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## ACADEMIC ARTICLE

# The Financial Independence of the Judiciary in France

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The purpose of this article is to explain the debate on the financial independence of the judiciary in France, and why this independence seems particularly necessary for the ordinary courts. The objective of this article is also to contribute to the definition of the financial independence of the judiciary and, starting with the French case, to show how it can be distinguished from two other concepts: financial autonomy and budgetary autonomy.

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**Keywords:** Judicial independence; Financial Independence; French courts

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Financial independence is, today, an unavoidable topic for any research on the independence of the judiciary, after recent years have seen significant developments in the administrative independence of courts and judges.<sup>1</sup> The purpose of this article is to examine the situation in France with regard to the financial independence of the judiciary. However, this can only be understood in context. Firstly, justice in France is not recognised as a “third power”. The Constitution of 4 October 1958 identifies it only as a judicial authority.<sup>2</sup> Moreover, in France, justice is not unified; there is a constitutional jurisdiction, as well as ordinary courts and administrative courts whose constitutional regime is different – without any constitutional hierarchy between them – and whose management is separate and divergent.

As far as budget is concerned, they are also distinct. The ordinary courts are those with the least autonomy and their budgetary situation is particularly critical. Several investigations have reported on this situation; the Senate created a fact-finding mission on the redress of justice, which produced a report in April 2017. It proposed a “sanctuary” for ordinary justice resources, but also a closer involvement of these courts in the definition and management of their own resources.<sup>3</sup> The Court of Cassation organised a working group chaired by Professor of Public Finance Michel Bouvier, who submitted a report in July 2017 in which 21 proposals were put forward. These included the possibility of granting the High Council of the Judiciary (*Conseil supérieur de la magistrature* (CSM)) a role as advisor on budgetary matters.<sup>4</sup> A joint report by the General Inspectorate of Justice and the General Inspectorate of Finance

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<sup>1</sup> *Le nouveau management de la justice et l'indépendance des juges*, (Dir. B. Frydman et E. Jeuland), Dalloz, 2011.

<sup>2</sup> Constitution Title VIII is about judicial authority and inside Article 64 provides: « The president of the Republic shall be the guarantor of the independence of the Judicial Authority ».

<sup>3</sup> « 5 ans pour sauver la justice! », rapport d'information de la Commission des lois du Sénat, 4 avril 2017.

<sup>4</sup> « Quelle indépendance financière pour l'autorité judiciaire ? », rapport sous la direction de Michel Bouvier remis au premier président de la Cour de cassation et au procureur général près cette cour, juillet 2017.

also noted the shortage of justice resources.<sup>5</sup> At the request of the National Assembly, the Court of Auditors (*Cour des comptes*) carried out a survey on the evaluation and allocation of resources to the ordinary courts and found that the measurement tools at the disposal of the Ministry were inadequate.<sup>6</sup> In that survey, the Court mainly questioned the allocation of human resources, but the allocation of financial resources was also addressed, as the two are closely linked.

In France, the question of financial independence can be analysed in terms of the financial crisis of the ordinary courts and the insufficient consideration by the political class of this budgetary shortage. But it can also be analysed in terms of the principle of the independence of the judiciary, particularly with regard to the ordinary courts. A question is raised about the system of allocation of financial resources that would best contribute to the independence of the judiciary, thus opening the latter subject to examination at more systemic and global levels. In particular, one may wonder which system can best guarantee this principle of independence: is it the historical system of France, based on a subsidy that is renewed almost identically each year? Or the more recently introduced productivity-based system?<sup>7</sup> Or perhaps a third way?

In France, the historic system has long been in place and the courts were not better funded. It could even be said that funding has started to (slightly) increase under the productivity-based system.<sup>8</sup> In reality, however, the role of the productivity system is difficult to evaluate, since it is largely illusory.<sup>9</sup> Furthermore, it constitutes only one of the elements to be taken into account when analysing the degree of financial independence of the judiciary in France. Political, administrative and legal factors are also decisive.

The aim of this article is therefore to promote a better understanding of the French system and the way in which certain actors refer to the financial independence of the French judiciary, in order to participate in the more global debate on the subject that animates both

<sup>5</sup> *Les dépenses de fonctionnement courant des juridictions*, rapport conjoint Inspection générale des finances – Inspection générale de la justice, janvier 2017.

<sup>6</sup> *Approche méthodologique des coûts de la justice. Enquête sur la mesure de l'activité et l'allocation des moyens des juridictions judiciaires*, Cour des comptes, décembre 2018.

<sup>7</sup> This French system is described by Federica Vapiana in « Funding the Judiciary: How Budgeting System Shapes Justice. A Comparative Analysis of Three Case Studies », *International Journal for Court Administration*, Volume 10, Issue 1, Winter 2019, pp. 23–33.

<sup>8</sup> This system is based on the implementation of Organic Law n° 2001-692 of 1 August 2001 on finance laws (hereinafter LOLF), the architecture of which « has several levels of spending cutbacks; in mission, programs, and actions, indicators are being placed at the chain end to evaluate the level of performance in achieving the objectives of state action ». The LOLF « had the intention to bring the organization and management of courts under a regime of autonomy and accountability » : T. Kirat, « Performance-Based Budgeting and Management of Judicial Courts in France: an Assessment », *International Journal for Court Administration*, April 2010, p. 2. *International Journal for Court Administration*, April 2010, p. 2.

<sup>9</sup> Productivity is only an artificial tool for budget allocation. Performance objectives and indicators are more useful for assessing the effectiveness of government for Parliament, rather than having a real budgetary impact for actors in the field. Continuing F. Vapiana's analysis, it can be said that in the French case, the link between performance information and funding is very flexible. There are no budgetary consequences if the objectives are not achieved. The courts are not required to reimburse the Ministry of Finance. In this sense, the managers' accountability advocated by the LOLF is illusory. But, as in Finland, the discussion can lead to a reallocation of resources, without this being automatic. As T. Kirat says, « there was a discrepancy between the 2001 Act spirit and the real conditions of courts funding and administration », p. 2. It is more the relationship between Parliament and the government that is concerned: « It is often impossible to draw practical conclusions relating to outcomes of measurements of indicators, and government departments are careful not to do so. As a matter of fact, it seems that the indicators are more Government – and Parliament – oriented than oriented at providing monitoring information at the courts level », p. 5. The value of performance information is political. It allows Parliament to control government action. This confusion between budgetary and political evaluation is very surprising and can only be understood within the logic of French constitutional law and particularly the weakness of its Parliament under the constitutional regime of the 5th Republic (since 1958).

researchers and international bodies.<sup>10</sup> One of the challenges of this article is thus to contribute to the definition of the financial independence of the judiciary and to show, through the example of France, that there are several degrees of it.

While financial independence may be a relevant concept, particularly for the Constitutional Council, for other French jurisdictions it may be that terms like financial autonomy and budgetary autonomy would be more appropriate. This contribution to the definition of financial independence of the judiciary therefore requires a description of all the dimensions of the French justice system, since different degrees of independence and autonomy are reflected in different parts of it. It is also interesting to discuss the extent to which the French system ensures financial independence and how, if necessary, to improve it.<sup>11</sup>

It is therefore necessary to first analyse the degrees of financial autonomy available to the constitutional and administrative courts and the highly centralised system which supervises the ordinary courts and leaves them little autonomy, before analysing the nature of the relevant financing systems and considering the prospects for development in the light of the principle of independence.

## **1. Financing systems of constitutional and administrative courts guaranteeing financial autonomy**

The financing systems applicable to constitutional and administrative courts are distinct, but are linked by the financial or budgetary autonomy that they provide. However, the Constitutional Council enjoys greater autonomy.

### **1.1 The Constitutional Council**

As the Constitution refers to it as a “public power”, the amount of funds required by the Constitutional Council (*Conseil constitutionnel*) is included in the finance bill. It constitutes an “endowment” (*dotation*).<sup>12</sup> The President of the Republic, the National Assembly, the Senate, the High Court (which may judge the President of the Republic) and the Court of Justice of the Republic (which judges ministers) are also funded by global provisions.<sup>13</sup> This financing system is justified by the separation of powers, which implies an independence of decision-making and operations for the institutions concerned.

Referring to this necessary financial autonomy in its decision analysing the constitutionality of the LOLF,<sup>14</sup> the Constitutional Council considered that implicitly these public powers “determine themselves the appropriations necessary for their functioning”.<sup>15</sup>

The great advantage of such a system is that it allows the constitutional court to escape the logic of performance and therefore the output budget. The executive and legislative powers do not intervene at any time to assess the relevance of resource allocation to the expected results since, as far as *dotations* are concerned, no objectives or performance indicators are

<sup>10</sup> European Network of Councils for the Judiciary (ENCJ), *Funding of the Judiciary*, Report 2015–2016. See also the Warsaw Declaration on the Future of Justice, June 2016. Recommendations of the Network of the Presidents of the Supreme Judicial Courts of the European Union, *Increasing the independence of Supreme Judicial Courts through their financial autonomy*, August 2018.

<sup>11</sup> With regard to proposals for improvement, it should be noted that many eventualities have been addressed already in the above-mentioned reports. Thus, this article will only make some minor contributions to this aspect of the issue.

<sup>12</sup> A *dotation* is an allocation of funds that does not follow performance logic, i.e. it does not include objectives and performance indicators that are subject to an annual evaluation by Parliament.

<sup>13</sup> These endowments are included in the “Mission Pouvoirs publics” provided for in Article 7 of the LOLF.

<sup>14</sup> “This system ensures the safeguarding of the principle of the financial autonomy of the public powers concerned, which is part of the respect for the separation of powers”, *décision n° 2001-448 DC du 25 juillet 2001, considérant 25*.

<sup>15</sup> *Conseil constitutionnel, décision n° 2001-456 DC du 27 décembre 2001, considérant 47*.

annexed to the annual finance law. The government has no option to reduce the budgetary resources during budget implementation. The Constitutional Council does not in any way depend on the Ministry of Justice for its functioning. As for the legislature, it merely validates the budget proposed by the Constitutional Council.

### 1.2 General administrative courts

The Constitution does not designate any administrative court as a public power. This is especially so for the Council of State, which is at once the legal adviser to the government and Parliament, a court of first and last instance, a court of appeal, a court of cassation for the administrative courts, as well as the manager of the general administrative courts.<sup>16</sup> However, the general administrative courts have financial or budgetary autonomy. They have their own “programme”<sup>17</sup> in the “Mission State Advice and Supervision” (*Mission Conseil et contrôle de l'Etat*), which is notable because it is attached to the Prime Minister – the ultimate financial arbiter of the government – and not to the Ministry of Justice, which is just one ministry among others. The Vice-President of the Council of State,<sup>18</sup> as programme manager, is accountable to Parliament for her or his management. Even so, the programme is protected from possible budgetary regulation (such as cancellation or credits freeze) during the financial year, since any reduction in the budget during the budgetary execution of these courts must be validated by the Vice-President.

As manager of the general administrative courts, it is the Council of State, or more precisely its general secretariat, who directs the budget for the other general administrative courts.<sup>19</sup> The Bouvier Report described this as a model Supreme Court management approach.<sup>20</sup> This raises a question of the financial independence of these other administrative courts from the Council of State.

The Council of State has established its own system of budgetary allocation for the administrative courts for which it is responsible. This implies that the presidents of those courts are accountable to it for their management.<sup>21</sup> There is only one “programme operational budget” (*Budget opérationnel de programme (BOP)*)<sup>22</sup> for general administrative courts, which is administered by the Council of State, thereby limiting the room for manoeuvring by the presidents of the other courts. All general administrative courts are “operational units” (*unités opérationnelles (UO)*) that report to the BOP of the Council of State.<sup>23</sup> In comparison, local financial courts have BOPs, such as the Court of Auditors (see below).

The administrative courts of appeal and the administrative tribunals have no autonomy in financial decision-making, although it should be noted that the Council of State organises a management dialogue with each head of a court or tribunal, during which the latter is free

<sup>16</sup> H. Pauliat, “Le modèle français d’administration de la justice : distinctions et convergences entre justice judiciaire et justice administrative”, *Revue Française d’Administration Publique* 2008/1, p. 93.

<sup>17</sup> Programmes are the components of missions. They constitute the second level in the credits classification nomenclature: “A programme includes appropriations intended to implement an action or a coherent set of actions under the same ministry with specific objectives, defined in terms of general interest aims, and expected and evaluated results” (article 7 § I LOLF).

<sup>18</sup> There is no President of the Council of State for historical and legal reasons. P. Gonod, “Le Vice-Président du Conseil d’Etat : ministre de la justice administrative ?”, *Pouvoirs*, 2007/4, n° 123.

<sup>19</sup> 8 Administrative Courts of Appeal, 42 administrative tribunals and the National Court of Asylum Law.

<sup>20</sup> Bouvier Report, p. 118.

<sup>21</sup> Since the presidents of administrative courts of appeal are themselves councillors of state, it is conceivable that they have more room to manoeuvre than the presidents of administrative tribunals.

<sup>22</sup> A BOP is a fraction of a “programme” on a geographical or functional area. It is itself divided into operational units (UO).

<sup>23</sup> The Council of State, as programme manager, decides how to allocate funds among the courts within its BOP; but above all, as BOP manager, it exercises control over the expenditure acts taken by the UOs.

to propose any budgetary changes she or he considers necessary. Arbitration is carried out by the Council of State, whose decision is most often linked to the sustainability of a request from the point of view of the Ministry of Budget. The benefit of this system lies in the direct dialogue between the head of a court or tribunal and the Council of State and between the Council of State and the Ministry of Finance.

On the other hand, the heads of administrative courts enjoy real autonomy in budgetary management. The presidents are protected from a reduction in their budget during the year and able to freely dispose of their appropriations. They are autonomous in their management, although also quite extensively responsible, since the Council of State asks for accounts during and at the end of the year. The head of each court or tribunal monitors activity (such as entries, exits, stocks and trial time) and the Council of State centralises the results, which it then disseminates to all administrative courts.<sup>24</sup>

### **1.3 Financial administrative courts**

As with the general administrative courts, the financial (administrative) courts<sup>25</sup> benefit from a specific “programme” in the “Mission State Advice and Supervision”, attached to the Prime Minister. Credits freezes are subject to acceptance by the programme manager (the First President of the Court of Auditors), which gives these courts financial autonomy. However, the Court of Auditors, which is the appellate court for the regional audit chambers,<sup>26</sup> does not exercise the same control over the budget of those chambers as the Council of State does with the general administrative courts.<sup>27</sup> The regional audit chambers each have their own BOP, which gives them greater responsibility but also greater budgetary autonomy.<sup>28</sup>

At the formal sitting of 9 May 2005, the former First President of the Court of Auditors, Philippe Séguin, argued that the ordinary courts would also benefit from a system that guarantees their independence: “Could I simply express the wish that the integration into the LOLF system of the Court of Cassation, the other ordinary courts and the independent administrative authorities – with whom we have also been in close contact – can be done – all other things being equal – in such a harmonious manner, their independence being no less precious to the Republic?”<sup>29</sup> He did not say that the funding system should be the same, but that the principle of independence should be similarly respected.

It must be said, indeed, that this President fought to get the financial courts out of the regime that was initially established by the application of the LOLF.<sup>30</sup> This previous system made the financial courts financially dependent on the Ministry of Finance, insofar as their

<sup>24</sup> “The scoreboards of all courts are compiled at central level and redistributed by the General Secretariat of the Council of State. This allows courts to compare their performance with each other. In addition, each year, letters of objectives are negotiated and decided by the Council of State with each of the administrative courts and determine priorities for the management of disputes. Additional resources (in particular decision-making support staff) may be allocated to implement stock reduction measures or to handle a new type of dispute”: *Cour des comptes, op. cit.*, p. 87.

<sup>25</sup> The Court of Auditors and the 13 regional audit chambers are specialised administrative courts.

<sup>26</sup> The Council of State is the Cassation court.

<sup>27</sup> The programme manager allocates her or his credits into programme operational budgets (BOP) and sets each BOP manager her or his own objectives.

<sup>28</sup> Only the party in charge of a BOP can officially formulate the request for resources by explaining how they will be used. The difference is not significant, however, as the Council of State has instituted a dialogue that allows presidents of courts and tribunals to make a request for resources.

<sup>29</sup> Quoted in « La mise en oeuvre de la LOLF dans la justice judiciaire », Rapport d’information de M. Roland du LUART, fait au nom de la commission des finances n° 478 (2004–2005) – 13 juillet 2005, p. 41. <https://www.senat.fr/rap/r04-478/r04-4781.pdf>.

<sup>30</sup> He demanded the respect of a principle of equidistance of the Court of Auditors between the Parliament and the government. See « Séance solennelle » du 9 mai 2005: <https://www.ccomptes.fr/sites/default/files/EzPublish/9505DiscoursPP.pdf>.

budget was integrated into a mission whose main managers were located in the Ministry of Finance. The general administrative courts were also originally dependent on the “Justice Mission”, as were the ordinary courts and the CSM.

The integration of these two categories of courts as a programme within a mission under the authority of the Prime Minister has therefore given them greater autonomy. The administrative and financial courts do not enjoy as much autonomy as the Constitutional Council, since they are obliged to report to Parliament and their budget is institutionally dependent on the Prime Minister. Nevertheless, they enjoy financial autonomy with regard to the Council of State and the Court of Auditors and budgetary autonomy from the other courts, which in turn allows them to be free in their annual budgetary implementation.

The ordinary courts, or at least some of their representatives, have used these arguments in favour of the developments seen by the administrative and financial courts to advocate for the evolution of their own financing system.<sup>31</sup>

## 2. The centralized financing system for ordinary courts

The ordinary courts are in a different situation again: specifically, they do not decide on their resources. For the vast majority of the time, they have no direct dialogue with the Ministry of Justice – and even less with the Ministry of Budget – and their credits can be cut during the budget year.<sup>32</sup> In this sense, they are treated like other public services. Therefore, they depend on the executive and legislative powers for budgetary decision-making and on the executive power for budgetary execution. This situation, which has been much criticized, is the subject of proposals for change.

### 2.1 Dependence on the Ministry of Justice

The ordinary courts fall under the remit of the “Justice Mission”, whose programme managers are central directors of the Ministry of Justice. Therefore, neither the First President of the Court of Cassation, nor its Advocate General, nor the Presidents of courts of appeal and tribunals of first instance are appointed as “programme managers”. The ordinary courts are budgetarily attached to the “Judicial Justice programme”,<sup>33</sup> with the Director of Judicial Services of the Ministry of Justice as programme manager. As the Court of Auditors points out, “while the head of the “Judicial Justice” programme must deal with the arbitrations of the Secretary General of the Ministry of Justice between the various programmes of the Justice Mission, the Vice-President of the Council of State enjoys greater autonomy in defining his budgetary priorities”.<sup>34</sup> The Directorate of Judicial Services (DSJ) conducts the budgetary dialogue with the courts and assists the General Secretariat in its budgetary negotiations and exchanges with the Budget Directorate (Ministry of the Budget). The DSJ is responsible for the distribution of credits between BOPs, the management of “arrowed credits”<sup>35</sup> and for budget regulation.

<sup>31</sup> See the *delibération* of the National Conference of First Presidents of Courts of Appeal (*Conférence nationale des premiers présidents de cour d'appel* in french) of June 2, 2005, contained in the previous cited Senate report, p. 43.

<sup>32</sup> As stated in the Senate report on the 2018 finance bill: “For 2017, nearly €284,2 million of the “Justice” mission's voted budget, including €90 million from the judicial authority, was frozen at the beginning of the management process, representing 81% of the budget increase allocated. Thereafter, Decree n° 2017-1182 of 20 July 2017 on the opening and cancellation of appropriations by way of advance cancelled 159,8 million euros in payment appropriations from the budget of the “Justice” mission, to which must be added the 78 million euros in appropriations that will soon be cancelled, as announced in the report annexed to the second bill amending finance law for 2017”.

<sup>33</sup> This programme covers civil, criminal and commercial justice.

<sup>34</sup> *Cour des comptes, op. cit.*, p. 84.

<sup>35</sup> Arrowed credits are credits whose nature of use is predetermined.

The Court of Cassation benefits from a BOP, although this does not give it any financial autonomy; its credits are simply distinguished from those of the other ordinary courts. It does not exercise the role of manager with regard to the other ordinary courts that the Council of State does in relation to the other general administrative courts. On the contrary, there is a dualist management of the courts of appeal by the First President and the Attorney General. Articles R. 312-65 to R. 312-67 of the Code of Judicial Organisation make the First President of the Court of Appeal and its prosecutor the administrators of the judicial services within their jurisdiction. They shall be regarded as the secondary authorising officers of court expenditures and revenue in respect of appropriations relating to the staff, operations and interventions of their court and of the tribunals of first instance within their jurisdiction.

The heads of appeal courts hold budgets, but clearly their room to make decisions is very limited. In particular, they are connected to regional administrative services that are responsible for preparing, implementing and monitoring decisions and acts of an administrative nature.<sup>36</sup> Each of the 36 Courts of Appeal is an UO, but there are only about ten metropolitan BOPs. The few First Presidents of courts of appeal who are BOP managers have no authority over the First Presidents of the courts of appeal under their jurisdiction, which limits their budgetary competence. In addition, the practice of using “arrowed credits”<sup>37</sup> by the Ministry of Justice limits the interest of these BOPs. There is no fungibility between credits. There is particularly no latitude on human resources, apart from the distribution of temporary contract credits and the assignment of magistrates placed (with the maximum number of posts being set at the central level). The purchasing policy is also very limited. Some expenses such as telephony and online documentation are centrally managed. The margin of manoeuvrability at the level of the tribunals of first instance is therefore non-existent, as it is the heads of the courts of appeal who authorise the expenditure of these courts, even though they have very little margin themselves.

The situation of the CSM is also noteworthy. The CSM is the body responsible for giving opinions on the appointment of judges, as well as deciding on their professional liability. It has no financial autonomy itself: the Secretary General of the Court must negotiate its budget with the Secretary General of the Ministry of Justice.<sup>38</sup> Currently, Article 12 of the Organic Law of 5 February 1994, as amended by the Organic Law of 22 July 2010, states: “The budgetary autonomy of the High Council shall be ensured under the conditions determined by a finance law”. The Constitutional Council associates this autonomy with the fact that the CSM has its own programme,<sup>39</sup> the head of which is the First President of the Court of Cassation.

In addition to the critical observation of this highly centralised administrative framework, the claim for financial independence has been made in a context where the justice budget is low, even if it has doubled in the last 40 years. The cost of prison administration weighs heavily on the budget of the Ministry of Justice, whose record number of detainees in France has just been surpassed. There are now 71 828 people incarcerated, or a prison density of

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<sup>36</sup> The Regional Administrative Services (SARs), created in 1996, support the management of courts. As Judge Didier Marshall said, « Never Chancery was also mandatory in the management of resources. The LOLF eventually resulted in both early years, a highly centralized management leaving no initiative to jurisdictions posing on the regional administrative services, sometimes treated as external services of the central government, considerable pressure » : « 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. 130.

<sup>37</sup> The programme manager determines the nature of the expenditure that the credit granted must finance and therefore prevents the BOP manager from distributing the credits according to the expenses she or he wishes to incur.

<sup>38</sup> In practice, the General Secretary of the Council negotiates his budget with the Ministry of the Budget accompanied by the General Secretariat of the Ministry of Justice.

<sup>39</sup> Conseil constitutionnel, Décision n° 2010-611 DC du 19 juillet 2010, considérant 13.

117.7%.<sup>40</sup> As a result, some courts are obliged to prioritise their disputes. More often than not, criminal and family cases are treated as a priority to the detriment of everything else.

The table below summarises the differences in the situation between the French courts.

## **2.2 Proposals for change to increase the financial independence of ordinary courts**

As mentioned above, the administrative and financial courts have succeeded in improving their situation, especially by invoking respect for the principle of independence. Several bodies have subsequently advocated for a similar evolution of the system that applies to the ordinary courts.

The April 2017 information report of the Senate fact-finding mission entitled “Five Years to Save Justice!”<sup>41</sup> also known as the Bas Report, showed that the Senate appears to be a genuine financial support for the justice system. In particular, it argues for the exemption of ordinary courts from budgetary regulation. 125 of the 127 recommendations in its report were approved by all political parties.

A working group convened at the initiative of the First President of the Court of Cassation and headed by Professor Michel Bouvier, entitled “What financial independence for the judicial authority?”, has made proposals to strengthen the financial decision-making and management autonomy of the ordinary courts. Among its 21 proposals, the report particularly recommends the creation of an autonomous “Judicial Justice” mission, incorporating the two programmes of “Ordinary Justice” and “High Council of the Judiciary” with the aim of disentangling them from the prison administration budget. Another proposal is that the Court of Cassation should not have a BOP but rather its own programme, which would allow it to escape budgetary regulation.

From the same perspective, the report proposes to establish one BOP per Court of Appeal. In addition to the existing “management dialogue”, it suggests a “decision-making dialogue” between the Ministry of Justice and the conferences of heads of courts and tribunals, to discuss the budgetary guidelines envisaged by the government. It recommends that ordinary courts have their own resources, such as a contribution for legal aid or to claim a right to a second copy of legal decisions, or rents for organisations that are currently housed free of charge in commercial courts. It also argues that legal fees should become evaluative credits again, instead of restrictive credits. It suggests the competence of the CSM to advise on the annual finance bill (adoption of the budget) and the statement bill (implementation of the budget).<sup>42</sup>

It also proposes that the CSM should have public power status,<sup>43</sup> which means that it would present its own budget to Parliament and have it voted on as it stands. According to the working group, this move is justified by the tasks carried out by the CSM and would be a necessary change if the CSM were to have more extensive administrative and budgetary functions in the future, thus integrating the model of the Justice Council Manager.<sup>44</sup> The implementation of this proposal would imply, as the report acknowledges, the recognition of a judicial power and not just a judicial authority, which may be a major obstacle.

## **2.3. The prospects for development**

The political reactions to this work seem disappointing in terms of structural reform. Even the Senate does not advocate a far-reaching reform that would entrust the preparation and execution of the budget of the judicial courts to the CSM. Invited to close the colloquium of

<sup>40</sup> Monthly prison statistics published by the Ministry of Justice on 14 May 2019.

<sup>41</sup> <http://www.senat.fr/rap/r16-495/r16-495.html>.

<sup>42</sup> The CSM considered that its association in the context of the budget adoption and review procedure was the most modest but necessary proposal.

<sup>43</sup> This is a proposal that was not born with the debate on financial independence, but that the CSM itself advocates.

<sup>44</sup> Bouvier Report, p. 119.



Table 1: On the comparison of French courts.

	Autonomy in budget decision-making	Budget adoption by Parliament	Decision-making dialogue with political powers	Decision-making dialogue with Manager	Autonomy in budget execution	Execution dialogue with Manager	No budget regulation	Accountability vis-à-vis political powers and/or Manager
<b>Constitutional Court</b>	✓	✓			✓		✓	
<b>General Administrative Courts</b>		✓	✓		✓		✓	✓
Council of State								
Administrative Appeal Courts		✓		✓		✓	✓	✓
Administrative Tribunals		✓		✓		✓	✓	✓
<b>Financial Courts</b>		✓	✓		✓		✓	✓
Court of Auditors								
Local Financial Courts		✓		✓			✓	✓
<b>Ordinary Courts</b>		✓		✓	✓			✓
Court of Cassation								
Appeal Courts		✓		✓*				✓
Tribunals of First Instance		✓						✓
<b>High Council of the Judiciary</b>		✓	✓**	✓	✓		✓	✓

\* Only for the ten courts of appeal in charge of a BOP.

\*\* The General Secretary of the Council negotiates her or his budget at the Ministry of the Budget accompanied by the General Secretariat of the Ministry of Justice.

**Table 2:** Comparing the current situation of the ordinary courts and the CSM against the main proposals of the Bouvier Report.

Current situation	Bouvier Report proposal	Public power status	Common budget with prison administration	Decision-making dialogue with political powers	Decision-making dialogue with Manager	Budget regulation	Own resources	Advice on budget adoption and implementation
<b>Ordinary Courts</b>								
	Court of Cassation	x	x	x	✓	x	x	x
	Appeal Courts	x	x	x	✓**	✓	x	x
	Tribunals of First Instance	x	x	x	x	✓	x	x
<b>High Council of the Judiciary</b>								
		x	x	x	✓	x	x	x

\* If the CSM was part of the new Judicial Justice mission, including the appropriations of the ordinary courts and excluding those of the prison administration. If it were to obtain the status of a public power, it would be exempt from this dialogue, as is the Constitutional Council.

\*\* Only for the ten courts of appeal in charge of a BOP.

\*\*\* Between the Ministry of Justice and the conferences of heads of courts and tribunals.

the Court of Cassation on the financial independence of ordinary courts on 16 October 2017, the chairman of the Senate Law Commission said that it would be a “triple step backwards for the State, for democracy, for justice”.<sup>45</sup> The Senate called for the adoption of a five-year law on the programming of judicial resources and the “sanctification” of two programmes bringing together the appropriations of the judicial authority, from the ordinary courts and the CSM respectively, and the strengthening of the budgetary responsibilities of the heads of courts and tribunals.<sup>46</sup>

The proposals from the Bouvier Report to reform financial decision-making and implementation have therefore not received a strong response. Yet they are reasonable, reflecting the resignation of judges to ask for only minor, politically amenable reforms and close to the recommendations of the above-mentioned international institutions. The Report does not call for decision-making autonomy, but for judges to be better involved in budgetary decision-making and management.

As it happens, even these realistic reforms have not yet been proposed: a constitutional bill was tabled in May 2018 that contains no provision on the “financial independence” of the CSM or the ordinary courts. This is despite the fact that the last constitutional amendment of 23 July 2008 led to a major reform: the presidency of the CSM by the President of the Republic and its vice-presidency by the Minister of Justice were abolished.<sup>47</sup> The recognition of public power status of the Council would be a logical follow-up.

However, a financial effort by the Government has been made. An increase in appropriations was included in the 2018–22 public finance programming law and reaffirmed by the 2018–22 programming and justice reform law<sup>48</sup> of 33.8% by 2022 compared to the 2017 finance law. As early as 2018, appropriations increased by 3.9% and an effort was undertaken in terms of recruitment. This is reflected, over the 2019–22 period, in the creation of 832 net new jobs for judges and 248 jobs for assistant lawyers. Budgetary regulation is not abolished, but it is reduced. The 2018–22 public finance programming law lowered the government share of possible regulation during the year from 8 to 3%,<sup>49</sup> but in reality the effort of the Government should slow down from 2020.<sup>50</sup>

In this context, can we foresee the implementation of a system in France where the ordinary courts would negotiate directly with the Government and Parliament? The majority of members of the Bouvier Commission were not in favour of the Court of Cassation assuming this role. Ordinary court judges fear for their independence from the Court of Cassation and have often stated that they do not wish to follow the model of French administrative justice. Could we then consider a model for budget administration by the CSM? The Dutch example shows that the management by the Justice Council established in 2001 does not prevent

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<sup>45</sup> Bas P. Allocution de clôture, *Revue française de finances publiques* 2018 n° 142, page 164.

<sup>46</sup> *Ibid.*

<sup>47</sup> Organic Law n° 2010-830 of 22 July 2010 on the application of article 65 of the Constitution implements the provisions relating to the CSM provided for in the Constitutional Law n° 2008-724 of 23 July 2008 on the modernization of the institutions of the Fifth Republic.

<sup>48</sup> A programming law is not mandatory for the government, but it is a political commitment. This justice programming law was recommended by the Senate report and the Bouvier Report.

<sup>49</sup> The government may decide to exempt certain priority programs from these regulatory measures, which do not consequently apply generally.

<sup>50</sup> As can be seen in the Senate report on the 2018 finance bill, even with this framework, the freezing of appropriations would amount to nearly €44,8 million for the judicial authority. Moreover, over this period 2018–22, only the 2018 and 2019 credit limits constitute a strong commitment by the government. The government’s effort will therefore tend to decrease from 2020. The Senate also notes that if operating and investment appropriations increase while they are too often neglected, the cost of the new Paris Courthouse alone represents two thirds of the increase in investment appropriations and one third of the operating appropriations of the “Judicial Justice” programme.

budget cuts.<sup>51</sup> However, as mentioned earlier, in France the debate on financial independence is first analysed through the problem of budgetary urgency and less on theoretical considerations. These budget cuts suggest that the financial independence of the judiciary does not exist. Therefore, it is necessary to better define the financial independence of the judiciary or, perhaps more usefully, their financial or budgetary autonomy.

### 3. Financial independence, financial or budgetary autonomy?

The French example certainly has something to contribute to a definition of the financial independence of the judiciary. It seems, indeed, to be based on at least three types of systems:

- A system that establishes financial independence, i.e. a financial decision-making mechanism in which the government and Parliament have a limited role in approving the requested allocation. In this regard, it should be pointed out that there are both theoretical and concrete doubts that the financial independence of justice can exist. Justice, despite the principles of separation of powers and independence, cannot be outside democratic logic and the representative system,<sup>52</sup> and it is not certain that public international law itself guarantees the “sanctification” of justice system resources.<sup>53</sup>
- A system that establishes financial autonomy, i.e. the possibility for a court (and perhaps, one day, for a Council of Justice) to decide on the resources allocated to its jurisdiction and the courts it administers, and the guarantee of a certain level of resources provided. Participation in financial decision-making is indeed possible. In Georgia, the law prohibits the reduction of the court budgets compared to the previous year without the agreement of the High Council of Justice. According to Opinion n° 2 (2001) §11 of the Consultative Council of European Judges, “One form which this active judicial involvement in drawing up the budget could take would be to give the independent authority responsible for managing the judiciary – in countries where such an authority exists – a co-ordinating role in preparing requests for court funding, and to make this body Parliament’s direct contact for evaluating the needs of the courts. It is desirable for a body representing all the courts to be responsible for submitting budget requests to Parliament or one of its special committees”.
- A system that establishes budgetary autonomy, i.e. autonomy in the management of the budget, more precisely in the use of the resources allocated.

Financial independence can be found in a system where the resources are determined and adopted by the Council for the Judiciary or a court itself. It is total financial freedom. The situation is very similar to that of the French Constitutional Council, which proposes a budget

<sup>51</sup> Langbroek, P., 2019. “Financing the Judiciary in the Netherlands: between work overload in the courts and government control of the Judicial Budget”. *International Journal for Court Administration*, 10(1), p. 0.

<sup>52</sup> William Scott Ferguson, “Judicial Financial Autonomy and Inherent Power”, *Cornell Law Review*, Volume 57, Issue 6, July 1972, p. 975–990. J. Ferejohn et L. D. Kramer, « Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint », *New York University Law Review*, Oct. 2002, vol. 77.965.

<sup>53</sup> Paragraph 7 of 1985 Basic Principles on the Independence of the Judiciary only specifies that “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.” and the 1989 Rules for the Effective Application of the Basic Principles on the Independence of the Judiciary provide that “In the application of Basic Principles 8 and 12, States shall pay particular attention to the need to allocate adequate resources for the functioning of the judicial system”. C. Expert-Foulquier, “Internationally Guarantee the Constitutional Bases of the Separation of Powers and the Independence of the Judiciary”, *Workshop New Democracies and Challenges to the Judicial Branch*, 10th World Congress of Constitutional Law (IACL-AIDC), Seoul 18–22 June 2018.

allocation that Parliament adopts without negotiation. Such independence can only be based on a historical budget and the financial restraint of the Council.

But the case of the French Constitutional Council may raise questions. It does not have the power to adopt its own resources, nor even to establish and recover them itself, but it can determine the amount and impose it on Parliament. Moreover, public powers<sup>54</sup> lack accountability, because of the French conception of the separation of powers, as constructed by the Constitutional Council itself.<sup>55</sup> This conception is contested because it actually prevents any financial accountability of these public powers to the representatives of the people.<sup>56</sup>

This lack of financial accountability contributes to the financial independence of the Constitutional Council and even makes a convincing argument for the identification of a de facto financial independence. Bernd Hayo and Stefan Voigt distinguish between legal independence and de facto independence. They demonstrate that independence does depend on the rules of law that are in force, but not entirely. Cultural, administrative and political factors, including whether or not those rules are likely to be applied, complement and precede the rules themselves in some cases.<sup>57</sup> In this regard, Olivier Beaud makes a very interesting remark about the notion of financial autonomy, which can be extended to that of financial independence: the very fact of reasoning in terms of financial autonomy (or independence) slides into the field of de facto independence.<sup>58</sup> As it happens, de facto independence is becoming more and more important nowadays.<sup>59</sup>

However, we know that the Constitutional Council itself speaks of financial autonomy,<sup>60</sup> seeming to allow that the idea of financial independence of the judiciary is illusory, given that the adoption of the budget is generally the responsibility of Parliament in democracies. But the situation of the French Constitutional Council above all illustrates that the financial autonomy of the judiciary is possible.

In France, this is true of the Constitutional Council, but also arguably of the Council of State and the Court of Auditors, which negotiate their budgets directly with the Ministry of the Budget and are protected from budgetary regulation. They therefore participate in budgetary decision-making. In this regard, the concept of budgetary autonomy could seem as appropriate as for the Constitutional Council. On the one hand, their situations are not as favourable as that of the Constitutional Council, so in order to put them in the same category it would have to be admitted that financial autonomy can have different degrees.

On the other hand, their situations are more favourable than that of the other administrative courts, which even so can be said to enjoy budgetary autonomy. The Court of Cassation and the CSM also enjoy budgetary autonomy. With regard to the CSM, the law and the

<sup>54</sup> Of which the Constitutional Council is a part and of which the CSM could be a part according to a proposal in the Bouvier Report.

<sup>55</sup> The principle of separation of powers as interpreted by the Constitutional Council leads to a strict separation and specialization of powers rather than a balance and true collaboration of powers: O. Beaud, « Le Conseil constitutionnel et le traitement du président de la République : une hérésie constitutionnelle », *Jus Politicum Revue de droit politique*, n° 9, 2013, p. 33.

<sup>56</sup> Ibid.

<sup>57</sup> B. Hayo, S. Voigt, « Explaining de facto Judicial Independence », *International Review of Law and Economics* 27, 2007, p. 269–290.

<sup>58</sup> O. Beaud, *op. cit.*, p. 27.

<sup>59</sup> This is reflected, for example, in the results of the recent survey of the European Network of Councils for the Judiciary, which particularly show that “many judges are very critical about their working conditions, and believe that these affect their independence”: ENCJ, Report on Independence, Accountability and Quality of the Judiciary, 2018–2019.

<sup>60</sup> See footnotes 14 et 15.

Constitutional Council explicitly use the term.<sup>61</sup> The other ordinary courts, however, enjoy neither independence nor financial autonomy, nor, as one might hope, budgetary autonomy.

This classification into three systems or definitions still needs to be criticized, qualified and completed; these three concepts are far from being delimited, particularly in France. The report of the working group led by Professor Michel Bouvier only uses the term financial autonomy, despite its title referring to financial independence. The report also uses financial autonomy and budgetary autonomy synonymously. On the other hand, it clearly distinguishes between autonomy in financial decision-making and autonomy in financial management,<sup>62</sup> which might be equivalent to the distinction between financial autonomy and budgetary autonomy.<sup>63</sup>

This distinction also seems to correspond to the spirit of the times. Observation of the French example shows that there is an evolution towards a differentiation (but not a separation) between the financial system and the budgetary system, which certainly reflects the greater importance given to accounting logic and budgetary results by French officials today. This is reflected very concretely in the distinction between the Minister of Finance and the Ministry of the Budget, the latter being generally attached to the former.<sup>64</sup> Therefore, arguably, financial autonomy is more related to budgetary decision-making and the search for a certain level of resources, while budgetary autonomy is more related to the free (but responsible) management of the budget.

The Bouvier Report establishes a very interesting link between management autonomy and decision-making autonomy, the former being the “foundation” of the latter, since it establishes the conditions for judges to be financially responsible,<sup>65</sup> which in turn is the prerequisite for their legitimacy to make decisions in this area. The more that judges demonstrate their ability to manage budgets, the more legitimacy they will have to demand financial decision-making autonomy. The financing systems that can best guarantee the principle of judicial independence are those that come closest to financial autonomy, but which do not exclude the realm of justice from representative control.

As mentioned above, many French experts believe that the financial autonomy that is being gradually built by the Constitutional Council through its case law for institutions with public power status is not satisfactory, because it protects those institutions from the democratic requirement of accountability. Certainly, France needs to make efforts to improve the logic of

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<sup>61</sup> See footnote 38.

<sup>62</sup> “The question of financial autonomy covers two aspects, management autonomy and decision-making autonomy”, p. 69.

<sup>63</sup> “Financial decision-making autonomy implies the possibility for an institution to freely define its budget in terms of resources and expenses. It does not necessarily imply total independence which would require financing from own resources derived, for example, from private estate income, service pricing or even own taxation. It is perfectly compatible with resources allocated by the State insofar as it is given the opportunity to determine its needs and participate in the decision. It requires an action strategy and a capacity to assess its own needs.

Financial management autonomy is at the heart of the LOLF because its objective is to make public actors accountable. It consists in transferring to the institution not the decision but the management of its budget. Here again, this autonomy may be more or less extensive and exclude certain aspects from its scope, such as the real estate stock or human resources. It requires the use of adapted tools from private management”, p. 28.

<sup>64</sup> The separation of Finance and Budget occurred in 2007. For the first time, a Minister of Budget and Public Accounts was appointed, a denomination “which is above all significant for the progress of the accounting approach in the field”: M. Bouvier, M.-C. Esclassan, Lassalle J.-P., *Finances publiques*, 2010, p. 244.

<sup>65</sup> “Financial management autonomy is the basis for a broader autonomy in the decision on the allocation of appropriations. The latter situation is one of financial decision-making autonomy which, in any case, can only be relative, at the risk of causing the system to implode into different entities. Thus, moving towards decision-making autonomy consists in identifying the mechanisms that could make it possible to move towards a better association of the judicial authority with the national budgetary decisions that concern it, accompanied by guarantees as to the availability of the resulting appropriations”, p. 70.

performance and the output budget system, since the LOLF introduced a real budgetary constraint for the courts in terms of savings, but failed to introduce accountability in the noble sense of the term. This kind of accountability would require a real evaluation of the results of the performance of courts in terms of quality of justice (i.e. well-reached court decisions within a reasonable time).<sup>66</sup> Such a process would give more legitimacy to the idea of giving greater financial or budgetary autonomy to the CSM and the ordinary courts.

Since a constitutional amendment in 2003, the French Constitution has enshrined the principle of the financial autonomy of local authorities in Article 72-2.<sup>67</sup> The Constitutional Council is gradually interpreting this principle, which requires local authorities to have sufficient resources at their disposal.<sup>68</sup> It is interesting to note that it follows from the principle of the free administration of local authorities provided for in article 72 of the Constitution,<sup>69</sup> which can be compared to the principle of judicial independence enshrined in article 64.<sup>70</sup> Such financial autonomy could therefore be enshrined for the judiciary, possibly in an article 64-2.

It remains to be seen whether financial independence or autonomy has a real impact on the independence of the judiciary. The first is an indisputable guarantee of the second, but in a democracy, the independence of the judiciary cannot imply the financial irresponsibility of judges. The independence of the judiciary is certainly not only a matter of financial considerations. In France, many criticisms are expressed against the system of overly political appointment of members of the Constitutional Council and the political-administrative history and culture of the Council of State, which makes it too close to the executive branch, while the ordinary courts – who do not enjoy similar financial autonomy – are seen as having a long tradition of independence from the political power. The factors for analysing the independence of justice are many.<sup>71</sup> The members who make up the courts, and who by their nature are constantly evolving, play a decisive role in guaranteeing the principle of judicial independence. A former President of the Constitutional Council told the members of the Constitutional Council: “Remember that we have a duty of ingratitude towards those who appointed us”.<sup>72</sup>

Financial independence may not be the *sine qua non* of judicial independence, but the current climate of questioning this independence leads judges to strive to move closer to it. Financial autonomy or budgetary autonomy may be more useful concepts, if only because they are less frightening to political power.

## Competing Interests

The author has no competing interests to declare.

<sup>66</sup> *La prise en compte de la notion de qualité dans la mesure de la performance judiciaire (QUALIJUS). La qualité: une notion relationnelle*, E. Jeuland (dir.), June 2015. Online: <http://www.gip-recherche-justice.fr/publication/qualijus-aspect-judiciaire/>.

*La prise en compte de la notion de qualité dans la mesure de la performance judiciaire (QUALIJUS) – Justice administrative*, L. Cluzel-Métayer, C. Foulquier-Expert and A. Sauviat (dir.), June 2015. Online: <http://www.gip-recherche-justice.fr/publication/qualijus-aspect-administratif/>.

<sup>67</sup> Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République.

<sup>68</sup> See in particular Decision n° 2004-500 DC of 29 July 2004, where the Council points out that for each category of local authorities, the share of own resources in their total resources must be “decisive” and this must be assessed in the light of a minimum threshold corresponding to the level recorded for 2003.

<sup>69</sup> The Constitutional Council subsequently pointed out that too significant a reduction in the resources of a local authority would be likely to hinder its free administration: décision DC 298 du 24 juillet 1991, considérant 38.

<sup>70</sup> Both involve a distance from the government and Parliament. Of course, the independence of the judiciary implies much more.

<sup>71</sup> According to M. C. Stephenson, in addition to the formal aspects of independence, such as constitutional guarantees, there are political factors of governmental acceptance of the independence of the judiciary to be taken into account: « When the Devil Turns... The Political Foundations of Independent Judicial Review », *Journal of Legal Studies*, University of Chicago Press, vol. 32, 2003, p. 59.

<sup>72</sup> Robert Badinter, President of the Constitutional Council from 4 March 1986 to 4 March 1995.

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