MINISTÈRE
DE LA JUSTICE
Liberté
Égalité
Fraternité

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Written contribution

Name of your organisation : **Fair Trials**

Fair Trials is an international non-governmental organisation working for fairness, justice and equality in the criminal justice system. Our mission is to expose emerging threats to the rule of law and the rights of the defence, and to lead and support reform movements aimed at achieving a fairer criminal justice system on a global scale.

Fair Trials coordinates the *Legal Experts Advisory Panel (*LEAP) network, which includes criminal lawyers, university professors and civil society organisations committed to the protection of human rights.

In preparation for this contribution, Fair Trials consulted with members of the LEAP network practising in France or with knowledge of the French system.

Typology of your organisation :

□ Administration
□ Association with a public service mission
□ Professional organisation
□ Trade union organisation
□ Independent authority
□ Company or self-employed
□ Political party or think-tank
x Other

Theme: *Simplification of the criminal procedure*	
Problem / issue identified:	***Ideas/proposals for improvement to address the problem/issue:***
<u>Excessive use of accelerated procedures</u> There is a growing use of accelerated procedures, such as fast track or summary proceedings, trial waiver systems and penal orders, with the aim of 'simplifying the criminal procedure'. Acknowledging and addressing this is fundamental to any attempt to rebuilding confidence in the judiciary, as these mechanisms give increasing power to prosecutors to act as judge before the judge. This disrupts the legal culture and endangers the procedural model protecting the rights of the defence.[1] Moreover, although the use of fast-track proceedings has improved the productivity of legal professionals, it has not relieved the criminal justice system - which is still 'overburdened' with minor offences that would not have been prosecuted before the automation of sentencing artificially widened the scope of the criminal justice system. [2] This managerial justice, [3]carried out by 'justice entrepreneurs', [4]is dangerous, dehumanising, and counterproductive to the aims sought.	• Decriminalise; • Independently assess of the impact of accelerated procedures; • Drop the managerial vision of justice imposing quantitative performance thresholds on prosecutors and judges, over a focus on quality justice.[5]

[1] Virginie Gautron. *Different methods, same results as French criminal courts try to meet contradictory policy demands*. Annie Hondeghem, Xavier Rousseaux, Fréderic Schoenaers. Modernisation of the criminal justice chain and the judicial system. New insights on trust, cooperation and human capital, 50, Springer, pp.37-50, 2016, Ius Gentium: Comparative Perspectives on Law and Justice, 978-3-319- 25802-7. ff10.1007/978-3-319-25802-7_3ff. ffhalshs-01575838

[2] *Id*.

[3] Virginie Gautron. *La " barémisation " et la standardisation des réponses pénales saisies au travers d'une étude quantitative et qualitative de l'administration de la justice pénale*. Isabelle Sayn. Le droit mis en barèmes, Dalloz, pp.85-97, 2014, 978-2-247-13463-2. ffhalshs-01575845e

[4] Vigour C. 2006, *Justice: l'introduction d'une rationalité managériale comme euphémisation des enjeux politiques*, Droit et société, 63-64, 425-455.

[5] Le Figaro. *États généraux de la justice : une tribune de 3000 magistrats dénonce les injonctions «de faire du chiffre»,* 24 November 2021. Available here.

Failure to respect procedural safeguards The principle of equality of arms is inherent to the fundamental right to a fair trial. As expressed by the European Court of Human Rights, equality of arms requires that each party be given a reasonable opportunity to present their case in conditions which do not place them at a disadvantage compared with their opponent.[6] To this end, procedural safeguards such as access to a lawyer and to the file are fundamental. Although these guarantees are recognised in European legislation[7] transposed by legislation in France, there remain serious problems in practice in France with regard to the procedural safeguards afforded to accused or suspected persons throughout the criminal proceedings. The European Commission has recently opened an infringement procedure [8] against France for incorrect transposition of the European Directive on access to a lawyer and the right to communicate in the event of arrest.[9] The absence of a lawyer adds to the vulnerability of the person facing the power of the state,[10] especially when pre-trial detention prevents the person from preparing a defence. Added to this is the difficulty raised by many lawyers practising in France of gaining access to the authorities' file on their clients, which further weakens the defence and jeopardises the principle of equality of arms between the parties involved in the trial. The aim here is not only to rebalance the power dynamic with the	• Correctly transpose the European 'Roadmap' to strengthen the procedural rights of suspects or accused persons in criminal proceedings, in particular by ensuring the monitoring of the transposition of these rights in an effective way in the context of police custody: ensure the possibility of access to a lawyer before questioning and the participation of a lawyer during questioning; allow access to the file; and if necessary, to an interpreter from the moment of custody. • Collect data on and analyse the number of waivers of the right to a lawyer, in order to identify coercive practices. • Analyse the impact of the exercise of the right to silence on decisions on pre-trial detention. • Collect data on and analyse the implementation of procedural rights in the context of the trial waver systems and accelerated procedures in order to allow a reflection on the risks of such procedures on the notion of the right to a fair trial.

[6] Guide to Article 6 of the European Convention on Human Rights, available here.
[7] See the list of relevant instruments here.
[8] See *September's Infringement proceedings: main decisions* here.
[9] DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in proceedings relating to the European Arrest Warrant, on the right to inform a third party immediately upon deprivation of liberty and on the right of persons deprived of their liberty to communicate with third parties and with consular authorities
[10] See the latest report of the Contrôleure générale des lieux de privation de liberté, *L'arrivée dans les lieux de privation de liberté*, 8 December 2021, available here.

prosecutor, who all too often has the power to restrict access to the file, but also to ensure that lawyers have the means to do so in good time, without having to travel etc. (especially in a pandemic context). Given the statistics showing the disproportionate presence of 'people of foreign origin' in the criminal justice system,[11] another issue to be addressed is the right to interpretation and translation, the implementation of which remains poor in France (as elsewhere in Europe). It is also important to note that there is often a large gap between the procedural guarantees - even if perfectly transposed, although this is not the case in France - provided by the law and their implementation in legal practice. The mistreatment of people from the moment they enter the system[12] only weakens the citizen's confidence in the justice system to ensure the protection of the fundamental right to a fair trial. In a broader sense, the problem is therefore one of legal and prison culture, and the lack of motivation and will to make justice fairer.	• Devote more thought, effort and resources to the implementation of procedural rights, taking into account that the criminal procedure creates vulnerability, especially among marginalised groups.

[11] See, for example, Virginie Gautron, Jean-Noël Retière. *La justice pénale est-elle discriminatoire ? Une étude empirique des pratiques décisionnelles dans cinq tribunaux correctionnels.* Colloquium "Discriminations : état de la recherche", Alliance de Recherche sur les Discriminations (ARDIS), Dec 2013, Université Paris Est Marne-la-Vallée, France.
[12] See, for example, Fair Trials, *Innocent until proven guilty? The presentation of suspects in criminal proceedings*, 3 June 2019, available here.

Theme: *Carceral and rehabilitative justice*	
Problem / issue identified:	**Ideas/proposals for improvement to address the problem/issue :**
<u>Responding to prison overcrowding and inhumane and degrading prison conditions by expanding the use of the electronic bracelet</u> As noted by the Observatoire International des Prisons in numerous analyses, the increase in the use of electronic monitoring in France has resulted in the extension of the criminal net and not in a decrease in the number of people incarcerated. [13] In practice, the electronic bracelet has become an alternative to release, not to pre-trial detention. Since this custodial measure is falsely regarded as less restrictive and, in any event, less severe than imprisonment, judges use it in cases where pre-trial detention would not normally be ordered.[14] The use of the electronic bracelet leads to an extension of prison outside prison, which contravenes the right to liberty, the right to a fair trial, the right to respect for private and family life, and the prohibition of discrimination; and, a priori, measures aimed at relieving an overburdened judicial system. Deprivation of liberty, in whatever form, is the most radical expression of the power of the state over an individual, who is necessarily disadvantaged in this power struggle. The electronic bracelet is an expression of the state's physical control over the wearer's body. Due to the strong physical and mental impact on the person and their entourage, this measure cannot be considered "light". In	• Act on the source of the problem, not on the symptoms Using electronic bracelets will not solve the problem of prison overcrowding, which is constantly increasing in France, unlike in other European Union countries.[16] To remedy this, the number of people entering the criminal justice system and subsequently the prison system must be reduced, with the aim of upholding the fundamental right to freedom and the presumption of innocence. • Reduce the use of custodial measures In this context, it is necessary to both: • Find solutions to drastically reduce the number of pre-trial detention measures (pre-trial detention, house arrest, electronic monitoring etc.), for example: ○ provide training for judges and prosecutors on pre-trial detention so that this measure is only applied as a last resort (see the criteria of the European Court of Human Rights in particular) and

[13] International Prison Observatory (IPO), *Bracelet électronique : le remède aux maux de la prison ?*, 8 September 2021, available here.
[14] *Id*.
[16] See, for example, Jean-Baptiste Jacquin, *La croissance du nombre de détenus dans les prisons françaises inquiète*, LE MONDE, 27 July 2021, available here.

addition, wearing the bracelet has implications for the person's relationships, access to work, the activities they can engage in, etc. Like prison, the bracelet isolates and stigmatises.

Furthermore, electronic monitoring reproduces social inequalities and reinforces discrimination against marginalised groups. It is clear, for example, that unhoused people or people without a fixed residence in France will not have access to it, and these categories make up a significant proportion of the prison population. Similarly, people living in poverty will not have the same experience of house arrest, with an electronic bracelet, as wealthier people.

Pre-trial detention is already overused in France,[15] in violation of the rule of law. Extending the use of electronic bracelets would only reinforce the carceral logic, further undermining public confidence in an increasingly repressive and dehumanising system, with little room for justice and procedural guarantees.

on the prohibition of taking this measure on the basis of discriminatory and unfair criteria such as the absence of a fixed residence or a French passport;
    - organise visits for magistrates to prisons (to see the conditions of detention);
    - devise mechanisms to ensure the accountability of judges ordering custodial measures (especially when the person is subsequently acquitted).

- Involve experts other than legal professionals in the criminal justice process, in order to ensure a more comprehensive understanding of a person's situation, and to better protect and divert from the criminal justice system vulnerable people who should not be there (e.g. people who have suffered prior victimization; people who suffer from addictions and need medical attention).

- Reduce the use of criminal law, and invest in holistic approaches to social problems that bring about social healing and promote sustainable safety in our societies and trust in justice.

- Create the space for directly impacted communities to lead policymaking.

Finally, it is a question of creating the conditions for all the judicial actors, lawyers and non-legal professionals who work with

[15] Fair Trials, *France must act on its pre-trial detention problem*, 28 September 2021, available here. See also, Fair Trials, *Pre-trial detention rates and the rule of law in Europe*, 26 April 2021, available here.

	people in the criminal legal system, as well as people who have passed through the prison system, to jointly participate in reform. It is necessary to: • Organise the collection of equality data[17] to understand which populations are, in practice, most impacted by pre-trial detention and the electronic bracelet. • Invest trust in the testimonies of these people, to break out of the predetermined and discriminatory labels on criminality and to rehumanise an increasingly obscure and oppressive system, especially for groups that are vulnerable as a result of systemic inequalities.

Theme: Economic and social justice	
Problem / issue identified:	***Ideas/proposals for improvement to address the problem/issue:***
<u>Institutional racism and systemic discrimination</u> It is astonishing that nowhere in this reform project are the demands of civil society, and especially of racialised groups, mentioned, even though it is a question of restoring confidence in the judicial system. On the other hand, there is mention of *increased investigative resources for terrorism* and *tougher sentences for attacks*	• Facilitate independent, impartial and standardised equality data collection by communities directly impacted by systemic discrimination regarding disparities in the criminal justice system.

[17] Throughout this paper, by *ethnic and racial statistics (equality data)* we mean statistics that can be legally collected observing the legislation in force in France, such as the surveys on subjective data on 'feeling of belonging' conducted by INSEE. See https://www.insee.fr/fr/information/2108548. See also the *EU Guidelines on improving the collection and use of equality data* (2018) and the *EU Guidance Note on the collection and use of equality data based on racial or ethnic origin* (2021), available here.

on law enforcement agencies, while at the same time equating criticism of the justice system with the justification of force and violence.[18]

In order to achieve genuine reform that restores confidence in the justice system, it is essential to confront and respond to the risks posed by : the proliferation of ethnic profiling, as well as ending the prevalence of police violence against racialised people[19] ; the disproportionate incarceration rates of racialised people compared to white people[20] ; the systematic targeting of Roma for minor poverty-related offences [21] ; the over-representation of racialised people in pre-trial detention [22] ; and the exponential over-representation of people of so-called 'foreign origin' in the criminal justice system.[23]

In light of this data, but more importantly in light of the stories of those who have experienced injustice within the system, it is then about finding the will to address the institutional racism that makes trust in the system highly unlikely for communities who historically[24] find themselves not protected by the system, but in need of protection to cope with it.

Another very concrete example of discrimination embedded in the criminal justice system is the instrumentalisation of legal tools against Muslim or perceived Muslim

- Acknowledge unequivocally that one of the main problems facing the French legal system - as indeed all European legal systems - is institutional racism, and commit to putting an end to it, and this since the conception of the national action plan against racism (in light of the European Union's anti-racism action plan).[29]

- Empower those directly impacted by racism and discrimination to lead collective efforts to understand and combat disparities in the criminal justice system.

- Disinvest in punitive and prison policies which, far from making our societies safer and more inclusive, reinforce inequalities and violence against the most marginalised groups.

[18] Speech by President Macron at the opening of the Etats généraux de la justice, 18 October 2021, available here.
[19] Victims of systemic discrimination according to the Defender of Rights, see *Défenseur des droits, Discriminations et origines : l'urgence d'agir*, 15 June 2020, available here.
[20] Fabien Jobard, Sophie Névanen, *Colour-Tainted Sentencing? Racial Discrimination in Court Sentences Concerning Offences Committed against Police Officers*, Revue française de sociologie Volume 48, Issue 2, 2007.
[21] Lukas Muntingh, Kristen Petersen, *PUNISHED FOR BEING POOR: Evidence and Arguments for the Decriminalisation and Declassification of Petty Offences*, Civil Society Prison Reform Initiative, 2015, available here.
[22] Devah Pager, *The Republican Ideal? National Minorities and the Criminal Justice System in Contemporary France, Punishment and Society,* 10 (4):375-400, 2008.
[23] Fabien Jobard. *Police, justice et discriminations raciales*. D. Fassin, É. Fassin. *De la question sociale à la question raciale? Représenter la société française*, La Découverte, pp.211-229, 2009.
[24] See, for example, Julien Suaudeau, *Les violences policières mettent au jour les fissures de l'ordre blanc*, 4 December 2020, SLATE FR, available here.
[29] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, A Union of equality: EU anti-racism action plan 2020-2025, 18 September 2021,available here

groups. As rightly illustrated by the *European Network Against Racism* (ENAR),[25] the vague and broad terms of so-called 'anti-terrorism' policies reinforce an institutional climate of racialised suspicion towards Muslim people. Indeed, the offence of *association de malfaiteurs en relation avec une entreprise terroriste has* long been[26] denounced for its imprecise nature, which opens the door to undue and abusive surveillance and convictions, expanding the toolbox of law enforcement and prosecutors while limiting procedural safeguards for those prosecuted.[27] The same applies to the recent so-called "anti-separatist" law[28], which extends the power of the authorities to dissolve organisations without serious grounds and according to very broad and vague assessments. The arbitrariness that has recently characterised a real tour de force by France against its own citizens undermines both the rule of law and confidence in the French judicial system, while further marginalising and reducing the space in civil society of entire communities because of their identity.	

[25] European Network Against Racism (ENAR), *SUSPICION, DISCRIMINATION AND SURVEILLANCE: The impact of counter-terrorism law and policy on racialised groups at risk of racism in Europe*, 2021, available here.
[26] See, for example, https://www.senat.fr/questions/base/2004/qSEQ040813584.html.
[27] See, for a more extensive analysis on this topic, *Submission by Fair Trials to the United Nations Human Rights Council Universal Periodic Review*, Spain 35th Session of the UPR Working Group, January 2020, available here.
[28] Law no. 2021-1109 of 24 August 2021 strengthening the respect of the principles of the Republic, available here.