

Chapter 2

Indicators or Incentives? Some Thoughts on the Use of the Penal Response Rate for Measuring the Activity of Public Prosecutors' Offices in France (1999–2010)

Christian Mouhanna and Frédéric Vesentini

2.1 Introduction

Starting from the 1990s, the French judicial system has been undergoing revolutionary internal changes that thoroughly altered its organisational structure, its way of processing penal cases, and even the occupational culture of the magistrates themselves. A number of court presidents and public prosecutors, growing acutely aware of the public's discontent towards what was perceived to be a sluggish, unresponsive judicial system, started experimenting with novel methods and tools meant to deliver improved judicial services to the public (Ackermann and Bastard 1998). “Houses of Justice” (*Maisons de la justice*) were created, ombudsmen were appointed, new organisational structures were designed to enhance process flows... In the early 2000s, the Ministry of Justice took over and selected what were felt to be the most interesting innovations, integrating them into nationwide policies aimed at modernising the judicial apparatus, and inviting all courts to make actual use of them. One notable example is the TTR scheme (*Traitement en Temps Réel* or Real-Time Processing), designed to bring an immediate response to an increasing number of crimes (Bastard and Mouhanna 2007). The goal was actually two-fold: avoiding dropped cases—of which there were many—, and processing police-initiated cases more quickly. Within this framework, “hotlines” were set up by courts, allowing the police to report “in real time”, directly to the prosecution

C. Mouhanna (✉)

National Center for Scientific Research, Centre de recherches sociologiques sur le droit et les institutions pénales (CESDIP), Paris, France
e-mail: mouhanna@cesdip.fr

F. Vesentini

Institute for Statistics, Evaluation and Foresight, Wallonia, Belgium
e-mail: f.vesentini@iweeps.be

staff, i.e. usually right after an arrest had been made. After a phone call that typically lasted no more than ten minutes, the prosecution staff had to make a decision regarding which direction to take with the case: serving a summons, dropping the case, or looking for an alternative measure.

At about the same time, the Ministry of Justice established management programs whose basic principles were shared across all local jurisdictions (Jean 2008; Vigour 2006; Gautron 2014b). The idea was to benchmark the “performances” of the various courts and require that the least effective become more productive, and to make sure that penal cases received systematic responses. Hence, instead of unique cases individually entrusted to the shrewdness of prosecuting magistrates emerged a “mass” to be processed as quickly as possible, and the activities of prosecutors’ offices were monitored through various quantitative indicators designed to “supervise” the work of prosecution staff: penal response rates per court, average processing time of cases, number of cases processed by a given prosecutor over a given time period... All of a sudden, at the onset of the 2000s, magistrates—who rather used to keep their distance from the quantitative evaluation of their activities—developed an increasing awareness of those figures that mattered so much in the eyes of both Prosecutor Generals and the Ministry. Since their operating funds—equipment, staff—depended on increased productivity, prosecutors had to document and justify their penal response rates with the Ministry. The underlying objective was clear enough: reducing the number of dropped cases, which are detrimental to the credibility of the response and the judicial system in general.

Faced with the double requirement of improving response times and measuring their own activities, prosecutors’ offices started optimising their decision-making processes by designing a variety of “productivity-boosting” technical and legal tools. Many alternative measures—such as mediations and cautionings (*rappel à la loi*), usually performed by ad hoc prosecution staff—were pushed forward, and scoring scales were developed to support prosecutors’ decision-making. For a given offence such as a specific blood alcohol level or a precise amount of prohibited substance, the prosecutor immediately knew which procedure to apply (Perrocheau 2014; Gautron 2014a). In addition, new methods were designed for dealing with proceedings, half-way between court hearings and alternative measures. Towards the end of the 1990s, the “*composition pénale*”¹ was introduced as a way of reaching a settlement, whereby the prosecutor proposes a penalty that can be accepted by the perpetrator. The role of the judge is extremely limited here, and reduced to validating—or possibly, but rarely, rejecting—the settlement. Since such offences do show up on criminal records, the idea is to increase the speed of sentencing—after all, as some prosecutors put it, “it gains time on hearings” (Milburn et al. 2005).

2004 saw the introduction of CRPC² (*Comparution sur Reconnaissance Préalable de Culpabilité*), basically a guilty plea based on the same principles as

¹Act of 23 June 1999 reinforcing the efficiency of penal procedure.

²PERBEN II Act, 9 March 2004 (article 137).

the *composition pénale*, except that potential sentences are heavier and include non-suspended prison terms. Another option is the *Ordonnance pénale délictuelle*, a simplified ruling procedure that allows the prosecutor to notify penal “sentences” by post. Those measures are interesting in that they make it possible to inflict a penalty—called “*sanction*”, as opposed to “*peine*”, in the absence of any court judgement—while saving time on hearings.

A further step was taken when mandatory sentencing was introduced in 2007,³ clearly indicating that those in charge at the Ministry of Justice would not be content with managing penal response rates, but wanted harsher—and still measurable—penalties as well. Prosecutors’ offices were henceforth appraised in terms of their performance regarding mandatory sentences, i.e. minimal penalties imposed by lawmakers for given offences—particularly reoffences, under certain conditions.

Upon examining those measures and their implementation, one is struck by the feeling of self-satisfaction that can be perceived among the prosecutors who did deploy these systems and subsequently saw their response rates improve, peaking at 89.6 % in 2013⁴—89.2 % in 2012. To them, what happened was nothing short of the long-overdue mutation of an obsolete judicial system that, instead of regulating its level of activity solely by deciding on whether or not to prosecute (the principle of opportunity), had finally found a way to operate optimally by measuring its own effectiveness and putting prosecutors’ offices under external management pressure. From then on, instead of using the principle of opportunity to conceal the lack of resources and investment that typically makes it impossible for the judicial system to respond to all requests, prosecutors would implement decision-making streamlining policies that would enable them to process almost all—i.e. 89 %, officially—of said requests. In 2013, 1,303,469 “prosecutable”—more on this concept later—cases were processed by prosecutors’ offices in France.

What is this supposed to mean in practice? A couple of studies with a fundamentally qualitative and microsociological approach (Bastard and Mouhanna 2007; Danet 2013) have shed some light on local transformations—both individual and organisational—experienced by prosecutors’ offices. This research has highlighted the negative effects induced by such a focus on the quantitative aspects of public prosecutors’ productivity. *In concreto* analysis highlights the necessary conditions of what appears to be an acceleration of judiciary time: scoring scales that merge individual cases into a shapeless mass to be processed indiscriminately; shorter hearings, hence less time devoted to listening to both pursuants/victims and defendants; burn-outs among prosecution staff, who incidentally feel that penal policies are eluding them entirely. One aspect that hasn’t been studied so far is the productivity of prosecutors’ offices itself. All of the issues discussed above are regular guests in the discourse of the promoters of this “fast” brand of justice, as a price to pay for a more efficient penal justice system. A closer look at the

³Act of 10 August 2007.

⁴From: Les chiffres clés de la Justice 2014—Ministère de la Justice-SDSE.

actual figures, however, leaves quite a few questions unanswered: are we really seeing an increase in the number of cases processed over the past 15 or 20 years, and if so, how substantial is it? To what degree are the “new” processing methods accountable for such an increase? How did the real-time processing culture spread over the years? Some of these questions can indeed be answered by examining the figures supplied by the Ministry of Justice, as well as local statistics.

2.2 Statistical Tools for Measuring Judicial Activity

While judiciary activity can be measured locally, the Ministry also provides numbers that help outline the changes occurring across all French jurisdictions. The French Ministry of Justice has a statistical division (the *Sous-direction de la statistique et des études*—SDSE) that produces annual reports and tables describing the activities of the judiciary. The publications colloquially known as “*cadres du parquet*” (public prosecutor’s data) give a rather traditional picture of the activity of the various public prosecutors’ offices, in terms of flows and inventories. Devoted to outgoing cases, they are very similar to the tables published in the *Compte général de l’administration de la justice criminelle* from 1825 until the late 1970s.

Over the years, some of the categories have remained absolutely unchanged. Conversely, other categories were created or modified as criminal proceedings evolved. Examples include the aforementioned *compositions pénales* (settlements)—73,700 in 2013—, *ordonnances pénales* (simplified rulings)—150,300—, and CRPC (guilty plea)—69,627—, all of which were introduced fairly recently, considering the time scale. These variations notwithstanding (more on them later), one major change occurred regarding dropped cases.

One of the points of those rating charts was to assess cases in terms of the principle of opportunity. Over the years, prosecutors ended up simply relying on them to regulate the flow of criminal cases that they were unable to process (Bruschi and Nadal 2002), which was in fact one of the main arguments pushed forward by the advocates of organisational changes in the judiciary (Brunet 1998) to justify real-time processing methods. As soon as performance indicators were introduced in public policy management in France in the early 2000s (Marshall 2008), the Ministry of Justice felt a need for greater accuracy, in order both to understand precisely what was being measured and to encourage prosecutors to improve judicial response rates.

In this context, a major innovation occurred in 1999 when a detailed table of reasons for dropped cases—which used to be bundled up into one single line—was included for publication in public prosecutor’s data. To be precise, the *compte général* did use to include such a table, until it disappeared in 1932. In the 1999 table, reasons for dropped cases were categorised on two levels. First, prosecutable versus non-prosecutable—either for legal or investigative reasons (problematic elucidation). In 2013, out of 4.35 million cases “processed” by public prosecutors, 3.5 million were considered non-prosecutable, either because of incomplete/

erroneous characterisation of the facts or insufficient evidence (492,267) or because the perpetrator was unknown, which falls into the cold case (*défaut d'élucidation*) category (2,560,222). Generally speaking, for a prosecutor to classify a case as “non prosecutable” means that the magistrate objectively or subjectively considers police work to be under par—the whys and wherefores of which, although interesting, are beyond the scope of the present chapter. Suffice it to say that a significant portion of the cases that reach prosecutors’ offices thus promptly exit official productivity statistics. Hence, out of 4.35 million “processed” cases, only 1.3 million are deemed “prosecutable”. This is the figure used to compute the prosecution rate, i.e. the number of cases in which public prosecutors do respond (89 % in 2013).

The second level of categorisation applies to prosecutable cases only. Many of them are dropped for various reasons: inconclusive investigations, discontinuance from the plaintiff (withdrawal of default), perpetrator suffering from mental deficiency, victim considered to bear some responsibility or not to have any interest in prosecuting, damage caused considered to be slight or already compensated. About 10 % of prosecutable cases are thus dropped because they are considered—by public prosecutors—to lack legal relevance. A further 38.7 % are then processed by “alternative” means such as cautionings, mediations, and conditional discharge—no prosecution if the perpetrator compensates the damages or accepts medical treatment. 5.7 % of prosecutable cases reach a settlement (*Composition Pénale*), which is considered as an alternative measure even though such offenses do appear on criminal records. Hence, the remaining cases yielded a 46.1 % prosecution rate in 2013, i.e. 600,000 cases that actually ended up in front of a criminal, police, or juvenile court, or on the desk of an investigative judge.

2.3 Changes: Real or Cosmetic?

Examination of long term trends, though, makes it apparent that from 1992 to 2009, statistics for dropped cases (and/or prosecution rates, which are complementary) stabilised (Chart 2.1). The prosecution rate, defined as the number of prosecuted cases divided by the number of processed cases, follows the pattern below and always stays at a more or less constant level of 11–15 % (Chart 2.2).

These graphs show that, in spite of the reorganisations that have affected prosecutors’ offices, in spite of the productivist, performance indicator-based policies that have been implemented throughout the 1990s, in spite of the pressure applied on prosecutors to improve prosecution rates, the number of processed cases has not changed significantly from the early 1990s through 2010. The prosecution rate itself hasn’t changed either. Real-time processing has failed to induce the “productivity revolution” that some observers had been anticipating from the early field results (Brunet 1998). This *stability* of the prosecution rate is all the more remarkable that from 2002 onwards, it occurred in the context of a tense debate on security, with huge pressure towards prosecution from politicians, the media, and upstream policing actors (Danet 2008).

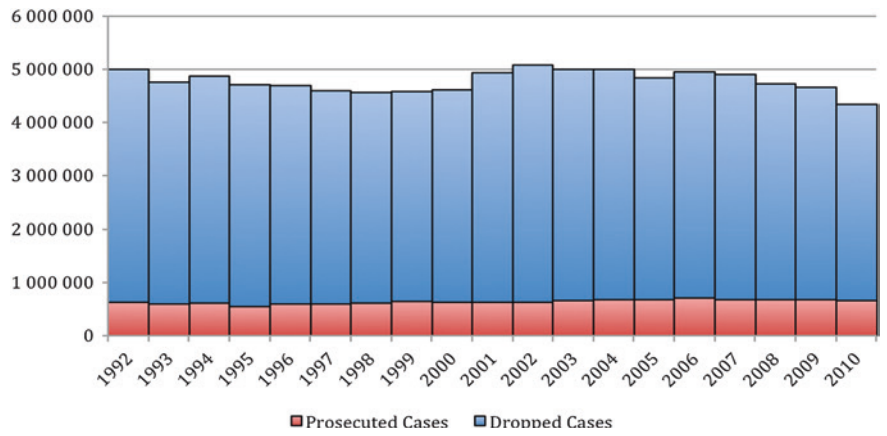


Chart 2.1 Number of dropped cases and prosecuted cases (from: Cadres du parquet)

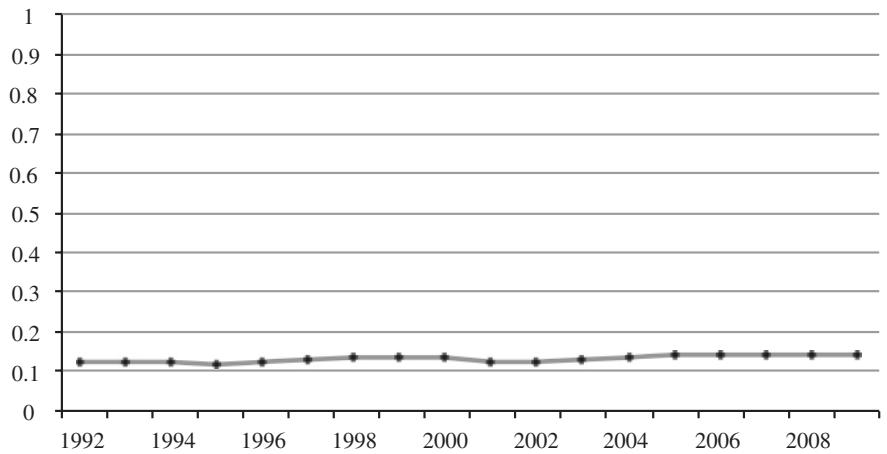


Chart 2.2 Prosecution rates (from: Cadres du parquet)

As mentioned before, though, the 1990s are precisely when the judicial world collectively realised and asserted that a 10 % prosecution rate or so—i.e. a 90 % dropped cases rate—is not something authorities (especially public prosecutors, whose activities are increasingly being monitored statistically) can easily put forward and defend. Such is the context in which statistics were reformed and a detailed table of motivated dropped cases appeared, broken down into several categories, as shown in the table below. Some of the categories have already been discussed: unknown perpetrator; incomplete or erroneous characterisation of the facts; breach of the principle of opportunity; settlements and alternatives, as well as prosecuted cases.

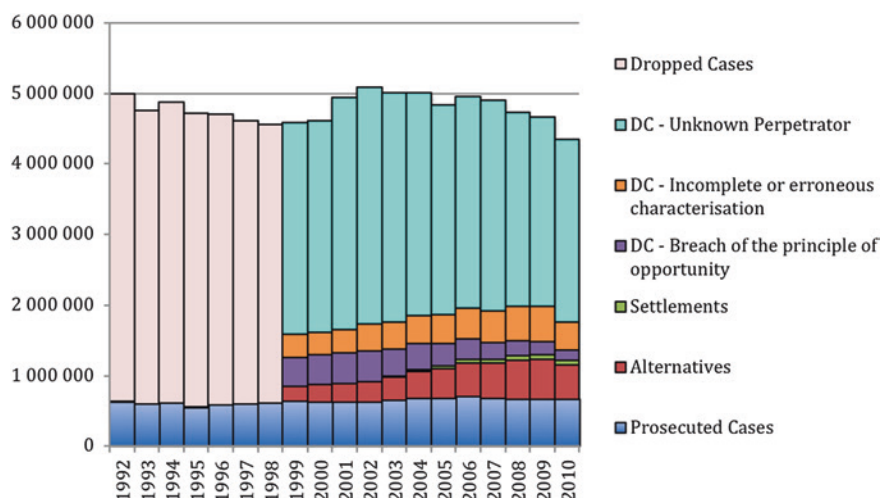


Chart 2.3 Evolution of processed cases: absolute numbers (from: Cadres du parquet)

This table (Chart 2.3) makes it easier to understand the point of this change. First of all, the magnitude of the dropped cases phenomenon, as it was interpreted prior to 1999, is put into perspective. This “overall” rate actually conceals a variety of situations. A closer look at the table shows that, starting 1999—i.e. the earliest available data—*cases dropped on grounds of inopportunity*, those that could be considered proof of either the permissiveness or the harshness of prosecutors, actually make up a very small portion of overall cases. The judiciary, prosecutors in particular, can simply claim that alternative treatments—the “third approach” (*troisième voie*), as they used to be called in France—, later followed by other measures such as settlements, somehow encroach on dropped cases as defined prior to 1999. Further research would be needed to decide whether people at the Ministry of Justice changed their accounting methods at the time precisely because they realised that the growth of alternative treatments at least partly answered criticism regarding these figures, or whether the change itself encouraged prosecutors’ offices to increase their reliance on alternatives. Whatever the case may be, the ensuing years saw a reinforcement of the combined effects of “alternatives” and “settlements”—see the red and green areas in the above table.

In addition, the advent of many differentiated categories made it possible to justify high rates of dropped cases without blaming the judiciary, since after all, “unknown perpetrator” was the largest category. Coming from prosecutors, this is a more or less implicit way of blaming those who are tasked with identifying perpetrators, i.e. the police. While this “Dropped Cases—Unknown Perpetrator” category has seldom been explicitly used as an argument by prosecutors against police forces, it is in fact a way for the judiciary to defend their own efficiency and shift the blame on the police. “Incomplete or erroneous characterisation of the facts” is another and rather similar category. The whole thing is almost funny, especially

if one remembers that the police—with the active support of the President of the Republic from 2007 to 2012—have consistently been criticising magistrates for their permissiveness and lack of repressive effectiveness. Still, inside the judiciary, the argument was heard: neither of these two categories is used as a performance indicator in the appraisal process of public prosecutors.

2.4 From Indicative to Incentive

According to the available data presented above, then, the idea behind the creation of the new indicator of the activity of prosecutors' offices—the *penal response rate*, examined below—was to highlight the fact that very few cases were dropped “for no reason at all”.

Instead of dividing the number of prosecuted cases by the total number of processed cases, as is the case for computing the prosecution rate, the idea is to use as a numerator not just prosecuted cases, but all cases that have received some penal response, i.e. including those that were processed using alternative treatments such as cautionings, or that were rerouted towards the healthcare system, for instance. Similarly, in the same perspective, measuring the responsiveness of public prosecutors by including in the denominator cases that were actually unprosecutable because there was simply no legal case to speak of, for instance, or even no defendant, was somewhat nonsensical... As a result, the penal response rate is computed by removing from the denominator cases whose perpetrators are unknown or whose facts are improperly characterised. At the end of the day, the *penal response rate* can be defined as the number of cases that did trigger a penal response over the number of cases that could have triggered a penal response. Understandably, a penal response rate that can reach as high as 90 % is a lot more palatable than the usual prosecution rate, with its 12 % average.

This modification of the leading indicator of public prosecutors' activity quickly gained ground in the public discourse, and it did so in a two-pronged way. First, as a good management practice indicator: the French judicial system is an extremely centralised one, which is further reinforced by the fact that the Ministry of Justice must comply with recent legislation that requires quantitative reporting of activities to be included in the budget presentations of all government entities. In this respect, the penal response rate is the key indicator indeed. Both at the national scale—France has 173 regional courts (*TGI*—*Tribunal de Grande Instance*) that are classified into 4 different types, depending on their size—and at a local administrative level—the courts of appeal—, prosecutors' offices engage in a subtle but real competition for the best response rates.

Everyone involved in this rat race at the time used every available means to improve the indicator, “creatively” relying on various alternative treatments in a more or less organised way (Aubert 2010), highly favouring settlements (Milburn 2005), and sometimes creatively interpreting such concepts as “incomplete or erroneous characterisation of the facts”. The initial reaction of magistrates and

public opinion alike was to praise the stimulus effect induced by this “magical” number, as evidenced by the following extract from *Figaro Magazine*, 26 March 2005, a rather faithful reflection of the general atmosphere:

Let us start by noting that, according to unpublished figures obtained by Le Figaro Magazine, the penal response rate has grown 2.2 % from early October 2003 to late September 2004. One of the best performances has to be credited to the Lyons area courts of appeal (see p. 51): according to Prosecutor General Jean-Olivier Viout, their 2004 response rate stands at 77 %, against 65 % a year before. In 2002, it stood at... 57.6 %, the worst score in France... To be sure, significant resources have been mobilised in the Lyons jurisdiction, which is so dear to the Minister’s heart. Other courts, however, also boast remarkable performances, such as the Riom (86.4 %), Limoges (85.9 %) and Pau (83.2 %) courts of appeal. Aix-en-Provence, on the other hand, is below par with 69.5 %. Generally speaking, the south does not fare as well as northern or central France. The penal response rate only stands at 60.9 % in Toulon and 59.1 % in Nice, against 97.7 % (!) in Péronne and 94.4 % in Saumur.

This ever-improving (at least in the early 2000s) penal response rate is also used by some prosecutors in an attempt to let public opinion know how efficient they are. Every new year is another opportunity to get the following message across: “The penal response rate is on the rise”, with such results as 98.7 % in Bastia in 2011,⁵ 97 % in Le Puy en Velay in 2013,⁶ 84 % in Every that same year.⁷ Prosecutors make a reputation, both internally and externally, based on these numbers, as evidenced by the following article, from *La Dépêche du Midi* in 2007, paying homage to the Toulouse prosecutor, who had just been promoted to Prosecutor General: “*He managed his team of prosecutors like a real business ‘boss’. Priorities, objectives, roadmaps,... Paul Michel took charge, and he took charge energetically. Within two years, the penal response rate (number of cases that are prosecuted) (sic) has literally surged...*”.⁸ In 2013, the Nadal committee,⁹ tasked with pondering the role and future of prosecutors’ offices, noted that “the ‘penal response rate’ now plays a key role in their operations.”

In the minds of successive Ministers of Justice during the first decade of the millennium, the pressure exerted via the penal response rate was not limited to increasing the productivity of the judiciary. As shown by the advent of mandatory sentencing in 2007 and the inflationary legislation passed at the time to amend the Criminal Code and Criminal Procedure Code, the objective was clearly to bolster the sanctions pronounced by criminal justice (Salas 2010). Prosecutors were urged to seek harsher sentences and think in terms of punishment, using all available

⁵*Corse Matin*, 13/01/2012 «La parquet a donné une réponse pénale à 98.7 % des affaires».

⁶[http://www.zoomdici.fr/actualite/Haute-Loire-il-faudra-attendre-\(au-moins\)-huit-mois-pour-etre-juge-id141566.html](http://www.zoomdici.fr/actualite/Haute-Loire-il-faudra-attendre-(au-moins)-huit-mois-pour-etre-juge-id141566.html).

⁷“In 2013, 90,000 case were processed by the TGI, 22,700 of which were “prosecutable”, and the penal response rate went from 78 to 84 %.” *Le Parisien*, 14/01/2014.

⁸*La Dépêche du Midi*, 15 November 2007.

⁹Committee chaired by Jean-Louis Nadal, *Refonder le Ministère public*, Report delivered to the Minister of Justice on the 29 November 2013.

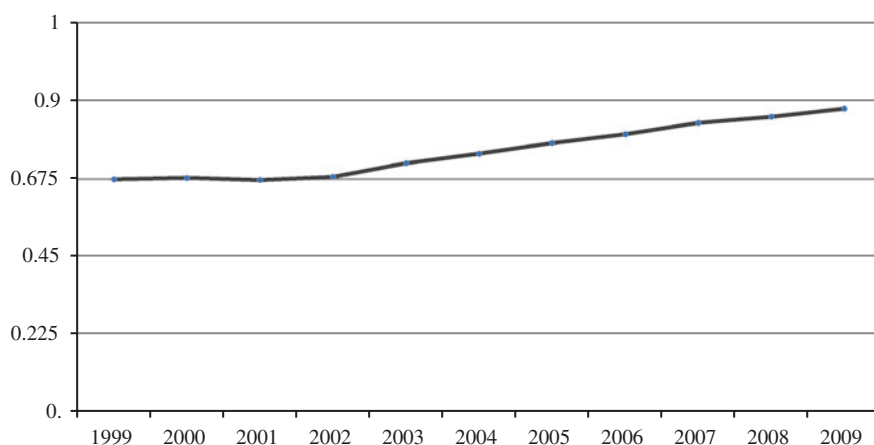


Chart 2.4 Progression of the penal response rate (from: Cadres du parquet)

responses, including those that do not qualify as “prosecution” proper, such as settlements. The response rate thus became an indicator of this harshness as well, which was one more reason for the Ministry to scrutinise it. As an example, here is how the *Dernières nouvelles d’Alsace* newspaper, in an article entitled “*Exceptional penal response*”, reported the words pronounced by Saverne’s public prosecutor Jean Dissler in his inaugural address at the start of the 2007 judicial year: “*Once again this year, considering in particular our fellow citizens’ demand for safety and the mobilisation of gendarmerie forces, the prosecutor’s office did its best to respond as systematically as possible to solved cases...*”.¹⁰

In such a context, the penal response rate, which started to be computable as early as 1999, took over the public discourse and grew considerably over the course of a decade, from 68 % on average in 1999 to 90 % in 2010, while the prosecution rate actually remained stable (Chart 2.4).

Can this growth be attributed to better practices from prosecutors—improved supervision, increased firmness? Again, this can be established statistically, with the eye of the accountant. There are two ways of raising the penal response rate in a given jurisdiction: either by reducing the number of cases dropped because of the principle of opportunity, or by increasing the number of prosecutions or alternative treatments. However, the following graph shows that prosecutions remained more or less stable over the given time period, while alternative treatments grew and cases dropped on the basis of inopportunity decreased. This national-scale snapshot confirms what local research had diagnosed: the decision to drop a case by appealing to the principle of opportunity is often based not just on strictly judicial considerations, but on such environmental aspects as the “general

¹⁰*Les Dernières Nouvelles d’Alsace*, 20 January 2007.

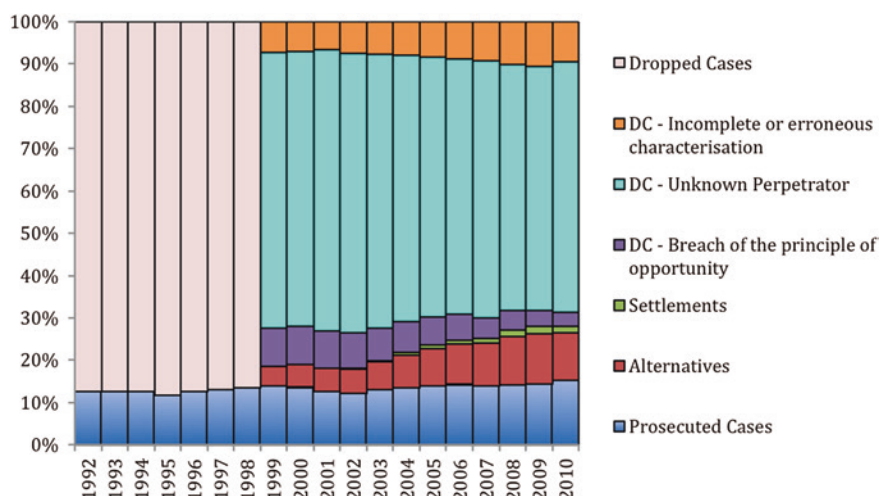


Chart 2.5 Processed cases: prosecuted versus dropped (from: Cadres du parquet)

atmosphere”, as well as productivity. Settlement procedures and alternative treatments are innovations that thus encroach upon those ratings, extending the reach of the judicial fishing net (Chart 2.5).

2.5 Are Prosecutors Altering Their Interpretation?

Other variables are revealing of how cases can be “played with”, classified, and oriented, i.e. dropped, conditionally dropped, prosecuted but unreferenced, or simply prosecuted. A closer look at even more detailed accounts of dropped cases, 1999–2008, confirms the idea that some “shifting” occurred among the various categories. The principle of opportunity, in particular, was less and less invoked, while alternative treatments were almost exclusively on the rise. Specifically, for instance, within just one decade, a fivefold increase of cases referred to “health, social, or vocational institutions” can be observed. How can we explain these shifts from cases being dropped for unspecified reasons (“*classement sans suite sec*”) or because of the principle of opportunity (“*classement pour inopportunité*”) to cases being essentially dropped, yet “referred to” other institutions (“*classement avec orientation*”), i.e. triggering some form of penal response after all?

Upon close examination, some of the reasons, although pertaining to different categories, are actually quite similar and likely to favour shifts from one to the other. One interesting example is mental deficiency (“*Etat mental déficient*”). Such cases could be dropped under the principle of inopportunity, except that the penal response rate would be adversely affected, since there is no actual penal response. Hence, they would be accounted for as not processed, and as such, included in

the denominator when calculating the response rate. However, there exists another, closely related reason: the “diminished responsibility” category (“*Irresponsabilité de l’auteur*”). While semantically close, this wording is not detrimental to the response rate, because it falls under the “erroneous or incomplete characterisation of the facts” category, hence non-prosecutable, and as such, not included in the denominator. Understandably enough, favouring “diminished responsibility” over “mental deficiency” to improve the overall response rate is rather tempting.

There are other examples of semantic proximity allowing potential transfers. A “*victime désintéressée d’office*”—the victim has no reason to prosecute because a stolen good has been recovered, for instance; this is referred to in the graphs below as—is just about the same as a “*plaignant désintéressé sur demande du parquet*”—plaintiff considered to have no or insufficient reason to prosecute according to the prosecutor’s office—, yet the former pertains to the principle of opportunity, while the latter is an alternative measure, hence a form of penal response. In this particular case, the statistical impact is huge, because the data point actually moves from the denominator to the numerator—i.e. not only is the penal response rate not diminished, but it is inflated to boot.

Equally questionable are some cautionings (“*rappel à la loi*”) for minor offenses. Cautioning is an alternative measure that somehow “competes” with the option of simply dropping the case on the grounds that the damage caused was small—“*préjudice peu important*”. Arguably, the judicial system does indeed respond here, by inviting perpetrators to recognise the illegal nature of their act. Yet, while proper cautioning, under proper conditions, may provoke an awakening and thus concur to prevention, considering the lack of proper research on the efficiency of cautionings, and given the avowed scepticism of some magistrates, one might be forgiven for suggesting that statistical pressure is a better explanation for the (excessive?) use of this alternative than the quest for a perfect penal response.

Well, did prosecutors make actual use of this porosity between the reasons for simply dropping a case and those that allow them to improve the all-important penal response rate? Several clues clearly seem to point towards a positive answer. Graphs reveal the existence of scissors effects that unambiguously point to transfers from one category to another, always in a way that makes prosecutors’ offices’ data look better. The example below shows the evolution—in opposite directions—of “Victime désintéressée d’office”—versus “Plaignant désintéressé sur demande du parquet”, two very close categories, the first one being a dropped cases category versus the second an alternative response. The reversal sparked by statistical demands is clearly visible (Chart 2.6).

The same happens when plotting the other pair we examined above: Dropped Cases “Préjudice peu important” versus “Rappels à la loi”, two reasons that have close effects for the perpetrator, yet have antithetical bearing on statistics. Again, “Préjudice peu important” refers to a dropped case while “Rappels à la loi” is an alternative response, and the transfer phenomenon could hardly be more conspicuous (Chart 2.7).

Examples of such one-sided shifts abound: statistically unfavourable reasons are transformed into other, closely-related reasons that enhance the penal response

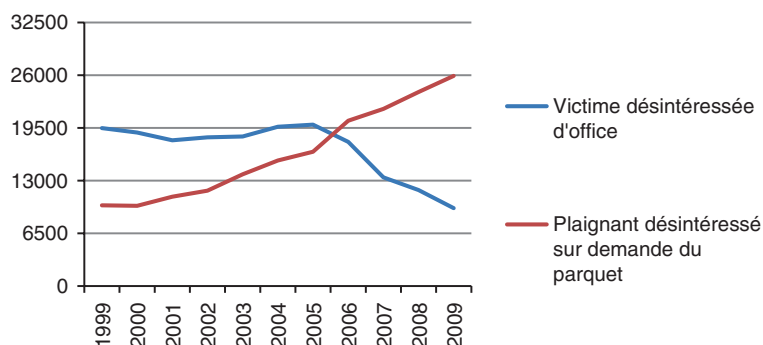


Chart 2.6 Dropped cases: case 1 (from: Cadres du parquet)

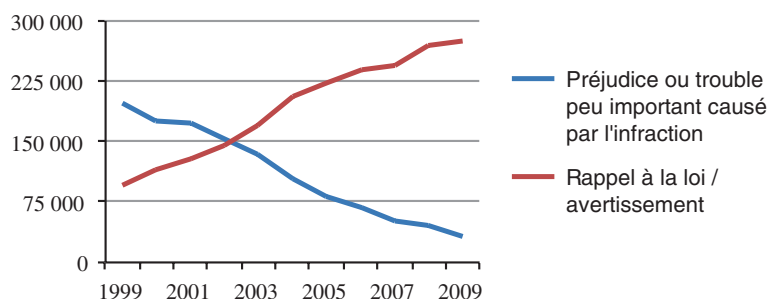


Chart 2.7 Dropped cases: case 2 (from: Cadres du parquet)

rate. In the first decade of the millennium, the concomitant statistical pressure has encouraged prosecutors to resort to these calculation methods in order to “prove” their efficiency, but the practical impact of this change raises multiple questions.

2.6 A Spreading Phenomenon

As shown by Werner Ackermann and Benoit Bastard in their research on the diffusion of innovation in French regional courts (TGI) in the years immediately preceding our studied period (Ackerman and Bastard 1998), changes in the judiciary do not occur simultaneously on the whole territory. Typically, innovations are born in specific places and only start spreading, little by little, once considered relevant by magistrates. This applies to organisational changes such as Real-time processing, and new structures, such as the Houses of Justice and Law (*Maisons de la Justice et du Droit—MJD*), but also to the diffusion of knowledge, including quantitative data and satisfying penal response rates. The map of jurisdictions is a useful tool to determine how this indicator—a major component of their appraisal

process—has spread throughout the country. Exactly how this is achieved should be examined in much more detail. However, at least three mechanisms are highly likely to be at work here. First, in line with the Ackermann-Bastard model, the professional transfer of a prosecutor from one jurisdiction to the other is part of this movement, since he will be taking his knowledge and innovative data-processing skills with him. The second major explanation is that prosecutors are networked: they attend formal and informal meetings where recipes get passed on. Third, the various ratings and models used for benchmarking the courts against each other are a strong incentive for promptly finding ways to improve the figures submitted to supervisory authorities—this has been perceptible to us in many interviews conducted along years of field work, and many prosecutors confessed that this was a serious concern indeed.

Space does not permit us to include comprehensive data extensively covering the year-by-year evolution and expansion of penal response rates, whose ever-improving nature obviously raises the issue of how significant, relevant, and even sincere such a tool might prove to be. In 1999, when relevant data was first made available, response rates were quite differentiated throughout the country. Each jurisdiction having its own organisation and environment, there were many idiosyncratic reasons for this, from the nature of the legal action to the activities of the police and gendarmerie forces, through the level of staffing of prosecutors' offices, availability of legal aid, etc. The multicoloured aspect of the map clearly illustrates the disparities to be found in mainland France, disparities that cannot be linked to the size of jurisdictions since similar regional courts display very dissimilar rates (Chart 2.8).

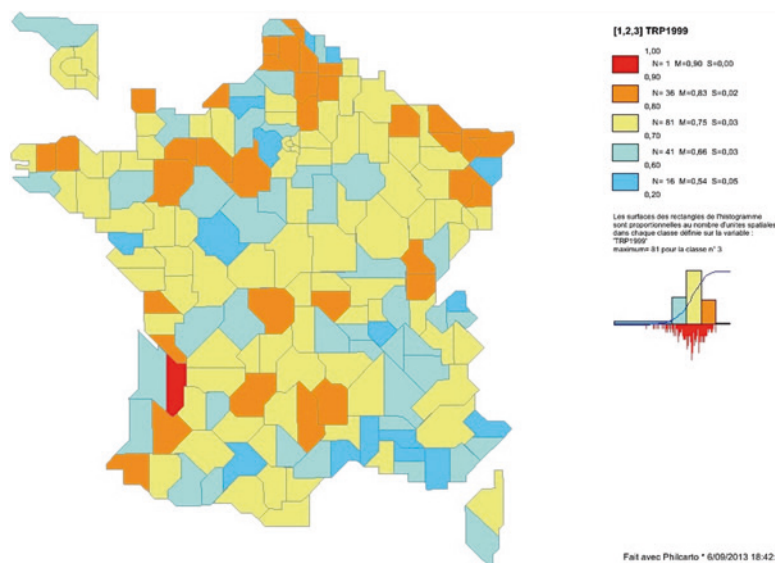


Chart 2.8 Penal response rates in France in 1999 (from: Cadres du parquet)

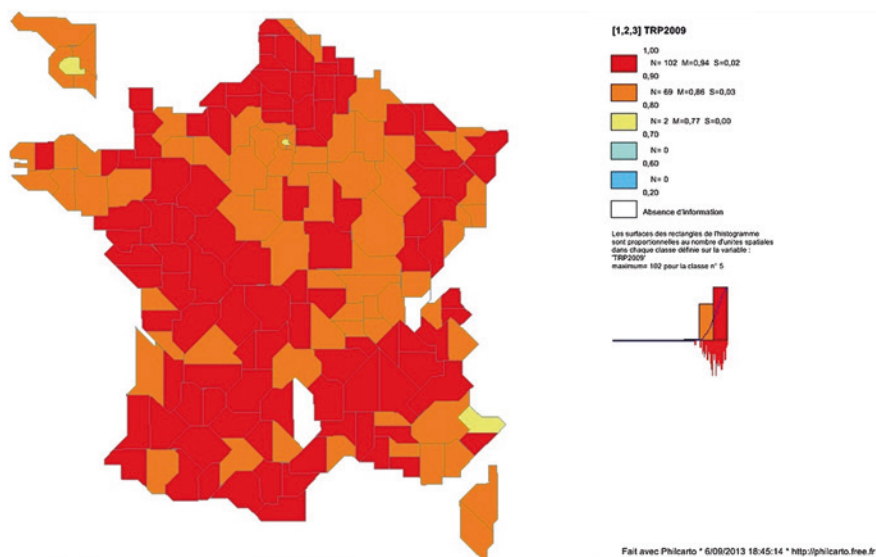


Chart 2.9 Penal response rates in France in 2009 (from: Cadres du parquet)

Ten years later, the penal response rate had become mainstream, the standard metric for measuring the performance of prosecutors' offices, and the map looked starkly different—absolutely homogeneous. All regional courts, regardless of the strong discrepancies characterising their respective environments, were aligned on similar rates, all of which exceeded 80 %, with only two exceptions—including Paris, a very specific case (Chart 2.9).

As is the case for other activities (Matelly and Mouhanna 2007), using a quantitative, activity-based performance indicator modifies the activity itself, as well as the associated statistical process. The Nadal committee (Nadal 2013), tasked with pondering the future of prosecutors' offices in France, had not failed to identify the associated effects of the primacy of the penal response rate in their operations:

Given that the efficiency of prosecutors' offices and, as a consequence, the associated jobs, partly depend on the importance of this rate, public prosecutors have implemented procedural patterns destined to reduce the number of dropped cases as much as possible, even if that means re-characterising – hence, dressing up – as 'cautionings' many decisions that were purely based on the principle of opportunity.(...)

In addition, ever-increasing penal response rates may give reason to believe that the judiciary might be able to bring a useful answer to any act of delinquency, regardless of its gravity or pettiness, which is not the case.

The inherent benchmarking logic of any performance evaluation measure thus somehow implies and ultimately brings about the fall of the metric itself, insofar as it no longer discriminates anything. In the meantime, however, practices will have been transformed and/or activities adjusted, as shown above, to meet the quantitative objective rather than to elaborate locally adapted policies. In our

case, the use of this rate is part of and reinforces a larger trend called *nouveau management judiciaire* (new judicial management), which reduces the autonomy of magistrates as well as the likelihood that cases might be treated as individual occurrences, bringing about a standardisation of prosecution via scoring scales. Indeed, magistrates are becoming more and more vocal against a trend that undermines the very foundations of their profession:

So, here is the sacro-sanct figure, which was for a while the magic formula of the good prosecutor: the penal response rate. Let us rejoice, dear colleagues, for it stands at 84.99 %. Now, is that good, or what?

Let this rate reassure whoever needs reassurance, giving us reasons to think that we have done our job... But what job, and for what result? There lies the difficulty of the job of the prosecutor, who is asked to make hurried decisions on criminal matters at the risk of becoming some kind of answering machine, with no time to contextualise his actions in the larger picture and look at broader considerations about what our fellow citizens may rightfully expect from us.¹¹

Then again, all criticisms and resistances to this managerialisation trend run into a massive argument: that of urgency and processing time, which absolutely and indefinitely needs to be shortened, for it is a fact that citizens expect their judicial system to be quicker.¹² The limits of penal response at all costs having been reached, those of the ever-shrinking processing time need to be accepted so that proper modes of evaluation of judiciary action—not reducible to fundamentally unreliable rates—may be thought out at last.

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¹¹Address by Mme Jaillon-Bru, procureur de la République près le TGI de Nevers (public prosecutor). Solemn sitting marking the beginning of the judicial year, Tuesday 4 January 2014.

¹²*L'esprit du temps: L'accélération dans l'institution judiciaire en France et en Belgique*, B. BASTARD, D. DELVAUX, C. MOUHANNA, F. SCHOENAERS, GIP-CESDIP-ISP Cachan, July 2012.

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