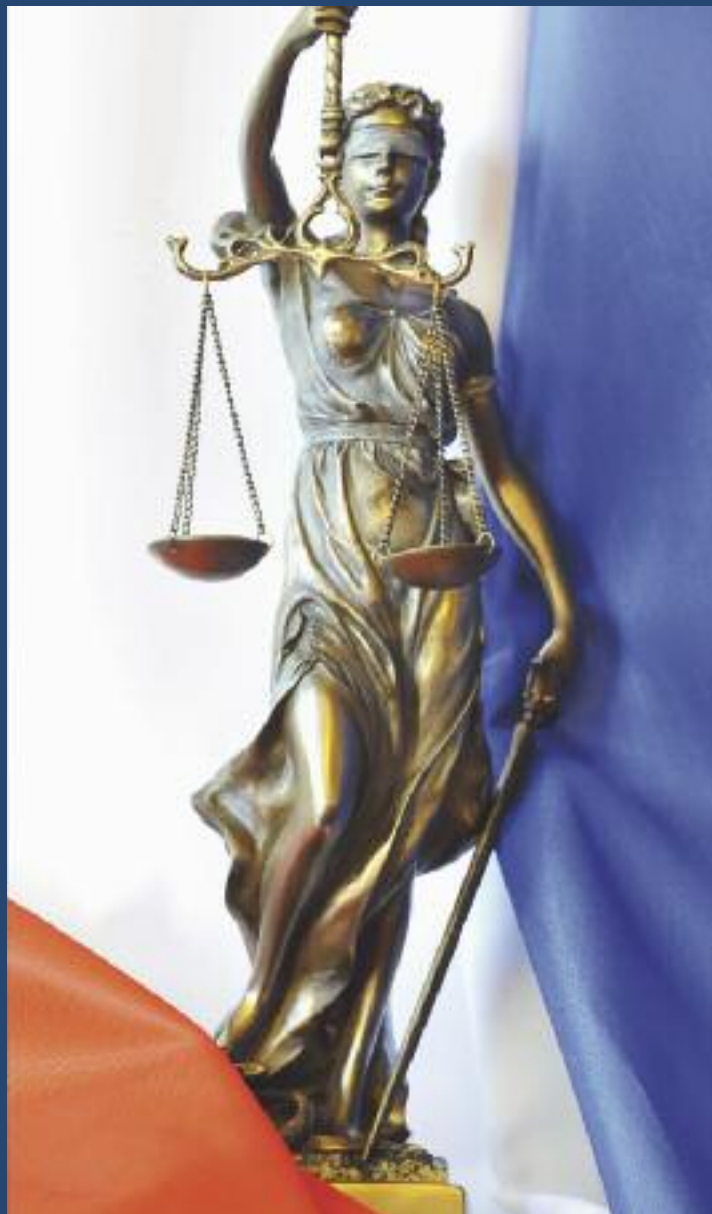




The French legal system



<i>Judicial system</i>	3
<i>Administrative courts</i>	7
<i>Training of judges and personnel in the justice system</i>	8
<i>The criminal proceedings</i>	10
<i>Juvenile Justice system</i>	11
<i>Sentence application and prison system</i>	13



Constitution and institutional system

The fifth French Constitution was promulgated on October 4, 1958. The Constitution is the highest norm in the internal hierarchy. The Constitutional Council in 1971 cited the Constitution's Preamble and the Declaration of the Man and of the Citizen (1789) as texts included in the Constitutional Principles. Moreover, the Fundamental Principles of the Republic expressed by the Constitutional Council and the Environment Charter of 2004 are also part of the "constitutional block".

The Constitution can be amended either by the French congress (joint session of both chambers of Parliament) or by referendum.

The French Constitution was fundamentally changed on 23 July 2008 by the constitutional revision bill of modernization of the institutions of the Fifth Republic. All branches of Government are affected by this reform. First, the exercise of the Executive power is modified. The revision puts an end to the ambiguous diarchy between the President of the Republic and the Prime Minister. Indeed, it recognises the supremacy of the President of the Republic while it limits his prerogatives. Secondly, a set of measures is devoted to the legislative power with the goal to restore to favour the role of Parliament by eliminating some of the harsher instruments of rationalized parliamentarianism introduced in 1958. Thirdly, the constitutional revision deals with judicial power and citizens rights and certainly the most noteworthy provision here is the introduction of a new form of a posteriori constitutional review of legislation.

The Constitutional Council has the power to interpret the highest French and International norms; it also ensures that the Constitution, the Constitutional Texts and Principles are upheld. By interpreting article 55 of the Constitution, the Constitutional Council has indicated that International and European Treaties are the highest norms. Therefore, the Constitution must be reviewed if it is contrary to any Treaty prior to their ratification.



Constitutional Council members are appointed for nine years (three every three years). Three are appointed by the President of the Republic, three by the President of the Senate and three by the President of the National Assembly. Former Presidents of the Republic are ex officio life members of the Constitutional Council.

The 1958 Constitution establishes a Democracy based on the Separation of Powers.

The Executive branch is headed by the Prime Minister and the President of the Republic.

The President of the Republic is directly elected for a 5-year term renewable one time. He is the Head of State and the Commander in Chief of the Army. His powers are defined by the Constitution. He appoints the Prime Minister and puts an end to the appointment when this one resigns.

On the proposition of the Prime Minister, the President appoints the other members of Government.

The President of the Republic promulgates the laws after their adoption by the Parliament. He can dissolve the National Assembly and call for early elections.

The Legislative branch is bicameral. The National Assembly is the main legislative chamber.

Judicial System



It is composed of 577 deputies directly elected through local votes. They are elected for 5 years renewable. The Assembly has a president elected by his peers. The other chamber is the Senate. The senators are indirectly elected by local elected officials. Since the 2004 reform, they are elected for 6 years renewable and half of the Senate is renewed every 3 years. The president of the Senate is elected by the senators among themselves and is the successor of the president in case of death, impeachment or resignation for medical reasons of the President of the Republic. The Legislative branch votes the law.

According to the Constitution, both chambers have the same power. Bills may be submitted to the Parliament by the Government or by each chamber. Every bill can be amended by the National Assembly and the Senate but the law must be voted in the same terms in each chamber. However, if the National Assembly and the Senate cannot agree on the terms of the law, the Government can give the last word to the National Assembly after a procedure called Commission Mixte Paritaire.

Judicial System

France has a legal system stemming from Roman law and based upon codified laws. The Civil Code was drafted in 1804 under Napoleon I.

Nevertheless judges have the duty to interpret the law and the decisions of the higher courts have a certain influence on the inferior courts even if they are not bound by any higher court's decision. The last time a death penalty was issued in France was in 1978. It was then officially prohibited in October 1981. The Parliament, both National Assembly and Senate, decided in February 2007, to amend the French Constitution in order to include an explicit ban of the death penalty.

The constitutional statement that "No-one shall be sentenced to death", makes France the 17th country worldwide to include prohibition of the death penalty in its Constitution.

The judiciary is independent from the executive and the legislative powers. There are several categories of courts divided into two major branches, a Judicial branch and an Administrative branch.

Judicial Organization

• The Judicial branch

The civil courts settle private disputes between individuals such as divorce, inheritance, property... but do not impose penalties. The criminal courts judge individuals who have committed offences.

• First degree of jurisdiction

The District courts *Tribunaux d'instance* have jurisdiction for civil matters. They hear personal property claims of under 10,000 euro as well as claims for which they have exclusive jurisdiction. They have a criminal division which is the Police Court *Tribunal de Police*, which handles misdemeanours in five classes, exclusively with fines. For petty offences (for classes one to four) and some civil issues under 4,000 euro it may be a "lay" judge *juge de proximité* or a professional judge who hears the case. For both civil and criminal issues, cases are tried by a judge sitting alone.

Claims over 10,000 Euros are heard by Regional courts *Tribunaux de Grande Instance* which have general jurisdiction and hear every dispute with an unspecified amount which does not fall within the jurisdiction of another court. Regional Courts also have exclusive power over cases involving divorce or proof of paternity.

The judges and members of the Regional courts are professionals. Generally, Regional courts are set in the chief town of the Department. Regional courts also have a criminal division. Indeed, each regional court has a Criminal court which pronounces penalties from 6 months up to 10 years of imprisonment.

But other penalties can be decided, such as fines, *jour-amende* (a fine that is followed by imprisonment if it is not paid in time) or work for the general interest/ Community service.

Regional and Criminal courts generally rule with three judges. One of them may be a "lay judge". However, they occasionally rule with a single judge.

The first degree of jurisdiction has also specialist courts which are Juvenile courts, Labour courts, Commercial courts, social Security courts and Agricultural and Land tribunals.

Except for the Juvenile courts, the judges of specialist courts are non professional and are elected or chosen with the respect of equal representation.

Finally, The Assize Court, *Cour d'assises*, tries those accused of crimes (murder, rape, armed robbery, etc), attempted crimes, and those accused as accomplices. The Assize Court is not a permanent court, usually meeting every three months for about two weeks. This type of court is found in each department. The composition and modus operandi are unusual, as it is the only court consisting of professional judges (three) and a jury (nine citizens chosen by drawing lots). Certain crimes are tried by a special Assize Court without a jury, such as certain acts of terrorism or acts connected with drug dealing. The judgments of the Assize Court may be appealed.

• Public prosecution

In the Criminal court, the Assize court and the Appellate Assize court, the Public prosecutor exercises criminal proceedings and seeks alternative sanctions adapted to the situation of the accused. It is characterised by its links with governmental authority for the implementation of Public prosecution policy, the controlling of judicial police activities and

criminal investigation and trial process. The importance of the French Public Prosecutor's role is based on the principle of prosecutorial discretion.

• Court of cassation

The last degree of jurisdiction is the Court of Cassation. It is the Highest Court in the judicial French system. It is the Court of last resort which sits in the Hall of justice in Paris. It succeeded to the Tribunal of Cassation created in 1790. The Court of Cassation does not judge on the facts but checks whether the laws have been properly applied by the inferior courts in civil and criminal matters. It never sits as an appeal court. Its decisions allow a certain unity regarding the application of laws even if the decisions do not bind inferior courts. Since 1991, the Court of Cassation also gives its opinion to the other jurisdictions on new and complex law issues.

The Court of Cassation consists of judges *conseillers*, the Office of the Prosecutor, an Administrative Office of Courts, Higher Council of the Judiciary and specially certified barristers. The judges of the Court of Cassation include the First President *premier président*, first presidents of the chambers, justices *conseillers* and assistant judges *conseillers référendaires*. The First President is responsible for the court administration and the discipline of judges along with judicial functions.

The judges are appointed by the President of the Republic on a recommendation of the Higher Council of the Judiciary. They are divided into six different chambers: First Civil Chamber, Second Civil Chamber, Third Civil Chamber, Labour Chamber, Commercial Chamber, and Criminal Division. Each division is headed by a Presiding judge.



In addition to the six divisions, there is also the possibility of joining chambers of the court together *Chambre Mixte* with the First President and a number of other judges from at least three other chambers (including the Presiding justice of the chamber). Finally the Court of Cassation can hear a case in "Full Court" *Assemblée plénière* which is the highest formation of the Court for important issues. The decision belongs to the First President or the chambers that handle the case. Sitting in this formation are the First President, all the Presiding and Senior justices of the chambers and one justice from each chamber. Decision is taken by the majority of the Chamber. There is no dissenting opinion.

The Office of the Prosecutor is also present at the Court of Cassation. It is headed by the Chief Prosecutor who does not try the case but advises the Court on how to proceed. He is assisted by deputy prosecutors *avocats généraux*. The Chief Prosecutor and the deputy prosecutors are independent from the Minister of justice. The deputy prosecutors are not subordinate to the Chief Prosecutor. The main role of the Office of the Prosecutor is to guarantee the consistency of the interpretation of the law and to ensure its conformity according to the intention of the legislation with the public interest and with the public order. He also has to ensure the unity of the case law inside the Court of Cassation as well as inside the other courts.

• The administrative branch:

Administrative courts

Since the 1953 reforms, the administrative courts have been first instance judges of administrative litigations. There are 35 such courts and approximately 600 magistrates who judge 100 000 cases a year. These courts settle disputes between public authorities (the government, regions, departments or administrative bodies) or State-owned companies on the one hand and citizens on the other hand. Examples of the matters at issue are: a refusal to give a building permit, an objection to a land-use plan or proposed motorway, an expropriation, a claim for compensation for damages caused by public bodies, a refusal to give a residence permit, the deportation of a foreigner, objections to direct taxes and their recovery, disputes related to

public construction contracts, etc. The administrative courts also deal with taxation, town council/local elections and civil service litigation.

Specialized administrative jurisdictions

There are also specialized administrative jurisdictions which have very specific responsibilities:

- the Refugees Appeal Board,
- the Disciplinary Section of Professional Bodies,
- the Repatriated Persons Compensation Commission,
- the social Aid Local Commission.

Financial courts

- The *Cour des Comptes* (the Audit Court) checks that public authorities at the national level have regularly managed their finances;
- the Regional Audit Courts check that the regional and local public authorities have regularly managed their finances;
- the Court of Budgetary and Financial Discipline punishes civil servant accountants who have mismanaged public finances.



Administrative courts

Created in 1987, the **administrative courts of appeal** rule over appeals against decisions delivered by the administrative courts (approximately 15% of which are appealed), except for specific cases over which the Council of State has jurisdiction. These administrative courts of appeal are each presided over by a counsellor of State, are seven in number (Paris, Lyon, Bordeaux, Nantes, Nancy, Marseille and Douai) and are divided into chambers. The Audit court is the appeal court for the judgments of the Regional audit courts.

The Council of State (Conseil d'Etat)

The Council of State, created in 1799, is the highest jurisdiction of the administrative branch:

• The Council of State as an instance of first and last resort

The first resort competence of the Council of State covers **litigation of special importance** (decrees, ministerial acts, the decisions of collegial bodies invested with national competence, individual measures involving civil servants appointed by Presidential decree) **or whose scope exceeds the competence of an administrative court**.

In addition, the Council of State deals directly with litigation over county council elections or elections to the European Parliament. Approximately 17% of the cases submitted to the Council of State fall within its competence of first resort.

• The Council of State as a court of appeal

The competence of the Council of State as a court of appeal has progressively been transferred to the administrative courts of appeal and is now limited to litigations over local and cantonal elections and appeal over assessment of legality.

• The Council of State as a Court of Cassation

The Council of State **exercises traditional powers as a court of cassation** in relation to some 30 specialized courts, the most important of which are the Cour des Comptes, the Court of Budgetary and Financial Discipline, the Magistrates Disciplinary Committee, and the disciplinary committees of various professions. Since the 1987 reforms, the Council of State **has had powers to quash rulings delivered by the administrative courts of appeal**. This expansion of its powers was accompanied by a major change in the rules governing appeal to the highest court. On the one hand, **a special procedure allows for the dismissal of appeals considered inadmissible or insufficiently grounded**; on the other hand, after



cassation, **the Council of State can judge the case as a third court of instance** "if the sound administration of justice justifies it" and thus act as the equivalent of a Supreme court in common law systems.

• Composition of the Council of State

The Council of State has a very specific composition compared to other jurisdictions. Indeed, it is made up of **state advisors, who are civil servants with a specific status guaranteeing their independence**. Most of them are recruited among the former students of the *Ecole Nationale d'Administration* (ENA). The Council of State is **presided over by the Prime Minister; the vice-President is the Garde des Sceaux (minister of justice)**.

The Council of State as government advisor

The oldest function of the Council of State is its role of advisor to the government. The Council examines and gives its opinion on bills and projects of decrees and by-laws. This consultative work represents approximately half of its work.

• The Conflicts Tribunal

The existence of the two systems of jurisdiction outlined above **sometimes results in difficulties in determining their respective powers**, and thus justifies the arbitration of the Conflicts Tribunal which was set up by the law of May 24th 1872.

Presided over by the Garde des Sceaux – the minister of justice – the Conflicts Tribunal is composed **of eight members elected for a three-year term**. Today, the frontiers between the judicial and administrative branches have become stable and only about forty cases are submitted to the Conflicts Tribunal each year. However, **its jurisprudence has been the most important building-block of French public law**. It is **not possible to appeal against the judgments of the Conflicts Tribunal**.

Training of judges and justice's personnel

Judges

Judges have an active position in the trial: they are more than just arbitrators. **They lead the hearing.**

The Act of 22 December 1958 establishes the status of the judiciary. **Every judge may be appointed during his career at judging functions and/ or at the office of the prosecutor (principle of unity of the judiciary).** Unlike prosecutors, judges are **not submitted to the hierarchical principle** and have security of tenure, that is to say that any **new assignment requires consent.** Judges and prosecutors follow the **same training within the same school.** On 1 January 2009, we had 8481 magistrates.

"Lay" judges

Established in 2002, "lay" judges are not professional judges, they are appointed by the legal profession by decree after the approval of the Higher Council of the Judiciary (CSM) for 7 years, not renewable. They exercise certain functions of judges in criminal or civil matters. In May 2009, there were 618 "lay" judges.

Prosecutors

Contrary to the sitting judges who are completely independent when they judge cases, **public prosecutors are under the authority of the minister of justice.** The minister of justice **conducts the policy of prosecution determined by the Government.** He or she ensures that the application of such a policy in the territory of the Republic is coherent by addressing general instructions on prosecution to the general prosecutors. There is a hierarchy within the prosecution service: the *Procureurs*

de la République (first level) are under the authority of the *Procureurs Généraux* (court of appeal) who can give them **instructions regarding the general functioning of their offices and the policy of their jurisdiction and also the decisions to take in a particular case, if deemed necessary.** The *Procureurs Généraux* report directly to the minister of justice.

The general organization of the Public Prosecutors Office is governed by three principles:

- **subordination in the chain of command:**

The public prosecutors are placed under the supervision and control of their superiors and under the authority of the minister of justice.

- **indivisibility of the prosecution service:**

The public prosecutors are **considered to embody one single person since they act in the name of the prosecution service as a whole.** As a consequence, the members of the Public Prosecutors Office **can replace each other mutually, including during the judgment phase of a case** (which is not the case for the sitting judges).

- **unchallengeable legitimacy of public prosecutors:**

The legitimacy of the public prosecutor cannot be challenged because he/she defends the interests of society as a whole and applies the policy defined by the government.





The Higher Council of the Judiciary *Conseil Supérieur de la Magistrature - CSM*

Some attributions of the CSM are related to the appointment and discipline of judges and Public prosecutors.

These rules are aimed at sheltering the judiciary from the risk of partisan influences. In France, the CSM assists the President of the Republic who under the Constitution has the mission to guarantee the independence of judicial authority. The President does not sit in the Higher Council of the Judiciary when it has to take decisions on disciplinary matters. The 2 benches in the Council are the judges and the Public prosecutors, and they are composed of 16 members. Twelve of them are elected judges and 4 are appointed jointly by the President of the Republic, the President of the National Assembly, the President of the Senate and the General Assembly of the Council of the State.

The French National school for the Judiciary *Ecole Nationale de la Magistrature - ENM*

Through the French National school for the Judiciary, France has developed a specific model enabling judges to share a common legal culture and to integrate new legislative developments into their professional practices throughout their career.

This school is an independent public institution which is dependent on the ministry of justice. It has an autonomous budget and a board of directors, responsible for defining its educational guidelines. Its function is to ensure:

- the training of future French judges and Public prosecutors who are for the main part law graduates recruited by examination after University;
- the continuing professional training of judges throughout their career. Judges are legally entitled to 5 days' training a year.

It also manages a growing international and European activity by hosting foreign trainees and



conducting programs in more than 60 countries as part of several international programs.

Finally, the ENM trains foreign executives and training officers belonging to judicial training institutions to help create and develop their own schools.

The National Registrars College *Ecole Nationale des Greffes - ENG*

The ENG's aim is to provide initial training for chief registrars and registrars, as well as officers on duty in various areas. It offers them training programs alternating between studies at the College and practical courses in jurisdictions.

The National Prison Service College *Ecole Nationale d'Administration Pénitentiaire - ENAP*

The ENAP gives prison officers theoretical and practical training before they take up employment. For wardens, governors, rehabilitation and probation personnel, as well as administrative and technical personnel, an initial training is provided.

Audit and expertise missions abroad in order to modernise foreign prison systems, are also a priority.



The criminal proceedings

French criminal proceedings are mainly inquisitorial, however they also include adversarial elements so as to reach a balance between the rights of the defence, the rights of the victim and those of society as a whole. The main principles are defined in the introduction of the Code of Criminal Procedure:

- equitable and adversarial proceedings,
- information and guarantee of the victims' rights,
- presumption of innocence and rights of the defence.

The public prosecutor supervises the criminal investigations department (*police judiciaire*)

The public prosecutor must be immediately informed of all offences committed as well as whether the *police judiciaire* is holding persons in custody for the purpose of its investigations. The public prosecutor ensures that custody in the police station is carried out in compliance with the law and may authorize its extension beyond 24 hours for a maximum duration of 48 hours. When someone has committed an offence, it will result in an investigation (preliminary investigation or investigation of flagrancy) conducted by various police departments. The offices of the prosecutor will then look at the case and decide on the charges and what direction to give at the case. The prosecutor may decide to close the case or prosecute, according to the principle of prosecutorial discretion.

The administration of proof under French criminal law

Pursuant to the principle of the presumption of innocence, the burden of proof is on the plaintiff, i.e. the public prosecutor in general, and sometimes on the victim when he or she claims damages. The public prosecutor must produce evidence that the offence was committed and the person being prosecuted was involved. He/she must collect elements of proof both in favour of the prosecution and in favour of the defence. The defendant does not have to provide proof of his or her innocence and is in no way obliged to collaborate in the search for evidence. The standard for a criminal conviction is proof "beyond reasonable doubt". Any doubt must benefit the defendant. All types of evidence – written, oral testimony, confessions, and scientific examinations – are admissible if they have been



collected and produced in compliance with the French Code of Criminal Procedure. Under French law, there are no varying degrees of evidence: it is up to the discretionary judgment of the sitting judges to determine the value of the evidence submitted in each case.

• *Juge d'instruction*

The French judicial system includes specialist judges, known as investigating judges *juges d'instruction*, who oversee investigations in the most serious and complex offences. The process is known as the judicial investigation *information judiciaire*.

Cases are referred to the *juge d'instruction* by the public prosecutor or by a victim who wishes to bring a civil claim for damages within criminal proceedings.

His or her role is to gather all the information that may incriminate or exonerate a person accused of an offence. The *juge d'instruction* does not reach any decision about a person's guilt or innocence.

As part of the investigation, the judge may interview any person, call upon the assistance of the police to require witnesses to attend for interview, issue warrants, take statements from persons bringing claims for damages and from suspects, appoint experts, carry out searches and seizures, order telephone tapping, etc.

Pre-trial detention may only be ordered by a judge for freedom and detention *Juge des libertés et de la détention*. When the investigation ends, the investigating judge may refer the accused to a court *tribunal* or *Cour d'assises* for trial (if there is sufficient evidence) or discharge the matter (if there is not enough evidence).

In order to encourage teamwork, 91 *pôles de l'instruction* (each one staffed by several *juges d'instruction*) have been in operation since 2010. They investigate complex offences.

Juvenile Justice system

In France, there is a special justice system for children and young people under 18. This juvenile justice (*justice des mineurs*) is mainly involved in the areas of juvenile crimes and children at risk.

Many other matters concerning minors are judged by ordinary jurisdictions (family judges...).

The Act of 2 February 1945 lays down the fundamental principles of juvenile justice. Its last amendment was made in March 2007.

France has chosen a joint approach by judges and educators, and has given priority to educational response in criminal matters.



The Judicial Youth Protection Directorate, dependent on the ministry of justice, is responsible for juvenile justice. It drafts texts on minors at risk and young offenders and ensures the enforcement of judgements made by the Juvenile courts in the 1,500 detention and probation centres.

Juvenile delinquents

Under French law the age threshold for criminal liability is 18 years old, therefore a minor cannot be tried by ordinary criminal courts.

Specialized courts are set and work in collaboration with the public prosecutor and the Youth Judicial Protection Service.

Juvenile courts are competent to hear youth offences cases and since 2005 they enforce the penalties imposed on minors.

These courts are presided by one juvenile court judge assisted by two lay judges and one court clerk.

For most serious cases, there are Juvenile Assize courts which have jurisdiction for offences committed by minors from 16 to 18. These courts are made up of three professional judges and a jury made up of 9 civilians randomly chosen.

To be sentenced, minors have to be criminally responsible which is defined by their "capability of understanding". In France the age of discernment is roughly set between the age of 8 and 10. Penalties are adapted to the offender's age.

- Basically, no penalties can be imposed on minors before they are 10 as they are not responsible at law. Only measures of "protection, assistance, supervision and education" can be taken.



- From 10 to 13, educational penalties can be taken (such as seizing an object for instance). If the interested minor does not comply with the penalty, he or she may be placed with foster carers or a specialised centre for juvenile offenders.
- Then, from 13 to 16, minors may be sentenced. They may be sentenced to imprisonment but the minors are liable to only half the sentence prescribed for adults. They cannot be remanded in custody, except if they have committed a major offence.
- From 16 to 18, minors can be remanded in custody and, depending on the kind of offence they committed, the special provision for dealing with minors may be set aside by the judge.

Immediate summary trials are also allowed for habitual offenders.

- In March 2004, an Act introduced the guilty plea which is applicable to offences carrying a maximum penalty of 5 years' imprisonment. The Act has strengthened the effectiveness of alternatives to imprisonment such as probation, placement under electronic surveillance, community service, and so on. It has also introduced civic training courses, a new criminal penalty applicable to minors aged 13 to 18 years.
- Lastly, the Act of March 2007, gave mayors the responsibility of establishing prevention policy in cities and reinforced the role of public prosecutors.

The Act's content is about identifying and supporting vulnerable families, city planning, care for individuals suffering from dangerous mental disorders and new forms of punishment and care for drug users.

The Act also introduced summary proceedings for minors aged 16 to 18 and "day activities orders".

Minors in danger

The idea is to protect minors facing difficulties or in danger, through 2 different mechanisms:

- administrative protection, which is ensured by the General Council and the services under its authority (such as the Child and Maternal Health Services (PMI), departmental social services, the Child Welfare Authority (ASE)...).

This administrative protection plays a role of prevention for families in difficulty and comes into play when a minor is at risk of being in danger: protective measures can be taken for the minor with the consent of his/her parents.

- Judicial protection when a minor's health, safety or morality is at risk or if the conditions for the minor's education are seriously jeopardized: this is a matter for educational assistance. The Judicial system intervenes mostly when prevention proves inadequate in protecting the minor or when child welfare has failed. There are two possible types of intervention:
 - An educational action in open custody : the family's consent is needed when he or she takes a decision concerning a minor. Whenever possible, the judge allows the minor to live in his usual living environment and asks an educator to assist and advise the minor and his parents.
 - A care order can be made by the juvenile court judge, when it is proven necessary to remove the minor from his home.





Sentence application and penitentiary system

The Prison Authorities-*Administration pénitentiaire* is dependent on the Ministry of Justice.

They are responsible for ensuring that sentences are served and that prisoners are reintegrated into society on release. These authorities contribute to drafting texts in this field and participate in the enforcement of judgements and sentences. They also encourage work, training, access to the arts and sports for prisoners, contributing to their social and professional rehabilitation.

There are several forms of control over the penitentiary system. A general inspection made by the "*Contrôleur Général des Prisons*", regional directions and a control within jurisdictional organisations made by public prosecutors in every Court of Appeal's jurisdiction.

The *Juge de l'application des peines* (JAP) has to report regularly about the situation of the inmates. In every establishment there is a *commission de surveillance*.

Since 1983, the ministry of social affairs controls the medical care and hygiene in the facilities which led to some improvements especially with the law of January 1994.

In France, wardens form about 80% of the total staff, which is relatively high compared with other countries. However, the ratio of wardens per detainees is low.

A central objective of penitentiary policy is to return detainees to society in a better condition, as well as the recognition of human rights in prisons and in society.

The sentence can be served through detention, in different kinds of prisons, or served outside the prisons under the authority of a *Juge de l'application des peines*.

Serving the sentence outside prison can be used for those who are put on probation, who are condemned to a sentence of public service or who are released on parole.

There is also the possibility of Electronic tagging, which consists of an electronic device attached to a person allowing his whereabouts to be monitored. If the tag of the electronic device is disconnected or is out of range, the authorities are automatically alerted.



When the sentence is detention, it can be served in different kinds of prisons.

The *Centre National d'Observation* evaluates all the detainees sentenced to more than 10 years of imprisonment in order to dispatch them in the different penitentiary structures.

The *Centres Pénitentiaires* have at least two different blocks with specific detention systems (it can be a *maison d'arrêt*, a *centre de détention* or a *maison centrale*).

The *Centres de détention* are aimed at returning the detainees to society, for the less dangerous convicts, who have better chances of rehabilitation.

For the inmates with a sentence of less than a year, or those who will be discharged in less than a year, there are *Maisons d'arrêt*, meanwhile the more dangerous detainees will be detained in the *Maisons centrales* which have higher security.

Then the *Centres de semi-liberté* which are focused on the release preparation and the rehabilitation of the inmates.

High Security Blocks have been removed in all the prisons.

France has also introduced an original institutional management method.

In 1987, a mixed management program was created. Standard management duties (accommodation, catering, cleaning, maintenance) and certain other functions linked to the care of the detainees (work and vocational training) are carried out by private organisations.

The duties of governors, wardens, rehabilitation staff and registrars remain the responsibility of the prison authorities.



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Secrétariat général

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Références

Cour de cassation
Assemblée plénière
Audience publique du vendredi 17 novembre 2000
N° de pourvoi: 99-13701
Publié au bulletin

Cassation.

Premier président :M. Canivet., président
Rapporteur : M. Sargos, assisté de Mme Bilger, auditeur., conseiller rapporteur
Avocat général : M. Sainte-Rose., avocat général
Avocats : MM. Choucroy, Le Prado, la SCP Piwnica et Molinié, la SCP Gatineau., avocat(s)

Texte intégral

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

Sur le deuxième moyen, pris en sa première branche du pourvoi principal formé par les époux X..., et le deuxième moyen du pourvoi provoqué, réunis, formé par la caisse primaire d'assurance maladie de l'Yonne :

Vu les articles 1165 et 1382 du Code civil ;

Attendu qu'un arrêt rendu le 17 décembre 1993 par la cour d'appel de Paris a jugé, de première part, que M. Y..., médecin, et le Laboratoire de biologie médicale de Yerres, aux droits duquel est M. A..., avaient commis des fautes contractuelles à l'occasion de recherches d'anticorps de la rubéole chez Mme X... alors qu'elle était enceinte, de deuxième part, que le préjudice de cette dernière, dont l'enfant avait développé de graves séquelles consécutives à une atteinte in utero par la rubéole, devait être réparé dès lors qu'elle avait décidé de recourir à une interruption volontaire de grossesse en cas d'atteinte rubéolique et que les fautes commises lui avaient fait croire à tort qu'elle était immunisée contre cette maladie, de troisième part, que le préjudice de l'enfant n'était pas en relation de causalité avec ces fautes ; que cet arrêt ayant été cassé en sa seule disposition relative au préjudice de l'enfant, l'arrêt attaqué de la Cour de renvoi dit que " l'enfant Nicolas X... ne subit pas un préjudice indemnisable en relation de causalité avec les fautes commises " par des motifs tirés de la circonstance que les séquelles dont il était atteint avaient pour seule cause la rubéole transmise par sa mère et non ces fautes et qu'il ne pouvait se prévaloir de la décision de ses parents quant à une interruption de grossesse ;

Attendu, cependant, que dès lors que les fautes commises par le médecin et le laboratoire dans l'exécution des contrats formés avec Mme X... avaient empêché celle-ci d'exercer son choix d'interrompre sa grossesse afin d'éviter la naissance d'un enfant atteint d'un handicap, ce dernier peut demander la réparation du préjudice résultant de ce handicap et causé par les fautes retenues ;

PAR CES MOTIFS, et sans qu'il soit nécessaire de statuer sur les autres griefs de l'un et l'autre des pourvois :

CASSE ET ANNULE, en son entier, l'arrêt rendu le 5 février 1999, entre les parties, par la cour d'appel d'Orléans ; remet, en conséquence, la cause et les parties dans l'état où elles se trouvaient avant ledit arrêt et, pour être fait droit, les renvoie devant la cour d'appel de Paris, autrement composée que lors de l'audience du 17 décembre 1993.

MOYENS ANNEXES

MOYENS produits par M. Choucroy, avocat aux Conseils pour les époux X...

PREMIER MOYEN DE CASSATION : (Publication sans intérêt) :

DEUXIEME MOYEN DE CASSATION :

Il est reproché à l'arrêt attaqué d'AVOIR dit que l'enfant Nicolas X... ne subissait pas un préjudice indemnisable en relation de causalité avec les fautes commises par le Laboratoire de biologie médicale de Yerres et le docteur Y..., dit que M. X... devra restituer aux appelants les sommes reçues à titre de provision et le déboute de toutes demandes plus amples et contraires.

AUX MOTIFS QU'il n'est pas contesté que Mme X... avait clairement exprimé la volonté, en cas d'atteinte rubéolique, de procéder à une interruption volontaire de grossesse ; que les fautes conjuguées des praticiens ne lui ont pas permis de recourir à cette solution ; qu'ainsi a été causé aux époux X... un préjudice tant moral que matériel dont l'indemnisation n'est remise en cause par personne ;

Que, cependant, la Cour n'est pas saisie du préjudice subi directement par les parents de Nicolas, mais de celui de l'enfant lui-même ;

Qu'il échet donc de rechercher quel est le dommage subi par ce dernier, en lien avec les fautes commises par les praticiens ;

Qu'il sera, toutefois, rappelé qu'en la matière, dès lors que le dommage peut avoir une autre cause que la faute constatée, cette faute ne peut être censée constituer la condition sine qua non de la perte de chance ;

Qu'il est constant que les praticiens sont étrangers à la transmission à la mère de la rubéole ; qu'ils ne sont intervenus qu'après le début de la grossesse, de sorte que ne pouvait plus être évitée la conception de l'enfant ;

Qu'il est tout aussi constant qu'aucune thérapeutique quelconque, pratiquée en début de grossesse, n'aurait pu supprimer, voire limiter les effets de la rubéole sur le fœtus ;

Que, dès lors, Nicolas qui n'avait aucune chance de venir au monde normal ou avec un handicap moindre, ne pouvait que naître avec les conséquences douloureuses imputables à la rubéole à laquelle la faute des praticiens est étrangère, ou disparaître à la suite d'une interruption volontaire de grossesse dont la décision n'appartient qu'à ses parents et qui ne constitue pas pour lui un droit dont il puisse se prévaloir ;

Qu'il s'ensuit que la seule conséquence en lien avec la faute des praticiens est la naissance de l'enfant ;

Que, si un être humain est titulaire de droits dès sa conception, il n'en possède pas pour autant celui de naître ou de ne pas naître, de vivre ou de ne pas vivre ; qu'ainsi, sa naissance ou la suppression de sa vie ne peut pas être considérée comme une chance ou comme une malchance dont il peut tirer des conséquences juridiques ;

Que, dès lors, Nicolas X... représenté par son père, ne peut pas invoquer à l'encontre des praticiens, comme source de dommage, le fait d'être né parce que, à raison de leurs fautes conjuguées, ils n'ont pas donné à ses parents les éléments d'appréciation suffisants pour leur permettre d'interrompre le processus vital qui devait aboutir à sa naissance ;

ALORS, D'UNE PART, QU'il résulte des propres constatations de l'arrêt attaqué que la mère de l'enfant avait clairement exprimé la volonté, en cas d'atteinte rubéolique, de procéder à une interruption volontaire de grossesse et que les fautes conjuguées des praticiens ne lui ont pas permis de recourir à cette solution ; qu'il s'ensuit que ces fautes étaient génératrices du dommage subi par l'enfant du fait de la rubéole de sa mère ; qu'en écartant le lien de causalité entre les fautes constatées et le dommage subi par l'enfant du fait de la rubéole de sa mère, l'arrêt attaqué a violé l'article 1147 du Code civil ;

ALORS, D'AUTRE PART, QUE dans ses conclusions devant la Cour l'exposant agissant " tant en son nom personnel qu'en sa qualité d'administrateur légal des biens de son fils Nicolas " faisait valoir et démontrait qu'au préjudice corporel subi par son fils correspondaient pour les parents de lourdes charges matérielles et financières ; que la Cour, qui admet le droit à réparation des parents pour leur préjudice matériel et moral, ne pouvait rejeter toute indemnisation sans se prononcer sur ces conclusions mettant en évidence l'existence d'un préjudice indemnisable ; qu'ainsi l'arrêt attaqué a violé l'article 455 du nouveau Code de procédure civile ;

TROISIEME MOYEN DE CASSATION : (Publication sans intérêt) ;

Moyens produits par la SCP Gatineau, avocat aux Conseils pour la CPAM de l'Yonne, demanderesse au pourvoi incident ;

PREMIER MOYEN DE CASSATION : (Publication sans intérêt) ;

DEUXIEME MOYEN DE CASSATION :

Il est fait grief à l'arrêt attaqué d'AVOIR dit que les fautes du docteur Y... et du laboratoire de biologie médicale de Yerres sont étrangères au préjudice subi par Nicolas X... et d'avoir rejeté les demandes de la CPAM.

AUX MOTIFS QU'il est constant que les praticiens sont étrangers à la transmission par la mère de la rubéole ; qu'ils ne sont intervenus qu'après le début de la grossesse, de sorte que ne pouvait plus être évitée la conception de l'enfant ;

Qu'il est tout aussi constant qu'aucune thérapeutique quelconque, pratiquée en début de grossesse, n'aurait pu supprimer, voire limiter les effets de la rubéole sur le fœtus ;

Que, dès lors, Nicolas qui n'avait aucune chance de venir au monde normal ou avec un handicap moindre, ne pouvait que naître avec les conséquences douloureuses imputables à la rubéole à laquelle la faute des praticiens est étrangère, ou disparaître à la suite d'une interruption volontaire de grossesse dont la décision n'appartient qu'à ses parents et qui ne constitue pas pour lui un droit dont il puisse se prévaloir ;

Qu'il s'ensuit que la seule conséquence en lien avec la faute des praticiens est la naissance de l'enfant ;

Que, si un être humain est titulaire de droits dès sa conception, il n'en possède pas pour autant celui de naître ou de ne pas naître, de vivre ou de ne pas vivre ; qu'ainsi, sa naissance ou la suppression de sa vie ne peut être considérée comme une chance ou comme une malchance dont il peut tirer des conséquences juridiques ;

Que, dès lors, Nicolas X... représenté par son père, ne peut pas invoquer à l'encontre des praticiens, comme source de dommage, le fait d'être né parce que, à raison de leurs fautes conjuguées, ils n'ont pas donné à ses parents les éléments d'appréciation suffisants pour leur permettre d'interrompre le processus vital qui devait aboutir à sa naissance ;

ALORS QUE, il résulte des propres énonciations des juges du fond que Mme X... avait manifesté la volonté de provoquer une interruption de grossesse en cas de rubéole ; que les fautes conjuguées des praticiens ont induit la fausse certitude que Mme X... était immunisée contre la rubéole et qu'elle pouvait poursuivre sa grossesse sans aucun risque pour l'enfant ; qu'en conséquence ces fautes étaient génératrices du dommage subi par l'enfant du fait de la rubéole de sa mère ; qu'en niant tout lien de causalité entre les fautes constatées et le dommage subi par l'enfant, l'arrêt attaqué a violé l'article 1147 du Code civil ;

TROISIEME MOYEN DE CASSATION :

Il est fait grief à l'arrêt attaqué d'avoir dit que la CPAM de l'Yonne devra restituer aux appelants les sommes reçues à titre de provision.

AUX MOTIFS QUE les praticiens ne sont pas responsables du préjudice causé à Nicolas X... ;

ALORS QUE la Caisse qui exerce un recours aux fins de voir son préjudice indemnisé ne se prévaut pas uniquement du dommage subi par l'assuré social ; qu'implicitement mais nécessairement elle se fonde également sur son propre préjudice qui est distinct du premier ; qu'à supposer que Nicolas X... n'ait souffert d'aucun dommage imputable aux appelants, il n'en demeure pas moins qu'en raison de la naissance de cet enfant, la CPAM de l'Yonne subit un préjudice propre résultant des nombreux versements qu'elle doit effectuer au profit de son assuré social ; que la créance de la CPAM n'est d'ailleurs contestée ni en son principe ni en son montant ; que la cour d'appel a retenu plusieurs fautes imputables à chacun des praticiens ; que le lien de causalité entre le préjudice de la Caisse et les fautes des appelants n'était pas contesté ; que les juges du fond ne pouvaient donc rejeter la responsabilité du docteur Y... et du laboratoire au seul motif tiré de leur absence de responsabilité vis-à-vis de Nicolas X... sans méconnaître le droit propre à la Caisse et violer ainsi les articles 1382 et suivant du Code civil.

Analyse

Publication : Bulletin 2000 A. P. N° 9 p. 15

Décision attaquée : Cour d'appel d'Orléans , du 5 février 1999

Titrages et résumés : PROFESSIONS MEDICALES ET PARAMEDICALES - Médecin chirurgien - Responsabilité contractuelle - Faute - Lien de causalité - Femme enceinte - Concours de fautes d'un laboratoire et d'un praticien - Enfant né handicapé - Droit à réparation .

Dès lors que les fautes commises par un médecin et un laboratoire dans l'exécution des contrats formés avec une femme enceinte avaient empêché celle-ci d'exercer son choix d'interrompre sa grossesse afin d'éviter la naissance d'un enfant atteint d'un handicap, ce dernier peut demander la réparation du préjudice résultant de ce handicap et causé par les fautes retenues.

RESPONSABILITE CONTRACTUELLE - Applications diverses - Médecin chirurgien - Femme enceinte - Concours de fautes d'un laboratoire et d'un praticien - Enfant né handicapé - Lien de causalité - Droit à réparation
RESPONSABILITE CONTRACTUELLE - Lien de causalité - Médecin chirurgien - Femme enceinte - Concours de fautes d'un laboratoire et d'un praticien - Enfant né handicapé - Droit à réparation

Précédents jurisprudentiels : DANS LE MEME SENS : Chambre civile 1, 1996-03-26, Bulletin 1996, I, n° 156, p. 109 (cassation partielle), et l'arrêt cité.

Textes appliqués :

- ▶ Code civil 1165, 1382



General Overview

The Constitutional Council was established by the Constitution of the Fifth Republic adopted on 4 October 1958.

It is a court vested with various powers, including in particular the review of the constitutionality of legislation. The Constitutional Council is not a supreme court that is hierarchically superior to the Conseil d'État or the Cour de Cassation.

Procedure

The Constitutional Council is a court, the hearings and sessions are determined by the applications it receives.

When it is seized of proceedings concerning the constitutionality of a law prior to enactment, the Council must rule within one month, or eight days in urgent cases.

If it is seized of an application for a priority preliminary ruling on the issue of constitutionality, the Council has three months to deliver its decision. During that period, the parties are granted the opportunity to present their observations and to file responses.

The Council sits and rules in plenary form at all times. Its decisions and opinions are delivered by at least seven members (quorum requirement). In the event of a tie, the President has the casting vote. No dissenting opinions may be issued. Unlike public hearings, deliberations and votes are not made public.

The investigation of cases is allocated to a member of the Council who is appointed as the rapporteur by the president, except in electoral disputes. In such disputes, the investigation is allocated to one of the three sections comprised of three members chosen at random, each of whom must have been appointed by a different authority.

Proceedings are conducted in writing and the parties are granted the right to make representations. In cases involving electoral disputes, the parties may request that they be heard and in cases involving an application for a priority preliminary ruling on the issue of constitutionality a public hearing is held.

Powers

The powers of the Constitutional Council, which are set out in the Constitution, are specified and completed by organic laws. The powers vested in it by this legislation may be subdivided into two categories:

Judicial powers

Normative litigation

- As the court responsible for assessing the constitutionality of legislation, the Constitutional Council exercises both *ex ante* and *ex post* reviews.

Ex ante review:

The Constitutional Council is seized on a mandatory basis with organic laws and the regulations of the Houses of Parliament prior to promulgation of the former and prior to the entry into force of the latter. It may also be seized of an international commitment prior to its ratification or approval. For ordinary legislation, the Council may be seized of a law prior to its promulgation. In these last two cases, the Council may be seized in different ways depending upon the act under review, either by a political authority (the President of the Republic, the Prime Minister or the president of the National Assembly or the Senate), or by at least 60 delegates to the National Assembly or 60 Senators.

Since 1999, the Constitutional Council may also examine the constitutionality of dependent territory laws adopted by the Congress of New Caledonia.

***Ex post* review:**

Since 1 March 2010 and following the constitutional amendment of 23 July 2008, the Constitutional Council may consider whether a legislative provision which is already in force violates the rights and freedoms guaranteed under the Constitution, acting on a referral by the Conseil d'État or the Cour de Cassation. In such cases, constitutional review is conducted on the initiative of an applicant, since the question was raised by application filed during proceedings before a court. Such cases involve applications for a priority preliminary ruling on the issue of constitutionality [*question prioritaire de constitutionnalité*, QPC].

- As the court responsible for delineating jurisdiction between the statutory and the regulatory fields, the Constitutional Council may also be seized on the one hand during discussions before Parliament by the president of the relevant House or by the Prime Minister, or on the other hand *ex post* by the Prime Minister in order to reclassify a legislative provision, that is to amend by decree a legislative provision the contents of which are regulatory in nature.
- Following the amendment of 23 July 2008, the Constitutional Council may be called upon to verify whether the terms under which bills are tabled comply with the conditions laid down by an organic law (Organic Law No. 2009-403 of 15 April 2009).
- Finally, the Constitutional Council rules on the division of powers between the State and certain overseas territories (to date: French Polynesia, Saint-Barthélemy and Saint-Martin).

Electoral disputes and referenda

The Constitutional Council oversees the regularity of the election of the President of the Republic and referenda, the results of which it proclaims. It rules on the regularity of elections of Members of Parliament, and hence their eligibility; it also takes action where a Member of Parliament is in a situation of incompatibility, or is likely to be so.

Easily accessible to voters, applications to the Council relating to elections have increased considerably following the approval of legislation organising and controlling the financing of electoral expenses which the Council oversees for candidates in parliamentary and presidential elections (on appeal). Accordingly, as at 4 October 2012, the Council had issued 2871 rulings in relation to elections and 889 rulings in disputes relating to legislation (of which 650 were conformity rulings).

Consultative powers

The Constitutional Council issues an opinion if consulted by the Head of State regarding the implementation of Article 16 of the Constitution, and also in relation to decisions taken within this framework. It assesses whether the conditions for implementation continue to be met either upon request by the president of one of the Houses of Parliament or by 60 Members of Parliament or 60 Senators after 30 days, or automatically after 60 days and at any time thereafter.

Moreover, the Government consults the Council on texts relating to the organisation of counts for elections of the President of the Republic and referenda. The Council also provides observations on past parliamentary and presidential elections as well as on upcoming elections with the goal of recommending to the public authorities all measures capable of improving the conduct of these elections.

THE ORGANISATION OF THE JUDICIARY IN THE FEDERAL REPUBLIC OF GERMANY

According to the German Constitution, there are courts on the federal level which are the Federal Constitutional Court and five federal supreme courts:

- the Federal Court of Justice (*Bundesgerichtshof*)
- the Federal Labour Court (*Bundesarbeitsgericht*)
- the Federal Social Court (*Bundessozialgericht*)
- the Federal Finance Court (*Bundesfinanzhof*)
- the Federal Administrative Court (*Bundesverwaltungsgericht*)

All the other courts in Germany are courts of the federal state and fall in the competences of the respective "Land".

Court organization in criminal matters

The courts having criminal jurisdiction are organized on four levels:

1. the local courts (*Amtsgerichte*)
2. the regional courts (*Landgerichte*)
3. the higher regional courts (*Oberlandesgerichte*)
4. the Federal Court of Justice (*Bundesgerichtshof*) in Karlsruhe.

The local, regional and higher regional courts are all courts of the "Länder". Only the Federal Court of Justice is a court of the federation. The competences of the different levels of courts, including but not limited to the criminal branch, are set out in a law, the Court Constitution Act: http://www.gesetze-im-internet.de/englisch_gvg/.

Whereas this law also contains some general procedural provisions, the procedure in criminal matters at a whole is laid down in the Code of Criminal Procedure: http://www.gesetze-im-internet.de/englisch_stpo/.

The local courts are located in almost every city and larger towns. They always act as court of first instance. In criminal matters the competence of the local court is limited to imposing a fine or a custodial sentence of less than four years.

The regional courts: the district of the regional court covers several local courts. The regional courts act as first instance and second instance. In criminal matters the regional courts are competent as courts of first instance in all cases where a custodial sentence of more than 4 years is expected. In second instance the regional courts are competent in criminal matters for appeals against the decisions and judgments of the local court.

The higher regional courts: the district of a higher regional court covers several regional courts and their local courts. The higher regional courts act mainly as court of appeal when an appeal had been lodged against the judgment of the regional courts acting as court of second instance; or of the local court as first instance. Besides this appellate function, it acts as court of first instance for certain types of offences, such as war crimes, crimes against the state and terrorism.

The Federal Court of Justice in Karlsruhe: It represents the final court of appeal for all judgments issued by the regional and higher regional courts in Germany acting as courts of first instance. The Federal Court of Justice never acts as court of first instance and has therefore no original jurisdiction.

The German law provides for two **types of appeal**:

1. The first one is called "*Berufung*". It is an appeal on questions of facts and law. This remedy provides for a full check of the case (trial de novo).
2. The other remedy is called "Revision". This is the appeal only on questions of law. The court of appeal only checks whether the substantive law has been applied correctly and whether the fundamental procedural rules have been observed. The appeal court will not reassess the evidence in place of the trial court but only intervene if it has been demonstrated to be clearly erroneous.

All judgments in criminal matters given by the local court can be challenged with the appeal on facts and law. It is for the regional court to decide upon such an appeal.

Against the decisions of a regional court following an appeal on facts and law a further remedy can be lodged which is the appeal on law. This appeal is dealt with by the higher regional court.

In cases where the regional court has decided as court of first instance, the appeal on facts and law is not possible. In these cases only the appeal on law is possible.

The same applies when the higher regional court has decided upon a case as court of first instance like for example in terrorist cases.

Also in this case there is only the appeal on law but not the appeal on facts and law. The appeals on law against the judgments of the regional court and the higher regional court are all dealt with by the Federal Court of Justice in Karlsruhe.

The Prosecution offices and their competences

The prosecution offices are set up at every regional court and carry out public prosecution functions not only at the regional court but also at the local courts belonging to the district of the respective regional court.

Public prosecution offices are competent to investigate all kinds of criminal offences except of offences against the state and other offences falling within the competence of the Federal Public Prosecution Office. They furthermore argue the cases they bring before criminal courts, and they are also competent for the execution of sentences.

As a rule, in Germany the principle of mandatory prosecution (*Legalitätsprinzip*) is applicable. If an investigative measure requires a decision by the judge (what is in particular the case for coercive measures like house searches, seizure, telephone tapping, pre-trial detention etc.), the competent public prosecutor submits his motion to the competent local court.

The examining magistrate (*Ermittlungsrichter*) then decides whether to grant the motion. Under certain preconditions, public prosecution offices may themselves order coercive measures in exigent circumstances, e.g. imminent danger.

The public prosecution offices are subordinate to the office of the Public Prosecutor General located at each Higher Regional Court. Each Land has at least one Higher Regional Court and therefore one General Prosecution Office, some have two (e.g. Baden-Württemberg and Rhineland-Palatinate) or three (Bavaria, Lower Saxony, North Rhine-Westphalia).

On the federal level there is only one prosecution office, the Federal Public Prosecution Office which has its seat in Karlsruhe. In the area of investigation and prosecution of crimes, the Federal Public Prosecution Office is competent to investigate and prosecute crimes against the state and terrorist crimes as well as other cases, if they involve serious crime that goes beyond individual Länder borders.

Furthermore it is involved in all appeals on questions of law lodged against judgments of all regional and higher regional courts in Germany when acting as court of first instance. There is no superior/subordinate relationship of any sort between the Federal Public Prosecution Office in Karlsruhe and the Länder prosecution offices.