers to enable the courts to start implementing quality standards, including training for judge-managers, technological investments and an injection of resources.

Another indication is the emphasis that the judge-manager should work closely with the professional manager to run the courts, thereby creating one organisation instead of two structures within one. This can be seen with the integral management approach in the Netherlands, and in France it can be seen from the interview analyses that there is a growing tendency for presidents and clerks to work more closely together in the management of the court. Another indication is the technological adoptions being made that require organisational changes and new approaches, especially in case management and registration.

20.3.2. What steps are being taken to bring the organisation closer to the people through quality policies?

Again, looking at court processes, the transparency of case management and internal processes are also taken for granted in that many did not believe it was necessary to be transparent. Externally, it was taken for granted that people could rely upon their lawyers to keep them informed. Only the administrative jurisdiction in France had made efforts at transparency of case processing towards the parties by implementing an online software programme that allows them to follow the progress of their cases. This is a public service approach to users, but it should belong to a wider quality assurance programme, which it does not.

Communications was the other standard by which I measured whether the organisation was in anyway close to the citizens. In the Netherlands, regarding communications of the courts in general, there was found to be a greater effort externally to connect to users through creating customer panels and questionnaires. In France, that external communications were not discussed is also reflected in these respondents' attitudes towards the Charte Marianne that deals with the quality of reception to public services, which showed no prospect of being implemented in any of the courts where interviews took place.

The lack of a tangible connection between the court organisations and the users shows that there is still a belief that the real face of the courts is the judge in the courtroom at the hearing. It follows from this that the dominant attitude within the courts at the time of this research is the following: as long as procedural law is followed there is no need for the user to understand the internal processes and organisation of the court. This illustrates that even though these judicial organisations are changing, and the responsibility of judges is expanding within the organisation, courts still have

a bureaucratic approach to the citizen and users. There have been a few quality measures that appear less bureaucratic in both countries, but the effects of these measures could not be identified in this research.

20.3.3. Do quality standards breach judicial independence at the level of the court?

As they are implemented at the moment in the Netherlands, one can see that quality standards are there as a learning tool for the organisation. The use of standards has led to the court organisation taking an increased role in supporting the judge in her role. It has already been stated that this expands the definition of judicial independence to include the court and not only the judge. However, as no quality standards have been applied (at the time of this research) to judgements, one can say that it is still the responsibility of judges and the legal framework to hold the judges to account for the standards of judgements.

However, judicial independence can now be said to apply to the court organisation itself. If the court organisation is to be considered to be an institution of justice, it must also exhibit accountability for its operations. I would conclude that the development and implementation of quality standards in the Netherlands concerning transparency through complaints procedures, customer panels and questionnaires, personnel development, describing working processes and methods, the improvement of information technology etc., has not only helped to reinforce the accountability of the court organisation itself to counterbalance its role in judicial independence.

One can see in general, though, that the programming quality for the judiciary is done with great care in both jurisdictions in that judges are very much involved as managers, and everything is done to ensure that judicial independence is not breached. Malleson said that

> 'An underlying difficulty which gives rise to tension in this area is the fact that there is not, in practice, a neat distinction between administrative and judicial functions. The structure, resources and procedures adopted in the courts all have a direct bearing on the type of justice received. Its speed, the level of experience of the judge allocated to a case… can all be described as administrative decisions yet they are all factors which can affect the ultimate decision.'[5]

Given that the judges are also responsible within the jurisdictions for administrative decisions, and given that judicial independence can be said to extend to the court organisation, there should be some way to hold the court organisation and the managers to account. According to Murgatroyd and Morgan:

> 'Quality is a function of strategy'[6]

5 K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Aldershot, Dartmouth 1999, p. 50.

6 S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Buckingham, Philadelphia 1994, p. 56.

The problem here is that the organisation (and its managers), not being directly involved in decision making in cases, cannot be held to the same accountability as judges in their normal roles. A strategy needs to be created to hold the organisation to account without breaching the judicial independence of judges (the link being stated by Malleson in the above citation). Whilst there are ways to hold an individual manager to account, it is not sufficient to hold the organisation to account for its role as an institution of justice. Managerial accountability is not the same as constitutional accountability, and an organisation such as a court, with both professional and non-professional staff, cannot be held to the same daily accountability as, for example, a government minister or a member of parliament.[7] Quality management, as would appear from this research, has the potential to have a good function as part of a strategy for holding the judicial organisation to account.

It can further be said that organisational solutions of quality theories can help the judicial organisation face the problems of growing unreasonable delays, and consequent problems of transparency and accountability, which lead to legitimacy gaps. Through the application of the five steps of quality described in this thesis, the courts themselves would be able to see the main problem areas and act accordingly. By focussing on issues of organisation and quality of justice, the courts are slowly building up a body of best practices as well as a foundation for a discipline of judicial administration. With this, quality theories can be adapted to the courts, and it is more visible to the politicians and policy-makers what is required in order to administer justice. The nature of responsibility in the state towards the judiciary is not only to invest more resources. It is to ensure that taxpayers' money is spent efficiently and effectively and to be accountable for the organisations in terms of reliability, timeliness and accuracy.

20.4. Administration of justice: problem questions

At an institutional level, the question arises as to whether it is constitutionally viable to implement quality standards in response to the expansion of judicial power and the lack of an adequate response to political/public requirements?

20.4.1. How do separation of powers and judicial independence operate at the institutional level?

At the institutional level, separation of powers is about institutional status and the separation of functions. The separation of functions is clearly set out in both countries, with parliament legislating, government administering, and judges deciding cases. As stated earlier, the institution of justice has been considered to be associated with the judge, not the courts, not the ministry of justice, but the judge. As has already been concluded, judicial independence operates in relation to the decision-making process in cases. Institutional separation of powers is not only about the separation of functions, but also about the appearance of the separation of functions (and thereby preventing bias and the appearances of bias in judicial decision making). It is essen-

7 D. Woodhouse, 'The reconstruction of constitutional accountability', in *Public Law* 2002, p. 73.

tially about protecting the citizen from abuse of power. It must appear that the legislature is free to create laws to be implemented by government, and that government does not overstep its powers by creating laws outside of its own mandate. Similarly, judges must be seen to decide cases in a way that does not breach government powers or legislative powers (within a constitutional context – a discussion not to be elaborated upon in this thesis).

What this thesis has dealt with at this level of analysis is quality management in judicial organisation and checks and balances. The administration of justice has traditionally been through the Ministry of Justice in both countries examined in this thesis. This aspect of independence goes towards enhancing the separation of powers organisationally, and therefore also constitutionally. Even though the French Ministry of Justice is politically responsible for the judicial organisation, I have found in fact that judges are very closely involved in the administration of justice for both jurisdictions, without having the political responsibility for it, whereas in the Netherlands, the creation of the Council for the Judiciary in 2002 is a step in enhancing a separation of the administration of the executive power and the administration of justice.

Whilst the checks and balances for the judiciary in France have been adapted to ensure that judges are able to participate in the administration of the judicial organisation, there is a lack of transparency that goes against constitutional principles of transparency. Therefore, even though it is important that they are able to participate and generate the legitimacy of administrative decision making towards the members of the judiciary, there is a democratic and therefore legitimacy gap in the way in which the judicial organisation is administered in France.

In the Netherlands, as of 2002 there have been official forums for the judges to take responsibility for their own organisation; however, it has been found that due to the young nature of the organisation the relationship between the Ministry of Justice (which is still ultimately politically responsible for the judicial organisation) and the Council for the Judiciary is not fixed at the time of this research, and that many things are not transparent to the public or to each other. However, the requirement of public reports on the functioning of justice increases the transparency of the operation of justice exponentially, and goes somewhat to increasing the legitimacy of the organisation of the judiciary towards the citizen. According to the theoretical framework of this thesis, a step towards legitimacy is the transparency of decision making, in this instance referring to organisational transparency. The court organisations now act under a legal framework of accountability like any other public service. They account for the organisation's performance and the steps taken to improve that performance; and they account for their spending, and justify the need for more money, giving their methods some legitimacy. The possibility to vote on a budget that has plans and reports gives parliament the chance to legitimate the organisation's methods at the same time as helping policy makers to understand what effective and efficient justice means.

20.4.2. *Can quality norms and criteria be applicable at this level to facilitate hard political accountability?*

At the macro level, it has been discovered that quality measures are important in the accountability for the judicial organisation. Increasingly, due to the way that accountability is being demanded from the courts in terms of finance, both in the Netherlands and in France, there is more information available about these organisations in the form of annual reports, budget plans, and inspections in France.

There has been no evidence to suggest that implementing quality management, as part of national policy, is contrary to constitutional law. I would say that the main problem encountered in attempting to change the organisation has been in finding judges who are competent and trained to take on the responsibility for the court organisations. In this sense, these courts, with or without the implementation of quality theories, are still professional bureaucracies in that professionals are still managed by professionals. The only thing that has changed is that the professionals (i.e. the judges) are also managing and are responsible for the back office of the organisation, something they are ill-trained to deal with.

From a constitutional and public administration point of view the transparency of organisation is essential (i.e. horizontally and vertically). The consequences will naturally be that the organisation is far more open to criticism and demands, but this takes the organisation a step towards being an institution that is part of the community, rather than an organisation that is considered closed and untransparent in the way it operates. It could be argued that given these moves towards the citizen at a constitutional level that it compensates for the fact that individual court organisations do not need to be. But I would say that this argument does not hold water, as the court organisation is representative of the judiciary as a whole and should as an institution of justice answer to such a high standard of societal legitimacy.

A quality approach to the administration of justice ensures that all interested parties have a voice and that all processes and issues are dealt with as transparently as possible and as policy issues. It leads to a more democratic organization, based on values and goals.

20.5. Conclusions

In this thesis I looked at the operation of judicial independence and the operation of quality theories and I have determined whether the two are compatible. I have found nothing to say that they are incompatible. In saying that, however, the questions then arise on the one hand as to what role quality norms and criteria have to play in the framework of checks and balances, and on the other, as to the extent of compatibility between judicial independence and quality norms. It was stated that the concept of public responsibility (soft accountability) is instrumental in achieving the political responsibility (hard accountability) of justice. This should be restricted, because of judicial independence, to organisational conditions for an efficient and effective delivery of justice. From this distinction, public responsibility for justice goes not only to organisational conditions but also to the judgements themselves, whereas political responsibility would only be for the organisational conditions. Public responsibility for

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

judgements would not be towards the body of elected officials (the legislator), i.e. responsibility for judgements would remain guaranteed through public hearings, publication of judgements, and the possibility to appeal.

The interaction between judicial organisation and the executive has affected the public responsibility for the organisation in the Netherlands. On the one hand, ministerial responsibility is maintained towards parliament. On the other hand, public responsibility of the judicial organisation has grown for the judicial organisation (i.e. the judges, and the Council for the Judiciary). The increase in public responsibility goes to enforcing ministerial responsibility for the delivery of effective justice; without it, the Minister would have very little data to support the fact that justice has been delivered effectively.

In France, the interaction between the judicial organisation and executive is rarely written about in academic terms. Dealing first with the role of judges in the Ministry of Justice, there is a lack of public accountability for the operation of the judicial organisation where the judge has a say at policy level. On the other hand, however, the Minister is ultimately responsible to Parliament and must cooperate with the courts to deliver effective justice. Conversely, the inspections of the courts in both the ordinary and administrative jurisdictions provide some form of public accountability for the operation of justice at the level of court organisation. This goes someway to providing the policy-making level and the legislature with data that they would not normally have about the operation of justice. This provides, therefore, valuable insights into what is required for delivering effective justice. This situation is not however a new situation in France, and more visibility of the judge's function as a manager or policy maker would go to imposing some public accountability on those who have responsibility for the judicial organisation.

This thesis is about accountability for the effective delivery of justice and how that should be organised within the principle of checks and balances. Central to this question is the role the judiciary should play and how they can be held to account for the organisation without it affecting judicial independence to decide cases.

It was stated in the theoretical framework that quality norms and criteria could have a part to play in terms of increasing soft accountability (i.e. transparency and accountability), which would further go to enhancing the hard political accountability of the judiciary without affecting judicial independence to judge cases. In this research, I have discovered, through the application of quality norms and criteria in the court that reasonable delay, is but one factor of many in the effective delivery of justice. From the micro level, one can see that supporting judges' work with quality measures has been effective in enforcing judges' roles and responsibilities. At the meso level, case management and communications are central processes of the courts, not only for ensuring reasonable delays, but also for the transparency of procedure and of court organisation. It is also important for the court's relationship with its community. At the level of administration of justice institutional relationships and the state's relationship with the citizen is at issue. Quality methods can give a broad overview of issues that need to be dealt with at an organisational and political point of view of the courts.

Quality norms and criteria therefore appear on the one hand to support the function of justice, and, on the other hand, provide transparent methods for organisation. Furthermore, as regards the organisation, quality methods appear to have given the

judiciary in both countries the possibility to examine in closer detail the elements involved in the delivery of effective justice.

The accountability for the judicial organisation by members of the judiciary (i.e. not the Ministry of Justice) in these countries is expressed through annual reports and financial planning, and occasional independent inspections. This highlights the issue of organisation and the delivery of effective justice as a matter of constitutional law, and changes the checks and balances because it involves holding members of the judiciary to account for something other than independence in decision-making. Theoretically speaking therefore, the concepts of judicial independence and quality norms and criteria are completely compatible. In practice however, what has been described in this thesis is a cautious process of change to implement quality norms and criteria at all levels of the judicial organisation. The caution appears to be born, on the one hand, out of a desire, by policy makers and judge-managers alike, to protect judicial independence. On the other hand, it would appear that time is also needed incorporate organisational values espoused by quality norms into judicial values of independence and accountability. Compatibility is to be found then in the extent that countries are willing and trusting of the techniques that quality management has to offer.

Vile's definition of checks and balances is where there is direct control by one power by authorizing it to play a limited part in the exercise of another's power. In this instance, especially in the Netherlands and France where the Ministry of Justice and Parliament share responsibility for providing effective justice, accountability for the organisation of justice was always imperfect because of the nature of the judicial organisation as a professional bureaucracy and the organisational autonomy that judges enjoyed as a result. Creating a soft or public accountability through the use of quality methods for the functioning of justice as a whole, i.e. for both the administration and for the quality of justice, goes to addressing the imperfect form of accountability in the checks and balances for the delivery of effective justice. Quality methods have been shown to move the organisation away from bureaucratic and inflexible structures (value orientation) towards a quality organisation (value and goal oriented). It has not been shown to interfere with the role of the judge in her decision making, in fact it has gone to assuring quality in the courts and enhancing judges' roles.

This thesis puts into sharp focus the enormity of the task of administration of justice, not only from a constitutional point of view but also from a public administration point of view.

Samenvatting

In dit proefschrift wordt de mogelijkheid onderzocht om te komen tot een normatieve wijze waarop de kwaliteit van de rechterlijke organisatie kan worden beoordeeld door te beargumenteren dat legitimiteit nauw verbonden is met het functioneren van de organisatie. Dit leidt bovendien tot de notie dat de rechterlijke macht staatsrechtelijk verantwoordelijk kan worden gehouden voor zijn organisatie of het ontbreken daarvan.

De rechterlijke organisatie heeft geen democratisch mandaat zoals de wetgevende en de uitvoerende macht binnen de staat (tenzij gebruik wordt gemaakt van verkiezingsprocedures, wat zeldzaam is in de meeste democratieën), maar toch heeft de rechterlijke macht veel regelgevende en beslissingsbevoegdheid over de levens van mensen. Vanwege de scheiding der machten en de manier waarop de verantwoordingsplicht is ingericht voor de rechterlijke macht, is de rechterlijke onafhankelijkheid een zeer sterke institutionele waarde in de abstracte wetenschappelijke theorie. Rechters worden opgevoerd als onpartijdig en onafhankelijk in de staatsrechtelijke doctrine, als tegenwicht voor onrechtvaardige wetgeving die wordt uitgevaardigd of onrechtvaardige handelingen door overheid en bestuur. De algemene rol die volgens de doctrine voor hen gereserveerd is, is om bescherming te bieden aan de burger tegen willekeur en om die reden is in de doctrine ook voorzien in een bepaalde mate van rechterlijke verantwoording. Deze verantwoording komt traditioneel eerder tot uitdrukking in openbare zittingen en de publicatie van beslissingen dan in de organisatie zelf. Bovendien zijn kwaliteitsborgingprocedures pas eind jaren negentig/begin jaren 2000 geïntroduceerd in de rechterlijke macht. Het is daarom interessant om te bekijken welk effect dit beleid heeft gehad op de rechterlijke macht en de daaraan gerelateerde vraag van de legitimiteit.

Dit proefschrift begint met een inleiding over het concept 'verantwoording' en hoe dat op verschillende manieren is ingericht door verschillende soorten organisaties en machten, en dat er geen blauwdruk bestaat voor het organiseren van verantwoording als zodanig. In de zoektocht naar hoe een normatief beoordelingskader te scheppen voor kwaliteit in de rechterlijke organisatie was het nodig om verscheidene andere concepten te onderzoeken en met elkaar in verband te brengen. Allereerst wordt een kort overzicht gegeven van de staatsrechtelijke ontwikkelingen gedurende de afgelopen twee eeuwen en de gevolgen die deze ontwikkelingen hebben gehad voor de rechterlijke machten in de zin van rechterlijke onafhankelijkheid en verantwoording

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

in Westerse democratieën. Dit leidde tot een onderzoek naar legitimiteit en burgerparticipatie en de integratie van de rechterlijke macht in de samenleving (een top-down/ bottom-up benadering).

Na een analyse en bespreking van de legitimiteitvraagstukken vanuit een staatsrechtelijk en burgerschapsoogpunt onderzoek ik vervolgens de organisatorische beginselen van niet alleen deelname, maar ook efficiëntie en doelmatigheid en de organisatorische instrumenten die worden gebruikt om deze organisatorische doelen te bereiken. Hierna behandel ik de literatuur en theorieën over wat een kwaliteitsorganisatie nu precies is en pas ik vervolgens het algemene concept aan aan de organisatorische verantwoordingsplicht van de rechterlijke macht.

De vraag naar het kwantificeren en meten van kwaliteit in de rechterlijke organisatie stelt ons voor een interessante uitdaging. Aan de ene kant heeft de rechterlijke macht een speciale status binnen de scheiding der machten om het recht te handhaven. In een rechtsstaat gebaseerd op democratie zijn de *checks and balances* bedoeld om de rechterlijke onafhankelijkheid te waarborgen terwijl tegelijkertijd gezocht wordt naar juridisch gebaande paden om leden van de rechterlijke macht ter verantwoording te roepen voor de uitoefening van hun macht. De afgelopen 200 jaar heeft het systeem de drie machten in evenwicht gehouden om mensen te beschermen tegen willekeurig machtsmisbruik. Legaliteit is altijd de basis geweest waarop overheidsorganisaties beslissingen nemen in een democratie. Hetzelfde wordt gezegd van de rechterlijke macht. Zolang rechters de procedurele regels in acht namen, ongeacht hoe lang het duurde en hoe gemakkelijk deze gemanipuleerd konden worden (door advocaten), handelden de rechters in overeenkomst met de eisen van de legaliteit (een behoorlijk proces). Dit was (en is nog steeds) het geval in tijden van corrupte en partijdige overheidsdienaren en in de dagen van de bureaucratie toen er zoveel regels waren dat de bescherming die de waarborgen van het procesrecht moest bieden tekortschoot en een papierwinkel de handelingen van overheidsfunctionarissen bedekte.

Aan de andere kant is de rechterlijke macht een organisatie met slechts beperkte middelen om zijn taken te vervullen. Gezien het feit dat de organisatie weinig aandacht heeft gekregen als gevolg van de rechterlijke onafhankelijkheid, hebben rechterlijke machten in heel Europa moeten zien om te gaan met een groeiende hoeveelheid zaken zonder dat er een organisatorische oplossing voor handen was. Hierdoor is op dit moment een nieuwe organisatorische vijand te signaleren: ondoelmatigheid door inefficiënt handelen van de organisatie. De middelen en het gebruik daarvan zijn niet de enige kwesties in het huidige beleid: er is ook de kwestie van tijdigheid. In het gebied waarop de rechterlijke macht opereert is dit cruciaal omdat uitspraken relevant moeten zijn op het moment dat ze worden gedaan. Wanneer uitspraken geen oplossingen bieden voor problemen op het moment dat dit nodig is, boetten ze in aan legitimiteit. Wanneer uitspraken legitimiteit ontberen, begint de rechterlijke macht het vertrouwen van het publiek te verliezen.

De daaropvolgende paragraaf behandelt de onderzoeksmethode die wordt gevolgd voor het vervolg van dit proefschrift. De nadruk van het verkennende onderzoek ligt op de manieren waarop kwaliteitsmaatregelen in rechtbanken zelf de kwaliteit van de

organisatie beïnvloeden. Hier behandel ik vragen als de verantwoordelijkheid van de afzonderlijke rechters in termen van nieuwe kwaliteitsmaatregelen en hoe dit de onafhankelijkheid beïnvloedt; kwaliteitsbeheer en kwaliteitsorganisatie en de verantwoordelijkheid van de rechtsbank; en nationaal beleid inzake de rechterlijke organisatie. Er zijn voor een gedeelte van tevoren gestructureerde vraaggesprekken gevoerd in Nederland en Frankrijk. Managers en rechters met managementtaken vormden de groep waarop met name de nadruk lag, maar ik heb ook gesprekken gevoerd met leden van de Raden voor de Rechtspraak (met bestuurlijke taken) en de Ministeries van Justitie om een helder beeld te krijgen van het huidige beleid en de toekomstige plannen. Naast deze gespreksrondes heb ik gebruik gemaakt van literatuur en ander onderzoek over de rechterlijke organisaties in andere landen.

De daaropvolgende twee paragrafen geven een brede beschrijving van hoe de scheiding der machten werkt vanuit het oogpunt van de rechterlijke machten in Nederland en Frankrijk. Hierna volgen gespreksanalyses die zijn onderverdeeld in de 'rol en verantwoordelijkheid van rechters', 'de organisatie van de rechtbank', en 'rechtspleging'. Daarbij wordt niet alleen gekeken naar de scheiding der machten in actie, maar ook naar hoe rechterlijke onafhankelijkheid en rechterlijke verantwoordelijkheid werken op het niveau van de rechter, in plaats van in theorie.

Tenslotte heb ik in de conclusies gekeken naar de werking van rechterlijke onafhankelijkheid en de werking van kwaliteitstheorieën en heb ik vastgesteld waar deze twee verenigbaar zijn. Ik heb niets kunnen vinden dat er op wijst dat ze niet verenigbaar zijn. Dat gezegd hebbende, rijst wel de vraag welke rol kwaliteitstheorieën kunnen spelen in het kader van *checks and balances*. Er werd geconstateerd dat het concept van de publieke verantwoording (zachte verantwoordingsplicht) instrumentaal is in het bereiken van de politieke verantwoordelijkheid (harde verantwoordingsplicht) van de rechtspraak.

De publieke verantwoordelijkheid (zachte verantwoordingsplicht) heeft betrekking op openheid en vertegenwoordiging en vereist procedurele transparantie, maar tegelijkertijd gevoeligheid voor de verschillende belangen en een veranderende sociale omgeving, terwijl de (harde) politieke verantwoordingsplicht betrekking heeft op verwijdering uit het ambt, verantwoording ten opzichte van de wetgevende macht, en burgerlijke en strafrechtelijke aansprakelijkheid voor schade toegebracht door een beslissing. Het is niet van toepassing op de rechterlijke macht vanwege het beginsel van rechterlijke onafhankelijkheid. Dit heeft dus alleen betrekking op de democratische staatsinstellingen. De verantwoordelijkheid van gekozen overheidsinstanties gaat echter hand in hand met transparant werken, wat aanleiding kan geven tot verdere publieke discussie. Uiteindelijk kunnen deze personen ter verantwoording worden geroepen omdat zij geacht worden representatief te zijn. Politieke verantwoordelijkheid is een laatste toevlucht in een systeem waarbij het publieke vertrouwen wordt gehandhaafd door het goed functioneren van gekozen instanties en ondersteunende diensten. Met andere woorden, publieke verantwoordelijkheid ligt besloten in politieke verantwoordelijkheid.

De verantwoordingsplicht moet vanwege de rechterlijke onafhankelijkheid worden beperkt tot de organisatorische voorwaarden voor een efficiënte en doelmatige rechts-

pleging. Vanuit deze nuancering werkt de publieke verantwoordelijkheid voor de rechtspleging niet alleen in op organisatorische voorwaarden, maar ook op de uitspraken zelf, terwijl politieke verantwoordelijkheid alleen bestaat voor de organisatorische voorwaarden. Publieke verantwoordelijkheid voor rechterlijke uitspraken zou niet bestaan ten opzichte van het corps van gekozen functionarissen (de wetgever), dat wil zeggen: verantwoordelijkheid voor uitspraken zou blijven binnen de sfeer van de traditionele *checks and balances*.

De interactie tussen de rechterlijke organisatie en de uitvoerende macht heeft invloed gehad op publieke verantwoordelijkheid voor de organisatie in Nederland. Aan de ene kant is de publieke verantwoordelijkheid van de rechterlijke macht (rechters en de Raad voor de Rechtspraak) voor de rechterlijke organisatie toegenomen. De toename van publieke verantwoordelijkheid werkt in op de handhaving van de ministeriële verantwoordelijkheid voor een effectieve rechtspleging; zou deze er niet zijn, dan zou de Minister zeer weinig gegevens hebben om aan te tonen dat er effectief is recht gedaan.

In Frankrijk wordt de interactie tussen de rechterlijke organisatie en de uitvoerende macht nauwelijks wetenschappelijk beschreven. Als we eerst kijken naar de rol van rechters binnen het Ministerie van Justitie, dan zien we een gebrek aan publieke verantwoordingsplicht voor het functioneren van de rechterlijke organisatie waar de rechter iets te zeggen heeft op beleidsniveau. Aan de andere kant is de Minister echter uiteindelijk verantwoording schuldig aan het parlement en moet hij samenwerken met de rechtbanken voor een effectieve rechtspleging. Omgekeerd leveren de inspecties van de rechtbanken in zowel de gewone rechtsmacht als de administratieve rechtsmacht een bepaalde vorm van publieke verantwoordingsplicht voor het functioneren van de rechtspraak op op het niveau van de organisatie van de rechtbanken. Dit zorgt voor de aanlevering van in ieder geval enige gegevens over de werking van de rechtspraak aan het beleidsniveau en de wetgever; gegevens die dezen normaal gesproken niet gehad zouden hebben. Dit levert dus waardevolle inzichten op in wat er nodig is voor een effectieve rechtspleging. Deze situatie is echter niet nieuw in Frankrijk, en meer zichtbaarheid van de functie van de rechter als manager of beleidsmaker zou zorgen voor het opleggen van tenminste een bepaalde mate van publieke verantwoordingsplicht aan degenen die verantwoordelijk zijn voor de rechterlijke organisatie.

Dit proefschrift bespreekt de verantwoording voor effectieve rechtspraak en hoe dit zou moeten worden georganiseerd binnen het principe van *checks and balances*. Centraal bij deze vraag staat de rol die de rechterlijke macht zou moeten spelen en hoe deze ter verantwoording kan worden geroepen voor de organisatie, zonder dat dit de rechterlijke onafhankelijkheid in het beslissen van zaken aantast.

In het theoretische kader is opgemerkt dat kwaliteitstheorieën een rol kunnen spelen in de zin dat ze de zachte verantwoording kunnen doen toenemen (dat wil zeggen, transparantie en verantwoordingsplicht) hetgeen verder ook inwerkt op het aanscherpen van de harde politieke verantwoordingsplicht van de rechterlijke macht zonder de rechterlijke onafhankelijkheid in het horen van zaken aan te tasten. In dit onderzoek heb ik ontdekt dat door de toepassing van kwaliteitstheorieën in de rechtbank de redelijke termijn, de oorsprong van veranderingen voor dit proefschrift, slechts

één van de vele factoren is in een effectieve rechtspleging. Op microniveau is te zien dat het ondersteunen van de rechterlijke arbeid met kwaliteitseisen effectief gewerkt heeft op de handhaving van de rol en de verantwoordelijkheden van rechters. Op meso niveau zijn dossierbeheer en communicatie de centrale processen bij de rechtbanken, niet alleen om te zorgen dat termijnen redelijk blijven, maar ook voor de transparantie van de procedure en de organisatie van de rechtbank. Dit is ook van belang voor de relatie van de rechtbank met de gemeenschap die hij bedient. Op het niveau van de rechtspleging staan de institutionele relaties en de relaties van de staat met de burger centraal. Kwaliteitsmethoden kunnen een breed overzicht opleveren van kwesties die moeten worden aangepakt vanuit organisatorisch en politiek-rechterlijk oogpunt.

Kwaliteitstheorieën lijken dus aan de ene kant de functie van de rechtspraak te ondersteunen en aan de andere kant transparante methodes voor organisatie te bieden. Waar het de organisatie betreft lijken kwaliteitsmethodes de rechterlijke machten in beide landen bovendien de mogelijkheid te hebben geboden om meer gedetailleerd de elementen te onderzoeken die betrokken zijn bij een effectieve rechtspraak.

De verantwoordingsplicht voor de rechterlijke organisatie van leden van de rechterlijke macht (dus niet de Minister van Justitie) komt in deze landen tot uitdrukking in jaarverslagen en in de financiële planning, en in sporadische onafhankelijke inspecties. Dit benadrukt de vraag van organisatie en effectieve rechtspraak als een zaak van constitutioneel recht, en verandert de *chicks and balansen* omdat het betekent dat leden van de rechterlijke macht verantwoording moeten afleggen voor nog iets anders dan onafhankelijkheid in de besluitvorming.

De definitie die Vile geeft van *chicks and balansen* is dat er directe controle is door de ene macht doordat deze macht de bevoegdheid heeft om een beperkte rol te spelen in de uitoefening van de bevoegdheid van een andere macht. In dit geval, vooral in Nederland en Frankrijk waar het Ministerie van Justitie en het parlement de verantwoordelijkheid voor de effectieve rechtspleging delen, is de verantwoording voor de organisatie van de rechtspraak altijd gebrekkig geweest vanwege de aard van de rechterlijke organisatie als een professionele bureaucratie en de organisatorische autonomie die rechters daardoor hadden. Het vestigen van een zachte of publieke verantwoordingsplicht door middel van het gebruik van kwaliteitsmethodes voor het functioneren van de rechtspraak als geheel, dat wil zeggen voor zowel de rechtspleging en de kwaliteit daarvan, draagt bij aan het oplossen van de gebrekkige vorm van verantwoording in de *chicks and balansen* voor het effectief rechtspreken. Het is gebleken dat kwaliteitsmethodes de organisatie uit de richting van bureaucratische en onflexibele structuren (waarde-georiënteerd) stuurt en in de richting van een kwaliteitsorganisatie (waarde- en doelgeoriënteerd). Het is niet aangetoond dat dit de rol van de rechter in zijn besluitvorming nadelig beïnvloedt; sterker nog: het heeft bijgedragen aan het waarborgen van kwaliteit in de rechtbanen en het uitbreiden van de rol van de rechter.

Of er enig risico is voor de rechterlijke onafhankelijkheid hangt ten zeerste af van de implementatie van kwaliteitsnormen (of andere organisatorische methodes). De manier waarop de kwaliteitstheorie is beschreven laat zien dat het eerder een ondersteunende dan een tegenwerkende factor is bij rechterlijke onafhankelijkheid. Bovendien geeft de manier waarop kwaliteitsbeheer en indicatoren functioneren in Frankrijk

en Nederland aan dat rechter-managers en het bestuur van rechtbanken steeds minder aandacht besteden aan rechterlijke onafhankelijkheid. In organisatorische termen is de belangrijkste *check* tegen het bestuur dat de rechter de macht heeft over de kwaliteit-toets over zijn beslissingen.

Dit proefschrift werpt een duidelijk licht op het enorme gewicht van de taak van rechtspleging, niet alleen vanuit staatsrechtelijk oogpunt, maar ook vanuit het perspectief van het openbare bestuur.

Gar Yein Ng, 'Quality of Judicial Organisation and Checks and Balances'

Résumé

La présente thèse de doctorat porte sur la possibilité de concevoir une approche normative de l'évaluation qualitative de l'organisation judiciaire, considérant que la légitimité est liée au fonctionnement de cette dernière. Poussé plus loin, l'argument conduit à l'idée que la magistrature peut être tenue constitutionnellement responsable de l'organisation qu'elle a – ou qu'elle n'a pas – mise en place.

À l'inverse du pouvoir législatif et du pouvoir exécutif de l'État, l'institution judiciaire n'a pas de mandat démocratique (hormis les rares cas dans lesquels les démocraties lui appliquent une procédure d'élection), alors qu'il détient un pouvoir juridique et décisionnel considérable sur la vie des citoyens. La séparation des pouvoirs et le mode de responsabilisation de la magistrature font de l'indépendance judiciaire une valeur institutionnelle primordiale dans la théorie abstraite issue de la réflexion académique. L'approche constitutionnelle veille à isoler la magistrature assise, afin d'en assurer l'impartialité et l'indépendance, et de lui permettre de neutraliser les dispositions législatives injustes qui seraient adoptées ou les actes injustes qui seraient commis par le gouvernement ou l'administration. La théorie constitutionnelle confère aux magistrats la fonction générale de protection du citoyen à l'encontre de toute action arbitraire et prévoit également, à cette fin, une certaine responsabilité judiciaire – laquelle se traduit le plus souvent par l'obligation de tenir des audiences publiques et de publier les jugements, mais porte plus rarement sur l'organisation proprement dite. Des politiques de qualité n'ont par ailleurs été introduites dans le système judiciaire qu'à la fin des années 1990 et au début des années 2000, et il est intéressant de se pencher sur l'impact qu'elles ont pu avoir sur l'ordre judiciaire et sur la légitimité qui y est associée.

La thèse débute par une introduction au concept de responsabilité et par la présentation des différentes formes que celle-ci peut revêtir selon le type d'organisation et de pouvoir, tout en montrant qu'il n'existe pas de schéma directeur pour organiser la responsabilité en tant que telle. J'ai été appelée, tout au long du processus de conception d'une évaluation normative de la qualité de l'organisation judiciaire, à examiner et à conjuguer divers autres concepts. Je commence par décrire brièvement les développements constitutionnels intervenus au cours des deux derniers siècles, et leurs répercussions sur les magistratures des démocraties occidentales en termes d'indépendance et de responsabilité. Cette première démarche m'a conduit à l'étude des

questions de légitimité, de participation des citoyens et d'intégration de l'ordre judiciaire dans la communauté (approche descendante et ascendante).

Après avoir analysé et discuté les questions de légitimité d'un point de vue constitutionnel et de citoyenneté, j'aborde les principes organisationnels régissant non seulement la participation, mais également l'efficience et l'efficacité, ainsi que les instruments utilisés pour atteindre ces objectifs. Je me penche ensuite sur la littérature et les théories relatives à ce que représente réellement une organisation de qualité, avant d'adapter ce concept général à la responsabilité organisationnelle de la magistrature.

La question de la quantification et de la mesure de la qualité d'une organisation judiciaire constitue un défi particulièrement intéressant. D'une part, le système judiciaire revêt un statut spécial dans le cadre de la séparation des pouvoirs afin de faire observer la loi. Dans un état de droit fondé sur la démocratie, les freins et contrepoids institutionnels ont été conçus de façon à protéger l'indépendance judiciaire tout en mettant en place des moyens juridiques classiques pour obliger les membres de la magistrature à rendre compte de l'exercice de leurs compétences. Le système a assuré l'équilibre des trois pouvoirs au cours des deux derniers siècles, afin de protéger les citoyens de tout usage arbitraire de l'un ou de l'autre. La légalité a toujours été la base sur laquelle les organisations publiques d'une démocratie ont fondé leurs décisions. Il en va de même de l'ordre judiciaire: pour autant que les magistrats suivent les règles de procédures – peu importe le temps que cela prend et la facilité de manipulation qui peut être exercée (par les juristes) – ils agissent dans la légalité (application régulière de la loi). Cette approche était (et reste) en vigueur au temps des fonctionnaires corrompus et partiaux, ou au temps de la bureaucratie, lorsque l'abondance des règles ne permet plus à l'application régulière de la loi d'assurer totalement la protection des citoyens et que les actes des fonctionnaires publics sont occultés par la paperasserie.

D'autre part, la magistrature est une organisation qui ne dispose, pour remplir sa mission, que de ressources limitées. Leur organisation ayant été ignorée au nom de l'indépendance judiciaire, les magistratures se sont trouvées confrontées, partout en Europe, à un volume de travail croissant sans aucune solution organisationnelle. Un nouvel ennemi est ainsi apparu: une inefficacité de la justice causée par l'incapacité de sa propre organisation d'agir avec efficience. Les ressources et leur utilisation ne sont pas le seul enjeu des politiques actuelles: la question du moment opportun est également importante. Elle est même essentielle dans le domaine d'action de l'appareil judiciaire, étant donné que les jugements doivent être pertinents au moment où ils sont rendus. En effet, faute de fournir des solutions aux problèmes au moment voulu, les jugements manquent de légitimité et la magistrature commence à perdre, par voie de conséquence, la confiance du public.

Le chapitre suivant est consacré à la méthodologie de recherche appliquée à la suite de la thèse. L'étude exploratoire se concentre sur la manière dont les mesures de qualité effectuées au niveau même des tribunaux influencent la qualité de l'organisation. J'y aborde des questions telles que la responsabilité des magistrats dans la perspective des nouvelles mesures de qualité, et l'impact de ces dernières sur leur indépendance; la

gestion de la qualité et l'organisation et la responsabilisation des tribunaux; et les politiques nationales en matière d'organisation judiciaire. Des entretiens semi-directifs ont été réalisés un peu partout aux Pays-Bas et en France. Les interviews visaient plus particulièrement des gestionnaires et des magistrats ayant des fonctions de gestion, mais je me suis également entretenue avec des membres de conseils de la magistrature (assumant des fonctions administratives) et avec des représentants du ministère de la Justice, afin d'avoir une idée précise des politiques en vigueur et des plans pour l'avenir. Parallèlement aux entretiens semi-directifs, j'ai consulté des ouvrages et d'autres travaux de recherche consacrés aux organisations judiciaires d'autres pays.

Les deux chapitres suivants contiennent une large description de la manière dont fonctionne la séparation des pouvoirs aux Pays-Bas et en France du point de vue de la magistrature. Les analyses d'entretiens proposées ensuite s'articulent autour du «rôle et de la responsabilité des magistrats», de «l'organisation des tribunaux» et de «l'administration de la justice». Il ne s'agit pas seulement ici d'examiner le fonctionnement réel de la séparation des pouvoirs, mais également d'observer comment fonctionnent l'indépendance et la responsabilité judiciaires au niveau concret du magistrat, plutôt qu'en théorie.

Enfin, dans les conclusions, j'étudie la manière dont opère l'indépendance judiciaire et dont opèrent les théories de la qualité, et j'établis si elles sont, ou non, compatibles. Je n'ai rien trouvé qui me fasse conclure à leur incompatibilité – ce qui pose toutefois la question du rôle que les théories en matière de qualité peuvent jouer au niveau des mécanismes régulateurs. Il a été établi que le concept de responsabilité publique (responsabilité non contraignante) joue un rôle déterminant dans l'instauration de la responsabilité politique (responsabilité contraignante) de la justice.

La responsabilité publique (non contraignante) concerne l'ouverture et la représentation, et exige à la fois la transparence des procédures et une sensibilité à l'égard d'intérêts différents et d'un environnement social en évolution, tandis que la responsabilité politique (contraignante) concerne la désinvestiture, la responsabilité vis-à-vis du corps législatif, et la responsabilité civile ou pénale du préjudice causé par une décision. Elle n'est pas applicable à la magistrature en raison du principe de l'indépendance judiciaire. Elle concerne donc exclusivement les institutions des États démocratiques. La responsabilité des autorités élues ne peut néanmoins être dissociée de l'exercice transparent de leur mission, ce qui peut ouvrir un autre débat public. En définitive, des comptes peuvent leur être demandés parce qu'elles sont censées être représentatives. La responsabilité politique est le dernier recours dans un système où la confiance de l'opinion publique naît du bon fonctionnement des instances élues et des services d'appui. Autrement dit, la responsabilité publique est implicite dans la responsabilité politique.

La responsabilité devrait se limiter, en raison de l'indépendance judiciaire, aux conditions organisationnelles assurant une prestation efficiente et efficace de la justice. Il découle de la distinction entre les deux types de responsabilité de la justice que sa responsabilité publique s'applique non seulement aux conditions organisationnelles, mais également aux jugements proprement dits, tandis que sa responsabilité politique concerne exclusivement les conditions organisationnelles. La responsabilité publique

des jugements ne viserait pas le corps des fonctionnaires élus (le législateur) – en d'autres termes, la responsabilité des jugements resterait du domaine des mécanismes régulateurs traditionnels.

L'interaction entre l'organisation judiciaire et l'exécutif a affecté la responsabilité publique de l'organisation aux Pays-Bas. D'une part, la responsabilité ministérielle à l'égard du Parlement est maintenue. D'autre part, la responsabilité publique de l'organisation judiciaire a été renforcée au niveau de la magistrature (autrement dit des magistrats et du conseil de la magistrature). Ce renforcement de la responsabilité publique contribue à faire appliquer l'obligation ministérielle d'assurer une justice efficace; sans cette responsabilité, en effet, le ministre disposerait de fort peu d'éléments pour faire valoir que la justice a été effectivement rendue.

En France, l'interaction entre l'organisation judiciaire et l'exécutif a rarement été décrite en termes académiques. En ce qui concerne tout d'abord le rôle des magistrats au sein du ministère de la Justice, on observe un manque de responsabilité publique en matière de fonctionnement de l'organisation judiciaire lorsque le magistrat a son mot à dire au niveau de l'élaboration des politiques. Par ailleurs, toutefois, le ministre est responsable en définitive devant le Parlement, et doit collaborer avec les tribunaux pour assurer une justice efficace. À l'inverse, les inspections des tribunaux – qu'il s'agisse de juridictions ordinaires ou de juridictions administratives – donnent lieu à une certaine forme de responsabilité publique du fonctionnement de la justice au niveau de l'organisation des tribunaux, et contribuent à fournir au niveau décisionnel et au pouvoir législatif des données dont ils ne disposeraient pas autrement à propos du fonctionnement de la justice. Des éléments précieux sont ainsi obtenus quant aux exigences à remplir pour rendre une justice efficace. Cette situation n'est cependant pas nouvelle en France, et une visibilité accrue de la fonction de magistrat en sa qualité de gestionnaire ou de décideur au niveau des politiques exigerait qu'une responsabilité publique soit imposée à ceux qui sont en charge de l'organisation judiciaire.

La présente thèse a pour objet la responsabilité d'une justice efficace et l'organisation à mettre en place à cette fin dans le respect du principe des freins et contrepoids. Le rôle à jouer par la magistrature et la mesure dans laquelle elle peut être tenue pour responsable de l'organisation sans perdre pour autant son indépendance dans le prononcé des jugements apparaissent comme des questions essentielles à cet égard.
Il a été établi dans le cadre théorique que les principes de qualité pourraient contribuer à renforcer la responsabilité non contraignante (à savoir la transparence) et, partant, la responsabilité politique contraignante de la magistrature sans affecter son indépendance judiciaire au moment où elle prononce ses jugements. Je me suis aperçue au cours de mes travaux, en appliquant les principes de qualité aux tribunaux, que le délai raisonnable n'est que l'un des nombreux facteurs qui sous-tendent une justice efficace. Au micro-niveau, on constate que les mesures de qualité adoptées à l'appui du travail des magistrats ont eu pour effet positif de renforcer le rôle et les responsabilités de ces derniers. Au méso-niveau, la gestion des affaires et la communication sont des processus déterminants pour assurer non seulement des délais raisonnables, mais également la transparence de la procédure et de l'organisation des tribunaux. Ces aspects sont

également importants pour les relations entre les tribunaux et la communauté. Au niveau de l'administration de la justice, ce sont les relations institutionnelles et les relations de l'État avec le citoyen qui sont en jeu. Les méthodes qualitatives peuvent donner un large aperçu des problématiques à traiter du point de vue organisationnel et politique des tribunaux.

Il apparaît donc que les principes de qualité viennent, d'une part, étayer le fonctionnement de la justice et qu'ils offrent, d'autre part, des méthodes transparentes en matière d'organisation. En ce qui concerne plus particulièrement cette dernière, ils semblent avoir offert aux magistratures des deux pays la possibilité d'un examen plus approfondi des composantes d'une justice efficace.

La responsabilité de l'organisation judiciaire qui incombe aux membres de la magistrature (autrement dit, pas au ministère de la Justice) de ces pays s'exprime dans des rapports annuels et des plans financiers, et lors d'inspections indépendantes occasionnelles – ce qui montre bien que la question de l'organisation et de la prestation d'une justice efficace relève du droit constitutionnel, et d'un changement au niveau des freins et contrepoids, dans la mesure où elle implique d'exiger autre chose des membres de la magistrature que l'indépendance de leur processus décisionnel.

Vile définit les freins et contrepoids comme l'exercice d'un contrôle direct par un pouvoir autorisé d'intervenir de façon limitée dans l'exercice des compétences d'un autre pouvoir. En l'occurrence, et en particulier aux Pays-Bas et en France où le ministère de la Justice et le Parlement sont conjointement chargés d'assurer une justice efficace, la responsabilité de l'organisation de la justice reste imparfaite en raison de la nature même de l'organisation judiciaire, à savoir une bureaucratie professionnelle, et de l'autonomie organisationnelle dont jouissent les magistrats par voie de conséquence. L'instauration d'une responsabilité non contraignante ou publique, par l'application de méthodes axées sur la qualité au fonctionnement de l'ensemble de la justice, c'est-à-dire à la fois à l'administration et à la qualité de la justice, contribuerait à remédier à la forme imparfaite de la responsabilité au niveau des freins et contrepoids dans la perspective d'une justice efficace. Il a été démontré que les méthodes axées sur la qualité font évoluer l'organisation d'une structure bureaucratique et rigide (orientation valeur) vers une organisation de qualité (orientation valeur et but). Rien n'indique qu'elles interfèrent dans le rôle décisionnel du magistrat; elles contribuent, en réalité, à promouvoir la qualité du travail des tribunaux et le rôle de la magistrature.

La menace éventuelle pour l'indépendance judiciaire au niveau des jugements rendus dépend largement de l'application des normes de qualité (ou d'autres méthodes organisationnelles). La manière dont la théorie de la qualité a été décrite montre qu'elle favorise l'indépendance judiciaire, plutôt qu'elle ne lui nuit. Le mode de fonctionnement actuel de la gestion et des indicateurs de qualité en France et aux Pays-Bas tendent en outre à montrer que les magistrats-gestionnaires restent très attentifs à l'indépendance judiciaire. Toutefois, même si la théorie maintient sa cohérence, la mise en œuvre pourrait comporter certains risques si les magistrats-gestionnaires et l'administration des tribunaux devaient se montrer moins vigilants à l'égard de cette indépendance. Le mécanisme régulateur le plus efficace à l'encontre de l'administration est en place, sur le plan organisationnel, lorsque le magistrat est habilité à exercer un contrôle de qualité sur ses décisions.

La présente thèse met en évidence l'ampleur immense de la tâche de l'administration de la justice, non seulement d'un point de vue constitutionnel, mais également d'un point de vue d'administration publique.

Bibliography

P. Albers, C. Boonstra, F.C.J. van der Doelen and L. Mos, 'De territoriale verdeling van rechtsmacht in Nederland: bevindingen naar aanleiding van de CEPEJ expert-meeting van de Raad van Europa op 6 oktober 2003 te Den Haag', *Trema* 2004, p. 16-23

P. Ardant, '*Institutions politiques et Droit constitutionnel*', Librarie générale de droit et de jurisprudence (LGDJ), 16 ed., Paris 2004

L Argentiéri, 'Le Conseil constitutionnel, "Militant forcé" de l'intégration communautaire. Note sous la décision no. 2004-496 DC du 10 juin 2003 relative à loi pour la confiance dans l'économic numérique', *Revue de l'actualité juridique française* 2004

C. Argyris and D.A. Scön, '*Organizational Learning II: Theory, Method, and Practice*', Addison-Wesley Publishing Company, Reading, Massachusetts etc. 1996

E. Bauw and F. van Dijk, 'Conflicterende eisen hollen rechtspraak uit', *Nederlands Juristenblad* 2003, p. 280-281

J. Bell, S. Boyron and S. Whittaker, '*Principles of French law*', Oxford University Press, Oxford 1998

J.B.J.M. ten Berge, 'Contouren van een kwaliteitsbeleid voor de rechtspraak', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut), Deventer 1998

J.B.J.M. ten Berge, 'Organisatie en individuele rechter in balans (over onafhankelijkheid en professionele autonomie)', in *De Onafhankelijkheid van de individuele rechter*, J.B.J.M. ten Berge and A. Hol (eds), Boom Juridische Uitgevers, The Hague 2006

Besluit financiering Rechtspraak, 2005

P. Biju-Duval, J-F. De Montgolfier, A-M. Desgranges and O. Le Clercq de Lannoy, 'Judicial Electronic Data Interchange In France', in *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends*, M. Fabri and F. Contini (eds), Lo Scarabeo, Bologna 2003

X. Bioy, 'L'institution judiciaire sous la Ve République : entre autorité constitutionelle et service public', *Revue de la Recherche Juridique*, Presses universitaires d'Aix-Marseille, Faculté de droit et science politique d'Aix-Marseille - *Droit prospectif* 1999 vol. 4, 1093

G. Bouckaert and S. van de Walle, *Government and trust in government*, at EGPA Conference Finland 2001

P.P.T. Bovend'Eert, 'Extern Klagen over rechters: mogelijkheden van en grenzen aan een externe klachtvoorziening ten aanzien van de rechterlijke macht', *Trema* 2002, p. 88-83

P.P.T. Bovend'Eert, 'Het bestuur en beheer van de rechterlijk macht in constitutioneel perspectief', *R.M. Themis* 1997, p. 229-240

P.P.T. Bovend'Eert and C.A.J.M Kortmann, 'Het Courtpacking plan van het kabinet Kok', *Nederlands Juristenblad* 2000, vol. 36, p. 1769

M.A.P. Bovens, '*The quest for responsibility, accountability and citizenship in complex organisations*', Cambridge University Press, 1998

A.F.M. Brenninkmeijer, 'Behoorlijke financiering van de rechtspraak', *Ars Aequi* 2004 vol. 53, p. 165-168

A.F.M. Brenninkmeijer, 'Naar een gedragscode voor de rechter?',*Trema* 2002, p. 84-91

L.N. Brown and J. Bell, '*French administrative law*', Clarendon Press, Oxford 1998

B. Brunet, 'La départementalisation de l'institution judiciaire (juin 1991-janvier 1993)', *Droit et Société* 1994, vol. 26, p. 95-107

C.J.H. Brunner, 'De rechterlijke macht en de ministerie van justitie', *Nederlands Juristenblad* 2001, vol. 24

M-L. Cavrois and M. Cardoso, 'Des démarches qualité en juridiction et au casier judiciaire', in *La qualité de la justice*, M-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation française, Paris 2002

J. Chevalier, 'La réforme de l'état et la conception Française du service public', *Revue Française d'administration publique* 1996, p. 189-205

D. Clark, 'Citizens, Charters and Public Service Reform in France and Britain', *Government and opposition: a quarterly of comparative politics* 2000, vol. 35, p. 152-169

A. Cole, 'The service public under stress', *West European Politics* 1999, vol. 22, p. 166-184

J. Commaille, 'La déstabilisation des territoires de justice', *Droit et Société* 1999, vol. 42/43, p. 239-264

J. Commaille, '*Territoires de Justice: Une sociologie politique de la carte judiciaire*', Presses Universitaires de France, Paris 2000

J. Commaille, *L'enchâssement de la carte judiciaire dans les traditions de la société française bilan du passé, schémas d'un avenir*, at Du juge de paix au tribunal départemental 1995, Actes du colloque du 17 mars 1995, Paris

Commissie Meijerink, '*Visitatie Gerechten 2006*', Raad voor de Rechtspraak, The Hague 2006

Conseil d'Etat, '*Contrats d'objectifs des cours administratives d'appel de Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes et Paris*', Conseil d'Etat, Paris 2002

G.J.M Corstens, '*Het Nederlands strafprocesrecht*', Kluwer, 5 ed., Deventer 2005

G.J.M Corstens, 'Reorganisatie van de rechterlijke macht', *Nederlands Juristenblad* 2001 vol. 3, p. 124

Council for the Judiciary (Netherlands) '*Agenda voor de rechtspraak 2002-2005: Continuïteit en vernieuwing*', Raad voor de Rechtspraak, The Hague 2002

J.W. Creswell, '*Qualitative inquiry and research design: Choosing among five traditions*', Sage Publications, Thousand Oaks, Califorina, London, New Delhi 1998

I. Curry-Sumner, 'It's marriage Jim, but not as we know it! The differences between civil partnership and marriage. Is the ban on same-sex marriage still justified?', *Irish Journal of Family Law* 2006, vol. 41, p. 2-10

H. Dalle, 'Introduction', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation Française, Paris 2002

H. Dalle, 'Les méthodes d'évaluation de la qualité de l'activité d'un tribunal de grande instance', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002

C. Debbasch, '*Droit administratif*', Economica, 6 ed., Paris 2002

Décision no. 80-119 DC - Loi portant validation d'actes administratifs, Conseil Constitutionnel, 22 July 1980

Décision no. 86-224 DC - Loi transférant à la juridiction judiciaire le contentieux des décisions du Conseil de la concurrence, Constitutional Council, 23 January 1987

Décision no. 2002-461 DC - Loi d'orientation et de programmation pour la justice, Conseil Constitutionnel, 29 August 2002

Décision no. 2006-539 DC - 20 juillet 2006, Loi relative à l'immigration et à l'intégration, Conseil Constitutionnel, 2006

Décret relatif à la procédure civile, à certaines procédures d'exécution et à la procédure de changement de nom, 2005

C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Country studies: France', in *L'administration de la justice en Europe et l'évaluation de sa qualité*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Montchrestien, Paris 2005

C. Deffigier, S. Gaboriau, D. Marshall, H. Pauliat and J-M. Plazy, 'Qualité et justice en France', in *The Administration of justice in Europe: Towards the development of quality standards*, M. Fabri, J.-P. Jean, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003

Derde voortgangsreportage pVRO, 1e halfjaar 2000, van landelijk naar lokaal, PVRO, Amersfoort 2000

T. Deschamps, C. Mouhanna and V. Michel, '*La specificité de l'administration Française de la justice: première approche*', Institut International d'administration publique, Paris 2001

L.A. Dexter, '*Elite and specialized interviewing*', Northwestern University Press, Evanston 1970

A.V. Dicey, '*Introduction to the study of the law of the constitution*', Liberty Fund, Indianapolis 1982

R. Didde, 'SSR under construction. Een nieuwe wind in Zutphen', *Trema* 2002, vol. 5, p. 230-232

É. Douat (ed)., '*Les budgets de la justice en Europe*', La documentation Française, Paris 2001

P. Doucet, 'Carte judiciaire: La vérité est dans les détails', in *Le Figaro Magazine*, Friday 25 March 2005

P. Doucet, 'Délais, lenteurs, effectifs: Les réponses de Dominique Perben', in *Le Figaro Magazine*, Friday 25 March 2005

F.C.J. van der Doelen, 'Over de kwaliteit van rechtspreken, rechters en gerechten', *Nederlands Juristenblad* 1999, vol. 28, p. 1301

EFQM, '*Mission*', http://www.efqm.org/Default.aspx?tabid=60

D.J. Elzinga, F. de Vries and H.G. Warmelink, *Developing trends of parliamentarism in the Netherlands*, at Fourteenth International Congress of Comparative Law, Athens 1994

M. Fabri, 'Selected Issues of Judicial Administration in a Comparative Perspective', in *The Challenge for Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000
M. Fabri, J-P. Jean, P.M. Langbroek and H. Pauliat (eds). '*L'administration de la justice en Europe et l'évaluation de sa qualité*', Montchrestien, Paris 2005
M. Fabri, P.M Langbroek and H. Pauliat (eds). '*The administraiton of justice in Europe: Towards the development of quality standards*', Lo Scarabeo, Bologna 2003
M. Fabri and P.M. Langbroek (eds). '*The challenge of change for judicial systems, developing a public administration perspective*', IOS Press Ohmsha, Amsterdam, Washington 2000
L. Favoreu, P. Gaïa, R. Ghevontian, J-L. Mestre, O. Pfersmann, A. Roux and G. Scoffoni, '*Droit constitutionnel*', Dalloz, 8 ed., Paris 2005
V. Fortier, 'L'applicabilité de la norme ISO 9001 à l'activité judiciaire', in *La qualité de la justice*, M.-L. Cavrois, H. Dalle and J.-P. Jean (eds), La Documentation française, Paris 2002
William Frazer, '*The legacy of Keynes and Friedman*', Praeger Publisher Text, Westport, Conneticut 1994
A. Garapon, '*Les responsabilité du juges*', Ecole Nationale de la Magistrature http://www.enm.justice.fr/centre_de_ressources/dossiers_reflexions/responsabilite/annexe3.htm
D. Gasset, 'La réforme de la justice de proximité', *Regard sur l'actualité* 2003, p. 79-86
F. Gibb, 'Magistrates will be packed off to vast justice factories in large urban centres', in *The Times*, July 02, 2002
GIP Mission de recherche Droit et Justice, Paris 2001
T. Graffin, 'Le statut des magistrats devant le Conseil Constitutionnel: une défense discutable de l'unité du corps judiciaire au profit d'une exigence forte d'indépendance des magistrats', *Revue du droit public* 2001, vol. 117, p. 831-864
C. Guarnieri and P. Pederzoli, '*The Power of Judges*', Oxford University Press, Oxford 2001
S. Guinchard, M. Bandrac, C.S. Delicostopoulos, I.S. Delicostopoulos, M. Douchy-Oudot, F. Ferrand, X. Lagarde, V. Magnier, H.R. Fabri, L Sinopoli and J-M. Sorel, '*Droit processuel: droit commun et droit comparé du procèes*', Dalloz, 3 ed., Paris 2005
H.R. van Gunsteren, 'The Ethical Context of Bureaucracy and Performance analysis', in *Guidance, control, and evaluation in the public sector: the Bielefeld interdisciplinary project*, F.-X. Kaufmann, G. Majone, V. Ostrom and W. Wirth (eds), De Gruyter, Berlin 1986
M.E. Guy, '*Professionals in organizations, debunking a myth*', Praeger Publishers, New York 1985
A. Hanssen, 'Independent courts and administrative agencies', *Journal of law, economics and organisation* 2000, vol. 16, p. 534-571
Y. Hasenfeld, '*Human Service Organizations*', Prentice Hall Inc., Englewood Cliffs, N.J. 1983
H.F.M. Hofhuis, 'Financiering van de rechtspraak en werklastmeting', *Trema* 2003, p. 90-95
C. Holleman and M.V.D Mortel, '*Oogsten om te zaaien*', Bureau PVRO, The Hague 2002
A. Hondeghem (eds), '*Ethics and accountability in a context of governance and new public management*', IOS Press Ohmsha, Amsterdam 1998

J.A.Z. Hooft Graafland, 'Beroepsethiek van rechters', *Trema* 2005, vol. 7, p. 286-292
J.A.Z. Hooft Graafland, 'Is een verschoningscode wenselijk?', *Trema* 2002, p. 92-95
ISO, '*www.iso.org*'
J.H. Jackson, '*The World Trading System: law and policy of international economic relations*', MIT Press, 2 ed., Cambridge, Massachusets 1997
J-P. Jean, 'Justice. Quels modes d'administration et d'évaluation pour un service public complexe qui doit rendre des décision en toute indépendence?', in *The Challenge of change for judicial systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000
A.H.M. de Jong and D.L. Kabel, 'De rol van evaluaties in het begrotingsproces', *Justitiële Verkenning* 2005, vol. 31, p. 100-109
S. de Jong, 'Interview met Paul Ruijs', in *HP/De Tijd,* 16 April 2004
E. van der Kam, '*Kwaliteit gewogen, verschillende perspectieven op kwaliteit van civiele rechtspleging*', Boom Juridische Uitgevers, The Hague 2000
I. Keilitz and M.L. Buenger, 'Courts and the Administration of Justice: The primacy of core values', *Public Administration and Management: An interactive journal* 1998, vol. 3, www.pamij.com/courts
J. Killah, 'In the past nine years, 110 local courts have shut', in *The Times,* July 02, 2002
Het klankbord, '*Corruptie in Nederland*', http://www.het-klankbord.vuurwerk.nl/recht. htm
A.W. Koers, '*Driemal is scheepsrecht, beschouwingen over de modernisering van de rechterlijke organisatie*', SDU Uitgevers, The Hague 1999
A.W. Koers, P.M. Langbroek, J.A.M. Vennix and J.M.M Austen (eds). '*Waar staat de ZM?*', Ministerie van Justitie, The Hague 1997
E. Köhne-Hoegen, 'Over de socialisatie en (her)opvoeding van de raio', *Trema* 2006, vol. 5, p. 186-190
N.K. Komesar ,'Reflections on the Essence of Economics, the Character of Courts, the Role of Ideology, and the Reform of Legal Education', *Law and Social Inquiry: journal of the American Bar Foundation* 2004, vol. 29, p. 291-298
C.A.J.M Kortmann, '*Constitutioneel recht*', Kluwer, Deventer 2001
C.A.J.M Kortmann and P.P.T. Bovend'Eert, '*Dutch constitutional law*', Kluwer International, The Hague, London, Boston 2000
P.H.M. Kuster and T.J. de Geus, 'Rechterswerk', *Trema* 2003, p. 315-318
Kwaliteitsrapportage Pilot Project Kwaliteit, Rechtbank Amsterdam, Amsterdam 2003
Laboratoire Ceras, '*La qualité de la justice: une analyse économique exploratoire*', EDJ, Université de Reims Champagne Ardenne
M.T.A.B. Laemers, 'Een wijs man gebruikt de klachten van zijn tegenstanders als een spiegel: Klachtenregeling ten aanzien van de rechterlijke macht', *Trema* 2003, p. 411-415
Y. Laidié, 'les juges administratifs: fonctionnaires ou magistrats?', *L'actualité juridique-Fonctions publique* 2004. vol. 4, p. 176-178
J-E. Lane, '*New Public Management*', Routledge, London 2000
P.M. Langbroek 'De publieke verantwoordelijkheid voor rechtspraak', *Trema* 1994, p. 405-413

P.M. Langbroek, 'Developing a Public Administration Perspective on Judicial Systems in Europe', in *The Challenge of Change for Judicial Systems*, M. Fabri and P.M. Langbroek (eds), IOS Press Ohmsha, Amsterdam 2000

P.M. Langbroek, 'Naar een rechtsplegingskunde', *Trema* 1995, p. 323-327

P.M. Langbroek and M. Fabri, '*Delay in Judicial Proceedings: a preliminary inquiry into the relation between the domains of the reasonable time requirement of article 6, 1 ECHR and their consequences for judges and judicial administration in the civil, criminal and administrative justice chains*', Council of Europe, Committee on the Efficiency of Justice, 2003

P.M. Langbroek, *Changing the judiciary and judicial administration: the Netherlands and Guatemala*, at World Bank Conference: Empowerment, security and opportunity through law and justice, St. Petersbourg 2001

P.M. Langbroek, 'Normering van kwaliteitszorg in de rechterlijke organisatie, een verkenning', in *Bestuurswetenschappen* 2000, vol. 54, no. 2, p. 96-122

P.M. Langbroek and M. Fabri, '*Case assignment to courts and within courts, a comparative study in 7 countries*', Shaker Publishing, Maastricht 2004

V. Lanisson, 'Constitutionalité de la Loi sur le Statut des magistrats et le Conseil Supérieur de la magistrature', *Le Dalloz* 2002, vol. 24, p. 1947-1948

J.M. Leemhuis-Stout '*Rechtspraak bij de tijd*', Adviescommissie toerusting en organisatie zittende magistratuur (commissie Leemhuis), The Hague1998

W.A. Lindsay and J.A. Petrick, '*Total Quality and organisation development*', St. Lucie Press Boca Ration, Florida 1997

Loi Organique relative au statut des Magistrats et au Conseil Supérieur de la Magistrature (2001-445DC), Conseil Constitutionnel, 19 juin 2001

Loi Organique sur le Conseil Supérieur de la Magistrature, 1994

R. du Luart, '*La mise en oeuvre de la LOLF dans la justice judiciaire, rapport d'information no. 478 (2004-2005)*', Commission des finances, Sénat, Paris 2004

J. Madison, A. Hamilton and J. Jay, '*The federalist papers: A collection of essays written in support of the constitution of the United States: from the original papers of Alexander Hamilton, James Madison, and John Jay*', Doubleday, 2 ed., New York 1966

K. Malleson, '*The New Judiciary: the effects of expansion and activism*', Ashgate Publishing, Aldershot, Dartmouth 1999

J.G. March and P.O. Olsen, '*Rediscovering institutions, the organizational basis of politics*', Free press (division of Macmillan Inc. NY, Collier Macmillan Publishers London), 1989

I. Maso, 'The interview as a dialogue', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996

N.Z. Mayer and P.D. Wallace, 'From evangelism to general service: The transformation of the YMCA', in *Qualitative studies of organisations*, J. van Maanen (eds), Sage Publications, Thousand Oaks, California 1998

H. Mazeland and P. ten Have, 'Essential tensions in (semi-) open research interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University Press, Brussels 1996

Memorie van toelichting 1999-2000 (Wet Rechterlijke Organisatie) 27181

R. Meijerink, '*Recht van spreken*', Interdepartementaal Beleidsonderzoek Bedrijfsvoering Rechtspraak, The Hague 1999

J.H. Merryman, 'The French deviation', *The American Journal of Comparative Law* 1996, vol. 44, p. 109-119

D. Millet, 'Quarante ans de budget de la justice', in *Justices: ce qui a changé dans la justice depuis 20 ans* 2000, no. 1, Dalloz, Paris

H. Mintzberg, 'Structure in 5's: A synthesis of the Research on Organization Design', *Management Science* 1980, vol. 26, p. 322-341

H. Mintzberg, '*Structure in Fives: Designing Effective Organisations*', Prent-Hall, New Jersey 1983

J-C. Müller, 'Actualité legislative: le point sur la reforme du statut', *Le nouveau pouvoir judiciaire* 2001, vol. 356, p. 4-5

S. Murgatroyd and C. Morgan, '*Total quality management and the school*', Open University Press, Buckingham, Philadelphia 1994

Nederlands Vereniging voor Rechtspraak www.verenigingvoorrechtspraak.nl

G.Y. Ng, 'Quality and Justice in the Netherlands', in *The administration of justice in Europe: Towards the development of quality standards*, M. Fabri, P.M. Langbroek and H. Pauliat (eds), Lo Scarabeo, Bologna 2003

NVVR, '*Leidraad Onpartijdigheid*',Raad voor de Rechtspraak http://www.rechtspraak.nl/Naar+de+rechter/Landelijke+regelingen/Algemeen/Leidraad+onpartijdigheid+van+de+rechter.htm

Ordonnance 58-1270 portante Loi Organique relative au Statut de la Magistrature, 1958

P.V. Orshoven, L.F.M. Verhey and K. Wagner (eds), '*De onafhankelijkheid van de rechter*', W.E.J. Tjeenk Willink, Deventer 2001

M.Q. Patton, '*Qualitative Evaluation and Research Methods*', Sage Publications, Thousand Oaks, California, London, New Dehli 2001 1990, p. 390.

R. Perrot, '*Institutions judiciaires*', Montschrestien, 11 ed., Paris 2004

Loïc Philip, 'Décision no. 2003-489DC du 29 décembre 2003, Loi de finances pour 2004, JO 31 décembre 2003, p. 22530', *Revue française de droit constituionnel* 2004, no. 57, p. 121-126

L.G. Picard, sr, '*The Fundamentals of quality control*', ASQC Quality Press, Milwaukee, Wisconsin 1992

R.M. Pirsig, '*Lila: An inquiry into morals*', Bantam Press, London 1991

R.M. Pirsig, '*Zen and the art of motorcycle maintenance: an inquiry into values*', Bantam Books, New York 1984

R. Post, '*Constitutional domains: Democracy, community and management*', Harvard University Press, Cambridge, Massachusetts 1995

J. Rampey and H. Roberts, *Perspectives in total quality*, at Total Quality Forum IV, Cincinatti, OH 1992

M-L. Rassat, '*La justice en France*', Presses Universitaires de France, 3 ed., Paris 1991

T. Renoux, '*Le Conseil Constitutionnel et l'Autorité Judiciaire*', Economica Presses Universitaires D'Aix-Marseille, Aix-en-Provence 1984

C.H. van Rhee, 'The Law's Delay: An Introduction', in *The Law's Delay: Essays on Undue Delay in Civil Litigation*, C.H. van Rhee (ed), Intersentia, Antwerp 2004

C.K. Riessman, 'Analysis of personal narratives', in *Handbook of interview research: Context and Method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, California, London, New Dehli 2001

J.B.H. Röben, 'Hoven in opleiding', *Trema* 2002, vol. 10, p. 508-511

M-L Robineau, 'La formation au service de la qualité de la justice', in *La qualité de la justice*, M-L. Cavrois, H. Dalle and J.-P. Jean (eds), La documentation française, Paris 2002

U. Rosenthal 'Macht en controle op de macht: de dringende behoefte aan publieke controle', *Nederlands Juristenblad* 2000, vol. 34, p. 1703

P.P.M. Ruijs, '*Wij zien u wel in de rechtszaal: klassenjustitie in Nederland?*', Aspekt, Soesterberg 2001

D.S. Rutkus, '*Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate*', Congressional Research Service, Washington DC 2005

C. Sellitz, M. Jahoda, M. Deutsch and S. Cook, '*Research methods in social relations*', Holt, Rinehart and Winston, New York 1966

P. Selznick, '*The moral commonwealth: Social theory and the promise of community*', University of California Press, Berkley, California 1992

P. Senge, '*The fifth discipline: the art and practice of the learning organisation*', Doubleday currency, New York 1990

R.W. Shuy, 'In person versus telephone interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, California, London, New Dehli 2001

C. Slothouber, 'De Organisatie-aspecten van de verhouding tussen rechters en ondersteuning', in *Kwaliteit van rechtspraak op de weegschaal*, P.M. Langbroek, K. Lahuis and J.B.J.M. ten Berge (eds), W.E.J. Tjeenk Willink (in cooperation with G.J. Wiarda Instituut), Deventer 1998

D.C. Steelman, J.A. Goerdt and J.E. McMillan, '*Caseflow management: The heart of Court Management in the New Millenium*', National Center for State Courts, Williamsburg, Virginia 2000

P.A. Stein, '*Compendium van het burgerlijk procesrecht*', Kluwer, 15 ed., Deventer 2005

R. Stevens, 'A loss of innocence? Judicial independence and the separation of powers', *Oxford Journal of Legal Studies* 1999, vol. Autumn, p. 365-402

F.A.M. Stroink and A.W. Heringa, '*Het bestuursrecht beschermd: liber amicorum F.A.M. Stroink*', Sdu Uitgevers, The Hague 2006

A.M. Sturm, W.D. ten Have and M.M.E. Donders, '*Eindrapport: Uitkomsten Pilot Project Kwaliteit Rechtbank Roermond*', Roermond 2002

D. Turpin, '*Droit Constitutionnel*', Presses Universitaires de France, Paris 2003

Union Syndicale des Magistrats, 'Reconstruction de carriere', *Le nouveau pouvoir judiciaire* 2002, vol. 360, p. 28

M .Velicogna and G.Y. Ng, 'Legitimacy and Internet in the judiciary: A Lesson from the Italian Courts', Websites Experience', *International Journal of law and information technology, Oxford Journals,* Oxford University Press 2006

L.F.M. Verhey and T. Zwart (eds), '*Agencies in European and comparative perspective*', Intersentia, Antwerp 2003

Cécile Vigour, 'Réformer la justice en Europe. Analyse comparée des cas de la Belgique, de la France et de l'Italie', *Droit et Société* 2004, vol. 56-57, p. 291-325

M.J.C. Vile, '*Constitutionalism and the separation of powers*', Liberty Fund, 2 ed., Indianapolis 1998

G. Vrieze, 'Zijn rechters zonder gedragscode nog wel te vertrouwen? (1)', *Trema* 2005, p. 139-150

C.A.B. Warren, 'Qualitative Interviewing', in *Handbook of interview research, context and method*, J.F. Gubrium and J.A. Holstein (eds), Sage Publications, Thousand Oaks, California London, New Dehli 2001

M.F.J.M. de Werd ,'De openbare uitspraak', *Nederlands Juristenblad* 2001, vol. 2, p. 67

F. Wester, 'The analysis of qualitative interviews', in *The Deliberate Dialogue*, I. Maso and F. Wester (eds), VUB University, Brussels 1996

Wet Nationale Ombudsman, 1981

Wet op de rechterlijke organisatie, 2002

Wet organisatie en bestuur gerechten, 2001

Wet rechtspositie rechterlijke ambtenaren, 1996

D. Woodhouse, 'The reconstruction of constitutional accountability', *Public Law* 2002, p. 73-90

N. Woolsey Biggart, 'The creative-destructive process of Organizational Change: The case of the Post Office', in *Qualitative studies of organizations*, J. van Maanen (ed), Sage Publications, Thousand Oaks, California 1998

WRR, '*De toekomst van de nationale rechtsstaat*', Wetenschappelijk Raad voor het Regeringsbeleid, The Hague 2002

J-C. Zarka, 'Sauf sur point, la loi organique du 25 juin 2001 relative au statut des magistrats et au Conseil supérieur de la magistrature est déclarée conforme à la Constitution', *La Semaine Juridique Édition Générale* 2001, vol. 31-35, p. 1575-1576

Index

Accessibility: 2.3; 2.4; 2.5.1; 2.6.1; 6.5; 7.3.2; 8.3.2; 9.2.4.; 12.3.1.; 12.3.2.;12.3.3.; 14.4.2.; 19.2.; 19.2.2.
Access to justice: 1.; 1.1,2.4; 3.1; 5.; 5.3; 11.; 11.1.1.; 12.3.2.; 12.3.3.; 14.3.1.; 19.1.; 19.2.1.
Accountability: 1.3.; 2.1.; 2.2.1.; 2.2.2; 2.3.; 2.4.; 2.5.1.; 2.6.1.; 2.6.2.; 3.1.; 3.2.; 3.4.; 4.2.; 4.3.; 4.4.; 6.2.1. 6.3.; 6.4.; 6.5.; 6.6.; 7.2.4.; 7.3.; 7.3.1.; 7.3.2.; 7.3.3.; 7.3.4.; 7.4.8.2.2.; 8.2.3.; 8.3.1.; 8.3.2.; 8.4.; 9.1.1.; 9.1.3.; 9.1.4.; 9.1.5.; 9.2.2.; 9.2.3.; 9.2.4.; 9.3.4.; 9.4.; 10.3.1. 103.3.; 11.3.; 12.3.2.; 12.3.3.; 12.4.; 13.1.2.; 13.1.5.; 13.3.; 13.3.1.; 13.3.3.; 13.4.; 14.2.2.; 14.2.4.; 14.3.1.; 14.4.2.; 14.5.; 15.1.3.; 15.2.1.; 15.2.2.; 15.2.3.; 15.2.4.; 15.3.; 16.1.2.; 16.2.4.; 16.3.; 18.1.1.; 18.3.2.; 18.3.3.; 18.4.; 19.1.; 19.1.1.; 19.1.2.; 19.1.3.; 19.2.1.; 19.2.2.; 19.3.; 19.3.2.; 19.3.4.; 20.1.; 20.2.1.; 20.2.3.; 20.3.3.; 20.4.1.; 20.4.2.; 20.5.
- soft: 2.2.2; 2.6.1.; 4.3.; 4.4.; 6.6.; 8.4.; 20.2.1.; 20.5.
- hard (political): 2.1. 2.2.2.; 2.6.1.; 2.6.2.; 4.2.; 19.2.2.; 19.3.; 19.3.4.; 20.2.1.; 20.4.2.; 20.5.
- managerial: 6.3.; 8.3.2.; 20.3.3.
- financial: 6.2.1.; 9.2.3.; 9.3.4.
Administration: 2.2.1.; 2.5.1.; 2.6.1.; 7.; ; 8.3.1.; 10.3.2.; 11.1.1.; 11.1.2.; 12.2.1.; 14.2.4.; 14.2.5.
- judicial: 1.1.; 2.6.1.; 3.6.; 4.2.; 5.2.1.; 7.4.; 8.1.
- central: 2.1.; 6.2.; 12.1.1.
- court: 6.1.; 6.2.; 6.2.1.; 6.3.; 6.4.; 8.2.3.; 8.2.4.; 11.1.2.; 12.1.1.; 12.2.1.; 13.1.4.; 14.2.3.
- financial: 6.4.
- of justice: 9.; 9.2.4.; 9.2.5.; 9.3.4.; 10.3.1.; 10.3.3.; 11.1.1.; 12.1.1.; 12.3.2.; 13.
- public: 2.4.; 11.2.1.; 19.2.1.; 20.1.; 20.4.2.; 20.5.
Administrative law: 3.5.; 3.6.; 5.1.1.; 5.1.2.; 5.2.1.; 5.3.; 7.2.3.; 7.2.4.; 8.1.; 8.2.3.; 8.3.1.; 8.3.2.; 8.3.3.; 8.4.; 9.1.3.; 10.3.2.; 11.1.2.; 11.2.2.; 11.3.; 12.2.2.; 12.3.2.; 12.3.3.; 16.1.1.; 16.1.3.; 16.2.2.; 17.3.1.; 18.1.1.; 19.2.1.; 19.2.2.
Assistent de justice: 13.2.1.; 13.2.2.
Article 6 European Convention on Human Rights: 1.; 1.2.; 1.3.; 2.2.2.; 4.1.; 4.3.; 5.1.1.; 6.3.; 6.6.; 9.3.5.; 10.2.; 11.; 12.1.1.; 12.3.3.; 13.1.3.; 14.4.2.; 15.1.1.; 16.1.5.

Besluit financiering Rechtspraak/Order in Council:
- 2002: 9.1.3.
- 2005: 9.1.5.

Case
- management: 2.6.1.; 3.4; 3.5; 5.1.1; 8.1; 8.3; 8.3.1; 8.3.2; 8.3.3; 8.4; 9.1.1; 9.3.5; 14.1; 14.2.1; 14.3; 14.3.1; 14.3.2; 14.5; 15.1.3; 16.1.3; 16.1.4; 17; 17.1.1; 17.2; 17.2.1; 17.2.2; 17.4; 19.2; 19.2.2; 19.2.4; 20.2.1; 20.3.1; 20.3.2; 20.5
- distribution: 9.3.2; 12.1.1; 13.1.4; 13.4
- flow: 9.3.4; 14.3.1; 14.3.2; 17.2.1
Cassation: 4.3; 5.1.1; 10.1; 10.2; 10.3.1; 10.3.3; 11.1.1; 12.3.3; 13.1.3; 13.1.5; 14.3.1
Chambers: 3.6; 8.3.1; 9.3.5; 11.1.1; 12.3.2; 13.1.3; 13.1.4; 13.2.6; 13.3.1; 13.3.2; 14.2.3; 14.3.1; 14.4.4; 15.1.3; 16.1.4; 16.2.3; 17.1.2; 17.2.1; 17.3.3; 19.1.1
Checks and balances: 1.3; 2.1; 2.2.1; 2.2.2; 2.6.2; 3.10; 4; 4.1; 4.4; 9.1.5; 10; 10.3.1; 10.4; 14.4.1; 15; 15.2; 19.3.1; 19.3.4; 20.1; 20.4.1; 20.5
Clerks: 11.1.1; 12.1.1; 12.3.2; 12.3.3; 13.1.4; 13.2.1; 13.2.2; 13.2.3; 13.2.4; 13.2.5; 13.2.6; 13.4; 14.2.2; 14.2.4; 14.3.1; 14.4.3; 14.4.4; 14.5; 15.1.3; 16.2.3; 17.1.2; 17.4; 18.1.2; 18.2; 18.3.1; 19.1.2; 19.2.1; 20.2.1; 20.2.2; 20.2.3; 20.3.1
Civil law: 3.1; 3.6; 5.1.2; 5.2.1; 7.2.3; 10.2; 10.3.3; 11.1.1; 11.1.3; 13.2.2; 14.3.1
Communication: 2.1; 6.3; 8.1; 8.2.3; 8.3; 8.3.3; 8.3.4; 9.1.1; 9.2.2; 9.3.3; 9.3.6; 9.4; 12.3.1; 12.3.3; 14.1; 14.4.1; 14.4.4; 17.4; 18.1.2; 19.2.2; 20.3.2; 20.5
Competences: 2.2.1; 2.6.2; 4.2; 5; 5.1.1; 5.1.2; 5.3; 6.2.3; 6.4; 6.5; 9.2.2; 9.4; 10.2; 10.3.2; 11.1.1; 11.1.2; 11.1.3; 18.1.1; 19.3.1; 19.3.2; 19.3.4; 20.3.1
Complaints:
- Regulations: 4.3; 6.5
- Procedures: 2.6.1; 8.3.2; 9.1.1; 20.3.3
Comportment: 1.3; 2.4; 2.6.1; 4.3; 6.5; 7.1.2; 7.1.3; 8.3.1; 8.3.2; 12.3.1; 12.3.3; 14.2.3; 16.1.2; 19.1.1; 20.2.1
Constitutional Council: 10; 10.1.; 10.2.; 10.3.1.; 10.3.2.; 11.1.2.; 12.2.1.; 12.2.2.; 12.3.1.; 16.2.4.
Constitutional law: 1; 3.1; 3.31; 3.10; 4; 4.3; 4.4; 6.4; 8.25; 8.32; 9.24; 9.3.5; 10; 10.1; 10.2; 10.4; 12.3.2; 12.3.3; 13.1.5; 13.3.2; 13.4; 14.2.5; 14.3.1; 15.1.4; 16.1.2; 16.2.4; 16.3; 19.3.1; 20.1; 20.4.2; 20.5
Constitutional theory: 2.1; 2.2; 2.2.1; 3; 3.2; 3.3.1; 15; 19.1.1
Council for the Judiciary: 3.1; 3.5; 3.7; 4.2; 4.4; 5.2.1; 6.1; 6.2.1; 6.2.2; 6.2.3; 6.3; 6.4; 6.5; 6.6; 8.3; 8.3.1; 8.3.2; 8.3.3; 9; 9.1.1; 9.1.2; 9.1.3; 9.1.4; 9.1.5; 9.2.1; 9.2.2; 9.2.3; 9.2.4; 9.2.5; 9.3; 9.3.1; 9.3.2; 9.3.3; 9.3.4; 9.3.6; 9.4; 10; 11.2.1; 15.1.3; 19.2.1; 19.3.2; 19.3.4; 20.2.1; 20.3.1; 20.4.120.5
Conseil Supérieur des tribunaux administratifs et cours administratives d'appel: 10.3.2.
Council of State:
- France: 3.6; 3.7; 10.1; 10.3.1; 10.3.2; 11.1.1; 11.1.2; 11.1.3; 11.2.1; 11.2.2; 12.1.1; 12.2.1; 12.2.2; 12.3.3; 16.1.2; 16.1.3; 16.2.2; 16.2.3; 16.2.4; 17.1.1; 17.2.1; 17.3.1; 18.1.1; 18.1.2; 18.1.3; 18.2; 18.2.1; 18.3.1; 18.3.2; 18.3.3
- The Netherlands: 5.1.1; 6.5; 8.3.1; 19.3.1; 19.3.2; 19.3.4; 20.3.1
Cour administrative d'appel: 11.1.2
Cour d'appel: 10.3.1
Courts
- First instance: 5.2.1; 11.1.1; 11.1.2; 14.2.1; 15.1.2; 15.1.3; 15.1.4; 15.2.1; 16.1.1; 18.2.1; 18.3.1; 19.3.1.

- of Appeal: 3.6; 5.1.1; 5.1.2; 5.2.1; 10.3.2; 10.3.3; 11.1.1; 11.1.2; 11.2.2; 11.3; 12.1.1; 12.2.1; 14.2.4; 15.1.2; 15.1.3; 15.1.4; 15.2.1; 15.3; 16.1.1; 17.3.1; 18.2.1; 18.3.1; 19.2.2; 19.3.1; 19.3.2
- Organisation: 1.1; 1.3; 2.4; 2.6.1; 2.6.2; 3.4; 3.5; 3.7; 6.2.3; 6.5; 7.1.1; 7.1.4; 7.3.2; 7.3.4; 7.4; 8; 8.1; 8.2.3; 8.3; 8.3.2; 9.1.1; 9.2.3; 9.3.1; 9.4; 13.1.1; 13.1.4; 13.2.6; 13.4; 14; 14.2.2; 14.4.3; 14.5; 15.1.1; 15.1.2; 16.1.3; 16.1.4; 17.3.2; 19.1; 19.1.2; 19.1.3; 19.2; 19.2.1; 19.2.3; 19.3; 19.3.1; 19.3.3; 20.1; 20.2.3; 20.3; 20.3.1; 20.3.2; 20.3.3; 20.4.1; 20.4.2; 20.5
- Sector: 3.4; 3.5; 3.6; 5.1.1; 5.1.2; 5.2.2; 6.2.1; 6.5; 7; 7.1.4; 7.2.1; 7.2.2; 7.2.3; 7.2.4; 7.3.3; 7.3.4; 7.4; 8.1; 8.2.1; 8.2.2; 8.2.3; 8.2.4; 8.2.5; 8.3; 8.3.1; 8.3.2; 8.3.3; 8.4; 9.1.1; 9.1.2; 9.1.3; 9.1.4; 9.2.1; 9.3.2; 9.3.5; 9.4; 11.1.1; 11.1.2; 11.1.3; 12.2.1; 12.3.1; 14.2.1; 19.1.1; 19.1.2; 19.2.3; 19.2.4; 20.3.1
- Supreme: 2.3; 4.3; 5.1.1; 5.1.2; 5.2.2; 6.5; 19.3.1
Customer
- panels: 6.5; 7.1.3; 19.2.2; 20.3.2; 20.3.3
- perspective: 8.3.2; 9.3.5

Decision making: 2.3; 7.3; 7.3.1; 7.3.4; 9.2.2; 9.2.4; 10.3.3; 13.2.6; 13.3; 15.1.2; 17.3.1; 19.1.2; 20.1; 20.3; 20.4.1
Due process: 2.2.2; 5; 9.2.4; 11; 12.3.1

European Convention on Human Rights: 1; 1.2; 1.3; 2.2.2; 4.3; 10.2; 11; 13.1.3; 14.4.2; 15.1.1; 16.1.5
Executive: 2.2.1; 2.2.2; 4; 4.4; 9.2.1; 9.2.2; 9.3.1; 9.3.3; 9.3.6; 9.4; 10; 10.1; 10.2; 10.3.2; 12.3.1; 19.3.1; 20.1; 20.4.1; 20.5
Expertise: 1.1; 5.2.2; 6.5; 7.1.2; 8.2.2; 8.3.2; 9.25; 15.2.4; 19.1.1; 19.1.3

Flying brigade: 9.3.5

Government: 2.1.; 2.2.1.; 2.2.2.; 2.3.; 3.2.; 3.3.1.; 3.4.; 3.5.; 4; 4.1.; 4.2.; 4.3.; 4.4.; 5.1.1.; 5.1.2.; 5.2.1.; 5.2.2.; 6.1.; 6.3.; 6.5.; 7.3.1.; 8.3.; 8.3.1. 8.3.2.; 8.4.; 9.1.5.; 9.2.3.; 9.4.; 10; 10.1.; 10.2.; 10.3.1.; 10.3.2.; 10.3.3.; 10.4.; 11.1.1.; 11.1.2.; 11.1.3.; 11.2.2.; 12.1.1.; 12.2.1.; 12.2.2.; 12.3.1.; 12.3.2.; 12.3.3.; 13.3.1.; 14.2.2.; 14.5.; 15.1.1.; 15.1.4.; 15.2.3.; 15.2.4.; 15.3.; 16.1.3.; 16.2.2.; 16.4.; 17.3.2.; 18.1.3.; 18.2.; 18.2.1.; 18.3.3.; 18.4.; 19.2.1.; 19.3.2.; 19.3.3.; 20.3.1.; 20.3.3.; 20.4.1.
Greffier assistants de Magistrats: 13.2.4

Hoekstra Committee: 4.2
Human service organisation: 2.1

ICT: 3.4.; 3.5.; 7.2.3.; 8.3.2.; 8.3.3.; 8.3.4.; 8.4.; 9.2.1.; 9.2.2.; 9.3.1.; 9.3.5; 11.2.2.; 12.3.2.; 12.3.3.; 13.2.1.; 13.2.5.; 14.2.2.; 14.2.3.; 14.3.1.; 14.3.2.; 14.4.4.; 14.4.5.; 14.5.; 15.2.2.; 16.2.3.; 16.2.4.; 17.2.1.; 17.3.2.; 19.1.2.; 19.2.2.
Impartiality, (Judicial): 1.2.; 2.2.2.; 2.6.1.; 4.1.; 4.3.; 4.4.; 5.3.; 6.5.; 6.6.; 7.3.2.; 8.3.2.; 10.2.; 10.3.1.; 10.3.3.; 11.1.2.; 12.1.1.; 12.3.2.; 12.3.3.; 13.4.; 16.1.5.; 16.3; 16.4.; 17.1.3.; 19.1.1.; 20.1.; 20.2.1.

Independence, (Judicial): 1; 1.3; 2.2.1; 2.2.2; 2.3; 2.5.1; 2.6.1; 2.6.2; 3.1; 3.2; 3.4; 3.5; 4.2; 4.3; 4.4; 5.2.1; 6; 6.1; 6.2.1; 6.4; 6.6; 7; 7.13; 7.15; 7.2.2; 7.2.4; 7.3; 7.3.1; 7.3.2; 7.3.3; 7.3.4; 7.4; 8.2.1; 8.3.2; 8.4; 9; 9.1.3; 9.1.4; 9.1.5; 9.2.3; 9.2.4; 9.2.5; 9.3.3; 93.35; 9.4; 10; 10.1; 10.2; 10.3.1; 10.3.2; 10.3.3; 10.4; 11; 11.1.2; 12; 12.1.1; 12.3; 13; 13.2.6; 13.3; 13.3.1; 13.3.2; 13.4; 14.2.1; 14.2.3; 14.2.4; 14.2.5; 14.5; 16; 15.1.1; 15.1.2; 15.1.3; 15.1.4; 15.2; 15.2.3; 15.2.4; 15.3; 16.3; 16.4; 17.2.1; 18.1.3; 18.3.2; 18.3.3; 18.4; 19.1; 19.1.1; 19.1.2; 19.1.3; 19.3.1; 19.3.3; 20.1; 20.1; 20.2.1; 20.2.3; 20.3.3; 20.4.1; 20.5
Institution: 1.1; 2.1; 2.2.1; 2.2.2; 2.3; 2.5.1; 2.6.1; 3.6; 4.2; 4.4; 5.1.1; 5.3; 7; 8.2.2; 9.2.3; 9.3.3; 9.3.6; 10; 10.1; 10.3.1; 10.3.2; 10.3.3; 10.4; 11; 11.1.1; 12.2.1; 12.2.2; 12.3
Institutional context: 5; 8.1; 9; 9.1.1; 9.1.5; 9.2.3; 9.3.4; 9.3.5; 11.3; 15.1.4; 19.1.3
Internet: 3.3.1; 9.3.2; 13.2.5; 14.4.4; 15.2.2
Interviews: 3.2; 3.3.2; 3.8; 3.9; 7.1.2; 7.1.4; 7.2.2; 7.2.3; 7.2.4; 7.3; 7.3.1; 7.3.2; 7.3.4; 7.4; 8.2.1; 8.2.2; 8.3; 8.3.1; 8.3.2; 8.3.3; 8.4; 9; 9.1.1; 9.1.2; 9.1.4; 9.2.1; 9.2.2; 9.2.4; 9.3.3; 9.3.6; 9.4; 13; 13.1.1; 13.1.2; 13.1.5; 13.2.4; 13.3; 13.3.1; 13.3.2; 13.3.3; 13.4; 14.1; 14.3.1; 14.3.2; 14.4.2; 14.4.3; 14.4.5; 15; 15.1.4; 15.2.2; 15.2.3; 15.2.4; 16.1.5; 16.2.4; 17.1.3; 17.2.1; 17.2.2; 18; 18.1.2; 18.2; 18.2.1; 18.4; 19.1.1; 19.1.2; 19.2.2; 19.2.4; 19.3.3; 20.1; 20.3.2
- The Netherlands: 3.4; 3.5; 5.2.1; 6.6; 7.2.1
- France: 3.6; 3.7; 14.1; 14.3.1; 14.3.2; 14.4.2
- methodology: 2.6.2; 3; 3.3.2; 3.5; 3.6; 3.7; 13

Judicial
- assistants: 12.1.1; 13.2.2; 13.4; 16.2.3; 17.2.1; 19.1.1; 19.1.2
- independence: 1; 1.3; 2.2.1; 2.2.2; 2.3; 2.5.1; 2.6.1; 2.6.2; 3.1; 3.2; 3.4; 3.5; 4.2; 4.3; 4.4; 5.2.1; 6; 6.1; 6.2.1; 6.4.2; 6.6; 7; 7.1.3; 7.1.5; 7.2.2; 7.2.4; 7.3; 7.3.1; 7.3.3; 7.3.4; 8.2.1; 8.3.2; 8.4; 9; 9.1.3; 9.1.5; 9.2.3; 9.3.5; 9.4; 10; 10.1; 10.2; 10.3; 10.4; 11; 11.1.2; 12; 12.1.1; 12.3; 13; 13.2.6; 13.3; 13.3.1; 13.3.2; 13.4; 14.2.1; 14.2.3; 14.2.4; 14.2.5; 14.5; 15; 15.1.1; 15.1.2; 15.1.3; 15.1.4; 15.2; 15.2.3; 15.2.4; 15.3; 16.3; 16.4; 17.2.1; 18.1.3; 18.3.2; 18.3.3; 18.4; 19.1; 19.1.1; 19.1.2; 19.1.3; 19.3.1; 19.3.3; 20.1; 20.2.1; 20.2.3; 20.3.3; 20.4.1; 20.5
- organisation: 1; 1.3; 2.4; 2.6.1; 3.1; 3.2; 3.5; 3.6; 3.7; 4; 4.2; 4.3; 4.4; 5.1.1; 5.2.1; 5.2.2; 6.1; 6.2.2; 6.2.3; 6.3; 6.4; 6.5; 6.6; 7.3.1; 8.1; 8.2.1; 8.2.5; 8.3; 8.3.1; 8.3.2; 8.4; 9; 9.1.2; 9.1.3; 9.1.4; 9.1.5; 9.2.1; 9.2.2; 9.2.3; 9.2.4; 9.2.5; 9.3.1; 9.3.5; 9.3.6; 9.4; 10; 10.2; 10.3.1; 11; 11.1.1; 11.2.2; 12.1.1; 12.3; 12.3.1; 12.3.2; 12.3.3; 13.3.1; 14.2.3; 14.2.5; 14.3.1; 14.4.1; 14.4.2; 14.4.3; 14.5; 15.1.2; 15.1.3; 15.1.4; 15.2.2; 15.2.3; 15.2.4; 15.3; 19.1; 19.1.1; 19.2.1; 19.2.3; 19.3; 19.3.1; 19.3.2; 19.3.3; 20.1; 20.2.1; 20.3.1; 20.3.2; 20.3.3; 20.4.1; 20.4.2; 20.5
- quality: 9.2.4; 9.2.5; 13.1.3; 19.1.3
Judicial Organisation Act 2002: 4.2.; 4.3.; 4.4.; 5.1.1.; 6.2.2.; 6.2.3.; 6.3.; 6.4.; 8.1.; 8.3.2.; 8.4.; 9.1.4.; 9.1.5.; 19.3.1.; 20.3.1.
Judiciary: 1; 1.1; 2.2; 2.2.1; 2.2.2; 2.3; 2.4; 2.5.1; 2.6; 2.6.1; 2.6.2; 3; 3.1; 3.2; 3.2.1; 3.4; 3.5; 3.6; 3.7; 3.10; 4; 4.1; 4.2; 4.3; 4.4; 5.1.1; 5.2; 5.1; 6.1; 6.2.1; 6.2.2; 6.2.3; 6.3; 6.4; 6.5; 6.6; 7; 8.2.5; 8.3; 8.3.1; 8.3.3; 8.4; 9; 9.1.1; 9.1.2; 9.1.3; 9.1.4; 9.1.5; 9.2.1; 9.2.2; 9.2.3; 9.2.4; 9.2.5; 9.3.1; 9.3.2; 9.3.3; 9.3.5; 9.3.6; 9.4; 10; 10.1; 10.2; 10.3.1; 10.3.2; 10.3.3; 10.4; 11; 11.1.1; 11.2; 11.2.1; 11.3; 12.1.1; 12.2.1; 12.3.2; 12.3.3; 13; 13.1.3; 13.1.5; 13.3.1; 14.2.1; 14.2.3; 14.2.4; 14.4.2; 14.4.3; 14.4.5; 14.5; 15.1.2; 15.1.3; 15.1.4;

15.2.3; 15.3; 16.1.5; 16.2.4; 16.4; 18.1.3; 19.1.1; 19.2.1; 19.2.5; 19.3; 19.3.1; 19.3.2; 19.3.3; 20.1; 20.2.1; 20.2.2; 20.3.1; 20.3.3; 20.4.1; 20.4.2; 20.5
Judgement: 2.2.2; 4.1; 5.2.1; 19.1.1
Judicial Organisation Act 2002: 4.2; 4.3; 4.4; 5.1.1; 6.2.2; 6.2.3; 6.3; 6.4; 8.1; 8.3.2; 8.4; 9.1.4; 9.1.5; 19.3.1; 20.3.1
Jurisdiction
- ordinary: 3.6; 10.1; 10.2; 10.3.2; 11; 11.1.1; 11.1.2; 11.1.3; 11.2.1; 11.2.2; 12.1; 12.2.2; 12.3.2; 13.3; 14.3; 14.3.2; 14.4.1; 16.1.3; 16.2.3; 16.2.4; 16.4; 18.3.2; 18.3.3; 18.4; 19.1.1; 19.1.2; 19.1.3; 19.2.1; 19.2.2; 19.2.3; 19.3.1; 19.3.2; 19.3.3; 20.3.1
- administrative: 3.6; 5.1.1; 5.1.2; 8.3.1; 10.1; 10.3.1; 10.3.2; 11; 11.1.1; 11.1.2; 11.1.3; 11.2.1; 11.2.2; 12.1.1; 12.2.2; 14.4.3; 16.1.1; 16.1.5; 16.2.3; 16.2.4; 16.4; 17.3.2; 17.3.3; 18.1.1; 18.1.2; 18.2; 18.2.1; 18.3.1; 18.3.2; 18.3.3; 18.4; 19.1.1; 19.1.2; 19.1.3; 19.2.1; 19.2.2; 19.2.3; 19.3.1; 19.3.2; 19.3.3; 20.3.1; 20.3.2; 20.5
- civil: 10.2
- criminal: 11.1.1; 12.3.2
- Dutch/ The Netherlands: 19.1.2
- French:11.1.1; 16.3; 19.1.1; 19.1.2
- territorial: 5.1.1; 11.1.1; 11.1.2
Justice Issue monitor: 9.2.4

Lamicie model: 3.5; 8.3.1; 8.3.2; 9.1.2; 9.1.3; 9.1.5; 9.2.3; 9.3.1; 9.3.4; 9.4
Lawyer(s): 1.; 1.2.; 2.6.1.; 4.3.; 5.2.1.; 5.2.2.; 6.4.; 7.1.3.; 10.2.; 11.1.3.; 12.3.3.; 13.1.4.; 13.4.; 14.2.2.; 14.3.1.; 14.3.2.; 14.4.2.; 14.4.3.; 14.4.4.; 14.5.; 15.1.3.; 16.2.3.; 16.2.4.; 17.1.1.; 17.2.1.; 17.2.2.; 17.3.1.; 19.1.2.; 19.1.3.; 19.2.2.; 20.3.2.
Leemhuis Committee: 1; 2.6.2; 6.1
Legal quality: 6.3; 7.1.1; 7.1.2; 7.1.3; 7.1.5; 7.4; 8.3.1; 8.3.2; 9.2.4; 9.3.5; 13.1.1; 13.1.3; 13.1.4; 13.4; 14.3.1; 16.1.3; 17.1.2; 19.3; 20.1
Legality: 2.1; 2.3; 2.4; 4.1; 4.2; 5.1.1; 12.3.1
Legitimacy : 1.3; 2.1; 2.3; 2.4; 2.5.1; 2.6.1; 2.6.2; 3; 3.1; 3.2; 3.10; 4.4; 5.2.1; 6.6; 8.2.5; 8.3.2; 9.2.4; 9.4; 10.4; 11.1.2; 12.2.1; 13.1.3; 13.1.5; 13.4; 14.5; 15.2.2; 16.4; 17.3.1; 18.3.3; 19.3.3; 20.1; 20.3.3; 20.4.1; 20.4.2
Legislator: 2.2.2; 10.2; 10.3.1; 10.3.2; 15.1.1; 20.5
Loi Organique de loi de finance (LOLF): 3.6; 14.2.4; 14.2.5; 14.4.1; 14.4.2; 14.4.5

Managers
- Judge: 7.2.3; 8.2.2; 8.2.3; 8.2.4; 8.2.5; 8.3; 8.3.1; 8.3.2; 8.3.3; 8.4; 15.2.3
Management
- integral:3.4; 3.5; 5.1.1; 6.1; 6.2.1; 6.2.2; 7.2.1; 8.1; 8.2.1; 8.2.2; 8.2.3; 8.2.4; 8.2.5; 8.3.3; 8.4; 14.5; 19.1.2; 19.2.1; 19.2.3; 20.3.1
- total quality: 2.5.1; 19.2; 19.2.3; 19.2.5; 20.3.1
- case: 2.6.1; 3.4; 3.5; 8.1.1; 8.1; 8.3; 8.3.1; 8.3.1; 8.3.2; 8.3.3; 8.4; 9.1.2; 14.1; 14.2.1; 14.3; 14.3.1; 14.3.2; 14.4.1; 14.5; 15.1.3; 16.1.3; 16.1.4; 17; 17.1.1; 17.2; 17.2.1; 17.2.2; 17.4; 19.2; 19.2.2; 19.2.4; 20.2.1; 20.3.1; 20.3.2; 20.5
- knowledge: 5.2.2; 6.5
- Courts: 3.4; 6.2.1; 6.4; 6.5; 8.3; 8.3.2; 9.1.1; 14.1; 14.2.1; 14.2.5; 14.3.1; 14.4.1; 14.4.2; 14.5; 17; 17.1.1; 17.1.2; 17.4; 18.2.1; 19.1.1; 19.2.2

- Managing judges: 2.6.1; 7; 7.2.1; 7.2.2; 7.2.3; 7.2.4; 7.3.2; 7.4; 8.2.2; 11.1.1; 12.4; 13; 13.2.6; 13.4; 14.2.1; 16.2; 16.2.2; 16.2.4; 16.4; 19.1.1; 19.1.2; 19.2.2; 20.2.1
Meijerink Committee: 4.2
Ministry of Finance: 9.2.3; 9.2.5; 12.2.2; 12.4
Ministry of Justice: 3.5; 3.7; 4.4; 5.2.1; 6.1; 6.2.3; 6.3; 6.4; 6.5; 8.3; 8.3.2; 9; 9.3.1; 9.1.5; 9.2.1; 9.2.2; 9.2.3; 9.2.4; 9.2.5; 9.3.1; 9.3.3; 9.3.4; 9.3.5; 9.4; 10.3.1; 10.3.3; 11; 11.1.1; 11.2.2; 12.2.1; 12.2.1; 12.2.2; 12.3.3; 12.4; 14.2.4; 14.4.2; 14.4.3; 14.4.4; 14.5; 15.1.2; 15.1.3; 15.1.4; 15.2; 15.2.1; 15.2.2; 15.2.3; 15.3; 16.1.2; 18.1.1; 18.2; 18.3.2; 19.2.1; 19.3.1; 19.3.2; 19.3.3; 20.2.1; 20.3.1; 20.4.1; 20.5

New Public Management: 2.1; 2.4; 2.5.1; 3.3.1
NVvR: 4.3; 8.3.2; 9.1.4

Organisational
- autonomy: 1.3; 7.3.2; 7.4; 8.4; 13.2.6; 13.3.2; 15.1.2; 15.1.3; 15.1.4; 15.2.3; 15.3; 16.1.2; 16.1.5; 16.2.4; 16.4; 18.3.2; 18.3.3; 18.4; 19.1.1; 19.3.1; 19.3.3; 20.1; 20.2.1; 20.5
- court organisation: 1.3; 2.61; 3.5; 3.7; 6.5; 7.3.2; 7.3.4; 7.4; 8.3; 8.3.2; 9.2.3; 13.1.4; 13.2.6; 13.4; 15.1.1; 15.1.2; 16.1.3; 16.1.4; 19.1; 19.1.2; 19.1.3; 19.2; 19.3; 19.3.3; 20.1; 20.2.3; 20.3.3; 20.4.2
- Instruments to aid: 7.2.1; 7.2.3; 7.2.4; 13.2; 13.2.1; 13.2.5; 16.2.3; 16.2.4; 16.4; 19.1.2; 20.2.1
Organisers: 3.3.1; 6; 8.2.1; 8.3; 12; 12.4; 14.1; 14.2.1; 14.5; 15.1.3; 16.2.4; 17.1.3; 17.3.3; 18.2.1; 19.2.1

Parliament: 2.1.; 2.2.1.; 2.2.2.; 2.3.; 2.6.1.; 20.3.3.; 20.4.1.; 20.5.
- Dutch: 2.3.; 4.1.; 4.2.; 4.3.; 4.4.; 6.1.; 6.2.2.; 6.2.3.; 6.3.; 6.4.; 6.6.; 9.1.5.; 9.2.1.; 9.2.4.; 9.2.5.; 9.3.4.; 9.4.
- French: 10; 10.1.; 10.2; 10.3.1.; 10.3.2.; 10.4.; 11.1.1.; 12.2.1.; 12.2.2; 12.4.; 15; 15.1.1.; 15.1.4.; 15.2.2.; 15.2.4.; 15.3.; 18.1.1.; 18.2.; 18.2.1.; 19.2.1.
Personnel: 1.1; 2.5.1; 3.6; 5.2.1; 6.2.1; 6.2.3; 6.5; 7.2.3; 7.4; 8.2.2; 8.3.2; 8.4; 9.2.2; 9.3.1; 12.1.1; 15.1.2; 15.1.3; 15.2.2; 16.2.3; 17.1.1; 17.1.2; 17.2.2; 17.3.2; 17.4; 18.1.1; 18.2; 19.2.2; 19.2.4; 20.3.3
Planning and control cycle: 6.4; 9.1.2; 9.1.3; 9.3.2
Policy: 2.1; 2.2.2; 2.3; 2.4; 2.6.1; 3.3.1; 3.4; 3.5; 3.6; 4.2; 4.3; 5.2.1; 6; 6.2.3; 6.3; 6.5; 6.6; 7.1.4; 7.2.2; 7.2.3; 7.3.2; 8.1; 8.2.1; 8.3; 8.3.1; 8.3.2; 8.3.3; 8.3.4; 9.1.4; 9.2.1; 9.2.2; 9.2.3; 9.2.4; 9.2.5; 9.3.1; 9.3.2; 9.3.3; 9.3.4; 9.3.5; 9.3.6; 9.4; 10.3.1; 10.3.3; 12; 12.3; 12.3.2; 12.3.3; 12.4; 13.2.6; 14.2.1; 14.2.2; 14.2.4; 14.2.5; 14.3.1; 14.4.1; 14.4.2; 14.4.3; 14.4.4; 14.4.5; 14.5; 15.1.2; 15.1.3; 15.1.4; 15.2.1; 15.2.2; 15.2.3; 15.3; 16.1.1; 16.1.2; 16.1.3; 16.1.5; 16.2.1; 16.2.3; 16.2.4; 16.3; 17.1.1; 17.1.3; 17.2.1; 17.2.2; 17.3.1; 17.3.3; 17.4; 18.1.1; 18.1.2; 18.2; 18.2.1; 18.3.1; 18.3.2; 19.1.2; 19.2; 19.2.1; 19.2.3; 19.2.5; 19.3; 19.3.1; 19.3.2; 20.3.1; 20.4.2; 20.5
Political responsibility: 2.2.2; 4.2; 20.2.1; 20.4.1; 20.5
Politics: 4.2; 6.2.2; 10.3.1; 12.1.1; 12.2.1; 15.1.2; 20.3.1
Power: 2.1; 2.2.1; 2.2.2; 2.3; 2.4; 2.5.1; 2.6.2; 3.6; 4.1; 4.2; 4.3; 4.4; 5.2.2; 7.2.2; 7.3.1; 7.3.2; 7.3.3; 8.2.2; 9.2.1; 9.3.3; 10; 10.1; 10.2; 10.3.1; 10.3.2; 10.4; 11.1.1; 11.1.2; 11.1.3; 12.2.1; 12.2.2; 12.3.1; 12.3.3; 15.1.1; 15.1.4; 20.4.1; 20.5;

Press judge (persrechter): 4.3
Prisma: 6.5; 8.3.2
Process: 1.1; 2.1; 2.2; 2.4; 2.6.1; 3.3.2; 3.8; 4.2; 4.4; 5; 5.2.1; 5.3; 6.1; 6.2.2; 6.2; 6.5; 8.3.1; 8.3.2; 8.3.4; 9.1.2; 9.2.3; 9.3.4; 10.1; 10.3.1; 11.2.2; 12; 12.2; 12.3.1; 12.3.2; 12.3.3; 13.3.1; 13.3.2; 14.3.1; 14.4.2; 14.4.5; 14.5; 15.1.2; 15.1.4; 15.2; 15.2.1; 15.2.2; 16.1.5; 17.2.1; 17.2.2; 18.3.1; 18.3.2; 18.4; 19.1.1; 19.2.2; 19.2.3; 19.2.4; 19.3; 19.3.2; 20.1; 20.2.1; 20.3.1; 20.3.2; 20.4.2; 20.5
Procedural law: 2.3; 2.4; 3.4; 3.5; 5.1.2; 5.2.1; 8.3.1; 11.2.2; 12.3; 14.2.5; 15.1.1; 20.3.2
Procedure: 2.2.2; 2.3; 2.4; 2.6.1; 2.6.2; 4.1; 4.2; 5.1.2; 5.2.1; 5.3; 8.3.1
Professional Bureaucracy
Project Versterking Rechterlijke Organisatie
Public hearings: 1.2.; 2.2.1.; 2.2.2.; 2.6.1.; 4.1.; 4.3.; 7.1.5.; 7.3.3.
Public Prosecutors: 1.2.; 4.2.; 5.1.2.; 5.2.1.
Public service: 2.1.; 2.2.2.; 2.6.1.
Public responsibility: 2.2.2.; 20.2.1.; 20.5.
Public trust: 2.1; 2.2.2; 9.2.4; 9.4; 17.3.2.; 20.2.1.
PVRO: 3.5.; 5.2.1.; 6.2.2.; 6.2.3.; 6.3.; 6.5.; 7.1.4.; 8.3.; 8.3.1.; 8.3.3.; 9.; 9.1.1.; 9.2.4.; 9.3.6.; 19.2.1.; 20.2.1.

Quality
- assurance: 1.1.; 2.5.1.; 6.5.; 7.1.3.; 9.2.5.; 19.2.; 19.2.2.; 19.2.3.; 19.2.5.; 19.3.3.; 20.3.1.; 20.3.2.
- control: 1.1.; 2.5.1.; 2.6.1.; 2.6.2.; 13.2.6.; 13.3.3.; 19.1.3.; 19.2.; 19.2.2.; 20.2.1.; 20.3.1.
- defined: 2.5.2.
- implementation of -: 5.3.; 14.4.2.; 17.4.; 19.1.1.; 19.1.3.; 20.3.1.; 20.3.3.; 20.4.2.
- legal -: 2.6.1.; 3.4.; 3.5.; 6.3.; 7.1.1.; 7.1.2.; 7.1.3.; 7.1.5.; 7.4.; 8.3.1.; 8.3.2.; 9.2.4.; 9.3.5.; 13.1.1.; 13.1.3.; 13.1.5.; 13.4.; 14.3.1.; 14.4.2.; 16.1.3.; 17.1.2.; 19.3.; 20.1.
- indicators: 2.1.; 6.5.; 8.3.; 9.3.5.; 13.3.1.; 14.3.; 14.4.1.; 14.4.2.; 14.5.; 17.3.1.; 17.4.
- management (total) : 2.4.; 2.5.1.; 2.6.2.; 3.5.; 8.3.; 8.3.2.; 12.3.3.; 14.2.1.; 14.5.; 17.4.; 19.1.2.; 19.2.; 19.2.2.; 19.2.3.; 19.2.5.; 20.3.1.; 20.3.3.; 20.4.1.; 20.4.2.
- meausres: 2.1.; 2.6.1.; 2.6.2.; 8.3.; 9.2.4.; 9.4.; 14.1.; 14.3.; 14.3.2.; 14.4.; 14.4.1.; 14.4.3.; 14.5.; 17; 17.2.; 17.4.; 19.1.; 19.1.1.; 19.1.2.; 19.1.3.; 19.2.1.; 20.1.; 20.2.3.; 20.3.2.; 20.4.2.; 20.5.
- organisation: 2.1.; 2.5.1.; 2.6.1.; 8.3.2.; 12.4.; 14.4.3.; 14.4.5.; 17.3.3.; 18.3.1.; 19.1.1.; 19.2.; 19.2.4.; 19.2.5.; 20.2.1.; 20.3.1.; 20.5.
- policy: 2.6.1.; 8.3.; 9.2.3.; 9.2.4.; 9.3.1.; 9.3.5.; 12.3.2.; 14.5.; 17.3.1.; 17.3.2.; 19.2.1.; 19.3.1.; 20.3.1.
- RechtspraaQ: 6.5.; 8.3.2.; 9.1.; 9.2.4.; 9.3.5.; 9.3.6.; 9.4.; 19.2.4.; 19.3.1.; 20.2.1.
- theory: 2.5.; 3; 20.3.1.
Quality systems
- EFQM: 2.5.1.; 6.2.3.
- INK: 6.5.; 8.3.1.; 9.1.1.
- ISO: 2.5.1.; 2.5.2.; 3.6.; 12.3.3.; 14.4.1.; 14.4.2.; 17.3.1
- Prisma: 6.5.; 8.3.

Repeat player: 14.4.5.
Resources: 1.3.; 2.5.1.; 2.5.2.; 2.61.; 3.4.; 3.5.; 3.6.; 5.2.1.; 6.1.; 6.2.2.; 6.2.3.; 6.3.; 7.2.1.; 7.2.3.; 8.3.1.; 8.3.2.; 8.4.; 9.; 9.1.2.; 9.1.3.; 9.1.5.; 9.2.2.; 9.2.3.; 9.3.4.; 9.4.; 10.3.3.; 11.2.2.; 11.3.; 12.1.1.; 12.2.1.; 12.2.2.; 12.3.1.; 12.3.2.; 12.3.3.; 12.4.; 13.1.3.; 13.2.6.; 14.2.2.; 14.2.3.; 14.2.4.; 14.2.5.; 14.3.1.; 14.3.2.; 14.4.1.; 14.4.2.; 14.5.; 15.1.2.; 15.1.3.; 15.1.4.; 15.2.; 15.2.1.; 15.2.2.; 15.2.3.; 15.2.4.; 15.3.; 16.1.4.; 16.2.1.; 16.2.3.; 16.2.4.; 16.3.; 17.1.1.; 17.1.2.; 17.2.1.; 17.2.2.; 17.3.1.; 17.4.; 18.1.1.; 18.2.; 18.2.1.; 18.3.1.; 18.3.2.; 18.3.3.; 19.1.2.; 19.1.3.; 19.2.1.; 19.2.2.; 19.3.; 19.3.1.; 19.3.2.; 20.2.2.; 20.3.1.; 20.3.3.
Responsibility: 2.2.2.; 2.4.; 2.5.1.; 2.6.1.; 3.4.; 3.5.; 4.1.; 4.2.; 4.3.; 4.4.; 6.1.; 6.2.1.; 6.2.2.; 6.3.; 6.4.; 6.6.; 7.; 7.1.1.; 7.1.2.; 7.1.3.; 7.1.5.; 7.2.1.; 7.2.3.; 7.2.4.; 7.3.; 7.3.2.; 7.4.; 8.1.; 8.2.1.; 8.2.2.; 8.2.3.; 8.2.5.; 8.3.1.; 8.3.2.; 8.4.; 9.1.3.; 9.1.5.; 9.2.1.; 9.2.3.; 9.2.4.; 9.2.5.; 9.3.1.; 9.3.2.; 9.3.4.; 9.4.; 10.3.1.; 10.3.3.; 11.; 11.1.1.; 11.1.2.; 11.2.2.; 12.1.1.; 12.1.2.; 12.2.1.; 12.2.2.; 12.3.1.; 12.3.2.; 12.3.3.; 12.4.; 13; 13.1.1.; 13.1.2.; 13.1.3.; 13.1.4.; 13.1.5.; 13.2.4.; 13.2.6.; 13.3.1.; 13.4.; 14.2.2.; 14.2.3.; 14.3.1.; 14.4.3.; 15.1.2.; 15.1.3.; 15.1.4.; 15.2.3.; 15.3.; 16.1.2.; 16.1.3.; 16.1.5.; 16.2.1.; 16.2.2.; 16.4.; 17.1.2.; 17.4.; 18.1.1.; 18.3.2.; 19.1.; 19.1.1.; 19.1.2.; 19.2.; 19.2.1.; 19.2.2.; 19.2.3.; 19.3.; 19.3.1.; 19.3.3.; 20.2.1.; 20.2.3.; 20.3.1.; 20.3.2.; 20.3.3.; 20.4.1.; 20.4.2.; 20.5.

Separation of powers: 1.; 2.1.; 2.2.1.; 2.2.2.; 2.4.; 2.6.1.; 2.6.2.; 3.5.; 3.6.; 3.10.; 4.1.; 4.2.; 6.3.; 7.3.1.; 8.2.5.; 8.4.; 9.1.2.; 9.1.3.; 9.1.5.; 10.; 10.1.; 10.3.1.; 10.3.2.; 12.1.1.; 14.5.; 15.; 15.1.4.; 15.2.; 15.2.4.; 15.3.; 16.3.; 18; 18.1.2.; 18.1.3.; 18.2.1.; 18.4.; 19.3.; 19.3.2.; 19.3.3.; 20.4.1.
Specialisation: 6.5.; 8.2.2.; 8.3.1.; 9.2.1.; 10.3.3.; 11.1.1.; 14.3.1.; 16.2.2.; 17.2.1.; 17.2.2.; 19.2.2.
Speed: 1.2.; 2.4.; 5.1.2.; 6.3.; 6.5.; 6.6.; 7.1.2.; 7.2.3.; 8.3.2.; 8.3.3.; 10.3.1.; 13.1.2.; 14.3.1.; 14.4.1.; 14.4.3.; 16.1.3.; 16.1.4.; 17.3.1.; 19.1.2.; 20.2.1.; 20.2.2.; 20.3.3.

Technology: 2.1.; 2.5.1.; 4.3.; 6.5.; 6.6.; 7.2.3.; 8.1.; 8.3.3.; 12.2.1.; 13.2.5.; 13.2.6.; 13.4.; 14.4.2.; 14.4.4.; 15.2.1.; 16.2.3.; 17.2.2.; 17.3.2.; 19.1.2.; 19.2.4.; 19.2.5.; 20.2.2.; 20.3.3.
Timeliness: 1.2.; 2.5.1.; 6.5.; 7.1.2.; 7.1.5.; 7.4.; 8.3.2.; 16.3.; 19.1.1.; 19.1.2.; 19.1.3.; 20.2.1.; 20.3.3.
Training: 1.1.; 2.2.2.; 2.5.1.; 2.6.1.; 3.4.; 3.5.; 3.6.; 5.; 5.1.1.; 5.2.1.; 5.2.2.; 5.3.; 6.5.; 7.1.2.; 7.1.4.; 7.1.5.; 7.2.3.; 8.2.4; 8.3.1.; 8.3.2.; 8.3.3.; 8.4.; 9.1.1.; 9.1.5.; 9.3.5.; 10.3.3.; 11; 11.1.2.; 11.2.1.; 11.2.2.; 12.3.2.; 12.3.3.; 13.1.3.; 13.2.1.; 13.2.3.; 13.2.4.; 13.2.5.; 13.2.6.; 13.3.1.; 13.4.; 14.2.1.; 14.2.2.; 14.2.4.; 14.2.5.; 14.3.1.; 14.5.; 15.1.2.; 15.1.3.; 16.1.2.; 16.2.2.; 16.2.3.; 16.2.4.; 16.4.; 17.1.1.; 17.1.3.; 17.2.1.; 17.2.2. 17.4.; 18.2.; 18.3.2; 18.4.; 19.1.1.; 19.1.2.; 19.2.3.; 19.3.; 19.3.1; 19.3.2; 20.1.; 20.2.2.; 20.3.1.
Transparency: 1.3.; 2.1.; 2.2.2.; 2.3.; 2.4.; 3.1.; 4.1.; 4.3.; 4.4.; 5.3.; 6.5.; 6.6.; 7.1.3.; 7.2.2.; 8.2.4.; 8.3.1.; 8.3.2.; 8.3.3.; 9.1.2.; 9.2.1.; 9.2.4.; 9.3.5.; 9.4.; 10.3.1.; 10.3.3.; 11.1.2.; 12.1.1.; 12.3.1.; 14.2.1.; 14.2.4.; 14.3.1.; 14.3.2.; 14.4.1.; 14.4.2.; 14.4.4.; 14.5.; 15.1.2.; 15.2.2.; 17.2.1.; 17.2.2.; 18.3.1.; 19.2.2.; 19.3.1.; 19.3.3.; 20.1.; 20.2.1.; 20.3.2.; 20.3.3.; 20.4.1.; 20.4.2.; 20.5.

Work processes: 6.2.3.; 6.5.; 8.3.1.; 8.3.2.

Curriculum vitae

Gar Yein Ng was born on the 21st February 1978. She read law at the University of Central England in Birmingham and received her LLB degree in 1999. In the same year she started to read for her LLM degree at the University of Maastricht in European and Comparative law, which was completed in the autumn of 2000.

After completing her studies she went on to work as a University Lecturer at the University of Passau in Germany, teaching English law for the University of London External Programme, and English law and a language. In 2001 she began her PhD research as a research assistant at the Wiarda Institute at Utrecht University. Her research was conducted under the auspices of the research spearhead 'Adjudication and enforcement of the law'.

IUS COMMUNE EUROPAEUM

A peer-reviewed book series in which the common foundations of the legal systems of the member states of the European Community are the central focus.

The *Ius Commune Europaeum* series includes horizontal comparative legal studies as well as studies on the effect of treaties within the national legal systems. All the classic fields of law are covered. The books are published in various European languages under the auspices of METRO, the Institute for Transnational Legal Research at the Maastricht University.

Editorial Board: Prof. Dr. J. SMITS (chair), Prof. Dr. M. FAURE and Prof. Dr. E. VOS.

Recently published:
Volume 48: *Risico en voorzorg in de rechtsmaatschappij*, E. VOS and G. VAN CALSTER (eds.)
Volume 49: *Good Governance and the European Union*, D.M. CURTIN and R.A. WESSEL (eds.)
Volume 50: *Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht*, J. SMITS and S. STIJNS (eds.)
Volume 51: *Genetic Discrimination and Genetic Privacy in a Comparative Perspective*, J.H. GERARDS, A.W. HERINGA and H.L. JANSSEN
Volume 52: *Judicial Lawmaking and Administrative Law*, F. STROINK and E. VAN DER LINDEN (eds.)
Volume 53: *MVO: Corporate Social Responsibility in a Transnational Perspective*, J.J.A. HAMERS, C.A. SCHWARZ and B.T.M. STEINS BISSCHOP (eds.)
Volume 54: *European Traditions in Civil Procedure*, C.H. VAN RHEE (ed.)
Volume 55: *Gehuwd of niet: maakt het iets uit?*, C. FORDER and A. VERBEKE (eds.)
Volume 56: *European Integration and Law,* D. CURTIN, A. KLIP, J. SMITS, and J. MCCAHERY (eds.)
Volume 57: *The Right Judge for Each Case*, Ph.M. LANGBROEK and M. FABRI (eds. and research directors)
Volume 58: *Grensoverschrijdend recht*, M. FAURE and M. PEETERS (eds.)
Volume 59: *Towards a Unified System of Land Burdens?*, S. VAN ERP and B. AKKERMANS (eds.)

Volume 60: *Contract Interpretation and Gap Filling: Comparative and Theoretical Perspectives*, N. KORNET
Volume 61: *Selected Issues in Equal Treatment Law,* M. GIJZEN
Volume 62: *Food Safety Regulation in Europe,* E. VOS and F. WENDLER (eds.)
Volume 63: *Quality of Judicial Organisation and Checks and Balances,* G.Y. NG