Disorder and the law: a strange hostage-taking

Didier Joubert*

General Commissioner of the French "Police Nationale",
Doctor in private law and criminal sciences,
Associate researcher at the University of Technology of Troyes, France
Associate researcher at the National Police College, France

Abstract. In the context of the successive crises that have marked France (terrorism, yellow vests protesters and COVID 19), the judge and the police are trying to respond as best they can to complexity. However, law and science seem to be victims of a strange hostage-taking even though complexity and disorder are constituent elements of reality and therefore subjects for scientific research. After illustrating the messiness and the complexity of the law with concrete examples, the author underlines the importance of science in the field of security and justice and regrets that competition between academic disciplines is hindering the development of a French school of criminology.

Terrorism, "Gilets jaunes" protesters (yellow vests) and coronavirus have heavily complexified the relationship between citizens and the law, jostling practitioners and scientists in real time. The masses cannot stand neither ignorance nor impotence. They demand immediate results, even if it means trampling on the principles they claim. At the same time, the scientific truth of global warming is incapable of exerting sufficient constraint to implement known solutions.
The ambiguous relationship between individuals and the law agrees in defending and questioning the democratic exercise and knowledge simultaneously. Science, which thrives on complexity, is thus the victim of a strange hostage-taking.
The purpose of this paper is to address the notions of complexity and disorder in the legal-police world. After having testified to the complexity and disorder in the relations between the police and the law in connection with the consequences of the latest avatars of "The Crisis", the reflection endeavours to identify, without pretension, in front of practitioners of the "hard" sciences, the sources of this imbroglio where the victim and the culprit come together to the prejudice of complex truths.

1 The rule of law turned upside down by the street and the legislator

The aim is to take a look at legal complexity (1.1) before showing that this complexity is self-perpetuating in context (1.2).

1.1 Legal complexity

Based on a street disorder situation of 16 May 2007 and a case law of the criminal chamber of the "Cour de Cassation" [1] of Tuesday 27 October 2015 [2] in a case that will only end in December 2018 before the "tribunal correctionnel" of LYON, it is first of all the legal complexity that will be tackled in order to better bring out the operational complexity.

1.1.1 Facts and concepts

The facts at the origin of this judicial marathon are dramatically simple: On 16 May 2007, on the fringes of a demonstration against the election of Nicolas Sarkozy, a 23-year-old student was seriously injured in the face by a projectile while crossing the "Place Grenette", in the centre of Grenoble. The victim suffered a permanent disability characterised by the loss of vision in her left eye and her sense of smell.
Without entering into the technical debate necessary to establish the responsibilities of the police officers involved, the legal elements of French law used by the judge of cassation are the criminal law of assembly, voluntary and involuntary violence, indifferent motive, mistake of person, the justifying fact of the command of the legitimate authority and the notion of manifestly illegal act, the question of complicity in an act covered by a justifying fact, the manifestly deliberate violation of a particular obligation of safety or caution imposed by the law or the regulations, In this case, by having given an order to disperse an assembly by force without having carried out the regulatory summonses, considering that neither the summonses carried out at 9.34 p.m., nor the summonses and a rocket launch carried out at 10.26 p.m., can be validly addressed at 10.52 p.m. to a newly formed group of people.

* Corresponding author: didier.joubert@interieur;gouv.fr

1.1.2 An overdue sanction

Notwithstanding the dryness of the technical notions that intersected during our Grenoble event and the difficulty of making decisions in the heat of the moment, which will be discussed below, it is necessary to emphasise the procedural complexity designed to protect the rights of all the parties, which is reflected in a timetable that extends over more than 11 years as appeals are lodged and appeals are lodged in the course of the investigation and then in the course of the trial itself. Although this is too long for any victim, it is a testament to the ability to pursue justice and accountability effectively and raises questions about the source of the complexities mentioned.
At the end of the proceedings, three police officers were acquitted on the basis of an order that was not 'manifestly illegal', while the police commissioner responsible for the scheme was referred to the courts on the basis of unintentional injury to the physical integrity of others resulting in incapacity of more than three months.
In the end, the commissioner and a police commander were found guilty of "involuntary injury" and sentenced to five months and three months suspended prison sentences respectively. Two other "executing" police officers were acquitted.

1.2 Operational complexity

To the procedural richness that guarantees the rights of the parties to the trial is added the operational complexity. In response to the complexity of the facts, there is a continuous expansion of the criminal law.

1.2.1 Decision-making in a complex operational context

The decision of the “Cour de Cassation” referred to above analyses the scene of disorder as follows: "...These officials were unable, in the conditions in which they were then placed, to consider whether or not the summonses had been issued and whether they had heard them. Having been involved in the public demonstration for several hours, with several bodies involved, and with a high level of noise, as evidenced, for example, by the statement in D 20 that Mr B. was "at 9.33 p.m. at the corner of “Rue de la Liberté” and “Place Verdun”, wearing his official insignia and unable to use his megaphone in view of the ambient noise level" and although it was raining, the officials in question had been able to obey the instructions given without being able to assess whether they were illegal; that, in any event, the unlawful nature of the act they were required to perform was not apparent either from its nature or from the conditions in which they were ordered to perform it..." [3].
The European Court itself underlined the complexity of decision-making in a situation of violent demonstration "having regard to the difficulties for the police to carry out their functions in contemporary societies and the unpredictability of human behaviour"[4] without erasing the respect of legitimate, legal and necessary obligations to minimise the use of force. Another ECHR case law points out that "advances in communications technology [allow] the mobilisation of protesters rapidly, secretly and on an unprecedented scale. The police forces of the contracting states [5] face new challenges, which perhaps no one foresaw at the time the convention was drafted” [6].

1.2.2 Complexity as a response to disorder

The legal concepts listed below do not stem from a desire to complicate the life of the judge and the litigant but from a desire to identify concepts that make it possible to respond to the realities of crime and to render justice.
As shown by Law 2019-22 of 23 March 2019 on programming 2018-2022 and reform for justice, and then the debates on the draft law on global security in November 2020, these new developments are the creations of a legislator and a State anxious to show that it is responding to the needs of the citizen and to current events, hence a form of legislative and regulatory incontinence.
Professor Etienne VERGES thus points to procedural asphyxia by emphasising that 'complexity [...] is not an end in itself. It is not the result of the legislator's perverse will. It is often the undesirable consequence of a laudable intention" [7]. It is with the use of exceptional legislation, i.e. provisions that go beyond the ordinary law, that we have recently taken a step forward. The unprecedented terrorist sequence that began in 2015 led to the use of exceptional legislation, a mechanism provided for in our French legal system and in Article 15 of the aforementioned European Convention on Human Rights. However, the difficulty was to come out of such a legal parenthesis in the "least bad" or most opportune way. After the doomed attempt to constitutionalise the state of emergency, we witnessed, at the cost of some semantic shifts, a transfer of the measures of this state of emergency into ordinary law with what some jurists considered to be a form of complacency on the part of the higher courts to allow the state apparatus the latitude it wished to respond to an exceptional situation [8].

This agility and trivialisation of the emergency in the law is accentuated by the current health crisis and raises questions about the complexity of the legal field. However, are the legal distortions mentioned fundamentally different from the changes in the state of matter that the hard sciences experience as a function of environmental conditions?

2 Complexity and disorder as a legal and scientific challenge

The aim here is, without pretension, to highlight other factors of complexity linked to criminal behaviour and the question of responsibility (2.1). As they carry risks and challenges for society, they provide an opportunity for debate and reflection on the meaning and scope of disorder, ethics and the concept of criminal science (2.2).

2.1. The moral and intentional element of the offence

The iter criminis, i.e. the path to the offence, and the quest for responsibility illustrate how, beyond the complexity inherent in the context and the criminal law itself, the desire to improve the consideration of the various actors of the criminal fact again feeds complexity.

2.1.1 The iter criminis

The legitimate desire to prevent crime has led to the constant advancement of the moment when it is possible to enter into repression. After the repression of the offence at the stage of the beginning of its execution, which characterises the attempt, we have moved on to the prosecution of preparatory acts with obstacle offences such as carrying a weapon or legislation on the repression of public drunkenness: it is a question of incriminating an act or a behaviour likely to lead to the commission of other offences. In the context of organised crime, this results in the criminalisation of criminal conspiracy to suppress a group of people before they commit serious acts. In the context of 'suburban' crime, this gives rise to the autonomous offence of ambush, whereas the jurist could already consider that the aggravating circumstance of ambush was a particular form of premeditation, which is itself provided for by the code [9]. In the case of terrorism, in response to the risk of radicalisation, the Constitutional Council has twice censured the offence of frequenting jihadist websites, the intentional element of which was insufficiently characterised [10]. In the long term, one could fear the criminalisation of criminal intent or mere criminal thought. Under the pressure of risk, fear and even clientelism, the notions of repression and prevention are coming closer together to the point that several authors now speak of repressive prevention and preventive repression! Beyond the questioning of the offence committed as a criminal offence and the awareness of its perpetrator, the emergence of a law of dangerousness [11] combined with the application of the precautionary principle in criminal matters leads to the criminal law of the enemy and to a highly questionable behavioural policy. Legitimate, for example, with regard to the fate of radicalised terrorists released from prison, this debate nevertheless leads to totalitarianism or even to a form of penal eugenics that is ethically questionable.

2.1.2 The delights of complicity

According to Article 121-7 of the Penal Code, "An accomplice to a crime or offence is any person who knowingly, by aid or assistance, facilitated its preparation or commission. The person who, by gift, promise, threat, order, abuse of authority or power, provoked an offence or gave instructions to commit it is also an accomplice.
The search for responsibility in the scene of the street disorder in Grenoble mentioned above made it possible to address the issue of complicity in unintentional injury. The subject of the intentional dimension of the positive act or omission that materialises this complicity is delicate. To resolve some of the difficulties, the current wording of the French Criminal Code provides that the accomplice to the offence will be punished in the same way as the perpetrator.
Complicity has been accepted in two cases where the elements exclude the possibility of an agreement between the perpetrator and the accomplice or any collusion [12]. These are complicity in an offence in the absence of intentional fault on the part of the perpetrator [13] and unintentional complicity in cases of professional failings, particularly in terms of controls and checks on operations carried out by principals or employers [14]. The “Cour de Cassation” thus held that a doctor was complicit in unintentional injuries due to insufficient supervision of laser hair removal operations, characterised by the fact that the defendant "did not intervene at any time before or after the hair removal operations as he was obliged to do" [15].
Criminal liability for the acts of others also underwent a major change with Law 2010-930 of 9 August 2010 adapting criminal law to the institution of the International Criminal Court. The provisions of this law transpose into the national legal corpus the modalities of criminal participation drawn from international criminal law with two new cases of complicity defined in Article 213-4-1 of the Criminal Code allowing for the prosecution of complicity by omission and those who 'knew' of the crime but did nothing.
The assassination of Samuel PATY [16], which violently reintroduced the need to examine the notion of moral author or instigator, and the decision of the “Cour de Cassation” to retain complicity in a crime against humanity, even if there is no intention to be associated with the commission of this offence [17], show how complicated the legal field continues to become.
The questions raised by these cases call for ethics to be taken into account, as it is in the life sciences. They should lead to a dialogue between legal philosophy and criminal sciences. In fact, is law not a science of the living?

2.2 The disorder and the quarrel of the criminal sciences in France

The tension between positive law, which is constantly evolving, and the work of justice may explain the disorder observed, as well as the 'dispute over criminal science' that characterises our country, even though justice and the police, in France as elsewhere, are relying more and more on science to investigate, act and decide.

2.2.1 Disorder as a constituent element of legal complexity

To continue along the path of complexity, it is once again the European case law that should be observed to note that in matters of contestation, the Strasbourg judge makes disorder, if not a condition, at least an unavoidable occurrence in the exercise of the right to demonstrate. In the famous BARRACO judgment, the European Court of

Human Rights logically explains what may seem paradoxical as follows:
"The Court recognises that any demonstration in a public place is likely to cause some disorder in the conduct of daily life, including disruption of traffic, and that, in the absence of acts of violence on the part of the demonstrators, it is important for the public authorities to show a certain tolerance for peaceful gatherings, so that the freedom of assembly is not deprived of all content." [18]

From the point of view of the exercise of public freedoms in a democratic regime, the reasoning is absolutely unassailable. However, without forcing the caricature, it is conceivable that, when brought back to the concrete exercise of safeguarding public order, which constitutes an objective of constitutional value, the reconciliation of injunctions is complex and that a great deal of skill, if not science, is required to deal with questions of public security! However, the sciences themselves are subject to exchanges that sometimes go beyond controversy and enrich the disorder of thought, as the Covid 19 health crisis vividly demonstrated. This disorder is not confined to the medical and biological fields. As Emile DURKHEIM said about crime [19] disorder is also a normal phenomenon whose nature and scope are variable. From the point of view of the law, the disturbance of public order during a demonstration is usually of lesser significance than a challenge to scientific certainties or legal categories with the right of the enemy. More profoundly, and without any pejorative connotation, it is legitimate to question the immanence of disorder in the law, because of the nature of a legal science that strives to regulate complex interactions. This quarrel between the legal viewpoint and the complexity of life has found particularly favourable ground in France.

2.2.1The dispute in the criminal sciences

Questions of security and criminal science are the subject of multiple expert opinions that are disputed in turn by the jurist, the sociologist, the political scientist, the psychologist and the doctor, sometimes refusing to listen to the experiential knowledge of the police officer. The subject being no small one, a prince recently decided to create a criminology section within the national council of universities, provoking an outcry and then a violent rejection in the spring of 2012, which the newspaper "Le Monde" summarised as follows: Criminology" between media success and academic rejection [20]. The criminology section did not see the light of day but the disorder continues, whether it be ideological quarrels or legitimate academic controversies in the field of human and social sciences. In the end, it resulted in the more or less timely and successful importation of Anglo-Saxon concepts which are likely to harm French thinking on the subject and deny the historical and local cultural dimension of social facts, with the risk of copying unsuitable schemes or even disturbing objectivity. This is a weakness of the human and social sciences that Wictor STOCZKOWSKI, a professor at the "Ecole des Hautes Etudes en Sciences Sociales" (EHESS), points out in an essay entitled "Social sciences as a vision of the world" [21]. It thus appears that despite the growing role of scientific expertise in the action of the judicial police and then in the act of judging, France is thus offering itself a dispute over criminal sciences that the clumsy appropriation of the concept of global security by politicians has not failed to revive. We cautiously hypothesise that Anglo-Saxon culture and the sociology of the Chicago school on the other side of the Atlantic are more conducive to a pragmatic approach. The messianic dimension evoked by Wictor STOCZKOWKSI with the considerable influence of the tutelary figures of Durkheim, Bourdieu and Foucault on their epigones maintains a critical look at the State and the Law, which may suffer from the quality of legitimate controversies on the institutions of police and justice, while the latter are increasingly based on science. The search for scientific evidence in the course of an investigation provides a remarkable demonstration of this evolution with the leap linked to DNA sequencing. The development of forensic science and the announced transition from the 'technical and scientific police' to the 'scientific police' also bear witness to this [22]. Finally, during the criminal trial, experts from all disciplines are also invited, with an inevitable risk of controversy likely to confuse the citizen, even though the scientific complexity on the one hand and the principles of the criminal trial on the other explain and justify the debate.

***

The criminal sciences arouse a political interest that feeds on the heat of the action and can parasitize the necessary trust between the actors involved, which requires a long time. As a result, the disorder remains untouched without the intelligence of the complexities, the object of science, necessarily shedding light on it. In this strange hostage-taking of science, law and the law, alternately hoped for and rejected, the perpetrators and the victims are strangely similar to us. The source of our confusion lies perhaps, in part, in the question posed by Christophe JAMIN on the rigour of the law following several successive court decisions taken during the COVID 19 crisis: "So the law: a formal rigour camouflaging a mass of emotions?" [23] Once again we will not all agree!

References

1. In order not to use an awkward literal translation of the names of institutions, the court decisions cited appear with the French name of the court that made them: "Tribunal correctionnel", "Cour d'appel", « Cour de Cassation » (Cass. crim.), "Conseil constitutionnel" (Cons. Const.).
2. Cass. Crim., 27 October 2015, n° 14-84952
3. Extract from the above-mentioned case law of 27 October 2015
4. ECHR, GIULIANI and GAGGIO V. Italy, 24 March 2011, app n°23458, §56
5. I.e. the States to which the European Convention on Human Rights applies

6. ECHR [GC] Austin and Others v. the United Kingdom, 15 March 2012, app n° 39692/09, §56
7. E. VERGES, *La procédure pénale technicienne (ou l'asphyxie procédurale)*, France, Revue de Science Criminelle et de Droit Pénal Comparé, Dalloz (2019), p.667 et seq.
8. On these subjects see : J. Alix, O. Cahn, *Mutations de l'antiterrorisme et émergence d'un droit répressif de la sécurité nationale (Changes in counter-terrorism and the emergence of a repressive national security law)*, France, Revue de Science Criminelle et de Droit Pénal Comparé, Dalloz, (2018), p.8451
9. On this point, see F. SAFI, *La loi bavarde : l'exemple du guet-apens* (*The chatty law: the example of the ambush), France*, Lexis Nexis, Droit Pénal n°2, February (2021)
10. Article 421-2-5-2 repealed, Penal Code, Cons. const. n° 2016-611 QPC, 10 February 2017 and Cons. const. n° 2017-682 QPC,15 December 2017
11. *Cf*. in particular under the direction of G. Giudicelli-Delage and C. Lazerges, *La dangerosité saisie par le droit pén*a*l* (*About dangerousness in criminal law*), Presses Universitaires de France, Paris (2011)
12. On complicity by collusion, see : A. DECOCQ, *Inaction, abstention and complicité par aide ou assistance (Inaction, abstention and complicity by aiding and abetting)*, France, JCP (1983) I 3124, C. GIRAULT, *Le relâchement du lien de concertation entre l'auteur principal et le complice (The loosening of the link between the principal perpetrator and the accomplice)*, France, D (2008), 1714
13. Cour d'appel, Chambéry, 8 March 1956, for a Bobsleigh accident.
14. Cass. crim. 31 January 2007, n°05-85.886, Bull. crim. 2007 n°25, D. 2007, Jur. p. 1843
15. Cass. crim. 13 September 2016, n° 15-85046, Bull. crim. Gaz. Pal. n°4/2017, p. 44
16. French history and geography teacher who was beheaded outside his school on 16 October 2020 for having mentioned and shown cartoons of Mohammed during a lesson on freedom of expression ten days earlier. After the father of one of the pupils, who was absent during the "offending" lesson, spread false information, social networks relayed a campaign of harassment that ended with the murder by a radicalised Islamist.
17. Cass. Crim. 7 September 2021, n°19-87. 367, J. LASSERRE CAPDEVILLE, *Affaire LAFARGE, précisions sur l'information judiciaire ouverte pour complicité de crime contre l'humanité*, (LAFARGE case, details of the judicial investigation opened for complicity in crimes against humanity), France, AJ Pénal, Dalloz, October (2021).
18. ECHR 5 March 2009, Barraco c. France, n° 31684/05
19. "First, crime is normal because a society free of it is quite impossible", in E. DURKHEIM, *Les règles de la méthode sociologique* (1894), p.95 of the electronic edition based on the book *Les règles de la méthode sociologique*, Paris, Les Presses universitaires de France, 16th edition, 1967, p.67, available on the website : http://classiques.uqac.ca/classiques/Durkheim_emile/regles_methode/regles_methode.html
20. Le Monde, 28 March 2012
21. W. Stoczkowski, *La science sociale comme vision du monde*. *Émile Durkheim et le mirage du salut (Social science as a worldview*. *Émile Durkheim and the mirage of salvation)*, Paris, Gallimard, coll. « NRF essais », (2019), 629 p.
22. Reform of the police forensic service, the framework of the draft law on the orientation and programming of the Ministry of the Interior 2022-2027 (LOPMI).
23. C. JAMIN, *Vous avez dit rigueur ? (Did you say rigour?)*, La semaine juridique, édition générale, n°18, May (2021, Lexis Nexis