Which Model for Twenty-First Century French Penal Procedure?

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Introduction

Trying to adjust contemporary penal procedure to one unique model is a vast and perilous enterprise! A pessimist might add that it is impossible and unattainable, in so far as the current schema of our penal procedure is lacking in legibility, clarity, and predictability…not to mention intelligibility. An emblematic figure of the state's *imperium*, our penal procedure today is in migration, in search of a balance between pragmatism and ideology, a compromise between the imperious necessity of preserving public order and the no less fundamental necessity of guaranteeing the exercise of individual liberty. Vilified by certain intellectuals, destabilized when it malfunctions,[1] confronted with formidable new criminal challenges, goaded by the sensibilities of the moment, subject to crossfire between Europe (the European Council and the European Union) and the Constitution (especially with the new mechanism of the Priority Preliminary Rulings on Constitutionality [*Question Prioritaire de Constitutionnalité*]), and exposed to the legitimate grievances of victims, the French penal justice system hesitates between two paradigms which seem entirely opposed to each other: the inquisitorial and the accusatory—in other words, two emblematic figures of antagonistic models of justice.

This balancing act can be sensed right from the preliminary article of the Code of Penal Procedure that resulted from the law of June 15, 2000 (and was supplemented by the reforms resulting from laws no. 2011–392 of April 14, 2011 and no. 2013–711 of August 5, 2013). In stating the directive principles of the penal process, the preliminary article actually avoids making any commitment in regard to the old quarrel over which system—accusatory or inquisitorial—should be affiliated with our procedures. Far from being an inadvertent omission, this legislatorial silence corresponds to a voluntary and perhaps healthy renunciation of the opposition between accusatory and inquisitorial, an opposition that is oversimplifying in theory and which always requires further nuance when it comes into contact with judicial practice and contemporary situations.[2] A clarification is necessary here.

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[1] See in particular the work of the parliamentary commission led by A. Vallini: *Au nom du people français. Juger après Outreau*, report 3125, tabled in the National Assembly on June 6, 2006.

[2] See in particular M. Langer, "The Long Shadow of the Adversarial and Inquisitorial Categories," in *The Oxford Handbook of Criminal Law*, ed. Markus D. Dubber and Tatjana Höernle (Oxford: Oxford University Press, 2014); A Garapon, *Bien Juger. Essai sur le ritual judiciaire* (Paris: O. Jacob, 1997); R. Colson and S. Field, "La fabrique des procédures pénales, Comparaison franco-anglaise des réformes de la justice répressive," *Revue de science criminelle* 2 (2010): 365.

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This distinction is above all of historical importance. From Greek antiquity up to the Middle Ages, the most widespread system in Europe was the accusatory system. From the eighth century (the time of the Crusades and the French Inquisition), the inquisitorial model progressively imposed itself, under the influence of the procedures initiated by the papacy and ecclesiastical justice: an expeditious, arbitrary procedure obsessively oriented toward the uncovering of crimes of treason against God (appeals for secret denunciations during preaching tours, anonymity of prosecution witnesses, dark dungeons, repeated torture to obtain confessions, burnings at the stake, etc.) At the time of the Inquisition, accusatorial (from the Latin *accusatio*: legal complaint) and inquisitorial (from the Latin *inquirere*: an inquiry into faith) procedures were not yet associated respectively with Anglo-Saxon and continental countries. It is only from the second half of the eighteenth century that these qualifications began to be used to refer respectively to the Anglo-American penal procedure and that of the Ancien Régime (the royal ordinances of Blois [1498], Villers-Cotterêts [1539], and Saint-Germain-en-Laye [1670] consecrating the dominance of the inquisitorial in French procedure).

Beyond its historical significance, the accusatory/inquisitorial distinction refers schematically to two antagonistic conceptions of the penal process, the first characterized by salient traits (public, oral, adversarial) radically opposed to those of the second (secret, written, non-adversarial). In practice, the "markers" of the two categories are far more numerous.[3] The accusatory/inquisitorial distinction is in fact a reflection of the sources of law (the abundance of jurisprudence in common law countries, rigorous codification in countries of the civil law tradition), the office of the judge (impartial arbiter or zealous inquisitor in an overseeing position), the relative position of the parties (egalitarian or nonegalitarian), the place of the jury and of professional magistrates, the system of proof (legal or moral), rights of defense (minimal or extensive), and indeed the existence of modes of recourse (more or less developed). The theoretical opposition between accusatory and inquisitorial procedures is also the result of different philosophies.[4]

Whereas the accusatory model considers as just that which has been debated and decided in an adversarial manner, the inquisitorial system puts forward a deeper and more substantive vision of justice, in reference to an ideal whose triumph must be ensured. Depending upon whether penal justice is expected to remain neutral (accusatory) or to be active (inquisitorial), it necessarily results in two different conceptions of truth: in the first case, a truth that is relative, and is the fruit of an equal confrontation between the parties; and in the second, an objective and absolute truth (whence the interest of certain studies on the relations between the different models

[3] D. Fairgrieve, H. Muir Watt, *Common law et tradition civiliste* (Paris: PUF, 2006).

[4] On this point, see P. Beliveau and J. Pradel, *La justice pénale dans les droits canadien et français* (Paris: Bruylant, second edition 2008); M. Delmas-Marty and J.R. Spencer, *European Criminal Procedures* (Cambridge University Press, 2002); M. Delmas-Marty, *Procedures pénales d'Europe* (Paris: PUF, 1995); J. Cedras, *La justice pénale aux Etats-Unis* (Paris: Economica-PUAM, 1990).

of procedure and judicial error).[5] According to certain authoritative writers, there is even a correlation between the different types of procedure and differing conceptions of the state—the inquisitorial system being affiliated with an authoritarian conception of the state, whereas the accusatory system is more associated with a democratic and popular conception.[6]

Even if the origins of our judicial systems go back to profoundly distinct historical and philosophical traditions, we should not allow the current opposition between Anglo-Saxon and continental models to devolve into caricature.[7] Congratulating itself on its presumed superiority as far as the rights of the defense are concerned, in practice the accusatory procedure is greatly idealized and overestimated: in point of fact, judicial error is a frequent occurrence in the US and the UK (see, for example, the cases of the so-called Guildford Four, the Birmingham Six, the Tottenham Three, the Taylor sisters, and those of Bridgewater and the Maguire Seven), and without the vigilant control of the Court of Strasbourg, the guarantee of the rights of the defense would largely beat a retreat: the equity of the procedure is regularly subject to manhandling by police practices that consist in violating the "disclosure of evidence" rule, and in not revealing to the defense the results of inquiries favorable to the defendant's case; the right not to self-incriminate is today weakened by the ability to draw negative conclusions from the silence of the accused. And finally, what value do the famous "right of silence" and "fairness of the trial" have in light of the secret detention locations where torture is used to extract confessions?

Inversely, sensitive to the sulfurous memories of its distant past (the repressive and purgative actions of the Grand Inquisitors such as Torquemada or indeed Simon de Montfort), the French model, imbued with the spirit of the inquisitorial, bolsters its respectability more each day by way of the right to a fair trial (Article 6 of the European Convention on Human Rights), which transcends all European justice systems and accelerates their increasing uniformity. Elusive, in so far as it surpasses the binary model (I), the originality of the contemporary French penal system lies in the hybrid model upon which it is articulated (II).

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[5] On this point see D. Inchauspé, *L'erreur judiciaire* (Paris: PUF, 2010); A. Garapon and I. Papadopoulos, J*uger en Amérique et en France, Culture juridique française et common law* (Paris: Odile Jacob, 2003); C. Walker and K. Starmer, *Justice in Error* (London: Blackstone Press, 1993).

[6] Faustin Hélie, *Traité de l'instruction criminelle*, 1853; K.J.A. Mittermaier, *Das deutsche Strafverfahren*, 1832; Max Weber.

[7] See B. Danlos, "De quelques contre-vérités sur la jurisprudence de la CEDH en matière pénale," *AJ Pénal* 9 (2014): 404; P. Bonfils, "Faut-il changer notre procédure pénale ?," *Dalloz* 3 (2010): 158; N. Jörg, S. Field, and C. Brants, "Are Inquisitorial and Adversarial Systems Converging?" in *Criminal Justice in Europe. A Comparative Study*, ed. P. Fennell, C. Harding, N. Jörg, and B. Swart (Oxford: Oxford University Press, 1995); N. Dongois and B. Viredaz, "De l'américanisation des sciences pénales européennes," in *Mélanges offerts à Raymond Gassin. Sciences pénales & sciences criminologiques*, ed. R. Gassin (Paris: PUAM, 2007), 215–232; Colson and Field, "La fabrique de procédures pénales"; *Les systèmes comparés de justice pénale. De la diversité au rapprochement* (Toulouse: Nouvelles Études Pénales: Eres, 1998); *Un droit pénal postmoderne ? Mise en perspective des évolutions et ruptures contemporaines*, ed. M. Massé, J.-P. Jean, and A. Guidicelli (Paris: PUF, 2009); A. Bernardini, "Le droit pénal entre unification européenne et cultures nationales," in *Mélanges*, ed. J. Pradel (Paris: Cujas, 2006), 955.

I. An Elusive Penal Justice System: Beyond the Binary Model

The fruit of lengthy debates and of the lessons of experience, the French Code of Penal Procedure is traditionally described as the outcome of a compromise between two opposed models (like the prior 1808 Code of Criminal Procedure). Just as one might identify many architectural styles within one and the same building, each phase of the penal process responds to one or the other of these procedural models.

While the pre-sentencing phase (investigation and pre-trial) has historically been dominated by the inquisitorial, the sentencing phase is infused with the accusatory. Under the influence of factors as diverse as the European Law of Human Rights and the increasing sway held by transparency in the judicial sphere, the chronological caesura of the trial today finds itself carried away by overenthusiasm for the adversarial (A) and the dwindling of the secret (B).

A. Overenthusiasm for the Adversarial

A flag of pride for contemporary penal reforms, adversariality is without a doubt on the ascendant in our penal procedure.[8] The rise of this emblematic figure of the accusatory model impacts all phases of the judicial process, including that of the criminal court hearing, which is traditionally very close to that of a civil court (with the public prosecutor and the lawyers of the parties allowed to pose direct questions to the defendant or the accused, to the civil party, to witnesses, and to anyone called to the bar, as in the procedure of cross-examination so dear to common law). The progressive predominance of the accusatory is yet more perceptible in the sentencing phase, especially since the coming into force of the reforms resulting from laws no. 2000-516 of June 15, 2000 and no. 20004-204 of March 9, 2004 (in terms of the judicialization and jurisdictionalization of the application of sentences, as well as the organization of actual adversarial debates before the sentencing court). But this encroachment of the adversarial onto what had hitherto been the preserve of the inquisitorial is most noticeable in the investigation and pre-trial phase. As far as the investigation is concerned, the most obvious transformation concerns custody. Through the combined play of convictions under European and constitutional influences,[9] regulation of this police mechanism of constraint (especially as a result of laws no. 2011-392 of April 14, 2011 and no. 2014-535 of May 27, 2014) has now given way to a more adversarial approach, if only in the sense of the new role now played

[8] See F. Bussy, "L'attraction exercée par les principes directeurs du process civil sur la matière pénale," *Revue de science criminelle*, 2007, 39.

[9] Constitutional Council declaration no. 2010-14/22 QPC of July 30, 2010; declaration no. 2010-31 QPC of September 22, 2010; European Court of Human Rights, *Brusco vs France*, October 14, 2010; Criminal Court, October 19, 2010, appeal no.10-85.051, 10-82.306 and 10-82.902; Criminal Court, December 15, 2010, Plenary Assembly of the Court of Cassation, April 15, 2011, appeal no. 11-81.412, 10-88.293, 10-80.034 and 10-88.809.

in it by the lawyer (the right of the lawyer not only to conduct an interview with his or her client, but to assist the respondent in his or her hearings and interviews; the right to pose questions and to present written observations in regard to the custodial period; the right to consult certain parts of the investigation file). By a sort of capillary action, this assistance of the lawyer has even recently been extended to so-called "free hearings"[10] (Code of Penal Procedure, Article 61-1, in the draft resulting from the aforementioned law of May 27, 2014). As far as the pre-trial phase is concerned, the imprint of the adversarial so dear to the civil process is palpable in the progressive recognition (especially following the reforms initiated by laws no. 93-2 of January 4, 1993 and no. 2000-516 of June 15, 2000) of a sort of right of the parties to intervene in the course of the judicial gathering of information (the right to information, the right to contestation via requests for dismissal of a case, the right to direct the judicial investigation by requesting the carrying out of all procedures that seem necessary to reach the truth, the right to demand the presence of a lawyer during certain pre-trial procedures, and other rights.). In the pre-trial domain, we should emphasize, moreover, that the imprint of accusatory procedure has appeared as negative—or indeed, negatively—in the considerable growth of police prerogatives within the framework of common law investigations (both preliminary and *flagrante delicto*), and yet more so within the framework of investigations derogatory to common law (criminality and organized crime, terrorism, etc.). The more the police—under the control of the public prosecutor [*Parquet*]—are granted important prerogatives, the more the role of the judge—the emblematic figure of the inquisitorial procedure—is correspondingly marginalized.

B: The Dwindling of Secrecy

Even when it is not elevated into a directive principle of the penal process, as other rules inscribed in the preliminary article of the Code of Penal Procedure may be, the secrecy of the investigation and of the pre-trial phase is undoubtedly the "DNA" of the inquisitorial procedure. Inherited from the Ancien Régime, proclaimed by the criminal decrees of Blois, Villers-Cotterêt, and Saint-Germain-en-Laye, and reprised in article 11 of the Code of Penal Procedure (after having been abolished during the revolutionary period, with the law of September 16–29, 1791), the rule of secrecy is exceptionally long-lived. Yet as Alexis de Tocqueville observed, the rule may be rigid but the practice is malleable.[11] For, in the name of freedom of expression[12]

[10] Translator's note: *audition libre*—a new capacity granted to police to request a suspect's consent to an interview without charges and outside of police custody, and thus without any legal assistance.

[11] Alexis de Tocqueville. *The Old Regime and the French Revolution*. (New York: Anchor Books, 1955 [1856]).

[12] Articles 4 and 11 of the Declaration of the Rights of Man, Article 1 of the law of July 29, 1881, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11 of the EU Charter of Fundamental Rights.

and of the public's right of access to information and ideas,[13] traditional and new media regularly end up interfering in the course of penal justice: sometimes by reporting the content of hearings underway as part of inquests or court cases, sometimes (better still!) by reproducing in full, and practically in real time, the minutes of a case filed in PDF format in the headlines of daily newspapers. The explosion of the information society—marked by the convergence of the printed press, audiovisual media, information technology, and telecommunications—is thus accompanied by numerous and patent abuses, and which go largely unpunished. The 1984 Gregory Affair (where the press was divided between those who believed in the guilt of the mother of the murdered child and those who insisted on the guilt of the stepbrother of the child's father), the Outreau Affair from 2001 onward, and, closer to us, the Clearstream Affair (with the reproduction of General Rondot's notes, the content of Dominique de Villepin's hearings, and even the minutes of the trial, including those of Judge Renaud Van Ruymbeke) and the Bettencourt Affair (with the resounding revelations of the online journal Médiapart, directed by Edwy Plenel) are emblematic of these out-of-control media affairs, which sometimes culminate in spectacular turnarounds (the media lynching of Judge Fabrice Burgaud after acquitting most of the defendants who had previously been qualified as "monsters"). Shot through by contradictions and a prey to cruel disillusionments, the secrecy of the inquest and of the pre-trial phase seem to belong to those mythical rules that are largely a matter of demagogic incantation alone, insofar as one cannot afford to gag the media.[14] Didn't Nicolas Sarkozy, then president of the Republic, declare, on this subject, that the secrecy of the investigation and the pre-trial phase "is a fable that no one believes in" (formal hearing of the re-entry of the Court of Cassation, January 7, 2009)?

II: An Original Model of Penal Justice: The Emergence of a Hybrid Model

Right at the heart of the paradigm of insecurity, attentive to the plight of victims, subject to onerous efficiency measures in a context of budgetary shortages,[15] prey to penal populism, shaken up by the exigencies of the European model of due process which can be traced back to Article 6 of the European Court of Human Rights (the "right to a fair trial," the standards of which are well known: the right to an independent, impartial court established by law; the right to be judged within a reasonable timespan; the right for a case to be heard equitably and publically; respect for the right to defense, and presumption of innocence), contemporary French penal justice has managed to develop original and hybrid traits. Although it indisputably scrambles the classical architecture of the French model (A), this singular development favors the rise of a new model founded upon compromise (B).

[13] An objective of constitutional status identified by the judges of rue Montpensier in their decision of October 10 and 11, 1984; Article 2 of the law of July 29, 1881 in the draft resulting from the law of January 4, 2010.

[14] For a recent illustration of this tendency, see European Court of Human Rights, February 24, 2015, *Haldimann and others vs. Suisse*.

[15] J.-P. Jean, "Politique criminelle et nouvelle économie du système pénal," *AJ Pénal* 2006: 473.

A: Compromising the Model

From the start of the new millennium and the solemn proclamation of the directive principles of the penal process within the preliminary article of the Code of Penal Procedure (on the model of those governing the Code of Civil Procedure), the route of our penal justice system has been traced out: it is that of the European model. Despite the constraints it imposes, this Strasbourgian compass does leave some latitude to French legislators. In the margins of the European (and constitutional) frameworks, the latter has been able to develop certain original rules whose effect is to reconfigure (or to disfigure, as the detractors of this movement would say) our procedures.

The duplication of the penal procedure—or if you prefer, the rise of an "encore" penal procedure[16]—is indisputably a primary source of imbalance. Thus, the fourth book of the Code of Penal Procedure contains thirty-three sections giving specific rules of procedure for particular offences (terrorism, criminality and organized crime, infractions of a sexual nature, procuring, drug trafficking, economic and financial offences, various types of pollution, and more). When the exception progressively tends to supplant the rule, the balance between the right to security and the right to safety becomes an exercise worthy of a contortionist acrobat. As with the "encore" penal procedure, the public prosecutor tends to become greedy, which is not without a certain danger for the separation of judicial functions. Although often leaving investigation for the investigative services to deal with,[17] the public prosecutor penetrates further every day into what used to be the "sanctuary" of magistrates—namely, the determination of sentences. With the development of accelerated and simplified procedures, and especially composite sentencing and appearance with prior recognition of guilt (CRPC),[18] public prosecutors—even though they are "neither judges nor magistrates authorized by law to exercise judiciary functions in the sense of Article 5 § 3 of the European Convention of Human Rights"[19]—accede to a new role which makes of them "an integral part of judgment." Once only the director of the investigation and the guarantor of discretionary prosecution, the public prosecutor now carries out quasi-jurisdictional tasks. This "professional mutation" inevitably confuses the distinction between sitting judges and public prosecutors, simultaneously eroding the sacrosanct separation of the powers of prosecution and judgment.[20]

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[16] Following the expression ["*Bis*"] used by Christine Lazerges in "La dérive de la procédure pénale," *Revue de science criminelle* 2003: 644.

[17] D. Salas, *La volonté de punir, essai sur le populisme pénal* (Paris: Hachette Littératures, 2005), 159; J. Danet, "Le droit pénal et la procédure pénale sous le paradigme de l'insécurité." *Arch. Polit. Crim*. 2003, vol. 25: 52.

[18] Translator's note: *Comparution sur reconnaissance préalable de culpabilité*—court appearance with prior recognition of guilt, a kind of plea-bargain.

[19] European Court of Human Rights, *Medvedyev vs France*, July 10, 2008, and in the Grand Chamber March 29, 2010; and more recently and more categorically *Moulin vs. France*, November 23, 2010; *Vassis vs. France*, June 27, 2013; *Hassan vs. France*, December 4, 2014; *Ali Samatar vs. France*, December 4, 2014.

Taking a closer look, the imperialism of the public prosecutor resonates with that of the sentencing courts. When the role of Judge for the Application of Sentences was created (in the December 1958 Code of Penal Procedure), it was conceived as involving nothing more than the adjustment of the penalties pronounced by a court of judgment. The powers of such a judge were thus strictly circumscribed, so as to avoid too great an erosion of sentences. With the triumph of individualization, the determination of a sentence (particularly if it is a sentence that deprives one of liberty) has today been elevated into a privileged moment of personalization and of rehabilitation. No longer considering only the past, but also the future, the sentence is supposed to prevent recidivism by helping the convict find a normal place in society again. This perspective is considered so compelling that the courts for the enforcement of sentences are now endowed with prerogatives (Article 707 sq., and especially Article 714 sq., of the Code of Penal Procedure) which are liable to appreciably denature the punishment that is imposed, and with it the authority of the case being judged and the separation of the phases of judgment and sentencing.

B. The Model of Compromise

Insofar as it is closely linked to a dynamic of the "privatization" of the trial, the notion of contractualization may appear on first glance to be foreign to the inquisitorial procedure, of which the penal process still seems to be the emblematic figure.[21] However, as the sentencing system takes on the responsibility of suppressing any act that disturbs public order, the conflict between the two goes beyond the protagonists alone. Thus, the penal process accords a place to individual wills, whether that of the offender or that of the victim. Although this is nothing new, the contemporary development of this phenomenon is an expression of the rise of negotiated penal justice, along with the correlative retreat of a justice imposed from above.[22]

As the golden thread of the penal process, presented as a remedy for all the ills of the justice system, contractualization is certainly alluring. However, at the risk of slight exaggeration, when common law encounters penal justice, it leaves the latter intact and unchanged—like water off a duck's back. Why? Essentially because of contractual imbalance.

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[20] See, among others, P. Maistre du Chambon, "Observations hétérodoxes sur quelques évolutions de la procédure pénale," in Pradel (ed.) *Mélanges*, 395; F. Molins, "Le procureur de la République, nouveau pivot de la justice pénale," in *Le nouveau processus pénal après la loi Perben II* (Paris: Dalloz, 2004), 365.

[21] X. Pin, "La privatisation du procès," *Revue de science criminelle* 2002: 245; Y. Benhamou, "Vers une inexorable privatisation de la justice," *Dalloz* 2003: Chron. 2771.

[22] On this point, see *Réforme de la justice, réforme de l'Etat*, ed. L. Cadiet and L. Richer (Paris: PUF, 2003); *Les modes alternatifs de règlement des litiges: les voies nouvelles d'une autre justice*, ed. P. Chevalier, Y. Desdevises and P. Milburn (Paris: La Documentation française, 2003); X. Lagarde, "Transaction et ordre public," *Dalloz* 2000: Chron. 217; C. Saas, "De la composition pénale au plaider-coupable: le pouvoir de sanction du procureur," *Revue de science criminelle* 2004: 827; M. Dobkine, "La transaction en matière pénale," *Dalloz* 1994: Chron. 137; C. Lazerges, "Médiation pénale, justice pénale et politique criminelle," Revue de science criminelle 1997: 186.

The various forms of negotiated justice (composite sentencing, appearance with prior recognition of guilt, etc.) do indeed seem very closely related to the notion of the contract. This proximity appeared first with the exchange of assent when an offer is made (whether at the trial, judgment, or sentencing stage) and accepted, sometimes tacitly, sometimes explicitly. Furthermore, as is the case for civil proceedings, penal law contains many precautions to make sure that the acceptance of such an offer by an offender—major and sometimes minor—is the act of an enlightened will: information as to the type of agreement being made and the resulting juridical consequences, as well as the establishment of a period for reflection and changing one's mind, are a part of this approach. The attraction of the contractual model goes further, with the reciprocal obligations that result from the meeting of minds: the offender obliges himself or herself to do or not to do certain things; as a counterpart, the judicial authority abstains from prosecuting, judging, or sanctioning him or her in peremptory manner. Finally, in the case that the offender-debtor does not carry out his or her obligations, or does so imperfectly, the contract of trust is dissolved and the sword of justice takes the place of the granting of damages.

Albeit seductive, this intellectual construction is rather artificial, for contractual justice is ideally characterized by a twofold balance—between the parties and their reciprocal obligations—that is largely foreign to the penal process.[23]

First of all, this imbalance is flagrant when the offer to contract an agreement is presented. At whatever stage of the penal process this occurs, the offender has no right to negotiate. It is "take it or leave it" (unlike the various American practices of negotiated justice, in which negotiation can bear upon the charges made against the accused—charge bargaining—or the penalty—sentence bargaining—or even on the judge by whom the case will be tried—"judge shopping"). The concession made by the judicial authority consists in permitting the offender to accept a proposition, without being able to make any counter-proposition in return. Any contract written in advance, any negotiations, discussions, and other bargaining are theoretically external to French penal law. Thus the public prosecutor is free to set the law in motion against any offender who declares that he has accepted in advance an alternative arrangement to legal proceedings. The contractualist vision of the penal process, already somewhat remodeled in regard to the contract offer, is further modified as far as the burden of risk in the case of a breakdown of negotiations is concerned.

No one who does not wish to enter into a contract shall do so—such is the principle of liberal-individualist civil law. Being free, an individual can refuse to enter into a contract with anyone who makes the offer to him or her. As a general rule, there is no gainsaying such a refusal, nor does it imply any further responsibility for the one who refuses. But the elective character of consent is not so rigorously protected in the constrained environment of the penal process. Certain defendants, although innocent, may be tempted to accept a proposition made to them with the sole aim of escaping

[23] On this point see B. Pereira, "Justice négociée: efficacité répressive et droits de la défense," *Dalloz* 2005: Chron. 2041.

penal proceedings or the uncertain prospect of a possible heavier sentence. This fear of judicial error, which vitiates consent, is a grave threat to innocent defendants, who are naturally more "risk-phobic" than defendants who are actually guilty.

On top of this fear of risk there is the "penal price" to be paid in case of a refusal to contract an agreement. Although in principle the defendant is free to refuse the proposition of the judicial authority, this freedom is chancy, temporary, and costly in terms of resources. Thus, one who refuses to assent to a search within the framework of a preliminary investigation risks being placed in custody (although in some circumstances this refusal may also be overcome by order of the liberties and detention judge). A defendant who refuses to come to court following a summons may be constrained to do so by use of force (Code of Penal Procedure, Article 78). Similarly, a defendant who refuses the composite sentence proposed by the public prosecutor opens himself up to the possibility that proceedings may be initiated against him or her (Code of Penal Procedure, Article 41-2). From the same perspective, a defendant who does not accept the sentence passed following an appearance with prior recognition of guilt is in principle sent back either before the instructing magistrate or before the Criminal Court, with all the uncertainties implied by such procedures (Code of Penal Procedure, Article 495-12). These ethically questionable retaliatory measures are present throughout the whole penal process, and in practice tend to pressurize the offender into capitulating, especially if he is short of money and cannot afford the services of a lawyer with irreproachable professional qualities throughout the trial proceedings.

Conclusion

Ultimately, contractualization is to the penal process what the contract of adhesion is to the theory of contracts. The strategic superiority of one of the parties, and the resulting absence of any power to negotiate, the unilateral—not to say one-sided—character of the clauses of the transaction, and the mass litigation which the approach intends to remedy, are so many sources of abuse. Furthermore, the risk of arbitrariness is accompanied by a possible departure from the principle of equality before the penal law, insofar as the content of the "contract" is not standardized, and varies appreciably depending upon the offender and the circumstances of the offence. It is understandable, under such conditions, that the shadow of the judge looms over the whole process, and especially in regard to the mechanisms of validation (composite sentencing) and qualification (appearance with prior admission of guilt).