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PERFORMANCE VS ETHICS: AN IMPOSSIBLE CHALLENGE FOR TODAY'S JUDGES?

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In October 2018, the French General Inspectorate for the Administration of Justice, a body working for the Ministry of Justice, published a report entitled "Mission on the attractiveness of the functions of Prosecutor", the aim of which was to identify and give qualitative solutions to the attractiveness of these functions. In December 2018, the French Audit Court released its own report on the Administration of Justice, called "Methodological approach to Justice costs", the aim of which was to find a way to set quantitative standards to evaluate the needs of French courts and provide adequate financial resources. It notably pointed out "a progression in court subsidies, yet a degradation in performance".

This coincidence summarises the ambiguous discourse that European States have about their Justice Administrations, and judges and prosecutors themselves: on the one hand, a need for qualitative and humane Justice; on the other, the will to master costs and to provide efficient Justice.

"Performance" is not a legal word. It used to be a word referring to sport and entertainment: those who ordinary perform tend to be musicians, actors or athletes, because when they perform in front of an audience, they actually do a job. However, their work contains an extra spark - a pianist "performs" because any mistake he makes can potentially ruin everything. The piece he plays has to be played *perfectly*. Therefore, the second common usage of the word "performance" applies to the world of mechanics: as a machine cannot do wrong, it naturally "performs". When related to machines, the definition of performance changes slightly: a machine does its work perfectly when it produces the quantified amount of work it was programmed to produce. Thus, performance means two things: an extraordinary way to produce something – the entertainment meaning –, and a fully accomplished way to produce something – the mechanical meaning.

Ethics seem to be far from the idea of performance. They are a matter of quality rather than quantity. In the judicial field, ethics are halfway between the professionalism of judges and prosecutors and the idea of Justice that a society commonly shares. Judicial ethics traditionally merge into values: independence, impartiality, integrity, legality, etc - Judicial ethics can be defined as standards of behaviour in the judicial field, the way judges and prosecutors have to behave. Judicial ethics are dictated by the status of judges and prosecutors, their office within the State, their role as a constitutional and counter-power, designed to have balanced institutions. Above all, these standards are professional, yet there are some morals in them too. Together, they create a guideline for judicial officers, and this guideline provides the extra spark that transforms the simple application of Law into Justice.

The 1980s triggered a movement which is now a burning issue for European chanceries: "the need to rationalise judicial production [was] a reaction to the dramatic increase in judicial demand[1]". Two different yet simultaneous things were expected of judges and prosecutors from then on: they had to solve more cases with the same tools as before– subsidies, time and workforce. To help them do so, a new form of management gradually made its way into the Justice Administration: "New Public Management". This concept, which emerged in the 1970s, became the dominant paradigm against which all public administrations/services should be tested: this included not only the justice system, but also hospitals and universities. It supposes that public administrations are not really different from private companies: as they have limited allowances and workforces, and as they need to produce results, their action can be quantified and optimised in a very pragmatic way. In other words, just like private companies, public administrations have to be productive and to *perform* well.

This managerial policy gave new meaning to the word "performance" and ushered in a new era of thinking about the justice system, which was to have a real impact on the professional conduct of judges and prosecutors. As Justice can be thought of in terms of offer and demand, judges and prosecutors would necessarily have to change the way they worked. By quantifying the variables of a case – complexity, persons involved, time, costs of investigation, etc. – courts could be compared and best practices identified. From the 1980s, "the question was less to know whether Justice had done well, than to know if it had efficiently drained away the flow of cases it had been given[2]".

The importation of the managerial model into the traditional rule-of-law model was supposed to remedy the crisis facing the latter: a budgetary crisis, overcrowded courts due to society becoming more and more litigious, the digital and technological evolution, etc. The managerial model was said to be fully in tune with the modern world: it is fast and efficient whereas the rule-of-law model is bureaucratic, rigid and slow. Moreover, the strength of the managerial model lies in its emphasis on the benefits that will be reaped thereof. Indeed, who would not want a faster and less costly justice system? Its success also originates from its apparent political or ideological neutrality. Yet, behind a purely technical and pragmatic

1 A. Garapon, *La raison du moindre Etat. Le néolibéralisme et la justice,* p.54.
2 *Ibid*., p 55.

discourse lurks another form of governance: a governance by numbers[3], not by laws, whose new normative ideal is to attain measurable objectives and which transforms the judge into an executive agent compelled to produce.

However, a managerial type of justice calls judicial ethics into question. Independence and impartiality are at stake, as the way subsidies are allocated is often a decision of the executive power. Professional conduct is questioned as well: if courts and judges themselves are forced to compete, there may be a risk of standardisation of decisions, in order to go more quickly, at the cost of quality justice. Furthermore, the chosen criteria to measure performance raise the issue of defining good justice: is efficient justice good justice? Will the judge still be an inspiring democratic figure if his role is nothing more than managing risks? On the other hand, won't his authority be undermined if he is expected to negotiate with offenders?

Therefore, what could possibly emerge from this apparently problematic coexistence of, or indeed competition between, the two models? Can they be compatible or reconcilable at all? What is happening to the judiciary, the guardian of the Rule-of-Law model, when it has to abide by a managerial organisation?

The first reaction towards change is often criticism. As a matter of fact, performance does seem to threaten judicial ethics (I). However, criticism without reflexion is pointless, all the more so since performance is now part of the judge's expected professional conduct. Indeed, many alliances between performance and judicial ethics already exist, which may lead to a renewed approach of the latter if mutual adjustments are made (II).

I. PERFORMANCE: A THREAT TO JUDICIAL ETHICS?

As it apparently cannot coexist with independence (A), and as it deeply changes the way magistrates work and by this, the idea of justice itself (B), performance seems to be a threat to judicial ethics.

[3] On this concept, see the seminal book by A. Supiot, *Governance by Numbers. The Making of a Legal Model of Allegiance*, Hart Publishing, 2017.

A. Performance: a threat to the independence of justice?

Before analysing the potential threats posed by the notion of performance, it is important to remember that determining a budget is a particularly sensitive issue when it comes to Justice. The principle of the separation of powers and the cardinal principles of independence and impartiality should be respected. As the legislative and/or executive branches play an active role in this process, it may be seen as a form of intrusion, as a threat to the above principles or even sometimes as a way to exercise pressure on judges and prosecutors. The results-oriented approach that is now used in many European budgetary procedures and Financial Acts might reinforce this possible abuse. Indeed, this logic implies that the judicial budget is determined according to different programmes that are divided into specific objectives, which in turn contain a number of performance indicators. At the end of the day, the budget depends on the capacity of judges to comply with the objectives laid down. For example, in the Netherlands, an output-based budget system has been implemented since 2005. A production time is determined upstream for judgements, sentences, hearings or court orders and a "minute price" is associated with it. The budget is thus determined this way: number of cases resolved in each category x minutes per case x minute price. If a court produces less than what was decided, it has to pay back part of its allocated budget. If a court produces more, it gets more money[4]. The main threat to this situation is that the legislative or executive branch uses economic and managerial arguments to indirectly put pressure on and/or influence the administration of justice. Several questions thus arise when thinking about budget: on the one hand, which actors should participate in determining the judicial budget? Should judges administrate themselves in order to respect their independence? On the other hand, who should decide and define the indicators to be used to evaluate the performance of Justice? And how should they be determined in order to respect the principle of independence?

The French government decided to go from a resource-based approach to a result-based approach at the beginning of the 21st century, taking a step forward to New Public Management principles. In 2001, a new budget procedure was thus adopted called the "*Loi organique des lois de finances"* hereinafter LOLF. According to this new procedure, the national budget is

4 M. Visser, R. Schouteten & J. Dikkers, "Controlling the Courts: New Public Management and the Dutch Judiciary", *Justice System Journal,* 2019, p.5.

determined according to "missions" and "programmes". There is one "Justice Mission" (*Mission justice)* which is divided into five different programmes:

- Judicial justice (programme 166)
- Penitentiary administration
- Judicial protection of youths
- Access to law and justice
- Administration of justice and related agencies[5]

Each programme has its own associated objectives, corresponding to various programme activities, each of them comprising several indicators. The French Audit Court's report on the Administration of Justice highlights several difficulties. Two of them are particularly important in view of the principle of independence. The first problem concerns the implementation of an annual "management dialogue" (*dialogue de gestion)* – which promotes exchanges between the administration, heads of courts and the government in defining financial and human needs within each court. The Audit Court underlines the diversity of actors that participate in this process and the lack of coordination between them so that they are not able to make proposals on time and the final decision rests with the government.

The second problem concerns the performance indicators used to determine the objectives, programmes and Justice budget. The above report highlights that the current tools used to analyse and follow court activities in France lack reliability and that they largely depend on the quality of the data[6] entered. As the performance indicators are based on them, one might wonder about their reliability. In addition, it appears that the data is only based on statistics, which means that indicators have a quantitative approach. In turn, it would mean that justice is now mainly evaluated according to a quantitative logic. For example, the first objective of "Judicial justice" (programme 166) is to render qualitative decisions on civil matters in a reasonable time. Eight indicators have been selected to measure the quality of decisions: four of them measure deadlines and stocks (the average processing time, managing case flows), two measure the productivity of judges and civil servants (number of cases solved) and two indicators measure the lack of quality (percentage of application for interpretation, rectification

5 T. Kirat, "Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment", *International Journal For Court Administration*, April 2010, pp. 1-2).

6 Cour des comptes, *Approche méthodologique des coûts de la justice, Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires,* Décembre 2018, p.65.

of a factual error, appeal and cassation)[7]. If celerity is important, how are the other ethical principles taken into account in these indicators? It seems that they are set apart from this approach of judicial performance.

One also has to raise the issue of the actors that define performance indicators. Again, this process can be a way to influence and/or put pressure on the administration of justice. In 2005, the French Senate published a study on the implementation of the new Financial Act in the judicial system. It pointed out that many judges complained about the fact that they had not been associated with the procedure of defining indicators[8]. More especially, if quantity is put forward compared to quality, one may legitimately think that traditional judicial ethics are undermined. For example, in 2012, seven appellate court judges signed a Manifesto in which they underlined that "the quality of the administration of justice is under pressure, many cases do not receive the attention they deserve, and irresponsible choices have been made to meet outcome criteria"[9]. In a survey commissioned in 2013 on the nature and development of judicial work in the Netherlands, "*71.2 percent of judges indicated that they "often" or "sometimes" make concessions to the quality of the work in order to execute the assigned tasks within the allocated time"*[10].

While a result-based approach threatens the principle of the independence of Justice, it can also threaten the independence of judges as stakeholders in a jurisdictional act. While evaluating judicial work seems to be important to some extent in respect of career development, one may question the use of performance indicators such as the number of cases resolved, the number of actions against court decisions or even worse, the number of judgements that are being reversed by a higher court[11]. Furthermore, some countries – such as France – have put in place a "performance bonus" for judges and prosecutors. If this new policy can be construed as a tool to emulate professionals and provide incentives, it clearly goes against the specific judicial ethos ("*l'esprit de corps"),* as it individualises and differentiates judges. Secondly, this new logic pushes judges towards one goal: to be more efficient or quickly progress and earn

7 D. Marshall "L'impact de la loi organique relative aux lois de finances (LOLF) sur les juridictions", *Revue française d'administration publique,* 2008/1 n°125, p.124.

8 Cour des comptes, *Approche méthodologique des coûts de la justice, Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires,* Décembre 2018, p. 62.

9 M. Visser, R. Schouteten & J. Dikkers, "Controlling the Courts: New Public Management and the Dutch Judiciary", *Justice System Journal,* 2019, p. 6.

10 *Ibib.*, p.8.

11 B. Frydman, *Concilier le management avec les valeurs du judiciaire?* Working Papers Centre Perelman de Philosophie du Droit, 2012/04.

money. But where does it set their independence and impartiality? Thirdly, the use of such logic ignores the fact that judges never act on their own but "as part of a team". While they may take the final decision on their own, they largely depend on court clerks, lawyers or security forces on a daily basis. Finally, using judicial numbers and statistics contributes to a movement that questions the social self-regulation of Justice and by which judicial actors are now asked to be accountable[12]. If judges have to show their efficiency only through numbers and statistics, what place does their independence and impartiality occupy?

B. Performance: a threat to professional conduct and the role of judges?

Performance is now expected of judges, and their efficiency is assessed through numbers and statistics. So as to fully understand the impact of performance-based policies on judicial independence and impartiality, it is necessary to understand the context in which these policies were born. Once this context is understood, examples of new professional conduct will be examined. Finally, an interpretation of the new office of judges will be analysed.

According to Michel Foucault[13], the 1970s were the decade when neoliberalism started being the philosophical and economic reference of European governments. In this mode of "governmentality", States do not seek to set moral standards, to promote or hamper peculiar lifestyles: States just seek to "govern less", and to legislate to a minimum, so that people can produce wealth easily. While in the 17th century, laws had to regulate markets, the neoliberal government of the 1970s allowed the market to set its own truth, and simultaneously sets the paradigm according to which laws should be created. In the neoliberal State, laws are not driven by ideological and political views, they just need to be efficient. The idea is, more or less, to let Adam Smith's "invisible hand" rule politics.

The rule-of-law which had accompanied the creation and stabilisation of European States during the 19th century had given special treatment to Justice administration: because the rule of law protected individual rights and freedoms, it could be slow, opaque and formidable. The way justice was done was as important as the final decision. The symbolic angle was prevalent. From the 1970s and the spread of neoliberal ideas amongst administrations, there

12 A. Vauchez, "Le chiffre dans le "gouvernement" de la justice", *Revue française d'administration publique*, 2008/1 n°125, pp. 111-120.
13 FOUCAULT Michel, *Naissance de la Biopolitique*, Seuil, Paris, 2004.

was no need for the Justice administration to be symbolic, in the same way that there was no need for other administrations. It was simply expected to be efficient, and laws help it to be so. In 2019, the French *Conseil Supérieur de la Magistrature* (Council for the Judiciary) released a new version of its *Collection of Deontological Duties.* In a chapter on "Professional Conscientiousness", point 9 reads: "[The judge] is careful to reconcile case flow management with the solving of cases, the requirement of reasonable time, the respect of procedure and legal rules, and the quality of the service given to the public[14]". Thereby, performance is now rooted in the professional conduct expected of a judge. An ethical judge or prosecutor cannot but have a rational and managerial overview of his own work. Judges have to make decisions, and these decisions will be all the more ethical when they are given quickly. Performance is now a legal expectation, as stated in article 6§1 of the European Convention on Human Rights which reads a "reasonable time". It is also expected on an ethical level, as highlighted in the *Collection of Deontological Duties.*

These new expectations of Justice administration have a massive impact on the professional conduct and ethics of judges. They may be tempted to work with new tools, such as Big Data, and standardise their response to criminal cases.

The tools of predictive justice are often shown as modern solutions, in order to accelerate the process of decision-making, and thus to enhance performance. Thanks to a gigantic compilation of previous decisions, algorithms could analyse a case and propose a solution, based on a jurisprudential average. In Estonia, this new tool is supposed to replace civil judges for cases involving less than 7,000 euros by the end of 2019[15]. This example raises many ethical questions. In France, these algorithms are touched upon as a potential future tool for judges to reduce legal uncertainty, and to help enforce equality before the law[16]. The problem is, as judges are expected to solve cases in an ever-reduced amount of time, they can be tempted to follow the algorithmic answer without questioning it. The result would be dehumanisation and a great threat to the traditional independence of Justice. Moreover, decisions would become more and more homogenised, when personalization is expected. Trial waiver systems help complete this dehumanisation.

Trial waiver systems are procedures in which a full trial is avoided. They serve to reduce costs, and save time for judges. Born in the U.S.A., plea-bargaining is the most famous example.

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14 CONSEIL SUPERIEUR DE LA MAGISTRATURE, "Collection of deontological duties".
15 Dalloz Actualité, 15 avril 2019, "Reality beyond the fantasy of a robotic Justice".
16 CADIET Louis, "Report on open data of justice decisions", 2017.

In this procedure, the prosecutor deals with the defendant: the trade is an agreement to plead guilty in exchange for a lighter sentence, or an agreement to plead guilty to at least one charge in exchange for the dropping of others. In this very deal, the motto of neoliberalism can be found: what is sought is not particularly Justice, but a quick answer, and the market is the quickest solution to solve a problem. According to a 2015 report,"The disappearing trial", by the British NGO "Fairtrials", Austria, England and Wales, Ireland, Italy and Scotland were the only European countries to use trial waiver systems before 1990. In 2016, almost every European country featured them[17]. These procedures, especially plea- bargaining, can be a threat to independence on two levels. Firstly, for judges themselves: in a context of overflowing courts, judges who oversee and approve the transactions between the prosecutor and the defendant can be tempted to simply confirm what has been decided, so as to save time. In the bigger picture, these procedures enhance the power of prosecutors, and reduce the role of judges, at the expense of a fair trial. As it gets more efficient, justice administration also becomes less independent of the executive power.

This way of managing Justice administration has been criticised: by judges and prosecutors themselves, who have experienced these transformations as a reduction of the specificity of their job[18]. Criticism also comes from intellectuals and academics, who notably point out that this phenomenon implies a depoliticisation of Justice administration[19]. Judges become managers of human relationships.

Focusing on numbers and promoting algorithms and trial waiver systems means that the very role of judges is indeed changing. Michel Foucault showed that in the 1970s, in order to govern less, political powers ceased to set political priorities first and ways to tackle these issues afterwards; they instead started by identifying problems which could be tackled easily, and made laws to deal with them afterwards. This new way of governing works "not thanks to a Law which organises, but thanks to judicial practices which make concrete solutions happen ; not through legal texts anymore, but through pre-existing habits called "best practices" or "rules of conduct[20]"". Hence the massive spread of trial waiver systems. Thus, the question is no more "what could the judge's role be in bringing justice?" but rather "how can the judge solve this

17 FAIRTRIALS ONG, Report "The disappearing trial", p30-31.

18 D'HERVE Nicolas, « La magistrature face au *management* judiciaire », *RSC*, 2015, p. 49.

19 VIGOUR Cecile, "Justice : l'introduction d'une rationalité managériale comme euphémisation des enjeux politiques", in Droit et société 2006/2-3 (n°63-64), p425 -455.

20 GARAPON Antoine, « Michel Foucault, visionnaire du droit contemporain », Raisons politiques, 2013/4 (N° 52), p. 39-49.

case quickly?" In managerial justice, judges are not inspiring figures who speak the democratic words of liberties; they become managers of human relationships, speaking the economic word of efficiency. To some extent, with managerial justice, judges merely help ease human relationships, by accelerating the outcome of people's problems. And as the whole of society has been judiciarised, more and more inter-individual situations which were extra-judicial in the 20th century are now judicial cases. Therefore, in the name of efficiency, judges may even be evicted from procedures if their role seems no longer necessary. The process of decision-making is far less important than the final response. Divorce is a good example. In France, divorcing couples have been able to divorce without seeing a judge since 2017, if they agree on the act of divorcing and its consequences. The judge's oversight and independence, which facilitate an efficient procedure, is totally missing.

Consequently, judges face the remarkable situation of reshaping their own ethics, as the question of their very purpose is raised. Efficiency seems to be the major expectation judges face, perhaps at the cost of every value which composed their former ethos. Rumours of suppressing the French National School for the Judiciary in order to merge the training of judicial judges with that of administrative judges seems logical in this perspective[21].

However, is this evolution wrong? The management system is now widespread in Europe, and European judges tend to accept it. For instance, in 2012-2013, the European Network of Councils for the Judiciary (ENCJ) wrote a report on "Minimum standards regarding evaluation of professional performance and irremovability of members of the judiciary". The aim of this project, supported by representatives of 14 member institutions (Belgium, Bulgaria, England and Wales, France, Ireland, Italy, Lithuania, the Netherlands, Northern Ireland, Poland, Portugal, Romania, Slovenia and Spain) was "the identification of relevant minimum standards in the field of assessment of professional performance and irremovability of judges and prosecutors, in order to make it possible to evaluate those standards at a larger stage by means of a set of indicators to be used as a tool for self-evaluation of the different judicial systems[22]". Considering performance as a part of their own professional conduct instead of considering it as an enemy may be a solution. This new horizon needs to focus on practices rather than principles. Does society need to judge *everything?* Obviously not. Is it not beneficial to everyone that Justice becomes faster? It would seem so. According to the French judge Nicolas d'Hervé, the agreement of judges to move towards New Public Management depends

21 Libération, 17/04/2019, "Emmanuel Macron veut-il supprimer l'Ecole Nationale de la Magistrature ?".
22 NCJ Report "Development of minimal judicial standards", p. 5.

on "the degree of responsibilities they have [...], seniority [...], and the office they hold. [...] Finally, their agreement will depend on their individual professional culture and personal sensitivity[23]".

For him, these changes are possible but they will need a strong and fair collaboration between judges and prosecutors. Performance and judicial ethics can be allies, if mutual adjustments are set up.

II. PERFORMANCE: A RENEWED APPROACH TO JUDICIAL ETHICS?

Traditionally depicted as an anathema to judicial ethics, performance is nonetheless not so alien to core judicial duties despite what might seem at first blush (A). If possible alliances do exist between performance and judicial ethics, their respective origin and culture make it necessary for them to adjust in order to preserve the singularity of the justice system and to fulfil their promises (B).

A. Performance and judicial ethics : possible alliances

Understood as something that works well, the notion of performance bears various similarities to, or indeed may be equated with, old-established ethical obligations such as the proper administration of justice or conscientiousness. This concern is well-known and widely entrenched across national, European and international judicial traditions. Thus, in France, the Collection of Ethical Duties states, under the heading "efficacy and diligence", that "the judge must carry out his/her tasks with diligence and, if need be, inform his/her superior of the obstacles he/she might encounter before his/her service deteriorates"[24].

Various European instruments also recall these duties, with a growing and unabashed reference to managerial terms. The most famous instance in this regard is probably the European Commission for the Efficiency of Justice (CEPEJ), which publishes a report every year analysing the functioning of judicial systems and ensuring that public policies relating to the courts are geared to greater efficiency. The European Network of Councils for the Judiciary (ENCJ) also published a report identifying minimum standards in the field of assessment of

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23 D'HERVE Nicolas, « La magistrature face au *management* judiciaire », *RSC*, 2015, p. 49.

24 Conseil supérieur de la magistrature, *Recueil des obligations déontologiques*, Chapter V, p. 20, available at http://www.conseil-superieur-magistrature.fr/publications/recueil-des-obligations-deontologiques.

professional performance, such as "the efficiency and effectiveness of the actions taken in the exercise of judicial functions; the ability to organise judicial work in identifying issues or carrying out other tasks and functions; the managerial culture", etc.[25].

Likewise, the European Court of Human Rights has developed abundant case-law on reasonable time, whose breach may give rise to compensation[26]. Interestingly, in placing focus on the behaviour of judicial authorities, the Court refers to a benchmark provided by the European Commission for the Efficiency of Justice.

This is also instilled at the very beginning of a judge's training in France. The National School for the Judiciary offers a class on the "administration of justice" in its curriculum, which aims at raising awareness on these issues. The basic skills to be acquired are the ability to organise, manage, innovate, adapt and take into account the institutional environment. The content of the training includes, amongst other things, the means and the economy of justice.

In practice, the logic underlying the proper administration of justice or performance has given rise to various reforms:

- The reform of the judicial map, which was launched in 2007 in France and consisted in gathering courthouses together with a view to increasing productivity. The criteria of the number of cases and the allocation of the means available to the justice system were promoted to the rank of general interest objectives, thereby dismissing other considerations such as the geographical distance this might create for justice users.

- The promotion of what is known in France as "Real-Time Treatment" of criminal proceedings, which was hailed as a response to the slowness and inefficacy of criminal justice. This fast-track procedure implies that, as soon as an investigation is completed, investigators phone the prosecution service and give a report on the case in hand. The prosecution must then decide how the case should be dealt with.

[25] https://www.encj.eu/images/stories/pdf/workinggroups/final_report_encj_project_minimum_standards_iii_corrected_july_2014.pdf.
[26] See, amongst others, ECHR, 8 Dec. 1983, *Pretto v. Italy*, n° 7984/77; ECHR, 25 March 1999, *Pélissier et Sassi v. France*, n° 25444/94 ; ECHR, 22 May 2003, *Gouveia da Siva Torrado v. Portugal*, n° 65305/01 ; ECHR, 29 March 2006, *Cocchiarella v. Italy* , n° 64886/01 ; ECHR, 24 Sept. 2009, *Sartory v. France*, n° 40589/07; ECHR, gd. ch., 10 Sept. 2010, *McFarlane v. Ireland*, n° 31333/06.

- The development of alternative dispute resolution (ADR), *i.e.* the procedure for settling disputes without litigation, such as mediation. ADR procedures are praised for being less costly and more expeditious. They have reached their climax with the 2019 Justice Reform in France[27], which encourages mediation at any stage in proceedings, whenever the judge deems it possible, even in fields where it was previously proscribed, such as divorce. The reform goes even further since it makes it compulsory for the parties to try and settle their dispute before they go to court, as long as it does not exceed a certain amount (around 5 000 Euros).

  A similar development consists in releasing the judge from some of his/her traditional functions. Thus, as mentioned previously, spouses can now get a divorce without the intervention of a judge when they both agree to it[28], and from now on, it will be up to a notary to receive the consent to medically-assisted reproduction[29].

  On the criminal-law side, the new mantra is to give more power to prosecutors in order to avoid a judge having to decide a case. Thus, as in the example of the plea bargaining procedure mentioned earlier, the judge does little more than approve the sentence negotiated between the prosecutor and the offender.

- One of the most recently debated development has been the advent of digital technology within the realm of justice, which entails a profound symbolic revolution and is a source of both hope and concern. Predictive justice is often acclaimed as a remedy to cure the three evils of any judicial system: costs, delays and predictability. Indeed, predictive justice may bring about quick and predictable solutions, especially for simple disputes. Moreover, no ethical duty would oppose the use of new technologies as long as they improve the quality of justice and do not jeopardise individual freedoms[30].

  In this sense, the recent reforms on the dematerialisation of various proceedings such as orders for payment have moved in the right direction. Some countries are even in the vanguard of progress in paving the way for algorithms. The most ambitious project to date emanates from the Estonian Ministry of Justice, which is designing a "robot judge"

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27 The *loi de programmation 2018-2022 et de réforme pour la justice*, which entered into force on March 23rd 2019.

28 See the *loi du 18 novembre 2016 de modernisation de la justice du 21ème siècle*.

29 See the 2019 *loi de programmation 2018-2022 et de réforme pour la justice.*

30 See chapter V, p. 20 of the French Collection of Ethical Duties, which remains – purposely? – silent on the definition of a justice of quality.

that could adjudicate small claims disputes of less than 7 000 €[31]. The project is still in its infancy and should start later this year with a pilot focusing on contract disputes. In practice, both parties will upload documents and other relevant information, and the robot judge will issue a decision that can be appealed to a human judge. Be that as it may, and even though digital technology can to a large extent improve access to courts and information, the law cannot be reduced to an information agency. It is above all a social and human experience[32].

All these reforms have been implemented for the sake of efficacy, diligence, the proper administration of justice and indeed performance. Therefore, to a certain extent, both notions – the proper administration of justice and performance – converge. In this sense, performance almost resonates as a contemporary notion for an old professional duty.

The gradual replacement of the proper administration of justice by performance is not insignificant: management has now become a professional duty in its own right. The latest version of the French Collection of Ethical Duties is particularly telling in this regard. The terms used to describe judges' missions draw directly from managerial vocabulary: management, flows, objectives, budget, etc. Interestingly, for the first time in 2010, the dialogue instituted between the French Ministry of Justice and Chief Justices regarding the means granted to courts has been renamed "dialogue of performance" whereas it was previously known as "management dialogue".

However, it would be illusory to think that performance and the proper administration of justice are interchangeable or equivalent notions. As we have seen, performance has been fathered by management and bears its stigma. In order to prevent a shift towards a purely quantitative conception of justice, which might become a measurable notion through benchmarking, indicators and audits, it is necessary to adjust the notion of performance to the specificity of the judicial system. This is not a lost cause. As has been pointed out, performance is a loose concept, "a subjective, variable, and contextual datum even though it is presented as

[31] See E. Niiler, "Can AI be a fair judge in court? Estonia thinks so", *The Wired*, 2019 https://www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/.

[32] See A. Garapon, « Le numérique est un remède à la lenteur de la justice », *Dalloz Actualité*, 4 May 2018 : https://www.dalloz-actualite.fr/interview/antoine-garapon-numerique-est-un-remede-lenteur-de-justice#.XOUZKcgzaUl. More generally, on this topic, see A. Garapon & J. Lassègue, *Justice digitale*, PUF, 2018.

a homogeneous label"[33]. Thus, the ambiguity and vagueness inherent to the notion of performance makes it adjustable.

B. Performance and judicial ethics: a necessary mutual adjustment

The current definition of performance, under the growing influence of management, tends to be purely quantitative. It is cost-oriented and prone to silencing the traditional missions of the justice system, making judicial debates more technical and stripping them of their political dimension. It is primarily focused on the way in which the judiciary carries out its tasks. The production of judgements becomes more important than their content. In other words, it equates justice with expenses and leaves behind the question of the search for meaning.

More precisely, we have seen in the first part of this paper the risks performance can represent for ethical duties and the role of judges. However, one should not throw the baby out with the bath water. Instead of dismissing the idea of performance altogether, one should set forth the fundamental principles that any managerial reform should respect[34].

Independence from other powers. This foundational principle dictates that the management of justice be exercised by the judiciary itself or by an authority within it. In any event, it should be independent from the executive power, notably the Ministry of Justice. For it to be successful, the management of justice must be self-management, which is not self-evident inasmuch as its funding comes from other powers. Management should not be an alibi to strengthen controls over the judiciary. In this regard, the Consultative Council of European Judges (CCEJ) rightly recalled in its opinion on the funding and management of courts with reference to the efficiency of the judiciary that "although the funding of courts is part of the State budget presented to Parliament by the Ministry of Finances, such funding should not be subject to political fluctuations. Although the level of funding a country can afford for its courts is a political decision, care must always be taken, in a system based on the separation of powers, to ensure that neither the executive nor the legislative authorities are able to exert any pressure on the judiciary when setting its budget. Decisions on the allocation of funds to the courts must

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[33] J. Duval Hamel, « La 'gestionnarisation' de la justice », in *Le nouveau management de la justice et l'indépendance des juges*, B. Frydman & E. Jeuland (dir.), Dalloz, 2011, p. 133.

[34] See B. Frydman, *Concilier le management avec les valeurs du judiciaire?*, Working Papers du Centre Perelman de Philosophie du Droit, 2012/04, available at http://wwwphilodroit.be.

be taken with the strictest respect for judicial independence"[35]. Thus, in Estonia or Slovakia, for example, the Supreme Courts directly present budget proposals to the Ministry of Finance. The CCEJ particularly suggests that the independent authority responsible for managing the judiciary could be the main actor through which views would be expressed and negotiated.
Such an authority already exists in various European countries, in the form of Judicial Councils. In this regard, the Special Rapporteur on the independence of judges and lawyers dedicated its last report to Judicial Councils, encouraging their creation[36]. Such Councils are independent of the executive, are competent for the appointment, assessment and promotion of judges and prosecutors and are granted means to audit, investigate and deal with complaints. They appear to be a neutral and most effective intermediary to first receive proposals from heads of courts and then synthesise them to present a final proposal to Parliament or the government while taking care that the search for performance and efficiency does not harm cardinal principles. In addition, going through one actor could resolve the diversity and coordination problem.
Moreover, managing being a job in its own right, would it not be preferable to create a body of justice administrators, based on the model of court managers, who already exist in various jurisdictions[37]? This would imply discharging chief justices of all acts related to administrative management, as opposed to acts related to procedural management and court organisation, which should remain a matter to be dealt with by judges[38].

Independence of the judge as the author of a jurisdictional act. The logic of management tends to reinforce hierarchical relationship: it assumes that there are managers and *managees*. Therefore, in order to find or frame a decision, there is a risk that first-instance judges would consult other judges, who are higher up on the judicial ladder and may well have to decide the same case as part of an appeal. Consequently, indicators which make the assessment of judges, and therefore their career development, dependent on the rate of appeals of their decisions should be banished. It would be more relevant to take any deviant behaviour into account.

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35 Opinion N° 2 (2001) , available at https://rm.coe.int/1680747492.

36 Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers,* 38 session, 2 May 2018.

37 The Council of Europe established and supported the second forum of court managers in March 2019. It focused on the introduction of HR guidelines prepared by the EU4Justice project, the public data sharing regulations, civil servant assessment criteria, effective communication and innovation management. See https://www.coe.int/en/web/cdcj/-/court-managers-forum.

38 See L. Cadiet, « La théorie du procès et le nouveau management de la justice : processus et procédure », in *Le nouveau management de la justice et l'indépendance des juges*, B. Frydman & E. Jeuland (dir.), Dalloz, 2011, p. 111.

Respect for a legal procedure. Justice must be done according to procedural rules determined by legal statutes and not on the basis of internal management imperatives. In this regard, special attention must be paid to the allocation of cases within a court, which is a matter of constitutional law in various legal traditions. Thus, article 13 of the Belgian Constitution reads that "no one can be reassigned, against his will, to a court other than that designated by law" – which is supposed to be the "natural judge" of the case[39].

Respect for Due Process. Last but not least, managerial recipes will have to make do with the right to a fair trial. Not only does this imply that "everyone is entitled to a fair and public hearing within a reasonable time", according to article 6.1 of the European Convention on Human Rights, but it must be ensured that the obsession with digits and standardisation that characterises management does not lead to a violation of the adversarial principle. Judges should take scales and ready-made models with a pinch of salt.

In elaborating these principles, it should be borne in mind that there are two visions of the justice system[40]. A macro-vision, which guides the public policies of the judiciary so that it offers the best possible service to all users, by measuring its overall performance. And a micro-vision which espouses users' perception and therefore fluctuates with daily experience or with the perception people have through the media. This puts the justice system at a disadvantage since judicial decisions do not aim to please the public. A balance therefore needs to be struck by using a variety of methods, both quantitative and qualitative.

Ironically, the notion of "quality" is not alien to New Public Management, whose very purpose is to proceed with quality control. This may explain why it established itself so easily within the judicial system. Indeed, the above examples show that, to a large extent, it has brought about satisfactory results. Thus, it is often said that the plea-bargaining procedure leads to a more muted and productive dialogue between the prosecution and the offender, whereas the latter might feel less at ease in explaining the facts and his past during a criminal trial. Likewise, can we consider that a carefully thought-out and crafted decision is a good decision if it is handed down a long time after the facts?

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[39] On this notion, see E. Jeuland, « Le renouveau du principe du juge naturel et l'industrialisation de la justice », in *Le nouveau management des juges et l'indépendance de la justice*, *op. cit*., p. 87.

[40] See J.-P. Jean, "Justice as a public service", available at : https://rm.coe.int/justice-as-a-public-service-jean-paul-jean-prosecutor-court-of-appeal-/168078e545

However, quality, as understood by New Public Management, is a measurable notion. It is a quantity, or at least a measure referring to a scale of levels or thresholds. Therefore, the requirements related to a reasonable time can sometimes be seen as a criterion of qualitative justice while sometimes being an obstacle to the improvement of that very same quality.

This tension within the notion of quality is used by management in a strategic way to modify practices in public establishments. New Public Management attempts to dissimulate its goal – that of increasing productivity – under the more laudable cloak of the enhancement of the quality of justice, thereby thwarting any possible protest. Therein lies its insidious character.

Eventually, in order to become a new source of legitimacy for judges and a relief in their daily tasks, performance must be what it claims to be, *i.e.* efficacious and productive. In other words, if it is to be accepted, it must be considered as a means and not an end in itself. What must be combated is not its values but the use one makes of it. Quality must not be equated with quantity and excellence cannot solely mean high productivity. The Real-Time Treatment of criminal cases is a good example of the adverse effects of an innovative practice. Even though more criminal cases have been dealt with, the actual decision is taken so quickly – over the phone and on the sole basis of an investigator's report – that it has led to lesser oversight by the prosecution over the investigation and therefore to an increase in mistakes or shortcomings in proceedings. This in turn entails that more cases are closed with no action taken and more offenders are acquitted by the courts. Such productivity is therefore detrimental to substantial quality.

Only a thoughtful assessment, involving judges[41] and combining both quantitative and qualitative data, and entrusted to a national agency for the evaluation of justice could avoid absurd and counter-productive results[42].

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[41] See F. Paychère, "How to measure court performance while safeguarding the fundamental principles of justice?", available at: https://rm.coe.int/how-to-measure-court-performance-while-safeguarding-the-fundamental-pr/168078e550. Likewise, "in evaluating the performance one should not only apply a judicial perspective, but also include a more organisational and sociological perspective. The judiciary isn't an island and on an organisational level has to deal with new social and economic developments" (F. van der Doelen, "Lessons from evaluating the modernisation of the Dutch judiciary 1996-2010", available at https://rm.coe.int/lessons-from-evaluating-the-modernisation-of-the-dutch-judiciary-1996-/168078e543).

[42] Nicolas d'Hervé, « La magistrature face au *management* judiciaire », *RSC*, 2015, p. 49.

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