The Treatment of Citizens' Complaints in the Justice Field: Is an Ombudsman Necessary?[1]

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For some years, France has searched for ways to control abuses in the judicial system. In the "Affaire d'Outreau," indictment, detention pending trial and conviction was delivered to innocent men and women, just because of witness evidence, which had not been verified by the investigating judge; the resulting public criticism made the French parliament reorganize the judicial organisation. This case intensified the crisis of confidence (which already existed) French citizens in the justice system. The Minister of Justice has not played an important role in curbing abuses, but the Superior Council of the Magistrates (CSM) has dealt with disciplinary prosecutions. Thus, the question remains whether it is possible to create a single institution to handle citizen complaints regarding the malfunctioning of judicial institutions, and various issues arise. Should the Mediator (the institution for complaints against executive institutions of the French state, which is the French equivalent of an Ombudsman) or a special Ombudsman for justice organisations, including courts handle these complaints? Should the CSM be given wider powers? France attempted to address these issues through a law on the responsibility of magistrates. However, this effort was a failure because the text was imprecise (so that the Conseil Constitutionnel censored some clauses) and elaborated without consultation.

The delivery of justice by the courts and the public prosecution service, as public services, must relate to the citizenry; but, as a constitutional authority, the delivery of justice cannot and must not be considered the equivalent of other public utilities. Even though quality issues are always present with this sovereign activity, the methods of assessment are open to discussion. The citizens, who appeal more and more often to the courts, are preoccupied with quality of justice issues, but (according to several surveys or opinion polls)[2], are distrustful of the judiciary. Citizens worry about the slowness of the justice process, the complexity of its language, the excessive costs of judicial proceedings, the inaccessible or distant attitude of its members, the lack of information available on its organisation, the weakness of communication, unfair functioning, and the absence of citizens as participants to hearing cases … The demand for results and the desire for information raise questions regarding the provision are certainly the translation of the questioning of the role and the missions of judicial services in public opinion. As some researchers have suggested that:

> "Complaints by citizens on the functioning of the courts are direct indications of the way society considers the judicial services. Every complaint can be considered as a source of information about the quality of the service. It is thus essential that (the treatment of) these complaints be treated with all attention, if we want these signals to be useful. Denying these signals can turn out to be a great error in the process of reduction of the gap between the citizen and the judicial services.

It therefore is important to think about how to restore public trust in the justice system, and the possible role of an Ombudsman in helping achieve that objective. Complaints concerning traditional public utilities (electricity, gas, water)[3], are often presented as consumers' complaints, expressing dissatisfaction with a specific service (electricity, gas, water), or as users who are dissatisfied with the result obtained (hospitals), or as customers criticizing the non compliance with timetables (railway transport). Public administration also suffers from critics and protests: opening hours, delays, incapacity of the civil servants … But the judicial services appear as the only ones looking for quality improvement while protecting judicial independence. To criticize public administration is common; to modify its functioning only implies a reorganization of the service, in order to restructure it. To enable the filing of complaints against justice implies a different conception of the service itself. Here; we cannot be content with just a reorganization of these services, because judges are constitutionally independent. Simple solutions are not possible and have to be made in consultation with all the actors of the institutions; many institutions are then in demand. The administration of justice is directly linked to the functioning of justice; it is the reason why the complaints of the citizens in this domain must not be treated in the same way as complaints against ordinary public services are.

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[1] This contribution was published in French in *Ethique publique,* Les gardiens de l'éthique, 2007, vol. 9, n° 2, pp. 83-96.

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

[3] Public utilities in France have traditionally been a service organized by the state for every citizen living in France, throughout its territory. It may be conceived of as a typical operation of the revolutionary equality principle.

The handling of citizen complaints has historically been regarded as the personal responsibility of the magistrates[4]. But it has not always been easy to isolate specific complaints, complaints which can be handled, in an autonomous and specific way[5]; and to distinguish them from general complaints regarding the functioning of justice and public confidence in the system.[6] One possible solution is to create an Ombudsman[7], with the power to conduct special proceedings. An Ombudsman must be independent and objective, and should have the authority to investigate complaints and have the power to make recommendations regarding the handling of those complaints and improving the overall system[8]. While the Ombudsman must be reconciled with the constitutional structure, the ultimate objective is to construct a system designed to handle complaints and such a role must fit the constitutional state, and this function needs to build a real management of the complaints and contribute to improvement of the justice system[9].

A comparative analysis indicates that different European countries have developed different mechanisms for dealing with citizen complaints. The European Charter on the status of judges[10], non-binding, refers to citizen complaints in a chapter pertaining to the responsibility of magistrates. The Charter vests the individual states with responsibility for organizing and conducting complaint proceedings. The Charter thus assumes that citizens will be able to file complaints, but does not mandate a particular type of institution for handling these complaints. However, the EU does provide some guidance to individual states[11]. A European Commission report on the efficiency of the justice summarizes the situation in the various member states. That report indicates that 22 countries have compensation systems for excessive delays, 44 countries or entities have compensation systems for illegal detentions, and 43 countries have compensation systems for illegal condemnations[12]. However, the variety of approach between the various states suggests that there might be a role for an Ombudsman who could receive and resolve citizen.

I-The Necessity for Creating Ombudsman to Handle Citizen Complaints

[4] For a general approach, F. Bottini, « La responsabilité personnelle des magistrats », *RRJ*, 2006-4, p. 2193 ; M. Deguergue (dir.), *Justice et responsabilité de l'Etat,* PUF, coll. Droit et justice, 2003, specially N. Albert, « De la responsabilité de l'Etat à la responsabilité personnelle des magistrats ; les actions récursoires et disciplinaires à l'encontre des magistrats », p. 209 ; M.-A. Frison-Roche, « La responsabilité des magistrats : l'évolution d'une idée », *JCP*, 1999, I, 174 ; for an historical analysis for the personal responsibility, G. Kerbaol, *La responsabilité personnelle des magistrats de l'ordre judiciaire,* Thèse Montpellier I, 2003

[5] We are quite distant from the classical question about the application and the impact of the L. 781-1 article COJ (art. L. 141-1 since 2006 the 8th of June ord.), which indicates « The State is obliged to give damages for the harm caused by the bad working of Justice. This responsibility is only bound for a gross negligence or denial of justice ». For a recent example : J. Pradel, « Inactivité d'un juge d'instruction pendant plus de quatre ans et responsabilité de l'Etat », observations about Cass., civ. 1ère, 13 mars 2007, D. 2007, JP, p. 1929

[6] See E. de Valicourt, *L'erreur judiciaire,* L'Harmattan, coll. Logiques juridiques, 2005.

[7] See Recommendation R (85) 13 of September the 23rd 1985, of the Committee of ministers to the State members relative to the Ombudsman, which indicates Ombudsman's missions, which include in particular examination of personal complaints about errors or insufficiency imputable to administrative authorities in order to increase individual protection into the relationships between citizens and administrations

[8] This definition is inspired by the notion proposed by G. Cornu, *Vocabulaire juridique,* Quadrige, PUF, 2000, under the Ombudsman and European Ombudsman headings. The original term is swedish, the notion means « complaints spokesman" or "the man of grievances". The term « ombudsmédiateur » is also used to combine the statutes and missions of a traditional Ombudsman and of a mediator; it includes some elements, as stated by Mrs R. Saint-Germain, Citizen's Protector in Canada, « independence, impartiality, equity, confidentiality and accessibility which, together, give credibility to each ombudsman's missions. These principles and fundamental values are specific because they strengthen themselves to increase efficacy. It is the reason why the conditions of the fulfilment of missions are very important. The formal guarantees linked to the Ombudsman statutes are based on his of his independence » (Intervention in colloquium May 2007, Montréal, *Universalité et diversité de l'institution de l'Ombudsman*). Many sectoral studies are written (v. for ex. P. Langbroek, P. Rijpkema, "Demands of proper administrative conduct; a research project into the ombudsprudence of the Dutch National Ombudsman", *Utrecht Law Review*, vol. II, Issue 2, December 2006).

[9] Some precautions have to be taken; an Ombudsman as an authority appears to be quite independent, or even, in some cases, as a public or political authority, depending on the reasons why it was created, organised and on how it is controlled. Its relationships with justice must be clarified. For example, the Constitution of Bosnia-Herzegovina of 1994 foresaw the creation of three ombudsmen (one for each community), every Ombudsman being able to intervene in judicial proceedings. Cautions are necessary because if the Ombudsman can interfere with justice, this affects his role considerably. The Venice Commission has indicated that Ombudsmen are to be able to control the functioning of the administration of justice (all the non-judicial activities including activities of notaries, bailiffs, as well as slowness, administrative management of files…) and eventually also the enforcement of the judicial decisions.

[10] European Charter adopted in July 10th, 1998; see for details the analysis of T.-S. Renoux (dir.), *Les Conseils supérieurs de la magistrature en Europe,* La Documentation française, 2000, specially the third part about the Charter (p. 271 et s.).

[11] For the notion of dysfunction and defective function of Justice services, see D. Sabourault, « La fonction juridictionnelle entre autorité, indépendance et responsabilité », in M. Deguergue (dir.), *Justice et responsabilité de l'Etat,* op. cit., p. 171 et s.

[12] V. *European judicial systems*, ed. 2006, The studies of the CEPEJ, n 1, Ed. du Conseil de l'Europe, p. 58 et s., table17

When we say that an Ombudsman can productively handle citizen, it is first necessary to define the term 'complaint'. In certain types of cases, the use of an Ombudsman will not be advisable. In other cases, the use of an Ombudsman might be not only desirable, but imperative.

A- A decisive qualification of the complaint.

A Belgian research team has attempted to develop a complaints matrix that would allow the system to weed out protests that can not really be regarded as "complaints," and to suggest how different types of complaints should be handled. The matrix distinguishes between issues related to the contents of a judicial decision, the policies and procedures used to create that decision, or the general functioning of the judicial system. The Matrix allows us to create a framework for deciding which types of issues should be handled by Ombudsman, and which should not.

A citizen complaint regarding the contents of a judicial decision should not be regarded as a complaint of the citizen against the judicial order or against the functioning of the judicial public service. This type of complaint should be handled by higher judicial bodies, and through reversal. The Canadian system provides interesting insights. Website of the Canadian council for the judiciary includes, on its homepage, a link which explains the various types of complaints that citizens might make. However, the webpage explains to citizens that complaints cannot focus on the content of a judicial decision. The contents of judicial decisions can only be challenged through the appellate process. Here interference of the ombudsman with the judicial domain is possible. This means an ombudsman dealing with complaints against a court organisation or a judge, may come to assess judicial decisions concerning the hearing, management and the content of a case, which belong to the exclusive domain of the judge and eventually of an appellate court.

There is uncertainty regarding how to handle citizen complaints regarding excessive delays[13]. If complaints regarding delays are regarded as part of the judicial decision, then they should be handled through the appellate process. On the other hand, if complaints regarding delays are regarded as related to the functioning of the public service of justice, then they might be appropriate for handling by a mediator or an Ombudsman. Within the EU member states, these issues are regarded differently in different states. For example, France provides remedies for excessive judicial delays through its administrative courts[14], as Portugal[15], and Italy (thanks to the Pinto law) do[16]. Other countries have adopted different approaches. For example, the Court of Appeal of Belgium adopted a specific responsibility of the lawmaking State, which gave rise to debate[17]. Slovenia created a compensation fund, and Poland allows parties to seek compensation from. In Poland, Ombudsman position has been formalized through legislation[18]. Complainants can, in some cases, refer the case to the Public prosecutor's department (Denmark) or to the Minister of Justice (Spain, Sweden) for further action.

The Committee of Ministers of the Council of Europe regularly draws the attention of member States to the necessity of creating mechanisms for providing financial compensation to citizens harmed by excessive delays[19]. As a result, most

[13] The European Council had drawn very early the attention of member states on the working of excess caseloads of the courts ; see Recommendation R(86) 12 of September 16th, 1986 of the Committee of the Ministers in member states relative to certain measures for preventing and reducing the working excess load of courts. This text does not speak the institution of Ombudsman.

[14] See specially CE, A, 28 juin 2002, Garde des Sceaux, Ministre de la Justice c./ Magiera, *Rec. Leb*., p. 247 ; *AJDA*, 2002, p. 596, chron. Donnat et Casas ; *RFDA*, 2002, p. 756, concl. Lamy ; see also CE, 25 janvier 2006, SARL Potchou, *AJDA*, 2006, p. 589, chron. Landais et Lenica and decree n 2005-911 du 28 juillet 2005, art. R. 311-1 7 du CJA.

[15] There are administrative courts, art. 4, nr 1, g) of the Law 107-D/2003 of December 31st.

[16] Law N 89 of March 24th, 2001; in their third annual report on the excessive duration of the judicial procedures in Italy for 2003 (CM/inf/DH (on 2004) 23 revised on September 24th, 2004), the delegates of the Ministers insisted on the fact that the Pinto Law had not settled all the difficulties, on the contrary, because the law doesn't accelerate pending procedures but risks to overload even more courts. See also Resolution ResDH(2005) 114.

[17] Court of Appeal of Belgium, June 30th, 2006, Belgian State c./ Mrs Ferrara Jung (N C.02.0570.F): "by declaring the claimant responsible to the defendant consisting of the fault of having omitted legislation to give to the judiciary the necessary means to allow her to (effectively insure justice, notably in respect of article 6.1 of the ECHR, the judgement does not underestimate the general principle of the right and it does not violate the capacities that aims at the means in this branch". The ruling of the Court of Appeal had indeed indicated that "It results from these motives that the Belgian State commits a fault which invokes its responsibility towards its national when it omits to take legislative measures susceptible to insure respect of the prescriptions of the article 6.1 of ECHR and, in particular, when this deficiency has the effect of depriving the judiciary - and in the case in point the Brussels jurisdictions - of sufficient means to allow them to treat the causes of the reasonable delay (from 6 to 8 months) ".

[18] R. Pelc, « Quels sont les attentes et les besoins des usagers de la justice : l'expérience de l'Ombudsman polonais », article available on the website of the European Commission for the efficiency of the justice (CEPEJ, organ of the European Council). R. Pelc underlined the numerous mails sent by Ombudsman to Minister of justice to alert him on the excessive duration of the procedures, on the slowness or the inactivity of certain jurisdictions and on the absence of a legal solution offered to the citizens, in spite of the very numerous convictions of Poland by the European Court of Human Rights.

[19] See the temporary resolution CM / RESDH 2007) 74 concerning excessive durations of procedures in front of the Greek administrative jurisdictions and the lack of actual appeals.

member States have mechanisms for providing damages for excessive delays attributable to problems in judicial procedure or judgment, as emphasized by the jurisprudence of the European Court of Human Rights[20]. Under these approaches, these types of complaints would not be appropriate for handling by an Ombudsman[21]. At most, an Ombudsman could alert the proper authorities to a problem and play an indirect role in the case.

A rational system will also create special procedures for dealing with complaints relating to specific instances of misconduct by magistrates requiring disciplinary proceedings. Within France, disciplinary actions are handled by superior council of the judiciary, the Council for the Judiciary. Some States, by contrast, place some power over these issues in an Ombudsman. For example, Spain has an individual referred to as the Defender of the People[22], as does Finland[23] and Sweden. In England and Wales, since 2006, a secretariat of complaints, under the joint responsibility of the Lord Chancellor (Minister of justice) and the Lord Chief of Justice (representing the judicial authority towards government and Parliament), is authorized to hear complaints[24]. English citizens can send their complaints to England's Ombudsman who can pass them on to the Secretariat. Denmark has also proposed a formalized mechanism, based on its Code, which allows aggrieved citizens to submit the case directly to a disciplinary court of magistrates. The most perfect system is probably the Canadian: every citizen can refer a complaint regarding the behaviour of a federal judge to the Canadian council for the judiciary. This mechanism was strengthened by the fact that this council elaborated ethical principles which every judge must respect[25].

The French system is currently undergoing a complete transformation. Recently a proposal was made for allowing complaints to be filed with the Mediator, who could have referred some cases to the CSM. After the Outreau case, the Minister of Justice suggested several reforms, among which the one adopted by Parliament[26]. Another proposal was to modify regulation of December 22nd, 1958, on the status of the judiciary, which contained the following provision: "every physical or moral person who thinks, on the occasion of a case concerning her, that the behaviour of a magistrate may constitute a disciplinary fault, can directly refer a complaint to the Mediator of the Republic"; the Mediator would be able to seek information from the heads of Courts. Even if the Mediator were not allowed to render an assessment of the propriety of a magistrate's conduct, he might refer the complaint to the Garde des Sceaux so that he refers to the Council for the Judiciary, if he considered that the facts should receive a disciplinary qualification, and if this complaint had not been referred to a court of the CSM by the chief of the court.

The legal definition of disciplinary fault has been an area beset by problems. The Council of State has suggested this qualification creates a risk of confusion between the role of appellate judges and disciplinary judges:

> "The appreciation of the behavior of the magistrate is inseparable from the appreciation of the legitimacy of the initiated appeals, in the same affair, before the judge of appeal or cassation" (advisory opinion on this bill)."

It is difficult to create a clear distinction between the various types of judicial errors (referred to in France as "faults") which create malfunctions in the judicial system. For the Constitutional Council, a fault is "any neglect by a magistrate in his duties, in the honour, in the delicacy or in the dignity"; but there is also a violation of duties defined as "the grave and deliberate violation by a magistrate of a rule of procedure giving an essential guarantee of the rights of the parties made

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[20] Among others, CEDH, in October 26th, 2000, Kudla c. / Poland, RFDA, 2003, p. 85.

[21] It is necessary to be careful with the definition of Ombudsman, because their powers and legal status vary from country to country.

[22] The Defender of the People or Mediator is foreseen in the article 54 of the Spanish Constitution; his status was clarified by an organic law of May 7th, 1981, modified. The article 13 explains that " When the Mediator receives complaints concerning the functioning of the administration of justice, he has to send them to the Prosecution so that this one may analyse if they are grounded and may take the relevant measures according to the law, or to pass them on to the General Council for the judiciary, according to the kind of complaint about which it is a question ".

[23] The complaint against a judge must be deposited to the Minister or to the parliamentary mediator.

[24] This specific mechanism of complaints exists for some time already. Based on a protocol concluded in April 2003 between the representatives of the profession and the Lord Chancellor, citizens can complain about the behaviour of a magistrate with the Lord Chancellor; these complaints are heard by a specialized administrative unit in charge of their instruction and with the competences to decide on the consequences for the magistrates (see *Le régime disciplinaire des magistrats du siège*, Documents de législation comparée du Sénat, n° LC 131, January, 2004, p. 9).

[25] V. Conseil de la justice administrative, Décision du 11 août 2006, *Beaudin c./ Harvey*, req. n° 2005 QCC JA 197. V. également Comité d'enquête du Conseil de la magistrature, Décision du 16 mars 2006, *Plainte de M. Marois à l'égard du juge Michel DuBois*, n° 2004-CMQC-3, based on article 268 of the Law on judicial courts. There is a very precise administrative regulation of the Canadian council on inquiries.

[26] Organic law N 2007-287 of March 5th, 2007 on the recruitment, the training and the responsibility of the magistrates.

within a case closed by a final judicial decision". According to the constitutional court[27], "a grave and deliberate violation of a rule of procedure (e.g. a fault) must be stated by a final decision of a court". Intervention by an ombudsman runs the risk of undermining separation of powers principles as well as judicial independence. Furthermore, the bill increased the risk of political influence on magistrates. Indeed, it would give a disciplinary council the possibility of inflicting a disciplinary sanction to a magistrate because of crass appreciation mistakes. And this might lead the disciplinary authority to appreciate the legality of a judicial decision. Now, if the composition of this authority belongs to the executive power, the system is locked; if we allow the complainants to bring disciplinary pursuits against magistrates themselves, via the Ministry of Justice , this one, political person, becomes the mainspring of the system[28] (because he appoints the members of this institution too).

There is thus a principle: the Mediator as an independent authority cannot give a direct or indirect "judgement" on judicial acts[29]. A French citizen can not refer a complaint directly to the Council for the Judiciary, which has the task "to transparently elaborate the ethical obligations of the magistrates"[30]. Citizens also cannot refer their complaints to the chiefs of courts, and they cannot submit negative answers of these chiefs to an adequate authority, such as the CSM. The disciplinary regime thus is very specific in each State, and doesn't necessarily provide for citizen complaints.

B-Specificity of the complaint

The complaint to be treated concerns the daily administrative functioning of the judicial system, but neither its procedures, nor its judicial decisions; rather the organisational process which leads to the taking of the judicial decision; the usual demand of information is excluded, because it is not considered a complaint as defined above. Such an approach supposes however that these processes are clearly defined in a document as a subject to the law charter, integrating the predictable delay of the processing of the case, the dates of meeting between magistrates, lawyers and citizen, the modalities of reception, information, frame and supply of information to the users … The distinction must be clearly established between the strictly ethical obligations (their misunderstanding can expose judges and court clerks to disciplinary prosecution before the competent authority), and the general obligations inherent to any public service. But the definition of the complaint should neither be too restrictive. If the research conducted in Belgium included a broad definition of the term "complaint" (the complaint was defined as "any demonstration of dissatisfaction of a citizen towards the functioning of the judicial order"), some elements, given by the superior council of the justice of Belgium[31], have general application. For example, the definition provides that:

> "There is complaint on the functioning of the judicial order when it denounces a situation where the service given to the citizens is not in accordance with what they can legally expect from a good functioning of the judicial order".

The complaint could thus be likened to a complaint on organisational malfunctioning, but this approach is not entirely satisfactory in situations where a judge could be subject to disciplinary liability. As the Belgian superior council of justice stated, the malfunctioning can include bad habits or bad practices within a court, but also the unexpected effects of legislation, contradictory instructions, and defective management of the cases of the citizens …

A similar system has been implemented in Luxemburg. In an opinion on the bill to install a Superior Council for Justice the Mediator advised in favour of it.[32] In his view, taking specific aspects of the judicial structure in Luxemburg into account,

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[27] Décision n° 2007-551 DC of March 1st 2007, *Loi organique relative au recrutement, à la formation et à la responsabilité des magistrats,* Droit pénal, avril 2007, n° 4, Alerte 15, « Outreau : une réforme touchée mais pas coulée » ; D. Ludet, A. Martinel, « Les demi-vérités du Conseil constitutionnel », *D*. 2007, jp, p. 1401 ; *DA*, 2007, n° 4, comm. 62.

[28] F. Bottini, op. cit., p. 2209 .

[29] The debates in commission before the vote on this law underline the questioning of the members of parliament on the subject as well as those of the Garde des Sceaux: "Some people wonder about the possibility of allowing the Mediateur to directly address the CSM when he considers that a disciplinary fault is characterized. This proposition however raises difficulties. From the point of view of the principles, it presents certain constitutional risk. To entrust to the Mediateur of the Republic the power to engage disciplinary prosecution against a magistrate could be considered as striking a blow at the independence of the judicial authority: this extension of the referral to a court of the CSM in an authority, even independent, indeed risks to increase the number of contestations of the decisions of justice next to the ways of appeal legally foreseen for that purpose. It is advisable to avoid multiplying authorities to seize the disciplinary organ, so that the disciplinary procedure is not used to undermine the magistrates in their judicial activity. It also means that the Mediateur would be entrusted with a rival power, even superior to the Garde des Sceaux, because he could surpass the Minister of justice to seize the CSM ".

[30] Organic law N 2007-287 of March 5th, 2007 relative to the recruitment, the training and the responsibility of the magistrates, art. 18.

[31] Opinion on two private bills concerning the procedure of the complaints relative to the judicial order, approved by the general assembly on February 22nd, 2006.

[32] Recommendation relative to the institution of a superior council of the justice, of March 22nd, 2006.

particularly the relationship between magistrates and lawyers, the Mediator suggested that he should not be the sole instance to receive complaints regarding dysfunction in the judiciary. He admitted citizens do have the right to complain about organisational dysfunctions, but actually, these complaints can be heard by the courts, the executive, the legislature, and the Mediator... Only an external authority, which is able to decide how to channel citizen complaints, can ensure that complaints are appropriately handled. The Mediator thus proposed that individual complaints be filed with the Superior Council of Justice by any individual or by a lawyer registered at the Luxembourg bar. If the Superior Council finds the complaint justified, it can make a recommendation for an eventual disciplinary action directly to the concerned authorities, to the Minister of Justice or to the complainant.

A complaint in the Luxembourg system can refer to the judicial organization, or management, or the general functioning of the judicial system. When a qualifying complaint is received, it must be considered by a competent authority that has the power to receive and process it, and to consider the consequences of the malfunction in question. The competent authority should have the power, not only to hear the complaint, but also to ensure follow-up and appropriate resolution. It must also consider how the system can prevent repetition of such dysfunctions. However, the latter task is really the function of an Ombudsman (in a general sense).

If clear complaint resolution processes can be established – for dealing with (referring to ordinary judicial processes) can be defined regarding the recording of cases, follow-ups on delays, administration of hearings, of dates of deliberation, citizen complaints can help produce an interactive dialogue between the courts and the reviewing authority. As a result, judicial dysfunctions can be identified and addressed earlier, and can lead to an improvement in judicial processes and the avoidance of similar future dysfunctions. As a result, the complaint process can help facilitate improvements to judicial administration and ultimately produce a higher level of public satisfaction in the system. However, the complaint process must be connected to the mechanisms related to the recruitment and training of heads of courts[33].

II- The Ombudsman's Role and Function

The position of Ombudsman thus offers a potentially beneficial method for receiving and dealing with certain types of citizen complaints against magistrates, and other judicial staff. But it is necessary for the Ombudsman to be able to know which institution is best suited to receive and resolve the complaint, and therefore it is necessary that the competencies or jurisdictions of the various institutions be clearly defined." There are different possibilities; France currently is experimenting with several ways of handling these issues.

A- The institution authorized to hear the complaint: a variety of solutions.

There are several modalities for handling citizen complaints, including internal (to the judicial body involved in the complaint) or external, national and local.

When a citizen files a complaint, he must have clear access to a specific procedure, and must know what he can criticize and to whom to submit the complaint. If the citizen simply wants to obtain general information on his complaint, he must know which department or official to contact. Research in various European countries reveals that many complaints can be resolved at any early stage if the complainant receives (relatively simple) information. It is the absence of a prompt response that leads to citizen criticisms, as well as to a loss of confidence in the judicial system. Within each court, there should be a department responsible for answering ordinary citizen questions (where is my file? How long will the procedure take?). This managerial mission actually leads to the organisational fulfilment of functions that otherwise would be left to an Ombudsman.

A complaint, as distinguished from a mere informational inquiry, may concern a more complex issue, related to the systemic functioning of the court. For these complaints, it might be useful to establish a complaints department within the jurisdiction or within the judicial district, a service shared by the head office and the public prosecutor's department, which would have the function of "complaints manager"[34]. This complaints manager cannot perform the function of an Ombudsman[35], because he would be a member of the judiciary and a magistrate. As a result, the complaint manager's rule must be internal to the institution: to collect all complaints and make sure that they are answered. If need be, the complaint's manager can contact the head of court to obtain information, or transmit to the chief to allow him/her to obtain further information from the magistrate. This system has the advantage of charging one person with giving an answer and avoids the risk of omissions and gaps that can occur when more than one institution is involved. The complaint manager, as magistrate, should be appointed by the head of courts, according to his specific qualities (capacities in communication,

[33] See the aforesaid Recommendation of the Mediator of the Grand Duché of Luxemburg.
[34] See the research led in Belgium, aforesaid, p. 34
[35] All the definitions of Ombudsman underline clearly the external character of the institution.

conflict management, flexibility in handling different situations), and maybe he can be released from his other duties during the time of his appointment.

The complaint process has the potential to improve the quality of the judicial process, and to make the system more attentive to quality issues. The internal processing of complaints has an evident advantage for the citizen who has a single interlocutor, from whom he justly expects an answer; the appointed magistrate himself manages the internal processes; and this will enhance the diligence of complaint processing. This proximity allows him to be informed regularly by the responsible persons of their assessment of the complaint and therefore the administrator of the complaints is invested with a heavy responsibility. The internal processing will have an immediate effect on the local judicial institution, because the knowledge, the follow-up and the treatment of the complaints allows him to react at once, to modify internal processes so as to avoid later dysfunctions by focusing on principles of good administration of justice. Finally, such a system may lead to a more positive public leads to a general conception of the justice system. In addition, if the complaint is handled by the court itself, the net effect may be an improvement in the court's processes, procedures, decision making and its sense of responsibility. Of course, the difficulty with an internal approach is that the system loses the perspective of an outsider like the Ombudsman.

An internal system does not preclude the handling of complaints at national level. And, of course, even a national system must interact with local systems. However, a national system helps the judiciary take a larger view regarding the scope of complaints (e.g., the answers given, the timeframes within which they were given, modifications brought to the judicial functioning), and this may help to preserve the general coherence of the judicial system and avoid contradictory answers. The national complaints could be handled by a superior council of the judiciary, or a superior council within the ministry of justice, or could be a specific commission within or outside of these institutions. Although this national authority might play the role of an Ombudsman, it does so independently from judicial structure and from Parliament. If created, the Ombudsman's powers should be clarified by Statute Act, notably the power of recommendation and the follow-up of these recommendations (followed by the answers of the Minister), the obligation to provide Parliament with information by an annual report. His intervention would allow an evaluation of the complaint as well as an evaluation of how the complaint was handled on the local level. He could ask for information, resume an inquiry, etc. … If this mechanism were adopted, the competent authority deals with the complaint in the second reading (not sure what this means). This second exam will appear then as a control of the processing and assessment of the complaint at the first level. The risk is that the magistrates would prefer that the second examination be conducted by a judicial official rather than by an external authority. It might perhaps be desirable to create a second level complaints authority to act, as a regulator or manager of judicial quality[36]: he would centralize the complaints dealt with at the first level, examine them for admissibility at the second level, verify the possibility of a second reading, and report his assessments to an administrator of complaints at of the first level. He would then serve in the role of judicial manager rather than a decision-maker.

Whatever model is chosen, it is important to educate the general public and those working in the field regarding the availability of mechanisms and processes. It is also important that all processes be transparent[37]. An annual report should provide a summary of the complaints, the timeframes required to resolve them, describe how the complaint was resolved, and offer observations for future improvements to the system.

As France questions the quality of its justice system, it may do well to consider the possibility of creating an Ombudsman. This step can be adopted compatibly with France's judicial culture, its institutional system and in particular with its concept of the Council for the Judiciary.

B-The establishment of transparent processes: the French efforts

If we try to apply the principles described above to the French judicial system, we see a need to develop clear mechanisms and institutions for dealing with complaints. At present, the system is best by a multiplicity of institutions able to intervene as well as by the absence of clear texts and a weak, Council for the Judiciary.

In 1999, the Chancellery created a national commission for examining citizen's complaints[38]. Its composition was designed to reflect the specificity and the variety of its mission (a magistrate exempted from the hierarchy of the Court of

[36] We know that this notion is not without risk; see A. Vauchez, L. Willemez, *La justice face à ses réformateurs,* PUF, coll. Droit et Justice, 2007, p. 98.

[37] On the requirements of transparency, v. W. Voermans, "Judicial transparency furthering public accountability for new judiciaries", *Utrecht Law Review*, vol. III, Issue 1, June 2007.

[38] On this question, V.R. Errera, Colloquium of the Court of Appeal, on 2003. The Garde des Sceaux, Elisabeth Guigou, had suggested establishing an authority of filtering to allow the citizens to engage the civil responsibility of the magistrates (JO, debates, AN, the session of January 15th, 1998, p. 8).

Appeal, two qualified personalities not magistrates, one appointed by the Mediator of the Republic, the other appointed collectively by the presidents of the National Assembly and of the Senate). This commission had the power to refer complaints on behalf of those prejudiced by a dysfunction in the justice system or against a magistrate who engaged in conduct that was subject to disciplinary action. It also had the power to demand information from the chief justices, to classify a dismissal, or to pass it on to the Minister of Justice or the appropriate chief justice. The Chancellery was required follow-up with the complainant and to file an annual report. The project failed because of the lack of authority given to the Chancellery, as well as because of the ambiguous nature of its relationship means given to this authority, its ambiguous relation with the Judiciary Council and the Inspection of judicial services. In addition, it failed because of the lack of a mechanism for ensuring receipt, processing and assessment of complaints in various courts of appeal (The Court of Appeal of Versailles, for example[39]). At present, different authorities consider themselves competent to handle complaints, but there is no legal requirement that they publish a general annual report describing the complaints and outcomes.

Among the institutions which intervene, we can note:

- The "houses of law and justice." Their existence goes back to a law of December 18th, 1998[40]; they intervene outside of the courts, but their role could be better defined. We know, for example, that the satisfaction rates of those involved with these processes is high and rebounds to the credit of the entire judicial institution. Institutions similar to the houses of law and justice exist in Belgium, but they play a somewhat different role[41]. The competence to deal with demands for information or with certain complaints could be returned to them.

- The Mediator of the Republic. The Mediator dates back to 1973 as an independent authority. He examines disputes between any a natural or corporate body may have and the justice system, but without intervening in the process. Nevertheless he understands the administrative tasks exercised by the courts and the types of dysfunctions that can arise in the system. The justice domain represents only a small part of his activity (approximately 5%[42]); he can however deal with complaints for which he may have to interrogate the concerned service, possibly the inspector of the judicial services, or the chief of a court through a ministerial correspondent.

- The Director of Judicial Services. The Director of judicial services is responsible for complaints concerning malfunctions in the justice system, and to demand changes. The division for the judiciary of this Direction (Office of magistrates' general cases) deals with complaints that directly concern a magistrate.

- Inspectorate of Judicial Services. The inspectorate of the judicial services carries out a permanent mission of inspection of the various judicial systems, and this competence allows the general inspector to be aware of dysfunctions in the system. The general inspector is the correspondent of the Mediator, but the institution is connected to the Garde des Sceaux[43], the Minister of justice and not to an independent authority, such as the Judiciary Council.

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[39] V. V. Lamanda, « Les plaintes des justiciables à la première présidence de la Cour d'appel de Versailles », *BICC*, 15 juillet 2000. This report clarifies that all the complaints of the citizens received by the first presidency are the object of a record and of a particular follow-up. Starting in 1997 in 1999, 350 requests from 301 different persons were listed, what makes an average of about 120 complaints a year. 16 % were issued by lawyers, the rest by citizens. The report shows that the complaints were passed on by the Chancellery, the others were received directly by the Court, the others, sometimes the same complaints, were received by the presidents of the jurisdictions of the first degree. The study of the object of the complaints is interesting: If we hold only the coherent complaints (thus by removing those who result manifestly from lunatics), some did not question a judicial service, 55 % concerned the functioning of a jurisdiction. On the complaints which could turn out to be lawful (126 on the whole), 76 were about delays of deliberation, 34 on delays of procedure, 10 on a dysfunction of the Clerk's Office, 3 in the relational behaviour of magistrates, 3 on a procedural dysfunction. Involving results of the complaint and its consequences, the report indicated that the complaint at first was the object of an acknowledgment of receipt; it was then communicated to the head of the jurisdiction concerned if it was justified, with a demand of an elaborate report for the definite delay; the complaint could then be classified, or if it was grounded, the head of jurisdiction was invited to take the necessary measures to stop the dysfunction. If the complaint concerned the behaviour of a particular magistrate, this can be taken into account it in his evaluation. A magistrate can be also removed from a promotion table, be the object of a warning, or of disciplinary prosecution.

[40] Law n□ 98-1163, December 18th 1998, relative to the access to the right and to the amicable resolution of the conflicts; decree N 2001-1009 of October 29th, 2001, modifying the Code of the judicial organization and concerning the houses of justice and the right; circular of November 24th, 2004, relative to the houses of law and justice and to the antennae of justice.

[41] It is about Houses of the Justice, while, paradoxically in France, they appear rather as Houses of law and additionally as houses of the justice. V.M. Lebois and P. Robin, "The dysfunctions of justice more than 5 years after the White March", a day of study of May 16th, 2002 in Brussels, See Review of the Law Faculty of Liège, on 2002, p. 523.

[42] See Rapport of Médiateur de la République for 1999 ; v. also C. Coste, « Plaintes des justiciables et fautes disciplinaires des magistrats », *BICC*, 15 juillet 2000.

[43] This is the French special name of the Minister of Justice.

- The Council of the Judiciary. The Council is the disciplinary authority of the magistrates; but its powers differ in relation to magistrates, chief justices and public prosecutors. But it can deal with behaviour of magistrates certain citizens complain about…

It is thus indispensable for France to develop an integrated system for handling complaints. At the moment, only the Lord Chancellor and the chiefs of court can refer a disciplinary case to the Judiciary Council[44]. In the large majority of cases, the referral is based on a report of the inspection service and is followed by an act of referral drafted by the directory of the judicial services assessing the ethical concerns and the disciplinary faults[45].

There are two main solutions: each one can be published and explained inside the houses of law and justice. First, the Judiciary Council can be placed in the centre of the system. The complaints are filed at the first level; so the citizens or the dissatisfied citizens can complain in the concerned jurisdiction, about a dysfunction or about a criticism concerning a service, a magistrate or a co-worker of justice, a court registrar, a lawyer … This complaint can be examined according by a Judiciary Council staff but the local administrator of complaints must still sort and allocate the complaints. The registered complaint is then passed on to the CSM. The CSM can take any of several actions either to take direct cognizance of a complaint regarding behaviour of a magistrate, or to ask for a preliminary inquiry by the Inspector of Judicial Services. When the complaint concerns a magistrate, the Judiciary Council can inform the chief of courts, by asking them to find a solution and by insuring follow-up regarding the complaint. Alternatively, if the dysfunction concerns a co-worker of justice, the head of the affected organisational unit can be informed. The function of the Ombudsman envisaged would help improve communication between a number of institutions, including the superior council and professional bodies (bailiffs, notaries…). Creation of the Ombudsman position would provide another way to deal with judicial dysfunctions with overwhelming the system: such a construction succeeds to treat general a dysfunction of the public utility in a general way, without overwhelming a magistrate or a service; a dysfunction can be indeed connected to several factors (working excess load of a lawyer, bad organization of a hearing, absence of a clerk of the court).

The Judiciary Council proposal would include several important reforms to turn the CSM into a real superior judiciary council: to put the Inspection of the judicial services either under its authority or under that of Minister of justice; and that this "new" council receives the power to define the internal processes indispensable to the jurisdictions. At the moment, by law, the CSM only has the power to establish the ethical principles for magistrates and judicial personnel. It would be desirable for the CSM to handle the registration and recording of complaints, the follow-up are defined by him and that it makes a synthesis of the whole and of the recommendations in terms of management of the jurisdictions, the means, the efficiency, as aspects of processing, procedure and ethics sometimes are connected. The CSM should also have the power to deal generally with complaints regarding the entire judicial system as a very different way from other traditional public services, which is in connection with all the occupations of justice, and to remove all competences in the justice field from the Mediateur. This renewed council for the judiciary for the greater part would really have a role of Ombudsman. No doubt it would be useful to centralize within it all the domains which would allow insuring the coherence of the system[46].

The second possibility is for the Mediator to become the linchpin of the system. His participation could be structured through existing modalities or could be broadened and enhanced. Regardless, he would be required to determine how to handle complaints, and who to refer them to, and correspond with the interested parties. As a result, he might handle a complaint differently depending on whether it concerns a magistrate (CSM), another professional (e.g., a bailiff, for example), or a dysfunction in a jurisdiction (chief of court). With regard to the Mediator, the difficulty in this domain is that a dysfunction is only very rarely due to a unique cause, and this can cause problems for the Mediator because he has to know all the elements of the case. Furthermore, the Mediator is unable to provide a binding solution, but can only propose a solution. The distinction between dysfunction (competence of the Mediator), error of process (competence of the jurisdiction and its complaint administrator), error of procedure (traditional ways of appeal) and difficulty connected to a

[44] The heads of jurisdiction have this possibility since the organic law N 2001-539 of June 25th, 2001; F. Bottini underlines however that the common private individuals can indirectly activate a disciplinary procedure by seizing with a complaint the leaders of yard or the Garde des Sceaux. If these complaints seem lawful, the leaders of yard have as a rule the obligation to educate them (op. cit., p. on 2216).

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

[46] So it would be necessary to think about the competence of the Commission for access to the administrative documents (CADA), for example; she often pronounces on the possibility or not to communicate documents in relation with justice. Should this competence be reserved for the renewed Council for the judiciary, or on the contrary, in a new system, would it be preferable to generalize this approach?

misunderstanding of ethical principles[47] (CSM) is attractive in theory but difficult to apply in practice. At the CSM, a system could be developed for dealing with these different types of complaints.

Citizen complaints regarding the judicial process are likely to become more and more numerous, as demands on the quality of judicial management and processing of the complaints are inseparable. Reflection and further research are indispensable to develop a coherent and legitimate system, and transparency is an essential element. The proposed solutions show however that an accumulation of structures will resolve nothing. It would be better to reform existing institutions, no doubt particularly the Superior Council of the Judiciary. The ambition of the French justice system should be to give to this institution the competences and a scope of intervention as high as the expectations of the citizens.

[47] It is not a good idea to multiply institutions; the CSM should simply appreciate the behaviour of a magistrate which may be considered as a subject of disciplinary proceedings; for other elements, it would be connected with a dysfunction. We know that the Canadian council for the judiciary has a system of particularly elaborated processing of the complaints which can lead to the revocation of a judge: the complaint is deposited in writing, a committee on the behaviour of the judges examines it, asks the concerned judge for information, has the possibility to seize a lower committee to obtain a supplementary inquiry; a committee of inquiry can be created, an advisory report is then passed on to the Council , and the procedure ends by sending a recommendation to the Minister.