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French parole and 'sentence management'

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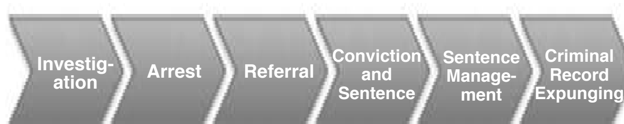
On January 1st, 2017, there were 78,796 inmates serving time in French prisons (59,300) or on remand (19,498). However, this official number includes those serving part of their time in 'prisoners' serving a 'measure under prison registry', ie either a 'semi-freedom' measure, where they spend part of their time in prison (usually night-time and weekends) and part of their time in the community having activities (eg Employment, treatment), or a 'placement in the community', ie a measure where the person is placed in the French equivalent of approved premises, or is serving time at home with an electronic monitoring device 'unless the court has issued a bench warrant, prison sentences of up to two years (one year if the person is a recidivist in the narrow legal sense) are' The main lesson for English parole is that it is paramount, In other words, strictly speaking, there were 68,432 people detained full time in prison. There were at the same time 164,146 people on probation, a term which includes people serving a community sentence or released prisoners on licence who are supervised by the probation services and/or charities.[1] Statistics for lifers were provided by he Ministry of Justice in 2018, for 2015: there were only 541.[2] France has a 'life without parole' system, which consists in a life sentence and the equivalent of a tariff (*mesure de sûreté*) which is itself perpetual in nature, which makes release impossible before thirty years.[3] No official statistics exist concerning 'true' life, probably because they sheer number is so minimal. A personal contact with the *Observatoire international des prisons* (Sept., 5, 2018) (International prison watch, France) has revealed that a total of four people had been sentenced to true life since its creation in 1994, one of whom has since died. Clearly, France appears rather unique in terms of its approach to sentencing. Moreover, probation and parole are part of a unique legal and institutional domain called 'sentence implementation' or 'sentence management', which associates the prison and probation services and the judiciary, notably a 'sentence implementation judge' (*juge de l'application des peines*, JAP). In essence, France sees sentence management as being part of the penal continuum and as being a dynamic process in which important decisions are made by the JAP, and daily supervision is performed by the probation services.

This article will describe: processes of sentence management from court, through prison and post release in France; the legal and practical structures of these processes, and shall consider the realities of the implementation of these sentence management ideals in light of current managerial, institutional, and political pressures.

It will be argued that the sentence management ideals in France offer the potential for positive examples internationally notwithstanding their imperfections and fragilities.

Parole as part of 'sentence management'

In France, parole is part of a wide specialised legal field called 'sentence implementation law' or 'sentence management'. The concept of sentence management refers to the understanding that sentences are dynamic, and the JAP must regularly adapt them to offenders' circumstances, reinsertion efforts, or the lack thereof. Prison release is thus perceived as being one of the phases of the penal process, which includes the supervision of community sentences, and prison release, reentry and supervision. It is regulated by 'Book' V (Livre, that is Part) of the Penal Procedure Code. This penal continuum is as follows:



1 Ministry of Justice (France) (2017). *Annuaire statistique, 2016,* Chapter 8 "L'application des peines ».
2 Ministry of Justice (France) (2018). *Projet de loi de programmation pour la justice 2018-2022*. Etude d'impact. 23 April.
3 Herzog-Evans, M. (2017). *Droit de l'exécution des peines.* Paris: Dalloz, 5th ed.

In essence, the penal courts which deal with felonies or crimes (not misdemeanours, because they do not carry prison sentences) convict and sentence offenders to prison, which then opens the sentence management phase, during which the JAP is competent. Unless the court has issued a bench warrant, prison sentences of up to two years (one year if the person is a recidivist in the narrow legal sense) are referred to the JAP, who can change them before the person is even sent to jail; this is called an 'article 723-15 procedure'. Longer sentences or people sent directly to jail via a bench warrant, or who have failed to submit to the JAP's '723-15 convocation' or to initiate the reinsertion efforts s/he requested (looking for a job; beginning treatment, etc.) serve part of their sentence until the JAP can release them early (usually between a third and a half of their sentence).

One of the striking features of the French sentence management system is how much flexibility, agency, and options the prisoners—and consequently, the JAP—have.

This article will, therefore, describe: the processes of sentence management from court, through prison and post release in France;the legal and practical structures of these processes, and shall consider the realities of the implementation of these sentence management ideals in light of current managerial and political pressures.

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Prison release measures and decisions making

In France, release decisions are made by a judge, the JAP, and parole or medical release decisions for long sentences are within the competence of a three JAP tribunal (*tribunal de l'application des peines*—TAP).

In essence, prison release is perceived as being the direct result of the prisoners' agency: Prisoners must file an application, which presents their release project, which they must prepare either on their own, or typically, with their attorney, their family, charities, employment and other agencies, and the probation services. The project is expected to meet the person's social and psychological needs; for instance, a drug abuser is expected to include a drug treatment component, the nature of which is usually left open to the prisoner's decision. The prisoner can choose to live wherever s/he wants, provided that there is no no-contact or no-show condition already attached to the sentence or the JAP does not deem this necessary (e.g. in a domestic violence cases). Releasees who are physically and mentally fit are expected to seek employment upon their release and to initiate contact with different community agencies before their release. Furlough is typically granted before the final release decision is made, allowing prisoners to meet charities, employment agencies, or treatment centres. Having obtained several furloughs and returned safely and on time to prison is a positive factor which the JAP takes into consideration.

Release projects are called 'prisoners' projects'. A typical question a JAP would ask at the beginning of a hearing would thus be: '*Can you describe your project to the court?'* The hearing consists in discussing the project and choosing the best measure to facilitate its smooth execution. Indeed, the prisoners apply for one, or sometimes alternatively, several release measures. A JAP cannot release a prisoner via one particular measure (e.g. semi-freedom) if the prisoner wants another (e.g. electronic monitoring—EM). The choice of a suitable measure depends on whether the prisoner needs more support, more monitoring, more freedom, for example to take care of small children, to travel, to get residential treatment, etc.

Release or release preparatory measures such as furlough are made in the context of roughly two main procedures: those which abide by due process rules, and are therefore close to the legitimacy of justice-procedural justice—therapeutic jurisprudence paradigm,[4] and those which are made in the absence of due process, and in which prisoners do not have a voice.

Measures which are pronounced without a court hearing in the context of a 'sentence' implementation commission, in which the prosecutor, prison governor, prison officers and probation officers sit, but in which the prisoner or his/her attorney are not present, are the following:

4. Herzog-Evans, M. (2016 a). Law as an extrinsic responsivity factor: What's just is what works! *European Journal of Probation, 8(3)*, 146-169.

- *Credit remission* is automatically granted to prisoners (three months for the first year and two for the following years; seven days per month for shorter sentences). The JAP can intervene and withdraw part or all of it if prisoners commit disciplinary offences whilst incarcerated. These are not release measures per se, but they greatly contribute, together with supplementary remission, to the reduction of time served in prison;
- *Supplementary remission* is granted by the JAP once a year (totalling three months for each year), or once a month for shorter sentences (seven days per month) and is based on the reinsertion efforts made by prisoners in the form of education, vocational training, work, treatment, the payment of liquidated damages, and even to read books;
- *Furlough*, of which there are four different types, depending on what the goal is and ranging from a few hours (e.g. to go to the hospital or to meet a potential employer) to several days (the most frequent causes being maintaining family contacts, or in tragic cases, attending a burial or seeing a dying family member one last time);
- *Furlough with escort* is granted for exceptional and tragic causes such as a death in the family and for prisoners who are either too far away from their release date, too dangerous, or represent too serious a flight risk for ordinary furlough to be granted.

Remission mostly is a tool which aims at encouraging prisoners to be of good behaviour, furlough is understood as being necessary to prepare for a full release measure, by gradually exposing prisoners to the outside world, and allowing them to make the necessary arrangements and contacts (e.g. with a hospital, a charity, state or private employment agencies, and so on).

Measures which are taken by the JAP or the TAP via a court hearing where the JAP, the prison governor or probation chief, and the prosecutor sit (the decision is made by the JAP alone) and where the prisoner and his/her attorney are present are: 'Conditional release' ('libération conditionnelle'), that is parole, where the person is supervised by the probation service and must abide by several obligations, but is otherwise essentially free; 'Sentence suspension'—ordinary, that is the suspension for a maximum of four years of sentences of up to two years for medical, social or family reasons, which in practice is seldom pronounced; and 'Medical sentence suspension' for dying people or people with a serious medical condition which is incompatible with incarceration, as analysed according to article 3 of the European Human Rights Convention.[5]

Measures under prison registry can also be managed (adapted) during their execution. The JAP can grant remission and furlough (particularly over weekends, so that prisoners can enjoy family life and activities).

The JAP can also pronounce three other measures via a due process trial: EM; semi-freedom in which the person is daily released into the community for work, to seek employment, to get treatment or to take care of his family, but returns to prison at night and over the weekend; and placement in the community, which is a very supportive measure for very dissocialised offenders with multiple needs, and is managed by charities and executed in specialised centres or in therapeutic apartments. These measures can also be pronounced as stand-alone sentences by the penal court. They only apply to sentences of up to two years for longer sentences with up to two years left to serve, whether the procedure comprises due process or not. These measures are called 'under prison registry' (sous écrou) because whilst (partly) physically released, the person is still legally a prisoner and has a prisoner identification number (*écrou*). These measures can also, and for the most serious cases (sexual or serious violent offences and long sentences) must, be used as probationary measures attached to parole. This creates a type of decompression chamber between high security prison and parole.

In 2014 the law was amended and created a procedure which competes with due process procedures. Called 'release under constraint', this procedure is open to offenders serving up to two years and who have not been released via a due process trial and without a release plan, by the time they have

5. Mortet, L. (2007). La suspension médicale de peine. Paris : L'Harmattan

served two third on their sentence. In this case, the JAP releases prisoners in the context of the aforementioned 'sentence' implementation commission'. The prison services, who drafted this piece of legislation, hoped that without the bother of a due process trial, more prisoners would be released. This did not work out for a number of reasons, which are examined below

Measures under prison registry can also be managed (adapted) during their execution. The JAP can grant remission and furlough (particularly over weekends, so that prisoners can enjoy family life and activities). S/he can additionally decide to transform one measure into another, for instance, EM into semi-freedom, if the person has breached an EM measure, rather than recall the person fully to prison, or conversely, semi-freedom into EM or even into parole, if the person is doing well.

The Constitution further allows the executive—in our case, the prison and probation services—to draft the laws and decrees that pertain to prison and community sentences and sentence management.

Obligations and prohibitions

The same list of obligations applies to community sentences and to release measures; some are mandatory and apply automatically, which means that the JAP cannot exempt releasees from them; others are optional.

- There are six mandatory control measures listed in article 132-44 of the Penal Code, notably the obligation to attend the meetings set by probation officers, to provide documented proof of residency, employment, treatment or payment of damages, or to seek the JAP's permission to change jobs or residency;

- There are 22 optional (for the court, not the releasee) *obligations or prohibitions* listed in article 132-45 of the Penal Code from which the JAP can choose. The obligations are, for instance, to work; to seek vocational training education; to seek treatment; to pay damages, a fine, or alimony. The person can be prohibited from going to bars or talking publicly about the offence, or can be issued a no-contact or restraining obligation regarding an ex-partner or the victim, and so forth. Importantly, because it is not mentioned in art. 132-45, the JAP cannot prohibit the use of computers or the internet, nor can s/he impose random drug tests. In practice, the JAP essentially uses only one to three optional obligations, that is, to seek or keep employment, to seek treatment, and to pay damages.[6] Adding or removing obligations, depending on the releasee's needs, circumstances, and behaviour, is also understood as being part of sentence management.

Recent trends in French prison release

The sentence management landscape has changed considerably in recent years. Hereafter, I shall list only the most salient issues.

First, as the state probation services have gradually focused exclusively on sentence implementation and have left the court building as a result of a 1999 merger with the prison services, their professional culture has become prisonised and more punitive. Combined with the increased recruitment of lawyers[7] and the more positive recent 'criminology' momentum, this means that the probation staff are now hybrid lawyers and criminologists whose tasks are essentially understood as the processing of files and documents, and as working with offenders on their 'criminal act' (*passage à l'acte*). Meanwhile, social work and the treatment of criminogenic and non-criminogenic needs are mostly completed by the third sector and community agencies,[8] which contribute, as stated above, to the elaboration of release projects (with the help of attorneys, many of them playing a *de facto* desistance supportive role.[9] The rampant privatisation of sentence management has led to *en masse* referral, which has not been theorised or thought of in 'case management' terms. Moreover, far too often, this leads to turf war

6. Herzog-Evans, M. (2014). *French reentry courts and rehabilitation: Mister Jourdain of desistance*. Paris: L'Harmattan.
7. de Larminat, X. (2012). *La probation en quête d'approbation. L'exécution des peines en milieu ouvert entre gestion des risques et gestion des flux,* Ph D thesis, Cesdip-University of Versailles-Saint Quentin.
8. Herzog-Evans, M. (forthcoming). France: managerialism, 'get off your butts' and de facto not-for-profit privatisation, in Dünkel, F., Pruin, I., Storgaard, A. & Weber, J. (eds.). Prisoner resettlement in Europe. Abingdon: Routledge. Herzog-Evans, M. (2018). French probation and prisoner resettlement: Involuntary 'privatisation' and corporatism, in Daems, T. & Vanderbekken, T. (eds.). *Privatising punishment in Europe?* Abingdon: Routledge, pp. 104-123.
9. Herzog-Evans, M. (2016). Release and supervision; relationship and support from classic and holistic attorneys. *International Journal of Therapeutic Jurisprudence, 1(1)*, 23-58.

issues, although there are considerable local variations in this respect.[10] It does not help that the probation and prison services have become hyper-managerial;[11] this has occurred not so much, as in other jurisdictions, in order to generate more accountability and efficiency, but to manage and make do because of the state public services' utter financial and material misery. The nexus of managerialism and hyper-centralism and bureaucracy does not make for very collaborative entities. The French Constitution, which considers only the executive and, to a limited degree, the legislative branches as 'powers', but not the judiciary, further contributes to this. The Constitution further allows the executive—in our case, the prison and probation services—to draft the laws and decrees that pertain to prison and community sentences and sentence management. In recent years, the prison and probation services have used this de facto legislative power to create several parallel release procedures which are devoid of due process, or respect for prisoners' agency, and are in essence designed as a managerial prison clearing system. In practice, however, the vast majority of practitioners and a significant proportion of prisoners have rejected this procedure: prisoners, because they are not at all supported through the gate[12] and their agency is not respected, and practitioners, because as many decision-making studies have shown,[13] when authorities or judges receive less qualitative information on applicants (in this procedure, virtually none are available), they are less likely to grant early release, not more likely as reformers had hoped, which was confirmed by a recent study I conducted.[14]

Conclusion

French sentence management produces a very flexible system, because it is seen as being part of the penal continuum, and as a dynamic process, which must be continually adapted to the person's circumstances and progress. It is a system in which the person is considered to be the actor in his release project and as being in the driver's seat when it comes to deciding about the nature and the content of the release measure. Baring more expedient parallel out of court procedures, the vast majority of release procedures furthermore respect the legitimacy of justice and procedural justice, which, along with offender agency, probably supports positive outcomes.

This model is, however, fragile, because hyper-centralisation has met managerialism, and the probation services have merged with the prison service executive. Repeated executive-led legislative attacks, thanks to a Constitution that does not truly recognise the separation of powers to the detriment of the judiciary[15] are being carried out, such as the failed attempts at creating administrative release procedures, which prisoners and practitioners have rejected. Thus, as I am writing these lines, a Bill currently being discussed in Parliament is planning to award furlough decisions to prison governors, with the risk of turning this measure purely into a prison management tool as opposed to a progressive reentry instrument. If the political right resents the fact that the JAP releases many offenders, and the left complains that it does not release enough, both camps converge to complain that the executive, that is through their own subordinates, does not have full control over these matters.

The main lesson for English parole is that is paramount, yet it is very difficult, to balance, on the one hand, due process, offender consent and engagement, qualitative reentry preparation and support, and, on the other hand the need to process prisoners out of prison in due time. This becomes particularly difficult in overcrowded times, when a natural institutional inclination is to instrumentalise release measures[16] with the sole purpose of freeing prison space, at the expense of resettlement and the prevention of reoffending. In short, one must ensure that efficiency does not trump efficacy.

10. Herzog-Evans, M. (2017). *La mise en œuvre de la libération sous contrainte dans le Nord-Est de la France*. Report for Mission Droit et Justice (GIP).
11. Dubourg, C. (2015). *Les services pénitentiaires d'insertion et de probation. Fondements juridiques. Evolution. Evaluation et avenir,* PhD thesis in criminal law and criminal sciences, University of Nantes.
12. Tribunal de Grande Instance de Créteil (2013). *Les obstacles à l'aménagement des peines. L'impact des courtes périodes de détention sur la mise en œuvre des aménagements de peine.* Rapport, 11 mars 2014. Available at: http://herzog-evans.com/les-courtes-peines-et-les-amenagements-de-peine/, accessed Dec. 15, 2017.
13. McNeill, F. & Beyens, K. (eds.) (2014). *Offender supervision in Europe*. Basingstoke: Palgrave Macmillan.
14. Herzog-Evans, 2017, op. cit.
15. Gentilini, A. (2014). *Le juge de l'application des peines: vers une disparition?*, in Ghelfi, F. (ed.). *Le droit de l'exécution des peines. Espoirs ou désillusion.* Paris: l'Harmattan, 107-120.
16. Snacken, S., Beyens, K. & Beernaert, M.A. (2010), 'Belgium', in Padfield, N., van Zyl Smit, D. & Dünkel, F. (Eds.) *Release from prison. European policy and practice,* Cullompton, Devon, Willan Publishing: 70-103.