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FROM SECURITY-MANIA TO HYPER-CRIMINALIZATION: FRENCH JUSTICE UNDER PRESSURE

The judicial system represents the end result of all State security schemes. The demand for more security implies handling the whip of penal threat with effective sanctions. For this reason, French policies have strengthened criminal sanctions and judicial efficiency. Such efforts show in the figures concerning imprisonment. The detention rate in France (for 100,000 inhabitants on Jan, 1st each year) has risen from 57.6 in 1970 to 66 in 1980, 77.6 in 1990, reaching 81.6 in 2000 and 91.5 in 2007. A steady growth in the detention rate started in the 80s but has soared since 2002.

What link is to be found between this process and the urge for security—given that justice is meant to be independent from both government agencies and parliamentary powers and that judges can pass sentences in full discretion? Such judicial independence is clear and has been confirmed by the many court sentences involving members of the elite, including senior political staff.[1] The new judicial status enacted in 1993 has indeed offered a better protection for judges' careers.[2]

Have judges become so much more severe in their sentencing in other cases? Perhaps, but that alone cannot explain detention inflation. It seems rather that court sentencing is overly determined and influenced by decisions made before

trial. Criminal justice works as a system where the trial is both the ultimate step and merely the most visible one. Hence, the reasons for hyper-criminalization are to be found elsewhere: below the visible top of the penal system iceberg.

What are the elements that come into view in the process of bringing a case before the court and defining its contours? There are many and we cannot discuss them all in this paper: police action, prosecutor's office decisions, victims' demands (complaint and suing), nature of proceedings, contents of the law. Looking at all of these different aspects of the justice system shows that hyper-criminalization is the result of modifications of different decision parameters. The evolution of legal provisions and the transformation of judicial agencies are two of the most major modifications.

NEW OFFENCES AND THE RISE OF SENTENCING LEVEL: THE PENAL NET WIDENING

Court decisions are based on law provisions which define the boundaries of penal action as well as the nature of offences and corresponding sentences. The law also delineates proceedings that determine judicial methods: both aspects have greatly expanded in the past years in France. Many Western countries have undergone this type of process which specialists call "penal net widening."

Legislating new offences or making sentences more severe for the existing offences represent the largest contributors to this process. Harsher sanctions for road traffic offences stand as the best example: drunk driving may now lead to a jail sentence. Prostitution has recently been criminalized in this country, public solicitation now is an offence. Gathering in a public

space has also been penalized in order to prevent young people from hanging out in public housing projects and being a nuisance to residents. A major act voted into law after the 2007 presidential election will definitely have the effect of increasing criminal sanctions in the future. It compels courts to impose mandatory minimums and very severe sentences for re-offenders.

More than the mere effect of increasing the number of potential situations considered as offences and the number sent to court by data-accountable police, such new provisions tend to catch in the criminal net individuals who would not have been caught in other circumstances. Sociological analysis of the penal system has long shown that those who receive heavy sentences owe it to their criminal record rather than to the nature of their offence. Indeed, previous remissions of sentences are cancelled out by any new offence and the court may refer to previous prosecutions to give a more severe sentence. Besides, after imprisonment, a diminished social status puts someone in a precarious position where minor re-offending is more likely to occur.

Hence, the diversification of legal possibilities to get caught in the penal net proportionately multiplies the occasions one faces a new and harsher sentence in a cumulative process. Now some categories of persons are disproportionately exposed to the risk of being in a position to repeatedly perform minor illicit deeds which could lead them on the criminal justice path: migrants, unemployed, homeless, alcohol or drug addicts, etc. Extension of the penal perimeter and the narrowing of the stitches of its net consequently multiply the rate and length of sentences.

This first process is enhanced by the rationalization of the management of penal cases undertaken in the two last decades, following the political urge to bring alleged impunity to an end. The penal system was indeed facing two problems due to the increasing congestion of court activity resulting from intensive policing. First, the delay of court hearings was becoming unacceptable, sometimes reaching a whole year after prosecution. Second, a large amount of minor offences were not be prosecuted. Hence, the criminal justice system was having bad results, lacking efficiency in the eyes of both the police and public opinion, and producing a feeling of impunity among presumed offenders awaiting their trial. Several schemes were then implemented in order to make the courts swifter.

During the 80s and 90s, two kinds of proceedings were set to meet this goal. One of them aimed at reducing the waiting time for lower court hearings. "Immediate sentencing" trials took place within 48 hours of offending. The timeline for preparing a defense was squeezed and harsher sentences were commonly pronounced. "Swift proceedings" were also implemented for investigations carried out in the short term. In this case, an instant communication device between police and prosecutor's office bypassed the usual bureaucratic delays and a close date for trial was set on a hearings calendar.[3] Such schemes enhanced court business capacity extensively, showing alleged vacant space for more prosecutions. Improving court flow capacity, these two proceedings thus worked in combination as a magnet for the prosecution of further offences.

In addition, they are exacerbated by a second kind of proceeding: diversion measures. When incriminating deeds are considered benign by the prosecutor, s/he considers a third

possibility between prosecution and dropping the case: therapeutic referrals (for drug addicts), penal mediation (for offences with prejudice), reparation or community referrals (for minors), and warnings (for illegal troublesome behaviour). Such measures offer a penal response without an effective sentence or a criminal record for the offender. Nonetheless, such responses feed the penal system circuit with situations that would have remained out of it if dealt with by ordinary or informal disciplinary sanctions.

The amplification effect is even stronger when combined with conventions mutually adopted by the prosecutor's office and local authorities or agencies (e.g. schools) that stipulate that the most minute of offences will be reported to the prosecutor instead of being dealt with within the community. Such conventions were designed for French local communities considered "sensitive" by national urban security policies. This results in additional cases of first contacts with the criminal justice system which increases the odds for prosecution and sentencing when re-offending, even in a minor way.

Moreover, new proceedings were inaugurated in early 2000: "penal bargaining" and "guilty plea" referrals[4]. They require the acknowledgement of guilt by the offender, after which the prosecutor proposes a sentence which is then ratified by the judge. This ends up as a new way to fall into the penal system and a new stitch in the process of extending the penal net.[5]

The urge for more efficient criminal justice did not, at first, respond to a motivation for a more repressive system but, rather, it intended to make justice swifter, closer to the com-

munity and more respectful of the citizen, following in the spirit of restorative justice.[6] But this purpose of meting out better justice gradually waned and was replaced by management goals and substantial pressure coming from public authorities, where head prosecutors played a decisive role.

PROSECUTION OFFICE (PO) COMBINING JUDICIAL ACTION WITH SECURITY POLICIES

French criminal justice is carried out by a body of professional magistrates divided between judges and prosecutors. The latter plead the case against the accused before the court. Also, the prosecution is in charge—they have the discretionary mandate either of pursuing or dropping the charges or taking a diversion referral. They also hold power to urge for and monitor a police inquiry (police detectives are put under the prosecutor's supervision), to order a judicial inquiry to be carried out by an "inquiry judge" for complex cases and to put in a request for custody.

Such prerogatives make the prosecutor the master of the penal system, with the single exception of the trial. Case selection and a tribunal's activity depend on his decisions. The whole process is known as "penal policies." But these do not merely reflect national and governmental policies in terms of public responses to crime. The prosecution office has acquired some leeway and autonomy concerning local penal policy at the tier of the tribunal's jurisdiction.

Indeed, since the 1980s, head prosecutors have endeavoured to bring additional value to their professional identity: they gradually turned a rather bureaucratic activity into one that includes team management and is concerned with com-

munity issues. During the 1990s, this change continued under the guise not of repressive intention but of modernising criminal justice as a public service.[7]

This was the aim pursued by head prosecutors when they designed most of the devices mentioned above: local prosecution offices implemented experimental schemes of mediation, reparation, swift proceedings and penal bargaining, without being explicitly supported by ministerial authorities. The same stated purpose of serving the community and innovating prevailed when prosecutors took part in local security policies where they represent the judicial institution. Creation of Law Centers ("*Maisons de justice et du droit*") in "sensitive" local communities and later of Local Security Councils (chaired by both the head prosecutor and the mayor) occurred following the same principles.

Prosecutors mediate between local security issues and penal policies, referring to their status as "director of judicial police services." This implies a need to coordinate the action of different agencies (police, *gendarmerie*, crime prevention, schools, local authorities, etc.) according to local security and crime issues as defined by "local diagnoses". Policing and judicial action are thus adapted to respond to specific targets of delinquency.

During this period of POs' innovations and involvement in local schemes, the pressure from governmental authorities tended to ease. In 1993, a reform of the Higher Magistrates' Council ("CSM")—which supervises the appointment and promotion of prosecutors—lessened the powers of the department of justice over prosecutors' careers. Since 1997, no more

direct instructions on specific cases are given to prosecutors by ministerial authority. Head prosecutors now carry out the monitoring of local "penal policies" independently. Hence, at this time, the process of increased criminalization was due to the reorganization and reinforcement of joint security and penal action, rather than actual pressure from the ministerial authorities. Such coordination was to be enhanced in the following years with the creation of new institutions such as Local Committees Against Illegal Employment ("*Colti*") or Local Intervention Groups targeting organized crime.

The 2002 presidential election came as a notable turn point in the process of extending the POs' field of action. Indeed, the new government has meant to use the support of prosecutors in order to implement its projects and strengthen the fight against crime, following a presidential campaign during which security concerns reached unprecedented levels. New proceedings (penal bargaining and guilty plea) are extended in their realm of application and a 2004 penal statute allots additional powers to prosecutors in matters of judicial investigations, further reducing the power of judges.

Ministerial instructions on specific cases remain scarce but on the other hand, there is an abundance of general instructions from the central government concerning particular responses aimed at various types of crime. Paedophilia is one example, designated by new national policies. Domestic violence is another, and prosecutors are being asked to find ways to deal appropriately with violent men. It is quite relevant that, from this time onwards, many ministerial instructions landing on prosecutors' desks are signed by both the minister of justice

and the home secretary, putting judicial action under the yoke of national security policies.

The government has initiated a re-centralization of judicial penal policies and prosecutors are to abide by national priorities. A crime prevention act in 2007 emphasises putting pressure on prosecutors by emphasising the hierarchical relationship between general prosecutors' powers over head prosecutors[8], especially when the coordination of penal policies at the regional level is at stake.

Thus, prosecutors' autonomy has tended to shrink to the point where the goal of excluding them from the body of magistrates that they share with judges has emerged from a parliamentary commission set to reform the justice system. This demand also comes from lawyers and judges who consider the extensive powers of prosecutors a threat to the institutional independence of justice.

Such a fear appears even more acute since the 2007 presidential election, as the pressure for change grows even stronger. It is reflected in some highly emotive events brought into the judicial milieu. In October 2007, a prosecutor was summoned by the department of justice because he made the claim in court that the newly edited minimum sentences were not compulsory. Yet both law and tradition guarantee free speech for prosecutors in court. Thus, the government is plainly playing on the edge of violating the independence of magistrates by invoking a major agent of the hyper-criminalization process: minimum sentences for re-offenders.

Additionally, another kind of pressure is exerted in the process of appointments. Since 2007, head prosecutors of

major jurisdictions (relative to their size and to the politically or economically important cases of which they are in charge) were appointed by the department of justice in spite of disapproval from the High Council of Magistrates. General prosecutors (head of PO at the court of appeals level) were appointed outside the high magistrates' usual turnover period, one of them having changed office six months before his retirement date. This large-scale replacement procedure was made in the name of gender equality to improve its public appeal, but in fact it reveals a political intention to take control over the prosecution process.

The evolution toward harsher penal justice has more subtle explanations than one might think, at first glance. It obviously is a response to the urge for stronger security and penal sanctions coming from the public and from the State, but this involves a series of indirect effects given that judges do not act under the authority of executive powers. The independence of magistrates is no mere illusion: it may not always be effective, but it does reveal itself in the many court decisions that go against governmental interests. Hence, penal justice is not under direct State control. Yet it is undergoing strong pressure from the State because of the evolution of penal regulations and the selective flow of cases reaching courts. On this second dimension, the control that national and local security policies have on court activity is highly decisive. Prosecutors emerge as significant players in this process, though fairly autonomous at first. Yet a strong hierarchy of control has taken over since and it is likely to intensify in the future, as suggested by the events we have just considered.

NOTES

1 See V. Roussel, *Affaires de juges. Les magistrats dans les scandales politiques en France*, Paris, La Découverte, 2002.

2 See J.-P. Royer, *Histoire de la justice en France*, Paris, PUF, 2001.

3 See B. Bastard, C. Mouhanna, *Une justice dans l'urgence. Le traitement en temps réel des affaires pénales*, PUF, Paris, 2007

4 « Composition pénale » and « comparution sur reconnaissance préalable de culpabilité ».

5 See Ph. A. Milburn, C. Mouhanna, V. Perrocheau, « Controverses et compromis dans la mise en place de la composition pénale », *Archives de politique criminelle*, n°27, 2005, p.151-165.

6 See Ph. A. Milburn, "How civil society is on the criminal justice agenda in France", in: J. Shapland (ed.), *.Justice, community and civil society, a contested terrain*. London, Willan, 2008.

7 The following analyses are inspired by a research programme on head prosecutors in France. See Ph. A. Milburn and D. Salas, *Les procureurs de la République. De la compétence personnelle à l'identité collective*. Rapport de recherche, Paris, Mission de recherche droit et justice, 2007.

8 General prosecutors officiate at Appeal court level and they are therefore in a superior position to head prosecutors at first level courts.