PROMOTING NON-DISCRIMINATORY ALTERNATIVES TO IMPRISONMENT ACROSS EUROPE

NON-CUSTODIAL SANCTIONS AND MEASURES IN THE MEMBER STATES OF THE EUROPEAN UNION

France

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Funded by the European Union

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Non-custodial sanctions and measures in France

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I. LEGAL FRAMEWORK

1. General framework of the national system of penal sanctions

The law on criminal sanctions has historically been characterised by the principle of individualisation of the penalty, which was clearly enshrined in the 1994 Criminal Code, while a more recent law of 15 August 2014 sought to streamline it in article 132-1 of the Criminal Code. This article lays down the obligation to specify the penalty at the stage of its imposition, while specifying the criteria for applying this principle. The scope of the principle of individualization of punishment is now such that it must extend to the enforcement stage (art. 707 of the Criminal Procedure Code)[1].

The main sanctions correspond to the penalties incurred as principal sanctions for the commission of a criminal offence. They only set maximum sentences that make it possible to classify offences according to their degree of seriousness (criminal offence, intermediate offence – *délit* – or misdemeanor – *contravention*). Thus, criminal offences are punishable by at least 10 years imprisonment and may extend to life imprisonment. Criminal offences may also be subject to a fine. The benchmark penalties for intermediate offences are imprisonment (from 2 months to 10 years at most) and a fine. The main sanctions for minor offences are fines, with the possibility of depriving or restricting rights (e. g. confiscation of a weapon, suspension of a driver's license) for the highest degree of offence, or reparation sanction (arts. 131-14 and 131-15-1 of the Criminal Code).

It should be noted that for sentences of imprisonment of up to one year, the trial court (ab initio, i. e. when pronouncing the sentence) or sentence enforcement judges (in charge of the enforcement of sentences: *le juge d'application des peines*) may decide not to carry out the sentence and may use an alternative sentence (e. g. home detention under electronic surveillance, day parole, external placement, sentence splitting or parole, art. 474 and 723-15 of the Criminal Procedure Code). Under the supervision of the Criminal Division of the Court of Cassation, the judge is required to give specific reasons for refusing to adjust any penalty of less than or equal to one year[2].

Although convicted by a trial court, the accused may also escape sentencing through the general mechanism of discharge (exemption from punishment). Discharge is available for intermediate and minor offences (Criminal Code, arts. 132-58) and gives the judge the

[1] E. Bonis-Garçon et V. Peltier, Droit de la peine, Lexis-Nexis, 3e éd. 2019 ; M. Giacopelli et A. Ponseille, Droit de la peine, LGDJ, 2020 ; M. Herzog-Evans, Droit de l'exécution des peines, Dalloz, 6e éd. 2021.
[2] Ex. Cass. Crim. 7th MRCH 2018, n° 17-80.449, Dr. Pénal 2018, comm. 98, obs. V. Peltier.

opportunity either to avoid committing an injustice or to take into account the rehabilitation of the offender. Exemption from punishment is tantamount to admitting the guilt of the offender, but without it being accompanied by a penalty. Another specific option also exists: the discharge limited to cases of repentant persons (articles 132-78 of the Criminal Code).

2. Non-custodial sanctions

For a long time, there has been a wide range of non-custodial sanctions, whether as primary or complementary sanction, or as alternative to imprisonment. Fine plays a significant role. It may be both a primary and/or complementary penalty. Thus, in intermediate offenses matters, the judge may order it cumulatively or alternatively to imprisonment (Criminal Code, arts. 132-17). The amount of the fine shall be fixed by the court and shall not exceed the maximum amount provided for in the law.

The judge may also apply a suspended sentence by ordering a suspension of the execution of an imprisonment sentence of up to five years (arts. 132-29 et seq. of the Criminal Code, art. 734 Criminal Procedure Code). Incidentally, the law of 23 March 2019 made it the principle in intermediate offence matters. Article 132-19 of the Criminal Code provides that "any sentence of imprisonment without suspension may be imposed only as a last resort if the gravity of the offence and the personality of the perpetrator make it necessary and if any other sanction is manifestly inadequate". The suspended sentence may be simple or probative, in which case the convicted person may be subject to supervision by the Correctional Rehabilitation and Probation Service with the purpose of preventing recidivism and promoting reintegration. Sentence enforcement judges may also impose on the convicted person a series of obligations to do or not to do, or even receive medical treatment or assistance (for the list, see arts. 132-44 ss. of the Criminal Code).

Lastly, the lawmaker has in the recent decades showed to develop or strengthen the powers of the judge to impose an alternative sentence to imprisonment. The fact that the regime of these alternative penalties is disparate and difficult to understand doesn't serve their purpose. Firstly, home detention under electronic surveillance has a special place, since it has been included in the range of main sentences between imprisonment and fine since 2019. Parliament wanted to make it an alternative to imprisonment. The period of detention is between 15 days and six months, and it may not exceed the term of imprisonment incurred (art. 131-4-1 of the Criminal Code). It may appear to be a consensual penalty considering the convicted person is informed that the surveillance device may not be installed without his authorization, but a refusal constitutes a violation of his obligations, with the consequence that the prison sentence may be enforced... (art. 723- Criminal Procedure Code). Second, community service is a multi-faceted measure. It is a penalty that may be imposed instead of imprisonment (art. 131-8 of the Criminal Code), as a modality for the suspension of imprisonment (art. 132-41 of the Criminal Code), as a supplementary penalty to imprisonment mainly for traffic offences[3], or even as the main penalty for some minor offences (arts. 322-1 and 322-3 of the Criminal Code). Community service lasts between 20 and 400 hours over a period not exceeding 18 months and may only be carried out upon the consent of the person concerned. Thirdly, the judge may apply sanctions of restriction or deprivation of rights. Either the court pronounces as principal penalty a restriction or deprivation of rights, originally intended as a supplementary penalty, or it refers to a list of measures as alternatives to imprisonment (article 131-6 of the Criminal Code). Fourthly, the daily fine corresponds to a daily contribution for a certain number of days to be paid by the convicted person at the end

[3] It can also be pronounced in case of a suspended fine for minor offences, art. 131-17 Criminal Code.

of the period fixed by the judge. The daily fine may not exceed 1000 €/day over a maximum period of 360 days. The number of days' fine is determined in the light of the circumstances of the offence and the resources and charges of the accused (article 131-5 of the Criminal Code). Fifthly, various courses or training programmes may be ordered as an alternative or complementary sanction to imprisonment (e. g. citizenship course, drivers awareness course, etc. art. 131-5-1 Criminal Code). Sixthly and lastly, there is also the penalty of reparation, which also appears to be a hybrid alternative or cumulative penalty to imprisonment (articles 131-8-1 and 131-15-1 of the Criminal Code).

Since the 1994 Criminal Code, the prohibition of accessory or automatic penalties has been deduced/has arisen from article 132-17, which provides that "*no penalty may be imposed unless the court has specifically pronounced it*". However, this exclusion concerns only the Criminal Code. Automatic penalties still exist in other criminal laws or other codes and, while the Constitutional Council has censured certain automatic penalties for failure to comply with the principle of individualization of penalties[4], the prohibition applies only on a case-by-case basis[5] and other accessory penalties still remain.

3- Justification of the sentence: determination of the type and duration of a non-custodial sentence

Sentencing is determined on the basis of several criteria that must be taken into account by the court when delivering a judgement. They concern the convicted person and the circumstances of the offence (article 132-1 of the Criminal Code). First, the judge is required to consider the material, family and social circumstances of the convicted person. Thus, when imposing a fine, he must take into account "*the resources and charges of the offender*" (Criminal Code, art. 132-20). Generally speaking, the Criminal Code provides for a procedure for postponing sentencing in order to investigate the person's personality or material, family and social circumstances (Criminal Code, art. 132-70), but unfortunately it is only sparingly applied. The judge must also consider the degree of discernment of the person at the time of the commission of the offence and, in the absence of complete abolition of discernment or control over his actions, mental or neuropsychological disorders must be taken into account in order to adjust the penalty (Criminal Code, art. 122-1).

The actual choice of the quantum of the penalty cannot be only about the maximum prescribed by law, in as much as the lawful repetition of the offence or the presence of aggravating circumstances are general grounds for aggravating the quantum of the penalty (arts. 130-1 and 132-8 ss. of the Criminal Code. The proportionality of the penalty is verified by the control carried out by the Court of Cassation, according to which the judge cannot simply state that the penalty is "*appropriate to the nature of offence*", but, in the case of confiscation for example, he must also assess the proportionality of the infringement on the right to property of the convicted person[6].

In addition, since the law of 23rd March 2019, the legislator/lawmaker has prohibited any sentence of imprisonment of up to one month or less, while sentences of imprisonment of less than six months must be adjusted onto non-custodial measures by the trial court (Art. 132-19 of the Criminal Code). As a general rule, an appeal in front of the Court of Appeal is

[4] Cons. const. 11 juin 2010, n° 2010-6/7 QPC ; Cons. const. 3 févr. 2012, n° 2011-218 QPC.
[5] Cons. const. 27 janv. 2012, n° 2011-211 QPC.
[6] Cass. Crim. 8th March 2017, n° 15-87422. See also E. Dreyer, Un contrôle de proportionnalité à la Cour de cassation, Gaz. Pal. 4 oct 2016, p. 67.

possible, and the Criminal Division of the Court of Cassation therefore verifies the reasons given in the judgment by the trial judge[7].

4 – Implementation of non-custodial sanctions and consequences of non-compliance

Supervision of non-custodial sanctions is mainly carried out by the judge of the application of sentences/ sentence enforcement judge (*juge de l'application des peines*), who shares jurisdiction with the court of the application of sentences/sentences enforcement court. These are courts of first instance. The judge of the application of sentences/ sentence enforcement judge has a wide range of functions. In addition to his supervisory role, he is a mandating judge, a homologating judge, a requesting judge, an investigating judge and an executing judge. The profile of this judge is summarized in article D. 49-27 of the Criminal Procedure Code: "*The judge of the application of sentences/* sentence enforcement judge *shall determine the main procedures for the enforcement of custodial sentences or certain sentences involving restriction of liberty by directing and supervising the conditions for their enforcement*". In order to do this, he shall be assisted by the Correctional Service for Rehabilitation and Probation, which is part of the Prison Service and includes rehabilitation and probation counsellors.

In this context, the judge of the application of sentences/ sentence enforcement judge is free to change the duration of the sentence or even revoke it and, depending on the circumstances, to send the convicted person to prison to serve his sentence. In fact, two scenarios should be distinguished. Either the convicted person commits a new offence for which an imprisonment is pronounced as a penalty, and it will be up to the trial court to revoke the original non-custodial sentence, or the convicted person fails to comply with the obligations and the supervisory measures imposed on him, and in this case the measure shall be amended or revoked by the judge of the application of sentences/ sentence enforcement judge (Criminal Code, art. 132-47).

5 – Early release

There are several options for early release. The oldest and best known is undoubtedly the conditional release, created by the Act of 14th August 1885.
Parole decision-making competence is divided between the judge and the tribunal responsible for the enforcement of sentences (*Juge de l'application des peines* and *Tribunal de l'application des peines*). The former is competent to decide on convicts serving a term of imprisonment of up to 10 years or where the remaining period of imprisonment is less than 3 years. The latter is competent in all other cases, i. e. for prison sentences exceeding 10 years, for which a term of imprisonment exceeding 3 years remains to be served.

The first condition for parole is based on a temporal criterion. The Criminal Procedure Code speaks of "*probationary time*" (art. 729 Criminal Procedure Code). Thus, release may be granted "*when the term of the sentence served* (…) *is at least equal to the term of the sentence* (…) *remaining to be served*". In view of the legal possibilities for reducing existing sentences (e. g. automatic remission of sentences), a convicted person is eligible for conditional release before half-sentence. The probationary period for conditional release may not exceed 15 years or, if the convicted person is recidivist, 20 years. For persons sentenced to life imprisonment, the probationary period is 18 years; it is 22 years if the convicted person is a recidivist.

[7] M. Giacopelli, Vers une généralisation de l'exigence de motivation de la peine ?, D. 2017, p. 932 ; E. Dreyer, La cour de cassation contrôle-t-elle la motivation des peines par les juges du fond ?, Dr. Pén. 2018, étude 8.

However, at least in the case of long sentences, it is extremely rare for this to happen in practice. Most parolees are granted well after half the sentence has been served.

The second condition for parole is a requirement for social rehabilitation. It is essential that the convicted person makes serious efforts at social rehabilitation.
During the probationary period, the judge or the court of the application of sentences may adjust the measures adopted in the light of the convicted person's behaviour or changes in his or her personal circumstances. In the event of non-compliance of his/her obligations or in case he/she commits a new offence, the competent court may also revoke the conditional release. In such cases, the convicted person is returned to prison to serve the remainder of the sentence. On the other hand, if the convicted person fulfils the obligations imposed on him/her, the release is considered final at the end of the probationary period.
Release is certainly not an obligation for the convicted person and he is entitled to refuse a proposal for early release, except in the case of foreign convicts sentenced to removal from the territory. The latter are required to comply with early release when granted (art.729-2 Criminal Procedure Code).

In addition to parole, there is a mechanism for release under constraint when the remaining sentence is not more than five years/does not exceed dive years. Article 720 of the Criminal Procedure Code sets that the situation of the convicted person must be reviewed by the judge of the application of sentences/sentence enforcement judge when two thirds of his sentence has been executed. Release under constraint may take the form of parole, home detention under electronic surveillance, external placement or day parole. The enforcement judge may refuse to grant release under constraint only if he finds, by specially reasoned decision, that it is impossible to implement one of these measures in the light of the requirements of article 707 of the Criminal Procedure Code.

6 – Sanctions or measures applicable to vulnerable persons and minority groups

Certain categories of convicted persons enjoy special conditions for conditional release. The rules are more flexible first of all for repentants who may benefit from an exceptional remission in probationary period of up to five years (see above). The rules are also less restrictive for the parents of a child under 10 years of age. No probationary period is required. However, other requirements (Art. 729-3 Criminal Procedure Code) apply: the sentence imposed or remaining to be served must be less than or equal to four years; the convicted person must not be dangerous to minors. Conditional release is thus excluded in the case of persons convicted of a crime or intermediate offence committed against a minor, regardless of the child's relationship with the convicted person. Finally, the convicted person must exercise parental authority over the child knowing that a condition of cohabitation with the child, prior to incarceration, is also necessary, or else it must be a woman over 12 weeks pregnant. Finally, there are different rules for convicts over 70 years of age. Sentences served to qualify for parole do not apply to them. It may be granted provided that "the convict is reintegrated, in particular if he receives appropriate care to his situation outside the prison or if he proves to be accommodated, except in the event of a serious risk of re-offending or if such release is likely to cause a serious disturbance of public order".

The law also provides for the possibility of suspension of the custodial sentence for health reasons. Since the Act of 4 March 2002 on the rights of patients, article 720-1-1 of the Criminal Procedure Code provides for the release of a convicted person on humanitarian grounds "irrespective of the nature of the sentence or the duration of the sentence remaining to be served". This humanitarian basis explains that this measure of adjustment of the

sentence may be applied, by way of derogation, during a "*security period*" (*période de sûreté*), when the prisoner is by law excluded from the benefit from certain measures such as parole or day parole[8]. The Act of 15 August 2014 extended the scope of this suspension to persons in pre-trial detention and persons with psychiatric disorders, with the exception of persons admitted to psychiatric care without their consent.

Medical suspension of sentence is conditional upon prior expert assessment of the presence of one of the two situations provided for by law: either the convicted person "*has a life-threatening pathology*"[9] or his state of health is "*permanently incompatible with continued detention*", in which case the condition of the patient is particularly debilitating or the prison administration is unable to provide him with adequate care. In an emergency, suspension may be ordered on the basis of a medical certificate issued by the doctor in charge of the health facility in which the detainee is being taken care of. The decision is taken by the judge of the application of sentences/ sentence enforcement judge, as well as when the deprivation of liberty is for a period of up to 10 years or if the remaining period of detention is for up to 3 years. In all other cases, the decision rests with the Court of the application of sentences. The court may decide to suspend the sentence altogether or impose one or more of the obligations or prohibitions set in articles 132-44 and 132-45 of the Criminal Code (e. g. receiving visits from a social worker, establishing residence in a specified place, refraining from contacting certain persons). Suspension of sentence is therefore pronounced in the light of the convict's state of health, unless there is a serious risk of the offence being repeated, which could lead the competent court to keep the convict in prison, despite his medical condition.
The granting of a medical suspension of sentence clearly allows the convicted person to avoid imprisonment. However, the duration of his release remains uncertain/undetermined/undeterminate, since the state of health of the patient, which is the only justification for his release from prison, is, by hypothesis, contingent. Therefore, if the condition relating to the pathology disappears, the suspension is no longer necessary (art. 720-1-1, para. 5 Criminal Code) and a new medical examination may be carried out at any time, at the request of the Public Prosecutor's Office or on the initiative of the court which ordered the release (Criminal Code, art. D. 147-2-5. and D. 147-5). When the released prisoner is convicted for a crime (the most serious offence), a new expertise is mandatory every six months.

II - NON-CUSTODIAL SANCTIONS/MEASURES IN PRACTICE

1 - How non-custodial sanctions and measures work in practice

The Ministry of Justice created in 2018 the agency for community service and professional integration (ATIGIP in French). This follows the observation of recurrent overcrowding in prison and the inactivity of prisoners (28% of prisoners have a job) and the need to promote rehabilitation in order to reduce recidivism. As such, the agency is in particular responsible for developing community service initiatives (TIG in French / hereinafter referred to as TIG), which concern the 3.5% of sentences handed down/released, whereas nearly 80% of TIGs

[8] By way of derogation from the principle according to which during the safety period determined by the trial court, the convicted person may have no access to a modification of the sentence.
[9] The vital prognosis must be committed in a short term according to case law, V. Cass. Crim. 28 sept. 2005, n° 05-81.010, AJ Pénal 2005, p. 461, obs. M. Herzog-Evans ; Rev. sc. crim. p. 428, obs. P. Poncela.

are? successfully executed and their recidivism rate is lower than the one that can be observed after a short stay in prison[10].

At the statistical level, the most used sanction is by far the suspension of imprisonment sentence with probation (which in 2020 became the probationary suspension) which alone represents nearly 70% of the total sanctions carried out in an open environment, out of a total of 175 367. The other main measures are, in descending order, community service (16,984), suspension sentence with community service (11,201) and parole (4765). Women and people of foreign nationality respectively represent the 7.1% and the 8.5% of people under supervision in an open environment. All categories combined, the average length of application of the measures is 20.6 months[11]. All these measures concern sentenced persons, but other individuals can serve all or part of their sentence in a free environment, while remaining counted among those under prison service supervision, that is to say they still are registered within the prison administration. This is the case for people placed in home detention under electronic surveillance (11,669), in day parole (1457) or in external placement (679)[12].

2 - Control of the application of non-custodial sanctions / measures

This part refers to the rehabilitation and probation staff working with people under the control of justice (open or closed environment), whose service was created in 1999[13]. They "*are in charge of preparing and executing the decisions of the judicial authority relating to the rehabilitation and probation of persons placed under the control of justice, accused or sentenced. To this end, they implement policies of integration and prevention of recidivism, ensure the follow-up or supervision of persons placed under the control of justice and prepare the release of prisoners*" (art. 13 Prison Law of 24th Nov. 2009). This body includes penitentiary rehabilitation and probation advisers, heads of rehabilitation and probation penitentiary services, rehabilitation and probation prison directors, and functional directors of rehabilitation and probation prison services. The number of cases that prison and probation counselors have to address is significant and appears to be in the range of 120 to 130. Such circumstance affects the performance of their duties[14].

3 - Effectiveness of non-custodial sanctions in achieving the objectives of the sentence and reducing the use of imprisonment

Since the beginning of the 2000s, the execution of sentences has continued to undergo legislative changes, oscillating between simplification and complexification, softening and hardening, jurisdictionalization and de-jurisdictionalization. Although the competence in matters of adjustment of the custodial sentence is entrusted to a specialized judicial judge (judge of the application of sentences/sentences enforcement judge, court of the application of sentences, chamber of the application of sentences), there have been in recent years several attempts to relieve him from the decision-making in case of short sentences involving deprivation of liberty or in case of prisoners at the end of their sentence. Such attempts aimed at avoiding the so-called "dry" exits, meaning without adjustment of sentence. In fact, during the vote of the law of August 15, 2014 which created the release under constraint, the Prison

[10] Source : Agence nationale du travail d'intérêt général et de l'insertion professionnelle, atigip-justice.fr, consulté le 27 juillet 2021.
[11] Source : Statistique annuelles de milieu ouvert au 31 décembre 2020, Ministère de la justice
[12] Source : Mesure de l'incarcération au 1er janvier 2021, Ministère de la Justice.
[13] Décr. n° 99-276 du 13 avr. 1999, JO 14 avr. 1999, p. 5478. Decree n. ---- of 13 April 1999, OJ April 1999, Page --

[14] See, in this sense, M. Herzog-Evans, Droit de l'exécution des peines, Dalloz, 6e ed. 2021.

Service noted that 80% of convicts and 97% of people sentenced to short sentences left prison without sentence adjustment. The aim of the release under constraint was to move to an "industrialization" of early release from prison under the guise of imposing obligations on the convicted person. It is true that beyond the mediocre statistics and the drop that has concerned some sentence adjustment measures (e.g. parole or day parole), the prison overcrowding rate is an incentive for the authorities to empty the prisons.

The path of compulsory probation may indeed be a mean of freeing up places in prison. However it presents the risk for magistrates to pronounce heavier sanctions on the basis of the fact that early release shall likely apply. In addition, it may not appear to be the best way to avoid recidivism as it severely limits the convict's ability to associate with the release plan and to agree with the control measures imposed. Anyway, these successive policies are a failure in view of prison overcrowding in France compared to other European countries[15]. It is accepted that the accompaniment and follow-up of the offender strengthens the offender's chances of rehabilitation. This is certainly the case for inmates who have been granted a period of parole, who are significantly less likely to reoffend than those who have not obtained a sentence adjustment (23% versus 33%)[16].

The latest reform aims to systematize a little more the measure of release under constraint for people sentenced to two years or less in prison and who have not benefited from a modification of sentence or a classic release under constraint when the two thirds of the sentence were executed, as long as the remaining sentence duration is less than or equal to three months. The judge of the application of sentences/the sentences enforcement judge will set obligations and prohibitions, which will be monitored by the prison rehabilitation and probation service. At the same time, the sentence reduction regime, which until now include an automatic part, might be overhauled and give way to a system where all of the sentence reductions will be granted by the judge of the application of sentences/the sentences enforcement judge only to "prisoners who have demonstrated good behavior and demonstrated efforts of rehabilitation in detention" (up to 6 months per year or 14 days per month may be granted)[17].

III. IMPACT OF THE COVID-19 PANDEMIC ON THE IMPOSITION AND IMPLEMENTATION OF NON-CUSTODIAL SANCTIONS AND MEASURES

1. Non-custodial sentences or measures aimed at reducing the prison population as a means of preventing the spread of the virus within prison facilities

The state of health emergency was declared by the Emergency Law N° 2020 -290 of March 23rd, 2020 due to the Covid-19 pandemic. In this context, the French Government has decided to confine a large part of the French population in order to slow down the spread of the virus. The Emergency Health Act (*Loi d'urgence sanitaire*) was followed by a multitude of orders, decrees and circulars designed to ensure that the procedures and rules in force were adapted to current circumstances and to the lockdown. With regard to prisons, the situation at the beginning of the crisis was already dire because of critical overcrowding in many prisons. On the 1st of March 2020, they were 72 400 prisoners in France, for about 61 500 places.

[15] ECHR, 30 jan. 2020, n° 9671/15, D. 2020, p. 753, note J.-F. Renucci, p. 1195, obs. J.-P. Céré, p. 1643, obs. J. Pradel, et 2021. 432, chron. M. Afroukh et J.-P. Marguénaud ; AJDA 2020, p. 263, et 1064, note H. Avvenire ; AJ pénal 2020, p. 122, note J.-P. Céré. See also Council of Europe, Annual Criminal Statistics, https://wp.unil.ch/space/space-i/annual-reports/

[16] F. Cornuau et M. Juillard, Mesurer et comprendre les déterminants de la récidive des sortants de prison, Infostat Justice, july 2021, n° 183.

[17] At the time of writing, this bill is under consideration in Parliament.

Important steps were taken very quickly to curb the extreme risk of mass contagion posed by overcrowding in prisons: order No 2020-303 of 25th March 2020[18] on the adaptation of the rules of criminal procedure has allowed to soften some processes.

On the sentencing perspective, courts activity was drastically reduced, mechanically decreasing the flow of people entering in prison. Also, between the 17th March 2020 and the 10th May 2020, police services have noted a decrease in the number of complaints filed, and apart from certain types of offences (particularly domestic violence), the number of offences recorded has dropped considerably compared to the previous year's figures over the same period, although there are many factors which could explain this decrease (perhaps a decrease in criminal activity, but also difficulties in travelling to file a complaint during the lockdown)[19].

On the post-sentencing perspective, various measures have been taken. First, in terms of prisoners' posting or assignment, the order allows the assignment of convicted prisoners in remand centres and, conversely, the posting of remand prisoners in centres usually reserved for convicted prisoners. Then, regarding the adjustments of prison sentences to non-custodial measures – such as an external placement (*placement extérieur*, a prison sentence executed outside the prison), day parole, parole or reducing mandatory minimum sentences duration –, the special order lightens the decision-making process: those measures may be granted without adversarial procedure. The process was also softened for sentence reductions and sentence suspensions (both simple and medical suspensions).

Additional sentence reductions of 2 months have been granted for most of the convicts serving a custodial sentence during the national lockdown.

Finally, specific arrangements for early release with house arrest or conversion of sentence (including deferred community service and home detention under electronic surveillance) have been created for prisoners convicted to a sentence of less than 5 years of imprisonment and whose remaining sentence was less than or equal to 2 months (for early release) or 6 months (for conversion of sentence) according to their personal situation, provided that they had accommodation.

About the conversion of sentence, an administrative order[20] specified that it was preferable to convert the prison sentence to community service rather than electronic surveillance, as prison staff (who are appointed to put electronic wristbands) were overwhelmed, making it impossible to ensure effective enforcement of electronic surveillance. It was also planned to implement community service sanctions at a later stage, preferably in connection with the consequences of the pandemic (and for community service sanctions pronounced during the state of health emergency, in hospitals or retirement houses)[21].

Most of these measures – except the last two: early release with house arrest and conversion of sentence for those specific cases – were pre-existing but under-used. The health crisis forced the judges (*juges de l'application des peines*), the prison service and the public prosecution service (who has the competence to enforce the execution of a criminal sentence) to find solutions to avoid mass Covid-19 contamination in overcrowded prisons. Some of

[18] *Ordonnance* n° 2020-303 of 25th of March 2020 *portant adaptation de règles de procédure pénale sur le fondement de la loi n° 2020-290 du 23 mars 2020 d'urgence pour faire face à l'épidémie de Covid-19*.

[19] French *Sénat*, Control mission about the measures taken during the Covid-19 pandemic, « Covid-19 : Mieux organiser la Nation en temps de crise – Rapport final sur la mise en œuvre de l'état d'urgence sanitaire », 8th july 2020, p. 39-40 [on line].

[20] *Circulaire* 27th of March 2020, CRIM-2020-11/H2-26.03.2020, 1.5. et 1.5.2.

[21] *Circulaire* 27th of March 2020, CRIM-2020-11/H2-26.03.2020, 1.5.2.

these measures were recently promoted by a previous law[22] which intended to avoid short imprisonment sentences and was supposed to come into effect on 2020, 24th of March, but the pandemic made it necessary to put them into practice slightly before the expected date. Nevertheless, it should be noted that those instructions and measures were very variably followed depending on the location[23].

None of these measures was specifically applicable to vulnerable groups and/or minorities, although it is likely that the cases of pregnant women or person with health issues, for instance, were dealt with as a priority. A number of prisoners were also explicitly excluded from the non-custodial adjustments or early release measures: persons convicted for terrorism, for domestic violence, for sexual offence against under 15 minor, and prisoners who took part on a violent collective action in prison or those who put others at risk not respecting the current health protection rules.

The measures allowed the reduction of the prison population on about 13 000 prisoners, 6 000 among them receiving early release[24]. There is no official record of the impact of these measures on recidivism, although very few cases of repeated offence have been reported in the press[25] and the government mentioned 30 reoffending cases ending on reimprisonment[26]. The general perception is there was no massive recidivism caused by the early release of those convicts[27]. Nevertheless, there has been some critics from the public opinion against this attempt to "empty prisons", as from certain members of the Parliament who expressed their discontentment with the government choices during questioning sessions[28].

Regarding non-custodial sanctions such as community services or "*suivi socio-judiciaire*" (supervised community sentence), they were suspended during the lockdown period (march to may 2020), and the time to complete the sentence was extended[29]. For those sanctions which have been almost fully enforced by the date of confinement, the Public Prosecutor's Office was later requested not to resume them[30]. If the remaining hours to be served were less than 35 hours in the case of community service, for example, and if the penalty has otherwise been satisfactorily enforced up to that point, the sanction should be considered as executed.

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[22] *Loi* nº 2019-222 23rd of March 2019 *de programmation 2018-2022 et de réforme pour la justice*, see above.
[23] V. BIANCHI, « La prison à l'épreuve de la crise sanitaire », AJ Pénal, 2020, p. 202 s.
[24] French *Sénat*, Control mission about the measures taken during the Covid-19 pandemic, *op. cit*., p. 67 s. [on line].
[25] Some local or regional newspapers mentioned various cases of violent offences or sexual offences, e.g.: [https://france3-regions.francetvinfo.fr/auvergne-rhone-alpes/rhone/lyon/libere-avec-la-crise-covid-un-homme-soupconne-du-viol-une-jeune-iseroise-la-famille-denonce-un-scandale-judiciaire-2043202.html]; [https://www.ouest-france.fr/bretagne/ploermel-56800/ploermel-le-covid-19-le-libere-mais-il-retourne-en-prison-6817168] [30/09/21].
[26] See the answer of the French Minister of Justice to a deputy's question: [https://questions.assemblee-nationale.fr/q15/15-29408QE.htm] [30/09/21].
[27] See for instance [https://www.la-croix.com/France/Lepidemie-Covid-19-tres-efficace-vider-prisons-2020-10-14-1201119382] [30/09/21].
[28] E.g.: [https://questions.assemblee-nationale.fr/q15/15-29408QE.htm] [30/09/21] ; [https://questions.assemblee-nationale.fr/q15/15-27935QE.htm]; [https://questions.assemblee-nationale.fr/q15/15-27838QE.htm].
[29] *Circulaire* 27th of March 2020, CRIM-2020-11/H2-26.03.2020, 1.5.1.
[30] *Circulaire* of 20th May 2020, CRIM2020–15/E3- 20/05/2020, 2.2.

2. Impact of the pandemic on non-custodial sanctions/measures

During the lockdown, courts were encouraged to avoid pronouncing sanctions under electronic surveillance, and to opt for sanctions without the necessity of being registered with the penitentiary administration[31].

All the community service sanctions' execution were suspended during this period, and face-to-face interview between justice social workers (probation counselors) and convicts on non-custodial measures were canceled. Most of them were replaced by visio-conference or phone calls.

There is no available data about particularly vulnerable groups or minorities.

Social workers have had to bear a very heavy workload: checking accommodation for early releases, accompanying prisoners deprived of any contact with the outside world, … They were in great demand, specially by families asking information about their family member in prison[32]. Regarding computer equipment, there were significant deficiencies, with workers being obliged to use their own equipment. If efforts are underway to equip everyone, that was clearly not the case at the time of the onset of the pandemic.

Prison staff and justice social workers were not considered a priority for the care of children (like for instance the health care personnel), and some noted late provision of masks and hand sanitizer. However, they were identified as a priority for the vaccination when it became available.

About associative work: it was very severely affected by the lockdown and later period, with significant restrictions on the access to the prisons and very limited activity in general.

The only way to mitigate the negative impacts of the pandemic on the implementation of non-custodial sanctions was to reinforce the remote monitoring process, resorting to increased calling contacts with convicts and relatives.

3. Impact of the pandemic on the future of non-custodial sanctions

Several associations, lawyers, judges' federations and prison staff trade unions have expressed the wish to see the development of non-custodial sanctions and measures[33] – as implemented during the lockdown – to avoid short prison sentences and maintain a prison rate not exceeding 100 per cent occupancy, but the system introduced during this period ended in July 2020. Since then, the occupancy rate is back to high numbers[34], despite an incitement by the Ministry of Justice[35] to perpetuate some of those measures.

Incidentally, the *Conseil d'État* (French Higher Administrive Court) partially repealed this Ministry recommendation concerning the non-enforcement of long-standing short sentences and sentences of less than one month[36] because it ment a breach on the principle of enforcement of criminal sentences.

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[31] *Circulaire* 27th of March 2020, CRIM-2020-11/H2-26.03.2020, 1.5.

[32] French *Sénat*, Control mission about the measures taken during the Covid-19 pandemic, « Covid-19 : Mieux organiser la Nation en temps de crise – Rapport final sur la mise en œuvre de l'état d'urgence sanitaire », *op. cit*.

[33] Open letter to the French President Emmanuel Macron, « En finir avec la surpopulation carcérale », 3rd june 2020, with more than a thousand signatories.

[34] With 68 472 inmates for 60 374 places, the average occupancy rate in French prisons is 113%, even reaching an average rate of 132% in remand centres.

[35] *Circulaire* of 20th May 2020, CRIM2020–15/E3- 20/05/2020, *op. cit*., 2.1.

[36] *Conseil d'État*, 23 septembre 2021, nº 441255.

In the meantime, however, it should be noted that the Committee of Ministers of the Council of Europe, the body responsible for monitoring the enforcement of sentences pronounced by the European Court of Human Rights, has recently expressed concern about the lack of effectivity of the legislative measures taken by France to fight against overcrowding and specifically invited the authority to "privilege and strengthen the means needed to develop non-custodial measures, as well as to further raise awareness among the judiciary of the prison reduction objectives" of the last reform (*Law of 23th March 2019, see above*)[37].

The main lesson of the pandemic for the future is, in the French case, that the actual legislation, with a little political willpower, allows in fact the drastic reduction of prisons occupancy rates, without causing an outbreak of delinquency.

About material resources, the authorities have become aware of the need for technology equipment for the staff. They also take in consideration the indispensable accompaniment of persons placed in non-custodial sanctions during those lockdown periods.

IV. PROSPECTS FOR THE FUTURE OF ALTERNATIVE TO IMPRISONMENT

1- Are there innovative initiatives in your country regarding alternatives to deprivation of liberty, ongoing or in preparation?

There was an important reform on 2019[38] which came into effect on 24th March 2020 (*see above, Part I*). However, one year later, it seems that courts have not really seized some of those new alternative sanctions, as electronic monitored house arrest[39], like it happened before with other alternative sanctions[40]. The effective implementation of this reform is the main challenge French criminal sentence and justice system is facing nowadays.

2- In your opinion, what are the prospects for the development of sanctions or measures in a way that promotes an effective reduction in use of imprisonment?

The French probation system has many strengths, with an interesting diversity of non-custodial measures and rich human resources. But it also suffers from understaffed probation service, lack of financial support and material backwardness[41].

Development of structures and increased human resources to support sentences in the community would help promoting the implementation of non-custodial measures, along with the training of the judges. There has been a rise from 3 to 11% of *ab initio* alternative sentences pronounced in the last year: it can be seen like an encouraging trend. Event though, it is not conceivable to use those alternatives at present for the most serious crimes: it would not be accepted socially and the means for supervision/accompaniment are insufficient to date.

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[37] Committee of Ministers, Council of Europe, CM/Del/Dec(2021)1411/H46-12, Supervision of J.M.B. and Others v. France, 16th septembre 2021 [on line].

[38] *Loi* nº 2019-222 23rd of March 2019 *de programmation 2018-2022 et de réforme pour la justice*, *op. cit*.

[39] [https://blogs.mediapart.fr/observatoire-international-des-prisons-section-francaise/blog/230921/nouvelle-peine-de-detention-domicile-sous-bracelet-une] [30/09/21].

[40] E.g. the « *contrainte pénale* », created in 2014 and revocated in 2019: C. Ménabé, « La probation en France : vers un renforcement du sens et de l'efficacité des peines ? », D. 2019, p. 1728 s.

[41] For a detailed analysis, see M. Herzog-Evans, *Moderniser la probation française: un défi à relever?*, Ed. L'Harmattan, 2013, *passim*.

For the future of alternative to imprisonment, new technologies could have a significant role to improve procedural efficiency: for sentencing and decisions about alternative measures, the use of e-mails or electronic transmissions should be encouraged and developed (for comparison, during the lockdown period, even with a slowed down mail service and understaffed courts, registered letters with acknowledgement of receipt were required to communicate with magistrates). Visio-conference could also be a useful tool, with appropriate use.

The development of monitoring technologies (electronic wristband, geolocation devices) could help with the sanction out of prisons, but balance must be found in order not to fall into the already very marked trend towards mass surveillance: some author already pointed the risk of increasing post-penal surveillance measures[42].

[42] X. PIN, *Droit pénal général*, Dalloz, 2020, p. 538 s.