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FRENCH POST CUSTODY LAW (2000-2009): FROM EQUITABLE TRIAL TO THE RELIGION OF CONTROL

Martine Herzog-Evans, Ph D
Professor of Law
University of Reims

Abstract

French post custody law (sentence execution law) has been through a host of reforms over the last decade. Originally this legal field was rather empirical, with only a moderate participation of the Judiciary. In 2000 and 2004 two Bills were passed which significantly improved the procedure and granted the Juge and the Tribunal de l'application des peines (known as Jap and Tap) the status of a regular Court of law. 9/11 then had a radical effect on criminal policies. It started affecting post custody in 2005. From then on 'tough on crime' Bills were to be passed. They created 'safety measures', marginalized the Jap and the Tap, and defined several categories of 'monsters' or recidivists who were to be neutralised.

Key words

Media - Sentence execution – Reforms - French law - Comparative law - Post custody – Reoffending - Sexual offenders - Social work - Probation officers - Juge de l'application des peines

Introduction

French post-custody law (called in French law, 'sentence execution's law') has been through several significant changes during the past decade. This article will explain what these changes were and try to account for why they occurred. It will deal with both the particularities of French law in that field (e.g. court hearings, defence, written law system, social workers being penitentiary civil servants) and the influence of the European Human Rights Convention and other countries. It will begin by outlining the situation prior to 2000 when there was little judicial participation, move on to discuss the key stages that have taken place and conclude by speculating what the future might hold.

Prior to 2000

When compared to the current situation, prior to 2000 the procedure governing sentence execution (otherwise known as sentence management) looks distinctly old-fashioned. Sentence management is a particular law field where a judge, the Juge de l'application des

peines (Jap), makes decisions, from the following options (Lameyre, Lavielle, Janas, 2008 ; Herzog-Evans, 2007):

Conditional release (libération conditionnelle)

Semi-freedom (semi-liberté)

Placement in the community (placement à l'extérieur)

Sentence suspension (suspension de peine)

Sentence fractionation[1] (fractionnement de peine)

Temporary leave (permission de sortir)

The Jap could also grant remission (réduction de peine) of two different kinds: 'ordinary', based on good behaviour in prison and 'supplementary', based on socialisation efforts. He could also grant 'temporary leave' and 'temporary leave under escort'. Although the Jap was a judge, trained exactly in the same way as all judges, he was not legally recognised as being part of a Court of law. His decisions were not 'judgements' and thus prisoners could not appeal. On the other hand, the public prosecutor did have that power, although technically this was not labelled an appeal since the case was to be referred to a 'first degree tribunal'. Decisions were prepared by the penitentiary administration (P.A.) and by social workers. Judges made their decision during a 'sentences' application commission' (SAC) where neither the inmate nor his solicitor was heard, but the prosecutor, the prison governor, social workers and several guards were present.

Of particular concern was the absence of judicial review. As a result of this, a prisoner who was denied sentence management or sanctioned for breach could not hope for an annulment. An additional problem was that no jurisprudence existed in this area (Herzog-Evans, 1999). Prosecutors rarely exercised their power. Even though France is a written law country, and despite jurisprudence being theoretically strictly forbidden in criminal law, because of the fundamental principle of legality, court cases are in fact very important. The law often is incoherent and needs to be explained. It needs to be interpreted, which is one of the principle tasks of courts, but also of lawyers (practitioners and legal academics). The latter (called 'the doctrine') spend half their time writing comments on court cases in law reviews. All this contributes to the unity of the application and interpretation of the law in France, something of particular importance in such a centralised Republic.

In France, sentence management really started to develop post-1945. Before that, only conditional release existed. The Jap was introduced on a pilot basis in 1945, but was only applied nationally in 1958, when the Penal Procedure Code (PPC - Code de Procedure Pénale) was created; and the PPC continues to define the basic rules for sentence implementation. Penology at this time was based on social theory and the influence of Marxism was still important. Thus poverty and lack of social skills were considered to be major factors in criminality. As a result, prisons tried to provide inmates with work, education or professional training. However these efforts only became systematic and rational in the nineties, when the prison system became more open to community influence. By then,

[1] Today one must also add electronic monitoring and medical sentenced fractionation…

the lingering economic crisis which had started in 1974 and of which France was never totally freed, had made the penal situation more difficult.

From the start, sentence management was granted based on good behaviour (the SAC made that factor pretty much dominant due to the presence of guards and governors) or on 'socialisation efforts' or both.

At the end of the seventies, the first tough on crime law was passed. At the time the Jap was still relatively novel and, as a result, found himself under considerable attack. He was labelled by his opponents a 'super social worker' or 'Santa Claus'. In 1978, a Bill was passed which created a 'safety period', a tariff (lasting in general for half or for up to a third of the sentence; up to 22 years for lifers), during which the Jap could not grant any sentence management measure, except for ordinary remission which would then only apply to that part of the sentence which that period did not touch (Couvrat, 1987). Safety periods were to be re-enforced in 1994 (Couvrat, 1994), leading to what would be called 'true life'. Those who had been sentenced for murder or assassination (murder with premeditation) of a minor up to 15 years of age, with aggravating factors like rape, torture or barbaric acts, could get up to 30 years safety period if they had been sentenced to 30 years and perpetual safety period if they had been sentenced to life. These would be the only tough on crime rules for more than seventeen years, in post custody law.

At the time, this field was not very complex; it was still understandable. It actually suffered more from a lack than from an excess of written rules. Indeed, most of the rules that existed were not at the legislative level (Canivet, 2000). Most were of mere decree level, and more often than not sub-decree level ('circulaires'). Politicians were not interested in improving the state of the law and no efforts were made to elevate the decree or sub-decree rules which come from the executive, to the legislative level, by passing bills. At the time there was still complete assimilation of prison law and sentence execution (Herzog-Evans, 1998). Both were considered as being part of public law – which was actually contradicted by the fact that the Jap was a judicial judge and not an administrative one and by the fact that all the rules were in the *penal* procedure code. This assimilation meant that it was considered politically dangerous to pass bills which were too visible since that would involve a public debate, unlike decrees which were merely signed by the 'Ministres' in their cabinet. It was feared that the general public would think that politicians spent time being nice to inmates when they themselves were struggling to survive in difficult times[2]. Politicians had yet to come up with the idea that one could also be tough on crime in the field of sentences' execution. When crime started being an issue, politicians started by reforming the earlier phases of the judicial process: arrest, police detention and questioning, remand, and sentences.

The first sign of any serious change, namely categorisation, appeared in the late 1980s and early 1990s. This began with a Bill on terrorism in 1987 (re-enforced in 1994 with the New Penal Code); then one on drug trafficking (1992), followed by one on sexual offenders in 1998. The 1998 Bill was remarkable in the sense that it was the first sign of a shift of interest in the direction of sentence execution. It created a new sentence called 'socio-judicial

[2] It was nonetheless surprising that sub-decrees, which are directives sent by the executive to its public servants, would be forwarded to the Jap, thus violating the principle of separation of the judicial and the executive.

control', which was either alternative to imprisonment or followed it, and forced convicts to get treatment post release.

In parallel to this, prison law also underwent radical changes in the same period. A court case (*Marie*) of the highest court in administrative law, the Conseil d'Etat, in 1995 reversed its previous jurisprudence and decided that from then on, inmates could appeal disciplinary sanctions. A decree published in April 1996 drew the necessary consequences with some more substantial changes in the PPC. The competition and attraction between prison law and sentence execution had always been strong despite prison law being more or less public law, whereas sentence execution was undoubtedly part of criminal law. This probably played a part in the creation of another Bill in 1997 that was heavily influenced by American and British law, to create what is today called 'static electronic monitoring'. At the time it was neither a community sentence nor a remand alternative, but only a post-custody measure. It could thus be used by the Jap either to transform very short sentences (up to one year), be it *ab initio* (before the person was even incarcerated) or later, or to put an end to a longer sentence where there was less than a year left to serve. Both 1997 and 1998 Bills rather surprisingly introduced judicial review of the Jap's decisions – something that was entirely new then, as noted above. These were all seeds planted in an obsolete system which was ready to crumble.

The first phase of change 2000-2004

Considerable change occurred during the years 2000-2004 and various factors lie behind these developments.

First, both legal practitioners (Staechele, 1995) and members of the doctrine (Herzog-Evans, 1999) had begun to argue in favour of changes that would recognize the Jap as a Court of law. This was made easier by the fact that several decades had now passed since the Jap had been introduced and his role was generally accepted. It was also strongly suggested that what is called under French law a 'contradictory debate', where all parties are present and can equally defend their case and cross examine their opponents, should take place in sentence execution, with the inmate getting legal assistance. Article 6 of the EHRC was quoted. But above all, it was more a matter of fair hearing as a basic general principle in French procedure, and of trying to establish 'the truth', i.e. whether the inmate really meant what was in his written file. In short, contradictory debate appeared to offer, in the French legal system, the best way to balance public safety, the victim's interests, the inmate's (re)socialisation efforts and to assess his risk of reoffending.

The increasing influence of European Human Rights rules also played an important part in the reforms to come. It did take some time before France took full account of these; French rules and court cases were more influenced by common law than by written law. But when France did move, it did so wholeheartedly. By the early years of this century it became common to see articles 5, 6, and even 8, frequently quoted in French courts of law.

Another factor that played a large part was a 1999 decree that created the Socialisation and Probation Penitentiary Service (Service Pénitentiaire d'Insertion et de Probation - SPIP) which replaced the previous Probation and Released Inmates' Assistance Committee. SPIP was to be an independent service with its own separate building, and its own chief (Director of SPIP, known as D-SPIP), whereas before it had been under the Jap's control and situated inside the tribunal. The Jap could still give orders (mandates) to social workers but could no

longer directly control the service. The SPIP could then elaborate its own policy and its link to the PA was reinforced. Social workers were now to be called Re-socialisation and Probation Counsellors and were under the direct authority of the regional director of the PA. They were to be hired through public exams at degree level as a minimum. Increasingly lawyers passed this exam, which involved criminal law knowledge (Garreaud, 2004), and this reinforced the idea that the Jap was indeed a Court.

Finally, in 2000, the publication of a book about La Sante prison in Paris caused a great deal of media interest. The author, who had worked as a GP in the prison, discussed privileged information about the treatment of VIP inmates (Vasseur 2000). In the absence of any other major piece of news at the time of the book's publication, prisons made the headlines for several weeks. French public opinion suddenly changed and became soft on convicts, after seeing rats and cockroaches on prime time TV programs and news. The demand for reform was suddenly enormous. Several commissions issued reports which also got media attention – a rather rare phenomenon. At the time, the Senate and the National Assembly were busy discussing a Criminal Bill and a decision was taken to add amendments relating to sentence execution procedure and conditional release, without fear that public opinion would be negative.

First step : June 15, 2000 Bill also known as the 'Presumption of innocence and rights of victims Bill'. The changes needed in sentence execution were procedural, so the Bill, for the most part, addressed these needs.

The most significant change was to acknowledge the Jap as a court of law by creating judicial review for his decisions, which were from then on to follow a contradictory debate where defence and the inmate were present[3], and decisions were to be explained in detail. Court hearings were to take place within the prison. At court of Appeal level, however, only the solicitor was present, and not the inmate. This reform, called 'juridictionnalisation'[4], nonetheless left out four types of decisions. Remission, temporary leave, and temporary leave under escort were still to be granted during a SAC; and changes in obligations imposed on the probationer were still to be decided informally inside the tribunal by the Jap, without any hearing. These choices were made because it was feared that the number of appeals would be excessive, since all Japs took several hundreds of thousands of such decisions each year. Also left out were the decisions concerning changes of obligations and sanctions for breach of community sentences, which were then decided by a number of different tribunals.

Victims were not considered as a party to the trial and were therefore excluded from the hearing along with their solicitors. Once sentence was pronounced they were out the picture, except for the payment of damages which started to become an important element in decision making.

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[3] PA (prison governor or D-Spip) could be there in personam and would write a synthetic report of what all the services, including the SPIP, thought would be best for the case.

[4] 'Juridictionnalisation' meant the legal system recognized that the Jap was a court of law and thus had to organize a formal court hearing, with a cross examination involving the presence of a solicitor, the inmate, and a public prosecutor. It also meant the Jap's decisions could be subject to appeal.

Following 9/11 everything changed (Danet, 2006) with crime becoming a number one issue for politicians across the world (Becket, 1997 ; Garland, 2001). It is certainly true to say that crime was becoming more violent in France, albeit it was nothing like in the UK. The French presidential election campaign was exclusively devoted to criminal issues. At first, as usual, changes remained focused on pre-trial procedures and sentencing. Tougher procedures and longer sentences were introduced with numerous Bills passed in 2001, 2002, 2003. There were also developments in sentence execution

Second step : Jan. 23, 2003 Bill, otherwise called the 'Anti-terrorist Bill'. The Bill (2008) concerned criminal procedure and sentences but also decided to transfer all sentence execution decisions made with regard to those convicted of terrorism to an anti terrorist Jap and other anti terrorist courts situated in Paris. This choice was deliberately made to be tougher on terrorists when the time came to examine their plea for release.

Third step : March 9, 2004 Bill, otherwise called 'loi Perben II'. The next Bill to be passed was as radical as the 2000 Bill, but was rather schizophrenic. Its first three quarters made criminal procedure and sentences even tougher for organised crime. The last quarter however concerned post-custody and did not reflect any of the tough on crime philosophy. Instead one could still feel the influence of the year 2000. Indeed, the Bill started with an excellent introductory article, article 707 of the PPC, which provided for balanced guidelines for the sentences execution[5].

The Bill first elevated a previously decree level article to legislative level, thus making its mandatory nature more apparent: new article 723-15 of the PPC (Herzog-Evans, 2008, b) also came with an equitable procedure including a contradictory debate and a possible appeal. Its goal was to prevent short term custodial sentences from being executed whenever possible. In 2004, all political parties had agreed that these sentences (up to one year) were dangerous: they were long enough to destroy whatever positive social elements a delinquent may have possessed (work, accommodation, ongoing training, detox. or treatment, new environment, payment of damages, etc.), but too short for prison to replace them by new ones. These cases were to be referred either by the prosecutor or by the tribunal to the Jap who would hold a contradictory debate, make sure the delinquent understood what his sentence was and why it had been chosen, what his views on his behaviour were, what his weaknesses were (alcohol, drugs, mental health problems, etc.) and what his social and personal environment was.

Unfortunately this procedure only applied to a person who was not at the time already incarcerated, as incarceration would mean that it was too late to save him/her from the destruction of his/her environment. This eliminated those on remand for another case or the numerous individuals who had been through 'speed trials' which in practice always lead to direct custody. Before the debate, a social worker would meet the delinquent and prepare a report. During the debate, the public prosecutor, the delinquent and, if he had made that choice, his solicitor, were all present. The Jap then assessed whether the social elements were enough to work on in order to replace the sentence by a sentence management measure. Had

[5] Its second paragraph states that « Sentences' execution favours the reintegration of convicted persons as well as the prevention of re-offending, whilst respecting the interests of society and the rights of victims".

the delinquent previously been on remand and released, it could be conditional 'release' if remand covered at least half the sentence (if he was a first offender), or two thirds of it (if he was a legal re-offender[6]), or even remission if it covered the rest of the sentence. It could also be either of three other sentence management measures: semi-freedom, placement in the community or static electronic monitoring. Mandatory work in the community was also a possibility. The Jap's decision would always include any number of obligations he deemed useful, chosen amongst those listed in article 132-45 of the Penal Code along with all control measures listed in article 132-44 of the same code[7].

The Jap could, of course, refuse to pronounce a sentence management measure, based on the absence or weakness of the social elements or on the level of risk that the delinquent represented. The prosecutor would then be free to have the sentence executed. Should the first debate be insufficient the Jap could also organise a second one. During the first meeting the Jap would typically tell the offender what he should do within the next weeks, i.e. typically find work, start treatment, a course or training, find a place to live, start paying damages, and provide written proof of all that for the second meeting. Overall the procedure was not to last for more than 4 months. If it did the prosecutor could have the person incarcerated. If any other sentences were involved the Bill made sure they were rapidly executed. Thus a special service, BEX (Bureau of sentences execution) was created to speed procedures up and to make sure the victim's damages and the fines were paid.

But the most important part of the Bill was the completion of juridictionnalisation. It first stated in article 712-1 that the Jap and the newly created Tribunals of the application des peines (Tap), which replaced the previous collegial courts, were "first degree courts for sentence application". A new chamber was created at the Court of appeal, called sentence application chamber (Chap). Then the Bill extended juridictionnalisation to all community sentences. From then on, all breaches of probation and modification of obligations were to be referred to the Jap and not to any other courts. A contradictory debate would be held and appeal would be possible. The four other types of decisions which had been set aside by the Bill (2000), were nearly juridictionnalised too. Remission, temporary leave, temporary leave under escort, were still decided during a SAC, but an appeal became possible. An appeal also became possible against the Jap's decisions to modify obligations. However, the appeal was not an ordinary one: only the president of the Chap would decide based on the files, without any debate.

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[6] Legal reoffending called recidivism is a rather complex notion, narrower than reoffending.

[7] These articles were also to become the rules for all sentence management measures and community sentences. Article 132-45 contains 19 different obligations amongst which the court can choose as many as necessary: reside at such address, work or find work, get training or education, go to detox. or get psychiatric treatment, pay damages and fine, not to get in contact with the victim or a category of persons, not to carry arms, drive a vehicle or go to pubs, not to appear on television or be interviewed in the press, etc. …. Article 132-44 provides for mandatory control measures such as: going to the meetings set by the judge or the social worker, accept social workers' control visits and present them with documents, ask permission to leave the area, etc.

Thanks to the Perben II Bill, court cases however developed even further, unifying the application of law and solving technical problems which were increasingly occurring due to the numerous reforms. A first attempt at increasing victims' rights was tried: they were now to be informed of the imminent sentence management and would be allowed to present written observations. During Tap and Chap's hearing (in the latter case only if the appeal concerned a Tap's ruling), the victim's solicitor could now be present – but not the victim.

Despite the development of juridictionnalisation, there were two signs of potential future 'de-juridictionalisation', i.e. taking decisions away from the Jap and transferring them to an administration, preferably penitentiary. First ordinary remission (now called remission credit) would not be decided by Japs anymore. It would be merely calculated by the prison clerk service ('Greffe'), where in fact mere secretaries and prison guards – hardly trained properly and without any legal background – worked in lieu of professional clerks (greffiers). The Jap would only take remission back when there had been bad behaviour. A second and more serious de-juridictionalisation attempt was labelled New Application Procedures (NPAP). The idea was to make the SPIP responsible for preparing sentence management for the Jap, in relation to short and medium-term sentences (Garreaud, 2004). They were to write the judgements for the Jap who would only have to sign them – or refuse to. Such a violation of the separation of executive and judiciary did not seem to disturb MPs when they voted on the Bill.

NPAP, however, proved to be a total failure. Overworked social workers could not take yet another task on board. French social workers have up to 130 dossiers each – a considerable caseload. Besides contradictory debate and court hearing fitted so perfectly well French legal culture that it immediately dominated. Because of their training, French social workers did not have the necessary objectivity to make decisions that would balance contradictory interests - those of the inmate as long as he intended to make resocialisation and behavioural efforts, but also those of the victim and of public safety. Only a judge would be distant enough from the case (and also a specialist in sentence execution) to decide neutrally taking all these elements into consideration. By this time juridictionnalisation was considered by all as being a perfect construction which NPAP were threatening. But an attack by the executive against the only recently recognised judiciary can be discerned and, as such it can be seen as a preliminary step that would be followed by more attempts in the future.

Two major reforms had been passed within four years. The law was already becoming very complex. However, overall it looked as if most of the job had been done during those years and most practitioners and academics seemed to be content. But not for long; a totally new series of developments was just about to make things monumentally complex and to radically change French penology.

The second phase 2005-2009

Three important Bills were to be passed during this period and these would have a profound impact upon sentence execution.

It is important to note that France is currently plagued by a reform obsession. Every problem, every exceptional crime, every issue in the country, is 'solved' by passing a bill or a decree. The public expects it because it is used to that approach. This means numerous bills are passed within a very short time. They are typically badly prepared, not thought through properly and often do not take previous laws or decrees into consideration. They simply add

layer after layer of legal rules, which may be contradictory or correspond to different penal philosophies depending on the era when they were passed, making it increasingly harder for practitioners to understand them. Therefore, there is considerable demand for legal construction and interpretation from both the courts and the academics. For the latter a great deal of time is spent explaining to practitioners what the law possibly means – or should – mean. This may be fun for those who like splitting 'legal hairs' but runs the risk of focusing on the details and ignoring the wider picture of what is occurring

While the laws passed in 2000-2004 (and their inevitable numerous decrees and sub-decrees) can be seen as politicians catching up on issues they had previously ignored, from 2005 things would radically change.

First step : Dec. 12, 2005 Bill, otherwise called the 'Recidivism Bill'. The main goal of the Bill was to make things much harder for legal re-offenders (recidivists). They could no longer access parental conditional release; they were to wait even longer for ordinary conditional release; and their remission credit would be of a lesser quantum. The Bill also concerned sexual offenders who would only get supplementary remission if they accepted psychiatric or psychological treatment while in prison.

Of most significance for sentence execution was the creation of what would later be labelled the 'First train' of 'safety measures'. Safety measures are not safety periods; they are periods of time *after release* where ex-inmates are to be submitted to a range of obligations and control measures, despite having finished their sentence. These measures are not concerned primarily with resocialisation; their unique goal is public safety. Indeed, under French law, safety measures do not have to abide by the prohibition of retroactivity which would normally affect sentences or sentence management. They can, therefore, apply to any person sentenced before the Bill which created them is passed. In 2005, safety measures were validated by the Constitutional Council because their duration was limited.

The first safety measure was 'judicial surveillance of dangerous persons' (hereafter judicial surveillance). It was directly inspired by German (Saas, 2006) and even more so, by Canadian law and its long term surveillance for dangerous people[8]. Inmates who had been labelled dangerous by psychiatric 'experts' were to be subjected to obligations and control measures for a maximum time corresponding to the remission they had been granted while incarcerated. Thus, technically, judicial surveillance did not add any length to the sentence itself; if in breach, the individual would be sent back to prison for the length of the remission. In order to obtain the safety measure label (necessary to ensure retroactivity) judicial surveillance did not contain any social obligation. For instance the Jap would not be able to force the person to get work or to pay damages. He would only be able to force him or her to reside in a certain place or to see a social worker on a regular basis. Treatment was mandatory. There were two obvious risks to this: one, those placed under surveillance ('placés') were not encouraged to change the habits and environment which had played a part in their becoming criminals in the first place and it was far too simplistic to assume that mental instability or disease was its only cause; second, the risk of breach was very high, precisely because there was no social work involved. Indeed for the bill to be constitutional it required to be labelled a 'safety measure' as it was retroactive . In the French legal system, if

[8] See http://www.csc-scc.gc.ca/text/pblct/tso/rol_f.shtml.

the law affects sentences it cannot be retroactive if harsher but this does not apply to 'safety measures'. Then in turn a measure can only be thus labelled if it only concerns the protection of society and does not contain either a punitive or a social element.

The second safety measure was mobile electronic monitoring (MEM). Inspired by previous U.S., English and Spanish experiences (Fenech, 2005), it was very different from static monitoring. MEM can permanently track the movements of a person and can therefore monitor whether an individual attends school, work, etc. The technology, however, is somewhat unreliable and it is costly in terms of human surveillance (unless passive surveillance based on recorded information is chosen). Moreover the technique is not discreet and can cause social problems. The device has got to be close to the skin, otherwise a very noisy alarm rings; and the alarm also tends to go off without cause. All this is incompatible with keeping a job or taking public transport. Those subject to MEM (also called 'placés') are often stressed because they fear they will be sent back to prison. Several, in fact, have actually asked to be re-incarcerated. Legally, it also is a very complex measure as it cannot be pronounced by itself. It must be attached to another measure: either a sentence of socio-judiciary control (see above); or, a sentence management disposal of conditional release, where the offender also has to abide by socio-judiciary control obligations (including mandatory treatment); or, a safety measure of judicial surveillance with socio-judiciary control obligations. In practice MEM only seems to make some sense when it is linked to conditional release where the court might not have been willing to take the risk of conditional release had it not been for MEM. Besides conditional release involves full probation (i.e. all article 132-45 obligations), and not its limited version under judiciary surveillance. The complexity extends to competence to decide on MEM: criminal courts for socio-judicial control; Jap or Tap for conditional release; Jap for judicial surveillance.

Safety measures and mandatory treatment meant experts were becoming a new force in sentence management and this raises several issues. In the first place, the independence and discretion of the courts were notably reduced. Further, experts were exclusively psychiatrists, whereas not all criminals are mentally ill and nor can crime be reduced to psychiatric issues. Psychiatric assessments are not always carried out comprehensively and it is not unusual for an expert to see the inmate for merely fifteen minutes. Another serious issue is the 'umbrella factor', i.e. the risk that all persons involved in the decision making, from the expert to the court and the social worker, will be afraid of bearing moral responsibility should the person reoffend. Therefore it becomes easy to be exceptionally cautious so that all sorts of risks are taken into account. More and more people are thus in danger of being labelled dangerous – a term which, it must be noted, is not scientifically defined (Danet and Saas, 2007 ; Mbanzoulou, 2008 ; Senon and Manzanera, 2008) or scientifically assessed by experts in risk assessment techniques (whatever the intrinsic merits of risk assessment schemes might be). All these issues would take on greater salience in what was to come.

Second step : August 10, 2007 Bill, otherwise called the 'Recidivism II Bill' which would introduce even tougher rules for re-offenders, creating mandatory minimum sentences – thereby making overcrowding worse. As for sentence execution, though, the Bill would be mainly concerned with sexual offenders and violent offences.

It first nearly generalised *psychiatric* mandatory treatment, this time not only to all those sentenced now or in the past to socio-judicial control, but also to those who, considering the type of crime they had committed, *could* have been so sentenced. Again, therefore, the law

was retroactive. Mandatory treatment would apply to certain community sentences with probation, to conditional release and to judicial surveillance. In addition, the list of crimes which made socio-judicial control possible was extended. This sentence now applied to non sexual offences such as arson and spouse or partner (or former spouse or partner) or child battering. Such offenders also had to go through mandatory treatment.

The notion that treatment without consent would work, but even more so that it would be still useful despite lasting potentially for up to several decades was ludicrous. It should be noted that France does not have criminologists and that treatment is either psychological or psychiatric[9]. The Bill concentrated all its efforts on such treatment, thereby marginalising social and environmental factors, which in turn marginalised social work. Social workers were increasingly questioning their worth (Poncela, 2007). What sense was there in their work which by now only involved control at its core in ensuring that the 'placé' did go to see his psychiatrist? One D-SPIP recently reported a client telling him his judicial surveillance was all too boring, so he asked: "why is that ? Something wrong with your treatment?" The 'placé' replied : "no actually it's seeing you every fortnight that does not make any sense".

Third step : Feb. 25, 2008 Bill, otherwise called the 'Safety Detention Bill' generated considerable opposition amongst human rights lobbyists and practitioners. This Bill dealt with extremely violent 'headline' crimes. It only applied to people sentenced to a minimum of 15 years, for certain aggravated forms of rape, murder or assassination, torture or barbaric acts or abduction. These were offenders who would be declared dangerous and still seriously at risk of reoffending, due to serious personality disorder. However limited the scope of the Bill was, it can be seen as having planted a seed for later expansion. It would seem likely that another Bill will, in the future, extend the new rules to less serious crimes without any further real opposition.

The Bill created three new safety measures, which were to be retroactive and, unlike those of 2005, could even be perpetual (Danet, 2008 ; Herzog-Evans, 2008a ; Pradel, 2008). The procedure which did apply was needlessly intricate as new courts were created. Overall the Bill – and the inevitable decrees and sub-decrees that followed – made sentence execution more complex than ever, to such a degree that practitioners really started to feel depressed. Moreover, it went further by marginalising the Jap and the Tap (Herzog-Evans, 2008, a).

The first and most shocking measure was SD, i.e. *safety detention*. Here the influences were German (Leblois-Happe, 2008)[10] and Dutch (Goujon and Gautier, 2006) laws. SD is purely and simply a custodial sentence. The Bill uses the expression 'retention' which in French law refers to a form of custody with which the French are not totally at ease (the term is used for police detention for questioning 10-13 year olds and for the camps where illegal immigrants are detained before being sent back to their country). Decree of Nov. 4, 2008 confirmed down to the tiniest detail that it was indeed a form of custody, even though it 'offered' 3 hours of mandatory psychiatric treatment every day. Even more shockingly, despite the fact that the

[9] Also note that French practitioners generally refuse to apply behavioural methods.

[10] See J. Leblois-Happe, « Rétention de sûreté vs Unterbringung in die Sicherungsverwahrung : les enseignements d'une comparaison franco-allemande », *Ajpénal* 2008, p. 209.

Constitutional Council had said it could not be retroactive, the government went on to 'discover' a loophole by claiming that the Council had tolerated retroactivity in one case: when SD constituted the sanction for the breach of the second newly created safety measure, i.e., safety surveillance. Subsequently, a detention centre (socio-judiciary centre) was built.

Safety surveillance (SS) is, – the Bill is not ashamed to put it word for word – the same as judicial surveillance except it lasts longer as, like SD, it can be perpetual. It can either follow SD (if the person has become less dangerous) or be used as a way to perpetually prolong socio-judicial control or judicial surveillance, with or without MOM. Since it is identical to judicial surveillance it means the social elements of probation are eliminated: there only is control and mandatory treatment. Human rights lobbyists did not see how dangerous for human rights SS was because they devoted all their efforts to fight SD. However it is nearly as dangerous, can be retroactive and it must be remembered that its breach can lead to SD.

Finally, the Bill (2008) created Home Detention. This is an obligation which can be added to socio-judicial control, judicial surveillance or SS and would normally involve MEM. It too can be perpetual.

With these perpetual safety measures, mandatory treatment becomes potentially perpetual too thereby rendering worthless any consideration of its usefulness. One is now faced with a system which can impose decades' worth of treatment in prison followed by decades' worth of treatment in custody or in the community along with permanent control with possibly perpetual electronic monitoring. As a result, most long term prisoners probably think "why bother preparing a project for my release since I'll be detained or subjected to prolonged or even perpetual control any way?" The problem with this new reality is that it completely ignores the knowledge that prepared release under probation works is a more effective procedure (Kensey and Tournier, 2000). And the Dutch example shows that inmates are, in any event, reluctant to get their treatment and that it simply does not work (Gougon and Gautier, 2006). Eventually they are more often than not left out and ignored, but maintained in detention without any treatment whatsoever (Observatoire International des Prisons, 2008).

After such drastic changes in sentence execution, what might the future hold ?

Conclusion : What next ?

While we might look forward anxiously to what the future 'penitentiary' Bill (Tournier, 2007), which has been discussed in the Senate in March 2009, might introduce it is possible to speculate about the consequences of the recent reforms.

It would appear that probation in its true social and balanced sense is going to disappear both for those sentenced to long term sentences who will be subjected to one safety measure or another (and more often than not several), and for those who receive short or medium-term sentences which under the penitentiary Bill will go through 'rapid and automatic procedures', thereby releasing inmates without any preparation whatsoever, or any social supervision. Jap and Tap will become even more marginalised. The PA, which in fact drafts most of the Bills, will have gained control over an increasing part of the decision making, via its services (prison 'greffe', SPIP via a new NPAP, and even prison governors). Juridictionnalisation, the greatest achievement of the last decade will be sparingly used for middle of the road sentences.

Social work will increasingly be merely a matter of control, without any of its traditional social and supportive elements. As a result, breach will be more frequent, since sentence management will not have been prepared in advance nor have received inmates' cooperation (Bruston, 2008). So there is likely to be more re-incarceration leading to prison overcrowding. Nor is the new style of social work likely to be especially effective in sending back reformed offenders to the community.

It is fortunate that, due to the economic recession, the debate in the National Assembly has been postponed. However there is little doubt that the Penitentiary Bill will eventually add another layer to the new penology which has been dominant since 2005.

E-mail:

martineevans@ymail.com

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