

PROVISIONAL RELEASE IN FRENCH PENAL LAW

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In French penal procedure, the term preventive detention (*détention préventive*) means the imprisonment which a defendant, whether *inculpé*, *prévenu* or *accusé*,¹ may have to undergo pending final judgment. Provisional release (*liberté provisoire*), on the other hand, is the means whereby a person continues to enjoy freedom, or regains it after having been placed in preventive detention, during the criminal proceedings.²

Under the new Code of Penal Procedure of 1957-1958, which has been applicable in France since March 2, 1959,³ "preventive detention is an *exceptional measure*."⁴ An advance official circular had already said of this measure that it could "only be an *exception* justified by the *frequent* exigencies of public policy or of the quest for truth";⁵ and the whole difficulty, therefore, is to determine how the exceptional character of preventive detention can in practice be reconciled with these exigencies, which may require its frequent application.

The difficulty disappears when the defendant is not liable to correctional imprisonment (a term exceeding two months) or a more serious penalty, for in that case he cannot be placed in preventive detention at all.⁶ But if the alleged offense is punishable by correctional imprisonment or a more severe penalty such detention is a possibility. The judicial authorities, however, are never compelled to apply the measure and, even if ordered, preventive detention may always be

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¹ At the stage of police inquiry there are only "suspects." A person against whom a preliminary judicial inquiry is directed is an *inculpé*. A person sent to a trial court becomes a *prévenu*, except that one committed to an assize court, which sits for the trial of *crimes*, see note 11 *infra*, is termed an *accusé*.

² Care should be taken not to confuse "provisional release" (*liberté provisoire*), which gives freedom to a defendant (*inculpé*, *prévenu* or *accusé*) before final judgment, with the "conditional release" (*libération conditionnelle*) of a convicted prisoner serving his sentence, CODE OF PENAL PROCEDURE [hereinafter cited as CODE] arts. 729-33, or with the "supervised freedom" (*liberté surveillée*) of juvenile offenders, Ordonnance of Feb. 2, 1945, arts. 25-32.

³ See 1 BESSON, VOUIN & ARPAILLANCE, CODE ANNOTÉ DE PROCÉDURE PÉNAL, arts. 1-230 (1958). On the judicial organization and French penal procedure immediately before the Code of Penal Procedure see VOUIN & LEAUTE, DROIT PÉNAL ET CRIMINOLOGIE 361-505 (1956).

⁴ CODE art. 137. (Emphasis added.)

⁵ Circular of April 2, 1952 [1952] Semaine Juridique 16903. (Emphasis added.)

⁶ CODE arts. 122, 131, 135.

discontinued pursuant to a warrant of provisional release issued before the final judgment which closes the proceedings.

In practice, many *inculpés* or *prévenus* know that their conviction is very probable and prefer to remain some time in preventive detention; some think that if the trial is delayed they will be shown greater indulgence; others rightly deem that preventive detention involves less hardship than serving a sentence and know that by virtue of the Penal Code⁷ the period of such detention must, in the absence of a contrary decision by the bench, be deducted from the term of the sentence imposed on conviction.

In the majority of cases, however, the defendant wishes to keep his liberty or, if he has lost it, to obtain his release. Furthermore, if he has been placed in preventive detention, the bench can release him even though he may wish to remain in custody. And again, the problem of preventive detention as against continued freedom is in practice very often solved by an immediate placement in custody, soon followed by release in accordance with the wishes of the person concerned. Provisional release, then, is a very important but complex institution. We will consider, in turn, its forms, its conditions and its effects.⁸

I. Forms of Release

Under the provisions of the new Code of Penal Procedure,⁹ provisional release may assume any one of three different forms which obviously do not all raise the same issues. A distinction must be drawn between *mandatory* release or release as of right, *discretionary* or properly judicial release, and a *necessary* release, which must on occasion take place automatically.¹⁰

(a) *Mandatory release.* We have already seen that in France a person cannot be placed in preventive detention unless the offense for which he is being prosecuted is legally punishable by correctional imprisonment or by a more severe penalty. By looking to the prescribed penalty, therefore, it is possible to distinguish between those who can be placed in preventive detention and those who cannot. But the

⁷ CODE PÉNAL art. 24 (Fr. 52d ed. Dalloz 1955).

⁸ "Preventive detention" should not be confused with the keeping under surveillance (*garde à vue*) of persons whom the criminal police may detain for twenty-four or forty-eight hours for the purpose of a police inquiry. Such keeping under surveillance, already practised without legal authority before the Code of Penal Procedure, was recognized and regulated, *i.e.*, restricted to fair proportions, by the Code's authors. CODE arts. 63, 77, 154.

⁹ CODE arts. 138-50.

¹⁰ The distinction between "mandatory release" and "discretionary release" is well established in French legal terminology. The expression "necessary release," however, is not in common use.

penalty applicable to the offense which the prosecution believes to have been committed may also reveal that the defendant belongs in a third category which falls between these two classes of *inculpés* or *prévenus*. According to article 138 of the Code of Penal Procedure, "in a correctional case, when the maximum penalty prescribed by law is less than two years' imprisonment, an *inculpé* domiciled in France cannot be detained for longer than five days after his first appearance before the examining judge, unless he has previously been convicted of a crime or sentenced to imprisonment for an unsuspended term exceeding three months for an offense under the general law."¹¹

The preventive detention must thus cease upon the expiration of the five-day period, and the *inculpé* or *prévenu* must be released provisionally as of right, whenever the offense for which he is being prosecuted is punishable by a penalty less severe than imprisonment for a term of two years.¹² This release, however, is also subject, according to the law, to three further conditions: (1) that the offense on which the prosecution is based is a correctional offense and not a petty offense (which never gives rise to preventive detention) or a crime (which wholly precludes mandatory release); (2) that the *inculpé* or *prévenu* has his domicile, or at least a *de facto* permanent residence, on French territory; and (3) that he has never previously been convicted of a crime or sentenced to imprisonment for a term exceeding three months, without suspension of the execution of the penalty, for a correctional offense under the general law.

Before a Legislative Decree of November 18, 1939, a person previously sentenced to correctional imprisonment was nevertheless entitled to mandatory release if the term of that imprisonment had not exceeded one year. Save for this one detail, the conditions of mandatory release, or release as of right, have not changed since its introduction into French penal procedure by the Law of July 14, 1865. The relevant legal rules, formerly contained in article 113 of our *Code d'instruction criminelle*, never evoked any criticism and were accordingly reintroduced without change into our new Code of Penal Pro-

¹¹ French criminal law distinguishes three categories of offenses (*infractions*): in order of increasing gravity, "petty offenses" (*contraventions de police*), "correctional offenses" (*délits correctionnels*) and "crimes" (*crimes*). There are also three categories of penalties (*peines*): petty, correctional and criminal (*de police, correctionnelles* and *criminelles*) and three categories of courts (*jurisdictions*): police courts, correctional courts and assize courts (*tribunaux de police, tribunaux correctionnels* and *cours d'assises*). French law also distinguishes, in keeping with the traditions of liberal countries, between offenses and penalties under the general law and offenses or penalties of a political nature. See VOUIN & LEAUTE, *op. cit. supra* note 3, at 154, 159, 541.

¹² The time of first appearance for examination depends on the circumstances in which the defendant comes before the examining judge. See CODE arts. 122-36, relating to the warrants and orders (*mandats*) issued by the examining judge.

cedure. While they can be considered satisfactory, one should nevertheless note that they limit somewhat narrowly the scope of mandatory release at the end of a five-day period. It should not be forgotten, however, that under French law the release of an *inculpé* or *prévenu*, when not mandatory, may still be obtained at the court's discretion.

(b) *Discretionary release.* An *inculpé*, *prévenu* or *accusé* who is not entitled to demand his provisional release as of right may nevertheless be released by order of the competent judicial authority, even if the offense on which the prosecution is based is a crime. The Code of Penal Procedure sets forth this rule with the greatest clarity: (1) "in every case where it cannot be claimed as of right, provisional release may be ordered by the examining judge on his own motion" and "the *procureur de la République* may also apply therefor at any time";¹³ (2) "provisional release may be requested at any time from the examining judge by the *inculpé* or his counsel";¹⁴ (3) "provisional release may also be requested by any *inculpé*, *prévenu* or *accusé* in all circumstances and at any stage of the proceedings"—that is, even when the case advances to the trial court, the court of appeal or the Court of Cassation.¹⁵

The new Code also contains many other provisions encouraging provisional release in cases when it is not mandatory. Not only may the release of an *inculpé* or *prévenu* in custody be requested by the defendant himself at every stage of the proceedings, applied for by the *procureur de la République* or even ordered by the examining judge on his own initiative; the Code also stipulates that the examining judge must give his ruling within five days,¹⁶ that the arraignment chamber,¹⁷ in the event of appeal against that judge's order, must give its decision within fifteen days,¹⁸ and even that the arraignment chamber may have the matter submitted to it directly by its own president, who must visit

¹³ CODE art. 140. The "examining judge" (*juge d'instruction*) is a judge of the court appointed for a renewable term of three years to examine evidence. By contrast, the *procureur de la République* belongs to the *ministère public*, which is a hierarchical corps of judges called upon to represent the executive power in the application of the penal law and to ensure the execution of court decisions. This *procureur* appears before the examining judge and the correctional court; the *procureur général*, who is his hierarchical superior, acts in the arraignment chamber, see note 17 *infra*, and in the court of appeal. See CODE arts. 31-48, 49-52.

¹⁴ CODE art. 141.

¹⁵ CODE art. 142.

¹⁶ CODE arts. 140, para. 2, 141, para. 3.

¹⁷ The arraignment chamber (*chambre d'accusation*, formerly *chambre des mises en accusation*) is a section of the court of appeal. Its basic functions are: (1) in the case of *crimes*, to decide whether there are grounds for committing the defendant for trial as an *accusé* to the assize court; (2) regardless of whether the alleged offense is a crime, correctional offense or petty offense, to hear appeals against the orders of the examining judge. CODE arts. 191-230.

¹⁸ CODE art. 194, para. 2.

the prisons at least once in every quarter and there look into the cases of defendants held in preventive detention.¹⁹ It will shortly also be shown that the very decision to place a defendant in preventive detention is only valid for a limited period and lapses unless renewed within a specified time.

Whatever these procedural rules, though, it is necessary to determine the grounds which would in practice justify a remand in custody as against provisional release. The General Instruction on the application of the Code of Penal Procedure replies to this question as follows: "Preventive detention can only be ordered if there are both very serious indications of guilt and reasons to fear that the *inculpé* may misuse his provisional release; as soon as one of these two conditions ceases to be fulfilled, the preventive detention must come to an end."²⁰ The Instruction also states that "when there are no substantial grounds for the belief that the *inculpé* may flee, exert pressure on witnesses, destroy evidence, commit new offenses or disturb public order, provisional release is a matter of right."²¹

French authors describe preventive detention as an evil, but a necessary one.²² They explain that it is at times indispensable—either to guarantee the appearance of the *inculpé* at the proceedings and for the eventual execution of the penalty, by precluding every possibility of flight—or as a safeguard in establishing the truth, by assuring non-interference with the evidence (dispersal of relevant material, subornation of witnesses)—or as a means of preserving public order, by calming the community, preventing the defendant from committing other offenses and sometimes even by protecting him from mob violence.

The circumstances which justify provisional release can be easily deduced from the very list of grounds which may necessitate a remand in custody; this is explained in the General Instruction, which very correctly states that the defendant has the right to demand his release as soon as preventive detention has ceased to be necessary. It may happen, however, that certain judges in fact misuse preventive detention or continue it over an exaggerated period. That is why the Code of Penal Procedure, in addition to the guarantees already mentioned, allows the defendant to appeal to the arraignment chamber against an order refusing his provisional release²³ and, above all, limits to a spe-

¹⁹ CODE arts. 222-23.

²⁰ CODE art. C.274, part 5.

²¹ *Ibid.*

²² See, e.g., 1 CARBONNIER, INSTRUCTION CRIMINELLE ET LIBERTÉ INDIVIDUELLE (1937) (only part published).

²³ CODE arts. 141, 186, para. 1.

cific duration the validity of any warrant authorizing preventive detention.

(c) *Necessary release.* Except in the case where the release of the prisoner must take place not later than five days after his first appearance,²⁴ "preventive detention may not exceed a period of two months" and, once that period has expired, may only be extended for a further period of two months by an order of the examining judge issued pursuant to an application of the *procureur de la République*, both the application and the order stating the grounds on which they are made.²⁵

Pessimists will note that the Code does not limit the number of orders which can successively be made to extend the preventive detention every two months; they will have observed, first of all, that this period of two months is already long in itself. In reality, the two months' period was fixed very advisedly, taking into account the special features of French judicial practice and the lessons drawn from an earlier reform attempted in 1933-1935 and abandoned in 1939.²⁶ Moreover, the rule which requires the release of the defendant in the absence of an extension of the detention has the great practical value—which is already something—of guaranteeing to the prisoner that he will not simply be forgotten in custody. And again, while the detention can be extended only by an order stating the specific grounds on which it is made, the examining judge may free the prisoner without having to give any grounds for his action, merely by allowing the two months' period to expire without renewing the detention.²⁷ This legal procedure is perhaps not perfect; but it marks a progress in French legislation and has already had a welcome influence on the conduct of our preliminary investigations.

There is yet another noteworthy rule in the new Code of Penal Procedure: the *inculpé* may, as was stated earlier, at any time apply for his provisional release to the examining judge, who must give his ruling within a maximum period of five days; and if this time limit is not observed, the defendant may submit his application directly to the arraignment chamber. The arraignment chamber must then give its own decision within fifteen days, "failing which the *inculpé* shall be granted provisional release automatically, unless some verification has

²⁴ CODE art. 138.

²⁵ CODE art. 139.

²⁶ See DONNEDIEU DE VABRES, TRAITÉ DE DROIT CRIMINEL ET DE LEGISLATION PÉNALE COMPARÉE §§ 1317-19 (3d ed. 1947).

²⁷ This was done recently (Nov. 13, 1959), in the case of Dr. Lacour (the *Lacaze* affair), after several refusals of provisional release, see Crim. June 25, 1959, [1959] *Semaine Juridique* 11288, conclusions by Gerthoffer and note by Vouin.

been ordered regarding the application.”²⁸ Such verification regarding the application can halt provisional release only if it has been ordered by the arraignment chamber in a judgment given before the expiration of the period of fifteen days. In the absence of such a judgment, the *inculpé* must necessarily be released, without any further order, on the responsibility of the *procureur général*.

These provisions have the practical value of stimulating the judiciary and expediting the course of proceedings. But in fact the release of a defendant in such circumstances is obviously a rare occurrence. Apart from mandatory release, which is an established practice, but of limited scope, the ordinary form of release of defendants (*inculpés, prévenus* or *accusés*) in France is discretionary provisional release after due consideration of the case by the bench, such release being also encouraged by the fact that preventive detention can be continued beyond a specified time only if expressly renewed. It remains to consider the legal conditions subject to which such discretionary release may be ordered.

II. Conditions of Release

By virtue of the Code of Penal Procedure, the provisional release of an *inculpé* is subject to three conditions: a personal undertaking by the defendant, the deposit of security and an election of domicile (address for service).

(a) *Personal undertaking.* Not only when granted on the application of the defendant but also when ordered by the court on its own initiative, provisional release is always “subject to the proviso that the defendant undertake to appear again at every stage of the proceedings, as soon as he may be required, and to keep the examining judge informed of all his movements.”²⁹ As will be shown below, a breach of this undertaking is punishable by the revocation of the conditional release order.³⁰

(b) *Security.* In the words of the Code, “provisional release, in all cases where the defendant is not entitled thereto as of right, may be made subject to the deposit of security.”³¹ The matter is thus left to the discretion of the court.

Although recognized by the old *Code d'instruction criminelle*,³² security in the form of a recognizance by another party was in fact a

²⁸ CODE art. 141, para. 5.

²⁹ CODE arts. 140, para. 1, 141, para. 1.

³⁰ CODE art. 144, para. 2.

³¹ CODE art. 145, para. 1.

³² Art. 120, para. 2.

very rare occurrence and was consequently abolished by the Code of Penal Procedure. Currently, security must be furnished in coin, bank-notes, certified checks, or bonds issued or guaranteed by the state, and must be deposited either with the registrar of the court or with the registering officer.³³ It is divided into two parts.

The first part of the security guarantees the appearance of the defendant at every stage of the proceedings in conformity with the undertaking obtained from him, and for the execution of the judgment.³⁴ If the defendant appears at all stages of the proceedings and for the execution of the judgment, this part is ultimately refunded. On the other hand, unless otherwise decided by the bench, if the defendant without valid excuse fails to appear at any stage of the proceedings or for the execution of the judgment, this part is forfeited to the state.³⁵

The second part of the security is always returned in the event of a non-suit or if the defendant is tried and acquitted.³⁶ In the event of conviction and sentence, on the other hand, it guarantees, according to an order of priorities fixed by law, the costs incurred by the civil claimant (victim of the offense), then the costs incurred by the public authorities (the state), then such fines as may be imposed and, finally, the restitution and reparation which the court orders in favor of the victim.³⁷ Only since the new Code have the costs of the civil claimant had priority over those incurred by the public authorities; this priority is important, for the same Code also deprives the victim of the offense of his former right to bring about an attachment of the defendant—that is, the latter's imprisonment for debt—with a view to obtaining the reparation awarded by the bench.³⁸

The sum to be deposited in each of the two parts of the security is freely determined by the judge issuing the provisional release order and duly specified in the same.³⁹ During the parliamentary work which preceded the adoption of the Code, it was stressed that judges should base the amount of security demanded of a released defendant on his means. This rule is not expressly formulated in the Code but it is naturally followed in practice. French judges should, in fact, show

³³ The registration of a legal document is a formality designed to ensure the conservation of the document, the certification of its exact date and the collection of certain taxes chargeable on its issue. The registering officer (*receveur de l'enregistrement*) is the official in charge of this service.

³⁴ CODE art. 145, para. 2(1).

³⁵ CODE art. 147.

³⁶ CODE art. 148.

³⁷ CODE arts. 148, para. 2, 145, para. 2(2).

³⁸ CODE art. 749.

³⁹ CODE art. 145, para. 3.

a greater readiness to exercise their powers, granting provisional release more frequently but making it subject to the deposit of security.

(c) *Election of domicile.* Every defendant must, after his first appearance before the examining judge, inform that judge whenever he changes his residence. Furthermore, he may elect a domicile within the jurisdiction of the examining judge, *i.e.*, specify an exact place or address within that territory where he may be served with documents and notices relating to the proceedings.⁴⁰ The designation of an address for service is essentially optional, but in the event of provisional release, with or without security, the defendant is obliged to elect domicile in the place where the preliminary investigation is being conducted.⁴¹

III. Effects of Release

The freedom which the untried prisoner regains by reason of his release is only *provisional*—that is, susceptible of termination by a revocation involving his return to preventive detention. But this freedom is also in principle *total*, subject to the undertaking already mentioned, and this factor sometimes raises certain difficulties which should be considered.

(a) *The revocation of release.* After provisional release has been granted, preventive detention may again be ordered by the bench through the issue of a new arrest warrant or committal order “if the defendant fails to comply with a summons to appear or if new or serious circumstances render his detention necessary.”⁴² These “new or serious circumstances” are of the same nature as those which may justify the placement in preventive detention of a defendant not already in custody. As to the non-appearance of the defendant, it constitutes grounds for the revocation of provisional release even if there is no fear that the defendant may abuse his freedom in order to escape from the jurisdiction altogether. In this respect, the released defendant’s freedom is, at least in theory, highly precarious.

(b) *The released defendant’s freedom.* It has already been shown what personal undertaking is required from the defendant as a condition of his release. Apart from this undertaking, a defendant (whether *inculpé*, *prévenu* or *accusé*) provisionally left at liberty or released may be assigned by the competent court to a place of residence, which he

⁴⁰ CODE art. 114, para. 6.

⁴¹ CODE art. 144, para. 1.

⁴² CODE art. 144, para. 2.

is forbidden to leave without authorization; in France, however, such compulsory residence can only be ordered in the case of persons of foreign nationality.⁴³

The freedom of a released untried prisoner of French nationality is thus subject to no other restriction than the undertaking, whether secured or unsecured, to appear at all stages of the proceedings and for the execution of the judgment. Such full freedom seems quite natural, but at times it has certain drawbacks; and it is undoubtedly a pity that judges have no other choice, with regard to their defendants, than between detention and this total freedom. These two alternatives should be considered further.

In the first place, it is certain that, in some cases, release which is not carefully prepared may be more disastrous than continued detention. Take, for example, the case of a man who is denounced by one of his wife's friends as guilty of violence against the wife. While this man is in preventive detention, his wife confirms the charges against him, giving certain details which lead the press to seize upon the case and to publish ironic comments on the poor husband who felt obliged to ensure, through a certain contrivance of his own invention, that his wife remained faithful during his absence! The device in question, however, could not have been put in place without the wife's consent. The husband is accordingly released as soon as the judge knows that the wife, having taken refuge with her parents, is safe from the husband's ire. But the husband, on returning home, finds the house deserted, the neighbors sneering, etc. . . . So he hangs himself during the following night, to the great surprise of a judge who had not foreseen it.⁴⁴ A death is thus directly attributable to an ill-timed or unprepared release. Without going into other examples, it is certain that the provisional release of a defendant should often be prepared, from the psychological and social viewpoint, with as much care as the release of a convicted prisoner before or after the expiration of his sentence.

On the other hand, the great excuse of certain French examining judges, when reproached for sometimes abusing preventive detention, is that the law offers them a choice only between such detention and a full freedom, which the defendant might not always be able to sustain. This explanation is not incorrect and tends to show that there is need for some measure which would enable certain defendants to avoid both

⁴³ CODE art. 142, paras. 5, 6. See also CODE arts. R.16, R.19.

⁴⁴ Take also the case of a young girl of good family who is rumored to have undergone an abortion. Out of respect for her and her family, instead of calling for an investigation and her placement in preventive detention, the *procureur de la République* simply asks her to agree to a medical examination by a physician selected with her consent. The young girl agrees, leaves the office of the *procureur* a free woman . . . and drowns herself the same day in the local river.

the various difficulties inherent in detention and those inherent in liberty. This very measure may not be difficult to find.

The new Code of Penal Procedure⁴⁵ has just extended to adult offenders the system of probation (*mise à l'épreuve*), which French penal law had in the past regarded as applicable only to juvenile offenders, in the form of *supervised freedom* (*liberté surveillée*). But the scope of this measure has been highly—and unduly—restricted, for it has been connected only with the suspension of sentence. There seems no reason why provision should not be made for the possibility of supervised freedom even during the preliminary investigation; if due stress were laid on assistance as well as on supervision proper, such a system could enable the defendant to avoid both detention and the risks of full liberty.⁴⁶

The system of provisional release, as indeed many other institutions, must be developed and diversified in the light of constantly intensified criminological studies. Progress in criminology should lead to a revision of the rules of penal procedure as well as of the rules of substantive criminal law.

⁴⁵ CODE arts. 738-47.

⁴⁶ See the reports presented at the seminars organized by the Penal Science Institutions of France, Belgium and Luxembourg at Liège in 1957. [1956-57] *REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE* at 871, and more particularly the report by Vouin, *id.* at 967, which envisages probation (*mise à l'épreuve*) even during the preliminary investigation as a means of studying the personality of the defendant.