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FIVE YEARS OF THE SECURITY MANIA

Forty laws modifying the French Code of Criminal Procedure were passed between 2002 and 2007, and thirty modifying the Criminal Code. This exceptional legislative activity, unparalleled in the past, has produced some major changes in our legal system. No doubt, the period witnessed some outstanding events requiring responses by the criminal justice system. The September 11, 2001 terrorist attacks, the suburban riots in 2005, the acceleration of technological innovation and the ensuing endless race between the police and organized crime, the Outreau affair,[1] and other incidents give reason for making assessments, questioning practices, and redeploying resources. Other countries have experienced change as well, but in France, responses inevitably take the form of legislation passed in an emergency situation.

These reforms raise two kinds of questions. First, do they modify our criminal policy model, and if so, how can we define the new model? Second, what is required for them to be efficacious, and what effects will they have on our society?

It is not certain that our liberal criminal policy model, in which both the community and the administration each have a role to play, is called into question.[2] After all, even if we take the new incriminations into full consideration, the administration does not contend to take charge of all deviant behavior, and social responses continue to be extended for much of that behavior. Conversely, a close look at the administration's pres-

ent response to offending shows a definite change in our model. We are moving toward a model that is comprehensively more "guarantor" with respect to the penal procedure, which is to say it is concerned with ensuring fair trial and providing citizens with guarantees in terms of their defense, and at the same time more "security-oriented" in terms of incriminations and punishment, but also in ferreting out offenses during the investigation phase.

In its relations with the community, the administration does not claim to deal with all deviant behavior, but henceforth every act that constitutes an offense must receive a judicial response. There is no end to the abdication from societal regulation of inter-individual conflicts and "problem situations,"[3] with growing commitment to "criminal justice everywhere," more or less well organized by legislators. The March 5, 2007 law on the prevention of offending merely reinforces this option. A last change involves the way the administration allocates responsibility for responses to the justice system. Advocacy of the right to security fatally puts offenders into the hands of the justice system for increasing periods of time. Criminal justice is in charge of punishment, but also of surveillance and treatment during the time served and afterwards.

Our criminal policy model has then entered a "guarantor/security-oriented" phase. But what does it guarantee? And for what security?

MAKING ALL RISK-TAKING, AND ALL THREATENING BEHAVIOR, AN OFFENSE

The largest number of new offenses were created between 2002 and 2004. The November 2001 law on everyday security

had already set the pace, soon followed by the September 9, 2002, March 18, 2003, and March 9, 2004 laws.

The fight against terrorism put great emphasis on "organized gangs," and the May 15, 2001 laws on criminal association make the mere preparation of felonies or misdemeanors (not actually committed) an offense again, punishable by a five-year custodial sentence. This is a setback to the 1810 code.

As of 2006 (law of January 23rd), it is an offense to be unable to account for resources corresponding to one's lifestyle while "habitually being in close contact" with persons having committed felonies or misdemeanors: this is a major reversal of the burden of proof.

In other fields, threatening behavior on the roads, in stadiums, on the streets, in schools, in stairwells, at work, or on the Internet are increasingly becoming offenses, even before any harm is caused. Alleging the necessary prevention of more serious acts, lawmakers thus turn at-risk behavior, or mere incivilities, into offenses.

No doubt, these incriminations are often aimed at the usual target groups—poor youths, beggars, prostitutes, and so on—but not exclusively, since it is never a status that is involved, but behavior, and beyond the threatening behavior of those target groups, what is targeted is all sorts of other acts which may be committed by just about anyone. The person who smokes a joint while driving, the overly enterprising colleague at work, the head of a firm who neglects to communicate his records when requisitioned by the police, or voyeurs filming happy slapping represent far broader groups with threatening profiles.

Between 2002 and 2004, the lawmakers defined a new public order via the creation of new offenses. It was conceived as revolving around the notion of the "right to security," proclaimed a basic right by parliament in 1995. This public order has three facets: new public order on the streets and in public places, public order involving cooperation with the security project, and corporeal public order, at the crossroads between the people's right to security and the protection of personal dignity.

Public order on the streets is aimed at all sorts of people ranging from street prostitutes, and sometimes their customers, beggars judged threatening, young people with nothing to do who hang around in stairwells, anti-patriotic supporters who boo the *Marseillaise* in stadiums, habitual fare-dodgers in the subways or trains, and so forth. That the latter had committed a petty misdeed (and were fined) was no longer sufficient: they have become offenders (when caught on several occasions).

Public order involving cooperation with security punishes forms of resistance, and of refusal to cooperate with the security project, which is compulsory for some professions, and perhaps even for all citizens. This includes complying with police requisitions, transmitting any data and information of a personal nature in one's possession for professional reasons, submitting to controls of all sorts, and submitting to the examinations authorized in the framework of police investigations.

Last, although the notion of "proper morality" no longer defines a corporeal public order, it has been replaced by the equally vague notion of "personal dignity," which legitimates the construction of new offenses involving asymmetric relations

susceptible of infringing on personal dignity. Here too, the legislative ragbag amalgamates initiation rituals, exploitation of begging, soliciting, harassment, mental manipulation, and pedo-pornography.

Criminal law wants to embrace whatever behavior our society perceives as threatening. Although not aimed at deviancy as such, it turns into offenses whatever deviant doings are perceived as generating a risk for public or private security.

SANCTIONING, PUNISHING, CONTROLLING, TREATING, AND NEUTRALIZING

Just as lawmakers were creating new offenses between 2001 and 2004, they often prescribed heavier sentences, especially for misdemeanors.[4] New aggravating circumstances are added to a great many misdemeanors and felonies, in some cases to cater to some victims' defense associations engaged in fierce competition, so that the sentences incurred even by first offenders are severe to the point of senselessness. For instance, if two eighteen-year-olds in a school yard punch a youth under age fifteen without causing any incapacity to work, they risk seven years in prison owing to three cumulative aggravating circumstances: acting in a group, acting in a school, and acting on a victim under age fifteen (article 222-13 of the Penal Code). Similarly, injuries by an "organized gang" to a police officer, resulting in incapacity to work exceeding one week, can entail a fifteen year prison sentence (article 22-14-1 of the Penal Code).

Personal violence, deliberate or not, is the main target here, to the point where the terms used actually introduce confusion with the law on "violence on highways." Risk-taking is

increasingly conceived as demanding the same response as unintentional harm. But the lawmaking frenzy goes far beyond merely raising maximum sentences incurred. Since 2004, the mutation in penality has been so deep that it may well break with the post 1945 logic,[5] contemporary with the Welfare State, and hark back to some authoritarian conceptions from the 1930s, taken to their limits by the governments of the time.[6]

The response to every offense in terms of sanctions rests less on the actual facts than on the assessment of the putative risk, or on the dangerousness of the person who commits them, according to an expert prognosis. After three laws on recidivism (December 12, 2005, March 5, 2007, and August 10, 2007), and one law on security detention (February 25, 2008)[7] consistent with the logic initiated in 1998[8] with the introduction of social-judicial monitoring of sexual offenders, we are now in a position to depict the new conception of our criminal justice system and how it is encouraged to respond to misdemeanors and felonies in terms of sanctions.

The system now includes five spheres, defined by degree of risk.

The first responds by admonitions, "*composition pénale*" measures,[9] and educational measures for juveniles. The idea here is to admonish, to *sanction without punishing*, since these are not sentences. Misdemeanors liable of up to five years' imprisonment may be handled this way.

The second sphere enables *punishment*, or punishment and/or education, as opposed to the following spheres which also include control and treatment. Alternatives to prison,

prison sentences with simple suspended imprisonment, all are up to the judge. The target group here, taken to [first instance] "*correctionnel*" court or heard following admission of guilt,[10] is first offenders, re-offenders, and even some recidivists eligible neither for minimum sentences nor for release on probation. All sorts of sentences have been developed for these groups, some hybrid—both measures and sentences—such as citizenship training workshops.[11] Other "workshop" sentences have appeared: there are workshops in parental responsibility, road safety awareness, or again, on the dangers of drug use. The sentence may also involve reparation, or constitute a community service order. Stationary electronic monitoring is another element. But the habit of inflicting short, unsuspended prison sentences may prevail in practice.

With the third sphere, we have the development of the newest missions assigned to criminal justice. The idea here is *punishment* and *treatment/care*, with no clear legal distinction between the latter two, between medical or psychiatric care and treatment of a medical-social nature.[12] The offenses involved are extremely varied in terms of the sentences incurred (ranging from one year in detention[13] to a life sentence[14]), but they have in common sentencing to social-judicial probation, which is to say a series of sometimes extremely restrictive measures enforced following detention. The offenses liable of social-judicial probation are defined exclusively by a list, infinitely modifiable according to the mood of the lawmakers and the pressure of petty incidents. The list currently includes sexual offenses, the most serious kinds of personal violence, but also violence within the family.

The fourth sphere adds another objective: the idea is to punish, to treat, but also to maintain close *control* after detention, and after treatment. Who is targeted here? Everyone who has been sentenced to a custodial sentence and to social-judicial probation, irrespective of whether they were judged by an assize or a *correctionnel* court. Here, sentences combine a prison term, treatment and monitoring of social-judicial probation, possibly for a long or even indefinite term, and eventually mobile electronic monitoring for as much as six years.

The last sphere came with the law on security detention, dated February 25, 2008. The point is to punish and treat, but also to *keep offenders locked up* until an expert proclaims them to be less dangerous. The two objectives are merged, neutralizing criminals without recourse to the death penalty, as in the case of the "complete life" sentence, passed in February 1994. Thanks to this security detention, which is not a sentence pronounced by an assize court, but is to be managed by a committee of judges, the justice system is now in complete charge of life after prison. It is no longer the acts committed and the sentence pronounced by a court, but an evaluation of dangerousness that is the sole justification of indefinite deprivation of freedom.

Cutting across the latter three spheres, and perhaps even the second in some cases, is the registration of sentenced offenders on the national computerized judicial file of perpetrators of sexual or violent offenses (the FIJAIS), implying checking in and exclusion from some professions over the long term. Added to other files, the branding effect is guaranteed.

All in all, here is a penal arsenal sufficiently excessive as to make honest citizens believe that the justice system is armed to protect us from every risk. Yet we have no distance from which to assess these schemes. The dissuasiveness of mobile electronic monitoring is far from proved, for instance. And as for the scientific ability of experts to deliver a personalized evaluation of the risk of backsliding, it is highly questionable, even according to members of the scientific community itself.[15] To shield themselves from criticism by the mass media and politicians, judges will be tempted to use all of these schemes as soon as some specialist has claimed them to be any bit relevant.

EFFECTIVE INVESTIGATION AND FAIR TRIAL

From the law of June 15, 2000 to that of March 5, 2007 on balanced procedures, lawmakers have ensured fair trial in conformity with the principles proclaimed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and interpreted by the European Court of Human Rights. It is true that criminal courts themselves were then perceived, in the light of the "Outreau affair," as threatening law-abiding citizens [see note 1—Trans.].

Legislators therefore concentrated on reforming judicial inquiry, compulsory in criminal cases, in 2000 and 2007, in particular. The idea was to ensure the hearing of both parties,[16] to make it more transparent, to open some phases to the public, to reinforce the rights of defendants, to make recourse more effective, to dissociate the power of inquiry and the power of custody, but also to give the civil parties more weapons, while limiting their excessive and even abusive use. In 2004, the establishment of a full-fledged sentence enforcement

court applied the logic of fair trial to that phase, which is now just as decisive for criminal procedure as judicial inquiry.

The creation of a variety of ways of handling misdemeanors, ranging from diversion to various kinds of prosecution,[17] was one of the great legislative projects of the past decade. The question is no longer whether or not to prosecute, but what response should be given to a prosecutable act. Now, with this diversification, the claim is that every case can be handled with no delay, but a fair trial must be ensured as well, in every case. This is not always so, however, because the institution has not given real thought to its practices. But parliament was unquestionably concerned here with the compatibility between management of flows and those guarantees-perhaps less out of virtue than out of fear of being condemned by the European court of human rights.

It would be inaccurate, however, to consider security-mindedness as being confined to criminalization and sentences, whereas the guarantor orientation would apply to the entire penal procedure. Our criminal justice policy model is only guarantor and concerned with fair trial and defendants' rights during the trial phase. The police investigation phase is still totally immune from the fair trial model. More than that, in 2004, the law of March 9 on the adaptation of the justice system to trends in crime has set up exceptional procedures around the extensible notion[18] of organized crime and offending, making it possible to conduct extremely intrusive investigations (phone-tapping, infiltration, wiring, searches, and so on) during the investigation phase—without any guarantee or possibility of self-defense—whereas these were previously reserved for the judicial inquiry phase. The guarantees granted

for judicial inquiry can be neutralized and circumvented by the investigation phase, then.

Over and beyond the exceptional procedure for organized crime and offending, and despite the Outreau lesson, which shed doubt on both the judicial inquiry and the investigation phases, our legal system refuses to allow any council at the police custody stage, allegedly for the efficiency of investigations.

The penal procedure as a whole, then, is torn between a security-oriented logic, prevailing during the investigation phase, and a concern with guarantees, which prevails during the trial.

CONCLUSION

The ability of all these arrangements to heighten productivity—their *efficiency*—is not proven, by a long shot. The motto "criminal justice everywhere" continues to overload the institution,[19] which suffers from insufficient resources, far inferior to what other European countries allocate to their justice system. The objectives for handling offenders look very nice on paper, but the means of achieving them are not furnished, at all.

But it is in terms of *efficacy* that this "guarantor/security-oriented" model raises the most serious questions. Because even if it were efficient, the question of its social efficacy would remain extremely problematic.

The confusion of roles (between public prosecutor and judge), the decline of the ritual (diversion, avoiding the organization of a trial), the lack of clarity in decisions for handling

offenses, and the disproportionate character of the sentences incurred generating excessive recourse to prison in the form of short custodial sentences, often make judicial action quite incomprehensible for both offenders and their entourage. The diversification of sentences since 1975 has not produced the expected effects. Alternatives to prison, especially community service orders, are insufficiently used, and there are reasons to believe that the same will be true of the new sentences that exist on paper.

The guarantor orientation, a partial one, conceals the excessive security orientation, as well as the shortcomings of enforcement of all sorts. The incrimination model built on the notion of "risk," and the penality model revolving around the notion of "dangerousness," conceal the many factors, especially the social ones, involved in offending. The "guarantor/security-oriented" model affords no guarantee of either security or fair trial.

If its real efficacy is ever measured some day, we may well discover that legislative activism has disappointed both public opinion and victims, and leaves the people it is supposed to punish, care for, treat, and endlessly control, worse off than ever. More crushed by all the kinds of vulnerability that led to their act to begin with. There is every reason to fear that the criminal justice mania will not diminish societal insecurity.

NOTES

1 In the "Outreau affair", several men and women were accused of rape committed on juveniles and placed in pretrial detention throughout the judicial inquiry, only to be found innocent later, some by a first instance assize court, the others following appeal.

2 M. Delmas-Marty, *Modèles et mouvements de politique criminelle* (Paris: Economica, 1983) republished in *Le flou du droit* (Paris: PUF, 2004), p. 155 and ff.

3 To hark back to the term used in the 1970s.

4 For people not familiar with the legal system: offenses are divided into three broad categories: felonies, misdemeanors, and petty offenses.

5 Formulated in France, by a group around Marc Ancel, as a modern approach to "social defense."

6 For an analysis of criminal law as developed by these schools in the '30s, see H. Donnedieu de Vabres, *La crise du droit pénal moderne, la politique criminelle des États autoritaires* (Paris: Sirey, 1938) and J. Danet, "Relire la politique criminelle des États autoritaires" in *Mélanges en l'honneur du Professeur Ottenhof* (Paris: Dalloz, 2006).

7 Law n° 2008-174 relative to safety detention and to the declaration of non-liability due to a psychological disorder.

8 Law of June 17, 1998.

9 "*Composition pénale*" is a form of diversion. The offender is asked to comply with some measures, which do not constitute punishment, even if the resemblance is great, since they include "specific fines, confiscation, and unpaid work," which sounds much like a community service order.

10 This procedure, known by its abbreviation, CRPC, is called "the French version of pleading guilty."

11 Which is a sentence, but may also be proposed as a *composition pénale* measure.

12 On this confusion and the dangers it entails, see J.-L. Senon, C. Manzanera, "L'obligation de soins dans la loi renforçant la lutte contre la récidive," *Actualité Juridique Pénal*, 2007, 9, p. 367.

13 The misdemeanor of indecent exposure (article 222-32 of the Penal Code) calls for one year's imprisonment and a social-judicial probation order (article 222-48-1).

14 For murder accompanied by torture or acts of barbarity.

15 See Ph. Bessoles, ed., *Criminalité et récidive* (Grenoble: Presses Universitaires de Grenoble, 2007).

16 Which is to say, to make sure that the council for the defense is better able to discuss the charges.

17 There are now up to eleven main ways of handling misdemeanors, with six kinds of diversion, including "*composition pénale*," and five types of prosecution: the "*ordonnance pénale*" or simplified procedure, a hearing before a single judge, a collegial hearing, summary trial and trial following admission of guilt.

18 The notion of "organized" crime or offending takes the form of a list of offenses which lawmakers can extend as they like to repair some curious original omissions (as is the case, presently, for corruption), or to broaden the field of application of this exceptional procedure.

19 Except for the criminal chamber of the court of cassation, the processing period for procedures is increasingly long.