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e-Justice in France: the e-Barreau experience

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1. Introduction¹

Despite the growing interest in and the efforts devoted to ICT development in the justice sector, there is still limited information and understanding being shared between European countries, especially where functional legitimization,² adoption procedures, practical implementation issues and concrete results are concerned.³ This situation is certainly not helped by the absence of clear and operable standards for the evaluation of ICT innovation efforts.⁴ In observing the many experiences of EU judicial administrations,⁵ it is apparent that through trial and error much has been learned at the national level concerning the problems related to the design and development of ICT technologies to support the courts and the activities of Public Prosecutor's Offices. Much has been learned concerning the need to include, for example, the users since the earliest stages of development and, on the other hand, the problems related to the 'excessive' influence of end-users in the development of a system as in the Dutch *HBS* case.⁶ Much has also been learned with

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2 F. Henning et al., 'The Challenge of Collaboration – ICT Implementation networks in courts in the Netherlands', 2009 *Transylvanian Review of Administrative Sciences*, no. 28 E, pp. 27-44, <<http://www.rtsa.ro/en/>>.

3 See: F. Contini, et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009; D. Reiling, *Technology for Justice, How Information Technology Can Support judicial Reform*, 2009; M. Velicogna, 'Justice Systems and ICT, What can be learned from Europe?', 2007 *Utrecht Law Review* 3, no. 1; M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007; M. Fabri, et al. (eds.) *Judicial electronic data interchange in Europe: Applications, policies and trends*, 2003.

4 M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007.

5 See for example: M. Velicogna, 'Use of Information and Communication Technologies (ICT) in European Judicial Systems', 2008 *CEPEJ Studies*, no. 7; M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007; M. Fabri, et al. (eds.) *Judicial electronic data interchange in Europe: Applications, policies and trends*, 2003.

6 P. Langbroek et al. 'Organising Data Exchange in the Dutch Criminal Justice Chain', 2009 *Transylvanian Review of Administrative Sciences*, no. 28 E, pp.8-26.

regard to issues related to outsourcing, to the management of legacy systems and to the system's maintenance and update. At the same time, all these experiences are often limited to the nation where they have taken place, and even there, only to the actors who have been directly involved in the ICT development and implementation experiences. Also, many countries are still 'poor at evaluating and measuring the actual contribution made by technology to the administration of justice'⁷ and this clearly 'does not help the effective development of ICT tools'.⁸

Furthermore, recent field research projects in the justice sector have shown how the development of e-justice entails much more than designing, installing and connecting technological devices or providing normative recognition to the use of the digital medium instead of the traditional one.⁹

Moving away from the 'modernisation' rhetoric, it becomes difficult to understand the contribution that ICT has made in concrete terms to the various administrations of justice. Not only are available quantitative data scarce, but in many cases such data are not particularly meaningful in helping to assess complex innovation processes or to contribute to more realistic and fact-based e-justice investments. The number of computers or of code lines owned by a justice administration do not tell us much about the problems of developing and implementing a new e-filing system, or of the results achieved by its adoption.¹⁰ More qualitative, theoretically-oriented information is needed to know how far ICT practices correspond to promises and how to improve the innovation effort. This article attempts to fill part of this regrettable gap through the dissemination of empirical information provided by a rich case study, and providing a small but important contribution to the creation of a more adequate description and explanation of the e-justice innovation phenomenon.

More in detail, this article presents an exploratory case study describing the French experience in developing an e-filing and document exchange system between lawyers and the ordinary courts in justice administration. The system, called e-Barreau,¹¹ has been intended as an electronic functional equivalent of traditional procedures and as a way of doing the same things more efficiently with the use of new, electronic tools. All the traditional objects and activities were to be translated into a digital format. At the beginning, as far as the actors promoting the development of the new system were concerned, the problems merely seemed to belong to the normative and technological domains. Normative, as the code of procedure was to allow and regulate the use of the new electronic means instead of the old paper-based ones (such as electronic documents and digital signatures). Technological, as it was necessary to find or develop technologies that were adequate to satisfy the normative requirements. As laws were passed by Parliament allowing for the use of electronic tools that imitated the paper-based procedure, the only problem seemed to be a 'technical' one. It soon emerged, however, that

7 M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007, p. 25.

8 Ibid., p. 25.

9 See: F. Contini, et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009; F. Henning et al., 'The Challenge of Collaboration- ICT Implementation networks in courts in the Netherlands', 2009 *Transylvanian Review of Administrative Sciences*, no. 28 E, pp. 27-44; P. Langbroek et al. 'Organising Data Exchange in the Dutch Criminal Justice Chain', 2009 *Transylvanian Review of Administrative Sciences*, no. 28 E, pp.8-26; M. Velicogna, 'Use of Information and Communication Technologies (ICT) in European Judicial Systems', 2008 *CEPEJ Studies*, no. 7; F. Contini et al., 'Information System ad Information Infrastructure Deployment: the Challenge of the Italian e-Justice Approach', 2007 *The Electronic Journal of e-Government* 5, no. 1, pp. 43-52; R. van den Hoogen,, *E-Justice: beginselen van behoorlijke elektronische rechtspraak*, 2007.

10 M. Velicogna, 'Use of Information and Communication Technologies (ICT) in European Judicial Systems', 2008 *CEPEJ Studies*, no. 7

11 To be more accurate, e-Barreau refers to the use of official electronic communication on the lawyers' side, through the RPVA (*réseau privé virtuel avocat*), which is connected to the RPVJ (*réseau privé virtuel justice*) on the courts' side. For reasons of clarity, we will use the term e-Barreau as being synonymous with the system developed to allow official electronic communication between ordinary courts of first instance and appeal.

nothing was as simple as it seemed. The real challenge to the development of the e-justice system did not lie in the search for, assembly and manufacture of technological tools, but in the creation of the governance net of relevant organizational actors that was needed to successfully sustain and implement the innovation. It concerned looking for acceptable compromises as to what can be done and how. The challenge was also to find ways to motivate users to actively participate in the creation of the new service which cannot work without them. Furthermore, external and somewhat unforeseeable events also played a relevant role in defining choices, the tempo and the possible success of the system's design and implementation.

The remainder of this article is structured as follows: a first part describes the methodological approach. A brief presentation of the French judicial system and of the French public administration ICT experience will follow in order to provide the background for observing and analysing the case-study. The article then proceeds by describing the history of the origin, design and implementation of e-Barreau, trying to offer, at the same time, a description of the system's technical characteristics, the role and the strategies implemented by the main actors, and the results achieved. Finally, some conclusions are drawn as to the possible implications of the ICT's design and implementation in the European justice sector.

2. Methodology

This article focuses on the presentation and analysis of an in-depth case-study. The use of case-studies has proved to be particularly effective in the area of ICT innovation research in the justice sector.¹² In general, in-depth case-studies are the preferred strategy when 'how' or 'in which way' questions are being posed, when the researcher/author has little control over certain events, and when the focus is on a contemporary phenomenon within some real-life context.¹³ These elements characterize our research project. Furthermore, the in-depth case-study methodology allows the use of an interdisciplinary approach which is particularly relevant in an area where multiple factors (such as legal/institutional, technological and practical) are deeply intertwined.

The case-study focuses on the most relevant aspects of the development, adoption, implementation and use of e-Barreau, paying attention to the institutional, organizational, normative and technological background.

As for data collection methods, legal and general literature research, document analysis, direct observations of the system, and informal interviews with experts and informed participants (such as judges, ICT personnel, lawyers etc.) have been carried out by the authors over a period of time that extended from February 2009 to August 2010. Although quantitative data have been collected and analysed when available (for instance, statistics on the use of the tools), the emphasis has been placed, for a number of reasons, on the collection of qualitative data. One of these reasons is that crucial elements of large ICT innovation are 'often found best with a qualitative method, that is, from data on structural conditions, consequences, deviances, norms, processes, patterns, and systems'.¹⁴ Furthermore, qualitative data have often proved to be 'the most "adequate" and "efficient" way to obtain the type of information required and to contend with the difficulties of an empirical situation'.¹⁵

12 F. Contini et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009; M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007.

13 R. Yin, *Case study research, design and methods*, 2003.

14 B. Glaser et al., *The Discovery of Grounded Theory: Strategies for Qualitative Research*, 1967.

15 Ibid.

3. Some notions on the French justice system

Institutional, organizational and normative features of justice systems have proved to play an important role both in defining the ICT innovation strategies and goals, and in the capability of the various systems to implement the specific changes.¹⁶ And no matter how fashionable and up to date e-justice projects are, it is very seldom that they are smoothly translated from the blueprint into functioning systems.¹⁷ Elements like political issues, organizational structures, budgeting allocation mechanisms, available financial resources, management relations, the prevailing administrative culture¹⁸ and coordination mechanisms which are in play between the relevant actors are likely to influence change in a sometimes unpredictable way and must therefore be analysed when trying to understand the ICT innovation process. As quite different arrangements and institutions characterize the administration of justice in Western democracies,¹⁹ these elements cannot be taken for granted. This part of the article therefore describes some of the most relevant elements of the French judicial system from the perspective of the development of e-justice systems. This description includes a brief presentation of some general features of the French justice system, the justice administration structure, the e-justice users, the most relevant norms, and the technological context.

3.1. Some relevant features of the French justice system

In France, as elsewhere, justice is administered through a combination of oral and written proceedings.²⁰ The mix varies according to the type of courts and their place in the judicial hierarchy, as provided for by procedural rules. Procedural rules are not the same throughout the French judicial system. They are to be found in three separate codes.²¹ As a general rule, oral proceedings are allowed whenever the presence of counsel is not compulsory, e.g. before the lower civil courts (*tribunal d'instance*), labour courts, Social Security tribunals, etc., together with written submissions. Elsewhere written submissions are the rule. Before the higher courts (*Cour de cassation*, *Conseil d'Etat*), proceedings are in writing and oral pleadings are rare. Before the administrative courts the rule is that the procedure is a written one, with some elements of an oral nature. At the same time, though, written proceedings are increasingly dominant, for reasons ascribed to the expeditious nature of the process, legal certainty and technicality.

As in other European countries, the influence of the European Convention on Human Rights and of the case law of the Strasbourg Court on Articles 6(1) and 13 is noticeable. It relates mainly to the central notions of fair trial, equality of arms and an effective remedy.²² One

16 F. Contini et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009; D. Carnevali et al., 'Information Systems as Assemblages: An Example from the Italian Justice System', 2009.

17 C. Ciborra, *The Labyrinths of Information: Challenging the Wisdom of Systems*, 2002; F. Contini, et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009.

18 C. Pollitt et al., *Public Management Reform: A Comparative Analysis*, 2004.

19 M. Damaska, *The Faces of Justice and State Authority*, 1986, p.14.

20 For a general analysis of French judicial procedure together with comparative developments see S. Guinchard et al., *Droit processuel. Droit commun et droit compare du procès équitable*, 2007. On civil procedure see S. Guinchard & D. Ferrand, *Procédure civile*, 2006. See also: Cour de cassation, *Le Nouveau code de procédure civile: vingt ans après. Actes du colloque des 11 et 12 décembre 1997 organisé par la Cour de cassation*, La Documentation française, 1998. On criminal procedure see S. Guinchard & J. Buisson, *Procédure pénale*, 2009. On administrative procedure see R. Chapus, *Droit du contentieux administratif*, 2008.

21 The *Nouveau code de procédure civile* for civil procedure, the *Code de procédure pénale* for criminal procedure and the *Code de justice administrative* for the administrative courts.

22 See Guinchard et al., supra note 20; *Les principes communs d'une justice des Etats de l'Union européenne. Actes du colloque des 4 et 5 décembre 2000*, La Documentation française, 2001.

consequence is that the classical distinction between adversary and inquisitorial procedure is less and less relevant. The same remark applies, mutatis mutandis, to the distinction between common law and civil law systems.²³

The overall result is the growing importance of the case file, which contains each piece of information that is relevant for the case figures, together with all other materials. In fact, it must be considered that the documents and all other materials ‘contained in the file are not internal official documents, helping a particular official to organize his activity, but rather sources of information on which to base both original and reviewing decision’.²⁴ Furthermore, ‘while the accuracy of information in the file is not unchallengeable, it commands considerable weight’.²⁵ The fact that the case file and the procedural rules concerning its creation and management command considerable weight in the judicial proceedings means that it plays an essential role in the definition of the requirements that an e-justice system should have and the level of security, integrity and reliability required of the electronic case-file systems.

3.2. The structure of justice administration

French justice services are provided by two autonomous branches of the courts: ordinary courts, which have jurisdiction over civil and criminal matters, and administrative courts which have jurisdiction over administrative law, which governs the relationships between the public administration and the people. Here we will briefly describe only the ordinary justice administration, where e-Barreau has been developed and is being implemented.

The ordinary justice administration is organised according to a three-level structure which includes: 181 courts of first instance with general jurisdiction (*tribunaux de grande instance*²⁶) and 473 courts of first instance for minor cases (*tribunaux d’instance*); 35 courts of appeal, which decide both on facts and the law; and the court of cassation (*Cour de cassation*), which provides for the possibility of an appeal, but only on points of law.

In these courts 8,000 career judges and public prosecutors work, together with 21,000 clerks and administrative personnel. The size of the courts may vary substantially; the smallest courts having a minimum of 3 judges, while the *tribunal de grande instance* of Paris has 350 judges. In 2007 the ordinary courts delivered 2,556,328 civil and commercial judgments and 1,203,370 criminal judgments.²⁷ The average length of civil proceedings without an appeal is between 4.9 (*tribunaux d’instance*) and 6.9 months (*tribunaux de grande instance*).²⁸

There are also several specialized courts of first instance, such as 185 commercial courts, 271 labour courts, 155 juvenile courts, 450 rural lease courts, and 116 social security courts.²⁹ Appeals against decisions taken by these courts go to the territorially competent court of appeal.

The appointment of judges and disciplinary decisions concerning them are taken by the Judicial Council (*Conseil supérieur de la magistrature*) while the Ministry of Justice concentrates on the main prerogatives relating to the management of the courts. In particular, the Ministry of Justice decides on the overall budget allocation to the courts within each court of appeal’s jurisdiction, as well as on the number of judges and staff.

23 See: B. Markesinis (ed.), *The Coming Together of the Common Law and the Civil Law*, 2000.

24 M. Damaska, *The Faces of Justice and State Authority*, 1986, p. 50.

25 *Ibid.*, p. 50.

26 In civil law proceedings they mainly deal with contracts (non-commercial), family law and the law of torts, whereas criminal law covers ‘contraventions’ (minor infringements), misdemeanours and felonies (G.Y. Ng, *Quality of Judicial Organisation and checks and balances*, 2007).

27 Ministère de la Justice, *Les chiffres-clés de la Justice*, October 2008, p. 11.

28 *Ibid.*, p. 11.

29 Cepej (2008), <http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2008/france_en.pdf>.

3.3. e-Justice users and their organization: lawyers, law firms and Bar Associations

While the general public are the final users of the justice system, both as parties in civil, criminal and administrative cases, as well as taxpayers and individuals living in a state which is subject to the rule of law,³⁰ the French e-justice systems have been developed taking into consideration lawyers and law firms as their external users.

According to data from the National Bar Council Observatory for the legal profession in January 2009, there are 50,314 practising lawyers in France.³¹ Of them, around 41% practice in Paris.³² This figure does not include legal advisors (solicitors or company lawyers) who cannot represent their clients in court. All lawyers can deal with civil, criminal and administrative cases, and have a monopoly of representation (with the exclusion of specific areas) in both ordinary and administrative proceedings.

Lawyers are members of 179 local Bar Associations (corresponding to the courts of first instance with general jurisdiction). A special Bar has a monopoly over legal representation before France's two higher courts: The *Cour de cassation* and the *Conseil d'Etat*. At the national level there is a National Bar Council (*Conseil national des barreaux*, hereafter: CNB). Created by a statute in 1990,³³ the CNB is the body which represents French lawyers. It is empowered to draft the lawyers' professional rules and they are contained in the *Règlement intérieur national*. It coordinates and reviews the initial training of lawyers at regional training centres as well as in-service training. Local Bar Associations, as we will see, have played an important role in the implementation of the e-Barreau system.

3.4. The ICT normative environment

The administration of justice in France enjoys a particularly high level of formalization and regulation compared to other forms of public administration.³⁴ Actions and the use of specific tools (at least in theory) have to be provided for by law and regulations. Judges, administrative personnel, lawyers, and all other actors involved in the justice service delivery are bound to follow these (again, at least in theory) complete, consistent and specific sets of rules.³⁵ E-justice tools and procedures do not escape this logic. As a consequence, over the years a number of laws and regulations have been introduced to define, allow and regulate the use of ICT by the public administration and justice systems. Two laws, in particular, have played a very important role in the development of French ICT: Law no. 659/1996 which liberalized the use of *cryptography tools*,³⁶ and Law no. 230/2000 on *digital signatures* and digital certificates,³⁷ which transposes EU Directive 1999/93/EC on a Community framework for electronic signatures.

30 F. Contini et al., *Judicial Evaluation*, 2008.

31 Source: <http://www.cnb.avocat.fr/Les-Chiffres-cles-de-l-Observatoire-Decembre-2009_a761.html>

32 Ibid.

33 Loi n° 90-1259 du 13 décembre 1990.

34 The high degree of formalization and regulation of justice administration compared to other public administration is not a French peculiarity. See for example: F. Contini 'ICT, assemblages and institutional contexts: understanding multiple development paths', in F. Contini, et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009, pp. 244-272.

35 M. Shapiro, *Courts: A Comparative and Political Analysis*, 1981.

36 Loi n° 96-659 du 26 juillet 1996 de réglementation des télécommunications, JORF n°174 du 27 juillet 1996 page 11384. Cryptography was previously strictly regulated for national security reasons. The 1996 law lifted restrictions regarding the development, purchase and use of encryption tools and software, and thus made it possible to use digital signature and encryption.

37 Loi n° 2000-230 du 13 mars 2000 – art. 4. JORF 14 mars 2000.

In practice, the first law authorized the use of digital signature technology, and the second recognized the digital signature as an equivalent of pen and ink signatures on paper documents.³⁸ Amongst other things, the digital signature law added several articles to the *Code civil* in order to acknowledge the fact that an electronic document has the same evidentiary value as a paper one,³⁹ and that an electronic document can be admitted as proof in a court of law provided that it meets certain conditions regarding the identification of its author and the integrity of its content.⁴⁰ A 2001 decree⁴¹ defines in more detail the criteria that a digital signature created with a digital certificate⁴² has to meet in order to be accepted.⁴³

3.5. ICT in the French public administration

Taking note of France's delay in introducing information and communication technologies, the Jospin Government (1997-2002) engaged in a very ambitious programme to overcome this.⁴⁴ In 1998 an action plan was prepared which was expected to help promote the use of ICT in public administration⁴⁵ and to help France to enter the 'Information Society' (PAGSI). The action plan 'set the goals to be reached and [it] defined the place that the State meant to occupy in this movement of national mobilization. The intervention of the State is warranted by its legitimate threefold role: a) as a catalyst, it must make business companies and citizens aware of the stakes of IT; b) as a regulator, it must ensure compliance with the rules on the networks, in particular with respect to the users' safety; c) as a leading actor itself, it modernizes its operation and its relationship with business companies, local organizations and citizens.'⁴⁶ The State's commitment to this plan was reflected by a budgetary allocation of EUR 900 million over the first two years.⁴⁷ Different administrative bodies have been in charge of the overall policy over the years, while each individual Ministry is in charge of implementing it in its domain.⁴⁸

Within this framework, two programmes to implement the use of ICT in the exchange of data between citizens and the public administration were particularly successful and influential, and are therefore worth mentioning here. It should be noted, however, that even their development did not prove as smooth and linear as initially foreseen. Several issues occurred during their development and, with hindsight, their cost appears to be considerable.

The first system, developed for the health sector, is called the Vitale card. It allows insured people to exchange data with the main actors operating within the national health insurance programme (*sécurité sociale*) using a smartcard. General practitioners, hospitals and pharmacies

38 See also J. Vallens, *La dématérialisation des décisions judiciaires : une évolution nécessaire*, La Semaine Juridique Edition Générale n° 11, 14 mars 2007, I 119. Under Art. 1316-4 of the *Code civil*, introduced by a March 2000 statute, the digital signature consists of 'a reliable process of identifying which safeguards relate to its link with the instrument'.

39 Art. 1316-3: 'L'écrit sur support électronique a la même force probante que l'écrit sur support papier.'

40 Art. 1316-1: 'L'écrit sous forme électronique est admis en preuve au même titre que l'écrit sur support papier, sous réserve que puisse être dûment identifiée la personne dont il émane et qu'il soit établi et conservé dans des conditions de nature à en garantir l'intégrité.'

41 Décret n°2001-272 du 30 mars 2001 pris pour l'application de l'article 1316-4 du code civil et relatif à la signature électronique.

42 A digital certificate can be used to verify that a digital signature belongs to the individual who signed a given document.

43 In particular, Art. 6 of the 2001 decree defines the digital certificate as an electronic document safeguarding the link between the data used to check the digital signature and the person signing ('*Certificat électronique: un document sous forme électronique attestant du lien entre les données de vérification de signature électronique et un signataire*'). A digital certificate is required to include several elements: it has to be provided by a certification services provider and it has to include the name of the person signing the document.

44 Y. Rabineau et al. 'The First Step in a New Era: ICT In the French Judicial System', in F. Contini et al. (eds.), *Justice and Technology in Europe: How ICT is Changing the Judicial Business*, 2001, pp. 177-196.

45 Programme d'action gouvernemental pour la société de l'information (PAGSI).

46 Y. Rabineau et al., 'The First Step in a New Era: ICT In the French Judicial System', in F. Contini et al. (eds.), *Justice and Technology in Europe: How ICT is Changing the Judicial Business*, 2001, p. 189.

47 Ibid.

48 P. Biju-Duval et al., 'Judicial Electronic Data Interchange in France', in M. Fabri et al. (eds.) *Judicial Electronic Data Interchange in Europe: Applications, Policies and Trends*, 2003, pp. 211-222.

are equipped with terminals, thus permitting the identification of patients and the electronic transmission of prescriptions and reimbursement forms.⁴⁹ The system was put into service in 1998 and in 2008 the Vitale card was used by 82% of general practitioners and 99% of pharmacists and one billion prescriptions were electronically transmitted.⁵⁰ The use of paper is still possible and represents about 20% of the claims for reimbursement, costing much more than the electronic claims.

The second system, TéléIR, has been developed more recently by the French Ministry of economy and finance. It is part of the so-called 'modernisation' of the taxation information system, whose total cost has exceeded EUR 1 billion. The system was introduced in 2002, allowing citizens to fill in taxation forms online, to send those data over the Internet and to have online access to their tax files. Incentives, such as a EUR 20 rebate and a different deadline, helped to boost electronic filing. In 2010, 10.4 million income tax files⁵¹ were sent electronically.⁵²

Given this general framework, it should not come as a surprise that the French ordinary judicial administration decided to explore the possibility of ICT innovation and electronic case filing. Excessively lengthy proceedings are a major issue and reducing delays is a strategic aim. ICT projects are seen as a relevant way to improve the efficiency of the courts and thus to allow them to meet their objectives.

4. e-Barreau

In the ordinary justice system, official electronic communication between courts and lawyers started at the beginning of 2000, with the implementation of a service called e-Greffe. This information system was introduced in the Paris ordinary court of first instance (*tribunal de grande instance*, hereafter: TGI). The project is worth mentioning since it was following this example that the nationwide e-Barreau project was later implemented. E-Greffe has been in service in Paris since 2003. In 2009 e-Greffe was connected to e-Barreau, as will be explained below.

4.1. e-Greffe: a pilot programme experimenting with simple procedures

4.1.1. Cooperation between public administration and the Bar

E-Greffe⁵³ is the result of a partnership between the Paris Bar, the Ministry of Justice and the Paris TGI. Basically, the idea was to allow lawyers to access information on a case, to receive court e-notices, and to download electronic documents. The way to achieve that goal was to partially open the court's Case Management Systems (CMS) so that lawyers could retrieve the information they were looking for through the internet. A convention was signed on 3 July 2003

49 The Vitale card does not include medical data. This is the purpose of another programme, the DMP (*dossier médical partagé* or shared medical file) which is under development.

50 Groupement d'intérêt économique Sesam-Vital, *Rapport annuel 2008*.

51 Out of a total of 15.7 million households paying income tax.

52 Source: press release by the French Finance Ministry, June 2010 <http://www.impots.gouv.fr/portal/dgi/public;jsessionid=PZHUVQBORL2HLQFIEMRSFFGAVARW4IV1?paf_dm=popup&paf_gm=content&typePage=cpr02&espld=1&paf_gear_id=500018&docOid=documentstandard_6108&temNvlPopUp=true>.

53 See also C. Boissel, 'E-greffe: de la dématérialisation des actes de procédure vers le développement d'une justice en ligne?', *Mémoire de DESS, droit et pratique du commerce électronique*, 2004, Université René Descartes, Paris 5, <<http://www.droit.univ-paris5.fr/dess-commerce-electronique/memoires/caroline%20boissel%20e-greffe%20DESS%20DPCE%202004.pdf>>.

between the three above-mentioned entities.⁵⁴ In October of the same year, the *e-Greffe* portal was put into service.

4.1.2. Technical characteristics of e-Greffe, the functions provided and the business model

In order to access e-Greffe, a lawyer needed a digital certificate stored on an USB key. This technology was provided by Certurope, a certification services provider. It guaranteed the identity of its user and the integrity of the information sent. The lawyer then logged on to the e-Greffe portal, entered his user name and a PIN code, and was able to use online services through a secured https connection.

In particular, e-Greffe allowed lawyers to do the following: to receive information on a case⁵⁵ and to have access to the ruling as soon as it was available; to sign up to a given application for emergency proceedings (*audience de référé*); to communicate with the court's clerks through emails and attachments. In compliance with the adversarial principle,⁵⁶ every message sent was forwarded to all parties to the case.

e-Greffe printscreen

The screenshot shows the e-Greffe portal interface. At the top, there are navigation tabs: DISPOSITIF, RECOURS, LIENS, HISTORIQUE, AUDIENCES, PARTIES, and a 'Sommaire' button. Below the tabs is the title 'Détail d'une affaire'. The main content area is divided into two sections: 'Historique' and 'Détail d'une décision'.

| Détail d'une affaire | |
|------------------------------|----------------------------------------------------|
| Type d'affaire | Référés |
| Numéro de répertoire général | 03/00039 |
| Date de saisine | 02/07/2003 |
| Date de l'acte de saisine | 02/07/2003 |
| Mode de saisine | Assignment à date fixe |
| Nature de l'affaire civile | Action détentrice ou réintégratoire de nationalité |

| Historique | |
|------------------------------------------------|--|
| Le 02/07/2003 (Test RP Injonction de conclure) | |
| Le 01/07/2003 à 09h00 (Mise en état) | |

| Détail d'une décision | |
|-----------------------|----------------------------------------------|
| Date | 01/07/2003 |
| Heure | 09h00 |
| Type d'audience | Mise en état |
| Décision | Acceptation partielle de la demande initiale |
| Nature de la | |

E-Greffe was determined to be interesting and time-saving by the lawyers using it, as it enabled them to receive information without having to go to the court. It was also considered time-saving by the court personnel, since electronically transmitted data could be easily reused, without having to be manually entered into the CMS.

Even though it was generally evaluated as positive by its users and by the administration, e-Greffe suffered from several shortcomings, the main one being that its scope was limited to emergency proceedings and thus excluded ordinary ones. The choice of emergency proceedings was made because the Bar wished to experiment with e-Greffe in a very simple kind of procedure. Emergency proceedings match this description.⁵⁷ In this regard, e-Greffe can be compared to Money Claim On Line, a specialised electronic case filing service used by the UK courts.⁵⁸

54 *Convention sur la communication électronique relative aux procédures civiles.*

55 The lawyer can make an enquiry by using the case's docket number (for instance: 03/10613) or hearing date.

56 In French: *principe du contradictoire.*

57 There are several kinds of emergency procedures. What they have in common is that their purpose is to allow a litigant to obtain a judgment swiftly in order to safeguard his/her rights. However, the judgment is provisional and can be overturned in a further case on the merits.

58 J. Kallinikos, 'Institutional Complexity and Functional Simplification: The Case of Money Claim Online in England and Wales', in F. Contini et al. (eds.), *ICT and Innovation in the Public Sector: European Studies in the Making of the E-Government*, 2009, pp. 174-210.

Another concern was to guarantee compliance between this experiment and the rules of civil procedure, given the fact that, at this time, it was not planned to modify those rules. Due to this situation, several actions performed online had to be subsequently confirmed by handing paper documents to the court with the result that there was a duplication of the work.

As for the business model, e-Greffe functioned on a subscription basis. The fee amounted to EUR 107 for 3 years. There were about 200 subscribers in 2004, 350 in 2006 and 750 in 2008. Although there are more than 20,000 lawyers in Paris, e-Greffe was targeting a core of 3,000 lawyers working at the *Tribunal de grande instance de Paris* on a regular basis.⁵⁹

4.2. From e-Greffe to e-Barreau: the creation of a nationwide electronic communication system

4.2.1. The strong commitment of the National Bar Council

In spite of its shortcomings, e-Greffe has been generally considered as an important step for ICT innovation in the administration of justice. It helped to experiment, set up and institutionalize⁶⁰ the framework of the governance network that would be used from then onwards in the design and implementation of the e-justice projects. It was a structure based on a partnership between the Ministry of Justice, the local Bar Associations and the courts, and on the sharing of responsibilities, including financial ones. At the same time, the deployment of e-Greffe was a local experience limited to Paris. The implementation of a nationwide electronic communication programme therefore involved a new actor, the National Bar Council (CNB).

In 2004, the CNB proposed a nationwide electronic communication project to the Ministry of Justice. This started a negotiation process between the two actors. The CNB had two main goals. Firstly, it wanted to overcome the failure of the first lawyers' virtual private network experience, Avocaweb, launched by Ediaavocat⁶¹ in the themed-1990s. Secondly, the CNB wanted an information system which complied with the rules regarding lawyer-client privilege and confidentiality. A single and common network seemed to be the best way to achieve those goals.

When looking at the motivations of the CNB, one also has to consider that in France there is competition between lawyers and notaries, and that the latter possess a nationwide intranet system which has 7,500 users and a system of digital certificates enabling them to access several databases such as the mortgage database. The fact that the very first official Electronic Notary Act was signed in October 2008 also illustrates the notaries' technological ambitions.⁶² Besides, one of the main goals of the lawyers' organizations has been to compete with the notaries' main prerogative, i.e. the ability to establish enforceable documents with strong probative evidence (*acte authentique ayant force exécutoire*). This explains the debate on the *acte d'avocat* which has taken place in France in recent years and it led to the Darrois Report in 2009.⁶³ Setting up a secured network enabling them to reliably transmit and store documents seemed to the lawyers

59 S. Rebboh, 'La mise en état électronique', 2007 n° 331, *Gazette du Palais*, p.5.

60 With institutionalization we refer here to the process through which a certain condition or a certain way of doing things first gains acceptability (e.g. it is acceptable to do things in that way) and is then taken for granted (it is the way the thing should be done and it is taken for granted that the activity is or will be carried out in that way).

61 *Ediaavocat* was a structure created by the Paris Bar and other lawyers' groups. Its purpose was to develop the use of ICT among law firms. *Avocaweb* was a VPN with secured mail inboxes for lawyers.

62 See for instance <<http://pro.01net.com/editorial/394621/lacte-authentique-devant-notaire-devient-electronique/>>.

63 *Rapport sur les professions du droit, remis au Président de la République le 8 avril 2009*. As of August, 2010, a bill is being discussed by the national assembly relating to the creation of a new kind of legal document: the act signed by a lawyer (*acte contresigné par avocat*). *Projet de loi de modernisation des professions judiciaires et juridiques réglementées introduisant notamment l'acte contresigné par avocat*, <http://www.assemblee-nationale.fr/13/dossiers/modernisation_professions_jud-jur_regl.asp>.

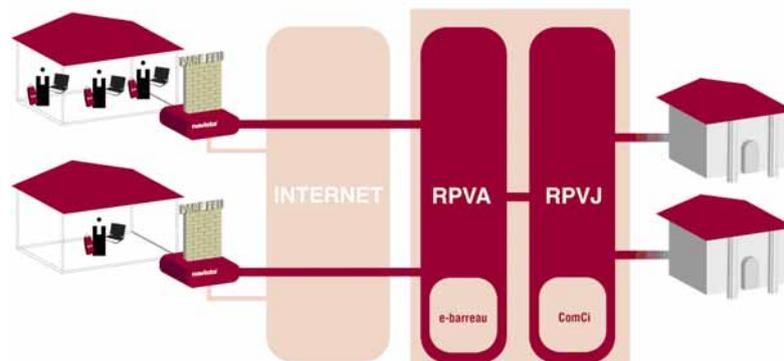
to be an efficient way of reinforcing their claim.⁶⁴ This goal also explains that the CNB needed to set up a single nationwide solution.⁶⁵

This situation clearly provided a strong incentive for the CNB to play an active role in the design of a nationwide electronic communication project. Apart from this incentive, promoting a unified system probably seemed to be a way for the CNB to ensure its leadership over the local Bar Associations.

4.2.2. The 2005 national convention and the adaptation of the rules of procedure

On May 4th 2005, a national framework convention was signed by the Ministry of Justice and the National Bar Council. It was the result of a year of negotiations. This convention defined the rules regarding official electronic communication between lawyers and the courts. The aim was to enable lawyers to receive information on the situation of the cases they had filed, and to implement two-way official communication concerning applications and documents. Connecting the RPVA and the RPVJ was the way to achieve this goal. Technically, the system is similar to the one used by e-Greffe: the Ministry of Justice and the CNB were to symmetrically adapt their existing systems so that they could be connected. Under the convention, the Ministry of Justice was responsible for opening up the court CMS, which is called WinCi TGI,⁶⁶ by implementing a communication add-on, ComCi TGI. The Bar was responsible for coming up with a way of connecting the lawyers' virtual private network to the E-Greffe portal, and to decide how the latter should be connected to the RPVJ.

The e-Barreau infrastructure



At this point, it became clear that the implementation of official electronic communication required some changes in procedural rules. Even the attempt to develop an electronic system that

64 On this subject, two interviews are very clear about this goal: 'Intervention de Thierry Wickers, Vice-président du Conseil National des Barreaux: Le rôle du RPVA dans la mise en œuvre de l'acte sous signature juridique', *Gazette du Palais*, 14 octobre 2008 n° 288, p. 25; 'Intervention de Patrick Michaud, avocat au Barreau de Paris: Conservation et rôle du RPVA, Pour assurer la sécurité et l'efficacité des rapports juridiques dans l'intérêt de nos concitoyens et de nos entreprises', *Gazette du Palais*, 14 octobre 2008 n° 288, p. 21.

65 'La sécurité juridique due au client exclut de laisser chaque Ordre ou chaque cabinet concevoir et promouvoir des services propres (...). Il faut donc concevoir collectivement les caractéristiques du service, et doter l'ensemble des avocats des mêmes outils informatiques de façon à ce que l'ensemble des clients et des actes bénéficient dans tous les cas des mêmes garanties de sécurité.' ('Concerns about legal certainty make it impossible to let each Bar or each law firm come up with and promote its own services (...). It is thus necessary to define together the specifications of the service, and provide all the lawyers with the same IT tools so that all customers and all acts will have the same level of security'), in 'Intervention de Thierry Wickers, Vice-président du Conseil National des Barreaux: Le rôle du RPVA dans la mise en œuvre de l'acte sous signature juridique', *Gazette du Palais*, 14 octobre 2008 n° 288, p. 25.

66 WinCi TGI has been designed by a French IT society, ESABORA..

was the functional equivalent of the paper-based one needed some normative adaptation. It is interesting to note that, until then, such a need had not been taken into consideration.

The required changes were introduced with the Decree of 28 December 2005, no. 1678.⁶⁷ Its Article 71 introduces in the new Code of Civil Procedure (hereafter: NCPC) an article allowing the courts to hold electronic registers and dockets, provided that the system can guarantee the integrity and confidentiality of the information therein.⁶⁸ More importantly, its Article 73 introduces several articles into the NCPC relating to official electronic communication (Articles 748-1 to 748-6). Article 748-1⁶⁹ allows the electronic transmission of a broad range of procedural acts, documents, summonses and judgments, provided that the recipient has agreed to receive them electronically (Article 748-2). An acknowledgment of receipt mentioning the date and hour of receiving them is automatically sent to the court by the recipient (Article 748-3). Article 748-6 lays down the requirements that official electronic communication has to meet: a reliable process of identifying both parties; safeguarding the exchanged documents through the security and confidentiality of the exchange; and the creation of logs allowing the verification of the time and date of the exchanges.⁷⁰

Article 88 of the decree provides that the above-mentioned rules become effective from 1 January 2009. However, the same article allowed the Minister of Justice to speed up this schedule and to enforce those measures before this date, if necessary, subject to the condition that the president of the court and the local Bar Association signed an agreement complying with the guidelines of the national framework convention.

4.2.3. On the Lawyers' side: e-Barreau's slow deployment during the first few years

Within the framework of the 4 May 2005 convention the CNB had to provide lawyers with a solution allowing them to connect to the courts' registers. It came up with a lawyers' e-Barreau package that included broadband internet access (512 Kb to 8 Mb), a secured mail inbox, a digital certificate stored on a USB key, and a digital signature tool. From a technical point of view, the solution was based on VPN/MPLS technology.⁷¹

This package was provided thanks to a three-year EUR 280,000 contract with France Télécom Equant, a subsidiary of the incumbent firm and a leading telecommunications operator. One major criticism of this solution was that subscribers (i.e. lawyers) were not free to choose their internet access provider, since the package was not compatible with ADSL broadband connections (as it was designed to be a walled-garden). With a fairly high monthly fee of about EUR 64 per month and a broadband connection of only 512 Kb to 8Mb (while internet access providers have been offering 20 Mb broadband since 2003), this solution was not considered particularly interesting, especially by lawyers and law firms already having broadband access.

67 Décret n° 2005-1678 du 28 décembre 2005 relatif à la procédure civile, à certaines procédures d'exécution et à la procédure de changement de nom, JORF n°302 du 29 décembre 2005, page 20350
texte n° 67.

68 Art. 729-1 du nouveau code de procédure civile: 'Le répertoire général, le dossier et le registre peuvent être tenus sur support électronique. Le système de traitement des informations doit en garantir l'intégrité et la confidentialité et permettre d'en assurer la conservation.'

69 Art. 748-1: 'Les envois, remises et notifications des actes de procédure, des pièces, avis, avertissements ou convocations, des rapports, des procès-verbaux ainsi que des copies et expéditions revêtues de la formule exécutoire des décisions juridictionnelles peuvent être effectués par voie électronique dans les conditions et selon les modalités fixées par le présent titre.'

70 Art. 748-6: 'Les procédés techniques utilisés doivent garantir, dans des conditions fixées par arrêté du garde des sceaux, ministre de la justice, la fiabilité de l'identification des parties à la communication électronique, l'intégrité des documents adressés, la sécurité et la confidentialité des échanges, la conservation des transmissions opérées et permettre d'établir de manière certaine la date d'envoi et celle de la réception par le destinataire.'

71 Virtual Private Network/Multi-protocol label switching.

As a result, from 2005 to 2007 the number of subscribers to the lawyers' virtual private network remained very low.⁷² In the same period, CNB was spending about EUR 300,000 per year for the RPVA contract.

A solution to this internet provider monopoly was introduced in September 2007 with the addition of a data encryption tool produced by another firm, Navista, to the lawyers' e-Barreau package and the removal of the mandatory internet access subscription to the France Telecom subsidiary (Equant). With the use of this Navista box, which must be connected to the lawyer's (or law firm's) router, the data exchange is encrypted. There are two layers of security: the data is encrypted with the HTTPS protocol and is then embedded in a virtual private network (VPN).

The Navista box



The business model followed the scheme which experimented with e-Greffe: lawyers wanting to use the system have to subscribe to the service and pay a monthly fee of EUR 55,⁷³ plus an installation fee of EUR 69. Each additional USB key with a digital certificate costs EUR 7 per month.

However, the involvement of Navista was not without its implications. In fact, while freeing the lawyers from the internet provider monopoly, Navista was granted a monopoly concerning the encryption for the data transfer between the lawyer's cabinet and the main e-Barreau server.⁷⁴ In other words, at least from 2007 to 2009,⁷⁵ there was no way for a lawyer to use e-Barreau without renting a Navista box.

4.3. 2007: the turn of the tide and the acceleration of the pace of the implementation of electronic communication

While the National Bar Council and the lawyers were working on their side of the problem, things proceeded slowly on the courts' side. Starting from 2006, experiments on the Case Management System add-on that would allow the data and document exchange with the lawyers (ComCi TGI v2) took place in the ordinary courts of first instance of Marseille, Lille and Alès. Things seemed to be lagging behind, however, with a risk that the system, which had lost its initial impulse, would become bogged down in a never-ending pilot phase.

72 Less than 200 by April 2007. It should be taken into consideration that at the time the system was actually in use in only a very limited number of courts. *Rapport sur le réseau privé virtuel avocat, assemblée générale du CNB des 27 et 28 avril 2007.*

73 According to a letter sent by the head of the CNB to the head of the Marseilles Bar on 6 November 2009, this fee is broken down as follows: network access subscription: EUR 45; e-Barreau management and maintenance: EUR 3.62; annual management fee: EUR 2.31; email address: EUR 2; digital certificate: EUR 2.

74 The monopoly was granted by CNB.COM (the group which manages the RPVA on behalf of the CNB).

75 See Section 4.4.2.2.

However, 2007 proved to be a turning point as the new Ministry of Justice firmly committed itself, among other projects, to ‘modernize’ the judicial system, in favour of a more rapid deployment of official electronic communication. As a result of the new impulse, at the local level the deployment of the ComCi TGI add-on in the courts of first instance was speeded up and the court of appeal version of the connection add-on, ComCi CA, began to be deployed.⁷⁶ Furthermore, at the national level a new framework agreement was signed between the Ministry of Justice and the CNB.

Elaborating the rules governing the electronic communication, even on the eve of this new commitment, proved to be a difficult and complex task. It required nationwide guidelines, local agreements, and a continued adaptation of the rules of proceedings. On 28 September 2007, a new framework convention was signed between the Ministry of Justice and the CNB. The new convention replaced that of 4 May 2005. It stresses the importance of the compliance of official electronic communication with the NCPC. It describes the way the different stakeholders were to share responsibilities, with the Ministry of Justice and the CNB setting the guidelines, and the courts and the local Bar Associations being required to sign agreements before implementing the official electronic communication at the local level. The convention emphasizes the importance of security and makes compliance with its requirements mandatory: digital certificates and the use of cryptography in order to secure electronic exchanges of data.

The convention also contains guidelines relating to the way electronic communication should be used. Article V D 1) states that the court clerks and the lawyers are required to transmit electronic versions of the documents listed in the local agreement, except for documents that have to be transmitted as paper documents. When a paper version of the document is transmitted, its electronic version also has to be transmitted. In other words, electronic communication replaces the communication of paper documents whenever possible.

Article V E lists the documents that have to be digitized and then electronically transmitted as a joint attachment to an email. The list of those procedural documents has to be mentioned in the local agreement. The negotiations that took place at the local level during the drafting of local agreements were a welcome opportunity for the different stakeholders – judges, clerks and lawyers – to have a better understanding of the expectations and constraints of all the participants involved.⁷⁷

Regarding the criminal procedure, a 2007 statute modified the code of criminal procedure in order to authorize the transmission (through email or CD-Rom) of a digital copy of the case file to the lawyers.⁷⁸ The same law made it possible to transmit summonses by email instead of a letter with an acknowledgement of receipt (*lettre recommandée avec demande d’avis de réception*), provided that a copy of the summons will be kept.⁷⁹ Some parts of the guidelines ask the clerks to systematically print the acknowledgement of receipt related to the emails they send and to sort them in the paper version of the case file. This provision in the guidelines offers an

76 The ComCi CA add-on was developed for the appeal courts’ case management system, WinCi CA.

77 S. Grayot, ‘Le droit à un procès civil équitable à l’aune des nouvelles technologies’, presentation performed during the meeting *Le procès civil à l’épreuve des nouvelles technologies*, Paris, 20 November 2009.

78 Article 114 of the Code of Criminal Procedure, modified by law no. 2007-291, 5 March 2007: ‘Après la première comparution ou la première audition, les avocats des parties peuvent se faire délivrer, à leurs frais, copie de tout ou partie des pièces et actes du dossier. Cette copie peut être adressée à l’avocat sous forme numérisée, le cas échéant par un moyen de télécommunication selon les modalités prévues à l’article 803-1. La délivrance de cette copie doit intervenir dans le mois qui suit la demande’.

79 Article 803-1 of the Code of Criminal Procedure, modified by law no. 2007-291, 5 March 2007: ‘Dans les cas où, en vertu des dispositions du présent code, il est prévu de procéder aux notifications à un avocat par lettre recommandée ou par lettre recommandée avec demande d’avis de réception, la notification peut aussi être faite sous la forme d’une télécopie avec récépissé ou par un envoi adressé par un moyen de télécommunication à l’adresse électronique de l’avocat et dont il est conservé une trace écrite’.

interesting contrast between the emphasis put on the use of electronic communication and the instruction to print every acknowledgement of receipt. However, the replacement of printed documents by digital documents is also widely promoted by those guidelines.

4.4. The ongoing deployment of e-Barreau and the experimentation with the system

4.4.1. Official electronic communication has become effective in 68 courts since November 2008

With the progress made in the deployment of ComCi TGI, the removal of the mandatory e-Barreau broadband access and multiple adaptations to the rules of proceedings, official electronic communication could quickly expand. Another important factor is that the Ministry of Justice made use of the provision of Article 88 of the 28 December 2005 decree allowing the implementation of electronic communication prior to January 2009, provided that the president of the court and the local Bar Association would enter into an agreement to comply with the guidelines of the national agreement. A September 2008 decision⁸⁰ put into force the provisions of Article 73 of the 28 December 2005 decree in 68 courts as of November 2008. It lists the documents that could be transmitted electronically, which includes the summons, the documents exchanged by the lawyers and some procedural decisions of the court.

Print-screen of an email template in ComCi TGI

CREATION D'UN CORPS D'EMAIL

Code

Libellé

Recherche :

Merci de bien vouloir compléter le questionnaire suivant :

1. Les adversaires ont-ils constitué avocat ? Si oui, lesquels.
Maître :
2. Avez-vous communiqué vos pièces ?
3. L'affaire pourra-t-elle être instruite devant le Président (circuit court) ?
Si non, pourquoi ?
4. Dans l'hypothèse où la partie adverse solliciterait l'organisation d'une audience par visioconférence, seriez-vous opposé à cette demande ?
(OPTIONNEL)
5. Avez-vous des observations complémentaires à formuler ? Dans

Zones clé

OK

Quitter

Official electronic communication can be divided into three functional categories: 1) the transmission of case management data: structured data, similar to an electronic form, are attached to an email, and can be transmitted to the different steps in the procedure, such as the inscription of a lawyer as a defending party, for instance; those data are mainly related to the preparation of the hearing, known in French as the *mise en état*; clerks and administrative staff in the courts are provided with templates allowing them to have pre-prepared sentences for the emails they will send to lawyers; 2) the exchange of emails, with attachments in .rtf or .pdf format: each document

80 Arrêté du 25 septembre 2008 portant application anticipée pour la procédure devant le tribunal de grande instance des dispositions relatives à la communication par voie électronique.

listed in the local agreement is transmitted through this medium; 3) the transmission of digitized documents relating to the proceedings.

In April 2009, the Ministry of Justice enforced the 28 September 2007 convention and translated it into the regulation.⁸¹ Therefore, official electronic communication has to comply with the rules laid down in the decision (Article 1). The CNB is responsible for the management of the RPVA and has to make sure that the communication is encrypted (Articles 5 to 8). E-Barreau users have to identify themselves with a digital certificate; the CNB and local Bar Associations are responsible for signing up the lawyers (Articles 9 to 14). Article 9 refers to the above-mentioned March 2001 decree relating to the digital signature.⁸² Data sent through the electronic communication system must generate acknowledgments of receipt. Those data are stored at the courts (Articles 15 to 17).

In April 2010, another decree was released⁸³ in order to solve a fairly relevant issue that had so far been ignored: what is the legal status of a document electronically created and then sent through e-Barreau⁸⁴? As seen above, the different decrees published since 2005 relate to the transmission of legal documents and not to drafting (i.e. the process of creating) those documents. Furthermore, the courts did not (and still do not) have the required software to recognize and prove the lawyers' digital signatures. As a consequence, some documents still need to have a handwritten signature and to be transmitted on paper. In order to solve this issue and to allow the electronic transmission of those documents, the decree of April 2010 states that the identification which is made when a lawyer logs on to e-Barreau is tantamount to a signature.⁸⁵ Article 2 of this decree states that this rule is valid until the end of 2014.

As of April 2009, 122 conventions had been signed⁸⁶ (the total number of first instance courts being 181). According to CNB data, e-Barreau had about 1,200 subscribers at the end of 2007, 2,500 in February 2009, and approximately 5,000 in October 2009.⁸⁷ By February 2010, 137 local agreements had been signed between the TGIs and the local Bar Associations while 7,000 lawyers had subscribed to the e-Barreau system.⁸⁸ At the same time, according to a report released by Navista on June 9, 2010, there were, as of April 2010, 2,722 Navista boxes in use in France.⁸⁹ It has to be reiterated that, in most cases, there is more than one lawyer in a law firm,⁹⁰ so one Navista box means several users. However, even though these data seem to provide a quite positive picture and indicate a swift diffusion of the system, we must remember that the number of subscribers to a system is not necessarily an indication that the system is actually used or of

81 Arrêté du 7 avril 2009 relatif à la communication par voie électronique devant les tribunaux de grande instance.

82 'La sécurité de la connexion des avocats au RPVA est garantie par un dispositif d'identification. Ce dispositif est fondé sur *un service de certification garantissant l'authentification de la qualité d'avocat personne physique, au sens du décret du 30 mars 2001 susvisé.* (...)' (emphasis added).

83 Décret n° 2010-434 du 29 avril 2010 relatif à la communication par voie électronique en matière de procédure civile, JORF n° 102 du 2 mai 2010 texte n° 17.

84 For an analysis of the decree, see Hervé Croze, 'Le décret du 29 avril 2010 relatif à la communication par voie électronique en matière de procédure civile: les significations d'un texte insignifiant', *Gazette du Palais*, 11 mai 2010 n° 131, p. 7.

85 It is interesting to observe that this new rule is very similar to the one that is used for Télérecours, the administrative jurisdiction e-filing system, which has been criticized for not adopting the digital signature which, at least on paper, was in use for e-Barreau: the mere fact of being connected to the application (Télérecours or e-Barreau) means that the user has been properly identified and thus that the documents he/she sends over the internet are seen as having been properly signed and therefore have legal value.

86 Réponse à une question parlementaire, question N°: 47577, publiée au JO le 09/06/2009 page 5646.

87 Speech by Thierry Wickers, head of the CNB, during the 25 September 2009 CNB meeting in Paris; <http://www.cnb.avocat.fr/Discours-d-ouverture-du-Batonnier-Thierry-WICKERS,-President-du-Conseil-National-des-Barreaux_a697.html>.

88 Source: A. Coignac, 'E-barreau et dématérialisation des procédures: «on ne va pas faire une justice virtuelle »', *La Semaine Juridique Edition Générale* n° 3, 18 janvier 2010, 46.

89 Rapport d'audit du réseau privé virtuel avocat, also know as Hattab report, p. 27.

90 According to the latest available statistics, only 35.6 % of French lawyers were working as individual lawyers in 2009. *Chiffres de l'Observatoire du Conseil national des barreaux*, 2009.

the quality of the services it provides. Besides, it has to be stressed that there is a lack of independent information relating to the RPVA, including the number of subscribers.

4.4.2. Is electronic communication working and are users satisfied with it?

At the time of writing, the deployment of e-Barreau is still ongoing and some of its technological, normative and organizational components are still under discussion. However, in the opinion of the authors of this article, it is already possible to analyze the first results of the experimentation

4.4.2.1. What can be actually done using the system?

According to the available data and the most recent interviews,⁹¹ while conventions have been signed, the transmission technology is in place and the temporary solution provided under Decree no. 2010-434 of 29 April 2010 solves the signature problem for the time being, the system is not yet being used to file cases. e-Barreau is used for accessing data relating to cases that have already been filed. The system also allows lawyers to attach documents to the emails they send to the clerks. So lawyers can send their .doc documents, as well as digitized .pdf documents, to the court. Furthermore, the local conventions between the local Bar Associations and the courts allow the replacement of some documents with their electronic version. When the handwritten signature is required on a document, it has to be digitized and then sent as a joint attachment. In the near future, e-Barreau should be upgraded in order to allow lawyers to file cases electronically. On the side of the courts, a communication through e-Barreau is equivalent to a paper notification and therefore the TGI sends emails to this effect. Lawyers and clerks send emails to each other relating to the *mise en état* (the scheduling and preparation of cases, as explained in Section 4.4.1), such as a summons by which the court requests a lawyer to send his/her observations (*injonction de conclure*), a decision of the judge to postpone a hearing, and so on – those measures are listed in Articles 763 to 781 of the Code of Civil Procedure. The problem lies with documents that have to be signed. Simple messages relating to the date of a hearing do not need to be signed and are therefore not an issue. But there is a problem with other documents. For instance, the courts can send the judgment by email through e-Barreau, but are compelled to send the original document on paper, since the court has no way of digitally signing the judgment.

4.4.2.2. High fees, technical complexity and the Navista monopoly as causes for concern

First of all, what do lawyers think of the system? They seem to be surprised by the subscription fee and the methods used by the CNB. Several lawyers' blogs make it very clear that the price is a major concern. The initial EUR 55 monthly fee was widely seen as being too expensive. The CNB took this criticism seriously and now offers a lower rate of EUR 32 per month. Beyond the price issue, the criticism mainly related to the choices made by the CNB and to its willingness to adopt a 'one size fits all' solution. In particular, the CNB ran into trouble in Paris, when the local Bar Association and Paris lawyers refused to adopt the new, much more expensive system and wanted to keep the already deployed e-Greffe. Given the 'dimension' of the problem (as previously mentioned, 41% of French lawyers practise in Paris), it could not easily be ignored. In March 2009 CNB and the Paris Bar came up with the following solution: e-Greffe was connected to e-Barreau and the CNB adapted its system so that e-Barreau would recognize as valid the certificates used by the Paris lawyers. For its part, the Paris Bar decided to finance the

91 See, for instance, the feedback from the head of the Tulle court: Benjamin Deparis, Président du tribunal de grande instance de Tulle, 'RPVA: expérience pratique, bilan positif', *Gazette du Palais*, 13 juillet 2010 n° 194, p. 9.

cost of the certificates in order to boost the adoption of e-Barreau. This amounts to EUR 622,000.⁹² As a consequence, Parisian lawyers are not required to obtain a Navista box and they keep their e-Greffe digital certificate.

This solution, though, has not been welcomed by lawyers outside Paris, because it seemed to indicate that the individual Navista box is not necessary. It would be technically possible to have a single Navista box per Bar Association, the lawyers of this bar being only required to obtain the USB key with a digital certificate.

Several lawyers vented their anger in their blogs,⁹³ saying that it was unfair that lawyers in Paris would not need the Navista box while provincial ones would be required to rent one.

As a consequence, some local Bar Associations started to look for adapted solutions. For instance, the Marseilles Bar, the third largest in France with 1,675 lawyers (5% of French lawyers), officially protested against the mandatory use of the Navista box and against the preferential treatment of the Paris Bar. In August 2009, the Marseilles Bar set up its own solution, relying on servers and software from Cisco. Basically, this solution consists of using a single Navista box for the whole bar, thus lowering the prices for lawyers: the Marseilles lawyers could use e-Barreau for only EUR 2 per month, and without being forced to connect from their office, since they do not need an individual Navista box.

The controversy has spread to the lack of transparency displayed by the CNB, which is a source of concern for lawyers. It has been lamented that CNB has provided no information on the method used to choose its business partners (France Télécom Equant, Navista), and on the call for tenders.⁹⁴

In the spring of 2010, the controversy reached its peak with several events. Until then, the debate had taken place on the lawyers' blogs, but in March and then in June 2010, two papers were published in the French daily legal journal *Gazette du Palais*, which is widely read among French lawyers and judges.⁹⁵ Those articles made public the ongoing debate about Navista and criticized the CNB for its ill-founded choices. The second paper also revealed that, in reprisals against the initiative of the Marseilles Bar, Navista had cut off the Ebarreau access of the Marseilles Bar in April 2010, officially because of safety concerns.

The second major event in the spring of 2010 was the release of the Hattab Report on 11 June 2010. The Hattab Report is the result of an audit ordered by the president of the *Conférence des bâtonniers*, which is an organisation of the heads of local Bar Associations. The *Conférence des bâtonniers* asked Hattab, an ICT specialist, to compare the three existing solutions ('mainstream' e-Barreau, the solution of the Paris Bar, and the solution of the Marseilles Bar), both according to a technical and an economic point of view, and to assess their level of security and their respective pros and cons. The conclusion of the Hattab Report was that the solutions of Paris and Marseilles, although a little less secure than the 'mainstream' e-Barreau, were sound and efficient. The report stressed the fact that several features of the Navista box were already available on the market and were often included in the packages provided to law

92 'A l'occasion de la présentation d'un collectif budgétaire additionnel au budget initial de l'Ordre des avocats de Paris pour l'année 2009, les avocats ont validé le financement des certificats offerts dans le cadre du RPVA, dont le total a été estimé à 622 020 €', <<http://www.actuel-avocat.fr/droit-justice-cabinet/procedure/a-17061/rpva-offert-aux-avocats-parisiens-622-020.html?xtmc=rpva&xtcr=2>>.

93 <<http://www.avocats.fr/space/jean.devalon/content/rpva--scandale-ou-pas-3A1BE7AD-04D7-4BB5-8B03-B746679DBB90#comments>>, for instance.

94 See for instance a lawyers' blog: 'où sont les études de marché et les appels d'offres?' ('where are the marketing studies and the calls for tenders?'), <<http://avocats.fr/space/bernard.kuchukian/content/8ad24fc2-b145-4b36-bb4e-f445fe2dba5b>>.

95 E. Boccara, 'RPVA : la guerre juridique', *Gazette du Palais*, 8 juin 2010 n° 159, p. 7; 'RPVA : le CNB dans la tourmente', *Gazette du Palais*, 30 mars 2010, p. 6.

firms by ICT vendors, thus implying that some of the technological choices of the CNB were questionable. The report also criticized the CNB for not exercising enough control over Navista and for being too dependent on this society, and it expressed some concern about this situation. Furthermore, the report confirmed that, for the Navista contract, there was no call for tenders at all.⁹⁶ The report concluded that there was no technical obstacle to a broadened use of the Paris and Marseilles solutions,⁹⁷ thus admitting that the individual Navista box, while interesting for some law firms wishing to have a single IT solution, should not necessarily be mandatory.

The report did not only contain technical information. It also made public, for the first time, the cost of the Navista contract and the compared costs of the Paris and Marseilles solutions. In a nutshell, the Hattab Report estimates that the cost of the Navista solution will be EUR 10.4 million from 2010 to 2014. In comparison, for the same period, the cost of the Paris solution will be EUR 600,000, and the cost of the Marseilles solution will be EUR 80,000.⁹⁸ As the report stated: ‘the economic justification of a virtual network based on RSA boxes in every law firm seems problematic’.⁹⁹ The costs per lawyer are as follows:

- ‘mainstream’ e-Barreau: EUR 14 per month (with an installed base of 7,000 lawyers)
- Paris solution: EUR 1.87 per month (with an installed base of 4,000 lawyers)
- Marseilles solution: EUR 1.29 per month (with an installed base of 1,000 lawyers).

On 18 June 2010, during the CNB annual meeting, the Paris Bar officially offered to open up its system to all the other French Bar Associations¹⁰⁰ but the CNB rejected this proposal.

It has to be noted that, as of August 2010, at least one Marseilles lawyer has filed a case before the Marseilles court following the loss of his e-Barreau access because of Navista’s initiative,¹⁰¹ and that another case has been filed at the *Autorité de la concurrence*, France’s competition watchdog, against the CNB and Navista on the ground of an abuse of a dominant position.

Another major criticism of e-Barreau concerned the use of the Navista box, which can be connected to only one computer or local network, thereby forcing the lawyers to use the system from a single place, i.e. their office, making it impossible for them to use e-Barreau from their home or on the move. The CNB addressed this issue by releasing, in April 2010, a new feature designed to allow lawyers to connect remotely to e-Barreau from their home. This feature, known as *Application Télétravail* (which translates as ‘Working remotely application’) works as follows: the lawyer connects from his home to his computer located at his office through a remote desktop or VPN application. In order to perform this operation, he needs to have a static IP address at his office and to make a redirection of ports on the router. This feature is an improvement but still seems to be complicated, especially when compared to e-Greffe or to Télérecours.¹⁰²

96 P. 40 of the Hattab report, available online <http://www.conferencedesbatonniers.com/Upload/file/actualites/AG%2011%20juin%202010/rapport_audit_rpva_version_final_site_090610.pdf>: ‘Nous relevons au passage que la sélection de Navista n’a pas résulté d’un appel d’offres’ (‘We notice, by the way, that there was no call for tenders prior to the choice of Navista’).

97 ‘Sur le plan purement technique (...), il nous semble que les solutions parisiennes et marseillaises ne montrent pas de carences qui les empêcheraient d’être ouvertes plus largement’, *Hattab Report*, p. 49.

98 *Hattab Report*, pp. 29-31.

99 P. 46. RSA refers to the Navista boxes, also known as ‘Routeur sécurisé avocat’.

100 *Bulletin du Bâtonnier*, mardi 29 juin 2010, n°24, p. 310-311.

101 On August 9, 2010, the Marseilles court declined to act, on the ground of Art. 6(1) of the European Convention on Human Rights, stating that the Marseilles Bar was involved in the procedure and that this raised an issue regarding the right to fair trial given that the Marseilles court and the Marseilles Bar are working together on the RPVA. The Marseilles court transferred the case to the Aix-en-Provence court. Tribunal de grande instance de Marseille, ordonnance de référé n°636/2010 du 9 août 2010.

102 Télérecours is the administrative jurisdiction e-filing system.

In spite of those criticisms, even the lawyers who are reluctant to subscribe seem to be aware that electronic communication is the way forward. The debate is not on the necessity of using electronic communication, but on the methods chosen by the CNB and the strategic and technical choices of the latter.

On 16 June 2010, a new convention was signed between the Ministry of Justice and the CNB. It replaces the 2007 convention. It has to be noted that this convention was signed only a few days after the release of the Hattab Report. It also has to be noted that the expiry date of the 2007 convention was 27 September 2010, which means that the 2010 convention entered into force earlier than expected. In their blogs, some lawyers expressed concern that there was a clear link between the Hattab Report going public and the new convention being signed.¹⁰³ To some extent, the new convention could be seen as a way for the Ministry of Justice and the CNB to confirm their position, ‘freezing’ the choices already made and thus reducing the risk of further deviations and requests for change that could emerge as a consequence of the Hattab Report and from which further technical, organizational and governance problems may arise.

The convention insists on the requirements that the lawyers have to comply with in order to use e-Barreau, and clearly refers, in its Article VI, to the Navista box.¹⁰⁴ Annex VI to the convention is even clearer and states that ‘Only the boxes (located on the local network in the firms or the Bar Associations) duly identified and authorized to connect to the RPVA can communicate with the VPN frontal of the RPVA platform and thus use the e-Barreau service’.¹⁰⁵

Just as this article is being finalized, while the CNB efforts seem to be directed towards supporting the existing e-Barreau configuration, it seems that the growing controversy will lead either to a compromise which can be acceptable to all the relevant actors involved (probably involving some further adaptation of e-Barreau) or to an all-out war between the CNB and several French Bar Associations.

4.4.2.3. The development of integrated software solutions embedding e-Barreau

Major legal software vendors such as LexisNexis and Wolters Kluwer have released software bundles specially designed for law firms and compatible with e-Barreau.¹⁰⁶ These software packages enable lawyers to manage their activity. Their compatibility with e-Barreau is guaranteed by a label. For instance, with LexisNexis’ Polyoffice software, copies of messages sent through e-Barreau are automatically stored. A new market is thus emerging since many French law firms are not generally equipped with such software, in contrast to, for example, their Austrian or German counterparts.¹⁰⁷

103 See in particular <<http://avocats.fr/space/jean.devalon/tag/rpva>>.

104 L’avocat désirant bénéficier des services ComCi CA ou ComCi TGI (...) doit (...) disposer d’un équipement terminal permettant l’accès aux services offerts par la plate-forme « e-barreau » selon les modalités techniques de raccordement au RPVA de l’équipement terminal de son cabinet’ (p. 12).

105 *Hattab Report*, p. 26.

106 <<http://www.ebarreau.fr/editeurs.html>>, <<http://www.lexisnexis.fr/solutions/gestion-metier/polyoffice/>>, <http://www.lexisnexis.fr/communiqués/04-2009/cp_LN_E_Barreau_2009.pdf>.

107 See, for example, S. Koch & E. Bernroider, ‘Aligning ICT and legal frameworks in Austria’s e-bureaucracy: from mainframe to the Internet’, in F. Contini & G. Lanzara (eds.), *ICT and Innovation in the Public Sector: European Studies in the Making of E-Government*, 2009, pp. 147-173.

Polyoffice printscreen



4.4.3. Towards mandatory electronic filing?

At the time of finalizing this article, new events seem to suggest that electronic filing will soon become compulsory. In June 2009 the Ministry of Justice started to hint that the use of electronic communication would be mandatory in the appeal courts by 2011, thus providing another incentive for lawyers to subscribe to e-Barreau.¹⁰⁸ This choice was confirmed by a decree issued in December of the same year.¹⁰⁹ The Decree makes electronic filing compulsory for appeal procedures, starting in 2011. According to the Decree, cases that will not be filed electronically will be held inadmissible by the court. The case may only be filed on paper if electronic filing is impossible (*'sauf impossibilité pour cause étrangère à l'expéditeur'*) due to a reason for which the sender cannot be held accountable (technical issues, the loss of an internet connection, etc.). Courts will communicate with the parties through electronic means as well. Also according to the Decree, data will be exchanged in a structured form through XML files. Documents will be attached as PDF files (Articles 3 and 4 of the 14 December *arrêté*).¹¹⁰

4.4.4. The peculiar situation of the Cour de cassation

While e-Barreau seems to be finally finding its way to full implementation at first instance and appeal court levels, it is interesting to note that at the *Cour de cassation* level a different e-filing and electronic document exchange system has been developed. While ex post one could criticize the duplications involved in the parallel development and coexistence of e-Barreau and of the *Cour de cassation* system, it should be noted that the *Cour de cassation* works quite autonomously from the rest of the ordinary justice administration.

108 Réponse à une question parlementaire, Question N°: 47577, publiée au JO le 09/06/2009 page 5646: 'Les futures évolutions du module « COMCI CA » en 2009 doivent permettre sa communication avec le système « e-barreau » des avocats pour s'adapter à la réforme de la profession d'avoué et permettre que les cours d'appel soient saisies uniquement par voie électronique dans toutes les procédures avec représentation obligatoire' (emphasis added).

109 Décret n° 2009-1524 du 9 décembre 2009 relatif à la procédure d'appel avec représentation obligatoire en matière civile. Art. 5: 'Art. 930-1. A peine d'irrecevabilité relevée d'office, les actes de procédure sont remis à la juridiction par voie électronique. (...) Les avis, avertissements ou convocations sont remis aux avoués des parties par voie électronique, sauf impossibilité pour cause étrangère à l'expéditeur.' See also arrêté du 14 décembre 2009 relatif à la communication par voie électronique dans les procédures sans représentation obligatoire devant les cours d'appel.

110 As mentioned above (Section 4.3.), the software used by the appeal courts are the Winci CA case management system and ComCi CA add-on, which are versions of the Winci TGI case management system and ComCi TGI add-on for the appeal courts.

A first convention was signed in 2002 between the *Cour de cassation* and the *avocats au Conseil d'Etat et à la Cour de cassation*. The organizational model of the system is very similar to the one of e-Barreau: the Justice Ministry is responsible for opening up its virtual private network and the *Cour de cassation*'s CMS (Nomos); the *ordre des avocats au Conseil d'Etat et à la Cour de cassation* is responsible for managing the registration of law firms and for providing those law firms with digital certificates embedded in USB keys. A contractor (Certeurope) is in charge of allowing law firms to become connected to the justice virtual private network.¹¹¹ Lawyers use a web-based service to establish this connection.

The programme started in July 2002 with three law firms; in May 2004, 26 law firms were involved.¹¹² Today, all 60 law firms composing the *ordre des avocats au Conseil d'Etat et à la Cour de cassation* are part of the programme. On 21 December 2007, a second convention was signed between the *Cour de cassation* and the *ordre des avocats au Conseil d'Etat et à la Cour de cassation*.¹¹³ This convention, relating to electronic filing in civil matters, updated the first one and made use of the above-mentioned Article 88 of the Decree of 28 December 2005, no.1678 allowing the anticipated enforcement of Article 73 relating to electronic communication. The Decree of 21 December 2007 was enforced by a decision of 18 June 2008.¹¹⁴ A joint working group meeting every quarter monitors the implementation of the convention and solves any issues that may arise. Electronic filing at the *Cour de cassation* is not mandatory and law firms may still use paper if they want to.¹¹⁵

As of November 2009, 70% of all applications to the *Cour de cassation* were filed electronically, the *Cour de cassation* having received 19,000 cases in civil matters and 8,000 in penal matters in 2008.¹¹⁶

It should be emphasized that the *Cour de cassation* did not restrict the scope of the programme to electronic case filing, but conceived it as a part of a broader and more comprehensive innovation effort. It involved providing judges and clerks with large flatscreens or dual screens, installing computers in the rooms where working sessions are held, and training judges and staff. Judges were provided with a comprehensive working environment called the *bureau virtuel*, which allows them to work remotely from their home while having access to all resources, as if they were physically in the *Cour de cassation*. The case files are in PDF format, allowing judges to easily reuse their text.

The success achieved by the *Cour de cassation* can be attributed to three features: the choice of a partnership with the *ordre des avocats aux Conseils*, as in the e-Barreau programme, with a clear repartition of responsibilities; the decision to make e-filing part of a more comprehensive and consistent innovation programme involving all aspects of the work in the court; and, finally, the small number of actors involved.

111 The convention specifies that the contractor has to provide lawyers with an identification mechanism through digital certificates, the digital signing of every case filed over the internet, and firewalls in order to secure the network.

112 See M. Azoula, 'La dématérialisation des dossiers de cassation, conference in Marrakech in 2004; '<<http://www.ahjucaf.org/spip.php?article46>>.

113 *Les Annonces de la Seine*, jeudi 27 décembre 2007, numéro 84, p. 12.

114 Arrêté du 17 juin 2008 portant application anticipée pour la procédure devant la Cour de cassation des dispositions relatives à la communication par voie électronique. JORF n°0148 du 26 juin 2008 page 10259, texte n° 27.

115 See *La Semaine Juridique Edition Générale* n°8,18 février 2009, I 115, 'Une gestion plus dynamique des pourvois'. - Dématérialisation de la procédure devant la Cour de cassation; Entretien par Vincent Lamanda, Premier président de la Cour de cassation et Didier Le Prado, Président de l'Ordre des avocats aux Conseils.

116 Vincent Vigneau, judge at the *Cour de cassation*; presentation performed during the meeting 'Le procès civil à l'épreuve des nouvelles technologies', Paris, 20 November 2009.

5. Concluding remarks

All too often, the development and implementation of ICT systems are analyzed and evaluated only on the basis of their formal conformity with contracts entered into by the administration and the ICT vendor as to what they can do ‘on paper’, or what they will be able to do in a not too distant (but never quite being reached) future.¹¹⁷ What they can do in practice, how they are concretely used, the problems confronted in their development and the governance issues that almost always emerge in their design and implementation are instead seldom investigated and rarely discussed in the open. Apart from the complexity of evaluating the ICT innovation, which the authors of this article clearly recognize, it is often difficult to collect the apparently simplest data. Reading available documentation on and research into ICT systems, it is in many cases difficult to understand if what is said about a system is theory or practice, or even how much a system costs to develop or to maintain and evolve, both in financial terms and in terms of resources allocated by the organizations and institutions involved (personnel etc.).¹¹⁸ In many cases such costs are not only unclear to external observers, but even to the organizations involved. And while economic costs (and gains) are something which should be clear and public, in order to be meaningful the evaluations should provide more. In this perspective, also simple ICT evaluation recipes based on linear, ideal processes confronting initial objectives, outputs and outcomes do not provide suitable assessment tools for large ICT innovation projects in which objectives, needs, power and the actors involved (and their relations) evolve over time in a quite dynamic way.

While we do not provide clear and operable standards and procedures, we suggest that a first step in the direction of a better and more useful evaluation of ICT innovation in the justice sector should go in the direction of describing what actually happened, beginning from the general context, the actors initially involved and the initial objectives, moving on to following the relevant events that take place in time and make the story meaningful, and describing the results achieved in the light of all the changes, detours and activities that have taken place. Complex technological but also normative, organizational and institutional systems, such as e-justice ones, are the result of the sedimentation of technical, normative, organizational choices and conditions,¹¹⁹ and their evaluation must therefore begin from there. Starting from this idea, this article has investigated an attempt to create the functional electronic equivalent of a traditional judicial procedure and the dynamics deriving therefrom.

The initial technological and normative effort undertaken was clearly aimed at replicating the same procedural rules that are used with the paper medium. The handwritten signature finds its digital equivalent in the normatively provided digital certificate, stored in a USB key owned by the lawyer. Furthermore, the substitution of electronic documents for paper documents, whenever authorized, is designed to avoid any major change in the traditional procedure. It is not by chance that the national convention and local model recommended by the Ministry of Justice state: ‘The whole range of the system features comply with the law. The electronic communication system is designed to adapt to procedural evolutions’.¹²⁰

117 M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007.

118 See, for example, M. Fabri (ed.), *Information and Communication Technologies for the Public Prosecutor's Office*, 2007; M. Fabri et al. (eds.) *Judicial electronic data interchange in Europe: Applications, policies and trends*, 2003.

119 F. Contini et al. (eds.), *ICT and Innovation in the Public Sector. European Perspectives in the making of e-government*, 2009.

120 Convention entre le Ministère de la Justice et le Conseil National des Barreaux, 28 September 2007 p. 3

‘L’utilisation des nouvelles technologies s’effectue dans le respect des règles du code de l’organisation judiciaire, du nouveau code de procédure civile, du code de procédure pénale ainsi que du code de l’entrée et du séjour des étrangers. (...) L’ensemble des fonctionnalités

At the same time, changes had to be made in order to allow the new electronic-based system to work, even while attempting to retain the old procedures and practices. The idea that the system could be swiftly adopted and used once a technological layer which mirrored the paper-based procedures and was consistent with the norms of the code was in place did not survive the proof of facts. When it was initially experimented with, the technology was refused by most end-users who did not see clear advantages in using it and for whom the normative legitimacy of the system was not enough. The lawyers were difficult to address with the typical governing mechanisms of the public administration, such as the hierarchy and regulations imposing the use of the system. These mechanisms were not easily available for several reasons, in particular the independence of the lawyers (and local Bar Associations) from both the justice administration and the CNB, and the political pressure that lawyers could stir if attempts were made to force them in directions where they did not want to go and did not consider to be acceptable. During the development of and the experimentation with the new system, consolidated ways of doing things were unfrozen, the interpretation of roles and authority came under discussion (the role of the National Bar, the acceptability of its decision) and agreements on how to do things had to be established in ways that were not only acceptable to, but motivated the users to participate. A governance mechanism had to be developed.

Furthermore, the official electronic communication in the ordinary courts did not emerge *ex nihilo*. The whole endeavour was aimed at making the already existing court CMS connectable through the ComCi TGI add-on. On the lawyers' side, the project for a virtual private network had been pursued since the mid-1990s, and was finally achieved with the RPVA. Both sides were aware of what was at stake and of the interest they had in working together. They managed to come up with a mutually beneficial solution.

At the same time, the organizational actors had to learn the rules of the new game through a 'trial and error' process. CNB had to learn that it cannot merely impose a technological choice on its constituency, but that such a choice has to be acceptable to them. The CNB demonstrated, to some extent, its ability to adapt by relinquishing or amending the most controversial features of e-Barreau, such as breaking the initial internet access monopoly, lowering prices – in some cases – as an incentive for the diffusion of the system, once it became clear that the proposed prices were too high, and creating an exception for the Paris lawyers and bar for the use of the Navista box in order to win their support.

Those steps did not just lead to an 'improvement'¹²¹ of a technological product but allowed the creation of a system which would be actively used. Furthermore, as the Paris affair highlighted, the definition of the technological choice can be much more contingent and negotiated than commonly expected.

Also, a solution to specific problems may generate new problems. The Paris exception generated reactions from other lawyers and local Bar Associations. The struggle there is still ongoing. Furthermore, new actors with an important role to play are just entering the fray (the judges that will decide on the case filed by the Marseille lawyer and the *Autorité de la concurrence*). It is also possible that some kind of conflict resolution will lead to the actors involved reaching a compromise.

des systèmes est conforme au droit positif. Les systèmes de communication instaurés sont conçus pour s'adapter aux évolutions procédurales.'

See also: Convention concernant le protocole de communication électronique entre le Tribunal de Grande Instance et les avocats, Version 2 October 2007, Section 1.1.

121 At least from the perspective of the Parisian lawyers' pockets.

The partnership between the Ministry of Justice and the French National Bar can be considered a good example of cooperation in spite of the difficulties that emerged and of the time required to develop the system. It is worth noticing that the main problem has not been finding a technically possible solution, but ‘creating’ a solution that was in line with the needs, the expectations and the requirements of the various parties. And that some of these expectations and the requirements were not even known to the actors themselves before the first attempts were made. CNB discovered that its initial choice of technological mix, even though technically viable, was not acceptable to its constituency both due to the procedure, which had excluded them, and to the result, which in their perspective was quite limited. Changes had to be made, new technological partners had to be sought (Navista and its box), old ones had to be dismissed (France Télécom Equant as the ADSL provider even if it remains involved in hosting some services and for the management of the firewall), while others kept doing business as usual (Certeurope for the digital certificates).

The mandatory use of e-Barreau for the appeal courts could first be proposed and thereafter be provided by a Decree, but only when the system had already gained legitimacy and had been accepted by a significant number of lawyers. At the same time, not all legitimacy problems have been resolved. Assuming that the use of electronic filing will become mandatory also at first-instance level, this choice raises concerns regarding equal access to justice and the right to a fair trial as guaranteed by Article 6(1) of the European Convention on Human Rights, especially when it comes to litigants representing themselves without a lawyer.

In the end, the emergent strategy combined a centralized but coordinated design, commitments from both sides with clear responsibilities, local experiments, an ability to adjust the course and relative autonomy at the local level. What needed to be built (and is partly still under construction), more than a technical system, was the governance network needed to develop the new communication infrastructure. At the same time, the actors involved needed to understand the implication of developing a system which has to take into account the not always homogeneous interests and emerging requests of the final users.

And while all this has taken place, the Marseilles protest (and in a less conflictual way a future possible need to integrate also the *Cour de cassation* in the system) seems to suggest that the governance network that has been built, the understandings that have been achieved are only a temporary condition. It allows us to foresee a future of further struggles, searches for compromises and for the creation of new governance networks that will, maybe, allow further integration and advancements in the French e-justice effort.