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РЕФОРМА УГОЛОВНОГО ПРАВОСУДИЯ ВО ФРАНЦИИ: ПРОБЛЕМА БАЛАНСА МЕЖДУ ФОРМАЛИЗМОМ ОСНОВНЫХ ПРАВ ЧЕЛОВЕКА И ЭФФЕКТИВНОСТЬЮ

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Рассматриваются недавние реформы, проведенные во Франции в целях устранения проблем, с которыми сталкивается система правосудия, и эффективной борьбы с преступностью. Даже если эти реформы необходимы, они подвергаются резкой критике, поскольку в большей степени сосредоточены на управленческих вопросах контроля затрат, эффективности, производительности труда, чем на официальных целях, объявленных правительством, и особенно на соблюдении основных прав человека. Изучение ключевых изменений в законодательстве показывает, что критика реформы достаточно обоснованна и подчеркивает роль конституционных судей в поддержании хрупкого баланса между культурным наследием, поиском эффективности и обеспечением как безопасности, так и верховенства закона.

Ключевые слова: уголовное правосудие; уголовное правосудие в отношении несовершеннолетних; альтернативные меры реагирования на судебное преследование; рецидивизм; основные права; процессуальные требования; право на справедливое судебное разбирательство; права на защиту; конституционный контроль.

THE REFORM OF CRIMINAL JUSTICE IN FRANCE: THE PROBLEM OF THE BALANCE BETWEEN THE FORMALISM OF FUNDAMENTAL RIGHTS AND EFFICIENCY

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This article aims to study the recent reforms that have been implemented in France in order to remedy the systemic problems the justice system is facing and to fight effectively against criminality. Even if considered necessary, these reforms are strongly criticised because they would be more focused on managerial questions of cost control, efficiency, work performance than that of the official objectives declared by the government and, especially, the respect of fundamental rights. The study of the key points of the introduced changes shows that the criticisms are not completely unfounded and highlights the role of the constitutional judges in maintaining the fragile balances between cultural heritage, the search for performance and ensuring both security and the rule of law.

Keywords: criminal justice; juvenile criminal justice; alternative responses to prosecution; recidivism; fundamental rights; procedural requirements; right to a fair trial; rights of the defence; constitutional control.

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Introduction

The declaration that citizens want an accessible, understandable, fast and equal justice for everybody was one of E. Macron's leitmotifs during the electoral campaign for the 2017 presidential election in defending the need to carry out a global reform of the system of justice in France in order to «restore the citizens' trust in the public service of justice». The questions relating to breach of trust and its causes are central to current political and social debate. For many years, the level of trust of French people in the system of justice continues to be one of the lowest in Western Europe. It varies between 43–48 %, depending on the period or particular contexts due to the crime phenomenon[1].

The president Macron, fully aware of the urgency of the problem, wanted the reform process to be implemented very quickly, from the start of his mandate. On the 6 October 2017, a consultation phase was set up by creating an *ad hoc* commission composed of ten experts who had to work with representatives of the system of justice from all over France for defining the priority questions and the main axes of the reform. After a period of 6 months of consultations, the final report submitted to the Prime minister and the Minister of justice contained five major themes as a tool of reflection[2]:

- simplification of criminal procedure;
- simplification of civil procedure;
- digital transformation;
- meaning and effectiveness of criminal sanctions;
- reorganisation of the judicial system.

They have been taken into consideration in the Law of 23 March 2019 No. 2019-222 «On the of 2018–2022 programming and justice reform» (hereinafter – Law No. 2019-222), presented as the start of the global reform promised by E. Macron. The new law, which was adopted within the framework of an accelerated legislative procedure, goes beyond these objectives by broadening its field of action to administrative justice, juvenile criminal justice, questions of efficiency of the system of justice in general. The introduced measures are focused on six axes, in particular:

- improvement and simplification of civil procedure;
- lightening of the workload of administrative jurisdictions (administrative tribunals and administrative courts of appeal) and strengthening of administrative justice efficiency;
- simplification and strengthening of the efficiency of criminal proceedings;
- efficiency and sense of criminal sanctions;
- diversification of the way in which juvenile offenders are taken care of;
- strengthening of the judicial organisation efficiency and adaptation of the functioning of domestic jurisdictions.

For going further in finding solutions, a new bill No. 4091 «For trust in the judicial institution» was presented to the National Assembly by É. Dupon-Moretti[3], the current Minister of justice, on 14 April 2021. The bill aims to implement the announcements made by the minister when he took office on 7 July 2020. The bill contains four major axes:

- raising awareness of justice by authorising the filming of certain court sessions in all types of litigation;
- improving the rights of litigants in criminal matters at the preliminary investigation stage;
- giving back meaning to the sentence by abolishing the automatic remission credits;
- strengthening the legal professions (lawyers, notaries, judicial officers) disciplinary regime for the benefit of citizens.

Composed of 37 articles, this text is contested by the judicial personnel, the legal professions representatives, but also within the political class[4]. As the basis of their criticisms, they invoke the absence of sufficient human and financial resources within the judicial institutions, the excessively brutal methods of control provided for the regulation of the disciplinary regime of the legal professions, etc. Given the sensitivity of discussed subjects, the bill risks to be hardly amended during parliamentary debates. This was notably the case of the above-mentioned Law No. 2019-222. Initially the bill contained 56 articles. The adopted version passed to 109 articles. Many provisions were, however, declared unconstitutional by the Constitutional Council in decision of 21 March 2019 No. 2019-778 DC[5], which was the longest decision it has pronounced since its creation in 1958[6].

On the criminal aspect, the Constitutional Council censured several articles of the law. It was in particular the case of paras 2, 3, 4 of art. 44 modifying the conditions under which it can be resorted, within the framework of an investigation or a judicial investigation, to

[1]Note de recherche Le Barometre de la confiance politique. Vague 12 [Ressource électronique]. URL: https://www.sciencespo.fr/cevipof/sites/sciencespo.fr.cevipof/files/NoteBaroV12_GF %26FL_confiancepolice_mars2021Versionfinale2.pdf (date de la demande: 24.05.2021).

[2]See: Les chantiers de la justice [Ressource électronique]. URL: https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2017/10/chantier_justice_dp_170925_a5_v10_page.pdf (date de la demande: 24.05.2021).

[3]The French Parliament is made up of two chambers: the National Assembly and the Senate.

[4]*Dufour O.* Confiance dans la justice: un projet sous très haute tension [Ressource électronique]. URL: https://www.actu-juridique.fr/justice/confiance-dans-la-justice-un-projet-sous-tres-haute-tension/ (date de la demande: 24.05.2021).

[5]The control was realised within the framework of the procedure of *ex-ante* control provided for in art. 61 of the Constitution.

[6]The decision contains 395 paragraphs.

interceptions of correspondence emitted by electronic communications. The Constitutional Council affirmed that the legislator may provide for special investigative measures in order to identify crimes and offenses of particular gravity and complexity, to seek evidence and to search for the authors. At the same time, the restrictions that they impose on constitutionally guaranteed rights must be proportionate to the gravity and complexity of the committed offenses and not introduce unjustified discrimination. In addition, these measures must be carried out with respect for the competences of the judicial authority, which is responsible in particular for ensuring that their implementation is necessary for the manifestation of the truth. However, in this context, the French Constitutional Council identified that the legislator has authorised the use of measures to intercept correspondence sent by electronic communications for offenses not necessarily of a particularly serious and complex nature, without accompanying this remedy with guarantees allowing a sufficient control by the judge to maintain the necessary and proportionate nature of these measures during their course. The legislator did not therefore operate a balanced reconciliation between the objective of constitutional value of researching offenders and the right to respect for private life and the secrecy of correspondence.

Constitutional judges have also censured the provisions of 2° of para 3 of art. 46 of the law authorising the use of special investigative techniques, as part of a flagrant or preliminary investigation, for any crime, and not only for organised crime and delinquency offenses. With regard to the particularly intrusive nature of these techniques, the Constitutional Council noted that, while the judge of liberty and detention can order their interruption at any time, the contested provisions do not provide that he or she can access all the elements of the procedure. Thus, while his authorisation is given for a period of one month, the judge does not have access to the reports produced within the framework of the ongoing investigation other than those drawn up in execution of his or her decision. Consequently, he or she is not informed about the progress of the investigation with regard to investigations other than acts carried out in execution of his or her decision. For this reason, in particular, the French Constitutional Council considered that the legislator did not operate a balanced reconciliation between, on the one hand, the objective of researching the authors of infringements and, on the other hand, the right to respect for private life, the secrecy of correspondence and the inviolability of the home.

Another important censure pronounced by the Constitutional Council was that aimed at para 3 of art. 49 of the Code of Criminal Procedure, allowing the public prosecutor to authorise agents in charge to ensure a person's appearance before a court for trial or other proceedings to enter a home after 6 o'clock a. m. and before 9 o'clock p. m. The legislator's aim was to establish a rapid measure excluding the intervention of the judge. For their part, the constitutional judges considered that, by excluding judges from this procedure, the legislator had not ensured a balanced reconciliation between the search for the perpetrators and the right to home inviolability.

The Constitutional Council also censured the 3° of para 10 of art. 54 of the law, cancelling the obligation to obtain prior agreement of the interested party for using audio-visual media for the debates relating to the extension of a pre-trial detention measure. The legislator justified this measure by the need to improve the good administration of justice and the good use of public funds, avoiding the difficulties and costs engaged by the transport of the persons placed in pre-trial detention. The constitutional judges noted that in view of the importance of the guarantee attached to the physical presence before the judge or the court within the framework of a procedure of pre-trial detention, the contested provisions unduly infringe the rights of the defence.

The decision of the Constitutional Council of the 21 March 2019 is extremely important[7]. It remedied the problem underlined by some French specialists in criminal law and criminal procedure. They especially alleged that the reform of March 2019 hasn't taken into account the criminal justice particularism, that is based on a set of rules governing the prosecution and repression of offenses but also the organisation of the defence against a charge[8]. At the same time, the constitutional judges validated a very large part of the provisions relating to the new organisation of the judicial system, to the development of the implementation of alternative responses to prosecution and execution of criminal punishment, and to the juvenile criminal law.

This reform is undoubtedly the most important among those carried out in France in the field of criminal justice, a field that has become too complex, sometimes even inconsistent because of the layers added by successive and separate adjustments. We'll analyse the mentioned above points in order to highlight the main changes introduced by the reform as well as the problems that have already been identified in practice.

The new organisation of criminal jurisdictions

General presentation of the organisation of French criminal jurisdictions. In France, there are two types of criminal jurisdictions: specialised criminal jurisdictions and ordinary criminal jurisdictions.

[7] *Derosier J.-P.* Justice cherche équilibre constitutionnel // Les Petites Affiches. 2010. No. 140. P. 3–22.
[8] *Luciani-Mien D.* La loi du 23 mars 2019: le rendement procédural au détriment des droits du suspect // Revue de science criminelle et de droit pénal comparé. 2019. No. 4. P. 765–780.

The second ones were created on the basis of the three categories of committed offenses: contraventions, misdemeanours and crimes.

For contraventions which are classified into five categories: from the least serious (1st class offense) to the most serious (5th class offense). In this case the competent jurisdictions are proximity judges (*Juges de proximité*) and the tribunals of police (*Tribunaux de police*). Since 2002, the judgment of «everyday» contraventions (noise nuisance, minor incivilities, contraventions of the legislation on dangerous dogs, etc.) included in the categories of contraventions going from 1st to 4th class, has been transferred to proximity judge. It is a jurisdiction exercised by non-professional judges; most often these are retired judges, prosecutors, lawyers. They have however the power to pronounce a sanction by choosing the one which seems to them the most appropriated to the person having committed the contravention. Their skills have been strengthened in this field by law of 8 April 2021 No. 2021-401 «For improving the efficiency of proximity justice, and of the criminal response» that introduced new alternative measures to prosecution, as for example *citizen contribution*, which would be paid into the account of an association of help of victims; *the prohibition to come into contact with victims*; *diversification of community works*, etc.

In the case of the most serious contraventions (5th class offense) like minor violence, degradation of one's property, press offense, the competent jurisdiction is the tribunal of police. Under the application of art. 523 of the Code of Criminal Procedure, it is composed of a single judge assisted by a clerk. The public ministry is represented by the public prosecutor or by a police commissioner.

The misdemeanours include attacks on persons, property or institutions, which cause serious damage. The sanctions may be up to 10 years imprisonment. This category of offenses is judged by criminal tribunals, called in France *Tribunaux correctionnels*. The public prosecutor or his substitutes carries out the public ministry.

Finally, crimes are the most serious offenses and are punishable by criminal imprisonment ranging from 10 years up to life imprisonment: murders, assassinations, rapes, acts of torture, barbarous acts, armed robbery, arson causing death, etc. They are tried by assize courts (*cours d'assises*) formed by three professional judges and nine jurors drawn by lot from the electoral list[9]. The Prosecutor's Office is provided by the public prosecutor at the court of appeal or a public prosecutor appointed by him, known as the general advocate (*avocat général*). French assize courts are non-permanent, departmental jurisdictions. They sit by session, approximately every quarter for an average duration of 15 days.

Any verdict or criminal judgment may be appealed by the prosecution or the convicted person. Besides the specific case of the assizes courts of appeal, which are competent to judge on appeal the judgements rendered by the assize courts, all appeals are brought to the courts of appeal[10]. The criminal chamber of the court of appeal, composed of three judges, hears them. It is only at the end of this appeal that the complainant's lawyer can file a cassation appeal in the Court of Cassation (*Cour de cassation*)[11].

Juvenile offenders are not judged by the above-mentioned jurisdictions. The necessity to establish juvenile jurisdictions was laid down in France in 1912 in order to take into account the peculiarities of children and to place education at the heart of the system of justice[12]. As in the case of adults, the organisation of the juvenile jurisdictions depends on the type of committed offenses[13]. Firstly, for contraventions going from the 1st to the 4th class, minors are referred to the proximity judges, like the adults. Then, juvenile judges ruling alone are competent to judge the contraventions of the 5th class and the misdemeanours. As a sanction, they can pronounce only educational measures (for minors aged 10 to 13) or educational sanctions (for minors aged 13 to 16). If they consider the case too complex or the educational measures or sanctions insufficient, they transmit the case to be tried by the juvenile tribunal (*Tribunal pour enfants*), which is composed of three juvenile judges. They mainly judge misdemeanours committed by minors as well as crimes committed by minors under the age of 16. Finally, juvenile assize courts (*Cours d'assises pour mineurs*) are competent for crimes committed by minors over 16 years. They are composed of a president, 2 juvenile judges and 6 jurors aged 23 or over. They sit in non-public hearings and can pronounce sentences of up to life imprisonment. The appeal and cassation procedures remain very close to those provided for adult delinquents, including of course specific adaptations to the age.

As regards the specialised criminal jurisdictions, their functioning is frequently exceptional. It is the

[9]Art. 259–267 of the Code of Criminal Procedure.

[10]There are 36 courts of appeal in France.

[11]The Court of Cassation is the supreme court in France responsible for unifying the law by verifying its correct application by ordinary judges. The first law dating from 1790, which provided for the creation of the Court of Cassation, first called the Tribunal of Cassation, already forbade its judges to rule on the merits of cases. This founding principle is still respected by the Court of Cassation.

[12]The Law of 22 of July 1912 «On juvenile tribunals and on supervised liberty» has provided for the creation of juvenile tribunals and introduced the measure of supervised liberty, allowing the judge to follow the minor within his family.

[13]The French Constitutional Council judged that they must not be considered as specialised jurisdictions despite the compulsory specialisation of judges in child protection and specific procedural adaptations. See: decision of Constitutional Council of 29 August 2002 No. 2002-461 DC.

case of the Military Tribunal from Paris (*Tribunal aux armées de Paris*), which judges offenses committed by soldiers in peacetime outside French territory, of the High Court of Justice (*Haute Cour de justice*) and the Court of Justice of the Republic (*Cour de justice de la République*), competent in judging respectively the President of France and the members of the French Government.

It is undeniable that the organisation of French criminal jurisdictions appears as quite complex. This often leads to a slowdown in procedures and has two major consequences. The first one is the problem of respecting the right of each person to a hearing within a reasonable time, which is considered as a key principle guaranteed by art. 6 of the European convention on human rights. According to official data, the average time for judgment fell from 37.9 months in 2013 to 40.6 months in 2015. The situation has not changed since[14]. The second one concerns the question of the effectiveness of criminal justice in general and its capacity to provide adequate responses to the exponential increase in criminality.

The changes introduced by the reform adopted in 2019. The Law No. 2019-222 introduced substantial changes in the organisation and functioning of criminal jurisdictions but none of them have been removed. The tribunals of police and the criminal tribunals are now part of a single jurisdiction called judicial tribunal (*Tribunal judiciaire*)[15]. Before the reform, the tribunals of police and the criminal tribunals were part of two separate jurisdictions (of *Tribunal d'instance* for the first and of *Tribunal de grande instance* for the second). The creation of a single structure aimed at merging the services and therefore increasing the efficiency of the work carried out.

However, the reform did not go in the direction of simplification. On the contrary, the legislator provided for the creation of a new criminal jurisdiction, called criminal court (*Cour criminelle*). It was presented as an initiative set up on an experimental basis in 15 departments of France for a period of 3 years (2019–2022). The new criminal courts coexist with the assize courts. They consist of 5 judges and sit without jurors. They judge crimes punishable by a sentence of up to 20 years of criminal imprisonment and committed by a non-recidivist adult. The assize courts remain competent to try more serious crimes, for which the penalty incurred exceeds 20 years, as well as to hear appeals from judgments of the criminal courts.

The implementation of these courts was done gradually. The ministerial ruling of 25 April 2019, first provided for their creation in 7 departments from 1 September 2019: Ardennes, Calvados, Cher, Moselle, Réunion, Seine-Maritime, Yvelines. The experimentation was extended to the departments of Hérault and Pyrénées-Atlantiques by the ministerial ruling of 2 March 2020. Then, in the third step, was authorised the extension of the experiment in six other departments from 1 August 2020 by ministerial ruling of 2 July 2020: Isère, Haute-Garonne, Loire-Atlantique, Val-d'Oise, Guadeloupe, Guyane.

Initially, it was planned that the decision relating to the interest of extending the creation of criminal courts to all departments would be taken by the Parliament at the end of the period of their experimentation, by appreciating the results and after consultations with the main actors of the system of justice. The new circumstances due to the health crisis of COVID-19 have changed the situation. Because of the difficulties of organisation, especially the problems for the convocation of jurors, hundreds of assize trials had to be postponed. To remedy this problem, the Government has proposed to extend the creation of criminal courts to 30 departments. This proposal was based on the first results, considered very positive, obtained following the start of activity of the first criminal courts since 1 September 2019. This concerns two points in particular. Firstly, there was a reduction in time of trials and in preparing the case. Secondly, the rate of appeals of judgements passed from 32 % in the case of assize courts to 21 % in that of the new criminal courts[16]. The Government proposal was rejected by the Parliament but the new bill No. 4091 «For trust in the judicial institution» that was presented to the National Assembly on 14 April 2021 by É. Dupon-Moretti, provides for the generalisation of these criminal courts throughout France. This could occur from 1 January 2022.

The decrease in the number of sessions for assize courts could allow the Ministry of Justice to make significant costs reduction, even if the financial argument is not really put forward. Official figures indicate that jurors receive a daily allowance of 72.16 euro with a possible compensation of loss of wages, travel costs, a meal allowance of 15.25 euro and a meal tray on the evenings of deliberation[17]. Expenses have heavily increased in recent years because of the multiplication of the number of appeals against judgements rendered by the assize courts. The question of controlling legal costs has become recurrent in France, more particularly in the criminal field, where they represent 69 % of the overall volume of expenditure. In a 2012 report, the

[14]Rapport de la Commission Cours d'assises et Cours criminelles départementales [Ressource électronique]. URL: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/03/rapport_getti.pdf (date de la demande: 24.05.2021).
[15]Art. L. 211-1 of the Code of Judicial Organisation.
[16]Rapport de la Commission Cours d'assises et Cours criminelles départementales [Ressource électronique]. URL: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/03/rapport_getti.pdf (date de la demande: 24.05.2021).
[17]Agen. Assises : combien coûte un procès ? [Ressource électronique]. URL: https://www.ladepeche.fr/article/2007/11/28/360143-agen-assises-combien-coute-un-proces.html (date de la demande: 24.05.2021).

Court of Auditors (*Cour des comptes*) noted an increase in legal costs of 41.6 % between 2006 and 2011[18]. The reforms carried out since with a view to better control of expenditure have not made it possible to remedy the problem. This is the reason why new measures had to be taken.

According to information provided by the Ministry of Justice, the average cost of a day of trial at the assize court is 2060 euro, while that of a day of trial at a criminal court is 1100 euro[19]. It is clear that the difference is enormous, especially taking into account the fact that the number of hearing days is greatly reduced. In the absence of jurors, the educational approach, as well as their prior preparation, is not necessary because the five judges forming the criminal court have a perfect knowledge of the procedural rules.

This reform was however strongly criticised by lawyers, including by the current Minister of justice, É. Dupon-Moretti, who was one of the greatest criminal lawyers in France before being appointed minister and who has a more measured position since on the question. The main problem lies in safeguarding the oral character of the debates that is a heritage of the French revolution. In France, the principle of oral debates has always been at the heart of the organisation of the assize courts, which gives all its specificity to this criminal procedure: «Everything is debated. What is not, does not enter in the deliberations room». The opponents of this reform continue to say that it «represents the shift from a high-quality system of justice, which takes the time to debate, with a strong ritual and an essential pedagogical and symbolic dimension, towards a justice which, in the name of efficiency assessed according to purely short-term economic criteria, is constrained by celerity and degradation of its functioning»[20]. In their opinion, by this reform, the French judicial system tilts into «an Americanisation» of the procedure, with all the faults that this one conveys.

In view of the results that have been obtained, it is perfectly clear that the creation of the criminal courts will be generalised in France in the near future. Some committees are working on possible improvements to respond to criticism and to remedy the problems identified in practice. A reflection is also underway regarding the reform of the procedure before the assize courts to put an end to the recurring dysfunctions. These technical questions remain, however, less complex compared to those relating to the measures that must be taken to prevent future offenses and to combat effectively recidivism.

The introduction of new measures to combat recidivism

Strengthening the use of alternative responses to prosecution and punishment. The incarceration rate recorded in France is among the highest in Europe[21]. Prison overcrowding poses the problem of detention conditions contrary to human dignity. The European Court of Human Rights regularly condemns France over inhuman conditions of detention. In the case *J. M. B. and others v. France* from 30 January 2020, the Court of Strasbourg noted that this was a structural problem and recommended that the French Government adopt general measures to improve conditions of detention, put an end to overcrowding and offer an effective remedy to detained people whose fundamental rights are violated as a result of these conditions. After this historical condemnation of France by the European judges[22], the French Constitutional Council called for a new law to challenge inhumane and degrading conditions of detention[23].

Being unable to urgently create thousands of places in prisons, the French authorities had to reconsider their approach. They began the implementation of measures in this direction before the condemnation of France by the European Court of Human Rights and in particular by the law of 23 March 2019. For example, by this law have been created new sentences, such as home detention under electronic monitoring, which is an autonomous sentence, for a duration between 15 days and 6 months. The reform also favours the use of the general interest work sanction, by broadening the conditions for its application and by developing and diversifying the job offers. In addition, the judge can no longer pronounce a sentence of imprisonment less than or equal to 1 month. For sentences of up to 1 year of imprisonment, the judge must verify whether, in view of the personality of the convicted person, his family and professional situation, an alternative to prison is

[18]Pour une meilleure maîtrise des frais de justice [Ressource électronique]. URL: https://www.senat.fr/rap/r12-031/r12-031_mono.html (date de la demande: 24.05.2021).

[19]Rapport de la Commission Cours d'assises et Cours criminelles départementales [Ressource électronique]. URL: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/03/rapport_getti.pdf (date de la demande: 24.05.2021).

[20]Ibid.

[21]Prisons: le taux d'incarcération recule en Europe, mais pas en France [Ressource électronique]. URL: https://www.lesechos.fr/monde/europe/prisons-le-taux-dincarceration-recule-en-europe-mais-pas-en-france-1305612 (date de la demande: 24.05.2021).

[22]The decision in *J. M. B. and others v. France* was in response to petitions brought by 32 inmates of several French prisons. The European judges held, unanimously, that there had been a violation of article 3 (prohibition of inhuman or degrading treatment) and a violation of art. 13 (right to an effective remedy) of the European convention on human rights. They noted in particular that in Ducos prison (Martinique), the occupancy rate varied from 124.6 % to 213.7 %; in the Faa'a-Nuutania prison (French Polynesia), the rate of occupancy varied from 143 % to 185.7 %; in Baie-Mahault prison, the occupancy rate varied from 150 % to 189 %; in Nîmes short-stay prison, the overcrowding was 215 %; in Lastly, Fresnes short-stay prison, the rate of overcrowding was 197 %.

[23]Decision of 2 October 2020 of No. 2020-858/859 QPC.

possible, such as electronic monitoring, semi-custodial facility, work release with effective social support, etc.

The development of alternative responses to prosecution is also an essential axis of the Law No. 2019-222, in particular the criminal mediation and the procedure of prior admission of guilt.

In France, the criminal mediation was introduced in 1993[24]. After an encouraging start, the use of this procedure has been steadily declining since 2005[25]. In 2012, P. Mbanzoulou even affirmed: «The future of mediation in France is becoming more and more uncertain. Even though the prosecutors agree in emphasising its restorative potential and presenting penal mediation as a solution for the future, it is clear that they are using it less and less»[26]. The Law of 15 August 2014 No. 2014-896 «On individualisation of sanctions and strengthening the effectiveness of criminal sanctions «has extended the possibility of recourse to restorative justice, which is largely based on the mediation process, at any stage of the criminal procedure. The intervention of the legislator did not produce the expected effects. This is the reason why he returned, once again, to this issue in the Law No. 2019-222.

The public prosecutor will initiate a criminal mediation if this measure:

• can allow compensation for the victim's damage;

• put an end to the disturbance caused by the offense;

• will contribute to the social reintegration of the perpetrator.

Mediation can target both adults and minors. It may relate to contraventions and certain misdemeanours, with the exception of attacks on physical integrity such as sexual assault, for example. The mediation process involves:

• free access to the procedure for the parties (the service being remunerated on legal costs);

• the neutrality of the mediator (neither party should be favoured);

• voluntary participation of the parties (this procedure is optional and requires the agreement of both parties to the mediation);

• the respect for the rights of each party (in particular the free choice of counsel);

• confidentiality (the mediator is bound by professional secrecy, except with regard to the prescribing magistrate).

The role of the prosecutor is very limited in this procedure. After initiating it, he or she only intervenes at the end to draw up the minutes containing the obligations of the parties in the event that the mediation is successful. The procedure of mediation has certainly important advantages in that it allows the conflict to calm down, by seeking to transform the relationship between the parties, an awareness by the perpetrator of the suffering he may have caused. However, in France, the culture of extra-judicial dialogue is not yet sufficiently developed. Victims consider that in the absence of a trial, justice has not been done. This explains the fact that, according to statistical data, criminal mediation procedures fail in 47 % of cases, a situation that probably leads prosecutors to be more reluctant about the interest of hiring them despite strong encouragement from the legislator.

In this context, French prosecutors prefer the using of procedure of prior admission of guilt, which was established by the law of 9 March 2004 No. 2004-204 «On the adaptation of justice to crime evolutions»[27]. It is a transaction that they can propose to the perpetrators if these one are adults, recognise the facts and only in case of misdemeanours. This procedure, which is entirely controlled by the prosecutor, cannot be implemented in the case of contraventions and crimes as well as for certain types of misdemeanours, like political offenses, press offenses. In view of the charges against the offender, the prosecutor may decide to summon him or her, in the presence of his lawyer, and suggest the implementation of one or more sentences if he or she recognises the facts. If the prosecutor's proposal is accepted, a judge will homologate the transaction. After a hearing in the presence of the lawyer, the judge can refuse the homologation, but he or she has not the right to propose another solution to the offender. If the latter refuses the proposed solution, the prosecutor will seize the criminal tribunal for a classic trial.

By the Law No. 2019-222, the legislator has made some improvements to this procedure to make it clearer and to ensure a greater use. This procedure has several advantages. The most important is the possibility to reduce by half the applicable sentences. In this case, it is easier to obtain specific adjustments, like electronic monitoring for example. Other advantages include the speed of the procedure, the possibility to discuss with the prosecutor about the qualification of the committed acts, the request for non-registration of the sentence in the criminal record. The role of lawyers is therefore greatly expanded not only for guaranteeing the effective respect of procedural rights but also for negotiating the optimal solution for the offender in order to ensure his or her social reintegration and preventing recidivism.

The establishment of real employment policies for fighting against recidivism. In France, since the entry into force of the Law of 22 June 1987 No. 87-432

[24]Art. 41-1 of the Code of Criminal Procedure.

[25]*Delcourt M. O.* Analyse statistique des médiations pénales en France [Ressource électronique]. URL: https://hal.archives-ouvertes.fr/hal-01495648v3/document (date de la demande: 24.05.2021).

[26]*Mbanzoulou P.* La médiation pénale. Paris : L'Harmattan, 2012. P. 103.

[27]Art. 495-7–495-16 of the Code of Criminal Procedure.

«On the public prison service» relating to the public prison service, the work of prisoners is no longer compulsory, but the Code of Criminal Procedure provides in art. 717-3 that prison establishments must take all necessary measures to ensure a professional activity to incarcerated persons who request it. The code also provides that they may be authorised to work for their own account or for the account of «associations formed with a view to preparing their social and professional reintegration».

Actually, almost 29 %, or around 20 000 prisoners, have a professional activity. A little over half of them work for the general services of penitentiaries (cleaning, maintenance, etc.). The others work for more than 350 private companies. They make them do packaging, repair of electrical equipment, digital archiving. After having been trained in the profession of web integrator, the inmates of a prison of Melun can thus develop websites. In order to encourage companies to offer jobs allowing better reintegration into society, the Ministry of Justice created the Peps label (produced in prisons).

The Code of Criminal Procedure provides in para 2 of art. D. 433 that the duration and organisation of the work of detainees «come as close as possible to those of outside professional activities». At the same time, the regulation of their activity is exorbitant from common law. The detainees sign a simple «act of engagement» with the prison administration, which was established by the Law of 24 November 2009 No. 2009-1438 called «Penitentiary 1». Their remuneration varies between 2.30 and 5.45 euro per h, while the minimum wage is 10.25 euro per h. They have no social protection. Working time must adapt to the supply, which can range from a few hours a week to work performed 7 days a week, without a day of rest. Likewise, prisoners do not have the right to paid leave. This is a real delay for France compared to other European countries. In Italy, for example, this problem, which constitutes a clear violation of the rights of detainees, was resolved in 2001 by a decision of the Constitutional Court of the country. The constitutional judges decided that despite the absence of such a provision in the legislation, detainees were entitled to paid annual leave.

In his speech delivered in March 2018 at the National School of Prison Administration, president Macron declared that the link between the prison administration and the detainees who have a professional activity must no longer be a unilateral act with the denial of all rights, but a contractual act including real guarantees. The French president said: «We cannot ask them to respect society, to be able to reintegrate it if we are denying their dignity and their rights».

The bill No. 4091 «For trust in the judicial institution» that was presented to the National Assembly on 14 April 2021, marks a revolution by providing for the application of labour law to prisoners. By bringing it closer to labour law, the objective of this bill is to better prepare detainees, most of whom have no professional experience, to become independent and responsible citizens again, but also to enhance the image of prison work in order to attract companies looking for a societal responsibility approach.

Art. 11 of the bill creates a prison employment contract instead of the unilateral act of engagement that now is linking the detained person to the prison administration. The contract will link the detained person with the prison administration and (or) a company, association or service responsible for the work activity. This article also clarifies that the prison employment contract regime will extend to work carried out outside the detention area, in the prison area and in the immediate surroundings.

Art. 12 of the bill clarifies the rules relating to the duration of work in detention as well as the methods of formation and termination of the employment relationship. It provides that the prison employment contract may be concluded for a fixed or indefinite period, for a period of full-time or part-time work. The provisions of the Labour Code relating to rest time, working hours, overtime and public holidays are included in this article too. The recruitment process is split into two stages: a first stage of classification at work by the head of the establishment and a second stage of assignment where the company, association or service in charge of the work activity plays a primary role. The mentioned article also provides the grounds for suspension of the prison employment contract.

Given the importance, even the absolute necessity of putting an end to a regime, which disregards the elementary guarantees that must be recognised for all human beings, this reform will be surely voted on by parliamentarians. A possible constitutional control can only strengthen these guarantees putting an end to a terrible injustice, apart from the ineffectiveness of the existing system to fight against recidivism.

The fundamental reform of juvenile criminal justice

The reaffirmation of general principles in the new Code of Juvenile Criminal Justice. «Few problems are as serious as those concerning the protection of children, and among them, those relating to the fate of children brought to justice. France is not rich enough of children for it to have the right to neglect anything that can make them healthy». Thus opened the preamble to Ordinance of 2 February 1945 No. 45-174, which has formed the legal basis in the field of juvenile delinquency for 75 years in France. Since its entry into force, the document has been amended more than 40 times. These successive changes have led to a proliferation of measures, procedural frameworks and methods of prosecution applicable to minors. Over

time, they have made the principles affirmed in 1945 less readable and have contributed to lengthening the time limits for judgment. By the Law No. 2019-222, the Government was authorised to reform this ordinance. It will be replaced by the Code of Juvenile Criminal Justice, which initially had to enter into force on the 1 October 2020. Due to the COVID-19 health crisis, delays were recorded in the preparation of its implementation. This led the authorities to postpone its entry into force until 30 September 2021.

The legislative part of the new Code of Juvenile Criminal Justice includes 277 articles divided into 7 books:

- educational measures and sanctions (Book I);
- the specialisation of participating actors (Book II);
- provisions common to the different phases of the applicable criminal proceedings (Book III);
- the pre-judgment procedure (Book IV);
- the judgment (Book V);
- the application and execution of educational measures and sanctions (Book VI);
- provisions relating to overseas territories (Book VII).

This code modifies and supplements the provisions relating to juvenile criminal justice in compliance with constitutional principles and international conventions applicable to it. The founding principles of juvenile criminal justice are thus recalled in a preliminary title: the reduction of the criminal responsibility of minors according to age, the primacy of the educational response and the principle of specialisation of judges or the use of appropriate procedures. As requested by the International convention on the rights of the child, a presumption of non-discernment for minors under 13 years of age is established, as well as a presumption of discernment for minors aged at least 13.

This code simplifies the criminal procedure applicable to minors. The instruction before the juvenile judge is abolished as well as the so-called «unofficial» procedure which applied for the most part and whose outlines were defined in various ways depending on the courts. A single mode of prosecution is instituted: referral to the specialised trial court for the purposes of judgment. The juvenile judge or the juvenile tribunal will rule on the guilt of the minor and will open a period of educational probation before the pronouncement of the sanction, in order to have detailed personality elements allowing the individualisation of the criminal response.

The judgment is speeded up so that it can be ruled quickly on the guilt of the minors. The current procedure, which provides for a period of compulsory investigation of each case by the juvenile judge at the end of which the judgment is issued, is not timed. It results in long trial periods, currently 18 months on average. As the investigation phase before the juvenile judge has been abolished, the minor will be summoned as soon as the investigation is concluded within 10 days to 3 months in order to have the question of his guilt settled. The pronouncement of the sanction is framed, since it must take place within 6 to 9 months from the first judgment. This procedure will make it possible to reduce the times of judgment and give more meaning to the sanction pronounced while devoting a dedicated time, the educational probation, to the knowledge of the personality and the environment of the minor, to his evolution as well as educational work.

The renewal of educational measures. The reform aimed to simplify and accelerate the judgment of juvenile offenders and to strengthen their protection. It also intended to improve the way victims are taken into account. The new text proposes two types of educational measures:

- the judicial warning;
- the judicial educational measure.

The remission to parents, the admonition and the solemn warning are merged into the judicial warning.

The judicial educational measure is created on a provisional basis or as a sanction. In the provisional phase, it can be ordered either when the minor is awaiting judgment (either on the guilt before the start of the educational probation phase or on the guilt and the sanction during a single hearing) or either after the conviction and before the judgment deciding on the sanction for the educational probation. Modular, the judicial educational measure therefore absorbs supervised liberty, the placement measure and educational sanctions, the reparation measure and day care. It systematically includes an educational intervention in an open environment to which the judge can add one or more of the following treatments or injunctions: integration, repair, health or placement modules, prohibitions on appearing, entering in contact with the victim, co-perpetrators or accomplices, coming and going on the public highway, confiscation of an object detained or belonging to the minor, the obligation to follow a civic training course.

The bill of the Code of Juvenile Criminal Justice prepared by the Ministry of justice underlines the importance of respect for the principle of proportionality by judges in determining sentences. As the Constitutional Council affirmed in six major decisions[28], the control of proportionality in the case of juvenile criminal justice is particular. It must be based on three fundamental criteria: the gradation of sanction measures according to age, the compulsory taking into account of the seriousness of the facts, the existence of antecedents. The use

[28]Decision of 13 March 2003 No. 2003-467 DC, decision of 2 March 2004 No. 2004-492 DC, decision of 3 March 2007 No. 2007-553 DC, decision of 9 August 2007 No. 2007-554 DC, decision of 10 March 2011 No. 2011-625 DC, decision of 4 August 2011 No. 2011-635 DC.

of this technique is necessary not only for respecting the constitutional and European principles of the right to a fair trial but first for personalising the sentences in order to allow minors' reconstruction and prevent recidivism.

Another advance that can be noted on reading the new code is that of the place given to restorative justice by the legislator, which is part of its general approach to make juvenile criminal justice more humane, more appropriate and therefore more effective. Restorative justice has a special place in the code. It is part of its general principles. According to art. L. 13-4 of the Code of Juvenile Criminal Justice It can be offered «to the victim and to the perpetrator «…» during any procedure involving a minor and at all stages of the procedure». Only mandatory prerequisites are:

- recognition of the facts;
- the capacity for discernment and the degree of maturity of the minor;
- the consent of legal representatives.

By positioning restorative justice in the preliminary title of the code as a complementary response to the judicial procedure, the French legislator has changed the focus on conflicts. From the entry into force of the code, the main objective will not be to maintain the monopoly of the state in the resolution of conflicts, but to bring together the victim and the perpetrator of the offense with the aim of making the latter more responsible and promoting peaceful social relations.

This new doctrine comes against a backdrop of increasing juvenile delinquency in France, which proves the ineffectiveness of previous policies and the need for an overhaul of the entire juvenile criminal justice system. Its success will depend on the financial and human resources that will be allocated to judges and educational structures whose role is absolutely essential. The writer V. Hugo already pointed out at the end of the 19th century «open schools and you will close prisons»[29]. This precious advice has unfortunately been ignored too long.

Conclusion

As it has been observed throughout this study, the system of justice in France is undergoing fundamental reform. It is quite certain that its reforming was necessary because the situation of French criminal jurisdictions and prisons, as well as the problem of increase of the phenomenon of criminality does not meet the expectations of citizens. The statistical data show without ambivalence that previous public policies in the fight against and prevention of crime have failed. At the same time, the assertions of many politicians, legal professionals, associations according to which the engaged reforms focuse more on managerial questions of cost control, efficiency, work performance than that of respect of fundamental rights and the official objectives declared by the Government, are not totally unfounded. The decision of the Constitutional Council of 21 March 2019 judging unconstitutional several articles of the Law No. 2019-222 relating to criminal justice confirms both the risks that may exist for the guarantee of rights and freedoms within the framework of such reforms and the importance of the role of the constitutional judges in maintaining the fragile balances between cultural heritage, the search for performance and efficiency and respect of the rule of law.

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