
Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment

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The efficiency of civil justice has become a central issue in several communities, including national states that have undertaken to reform their civil procedures rules and/or to implement methods of case management (such as the USA and United Kingdom) and international organizations such as the Council of Europe and the World Bank. Of course, there has always also been interest on the part of legal academics and judicial/court administration professionals.

Court systems have two aspects: on one side, as public institutions, their funding, the recruitment of judges and clerks and employees, the procedural rules they must comply with, are determined by the state. On the other side, as organizations producing dispute resolution services, their operation and management are borne by the chiefs of courts. The importance of capacity management of the former, who are most often judges, is now acknowledged by most specialists, even if the compatibility between legal rationality and managerial rationality is questioned by some of them. This article seeks to explain the situation of French courts, focusing on court administration that can not be addressed without taking account of the broader framework of State policy concerning most specifically the budget-setting process which has undergone recent radical reforms.

Almost a decade ago, proponents of the Organic Act enacted 1 August 2001 on budget acts² reforming the "financial constitution" of France wanted to base the allocation of public funds not on a "logic of spending", but on a "logic of the performance" (Loi organique aux lois de finances – hereinafter LOLF). It is with this objective that the organic Act amended the budget framework and categories of public policy by developing a complex architecture of missions, programs and actions with indicators designed to measure cost-effectiveness, public policies and the level of performance achieved by managers of public resources. In parallel, , the reform of public accounting, largely inspired by the accounting standards of the private sector, was implemented, in principle, in order to measure the cost of state policy³. Many analysts have seen in these reforms a radical change of French administrative culture, with a great step made towards the principles of the New Public Management⁴. However, the spirit of the recent reform is not without precedent; the winds of efficiency and performance have been blowing in French public administration, since the introduction of a method of cost-benefit valuation of state action in 1968. The so-called "Budgetary Choice rationalisation" (*Rationalisation des Choix Budgétaires* – hereinafter RCB) was then inspired by the model of the American *Planning Programming Budgeting System* (PPBS). The guiding idea was to assess the efficiency of state action thanks to economic and monetary valuation of discounted costs and benefits of public money spending. From an institutional view point, the implementation of RCB methods involved mainly economists and experts in economic valuation within an economic unit of the Ministry of Finance: the *Direction de la Prévision*. The RCB experience turned into a sterile process for a series of reasons, among

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² Loi organique du 1er août 2001 relative aux lois de finances (thereinafter LOLF). Its implementation was phased over several years. The Budget Act 2006 was the first to be fully prepared, adopted and enforced under the new budget framework.

³ Y. Biondi, T. Kirat, "Les enjeux de la réforme des normes comptables de l'État", journée d'étude de l'IRISES : "Expertise, réforme de l'État et transformation de l'action publique", Paris-Dauphine, February 9, 2007 ; Y. Biondi, "Should Business and Non-Business Accounting Be Different? A Comparative Perspective Applied to the New French Governmental Accounting Standards", 12th Biennial CIGAR Conference Paper, University of Modena, Italy, May 28-29, 2009 (downloadable at <http://ssrn.com/abstract=1414751>).

⁴ For instance: S. Maury, "La LOLF est-elle un bon moyen d'évaluer les politiques publiques?", *Actualité Juridique-Droit Administratif* (AJDA), 2008, at. 1366 ; J.-P. Jean & H. Pauliat, "An evaluation of the quality of justice in Europe and its developments in France", *Utrecht Law Review*, 2(2), dec. 2006, 44-60 ; A. Vauchez, "Le chiffre dans le 'gouvernement' de la justice", *Revue Française d'Administration Publique*, 2008/1, 111-120. For a broader overview based on CEPEJ datas and reports: Gar Yein Ng, Marco Velicogna and Cristina Dallara, "Monitoring and Evaluation of Courts Activities and Performance", *International Journal For Court Administration* (1)1, January 2008, 59-64.

which the main one is that the administrative structures were not appropriate to allow a useful implementation of economic valuation⁵.

After the end of the RCB era, the reformers of the budget law and its budgetary framework in 2001 responded to an administrative and financial logic, quite different from the previous experience. Between the RCB and the LOLF of 2001, the communities involved have nothing in common: economists and economist-statisticians have not been associated in the preparation and implementation of LOLF. They have been invited neither to contribute to the setting-up of indicators for measuring the performance nor to assess the effectiveness of missions, programs and actions of the state. Therefore, the question may be asked, what measures the performance indicators, their role in allocating resources, and more importantly, their legitimacy with respect to service users should play. The question is particularly sensitive for a sovereign function, such as justice.

The effects of LOLF on the efficiency of judicial services and cost-effectiveness of courts deserve attention: how far did its implementation lead to an improvement of courts performance? That issue is the focus of the present article, which must first set-up the broader institutional framework within which courts operate. To date, few judges and few lawyers are interested in this issue⁶. Two particularly important aspects of the budgeting and administration of justice must be considered: First, the definition of missions, programs, actions and performance indicators that managers of funds must agree on in order to inform the development and discussion of the budget laws. Second, that the LOLF had the intention to bring the organization and management of courts under a regime of autonomy and accountability.

From the outset there was a discrepancy between the 2001 Act spirit and the real conditions of courts funding and administration. This issue is discussed below. Considering the preparatory reports of the 2001 Act, one may expect the emergence of a new model of courts funding and administration, allowing the chiefs of courts more autonomy and responsibility to achieve higher levels of efficiency and quality. The assessment of performance of courts management through a series of indicators is in theory the core issue: the link between the political-budgetary process involving Government and Parliament on one side, and the judicial administration process on the other. However, as is argued below, these two processes remain separate: the allocation of funds to courts remains broadly speaking disconnected to the performance achieved in courts management. Meanwhile, at the court level, a huge increase in workload of administrative and budgetary tasks compromises the achievement of efficiency and quality of justice. The two issues, namely the performance-based budgetary process on the one and the administrative and financial responsibilities of courts on the other, are then connected.

The article is divided as follows: Section 1 is devoted to the budgetary aspects and performance indicators established for judicial justice within the LOLF framework. Section 2 discusses the conditions of the court management from the perspective of the appeal courts and first instance court levels. It will focus on the managerial responsibilities of chiefs of courts.

I- A New Framework for Public Policies: "Mission Justice" and Performance Indicators

The architecture of the LOLF has several levels of spending cutbacks; in mission, programs, and actions, indicators are being placed at the chain end to evaluate the level of performance in achieving the objectives of state action. In the "mission justice" as the first floor, the administrative courts have succeeded again in escaping the institutional history of France by eluding their integration into the Ministry justice. Instead, they are integrated into another mission ("state control and counsel"). On the second floor are located five programs: 166: *Judicial Justice*, Program 107: *Penitential administration*, Program 182: *Judicial Protection of Youth*, Program 101: *Access to law and justice*, Program 213: *administration of justice and related agencies*. Each program has its own associated objectives, which correspond to various program activities. These five programs comprise 60 indicators⁷.

⁵ see F. Ecalle, "De la rationalisation des choix budgétaires à la LOFL", Rapport du Conseil d'Analyse Economique, Economie politique de la LOLF, La Documentation française, 2007, 239-252.

⁶ For a first assessment, see: *l'Actualité Juridique Pénal* 2006, 473 à 496, which includes contributions from several judges on various aspects of LOLF (general principles, legal costs, operating services, prison); see also *Revue Française d'Administration Publique*, n° 125, 2008/1, in particular the contribution of the First President of the Court of Appeals of Caen, Justice Didier Marshall: "L'impact de la loi organique relative aux lois de finances (LOLF) sur les juridictions", *id.*, 121-131.

⁷ An exhaustive and updated list of indicators is provided by the government website : <http://www.performance-publique.gouv.fr/la-performance-de-laction-publique.html>

These are the indicators of the judicial justice program we will attention here, mainly because of the centrality of this program for the mission. Even if these indicators fit well within the framework outlined by the LOLF (1), their design is far from the classical definition of the measuring instrument (2), and this results in paradoxical conclusions on the indicators of performance (3). We will discuss issues 1-3 below.

The Design of Indicators as Part of the Budgetary Process Under The 2001 Act

According to the LOLF: "A program includes funding for implementing an action or a coherent set of actions within a department, which are associated with specific goals, defined in terms of objectives of general interest, and with expected results that can be evaluated." Henceforth, annual performance plans ("Plan annuel de Performance") for each program should be annexed to the Budget Law. These plans must state: "The presentation of actions, costs, objectives pursued, the results obtained and expected in the coming years, measured by precise indicators whose choice is justified" (Loi organique relative aux lois de finances, art. 51, 5°, a).

Three types of objectives are broken down: "- The objectives of socio-economic efficiency to meet people's expectations (...), which show not what the government produces, but the impact of what it does: its (socio-economic) objectives of service quality relevant to the user, the efficiency objectives of management relevant to the taxpayer. These objectives intend to increase production or public activities with the same level of resources, or to maintain the same level of activities with fewer resources."⁸

The methodological guide for the implementation of the LOLF published by the Ministry of Economy and Finance in June 2004 states that indicators must be "relevant, that is to say, can assess the results actually obtained (consistent with the objective related to a substantial aspect of the result, to make judgements, avoiding adverse effects to those sought)". Do indicators provided for the program "judicial justice" live up to these criteria?

The Design of Indicators for the "Judicial Justice" Program

A series of quantitative indicators have been set up to define *ex ante* the objectives and assess the performances *ex post*. The methodology of the quantitative index is not questioned as such here. We focus on the prevailing ones and try to assess their relevance for their own purpose. Indicators have been set-up for the 2006 Budgetary Law, but the list of indicators on Justice has since been adapted. Some of them were not filled in the first years due to lack of information; others were added since 2006. The broad framework remains unchanged. As stated earlier, the "Mission Justice" is divided into five programs, each of them including a series of objectives associated with performance indicators. It is not possible to provide here due to a lack of space a complete presentation of the totality of indicators. I focus instead on the main program of the Mission Justice: the Judicial Justice Program (Program 166). As shown in the following table (table 1), the list of indicators has been modified since the first Budget Law project set-up in the LOLF framework.

Table 1 – Judicial Justice Program: a comparison between 2006 and 2010 Budget Law Projects

Programme 166 –	in 2006 Budget Law	Indicators in the 2010 Budget Law
1. Issuing decision in reasonable time in civil case	1.1. average duration of cases adjudication, by level of jurisdiction	1.1. average duration of cases adjudication, by level of jurisdiction
	1.2. theoretical of the stock of terminated cases, by kind of jurisdiction	1.2 (modified) Percentage of courts exceeding a ceiling duration of case processing
	1.3. average seniority of the	1.3. average seniority of the

⁸ quoted from the methodological guide for applying the organic law published by the Ministry of Finance in June, 2004 : *Guide méthodologique pour l'application de la loi organique relative aux lois de finances du 1^{er} août 2001. La démarche de performance : stratégie, objectifs, indicateurs.*

	backlog, by kind of jurisdiction	backlog, by kind of jurisdiction
	1.4. Average time for delivering of the judgment with the executory formula	1.4. Average time for delivering of the judgment with the executory formula
	1.5. <i>query rate interpretation, for correction of clerical errors and failure to rule</i>	(cancelled)
	1.6. rate of reversal by the higher court in civil cases	1.5 rate of reversal by the higher court in civil cases
	1.7 Number of civil cases handled by the judge or by the reporting judge	1.6 Number of civil cases handled by the judge or by the reporting judge
	1.8 Number of cases handled by civil servant in charge within the courts	1.7 Number of cases handled by civil servant in charge within the courts
2. Issuing quality decision in reasonable time in criminal cases	2.1. average duration of criminal procedures	2.1. average duration of criminal procedures
	2.2 rate of non-admittance of criminal recording by the the national criminal register (Casier judiciaire national)	2.2 rate of non-admittance of criminal recording by the the national criminal register (Casier judiciaire national)
	2.3. average duration of transmission of notice of criminal sentence to the national criminal register	cancelled
	2.4. rate of reversal by the higher court in criminal cases	2.3 rate of reversal by the higher court in criminal cases
	2.5 Amount of offences that may be prosecuted by public prosecutors department officers	2.4 Amount of offences that may be prosecuted by public prosecutors department officers
	2.6 Number of criminal cases handled by the judge or by the reporting judge	2.5 Number of criminal cases handled by the judge or by the reporting judge

Beyond the changes made in the list of indicators, it is worth noting that several among them have not been filed since the beginning. This is the case, for instance, with the number of judges involved in civil and criminal cases (indicators 1.7 and 2.5 in the 2010 Budget Act, table 1 above). In fact, the data delivered by the statistical service within the Ministry of Justice do not provide all the necessary information to enable the ministry to adequately fill these indicators out: the statistical data available to determine this figure is the actual budget, but this does not distinguish between the numbers of judges appointed to the civil law divisions in the courts and the number of judges appointed to the criminal law divisions in the courts. One solution was found by the Ministry of Justice for the Project of Budget Act for 2008 by a complex matching of several administrative payroll and personnel files.

One can admit that the first condition for an indicator to help determine an outcome is that the aim is precisely defined. However, many targets identified in the various actions and programs within the "mission Justice" resemble less specific goals as statements of intent, such as those among the objectives of prison management, "*adapt the management of housing stock to penitentiary population groups (minors -major)*", "*develop the facilities of punishment*", "*optimize the judicial pathway of the young*" ...

Moreover, the vast majority of indicators are not *stricto sensu* performance indicators but focus strictly on raw quantitative empirical data. Strictly speaking, talking of indicators in these conditions is a misnomer. Indeed, a genuine performance indicator of performance should be like: "if x% of civil cases are processed within Y months, the score of the indicator"

time "X is on a scale from 1 to N". Only some indicators are authentic indicators of performance, understood in terms of (average) productivity of judges. This is the case in the Judicial Justice Program, with indicators like "number of civil cases handled by judge or by the reporting judge, " and "number of criminal cases handled by the judge or by the reporting judge". However, the calculation of average duration of a case in the court is based on the aggregation of both cases heard and decided *and* referral of cases. This choice is far from being the most relevant. It would have been more appropriate and meaningful to retain the principle of calculating the duration by type of legal issues within each jurisdiction. Moreover, the Ministry of Finance "Methodological Guide" advocates variance indicators instead of average ones. The single indicator which is closer to a variance approach is the "percentage of courts exceeding a ceiling time" (1.2. in the 2010 budget law), which constitute a rather minimalist compliance with the Ministry of Finances recommendations.

One may consider that for each program objective, that includes several indicators. One would expect that indicators be developed that synthesize information on the associated actions. The core indicators should be commensurable (that is to say, expressed in a "metric" policy) and possibly ponderable.

Finally, one may wonder if the rate of reversal of decisions of first instance courts by appeal courts or of appeal courts by the court of cassation provides a good assessment of judicial quality. Some scholars consider it a good proxy of judicial quality⁹. However, the issue has been controversial among the judiciary in France. Some professional organizations, such as the Syndicat de la magistrature, have expressed their doubt about such indicators¹⁰.

The Paradoxical Nature of Indicators and Their Interpretation

The development and definition of indicators was not achieved without resistance within the judiciary. For instance, professional organizations of judges have expressed doubt about the construction of a quality indicator based on the rate of Cassation. Some unions of the judiciary have tried in vain to attract the attention of the ministry to the limitations of the indicator "*query rate interpretation, for correction of clerical errors and failure to rule*", given that these complaints are often dilatory and it would have been better to measure the rate of admission of these requests. As a matter of fact, such an indicator was given up a couple of years after the 2006 budget law.

More generally speaking, professional organizations of magistrates as well as the Sénat continue to express their concern about strictly quantitative indicators, owing to the fact that they do not reflect the reality of the judicial activities within the courts. The Chief of the Court of appeals of Caen, Didier Marshall, reflects the views of the major critics regarding the "reasonable time" indicators in both civil and criminal cases: The time of adjudication depends on the kind of cases and their legal base, which in turn are a function of the socioeconomic context of the courts¹¹.

More generally, many concerns were expressed about the interpretation of indicators and how to draw consequences from the standpoint of resource allocation. Indeed, the use of indicators for the budget decision may lead to paradoxes. A simple example helps to understand: an indicator of performance is the prisons' '*escape rate*' (indicator on *Penitentiary Administration*). Two opposite conclusions can be drawn from a high escape rate. If this rate reflects an insufficient supervision, then it would be logical to increase the capacity of the Program to address safety problems. Alternatively, if it represents a misuse of resources available, this should be sanctioned by a reduction of funds, with the risk of aggravating the situation. It is often impossible to draw practical conclusions relating to outcomes of measurements of indicators, and government departments are careful not to do so. As a matter of fact, it seems that the indicators are more Government- and Parliament-oriented than oriented at providing monitoring information at the courts level. In short, they cannot serve as assessment and management tools within the courts, due to the fact that, according to Judge Didier Marshall, they do not capture the "quality of work achieved" within the courts¹².

Under these circumstances, it is useful to consider the conditions of management of courts in the post-LOLF era.

⁹ see Martin R. Schneider, Judicial Career Incentives and Court Performances. An Empirical Study of the German Labour Courts of Appeal, *European Journal of Law and Economics*, 20:127-144, 2005

¹⁰ According to a report of the Sénat, one major objection towards the reversal rate lies in a difference between civil and criminal cases. See Sénat, *La mise en oeuvre de la LOLF dans la justice judiciaire*, Rapport d'information n° 478 (2004-2005) de M. Roland du LUART, fait au nom de la commission des finances, déposé le 13 juillet 2005. Senator du Luart regrets that the professional organizations have not be invited to participate, even been consulted, to the setting-up of indicators concerning justice.

¹¹ D. Marshall op. quoted, at p. 124.

¹² D. Marshall, op. quoted, at p. 124.

II- The Management of Courts: Towards More Autonomy, Accountability, and Efficiency?

A basic principle of the LOLF is to empower managers of funds by giving them some leeway in the decisions of resource allocation, that is to say, ensuring their "fungibility." Chief program officers are expected to be able to reallocate funds according to needs and local constraints, such as redeployment of operating funds to capital expenditure. This fungibility is not absolute: it is "asymmetric" as we shall see later.

Management of "Asymmetric Fungibility"

The principle of "asymmetric fungibility" established by the LOLF is the ability to allocate authorised funds (wages, operating expenses, investment) for other uses than in projected appropriations, with the provision that managers shall not convert funds into additional wages. In short, it is possible to draw on wage funds to finance the operating expenses, but not *vice versa*...

To get a clear understanding of the issues of autonomy and accountability, a couple of key characteristics of the programs architecture should be remembered. : Each program is the responsibility of an executive official (usually at the level of "director" within the government). Each program is divided into '*operational budgets of program*' (*Budget Opérationnel de Programme* - BOP), comprising "*the share of funding a program available to an identified responsible for an area of activity (for example part of the program) or territory (region, department ...), in order to harmonize the management of funds from spot*"¹².

For the Mission Justice, the chiefs of courts are responsible for BOP: there is one BOP for each appeals court. One would expect that the asymmetric fungibility can be implemented by chiefs of courts as being responsible for BOP, but in practice fungibility is controlled and decided by the program executive manager -- the Director of Legal Services within the Ministry of Justice. In this respect, a persistently high level of centralization of decision making is inconsistent with the spirit of "accountability" of funds managers that LOLF is supposed to promote¹³.

Authorization of expenditure

What about the administrative and budgetary management of courts? Since 1996 the management of courts is supported by the Regional Administrative Services (RAS)¹⁴ which depend on chiefs of appeal courts. The RAS were benefiting an administrative support provided by the state administration at the local level (*préfectures*): management of authorization of expenditure was provided the *préfectures*. A 2004 decree transferred to the chiefs of court the task of expenditure authorization, excluding capital expenditures¹⁵. The shift of these accounting functions from local-level State Administration to the Chiefs of Courts is not without both technical and institutional problems.

The institutional problem concerns the fact that one can not separate the financial management of courts from the judiciary (and its basic principles). The chiefs of courts are simultaneously the first presidents and prosecutors of the Courts of Appeal. The fact that they are authorizing expenditures may undermine the principle of separation of judicial power and prosecution. The conference of first presidents of the *Cours d'appel* has unsuccessfully published a motion against this change in the management pattern of courts: "*The establishment of a very complex co-scheduling, which makes the implementation of the budgets of courts dependent on the signatures of the first President and the Attorney General, causes confusion. It causes confusion between prosecution and the representation of the public interest, which is the sole authority of the Attorney General who is hierarchically subordinate to the Ministry of Justice on the one hand and the judicial activity which is the sole responsibility of independent judges.*"¹⁶

As to the technical problems, they are due to the fact that before the 2004 reform, the time-consuming management of authorization of expenditure was provided by the services of the *préfecture*. Indeed, the transfer of responsibility to the heads of court was not accompanied by additional staff resources. The chiefs of courts were forced to assign officers to

¹³ The statement of the First President of the Court of Appeal of Caen, Mr. Didier Marshall, illustrates this diagnosis: "Never Chancery was also mandatory in the management of resources. The LOLF eventually resulted in both early years, a highly centralized management leaving no initiative to jurisdictions posing on the regional administrative services, sometimes treated as external services of the central government, considerable pressure". D. Marshall, op. quoted, at p. 130.

¹⁴ SAR (Service Administratif Régional) in French.

¹⁵ Decree No. 2004-435 of May 24, 2004 - art. R. 213-30 of the Code of judicial organization.

¹⁶ See the Statement of the Conference of First Presidents of the Courts of Appeal dated June 2, 2005.

this heavy job, while the administrative staff is already inadequate in the courts and the clerks are not trained to perform accounting and financial management functions. Moreover, the balance between the judicial and administrative responsibilities within the courts is severely affected. The relationship between the chief clerks with responsibilities and managers/judges seems marked by a tension on the one hand; on the other hand, the relationships between the President of the Court of Appeals and the Prosecutor concerning funds allocation and utilization is not yet clarified and seems to vary according to the level of jurisdiction. According to Jean-Paul Jean and H el ene Pauliat¹⁷ and a Report of the S enat¹⁸, at the level of the Courts of Appeals, the general prosecutors seem to be more committed to administrative matters than the First President, more sensitive to the case-workload *stricto sensu*, whereas that at the level of the Tribunaux de Grande Instance, the reverse situation prevails: the prosecutors devote more time to prosecution than to management of the court, which is tackled by the President.

The Apportionment of Funds Between Jurisdictions

The chiefs of courts must also allocate funds within the first instance courts in the jurisdiction of their court of appeal. The apportionment of funds is made after consultation with presidents of courts of all levels within a region, by means of a budget conference. Since January 1, 2006, the chiefs of Courts of Appeal assume, as part of their Operational Program Budget, the management of the entire funds allocated to the courts located within their jurisdiction. These resources are allocated as a lump sum, the amount of which is determined after a series of budgetary conferences organized at the regional level. These conferences are to discuss budget requests and check their justification. The chiefs of courts of appeal are received by the director of judicial services at the Ministry of Justice for a negotiation of management issues, after which the tradeoffs are made and the final budget is notified to the operational programming budgets (BOP). The chiefs of courts then organize the distribution of funds among the courts of their jurisdiction.

As noted by senators D etraigne and Dutour in their report on the Project of Budget Law 2008 concerning Justice and access to justice, the chiefs of courts as well as the Presidents of lower courts have only a very small leeway in managing credit. It follows that any savings or efficiency improvement realized by courts of first instance was not returned to them. Thus, the Tribunal de Grande Instance of Nanterre had achieved savings of 1.4 million euros over the post of legal fees without getting a matching contribution equivalent to another item of expenditure, contrary to expectations stimulated by the principle of interchangeability (fungibility) of credits¹⁹. The conditions under which the funds have been delegated to first level courts by the appellate courts are not satisfactory. It seems that appeal courts are reluctant to give some leeway to the courts of first instance, which does not contribute to the empowerment of managers as intended by the LOLF.

Legal Aid and Legal Costs: A More Restrictive Budgetary Pattern, A Legally-Driven Shift of Cost Bearers

As regards justice, provisional funds were traditionally allocated to finance two kind of legal expenses that depend only to a small extent on judges' decisions. The main part of these expenses (such as telephone tapping or forensic evidence in criminal cases, investigations into the social field of protection of minors, etc.) and legal aid are not under the sole control of the judiciary. Their amount depends on other actors than the judges, such as police services and litigants. These two sources of expenditures in recent years, have become a genuine obsession on the part of the political majority in parliament²⁰.

Regarding legal aid, reforms introduced since 1991 drive the change in the same direction: the transfer of costs from the state to other cost-bearers. The Act of July 10, 1991 provides that "in any matter, counsel for party benefiting partial or

¹⁷ Jean-Paul Jean, H el ene Pauliat, "An Evaluation of the Quality of Justice in Europe and its Developments in France", *Utrecht Law Review*, (2)2, dec. 2006, at. p. 53 and following.

¹⁸ S enat, Rapport d'information fait au nom de la commission des Lois constitutionnelles, de l egislation, du suffrage universel, du R eglement et d'administration g en erale par la mission d'information sur l' evolution des m etiers de la justice par M. Christian COINTAT, Annexe au proc es-verbal de la s eance du 3 juillet 2002, n o 345.

¹⁹ S enat, Avis pr esent e au nom de la commission des Lois constitutionnelles, de l egislation, du suffrage universel, du R eglement et d'administration g en erale (1) sur le projet de loi de finances pour 2008, Adopt e par l'Assembl ee nationale, tome III : Justice et acc es au droit, par MM. Yves D etraigne et Simon Dutour, Session ordinaire de 2007-2008 - Annexe au proc es-verbal de la s eance du 22 novembre 2007.

²⁰ S enat, Commission des finances, Rapport d'information n o 23 de M. Roland du Luart, s enateur de la Sarthe (rapporteur sp ecial de la mission "Justice") : *L'aide juridictionnelle : r eformer un syst eme  a bout de souffle*, 2007. An expanded version of what follows is provided by T. Kirat & E. Serverin, "L'allocation des moyens en fonction de la performance : les limites du mod ele de r egulation issu de la LOLF pour le financement et l'administration de la justice", *Annales de la R egulation*, vol. 2 (2009), Biblioth eque de L'institut de Recherche Juridique de la Sorbonne - Institut Andr e Tunc, IRJS Editions, 59-78.

total legal aid may ask the judge to order the losing party to pay the lawyers fees, if he does not benefit himself legal aid..." According to a report in Parliament, this provision of the 1991 Act was scarcely implemented because the lawyers were pessimistic about the recovery of their fees from the losing party". They had more confidence on the payment of their fees based on public funds rather than on money in the pockets of the losing parties in trials.

In 2005, two steps towards were made as regards the shift in the cost-bearing pattern. First, the Ministry of Justice enacted a directive dated January, 12 about divorces²¹. The directive recommended the judges to take a better account of positive changes in the financial capacities of litigants benefiting legal aid in the course of the judicial process. Second, a similar directive dated 25 February concerning filing and examination of legal aid applicants by the Legal Aid Bureau reminded the latter that the benefit of a counsel ex officio should not automatically imply the benefit of legal aid²². The Directive also specified that the ex officio lawyer must agree on the fees which he will claim with the person whom he assists, if this one has resources higher than the ceiling for obtaining a legal aid.

Two years later, a law enacted 19 February 2007 concerning insurance of legal protection²³ provides that the principle of subsidiarity of legal aid is comparable to the benefit in insurance of legal protection. With that law, the burden of litigation costs is allocated on the insurance industry rather than on state funding.

In addition to legal aid, control of *legal costs* has become a central policy objective, after finding an alarming and excessive raise of these costs in recent years (e.g. in the appropriations acts, they increased by 48% between 2000 and 2004).

The desire to control and reduce legal costs has led to a series of steps: first to convert these credits, originally provisional credits, into limitative ones. In the first case, the funds were assessed on an interim basis, and upward adjustments as needed were available. In the second case, the funds allocated are final and no overtaking is allowed. The governments' commitment to lower the funds allocated to legal costs has also led to negotiation of discounted rates with mobile phone operators for the costs of wiretapping in criminal proceedings. In regard of another costly process, namely the deployment of genetic and medical expertise, the Ministry of Justice has launched a competitive tendering process towards laboratories for fingerprinting for a national computerized file of DNA.

In addition, the allocation of legal costs is directed primarily to the criminal at the expense of investigations or expertise in civil proceedings, to an extent that it is not feasible to measure it accurately.

Conclusion

In conclusion, we must insist on the two main effects of the LOLF and the reforms that accompany it: First, a huge increase of management responsibilities for the chiefs of courts of appeal and the heads of the lower courts, without an allocation of means to adequately administer these time consuming responsibilities. (And knowing that the increased budget for the mission "judicial justice" primarily benefits the program "Penitentiary administration"). Second, the chiefs of courts have not gained a real autonomy in terms of management and budgetary decision making. Ultimately, the implementation of the LOLF results, for courts and regional administrative services, in an overload of managerial and administrative tasks, without additional human resources, even without efforts to train judges and clerks in order to enable them to deal adequately with their administrative and budgetary responsibilities. In this regard, there is good empirical evidence that the increase of administrative and managerial tasks performed by the judges is correlated with a higher duration of case processing, a worse clearance rate, and a lower quality of justice²⁴.

In other words, under the new clothes of LOLF and the language of "performance" and "quality", judicial justice is the subject of actions unfavourable to a smooth functioning of the courts, given the heavier management tasks for judges and

²¹ Circulaire du 12 janvier 2005 relative à la mise en œuvre de la réforme du divorce.

²² Circulaire du 25 février 2005 relative à l'enregistrement et à l'instruction des demandes d'aide juridictionnelle.

²³ Loi n° 2007-210 du 19 février 2007 portant réforme de l'assurance de protection juridique.

²⁴ see Edgardo Buscaglia & Maria Dakolias, *Comparative International Study of Court Performance Indicators. A Descriptive and Analytical Account*, The International Bank for Reconstruction and Development / The World Bank, 1999 ; on Brazilian courts, Luciana Luk-Tai Yeung & Paulo Furquim de Azevedo, "Beyond Conventional Wisdom and Anecdotal Evidence: Measuring Efficiency of Brazilian Courts", Escola de Economia de São Paulo, Fundação Getúlio Vargas, São Paulo, Brazil ; on Norwegian courts, see Sverre A.C. Kittelsen & Finn R. Førsund, "Efficiency Analysis of Norwegian District Courts", *The Journal of Productivity Analysis*, 3, 1992, 277-306.

clerks, without autonomy, without adequate means, without the possibility for court to find a positive reward for their budgetary efforts to improve the administration of the courts in terms of means and results. The case illustrates the judicial justice to the environmental elements of diagnosis posed by the First President of the *Cour des Comptes* on the occasion of his speech at the solemn annual assembly of this institution, stressing that "the budget management in accordance with the 'LOLF regime' remains largely the domain of theory". President Seguin also put the emphasis on "the continuing of old budgetary practices and management" but, more importantly, he questioned the quality and relevance of indicators of performance, hence the realism and relevance of some "annual performance reports". President Seguin finally focused on "a kind of contradiction" between the LOLF and the organization of the governmental administration²⁵. This last issue reflects the contradictions outlined above between the logic of autonomy and accountability brought by LOLF regarding the chiefs of courts, and the persistence of poor budgetary responsibilities and centralized decision-making.



²⁵ Discourse of President Seguin, séance solennelle de rentrée de la Cour des comptes, January 27, 2009.