2.1.1 Choosing the right moment: administrative or judicial policing

Public authorities have two options for dealing with collective disorder: they can anticipate it if it is foreseeable, or they can react when it occurs. This immediately raises the first difficulty when it comes to the exercise of a public freedom, and freedom of expression in particular: how to prevent disorder without obstructing that freedom? Any anticipatory measure is potentially read, rightly or wrongly, as an infringement of freedom, hence the irrefragable political dimension of managing public disorder.

When it comes to public freedoms, there are two main options: the repressive system, which prohibits nothing but punishes, *a posteriori*, behaviour that constitutes an offence; and the preventive system, which - to avoid disturbances - regulates the exercise of a given freedom (for example, by creating a highway code to avoid excesses in the freedom to move about freely). The repressive regime calls for judicial police measures (and the intervention of magistrates), while the preventive regime calls for the intervention of the administrative authority (the prefect who prohibits or modifies the modalities of a sporting, cultural or religious event...).

The preventive regime is intellectually and practically satisfactory for maintaining public peace, and consequently the most prejudicial to civil liberties. France has therefore opted for a "mixed" system, requiring only a prior declaration, and allowing precautionary measures to be taken if necessary, up to and including outright prohibition. In France, therefore, there is no authorization for demonstrations, but some are banned from time to time.

It's easy to imagine the embarrassment of managing a demonstration that is both undeclared and unbidden! This is one of the reasons why, over the last ten years or so, there has been a call for the judicialization of public order, so that those involved have a clear, effective and protective legal framework within which to act, with the endorsement and under the control of the judicial authorities. What can be considered a guarantee, however, implies intervening during or after disturbances, with all the risks that this entails. Hence, then, the search for and creation of specific offences such as obstacle offences, in an attempt to reconcile a solid legal framework for action with preventive effectiveness.

The ability to model the kinetics of certain forms of collective behavior opens up new possibilities for anticipating the reactions of this or that fraction of the population. There is, however, a limitation and a paradox. One limitation is that the trigger for riotous violence is frequently a contingent event, the occurrence of which is itself difficult to anticipate. Put another way, it's possible to anticipate the consequences of a fact, piece of information or decision, but predicting the initial cause is trickier. A paradox, because while preventive measures are particularly effective, the State and public authorities are exposed to a mechanical legal risk, even in the absence of disorder, for having implemented potentially disproportionate infringements of freedom of expression and/or freedom of movement.

Having highlighted these contradictions in the context of timing, we now turn to the question of means.

2.1.2 The choice of means: use of force and tolerance of disorder

"In a society where custom and tradition reign, where written and state law have not yet been put into practice, collective violence occupies a primordial place. This place is even enshrined in law... The bell rings in the event of a fire and the volunteers come running, because it is their duty to come to the community's rescue" [23]. Yves-Marie BERCE's quotation provides an opportunity, well before the French Revolution, to question the status of collective violence in our surprising country, where insubordination is advocated by members of parliament, not without a link to the revolutionary constitution of 1793 and, more to the point, the Declaration of the Rights of Man.

In 1793, Article 9 of the constitution stated that "The law must protect public and individual liberty against oppression by those who govern", Article 33 that "Resistance to oppression is the consequence of the other Rights of Man" and Article 35 contained the famous statement "When the government violates the rights of the people, insurrection is, for the people and for each portion of the people, the most sacred of rights and the most indispensable of duties".

In 1789, Article 2 of the Declaration of Rights stated that "The aim of every political association is the conservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression".

In order to re-establish order, positive law is first and foremost concerned with prevention: "The purpose of maintaining order is to prevent disturbances so that they do not have to be suppressed; it includes above all preventive measures, the importance of which must never be lost sight of. If order is nevertheless disturbed, it also includes measures designed to restore it" [24]. This position is logical. The administrative nature of public order management follows from it [25].

Legally, to meet both the objective of anticipating disorder and that of restoring order, the law states that "An assembly within the meaning of article L 431-3 of the Code of Internal Security may be dissipated by the police after two summonses to disperse have remained without effect, addressed by the prefect, the sub-prefect, the mayor or one of his deputies, any judicial police officer responsible for public security, or any other judicial police officer, wearing the insignia of their position. [26]" In practical terms, however, there are two specific cases in which the use of force can be used without prior summons [27].

In addition to legal constraint (the prohibition imposed by the law), it is sometimes necessary to use force, open force or brute force. However, the use of public force only leads to the legitimate use of violence, an expression I borrow from Raymond ARON [28], when

the legal constraint imposed by the law is not enough. Basically, without being angelic or glossing over any professional misconduct, the rule of law does indeed require the use of legal coercion, if necessary just the use of force within the framework provided by the law. Similarly, it is legitimate to prosecute those whose behaviour falls foul of the law because they do not respect the defined legal framework.

The fact remains, however, that the choice to use force is not a mechanical one. It responds to a legal diagnosis and a subjective analysis of opportunity in context. In France, the criminal law governing assemblies, as set out in the Penal Code and the Internal Security Code, has long been a model of flexible law, with a subjective dimension that gives the civil authority responsible for the decision to use force the opportunity to decide whether or not to use force, even when the legal conditions for its use have been met. This is also the reason for the existence of a specific system of liability, which will be discussed in greater detail later in this article.

In doctrine, this practical dimension of assuming, if necessary, damage to property in order to limit damage to persons is known as "patrimonialisation". The very existence of this derogatory regime reflects both a form of tolerance of disorder [29] and the difficulties of taking into account the violent collective behaviour to which the collective expression of ideas and opinions can give rise. The source of these difficulties is undoubtedly linked to the irrefragable political dimension of the search for a socially acceptable balance between the maintenance of public order and the practical exercise of civil liberties [30]. The cardinal distinction between the civil authority, which decides on the use of force and assumes responsibility for it, and the public force commander, who implements the use of force, reflects the political nature of public order management. In the field and in practice, these difficulties are obviously of an operational nature, in terms of distinguishing between peaceful and violent actors in a crowd, but they are also of a legal nature.

2.2 Individual responsibility versus collective action: the legal quandary

The individualisation of criminal liability is a hallmark of the rule of law, and we all remember the unjust and retrograde nature of collective punishments or exemplary punishments such as the decimation evoked by Roman historians and writers. Today, Article L-121-1 of the French Penal Code states that "No one shall be held criminally responsible except for his own actions". The fact remains, however, that when it comes to responding to the social risks associated with collective action, French law has for a long time had two liability systems coexisting.

In the case of violent behaviour committed in the exercise of public freedoms, a system of extra-criminal legal liability can be found alongside the traditional forms of punishment for criminal participation. So before reviewing the efforts made by the legislature and the courts to provide a better response to collective behaviour that constitutes an offence, it is worth mentioning the specific system for compensating victims "for damage and injury resulting from crimes and misdemeanours committed with open force or violence, by armed or unarmed gatherings or assemblies, either against persons or against property"[31].

2.2.1 A specific extra-criminal liability regime to compensate for the risks associated with popular protest movements

The search for liability for damage linked to protest movements is marked by the historical legacy of the relationship between the central State and local authorities. Once again, a retrospective look is instructive. It allows us to confirm the permanence of the major categories of "disputes" linked, for example, to tax or food issues. It also shows that our culture is changing slowly and little.

Jean-Nicolas' research shows, for example, that 55% of the 8,528 acts of rebellion he recorded between 1661 and 1789 concerned taxation and the State's judicial or police apparatus. These studies also highlight the popular tradition of "rescuing", which demonstrates the solidarity of local people in the face of outside authority. The rescue mechanism is a variation on the tocsin's call for help in the event of danger, fire or other calamity. In the eyes of public opinion, tax collectors, in the broadest sense of the term, naturally fall into the "calamity" category. Coming to the rescue also involved very young people, long before there was any talk of urban violence in the suburbs: "In the street, young people are marvellous when it comes to resisting arrest or seizure. Building site labourers, schoolchildren and other rascals have the art of stirring up a neighbourhood, swinging their fists and posing as victims at the slightest threat"[32].

In the same vein as the rescue, and not unconnected with the mythology of the tumultuous relationship between the state, the citizen and local authorities, the uprising of "La Commune" also constitutes a marker of collective action, with a representation both real and fantasised of the legitimacy of indignation and collective anger against an unjust power embodied in repression. This is not the place for a detailed analysis, but we can certainly see similarities between the lifting of "communes" in the past and certain uprisings today around a roundabout or a « ZAD » *ie* a zone to be defended. In the event of a rescue or the lifting of a commune, it is in the face of more or less organised groups that the public authorities must react. So it is to the vehement exercise of freedom of expression by people using their collective public freedoms that the State reacts by using, over and above a criminal law whose principles are more suited to the repression of criminal associations than to the stormy gathering of angry citizen-demonstrators, a specific system of liability, directly inherited from the Middle Ages and formalised in 1795 during the post-revolutionary period!

Symbolic of the relationship between the central State and local authorities, including in terms of maintaining public peace, the revolutionary provisions aimed to make communes liable for compensation for damages and interest resulting from "offences committed with open force or violence on its territory, by armed or unarmed gatherings or assemblies, either against individuals or against national or private property"[33]. Article 2 of the same text of An IV clearly proves that the aim was not only to give victims the right to compensation, but also to force communes to "control" the excesses of their population: "In the event that the inhabitants of the commune have taken part in the offences committed on its territory, by assemblies and gatherings, this commune will be obliged to pay the Republic a fine equal to the amount of the main reparation". In addition, article 5 of the Vendémiaire decree provides for the possibility of joint liability on the part of several communes and a form of collective liability on the part of the commune's inhabitants: "when, as a result of an assembly or gathering, an individual, whether domiciled in a commune or not, is looted, mistreated or killed there, all the inhabitants will be required to pay damages to him or, in the event of his death, to his widow and children".

A century later, the law of 5 April 1884 (known as the Municipal Law) and the law of 16 April 1914, which amended articles 106 to 109 [34], perpetuated the creation of a system of liability for social risk and, in our opinion, also political risk, by stipulating in article 108 "However, if the municipality has failed in its duties through inertia or collusion with the rioters, the State may take recourse against the municipality for up to sixty per cent (60%) of the sums".

Today, the specific liability regime is set out in article L 211-10 of the French Internal Security Code. The first paragraph of this article states that "The State is civilly liable for damage and injury resulting from crimes and offences committed, by open force or by violence, by armed or unarmed gatherings, either against persons or against property".

Thus, throughout history, the legislature has recognised the social cost of exercising public freedoms, while at the same time endeavouring not to fall into the trap of an insurance-type system that provides systematic compensation that is convenient but costly for the State's public finances [35]. It is therefore understandable that traditional criminal law retains a legitimate and predominant place in responding to the behaviour of angry citizens during episodes of collective violence.

2.2.2 Recent developments in positive law and case law relating to collective violence.

In the face of collective outbursts, the legislature, the courts and legal doctrine have reacted in various ways, without being able to avoid the recurrence of polemics on the occasion of this or that news item featuring the violence of gangs or hooligans, and today the behaviour of "black-bloc" demonstrators.

In the context of criminal law and, consequently, the principle of personal liability, collective violence is dealt with technically by all the provisions relating to criminal participation (complicity), by a particular *modus operandi* characterising the material element of an offence (action, concerted manner or plan, provocation), by specific aggravating circumstances (grouping, multiple persons acting as perpetrators or accomplices, organised gang) or by autonomous offences or offences-obstacles (criminal conspiracy, participation in a group or an agreement established with a view to ..., participation in a combat group, participation in an armed group, etc.). participation in a combat group, participation in a violent group, which we will discuss below). Certain forms of collective violence are now also treated as part of the concept of organised crime or terrorist offences.

As far as the law and the legislator are concerned, the issue is still marked, in France, by the figure of the “Casseurs” [looters or rioters] and Law 70-480 of 8 June 1970 designed to repress certain new forms of delinquency, known as the "Marcellin Law" after the Minister of the Interior at the time, then the "Anti-Casseurs Law"[36], which stipulated in particular that "When, as a result of a concerted action carried out with open force by a group, violence or assault has been committed against persons or destruction or damage has been caused to property, the instigators and organisers of this action as well as those who voluntarily take part in it will be punished, without prejudice to the application of the more severe penalties provided for by law, by imprisonment of between one and five years... ". Drafted and promulgated in the post-1968 context, this law was intended to crack down hard on collective behaviour attributed to extremist groups and to provide for joint compensation for personal injury or material damage caused by such behaviour. Criticised as a "legal monstrosity" or "police law", the law was repealed shortly after François MITTERAND came to power in 1981[37].

History is stuttering. In response to "the increasing number of acts of violence committed by gangs" and "the gaps in our repressive arsenal"[38], Act n°. 2010 of 2 March 2010 strengthening the fight against group violence and the protection of persons entrusted with a public service mission[39] introduces a new offence in Article 222-14-2 of the Criminal Code, making it a criminal offence "for a person to knowingly participate in a group, even if formed on a temporary basis, with a view to preparing, as evidenced by one or more material acts, deliberate violence against persons or destruction or damage to property, is punishable by one year's imprisonment and a fine of €15,000".

History is still stuttering. In the context of the Yellow Vests conflict, the proposed law aimed at reinforcing and guaranteeing the maintenance of public order during demonstrations, known as the Retailleau law, which seeks to introduce an administrative ban on demonstrations along the lines of the provisions relating to administrative stadium bans created in 1993 [40], once again raises the spectre of the 1970 anti-breakers law. Referred to the Constitutional Council, the text was partially censured [41], but the parliamentary debates following the pension reform in 2023 once again raised

the question of the appropriateness of criminalising violent collective behaviour.

In addition, and in parallel with the development of positive law, legal doctrine and case law have long sought to respond to the difficulties by broadening the notion of complicity or by creating, as early as the 19th century, concepts such as co-respective complicity and the single scene of violence, to which we will return later.

The scope of complicity has been broadened to include indirect complicity, also known as second-degree complicity, which most often disappears behind the notion of aid or assistance, the theory of participatory abstention or passive complicity[42], complicity in an offence even in the absence of intentional fault on the part of the principal perpetrator [43] and unintentional complicity in cases where certain professionals fail to control or verify operations committed by principals or employers[44].

The concept of co-respective complicity appeared as early as the 19th century [45], in particular to be able to punish acts committed collectively where the circumstances in which they were committed made it impossible, for example, to precisely identify the perpetrator of fatal blows. However, the concept now most widely used in this area is that of a "single scene of violence", i.e. a scene "which must be assessed as a whole, without it being necessary to specify the actions of each of the participants"[46]. This jurisprudential construction was recently judged to comply with the Constitution on the occasion of a “question prioritaire de constitutionnalité” rejected in the following terms by the “Cour de cassation”, which affirmed that "personal participation in indivisible violence caused by several perpetrators. This assessment of individual behaviour does not, therefore, undermine the presumption of innocence, and does not imply either a reversal of the burden of proof or a disregard for the principle of individualisation in the application of criminal law."[47]

To conclude provisionally on a subject that will undoubtedly be developed further, it is worth noting the unique use, as far as our research is concerned, of the concept of "a single scene of destruction or damage"[48] on the occasion of a collective operation against the cultivation of GMOs, which gave rise to an appeal that was rejected by the French Supreme Court, confirming in particular that "in a democratic society, there are means other than the commission of criminal offences to prevent a possible danger..."[49].

The treatment of mob violence is still divided between preventive and repressive measures. Beyond the recurrent polemics often dictated by political posturing, the difficulty of dealing effectively with the preventive aspect remains, particularly when the risk of violence is concomitant with the exercise of a constitutionally protected collective public freedom, since any preventive measure will necessarily and legitimately be analysed as a potentially disproportionate interference. The path to a fair balance will remain narrow in this area.

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At the end of this presentation, in the course of which each of the concepts evoked would be likely to provide material for several symposia, seminars or scientific publications, it is perhaps worth drawing attention to two specific points regarding the treatment of violent collective behaviour. On the one hand, the richness and lack of guaranteed effectiveness of our legal tools, which could or should lead to the creation of new rules or the codification of certain concepts such as "a single scene of violence" and "a single scene of degradation". On the other hand, there is an interest in preserving, for the benefit of litigants, the flexibility of ad-hoc jurisprudential creations so as not to fuel the inflation of legal standards. The debate remains open. For example, at the end of the trial into the terrorist attacks of 13 November 2015, criminal law professor Julie ALIX deplored the "lack of effort to conceptualise this issue". This trial could have been an opportunity to note that our law is not adapted to the imputation of mass crimes and that something new had to be built"[50]. Efforts under international law, in particular Article 25 of the Rome Statute of the International Criminal Court, combine the principle of individual criminal responsibility with certain forms of group crime by extending the scope for prosecution to those who order, solicit, encourage [51], contribute [52] or incite [53] criminal activity. More recently, in France, the pensions dispute and opposition to certain infrastructure projects [54] led to the creation of a new parliamentary committee of enquiry chaired by Patrick HETZL, MP for Bas-Rhin. For six months, the members of this committee of enquiry looked into "the structure, funding, resources and methods of action of the small groups responsible for violence during the demonstrations and gatherings that took place between March 16 and May 3 2023, as well as the way in which these demonstrations and gatherings were conducted"[55], noting in particular "the hysteria of the public debate surrounding the violence, between saturation and caricature", "the uninhibited legitimisation of the use of violence", and the semantic and legal approximations surrounding the notions of violence and damage. The list of 36 recommendations contains few technical proposals in criminal matters (formal or substantive law) apart from extending the scope of the ban on demonstrations and the inevitable increase in the quantum of the penalty for violating the ban. Of course, this may give rise to further speeches illustrating the complexity of responding to the world's disorder while endeavouring not to undermine civil liberties.

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Appendice:

On 27 June 2023, the death of a young man of 17 following the use of a firearm by a police officer in Nanterre led to a week of rioting. It is therefore interesting to compare the kinetics of this new crisis (speed of spread and duration) with the developments of our intervention on 19 June. Two key elements seem to be emerging:

- Confirmation of a further acceleration in the spread of the crisis, in line with the historical trend already observed, with information circulating ever faster

and more effectively among teenagers and young adults, thanks in particular to the use of social networks: the phenomenon reached Lyon on 28 June and set Marseilles ablaze on 29 June (figure 4 showed a much greater time lag between the suburbs of Paris and the Rhône in 2005).

- An acute phase of crisis lasting around a week, which is comparable to the duration of the 2005 crisis if we look at the phenomenon on a local scale. Indeed, while the 2005 riots lasted three weeks at national level, this was due to the slower spread of the phenomenon across the country). The graphs in the first part of this paper illustrate the time lag from one department to another, which extends the total duration of the cycle of violence (*cf*. I figures 2 & 4).

Two other points require in-depth research in order to accurately analyse data which, to date, are not necessarily available or exactly comparable:

- With regard to the geographical extent of the phenomenon (66 departments and 516 cities according to the joint report by the Inspection Générale de l'Administration and the Inspection Générale des Services judiciaires [56], it seems necessary to take a step back in order to avoid over-hasty analyses that may underestimate the number of departments actually affected in 2005 and consequently overestimate the change in scale between 2023 and 2005. In its summary report published in 2007, the French "Centre d'Analyse Stratégique" mentioned a total of 531 cities affected by urban violence, including 66 with fewer than 10,000 inhabitants and 328 where more than 5 vehicles were burnt [57].
- With regard to the nature of offences and collective behaviour recorded in 2023 compared with 2005, future analyses will have to verify that 2023 is characterised by more crime of opportunity (shoplifting and looting) and that, as such, more places located outside collective housing areas are concerned.
- Finally, the possibility of modelling "epidemics of collective violence" should encourage us to continue in this direction in order to anticipate, train and inform those involved in public peace in order to limit the occurrence and intensity of future crises.

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