

Policy briefing

The JAP: lessons for England and Wales?

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About the Criminal Justice Alliance

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Introduction

In this paper we explore the role of the *Juge d'application des peines* (JAP) in the French penal system. It is important to say at the outset that we do not present the French system as a model to be followed blindly: as we shall point out, it has many faults and suffers from the same sort of political and financial pressures as are so obvious on this side of the Channel. Much of the current work being done around problem solving courts and sentencer supervision would appear to be coming from the USA (see for example, the recent report of the Justice Committee of the House of Commons on *Crime reduction policies: a co-ordinated approach?* 2014).¹ We seek to widen the debate. Valuable lessons in theory and practice can be learnt from continental Europe. Our focus here is twofold: first, the role of the French JAP as a mechanism for supervising the progress of prisoners through custodial sentences and their re-entry into the community; second, the role of the JAP in the on-going supervision of community sentences.

The history of the JAP

JAPs (*juges de l'application des peines* – sentence implementation judges) were first introduced in France as judges ‘delegated’ by the president of general district courts (which deal with felony offences and family or other civil disputes) in 1945 as part of the post-war human rights frenzy that came with liberation. They were extended nationally in 1958 and now cover the entire French territory with about 390 in existence today. They are, like all judges in France, essentially civil servants, recruited after an exceptionally selective national exam from amongst the best lawyers (who have obtained a Masters degree) and then trained for two additional years in Bordeaux at the National School of Magistrates. There they receive an intense practical schooling, with mandatory internships within their main criminal justice partners’ organisations (police, gendarmes, juvenile justice and protection, criminal lawyers, probation services, and so on) as well as lectures, hypothetical training exercises, and internships with their more experienced colleagues. So already we see this is a very different judiciary to that which we have in England and Wales.

The role and responsibilities of the JAP are varied. They:

- may release prisoners from custodial sentences, applying a complex set of rules and options, which include:
 - conditional release (the equivalent of discretionary release on licence within England and Wales);
 - medical sentence suspension (granted more readily than compassionate release is granted in this jurisdiction);

¹ <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/307/30702.htm>

- electronic monitoring (used perhaps less ‘punitively’ than in England and Wales, where a “curfew” condition may be an enhancement of punishment);
- semi-freedom (used for those judged to need more constraints imposed upon them on release);
- placement in the community (which involves releasing a prisoner to somewhere similar to approved premises or half-way houses; used particularly for those with psycho-social needs);
- sentence ‘*fractionnement*’ or intermittent custody (weekend detention for a maximum of 4 years);

This diversity of options is designed to enable the JAP to adapt the terms and conditions of release to the needs of each offender.

- may grant temporary release (on similar conditions to release on temporary licence) and remission (sentence discounts, calculated according to complex statutory criteria);
- may transform custodial sentences of up to two years (up to one year for repeat offenders) into various community sentences or measures (CSM) *before* they are executed – i.e. despite the fact that the sentencing court sentenced someone to a short custodial sentence, the JAP can in effect transform the sentence into an alternative sentence or measure. This system has been created in order to avoid imprisonment. In practice, the person is sentenced to imprisonment but the sentence cannot be executed (unless there is a bench warrant); the person is then summoned by the JAP who has the power to transform the sentence into a CSM. Typically, offenders whose sentences are not transformed in this way are those who do not attend the JAP’s summons. The JAP defines which conditions will be attached to the CSM and can modify, add or remove them;
- are in charge of the supervision or management of all community sentences and release measures (probation services are in charge of the daily supervision of offenders but it is the JAP who makes all the important decisions);
- deal with breaches of community sentences and measures and impose the appropriate sanction for breach;
- can expunge criminal records for released offenders. This important form of judicial rehabilitation, unknown in England and Wales, is used in particular to help offenders find employment, extending far beyond the current remit of the Rehabilitation of Offenders Act (see Herzog Evans, 2011);
- must be informed of relevant incidents and breaches and require probation services (and at times the police or the third sector) to investigate and to write reports;

- give the formal notification, in some cases, of the offender's sentence conditions rather than the probation service. Notification is mandatory for the sentence to start being implemented and for the conditions to become obligatory.

Custodial sentences

For those serving long sentences in France, there are only two ways to obtain early release: conditional release and medical suspension of sentence. For sentences that are longer than ten years where there is more than four years to serve, a three JAP court (*Tribunal de l'application des peines*, TAP) sits to decide on release. Whether the sentence is long or short, the TAP or JAP will meet in the prison where the prisoner is held. Most prisoners will be legally represented (as this is covered by legal aid) and the prison is represented by the prison governor or the chief of the probation service (although in some cases they will only send a report). It feels very uncourt-like to the English observer, but is fully court-like in the French inquisitorial tradition. In most cases, the JAP and the TAP decide in the course of an adversarial but informal hearing. All these decisions, without exception, can be appealed to a special chamber of the Court of Appeal (*Chambre de l'application des peines*). In relation to points of law only, the Court of Appeal's decisions can then be referred to the French equivalent of the Supreme Court (*Cour de cassation*, criminal chamber).²

Non-custodial cases

Non-custodial hearings, such as those to determine the progress of individuals who have not received custodial sentences or individuals who may have breached their sentences, take place in the JAP's chambers. Again, the offender can be legally represented with the prosecutor representing the state and again these feel very uncourt-like to the English observer. The offender comes to the judge's office and the 'hearing' feels very much more like a conversation than a 'process'. With breach cases, JAPs have a large range of sanctions: they can withdraw remission and sentence discounts, add conditions, tighten supervision, withdraw free weekends (for electronic monitoring, semi-freedom and placement in the community) and, only as a last resort, sentence or recall offenders to prison. In most cases JAPs first summon (*convoquer*) offenders for a 'reminding of the law' hearing, in essence a warning, and only sanction the person if there is a new violation.

Criticisms

Throughout their 80 year existence, JAPs have been regularly under attack. The media and doubtless some parts of public opinion tend to think that they release

² Courts of Appeal and Court of Cassation rulings have thus generated a rich body of jurisprudence, which has contributed to the even and fair application of the law across the country. It is important to remember that France has very detailed formal laws, and that the many rules which govern sentence implementation thereby reduce courts' discretion

offenders (particularly high risk offenders) too easily. Conversely, governments (right and left alike) have exercised various forms of pressure on them to force them to release many more offenders (particularly low and medium risk offenders), without too much attention to detail.

In France the chronic overcrowding of prisons seems to have been recognised as a ‘problem’ for a very long time and at the moment, finances are particularly tight due to the economic crisis. Although JAPs have indeed been releasing many more (and a higher proportion of) prisoners in the last few years, this has not been deemed to be sufficient. Several laws (2004, 2009 and now the 2014 ‘Taubira’ Act) have attempted to create various parallel fast track procedures whereby the usual adversarial and thorough procedures are left aside and prisoners are released much faster, either without the JAP or in the context of a quasi-administrative commission where no hearing takes place. All the information the judge obtains is prison-based, and between 80-100 cases can be processed in a day (typically in about three minutes each) as opposed to the 5-15 cases a day heard with adversarial hearings. Most of these attempts have failed (only a few hundred such decisions being made each year) as prisoners generally prefer to elect to have a hearing and legal representation: these fast track procedures also appear unsafe to most JAPs and prosecutors.³

Criticisms of JAPs also stem, interestingly, from the increasingly monopolistic powers of probation services. They became part of the gigantic and super-powerful prison administration in 1999 and their professional culture has evolved accordingly ever since. Rather than the ‘polibation’ in England and Wales (noted by Nash, 2007), which suggests that the probation service was becoming more police-like, or growing closer to the police, in France we see something more akin to ‘prisonbation’: probation and prison growing together and increasingly resenting the JAP’s decision-making powers. The professional and political confidence of the prison service seems to lead them to suggest that they know better than the professional judiciary, whose decisions ‘get in the way’. Since Ministry of Justice Bills and other rules are drafted by the prison service, they have in recent years won a series of battles to reduce the powers of the JAP and to increase their own autonomy. Thus, due process increasingly appears to be becoming a luxury that the French system may have to do without. As we said at the beginning, all is not well in France!

3 The fate of the 2014 ‘Taubira’ Act remains to be seen.

Comparisons with post-sentence supervision in England and Wales

In England and Wales, the judiciary have traditionally had only a minimal role in post-sentence supervision. When it comes to the supervision of custodial sentences, there is the Parole Board but this is very different to the JAP or the TAP. It was created in 1967 as a purely advisory body and has become more ‘court-like’ over the years, forced in that direction by a large number of domestic and European Court of Human Rights decisions. Today the Parole Board’s role extends to considering the cases of those sentenced to: indeterminate sentences; extended sentences; determinate sentences of 15 years or more; and those offenders who have been recalled to prison during the period that they were on licence in the community.⁴ We would seek to encourage further evolution so that prisoners’ progress through the prison system would be supervised by judges or at least by a judicial body. In England and Wales at the moment, all determinate sentence prisoners are released either automatically at half-time, on licence, or earlier than that on Home Detention Curfew (HDC). Eligibility for HDC is limited (a) by sentence length; and (b) by type of offence: it is not available for sex or violent offences.

The Criminal Justice Act 2003 s 238 gave the sentencing court the power to recommend to the Secretary of State (i.e. the prison authorities/Ministry of Justice) particular conditions that in its view should be included in any licence granted to the offender on his release from prison. But courts have been counselled not to use this power: it would in any case simply be a recommendation and the view seems to be widely accepted that prison authorities are better placed to consider licence conditions at the time of release than are judges at the point of sentence. The precise time and conditions of early release upon licence remain largely a matter of executive policy for the Secretary of State.

When it comes to supervision of community orders, there has been some experimentation with judicial supervision, particularly in relation to drug treatment orders, since the power to review was introduced in 2000. Understanding the effectiveness of such programmes is notoriously difficult: often studies rely on reconviction data, a very blunt measure. As well, the quality and availability of treatment has always been very variable (for a review of the literature, McSweeney et al, 2008). It is very difficult to assess whether the intervention of the judiciary has had any significant effect within the French context, as a result of a lack of empirical research. There is however strong empirical evidence in other jurisdictions, showing that judicial supervision adds to its efficacy (Herzog-Evans, forthcoming)

4 The licence conditions of indeterminate sentence prisoners are proposed by Offender Managers but determined by the Parole Board and not the prison establishment. The conditions need to be reasonable, necessary and proportionate.

The fashion for problem solving courts

Some ten years ago, ‘problem solving courts’ (PSCs) appeared to be becoming popular. Yet the concept for some remains unclear: PSCs inhabit an area which is deeply contested. At one level, all courts are, of course, problem solving courts. Yet the term has come to be used to identify courts in which the judge is more ‘hands on’ than is traditionally the case. The most famous in England has been the North Liverpool Community Justice Centre, launched at the end of 2004 with considerable publicity. At that time, with the enactment of s178 Criminal Justice Act 2003, it seemed that court reviews might become more common.⁵ After a number of experiments and pilots, their influence seemed to wane, perhaps because they were seen to be expensive, ineffective, or difficult to organise. One evaluation of the North Liverpool court failed to provide little hard evidence that it reduced re-offending (see Booth et al, 2012). Conversely, other PSCs have been evaluated, including with randomised controlled trials (Gottfredson et al., 2003; Lind et al., 2002), which do appear to encourage rehabilitation and to prevent reoffending. This is due to a series of factors, such as the creation of a therapeutic alliance (in particular with the judge), whilst focusing on offenders’ strengths, providing them with a one-stop-shop setting that considerably reduces attrition and responding to their criminogenic and other needs.⁶ The most effective may be those that implement ‘Risk-Needs-Responsivity’ principles (Andrews & Bonta, 2010; Marlowe et al., 2007). We are certainly sympathetic to this move towards judicial supervision.

Lessons from France?

The French JAP can be seen as a primitive form of PSC. They include most of the components of a PSC (Herzog-Evans, forthcoming) with the added bonus that, contrary to most PSCs around the world, they constitute the norm, rather than a parallel system. They present the advantage of including fair trial and legitimacy, which is increasingly understood as being an essential component of compliance (Hough, forthcoming). Despite current criticisms heard in France, they usually work rather quickly and efficiently. Judicial intervention also offers the advantage of being, by culture and tradition, demanding in terms of the burden of proof: due process and other judicial safeguards are built into the decision-making. For example, in France the JAP pays careful attention to the authenticity of documents (such as letters offering employment), which may well ensure safer and fairer decision-making. However, as with PSCs more generally, such a system can only

5 S 178 enables a court to review any type of community order (and not simply a DRR) provided the Secretary of State has promoted secondary legislation bringing the provision into effect in that court, or category of court

6 The Centre for Justice Innovation have produced a wide range of resources looking at this particular issue through their Better Courts project, for example: Better Courts: Cutting Crime through Court Innovation

work well if judges are caring and empathetic human beings who are interested in supporting desistance and have enough knowledge to contribute to it. In practice, France does recruit such judges. Recent research (Herzog-Evans, 2014) has shown that their knowledge of desistance is considerable in spite of their lack of specific training in criminology. This is probably because the judges who are appointed to such positions are there by choice. The positions attract those of a more ‘social work’ orientation. As well, judges taking on such roles are brought within the dominant culture in the space of a few months. The impact of the phenomenon of judicial culture has been under-explored in both France and England.

Unfortunately, the JAP’s contribution to preventing reoffending or rehabilitation has never been evaluated as France is, by tradition, quite reluctant to evaluate criminal justice practices. Even in England and Wales, the success of different measures is poorly evaluated, with most studies relying on reconviction data, which is inherently unreliable. It is well known that perhaps only 3 in 100 recorded offences result in a conviction; and of course a reduction in seriousness or frequency of offending should often be seen as a success, not as a failure. We would call for much more research in this area. There are many questions to explore and here we suggest just a few:

- (i) The extent to which the personal involvement of judges results in better decision-making.** There is evidence of the vital role of the relationship between offender and judge in delivering positive outcomes (Rempel 2005, Rossman 2011) but this is not as yet well understood. Judicial behaviour, the role of the judge, is crucial. In US ‘problem solving courts’ the judges are reported to be more emotionally involved and less ‘buttoned up’ than English judges (Nolan, 2009). Part of this is cultural, of course. One of the most striking things for an English observer of French JAPs is the relaxed demeanour of the judges who communicate in a straightforward and direct way with the offenders before them. The same judges also keep the case and get to know their clients. They really are supervising the individual offender. Their exchanges are interactive. As Fox and Bowen (forthcoming) say, there is a growing evidence base that stresses the value of more direct interaction between judicial actors and litigants.

A particular kind of judicial behaviour is critical to the success of problem solving courts. A study of 23 drug courts across the United States conducted by the Center for Court Innovation and RTI International showed that the most important factor driving reductions in drug use and criminal activity among drug court participants was defendants’ perceptions of the fairness of judicial actors – whether offenders felt they understood the legal process, were treated with respect and dignity by the judge, and had a chance to tell their side of the story (Berman, 2011).⁷

7 In the area of domestic violence courts, a 2013 multi-site evaluation of domestic violence courts (Cissner, 2013) suggests that ‘domestic violence courts that prioritized offender accountability (through judicial monitoring) — and that have more accountability-oriented practices in place — appeared particularly likely to reduce re-arrest for any crime’.

- (ii) **The legal framework.** In both England and France the law surrounding release and recall has become very complicated. In France, the JAP has a wide variety of optional disposals. In England and Wales the initial sentencing options are themselves complex and frequently changed. Calculation of release dates in both jurisdictions can be difficult. We would urge serious comparative studies of these differing legal frameworks. There is a rich body of resources to be studied (for an introduction, see Padfield, van Zyl Smit, and Dünkel, 2010).
- (iii) **The content and importance of judicial training.** We are attracted to the idea that judges should be trained well in understanding wider criminal justice processes and the literature on what works to reduce re-offending. The English system of non-expert and often part-time judges presiding over criminal trials implies that all judges need are the judicial qualities of fairness and so on. We would argue that sentencers and all those who manage sentences, whether they are magistrates, judges or panels of the Parole Board,⁸ should have a very significant understanding of the empirical evidence, of criminological theory, and of the practice of criminal justice.
- (iv) **The extent to which the involvement of the judiciary protects the system from undue politicisation.** For example, in England recently the much publicised absconding of some offenders on temporary release caused the Secretary of State for Justice to change the ROTL system almost overnight.⁹ Could this happen in France, where such decisions are judicial? The answer of course is that the French politician is equally wary of such judicial independence. The independent JAP, as has been pointed out, is under threat for failing to adequately reduce the prison population.
- (v) **Due process issues.** Fair trial takes more time than automatic release. But it is increasingly understood that legitimacy matters not only for moral reasons but for operational reasons. Offenders who are engaged in their own rehabilitation are more likely to trust and to comply with the system. A fair trial, a judicial hearing, is in itself supportive of compliance (Liebling, 2007; Hough, forthcoming), which is consistent with the literature on legitimacy of justice (Tyler, 2006, 2007, 2012, De Mesmeacker, 2014) and on the importance of rituals of re-entry (Maruna, 2011). Moreover, after a suitable trial, offenders have to prepare and engage with their own release plan – with their families,

8 The function of the Parole Board is not technically to manage the sentence but to consider whether it is necessary for the protection of the public that the prisoner should continue to be confined, on the basis of whether or not the prisoner poses more than a minimal risk to life and limb.

9 And to preclude those who had ever absconded from open conditions, or had a ROTL failure during their current sentence, to be eligible to return to open conditions. Some of these “failures” happened more than 30 years ago.

the probation service and other agencies. In other words, their release is based on their choices for the future and the evidence suggests that offender agency is also key to desistance (King, 2013; 2014). There is a very real problem in England with automatic release and with licence conditions imposed by probation officers without careful consideration of whether such conditions are “reasonable, proportionate & necessary”, which is what the Prison Service Instruction requires. Many offenders believe that the release plan is simply something imposed on them, by outsiders who have no understanding of the realities of their lives (Padfield, 2013). Discussion of proposed conditions in a judicial forum can force an offender to negotiate and to ‘sign up’ to release conditions.

(vi) Court architecture. This is another subject largely ignored by the literature. English and Welsh courts today tend to put defendants in glass boxes at the back of the court room, even for more minor cases.¹⁰ The JAP and TAP hearings are much more relaxed and the offender is centre stage. In the supervision of community sentences, the JAP meets the offender in her office. The conversation is un-court like. Moreover, JAPs deliberately do not wear their robes in order to create a more intimate and informal context in which the offender will be less intimidated and more inclined to present his true self (Herzog-Evans, 2014: 80-81).

We hope that this briefing might fuel further debate. It is extraordinary to us that there has been no formal attempt to learn from France in this country. Our instinct is that sentencer supervision can be truly effective. We readily accept that ‘evidence’ is relatively scarce but that is a reason for gathering more evidence, not for doing nothing.

¹⁰ Save that those courts who review sentences invariably do so either in Chambers, or with the defendant in the witness box, right next to the judicial officer. The “glass box” is used only for sentencing.

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Nicola Padfield is a Reader in Criminal and Penal Justice at the Law Faculty, University of Cambridge, and has been a Fellow of Fitzwilliam College since 1991. She is a criminal lawyer who is interested in all parts of the criminal justice system including the decision-making which goes on in police stations, courts and prisons. She has written a number of books, and many articles, and is a part-time judge (Recorder). She likes to explore areas of the system which are under-researched, or throw the spotlight on new areas: for example at the moment she is involved in projects which seek to better understand why so many prisoners are being recalled to prison during the second part of their prison sentence (the part served on licence in the community).

This briefing is the third in a series which explore different policy ideas to make the criminal justice system more effective. This paper outlines the role of the French *juge d'application des peines*, or JAP, and what the courts in England and Wales could learn from the French experience.

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