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Penal Orders for Misdemeanours and Felonies in France: A Procedural Economy at the Expense of the Defence?

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Abstract

The French Code of Criminal Procedure allows misdemeanours and felonies to be tried under a simplified procedure called penal orders. This entirely written procedure is directed by the prosecution with the support of the police. Once their decision is taken, prosecutors send their file to a judge who would then issue the penal order. If the defendant does not object, the conviction equals a judgment rendered by a court at the end of a trial. The lack of hearing of the defendant and the rights of the defence being reduced to their minimal expression might produce erroneous convictions. Although this procedural economy succeeds in unburdening the courts, it comes at the cost of defendants. This contribution discusses the procedure and the rights of the defence in France. It also proposes solutions that could address the shortcomings of penal orders.

Keywords: Simplified procedure, sentencing, prosecutorial decision-making, wrongful conviction.

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1. Introduction

Penal orders were introduced in the French criminal procedure in 1972, almost a century after Germany and Switzerland. Their application was first reserved for minor offences caught in flagrante, in which the guilt of the offender left no doubt (Vivell, 2006). With the rise of security measures and the transition from a constitutional to a security state, the need for sanction became very pronounced in France and elsewhere (Brunhöber, 2018). The progressive extension over the years to more infractions aimed at improving the management of minor crimes (Roussel, 2014). In 2018, the most recent year for which statistics are provided, convictions for felonies represent the majority of criminal cases (606937), misdemeanours of the first four categories are almost halved with 318467 convictions. Both convictions for serious crimes (2279) and misdemeanours of the fifth category (5747) are rare (Bréchard, Legargasson & Le Caignec, 2021). These numbers show that the infractions to which penal orders could apply – felonies and misdemeanours – represent the majority of cases in the criminal justice system. Although official data do not allow to know how many were tried by penal order in each category, 174020 penal orders were rendered by courts, which is 0,7% more than in the previous year. An estimate shows that 15% of felonies are tried by penal orders, the percent of misdemeanours adjudicated under a complete or simplified procedure is not known (Cabinet Gueguen-Caroll, 2011).

French criminal law classifies offences into three categories characterised by the seriousness of their punishment: misdemeanours, felonies, and crimes. Misdemeanours are created, modified or suppressed by an administrative authority called Council of State or *Conseil d'Etat*, in other words by the government issuing a decree (Dupré de Boulois, 2012). Felonies and crimes are exclusively issued by the legislative power, i.e.

the Parliament voting a law. Crimes are punished by a prison sentence of more than ten years and felonies by an imprisonment of up to ten years and/or a fine equal to or more than 3750 € (Académie de Bordeaux, 2021). Misdemeanours are minor crimes punished by a fine of up to 1500 € or 3000 € in case of recidivism (art. 131-13 Code of Criminal Procedure, CCP). They are listed in the Code of Criminal Procedure (art. R621-1 to R-655-1 CCP) in five classes according to their seriousness and their corresponding fine: 38 € for the first class, 150 € for the second, 450 € for the third, 750 € for the fourth, 1500 € for the fifth class.

In March 2020, two decrees instituted a class four misdemeanour related to the context of sanitary threat under Covid (Decree nr. 2020-264, 2020; Decree nr. 2020-290, 2020). One year later, in March 2021, the weekly news media *L'Express* published an article entitled *"Amendes Covid": les ordonnances pénales, une justice expéditive?* translated as «Covid fines: penal orders, expeditious justice? » (Chahuneau, 2021). The author states that judges use penal orders to unburden courts with this procedure skipping a hearing or a trial. A more accurate statement would be that it is public prosecutors who use penal orders to this purpose, since judges merely sign the order to be issued. The focus of the article lies in the worsening of the relation between citizens and their criminal justice system. During the first and the second lockdown, at least 1,4 million fines have been distributed according to numbers of the Ministry of Inner Affairs, many of them for missing or erroneous documents allowing to move out of one's home or related to mask wearing. In March 2020, an individual went out for a walk near his home and 400 meters away he was stopped by police officers for identity and document check. They told him that he should not be out, then let him go without a warning. Eight months later he received a penal order convicting him of forbidden leave of one's living place with a punishment of a 166 € fine, among which 31 € for the procedure. The article asks if these cases represent mistakes that can be easily corrected

or rather an abusive handling by the police. Defence lawyers reply that this procedure is bureaucratic because judges take their decision according to the police report and the prosecutor's proposal, without inviting the defendant to state his opinion or raise contradictions. It is quasi automatically a guilt guaranteed procedure says a Parisian lawyer. If an objection is raised after receiving the penal order, the hearing at the court takes in average 18 months after the date of the offence and could carry a harsher sentence. According to another defence lawyer involved in human rights cases, penal orders rely on a minority of defendants objecting their conviction. Indeed, why risk a higher penalty after one year and a half instead of paying the original fine? The procedure states this point very clearly: cases tried by penal orders should be clear and leave no doubt about the culpability of a person.

Misdemeanours are tried by Police Courts composed by a judge sitting alone and a public prosecutor (art. 521 CCP). They follow one of three procedures: the standard one with a trial at the Police court; a simplified procedure by penal order; a fixed fine for the classes one to four if the prosecutor chooses to do so. Since January 2020, misdemeanours of the first four classes, and misdemeanours of the fifth class for which a fixed fine may be imposed, can be tried at the Police Court by a single temporary judge (art. 523 CCP). Professionals related to the legal system can be elected under certain conditions for five years to become temporary judges and adjudicate misdemeanours by penal order (Ministère de la Justice, 2021). Felonies are more serious offences tried at the Correctional Court by three judges. They can be punished by a prison term ranging from two months to ten years and a fine of at least 3750 €. Penal orders are regulated by seven articles for misdemeanours (art. 524 to 528-2 CCP) and ten articles for felonies (art. 495 to 495-6 CCP). We will first have a closer look at the procedure for misdemeanours and then complete the description with the procedure applied to felonies.

2. Penal orders for Misdemeanours

Every misdemeanour can be tried by penal order, even the ones committed by repeat offenders. Since 2016, misdemeanours defined by the labour code can also be adjudicated in this way. Penal orders are excluded if the victim summoned directly the defendant before the penal order is issued (art. 524 CCP). The prosecutor sends to the judge the case file with the charges and the sentence he proposes for the defendant. The judge rules the case without prior hearing and chooses one of three possibilities: discharge, conviction that imposes a fine, with or without a complementary sentence (for ex. suspension of driving license). If he determines that an adversarial hearing would be useful, he sends back the case file to the public prosecutor in order to be prosecuted under an ordinary procedure (art. 525 CCP). The prosecutor has ten days to object the judge's decision by filing a declaration at the court office. If no objection is filed, the penal order is notified to the defendant in one of three modalities listed under an article for felonies (art. 495-3 al. 2 CCP). The defendant has thirty days to object the penal order.

This deadline is set in a very specific way by the legislator: if it is not clear from the receipt notice that the defendant received the notification letter, the objection can be filed even after thirty days. The deadline starts to count from the day when the defendant learns about his conviction by any means necessary, and about the deadline and procedure to object the penal order (art. 527 CCP). If the prosecutor or the defendant files an objection, the case is being heard at the Police Court under a complete procedure. Until the ordinary proceedings take place, the defendant can waive his objection (art. 528 CCP). The oldest article unchanged since the beginning of the

procedure in 1972 states that a judgment by penal order has the effect of a judgment that has become res judicata, similarly to a verdict rendered by a court of law after a complete procedure. However, the penal order does not have the effect of res judicata in respect of any civil action for compensation of a damage caused by the offence (art. 528-1 CCP). The victim can still summon the offender directly at the Police Court even if it is done after a penal order has been issued (art. 528-2 CCP).

3. Penal Orders for Felonies

Since 2002, penal orders include a limited number of *délits* or felonies, for which a prison term, even suspended, cannot be imposed (Taleb, 2012, p. 91). The sentence is more lenient than the one in Germany, where penal orders can impose a suspended prison sentence up to one year, while in Switzerland the penalty can be up to six months of imprisonment. At first, only felonies against the traffic code and against regulations governing road transport were included under article 495 CCP. Each amendment added offences from other codes (commercial, intellectual, press and media). To the present day, the occupation of building halls, drug abuse and counterfeiting over the Internet have been added to the list (see Circulaire du 20 mars 2012 étendant l'ordonnance pénale, 2012, p. 2). Even felonies that were initially excluded by the legislator because they would require a court hearing to address properly the matter at hand can now be tried by penal order: desertion of family, simple or aggravated theft, threats, receiving stolen goods, contempt and obstruction, offences related to a technical dispute (forest code, rural code, code of maritime fishing, urban planning code). Since September 1, 2019, the complete list of felonies tried by penal order is to be found under article 398-1 CCP, and not anymore directly under article 495 CCP. Since then, penal orders apply to all felonies listed under article 398-1 CCP, except (un)voluntary felonies against the person. To this day, the list comprises 27 categories of offences from the Criminal

Code, all offences from the traffic code, and various offences from ten additional codes (for ex. regulations of road transport, commercial code, public health code, construction and housing (habitation) code, intellectual property code, monetary and financial code, internal security code). The last addition to art. 398-1 CCP dates from August 2021 with amendments related to the sanitary crisis and the environmental protection. Felonies are usually tried at a Correctional court by a president judge and two judges. If they can be tried by penal order, and the prosecutor chooses not to do so but follows a complete procedure, the court is composed by a single judge with the powers of a president judge (398 al. 3 CCP).

Penal orders can be used only if the police investigation found the facts clear and established, leaving no doubt as for the guilt of the defendant. The information regarding the personality of the defendant and his financial situation should also be sufficient to determine his sentence. The procedure cannot be chosen if the rights of the victim(s) are infringed. As mentioned above, a prison term is excluded and the fine cannot exceed 5000 €. A strong incentive to accept the penal order is that the fine reaches only half the amount ruled under a complete procedure (art. 495 CCP). Complementary measures defined under art. 131-5 to 131-8-1 CCP can be added to the fine or pronounced as principal sentence (art. 495-1 al. 2 CCP). The procedure cannot be applied if the defendant is younger than 18-year-old on the day of the infraction. Moreover, it is also not applicable if the victim has summoned the defendant to a hearing in court before the penal order was signed by the judge. If the offence has been committed at the same time as another one for which the penal order cannot be applied, then the penal order cannot be used anymore. From September 1, 2019, penal orders can sentence repeat offenders, which was clearly excluded until then (495 al. 3 CCP). The reason for the exclusion of repeat offenders was that the written nature of penal orders

did not allow judges to play their pedagogical role by communicating their judgment in person to the defendant (Bulletin officiel du Ministère de la Justice, 2004).

The public prosecutor sends the case file along with the charges and the sentence to the presiding judge of the court. The judge rules by means of penal order without a hearing, which may result in a discharge or a fine as well as complementary penalties. Community work can be pronounced only if the defendant has been contacted during the investigation and if he accepted to serve such a sentence. If he considers that a contradictory hearing or a prison term is necessary, the judge sends the file back to the prosecutor (art. 495-1 CCP). Contrary to misdemeanours, penal orders for felonies must be reasoned, in particular in regards to the establishment of the facts and the information about the income and expenses of the defendant (art. 495-2 CCP). Since 2011, a new article deals with civil claims, which allows more cases to be tried by penal orders: if the victim asked for compensation or restitution as a civil law party during the police investigation, the president rules also on this point by penal order. If he cannot do so, he sends the file back to the prosecutor so that he initiates a procedure at a civil court (art. 495-2-1 CCP). After the judge ruled, the penal order is sent to the public prosecutor who may within ten days either object by means of a statement at the clerks' office at the court or carry out the execution of the order. There are different ways to communicate a penal order to the defendant: by recorded delivery letter with acknowledgment of receipt, alternatively a district prosecutor or a person representing him delivers the penal order directly to the defendant. The latter is obligatory if the sentence consists either of a day fine or community work. If the defendant does not pay the day fine, the sentence is commuted into a prison term.

The defendant is informed that he has 45 days to object the penal order, starting from the notification date. His objection initiates a complete procedure with court hearing of the parties at the Correctional Court. For this trial procedure, he may be assisted by a

defence lawyer, whom he can ask to be appointed for him. The defendant is also informed that the Correctional Court, in case of a conviction, can impose a prison term if this type of sentence is applicable to the offence. This feature serves as a serious deterrent to object the penal order, even more so than for misdemeanours in which the fine can be higher if the defendant objects the initial judgment by penal order. If there is no acknowledgment of receipt to prove that the defendant has received the notification letter, the penal order can be opposed until the end of a thirty-day period running from the date when the defendant learnt about his conviction as well as about the deadline and the means of objection (art. 495-3 CCP). If the penal order rules over a civil claim, the decision is sent to the victim who has 45 days to object solely on this point of the judgment (art. 495-3-1 CCP). If an objection to the penal order is filed by either the public prosecutor or the defendant, the case is tried under a complete procedure with a hearing at the Correctional Court. Until the opening of the trial, the objection can be withdrawn. The executory effect of the order then revives and no further objection can be filed (art. 495-4 CCP). When no objection is filed, the judgment bears the same effect as a verdict of a court trial at the Correctional Court. However, it does not have this effect in relation to civil claims brought for a damage caused by the offence. Since 2011, we can clearly observe that the rights of the victim have been strengthened. The victim can be allowed to bring later a civil claim if he could not do so earlier (art. 495-5 CCP and 495-5-1 CCP). These points of law do not cancel the possibility for the victim to summon the perpetrator directly at the Correctional Court. In this case, the court rules only on the civil interests if the penal order has acquired the status of a final decision. At this hearing, the court is also composed of a president, sitting as a single judge (art. 495-6 CCP).

4. Advantages and Risks of Penal Orders

The main feature of penal orders is the lack of a court hearing involving both parties of the case. The Police Court as well as the Correctional Court can render a judgment by penal order without hearing the defendant, after the public prosecutor chooses to apply this simplified procedure. While this procedure can be appropriate for *in flagrante* offences recorded on the spot by law enforcement officers, it becomes riskier for cases even simple but who would benefit from the defendant's testimony. French judges are not required to render a reasoned judgment for misdemeanours tried by penal order, but they are obliged to do so for felonies. Once the judgment is rendered and it is not objected in due time, the sentence shall be executed. If this is not the case, law enforcement officers may be sent to enforce its execution. There is no further possibility to appeal the decision of the court and have the case tried again by an appeal court. Only a victim can appeal the decision about civil claims.

French prosecutors are encouraged to choose a simplified procedure by penal order when they consider that the case is clear and does not require a public debate (art. 495 CCP). They are especially encouraged to prosecute by penal order instead of using available alternatives to a criminal charge such as a penal composition or a reminder to the law. This is mostly the case in mass infractions as long as facts are clear and not subject to interpretation, even if they imply multiple authors or victims. In other words, prosecutors are encouraged to charge instead of making alternative offers (Roussel, 2014). In Germany, prosecutors are obliged to use penal orders whenever the case allows it (Enescu, 2019). The result is that a growing number of people have a criminal record and therefore are at risk of recidivism, which entails higher fines or imprisonment terms. Defendants are also encouraged to accept a penal order. If they do not file an objection, they benefit from a reduction of 20% on the fine along with

procedural costs of 31 €, if they pay these costs within 30 days starting from the date on which the penal order has been sent.

Until 2004, penal orders could only be communicated by letter delivery with acknowledgment of receipt. While this was meant to fasten the reception of the order, in fact it was delivered more than eight months after the commission of the offence. Court clerks were overloaded with this type of court communication and could not handle faster the large amount of penal orders to be sent to defendants. Moreover, letters were often sent to the wrong address or were not picked up by the defendants. If the letter was not picked at the post office, law enforcement officers were delivering it to the defendant, which was in turn rather cost ineffective. The Swiss procedure of penal orders allows a very economical solution to the detriment of the defendant: the letter is considered delivered if the defendant did not pick it up at the post office within the allotted time of seven days (Thommen, 2021). Since 2004, the French prosecutor or a person representing the prosecution services has the possibility to bring the penal order to the defendant. This mode of communication of the penal order becomes more and more privileged, due to the pedagogical value of such a procedure. While it does not replace a hearing, it has the advantage to be taken far more seriously by defendants who might at first not understand the seriousness of a letter. There is no official data showing the number of personal deliveries of penal orders. We can interpret it as a minor attempt to keep a personal contact with the defendant, especially in less minor cases tried by penal order. The pedagogical dimension of a public hearing and the lack thereof pushed the French legislator even further in a recommendation to notify penal orders in so called judicial appointments (Bulletin officiel du Ministère de la Justice, 2004). Prosecutors or a person representing them would schedule an appointment with the defendant in order to explain the sentence and the meaning of a penal order. This direct

contact could in turn improve the execution of sentences and foster a better understanding of the procedure.

5. The role of the defence in the procedure of penal orders

Although the objective of simplified procedures to unburden courts proves itself successful, we should emphasize that the rights of the defence are reduced to a minimum level in France. The role of the defence is limited to the objection and the subsequent trial under a complete procedure at the Police or Correctional Court. Of course, in order to do so, the defendant must understand the penal order and request the assistance of a lawyer. The rights of the defence are also guaranteed by allowing defendants to object the penal order with a simple letter stating their objection without the need to provide any reason for their decision. The objection opens the road to a complete procedure and this possibility constitutes the minimum requirement for the defendant's rights. The deadline for an objection is longer in France than in Germany (14 days) or in Switzerland (10 days), 45 days for felonies and 30 days for misdemeanours. In fact, defendants object penal orders in 2% to 7% of the cases in different jurisdictions. Does it mean that penal orders convict defendants to more lenient sentences than courts would do? For felonies, sentences were found to be similar, so there is no reduced sentence for accepting a penal order (Roussel, 2014). This point might show that judges follow the case file of the prosecutor proposing a sentence. During a normal procedure, judges seem to not depart from the prosecutor's request and confirm the penal order. By eluding the individualisation of the sentence, the role of the judge becomes one of an automated distributor of sentences (Cabinet Gueguen-Caroll, 2011). This tendency is not observed in Switzerland where empirical data show that defendants who object their penal order receive a more lenient sentence from the judge at the court under a complete procedure (Thommen & Eschle, 2019).

Penal orders skip the trial but convey a judgment and a criminal conviction equal to the one rendered at a court. The points listed in the preliminary article of the code of criminal procedure present a set of principles applied to criminal judgments. They apply to infractions of all degrees of seriousness, including the ones tried by penal orders. Also, they cover procedures brought in front of any court (Police, Correctional, and Assize court) as well as procedures taking place during the investigative stage prior to a judgment. One of the principles concerns the language of the procedure: if the defendant does not understand French, he has the right to have an interpreter during the whole procedure, also for meetings with his defence lawyer when they are related directly to a hearing or an interrogation. Moreover, the defendant has the right to receive a translation of the main documents allowing him to build his defence, unless he explicitly abandons this right after having declared that he understood what is at stake (Article préliminaire, CPP). Individuals convicted by penal orders might not be aware of their rights and because they did not know of a procedure against them and were not heard by the prosecutor, it is not too far stretched out to assume that they were not aware of their right to benefit from a judicial assistance, or an interpretation or translation.

A defence lawyer is obligatory only when the monetary value of a case exceeds 10000 €. Penal orders do not require a defence lawyer, since the maximum fine amounts to 5000 €. In France, the prosecutor does not hear the defendant and when the facts are clear enough, he writes a sentence proposal and sends the file to a judge for confirmation. When a penal order is issued by the judge, the defendant misses the opportunity to be heard either by the prosecutor, or by the judge. When investigative authorities, the police and prosecutors are conducting the charge without granting a hearing and a trial, there is a higher risk of erroneous judgments. Studies have extensively shown how police officers and prosecutors are biased against the suspect.

There is no need to call on fraudulent activities, although they do take place, but simply on cognitive biases such as tunnel vision or confirmation bias (see Jonas et al., 2001; Findley & Scott, 2006). The core of an investigative phase consists of an inquisitorial procedure meant to bring charges against a defendant. It is not meant to establish the truth on which a judgment should be based (Schünemann, 2004, p. 83). In other words, preliminary proceedings aim at gathering sufficient evidence to bring charges against a defendant, which would be then weighted by a court. The fact that penal orders, in the absence of a successful objection by the defendant, do not offer this counterweight leads to an inquisitorial procedure being transformed into a judgment (Schubarth, 2007, p. 537). The right to a hearing shows the transition from the defendant being an object of inquisition to him being a participant in his own procedure (Vest, 2002). It is also a sign of minimum respect granted to offenders and constitutes a precept of human dignity (Thommen, 2010, p. 393). The only way to secure a hearing in this instance is to oppose the penal order within 30 or 45 days. If a defendant wishes to have a defence lawyer but does not know of any (or if the defendant has the duty to have a lawyer but does not choose any, which is not the case with penal orders), the judge mandates a lawyer, whose remuneration depends on the financial means of the defendant. The costs of the defence can be covered up to 100% under the conditions of a judicial assistance.

6. Conclusion

While penal orders have certainly reduced the overload of courts wherever they have been implemented, they bring a long list of collateral damages: the defendant's right to be heard has been suppressed, the right to counsel is reserved to very few cases, the separation of powers between prosecutors and judges fades away, the right to translation is not guaranteed and the material truth has been sacrificed to the efficiency of the criminal justice system.

Defence lawyers voice their concerns about the increasing application of this simplified procedure: the rights of the defence are reduced to their very basics. The involvement of a defence lawyer can only take place when the defendant is notified of the penal order and wishes to form an opposition, if he is aware of his right to request a lawyer with a financial help. Not surprisingly, penal orders are opposed in only 2% to 7% depending on the regional unit. Sentencing became an automatic decision, which lost its personalized character, and promotes judges to a new role of sentence distributors.

The hearing should not constitute a right that the accused can exercise if he understands correctly the penal order and the procedure to follow, but a right written in the procedure. Although penal orders reduce the burden of courts, they are not conceived in a way that guarantees the correctness of the judgment.

A promising solution for over-criminalised times would be to reduce the growing number of minor criminal cases and the pending cases in courts not by increasing the efficiency of justice systems with simplified procedures, but by decriminalising the pettiest infractions and by abandoning proceedings for bagatelle cases. The measure was proposed in 1987 by the Ministers of Justice of European state members in the document recommending the development of penal orders to simplify criminal justice systems, under Decriminalisation of and summary procedures for offences which are inherently minor (Council of Europe, 1987, p. 3): “Legal systems which make a distinction between administrative offences and criminal offences should take steps to decriminalize offences, particularly mass offences in the field of road traffic, tax and customs law, under the condition that they are inherently minor”. After decades of developing widely penal orders, it is time to go back to the recommendation and move towards the decriminalisation of petty infractions.

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