European Journal of Probation
University of Bucharest
www.ejprob.ro
Vol. 4, No1, 2012, pp 46 – 62
ISSN: 2006 – 2203

Non-compliance in France: a human approach and a hair splitting legal system

Martine Herzog-Evans[1]

Abstract

This article reviews the French system of recall: paradoxically, for a system tightly bound by complex rules, a great deal of discretion is left to judges (particularly those responsible for sentence enforcement). Building on the initial findings from her current research, the author argues that *juges d'application des peines* generally have a rehabilitative approach to sanctioning non-compliance, for example, taking offenders' personal circumstances and individual 'merit' seriously. She fears that non-compliance may soon become a political issue.

Keywords: Breach - Community work – Compliance – Consistency – Discipline – Discretion - Electronic monitoring – Furlough – Individualisation - Juge de l'application des peines - Prison escape –Probation – Prosecutor – Rehabilitation – Recall – Release – Remission - Sentences' implementation – Sanctions – Supervision - Suspended sentence.

In the French legal system, particularly in the field of penal law, every situation must be foreseen in legal provisions (law or decrees, codified in the Criminal procedure code – PPC – and Penal code – PC). Non-compliance is thus what the law defines as such and, in theory, only the sanctions existing in the law can be pronounced. Recently, politicians have discovered that sentence implementation can be just as efficient a tool as other penal issues, when the time comes to appear 'tough on crime'. Ten laws along with their decrees and sub-decrees have transformed sentence implementation into one of the most complex and technical of all legal fields.

Paradoxically, judges still enjoy a great deal of discretion. France was never struck by the consistency in sentencing movement and has in fact totally ignored the Recommendation R (92)17 consistency in sentencing of the Council of Europe. Discretion is viewed as indispensable as its penal system lies heavily on the fundamental principle of individualisation of sentences and their implementation (Desportes and Le Gunehec, 2009), a principle which is set up in the marble of its codes (PC, art. 132-24; PPC, art. 707). It means that each sentence has to be tailored to the person, his circumstances, personal background, personality, dangerousness, etc. The moral dimension of his act also counts.

[1] University of Reims Law Faculty, France: see http://herzog-evans; martineevans@ymail.com

However, in practice, such an ideal is only met when it comes to the treatment of serious crimes. With other offences, two reasons make it difficult. The first is that in a French penal court hearing, there is only one phase: the one where the offender will be deemed guilty. The sentence is then either decided upon immediately by the court or 'mise en délibéré', i.e. postponed until another date, where it will merely be read to the person, who is generally no longer present. In short, there is no debate about the sentence itself. Secondly, because of the sheer number of offences (in particular felonies, called délits) and a desire, over the last ten years, actually to deal with all of them, there is no time to meet the standards of individualisation. Consequently, France actually tailors the treatment of crime until a second phase, where a special judge, the sentence implementation judge (*juge de l'application des peines* – JAP), either at the very beginning of the sentence's implementation, or when it is in the course of being executed, can transform and adapt it to the actual circumstances of the person.

In a system where courts enjoy considerable discretion, understanding the nature of their professional culture is essential. Yet, France being above all a country of lawyers, only legal research had been so far conducted, in order to describe JAP's missions, measures and procedures (du Mesnil du Buisson, 2001). With ten laws in ten years radically changing the nature of his missions and professional environment, and shifting from one type of penology to another, it seemed urgent to launch a research trying to assess whether JAP had fundamentally changed since the author of these lines had become a specialist of sentence implementation two decades ago. Were they still idealists, yet hands on, and did they still follow the two traditional compasses of individualisation and reinsertion? In the course of this ongoing research, several questions concerned the way practitioners dealt with non-compliance.

The methodology was three fold:

- Collecting and analysing as many court decisions as possible (1,300) – these had not been coded yet for the present article and shall not be used here;
- Interviewing JAP and other practitioners. At the time we wrote this article, we had interviewed 15 JAP and 4 prosecutors;
- Attending court hearings; so far, we have attended a little more than a hundred individual hearings.

The present article presents the French system of recall; its practice will be described in its last developments. It is however, first necessary to present the French sentence implementation system**.**

§-1-Existing sentences and measures in the French legal system

A) Front door measures: community sentences

French courts can use a host of alternative sentences (Lameyre, Lavielle and Janas, 2008): some of these involve supervision. Two of these stand out as they are used more frequently:

- suspended sentence with supervision *(Sursis avec mise à l'épreuve* – hereafter SME*)* applies to custody sentences of up to five years and of up to ten years if the person is a recidivist. It cannot apply to a person who has previously received two SME nor to the most serious crimes. If the obligations are respected and there is no further offence during the

probation period (which lasts from twelve months to three years), the sentence is deemed to have never legally existed (‘*non-avenu’*) and is expunged from the person’s criminal record.
SME can be a mixed sentence comprising of a custodial part and a suspended part.
- unpaid community work (*Travail d’intérêt général* hereafter TIG). With TIG, the person has to do between 20 and 210 hours of unpaid work over a maximum period of eighteen months. Usually, the work is provided by a local partner, such as a city, a region or a department (France’s administrative divisions) or by a third sector agency or charity. Typically, TIG consists in renovating public buildings or gardening in public areas. However, the law has recently enabled the private sector to offer positions, this only in activities that are in the public interest, such, for instance, as school canteens. There is no probation with the usual form of TIG.

Other community sentences are less frequent because they are legally more complex or require more human intervention. Such is the case with the **combination of suspended sentence with supervision and unpaid community work** (*Sursis-TIG*). Another less frequent community measure, which involves supervision, is **adjournment of the sentence with probation** (*Ajournement de peine avec mise à l’épreuve*) (Saas, 2004; Bard, 1998). With adjournment, the person is declared guilty, but the decision on the sentence is suspended for a maximum period of one year. During that period, the person is under probation, after which, during a second hearing, the court can decide whether he will be sentenced or spared of any sentence depending on his behaviour in the course of probation.

B) Back door measures

Back door measures are measures whereby a person is released from prison. They can either be pronounced ab initio, i.e. before the custody sentence of up to two years (one year if the person is a recidivist) is implemented (PPC, art. 723-15 s.), or during the execution of the sentence or measure (Herzog-Evans, 2011b).

We shall here only present the measures that allow the person to spend most or half of his time in the community, leaving out remission, furlough, and other temporary measures.
- ‘***Conditional liberation*’** (*libération conditionnelle*) is a release measure granted before the end of the custodial sentence. It is possible at about half point, or two third point for recidivists, after eighteen years for lifers, and twenty-two years if they are recidivists. A minima, conditional supervision lasts for as long as what was left of the custodial sentence. To this, the JAP or TAP (the TAP is competent for longer sentences) can add another year. Supervision must last from five to ten years for a lifer and is perpetual with ‘true’ life.
- ‘***Sentence suspension’ – ordinary***, (*suspension ordinaire de peine*) is the suspension for a maximum of four years of a sentence of up to two years and only applies to délits. It can be granted for medical, social or family reasons.
- ‘***Medical sentence suspension*’** (*suspension médicale de peine*) It is the suspension of custody for terminally ill inmates or people who have a medical condition which is incompatible with custody – a situation which is defined with reference to article 3 of the ECHR jurisprudence (Mortet, 2007).
- *Electronic monitoring* (hereafter EM) (*placement sous surveillance électronique*). In France, EM can be a sentence or a JAP’s decision (ab initio or during the execution of a custody sentence). It then applies to offenders who have up to two years to serve (one if they are recidivists). It can also consist in a sort of Home Detention Curfew whereby people with less than four months to serve are released nearly automatically by the probation service

(hereafter SPIP), with no other 'supervision' than the tag, and are only allowed two to four hours out of their home each day (PPC, art. 723-28).
- ***Semi-freedom*** (day-leave) (*semi-liberté*). Semi-freedom and placement in the community apply to the same offences as EM. The JAP can transform any one of these measures into the other and with EM. The person leaves the prison in the morning in order to go to work, sometimes to attend classes or other socialisationactivities or for treatment. He or she has to be back at the prison after work, and stays there at night and over the week-end.
- ***Placement in the community*** *(Placement à l'extérieur).* Placement in the community is close to semi-freedom (and applies to the same sentences) but usually concerns very dissocialised offenders who need a high degree of supervision and support.

With the last three measures, the person can be granted remission and furlough over the week-ends or bank holidays (PPC, art. D 143-1). These are typically used to loosen up control and occur after a while, when the person respects the probation and is of good behaviour.

C) Mixed measures

EM, semi-freedom and placement in the community are mixed measures in the sense that they can be both release measures and community sentences. Another measure is mixed in another sense: the penal court pronounces it, but it usually applies after the person is released from custody. This sentence is called '*Suivi socio-judiciaire'* (literally: '***social and judicial supervision'*** – hereafter SSJ) (Lavielle, 1999; Castaignède, 1999; Herzog-Evans, 2011b). SSJ applies to sexual or violent offenders. Attached to SSJ are mandatory treatment, which has to start in prison, and a regular probation. SSJ supervision applies not only to people who have actually been sentenced to SSJ, but also to people who, given the offence they have committed, could have received such a sentence. Other serious offenders will have to endure safety measures.

D) Safety measures

Safety measures consist in a mandatory supervision and the control of dangerous offenders released in the community, this, after they have completed their sentence. They apply to very violent, sexual or dangerous offenders who have been denied release, precisely because of their dangerousness, and for whom when their sentence have been served, there still is a risk that, upon release, they will commit further serious offenses (Herzog-Evans, 2010c). At that point, it suddenly becomes obvious that they need supervision and/or treatment. For such offenders, three successive laws (Dec. 1, 2005; Feb. 25, 2008; March 10, 2010) have created a range of safety measures. In this respect, France has followed in the steps of Canada, Germany, Belgium and Holland... (Padfield and al., 2010; van Marle, 2010). One of these safety measures is not an autonomous measure and needs to be coupled with another safety measure, or conditional release or SSJ (Herzog-Evans, 2010). Another, safety surveillance, can last indefinitely and renders GPS-EM perpetual as well when it is attached to it.

Whatever the nature of the measure is, the nature of supervision is based on the same legal rules.

E) Content of supervision

Whether the measure is a sentence, a back door measure or a safety measure, the court which grants if – or if it hasn't, the JAP – determines the precise content of the obligations that apply to the offender.

French law differentiates between 'control measures' (*mesures de contrôle*) and 'specific obligations' (*obligations particulières*). Control measures are listed in article 132-44 of the Penal code (e.g. attend the probation officers meetings); specific obligations are listed in article 132-45 of the same code (e.g. work, get treatment, pay damages or the fine, not talk publicly about the offence). Control measures are automatic, which means they apply even if the court or the JAP do not choose or refer to them in the decision. Control measures are also compulsory for the court, which means that it cannot decide not to submit the offender to all of them. Specific obligations are optional for the court or the JAP: they choose among a list of nineteen obligations, those which must apply to the offender.

SPIP supervise the person under the authority of the JAP who can continue to tailor the measure as time passes (adding, deleting, obligations, changing curfew hours, granting the person free week-ends, allowing him to move from one region to another, to go on holiday abroad, etc.). The JAP can however delegate to the Director of the SPIP or to the prison governor, the right to change curfew hours, which is useful when a person's working shifts change frequently. The JAP is also responsible for determining what the frequency of the meetings should be – or he can leave this to the probation service. He is naturally in the front seat when it comes to sanctioning non-compliance.

§-2-Who sanctions non-compliance?

As he is the sentence implementation judge, the **JAP** should theoretically be the sole authority to recall or sanction. However, unfortunately, the French legal system is much more complex than this.

In certain cases (but only with back door measures) it is the **TAP** who decides. The TAP is a three JAP court. Roughly TAP is in charge of sanctioning for conditional release, medical sentence suspension for long sentences; and one safety measure with or without GPS-EM. However, if a JAP has been appointed by the TAP to supervise the offender he can also use a variety of other sanctions (see infra).

With community sentences, there are cases where the JAP can sanction, and others where he has to refer the case to a penal court, the **tribunal correctionnel,** as the sanction for breach is not recall per se, but another sentence. Such is the case for TIG and with adjournment with probation, where the person is sentenced rather than spared a sanction.

For semi-freedom, placement in the community and EM, the offender is legally still an inmate, and, as a result, can be considered as a prison escapee in certain circumstances (see infra). This offence is called assimilated escape[2] (CP, art. 434-29). When this applies, only a penal court can pronounce the sentence.

[2] Assimilated prison escape is an offence which consists for the prisoner in not returning to the prison, or not returning to the prison on time, when under semi-freedom, placement in the community or furlough. It can also consist in trying to break or damage the tag in the case of EM. It is called 'assimilated prison escape' as article 434-29 refers to the text defining regular prison escape (art. 434-27 of the PC) and applies the same sentences.

With the French equivalent to HDC (Janas, 2010; Herzog-Evans, 2009b and 2011a), a complex system has been put in place:

- For disciplinary violations or obligations violations, the **director of the probation service** can recall. However, if there is an emergency, the **prison governor** is competent;
- If it is a new offence, then only the **prosecutor** can recall;
- In both cases, the **JAP** can be an 'appeal' court for these authorities' decisions;
- The prosecutor can also ask the JAP to withdraw remission.

The **Court of appeal** (chambre de l'application des peines, hereafter CHAP), a special chamber for 'back door' measures, hears the appeals against all the decisions made by JAP and TAP. It can thus confirm or annul their decisions on breach.

With two safety measures, a separate court, the *Juridiction Régionale de la Rétention de Sûreté* (Regional Court for Safety Detention – **JRRS**) is competent, and, with appeal the competence lies with the National Court for Safety Detention (*Juridiction Nationale de la Retention de Sûreté*, **JNRS**).
The French legal system is just as needlessly intricate concerning the definition of non-compliance.

§-3-What constitutes non-compliance according to the law?

Like in most jurisdictions, there are three series of violations which are applicable to all community sentences and release measure. Such is the case with:

- **The violation of control measures and specific obligations**[3], and for the latter, only for those specifically listed in the decision granting the measure or added later by the JAP. This may include not being on time for meetings with the probation officer, not attending one or more meetings, relocating without telling the JAP or probation service, not respecting curfew hours.....
- **Reoffending**. In some cases, the law refers to a new sentence; in others to a new offence. In the latter case, this raises the issue of the presumption of innocence[4]. Another issue is whether the JAP/TAP have their own interpretation of the truth, in contradiction with the sentencing court.
- **A change of circumstances can be assimilated to breach**, for instance when the person has lost his job, when he had the obligation to keep one.

There is, secondly, a long list of other violations, which only apply to specific measures or sentences. Such is the case of:

- (N**otorious) bad behaviour** is ancient terminology which applies to conditional release (PPC, art. 730). However, it has been extended – without the adjective 'notorious' however – to all measures and sentences by way of a decree (PPC, art. D 49-25). The problem with bad behaviour is obviously its lack of clear meaning. In a field such as criminal law governed by the cardinal principal of legality, norms, in particular those defining offences or breach, should be drafted with utmost care and

[3] Note that neither the law, nor the doctrine or the jurisprudence call these violations 'technical violations'. They may not be deemed worthy of recall as we shall see below, but they are not considered as merely technical either, as they concern the very core of the supervision, i.e. what is supposed to encourage/help the offender desist.
[4] An issue raised only by one JAP (JAP 2).

precision (Herzog-Evans, 2011b). In practice, it is useful when the probationer who has an alcohol addiction is still drinking heavily: this is not an offence, nor technically a breach (French probation law cannot forbid a person to drink); but it can be deemed as being bad behaviour.

- **Prison disciplinary offence.** A person who is still legally a prisoner can commit a prison disciplinary offence when he is in the community or when he goes back to the prison. Typical cases are people on furlough or semi-freedom who return to the prison under the influence of alcohol or drugs or try and smuggle drugs into the prison.
- **Not doing the community work.** In the case of community work without probation, it is a separate offence; in the case of community work with probation, it is a breach of the probation order.
- **Refusing or not submitting to medical treatment.** This applies in a host of cases where medical treatment is mandatory, whether on the basis of article 132-45 or on the basis of SSJ.
- **Assimilated prison escape** applies when the person on semi-freedom, placement in the community or furlough, returns late to the prison or does not return at all or when the person under EM, (tries and) destroy(s) or damage(s) the tag (PC, art. 434-29).
- **Refusing to submit to a safety measure**. With some forms of safety measures which include GPS-EM, the offender is offered the possibility to refuse the measure. However, if he does, he risks a sanction (PPC, art. art. 706-53-19, 723-35, R. 61-27-1, 1° and 3°D 147-42, D. 539, §. 4 ; CP, art. 131-36-12).
- Being assessed as **being still dangerous**. In the case of medical sentence suspension (PPC, art. 720-1-1) or with most safety measures, being assessed as being still dangerous can lead to a 'sanction'.

§-4-What are the available sanctions?

French law only mentions recall or equivalent sanctions for breach of the various measures presented above. In practice, JAP use a wide range of other measures.

A) The strict provisions of the law: custody or more supervision

Withdrawal of remission can be the sanction of choice of one safety measure (PPC, art. 723-35) which means that the person returns to prison for the remaining part of the sentence. It can also apply to a person who is either actually or legally deemed incarcerated (PPC, art. 721, D 49-25).

With conditional release, medical or ordinary sentence suspension, semi-freedom, placement in the community and EM, the sanction provided for by the law is **recall** (*révocation* or *retrait*). The person returns to prison to execute the remainder of his sentence (PPC, art. 733, 720-1-1, D 49-25).

With one form of safety measure, the sanction consists in being placed in a **safety detention** centre (PPC, art. 706-53-19)[5].

[5] However it has never applied yet as the courts are prudent and also because of the doubts concerning its compatibility with the EHR convention. see EHRCt, *M v. Germany*, Dec. 17, 2009, applic. n° 19359/04

With SSJ: the penal court has **pre-determined** the **period** that the person would have to spend in **custody** (between three to seven years) should he violate his obligations. The JAP can implement it.

As we have seen, with community work (PC, art. 434-42), and in the case of assimilated prison escape (PC, art. 434-29), breach is considered as being a **separate offence**. With TIG, the sentence if of up to two years and 30 000 Euros fine; with prison escape, it is of three years and 45 000 Euros fine.

With GPS-EM, the sanction that applies is the one applicable to the measure that this form of EM is attached to. GPS-EM can itself be a sanction in the case of safety measures, conditional release or SSJ.

In some cases, the law allows the court to **prolong the length of supervision.** Such is the case with SME (PPC, art. 742) and conditional release (PPC, art. 732-1). Another technique consists in **transforming a measure** (conditional release, SSJ, judicial supervision), which would normally have ended at one point, into **safety supervision**, which, on the contrary, can be perpetual (: PPC, art. 723-37, 732-1, 763-8) and this also applies to the GPS-EM attached to these measures.

In practice, JAP and TAP use a wide range of other sanctions, which are not mentioned in the law as sanctions per se.

B) Other tools used by the courts

Typically the JAP can **simply withdraw remission,** when it applies (semi-freedom, placement in the community or EM), **but not the measure itself**. Or he/she can **recall only part of the measure** (or remission) so that the person will not spend too much time in prison, and the JAP will also thus keep some leverage when the person is re-released.

Another method consists in **transforming the measure into a harsher one**. For instance, in the course of our research, JAP10, JAP15 and JAP2 explained that they placed the offender who was so far under EM, under semi-freedom. Semi-freedom is considered as being a stricter measure as the offender will have to sleep in the prison rather than home and will have to submit to prison regulations; JAP also appreciate the fact that it allows to better control the person.

In addition, the JAP can order the person to attend a meeting with him/her, as opposed to merely with his probation officer. During this meeting he **solemnly reminds the person of the content of the order** and warns him that there will be no second chance. This research showed that this technique, called ‘reminding the person of the law’ (*rappel à la loi*), was used systematically by the JAP as a first response to breach, except when it consisted in a new offence.

The JAP can also decide that the supervision will be tighter, and that the person will have **more meetings** with his probation officer. This is however impractical as French probation services have a terrible case-load. In the same vein, the JAP can **add more obligations** (e.g. add treatment) or **make them stricter** (e.g. stricter curfew hours).

Conversely, in certain cases, the JAP realises that if the offender has violated his obligations it is because the order had lasted for too long and/or is too tight. In those cases, he can **loosen up the order.** For instance, the JAP can allow the person to spend more time out on Saturdays with his family (EM) or to have dinner with his family each evening before going back to the prison (semi-freedom). Furlough week-ends can in turn be used as sanctions, the JAP withdrawing them.

In the course of our ongoing research, several JAP suggested that they would like the law to provide them with **other forms of sanctions**. One JAP listed several she thought might be interesting:

> '*a mini two day community work ; mandatory participation to a citizen internship ; mandatory participation to group work about various subjects (violence, alcohol, drugs) which would be determined depending on the person's personality and circumstances*' (JAP 15).

§-5-What is the actual practice of non-compliance?

Our research has confirmed that JAP are for the most part strongly rehabilitation oriented. Unsurprisingly, they have a rather loose practice concerning non-compliance.

A) Variations with regard to the measure

Only two of the JAP (JAP 14 and 6) had readymade statistics for the previous year (2010). They roughly confirmed what the other JAP told us, i.e. that they recalled about 10% of measures. It appeared however that these two JAP recalled more release measures than community sentences.

Also, it is proportionally easier to detect violations with day-leave than it is with all the other measures: the offender has to go back to prison every evening. With day-leave, JAP also have to take into consideration the fact that the person goes back to prison every evening, which means they have to take into account the effect that the sanction, or the lack thereof, would have on the rest of the inmates (in particular in the very frequent instance where the violation consists in trying to smuggle drugs in the prison). Consequently, they recall more frequently.
One of the most liberal JAP (JAP 13), told us that she was less severe with safety measures, when it came to violations of specific obligations – but not in the case of a new offence – as:

> '*the consequences are much harsher... But I do know that I am going against the law's principles, which expects me to be harsher on these types of offenders when they violate their obligations.*'

B) Serious and less serious non-compliance

Overall, and clearly, the reason why JAP do not recall much, is because they have in mind the consequences of recalling the offender: if he goes (back) to prison, he will lose his 'reinsertion elements' ('*elements de reinsertion'*) – which roughly corresponds to social capital – even if one told us bluntly: '*I don't give a damn if it has effects on his work or family*' (JAP 1).

1) What constitute 'serious' non-compliance

So far, the most consistent finding of the research is the existence of a dichotomy, in practice, (not in the law) between serious non-compliance and less serious non-compliance.

First, all the interviewed JAP told us that **reoffending** is **nearly always considered serious** enough for them – or for the local TAP – to recall to prison.

> '*I systematically recall. It is a sure sign that the person has not understood at all what his measure was for'* (JAP12).
>
> Recall is systematic for '*violations that predict reoffending and for reoffending' (Prosecutor 1)*
>
> *'The idea is to save a minimum of credibility for the sentence along with the very meaning of sentence's management measures'* (JAP 15)

But there were some exceptions. The author found, in the course of previous research, that offenders are hardly ever charged **for assimilated prison escape**. Practitioners seem to think that it is enough that he is recalled to prison – which is in that case systematic – and that consequently, he should not have to serve another sentence. Also they seem to think that assimilated escape is not true escape; that escape should only apply to an actual prison break (Herzog-Evans, 2009c).

Another exception is actually found in the law itself: with the French equivalent of HDC (PPC, art. 723-28), a decree has created a form of loophole: if the person commits another offence and is sentenced to up to four months – which is precisely the maximum length of HDC – the prosecutor can decide that the new sentence shall be executed under HDC rather than in the form of actual custody (PPC, art. D 147-30-52 and D 147-30-54). This incredible leniency can be explained by the very reason why HDC was created: to free a maximum of prison space.

Second, JAP also recall systematically in the case of **repeat obligations' violations**. In such occurrences, it seems quite obvious that what annoys the judge is that the person is disrespecting the Justice system as a whole.

JAP also consider as being very serious, but not always to the point of recalling when the **offender does not pay the damages** to the victim.

The court will also be systematically **more severe with certain categories of offender**s, whatever the violation is. Such is the case with violent and serious sexual offenders; with domestic violence where there is a danger to the family. Such is also the case with terrorists. A recent case illustrates how severely courts[6] react to violations. Mr Rouillan, an ex member of Action Directe, the French 1970's equivalent of the Baader group, who had been sentenced to life and had spent decades in prison, obtained conditional release preceded by a mandatory one year period under semi-freedom. He was banned from talking publicly about his offence. In 2008, in the course of the execution of his semi-freedom, he was interviewed by a national weekly (l'Express). The journalist asked him whether he regretted having killed Mr X. His answer was: '*I cannot answer this. But the very fact that I cannot answer this is in itself significant. If we regretted everything we did...*' He was subsequently considered as being in

[6] It is to be noted that these courts are special antiterrorist JAP and TAP.

breach and was recalled. As a result, he spent one and a half more year in prison before being re-released again under the same type of combined conditional release and one year semi-freedom.

2) What constitutes 'non-serious' non-compliance

What JAP consider as being non-serious non-compliance will also be sanctioned; but the sanction will not be recall. Such is the case when the offender misses one meeting with the probation officer or turns late for such a meeting. In fact, in most cases, JAP are not even notified of such events. This seems to annoy some the JAP, as they think they miss the opportunity to do a solemn 'rappel à la loi'.

> '*I don't mind being nice, but I need to be told what is going on. Then I see the offender, set up the boundaries again and only then if there is a repeat do I recall or sanction'* (JAP 11).

The research revealed other violations would not be considered serious:

- When the offender was 5/10 minutes late at work (but not if it happened every day);
- When the offender was absent from work once (but not if it happened several times);

Naturally, with all these examples, the question at stake is: where lies the limit? Inevitably discretion leads to inconsistency in decision-making. Undeniably, there are harsh JAP, very soft JAP, even if most JAP are not very harsh.

With no other obligation than the **obligation to find work**, this fine line is more apparent. Article 132-45 of the Penal code allows the JAP or the court to demand that the offender actively looks for a position. Given the job market, JAP can be understanding if the offender gives documented proof that he is being active.

When the offender has a job, his obligation may be to keep it. Should he want to change it, he must ask for the JAP's authorisation. During a hearing that we attended, the offender had only notified the probation officer but not asked for the JAP's permission. He appeared to be sincere when he said he thought he only had to notify the SPIP. This was unfortunately a classic case where the latter did not communicate the information to the JAP, nor inform the offender of his obligations. As a result, there was no sanction.

With non-serious or less-serious violations, the usual practice of JAP is progressive. Most of the time, there is a 'rappel à la loi', then, only if there is a repeat, they sanctions, but do not necessarily recall. With the second repeat, they usually recall the offender to prison.

The seriousness of the violation is also appreciated depending on the nature of the offence and other personal circumstances.

C) Personal circumstances count

JAP consistently – but not systematically – take the offender's personal circumstances into account.

Sometimes, the JAP will **be** more **understanding**, in the documented presence of particularly difficult circumstances, such as in the case of an offender whose child has leukaemia; whose wife is handicapped; whose wife has just left him, etc. In one case we followed, the offender's father had died. He did not ask for the JAP's permission to go home in Africa to be with his family in such a difficult time. The Judge did not sanction, as the offender did give him documented proof after his trip, but decided to convoke him the following day at the tribunal for a 'rappel à la loi'.

With some offenders, being understanding is the best course of action. Such is the case with mentally ill offenders who violate their curfew hours or forget meetings. Also, with drug and alcohol related violations, JAP are consistently lenient and understanding. They are well aware that relapse is part and parcel of addiction and that sending the person back to prison is not the best approach. None of the JAP we interviewed would recall for alcohol or drug repeat use, unless there was a serious degradation of the situation and other associated violations. But they did recall, sometimes only for short periods, people who tried to smuggle drugs back inside the prison or the semi-freedom centre. This can be explained because, in such a case, their partner, the prison service, demands a significant sanction.

Sometimes, being understanding appears to **be** the **reasonable** thing to do. Here are a few examples that we encountered in the course of our research:

- There was a bus strike and the offender arrived late at home and the offender did call the probation service;
- The offender's son was back from a school trip and his coach was delayed; she had to wait by the school and, as a result, violated her curfew hours;
- The offender's boss had asked him to work overtime that day and the offender called to tell the probation service;
- The offender had lost his job but was looking for another.

Personal circumstances can however also **be aggravated factors**, such as when the offender has committed serious offences.

> '*It really depends on the personality and the sentenced' person's past. With certain offenders, because of the nature of their offence and their personality, I'll be very reactive and less indulgent*'

> '*so clearly with those who committed violent offences, those who have a dangerous personality, those who may be a danger to other people... recall is more likely'* (JAP 15).

Conversely, the merit of the person will often save him from recall.

D) Merit counts too

In some cases, there is undeniably **a moral dimension to the decision**. For instance, JAP 11 does not recall if the addicted offender who has relapsed is in the course of some form of treatment. The idea is that the offender has tried his best and needs more help – along with more supervision. However, merit goes both way, and if the person is not making any efforts to improve his situation and desist, then this is held against him.

This moral dimension was expressed as follows by JAP 10: '*I appreciate loyalty. If the bugger gives me fake work certificates, I get harsh'*. Yet, in order to illustrate this philosophy she added: '*if he loses his job and doesn't tell us and thus benefits from endless free time outdoors, then I swap his EM measure for a semi-freedom measure or place him under curfew every morning'*. In other words, being harsh does not necessarily mean recalling.

The **attitude of the offender during the recall hearing** also counts considerably. For instance, during this hearing of JAP 8, the offender first attempted to explain that he could not remember receiving the letter notifying him to go to the SPIP as he was in rehab. When it appeared that he had not actually been in rehab at the time, he just said '*duh.... I must have forgotten*' in a nonchalant way. The JAP confronted him in a very harsh tone and sanctioned. But rather than recalling, the JAP decided to extend his time under probation because one year had been wasted due to his nonchalant behaviour, during which no progress had been made and he had not complied. Recalling would in a sense be too easy on him, and not solve the problem. Prolonging the measure was both a sanction and a way of trying to force-submit him to the very obligations that might help him address his issues.

Whatever the sanction, a nonchalant attitude certainly tends to exasperate the judge and influence his decision as shown in the following example:

> JAP 2 hearing. *The offender has to pay 5000 Euros to the victim (he did not respect a stop sign and hit the victim with his car). Two years later he has not even started paying and theatrically and loudly explains – and interrupts the judge and prosecutor several times, that he does not earn enough*.
>
> Prosecutor: '*we hear you and quite loudly so, but you do not listen to*... (the offender tries to interrupt again). *What do you know about the victim? He may also have financial problems. You are totally dismissing his situation*.'...
>
> JAP: '*Are you ready to pay 70 Euros*?' (monthly)
>
> Offender: '*I meant to pay 50'*
>
> JAP: '*you have 5000 to pay*!'
>
> Offender: '*I thought I would first start by paying 50 and in a few months, when my financial situation allows it, to go up to 70'*
>
> JAP (exasperated): '*If before the 6th of June you haven't sent me a clear cut project with 70 a month or 10% off your wages, it will be two months imprisonment and that's the end of it*!'
>
> Offender: '*If you want to jail people who have a job, if that's what the French Justice system is all about, well that's great then*!'
>
> JAP: '*You'd better keep your statements about the French Justice system to yourself. It is high time you understood that you are not alone in this world'*
>
> (note that there was no recall in this case. The measure was prolonged to make sure he would really pay).

An even more nonchalant attitude is when th**e person is not even present for the breach hearing**. In such cases, most of the time, there hardly is any discussion, and the sanction is indeed recall.

> Example: During a JAP 3 hearing: the offender had an ab initio EM (i.e. he never was incarcerated as his sentence was immediately transformed into EM). He had not sent any documented proof about his situation, did not go to work, had not started paying damages to the victims and was still aggressive towards them; lastly, he was not even present at the hearing.
>
> Prosecutor, jokingly: '*I would be kind of tempted to advocate you recalled the measure*!' (JAP 3 and prosecutor giggle).

The same applies when the person is present physically, but is indifferent to being recalled, or actually seems to welcome it. In such cases, JAP tend to go along.

> For instance, during a JAP 1 hearing, the offender had committed new offences and had a heroin addiction problem. During the hearing he showed all the signs of someone undergoing withdrawal. He had been temporarily sent to prison before as he had relapsed and the JAP had to decide whether to recall him as he had relapsed yet again.
>
> JAP: '*what do you think?*'
>
> Offender: '*I am better off staying in prison until I get better'*

JAP may seem to react in a moral way, to the offender's nonchalance or apparent disinterest as to what happens to him. However, their response to this can also be explained by their understanding of what lies behind this attitude: the fact that the offender is not yet ready to desist, and that there is nothing at this stage that can be done for him. On a more philosophical level, JAP are very concerned about the very meaning of the measure itself.

> '*When the offender has not invested the project at all despite being really taken charge of, and despite being warned... then recall is the only sensible decision, because the measure has lost all meaning and purpose'* (JAP 15).

In the presence of a violation, and when the offender has had so far a compliant attitude, JAP tend to be more lenient. However, they make a distinction between **real compliance and 'pretend' compliance** – a dichotomy which is consistent with the findings of the literature (Bottoms, 2001; Robinson and McNeill, 2010). In that respect, a frequent question that arises is whether the person actually submits to treatment because it is mandatory or because he understands that he has a problem and needs treatment. This is particularly apparent with sexual or domestic violent offences.

> Example: JAP 8 court hearing:
>
> JAP 8: '*Going to see a shrink every three months is useless! It seems to me that you don't really want to go. You like going to see the shrink? You want to go*?
>
> Offender: '*bah... I go because I have to*!'

JAP 8: '*that's precisely the problem: you go because you have to*!'

The attitude of the offender during the hearing can be rather revealing in that respect:

Example: JAP 8 court hearing

JAP 8: '*you seem to still have the same line of thinking...*'

Offender: '*I know I must avoid youngsters'*

JAP 8 (exasperated): '*Why, because when one sees a youngster, one just jumps on them*?'

Offender: '*Bah no... because I understand now'*

JAP 8: '*can you force yourself onto someone*?'

Offender: '*Bah... no but she agreed: she came to my place to eat'*

JAP 8: '*So you still have no clue then?*!'

§-6-The problem with discretion

'*discretion refers to the freedom, power, authority, decision or leeway of an official, organisation or individual to decide, discern or determine to make a judgment, choice or decision, about alternative courses of action or inaction'* (Gelsthorpe and Padfield, 2003:3).

The first and obvious problem with discretion is naturally the risk of prejudice. There is simply no French study about potential prejudice and discrimination that French sentence implementation courts – or even sentencing courts – may display (Cliquenois, forthcoming). The overall philosophy is that individualisation is such a paramount principle, that it counterbalances the risk of discrimination, which is seen as menial, although there is naturally no way of knowing whether this is true. In practice, what seems more apparent is that whereas in general, most JAP are strongly rehabilitation oriented, others sound harsher. Such appeared at first sight to be the case with three of the fifteen interviewed JAP (Jap 1, 6 and 14). Both JAP 14 and JAP 1 – and JAP 2, but her practice was very different –used the very same expression: *'I never get a conscience pang'*. JAP 1 concluded '*I am not a social worker. I am very much a judge. They already have the chance of being let out so the least they can do is to behave'*. However, when questioned more in depth about their actual practice, all these apparently harsher JAP described practices which were nearly identical to those of their more lenient colleagues.

Another and more pressing question raised by discretion in the French context, is: **who is actually in charge of exercising discretion; the court or the probation service**? It is not the subject of this article to describe the complex, changing and difficult relationship between JAP and probation services (see Herzog-Evans, forthcoming). With non-compliance, we have seen that probation services try and influence JAP's decisions by not telling them about first time violations, and by only referring to them cases where two, three or more violations have occurred. Conversely, in other cases JAP complained that the probation service insisted rather

strongly that the JAP would recall for ridiculously light violations. So far, when confronting the current research on JAP with previous research we have done on probation services (Herzog-Evans, 2011c and forthcoming); it appears to us that JAP are overall more rehabilitative than probation officers.

Difficult procedural questions also arise, when it comes to **burden of the proof**, in the case of disciplinary offences. The JAP has no input in the investigation, and thus depends entirely, when asked to recall or sanction, on the evidence presented to him by prison authorities. For obligations' violations, he depends on the evidence presented by the SPIP. JAP thus welcome the opportunity to discuss the charges and hear the offender, in the course of the fair trial that has to take place before he makes his decision.

Conclusion

We have seen that, in France, non-compliance is not yet an issue that interests politicians and that so far, practitioners still enjoy a great deal of discretion. What probably helps is that the law is so complex that journalists and the public have no idea who does what and what is legally possible. However, in March 2010 another law was passed, which showed that things may be about to change: it created a special form of police arrest and investigation for non-compliance. So far, our research has showed that most JAP would not use this new legal tool – but prosecutors seemed more interested.
Other more general signs reveal that the attention of the public and of politicians will eventually be drawn to non-compliance. First, after politicians have long exhausted the godsend of tough on crime discourses in the fields of criminal procedure, criminal law and sentences, they have more recently realised that sentence implementation provided them with a new device. It is only a matter of time before they add an 11th reform to the ten laws which have thus been passed in the last decade, and decide to tackle non-compliance.

References

Bard v. (1998), *L'ajournement et la dispense de peine,* PhD dissertation, Grenoble II

Bottoms A. (2001), 'Compliance with community penalties', in A. Bottoms, L. Gelsthorpe and S. Rex, *Community Penalties: Change and Challenge,* Cullompton, Willan Publishing.

Castaignède J., (1999), 'Le suivi socio-judiciaire applicable aux délinquants sexuels ou la dialectique sanction-traitement',. *D* 1999, chron., p. 23.

CliquenoisG. (forthcoming), 'La prise de décision par les juges de l'application des peines ou l'hétérogénéité décisionnelle'.

Desportes F. and Le Gunehec F. (2009), *Droit pénal général*, 19th ed., Paris, Economica

Du Mesnil du Buisson G., (2001), *Juge de l'application des peines*, Encyclopédie de droit pénal et de procédure pénale, Paris, Dalloz

Gelsthorpe L. and Padfield N. (2003), 'Introduction', in L. Gelsthorpe and N. Padfield, *Exercising Discretion. Decision-making in the criminal justice system and beyond,* Cullomton, Willan Publishing, pp. 1-28

Herzog-Evans M. (2009a). 'French post custody law (2000-2009) : from equitable trial to the religion of control', *EJprob*, vol. 1, n° 2, pp. 97-109

Herzog-Evans M. (2009b), ' Application des peines : la prétendue « bonne partie » de la loi pénitentiaire', *AJPénal*, p. 483-490

Herzog-Evans M. (2009c), *L'évasion*, Paris, L'Harmattan.

Herzog-Evans M. (2010a), 'La loi « récidive III »: extension et aggravation de la « probation » obligatoire', *Recueil Dalloz*, forthcoming

Herzog-Evans M., (2010b), 'Loi pénitentiaire n° 2009-1436 du 24 novembre 2009 : changement de paradigme pénologique et toute puisse administrative', Recueil Dalloz, 2010, p. 31-38

Herzog-Evans (2010 c), 'Safety measures in France', in Herzog-Evans (ed.), *Transnational Criminology Manual*, Nijmegen, Wolf Legal Publishers, vol. III, pp. 423-451

Herzog-Evans M. (2011a), 'Nouveaux enjeux dans l'application des peines. Les leçons d u droit et de la criminologie comparée', *Ajpénal* 2011, pp. 177-181

Herzog-Evans M. (2011b). *Droit de l'exécution des peines*, Dalloz, Paris, 4th ed.

Herzog-Evans, (2011c), 'Desisting in France: what probation officers know and do. A first approach', EJprob, vol. 3, n° 2, pp. 29-46.

Herzog-Evans (forthcoming), Probation in France: Some things old, some things new, some things borrowed and often blue', *Probation Journal*.

Janas M. (2010), 'Les dispositions relatives au prononcé et à l'application des peines de la loi n° 2009-1436 du 24 novembre 2009 dite loi pénitentiaire', *Dr. Pénal*, janv., p. 7

Lavielle B., Lameyre X. et Janas M. (2008), *Le Guide des peines*, Dalloz, Paris.

Lavielle B. (1999), 'Surveiller et soigner les agresseurs sexuels : un des défis posés par la loi du 17 juin 1998', *RSC*, 1999, p. 35

Mortet L. (2007), *Suspension médicale de peine*, L'Harmattan, Paris

Mucchielli L., (2010), 'De la criminologie comme science appliquée et des discours mythique sur la « multidisciplinarité » et « l'exception française », Champ pénal/Penal Field, vol. VII, uploaded on Feb. 06, consulted on 07 2011. URL : http://champpenal.revues.org/7728 ; DOI : 10.4000/champpenal.7728

Padfield N. (2009). 'The future of parole', *Archbold News*, Nov. 4; n° 9:6-9

Padfield N., van Zyl Smit D. and Dünkel F. (ed.) (2010), *Release from Prison. European policy and practice*, Willan Publishing, Cullompton

Robinson G. and McNeill F. (2010), 'The dynamics of compliance with offender supervision', in F. McNeill, P. Raynor and C. Trotter, *Offender Supervision. New Directions in theory, research and practice*, Cullompton, Willan Publishing, pp. 367-383

Saas C. (2004), *L'ajournement du prononcé de la peine. Césure et recomposition du procès pénal*, LGDJ, Paris

Timbard O. (2009), *Les condamnations prononcées en 2008: infractions sanctionnée et peines prononcées*, Infostat Justice, Ministère de la Justice, décembre

Van Marle H. J. C. and van der Wolf M. (2010), 'Safety measures in Holland- the TBS', in Herzog-Evans (ed.), *Transnational Criminology Manual*, Nijmegen, Wolf Legal Publishers, vol. III, pp. 439-451