

49th Presidents Conference
“The State of Law and Democracy - Bridging the Gap between Policy and Practice”
Draft of French National Report

1. Continuity of the justice system and the legal profession during Covid

➤ **Active engagement of attorney groups**

Since the health crisis began, the representative bodies of the legal profession have been taking action so that law firms and courts might continue to operate despite the series of lockdowns. A state of emergency was first declared throughout France on March 24, 2020 with the promulgation of Law 2020-290, which was successively extended to July 10, 2020, February 16, 2021 and June 1, 2021. The state of emergency authorizes the government to use its regulatory powers to limit the freedom to travel, conduct business and assemble; to requisition any and all goods and services necessary to end the health crisis; and to impose price controls.

It also authorizes the modification of various legal provisions relating to the judiciary. For each of the two lockdowns, the Government adopted a wave of three ordinances—one for the civil and commercial courts, one for the administrative courts and one for the criminal courts. These ordinances notably permitted the holding of proceedings without hearings or by videoconference, including in criminal cases, without the consent of the parties.

The Conseil national des barreaux filed several appeals before France’s State Council to ensure that rights and fundamental freedoms be respected. Among its efforts in this regard, it challenged the ability of courts to deny requests for injunctions without a hearing, pleadings or written opinion and also the automatic extension of provisional detentions beyond the maximum length without a court order. The CNB also urged the administrative court to declare the shutdown of certain administrative detention centers in light of their deteriorated conditions and the risk of widespread infection among the detainees. In a recent decision of the Constitutional Council, the use of videoconferencing without the consent of the party concerned was deemed to be unconstitutional. It was the view of the Council that although such measures furthered the constitutional tenet of protecting public health and were helpful in carrying out the constitutional principle of a continually functioning judiciary, their infringement of the right to defense was not justified by the special circumstances brought about by the Covid-19 epidemic at the time the measures were applied.

➤ **Measures obtained on behalf of the legal profession**

As of March 19, 2020 the Conseil national des barreaux obtained a waiver from the French Social Services Ministry which then became applicable to all self-employed professionals as well as to individuals deemed to be at risk: the right to per diem compensation for childcare if the child is under 16 or disabled. Following CNB’s proposal, a program to give advances on legal aid income for law firms that regularly provide legal aid services, enabling them to preserve their cash, was established by Decree No. 2020-653 of May 29, 2020 and extended by Decree No. 2020-1001 of August 07, 2020. With the promulgation of Decree No. 2020-378 of March 31, 2020 and Ordinance No. 2020-316 of March 25, 2020, the CNB also obtained for lawyers the right to defer payments on their firm’s rent and water, gas and electricity bills. Lastly, the CNB obtained for lawyers an entitlement to the relief funds established by the government for businesses especially hard hit by the economic, financial and social consequences of the public health crisis and access to loans guaranteed by the French Government. To ensure that the legal system continued to serve the public during the health crisis, on April 24, 2020 the CNB signed a national protocol with the French Ministry of Justice concerning electronic communications in criminal cases, which was later tailored to the different Bars. The Conseil national

des barreaux then signed a protocol on May 12, 2020 permitting lawyers to receive the scanned copies of the criminal files to which they were entitled under the French Code of Criminal Procedure.

2. Independence of the profession:

- **Pension reform project:**

On July 18, 2019 , Jean-Paul Delevoye, High Commissioner for Pension Reform, presented the conclusions of his report “For a Universal Retirement System,” which proposes that the independent retirement plan for lawyers be absorbed into the universal system, entailing among other things a doubling of contributions and a reduction of pensions.

The CNB was from the beginning opposed to folding lawyers into the universal system, taking the view that it would weaken solidarity among the profession to the benefit of lawyers with the lowest incomes and weaken guarantees of gender equality.

The CNB headed up an opposition movement, enlisting lawyers and other professionals (pilots, flight crews, doctors, nurses, physical therapists, etc.) into a “Retirement SOS” group and organizing two nationwide demonstrations in Paris in September 2019 and February 2020. At the local level, the various Bars made known the demands of lawyers and organized numerous actions. As an example, the Paris Bar organized an extraordinary general meeting on February 11, 2020 inside the Paris main courthouse, the Palais de Justice, with 1,400 Paris lawyers attending, who voted to continue the total strike against pension reform. After over seven months of activity led by our profession, the government postponed the reform indefinitely.

- **Combating money laundering and terrorist financing (known by the French acronym LCB- FT)**

Two major challenges have arisen: the upcoming assessment of France by the FATF (in its final phase in 2021 due to the pandemic) and the transposition into French law of the Fifth “Anti-money laundering” Directive No. 2018/843 by Ordinance No. 2020-115 of February 12, 2020.

This ordinance made substantial changes to the set of laws pertaining to lawyers by incorporating tax advice into the scope of LCB-FT requirements, by broadening the duty of care to include legal counsel and litigation, and by extending the system for the prevention and detection of money-laundering and terrorist financing to the escrow entity used by all French lawyers (acronym: CARPA).

The CNB published a new version of its LCB-FT practical guide to help its lawyers come to grips with these regulations. This guide includes software for mapping and classifying LCB-FT risks, a “control kit” for each Bar and an e-learning training module.

- **Professional confidentiality**

The CNB reiterated its opposition to Ordinance No. 2019-1068 of October 21, 2019 transposing the DAC 6 Directive 2018/822 of May 25, 2018, which places on lawyers a duty to declare to the tax authority their clients’ potentially aggressive cross-border arrangements. This ordinance involves a three-phase system of declarations that seriously infringes client-attorney privilege and provides no “protective filter” comparable to that used when declaring suspicion of money laundering . The CNB, the Conference of Bar Association Presidents and the Paris Bar therefore filed for a temporary injunction against the administrative comments published November 25, 2020 in the official bulletin of public finance (termed BOFIP DAC 6), which summarized and laid out the provisions of the ordinance that would transpose the DAC 6 Directive into French law.

Additionally, the CNB, alongside the CCBE, joined the appeal filed by the French- and German-speaking Bar Association of Belgium with the Belgian constitutional court against the Belgian law transposing the DAC 6 Directive. The Belgian constitutional court raised a preliminary question to the CJEU. Holding that the information likely to be transmitted per the directive is protected by attorney-client privilege, the Belgian court asked the European Court about the directive's compliance with the right to a fair trial guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union and with the right to privacy guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union,

3. Freedom of speech:

- **Proposed "total security" legislation**

A so-called "total security" bill filed with the French National Assembly on October 20, 2020 provides for (i) the transfer of powers hitherto reserved to the national police to municipal police and private agents; (ii) a prohibition against disseminating images "showing a member of the national police or the national gendarmerie in the performance of his duties for the purpose of attacking him physically or psychologically," and (iii) the use of drones to provide surveillance of demonstrations and borders. In a motion adopted November 13, 2020 the CNB condemned these provisions, which it believes are contrary to the freedom of movement, of demonstration and of conscience guaranteed by European texts and the French constitution. Many bars also came out strongly against this proposed law, such as the Paris Bar, the governing board of whose Bar Association passed a motion on November 17, 2020.

- **Law of June 24, 2020 to combat hateful content on the internet**

The law against hateful content on websites known as the Avia Act was promulgated on June 24, 2020 after being largely censured by the Constitutional Council, which took the view that it infringed freedom of speech. In May 2019 the CNB had adopted a motion condemning the bill for two reasons. The sanctions in the bill violated the principle of proportional punishment, and the bill provided no effective appeal to a judicial authority for a suppression of content and no penalty for wrongful suppression.

The Paris Bar had also formulated a clear legal position on this and during the parliamentary debate brought to the attention of the legislators the various points in the bill that it found unconstitutional. Those arguments appeared again in the ruling of unconstitutionality made by the Constitutional Council.

4. Criminal justice reform for minors

The proposal to ratify Ordinance No. 2019-950 of September 11, 2019 containing the legislative portion of the Criminal Justice Code for Minors was presented to the Council of Ministers on October 30, 2020. That bill, currently under debate in Parliament, has been roundly criticized by the legal profession as well as by childhood professionals. Apart from the government's ill-chosen method of reforming juvenile criminal justice through an ordinance, the bill undermines one of the principal foundations of such justice, the primacy of education in the sentences of juvenile delinquents. Taking a purely punitive approach, emulating the justice system for adults, the bill introduces a simple presumption of criminal irresponsibility for minors of 13 years, which the prosecutor's office can always overcome, so that a young child might subsequently be given a criminal trial. The bill takes this limited approach even though a delinquent minor is also a child at risk, who must be protected. It creates new procedures including a single-hearing judgment, an expedited procedure in the hands of the State prosecutor, and a two-step procedure, the timing of which is so tight that it will be very challenging to mount a defense of the child and provide him with educational assistance. The bill enhances judicial control by favoring provisional detentions and by establishing electronically monitored home detention for minors, for whom that sentence is completely inappropriate. In

addition, the CNB has restated its firm opposition to police custody for minors under 10 and detention for those 13 and older without the presence of a lawyer for up to 24 hours. The legal profession is asking that as part of this reform, its effective date be deferred and that the procedural timeframes be lengthened so as to provide the delinquent child with quality educational assistance and the defense with enough time to prepare properly, in keeping with the right to a fair trial. France ranks 23rd among European nations in terms of resources devoted to juvenile justice, according to the European Commission for the Efficiency of Justice. The Conseil national des barreaux is mindful that those resources are the price of putting young people back into society and combating recidivism, efforts that must not be sacrificed to budgetary constraints.

5. Violence against women

Decree No. 2020-636 shortens the timeframes of the ordinance meant to protect victims of domestic violence by providing them legal protections such as restraining orders against the accused, measures pertaining to children and the provision of housing. In a motion adopted July 12, 2020 the Conseil national des barreaux opposes these reduced timeframes, on the basis that victims of domestic violence will be prevented from making effective use of the protection ordinance and demands that sufficient resources be given to family court judges to process protection ordinance requests within the six days set by Law No. 2019-148.

The lockdowns and curfews put in place to combat Covid-19, moreover, have aggravated the situation of domestic violence victims. Many French Bars begun to offer emergency remote access to legal help so that victims can reach a lawyer quickly and with a minimum of risk and can learn of their options to receive protection and file complaints. With a view to long-term improvement in such victims' access to law and the legal system, the Paris Bar has drawn up a list of lawyers specially trained in legal aid and of offices offering free legal advice.

6. Immigrant rights and asylum:

The CNB has been paying very close attention to the situation of immigrants at the borders of the European Union, from Lesbos to Calais. The situation is especially worrisome in the North of France, where exiles are living in ever-worsening conditions. The lack of healthcare, food and legal access is cause for great concern.

Furthermore, Brexit has automatically rendered inapplicable the various European regulations covering asylum, in particular EU Regulation 604/2013 of June 26, 2013. This regulation "establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person" (Dublin III). Article 8 of this regulation provides a mechanism for reuniting unaccompanied minors with their family. This forces isolated, foreign minors to cross the Channel by other means than legal transfers, putting their lives at risk. This is the background against which the CNB, in partnership with local Bars, onsite non-profit groups and our British counterparts, have initiated an extensive project to improve legal access for individuals exiled in the North of France.

The situation of foreigners and/or asylum-seekers continues to be particularly troublesome in Paris, where feelings run high about access to the law and to lodging. The Paris Bar has taken action alongside a number of social agencies to meet the needs of foreigners and asylum seekers to gain access to the law and the legal system, and to give them a decent and humane reception. Numerous offices have been set up for both in-person and virtual consultations.

7. Practice of the profession

- Law No. 2015-990 of August 06, 2015 and its enforcing decrees have made it necessary to amend the national internal regulations of the legal profession (French acronym: RIN) to include “**multi-practice**,” by which several legal practices can be combined—sole practitioner, office of sole practitioners, employee or partner—and as a member of one or more local Bars. On August 30, 2020 the CNB issued its prescriptive ruling titled “Multi-Practice.” Subsequently, the CNB also drew up a guide to multi-practice for lawyers and bar associations.
- The **multi-practice entities** (French acronym: SPE) created by the Ordinance of March 31, 2016 make it possible to jointly practice as a lawyer, attorney before the French State Council and Court of Appeals, auctioneer, court bailiff, receiver, trustee, patent and trademark attorney, auditor or public accountant. In July 2020, joining with the national chamber of court enforcement officers, the association of attorneys before the State Council and Court of Appeals, the governing board of the association of public accountants, the patent & trademark attorneys institute, and the governing board of notaries, the Conseil national des barreaux published a guide that explains the new rules and the recommendations of the task force for this very distinct form of legal practice.
- Ordinance No. 2018-310 of April 27, 2018 had created the status of foreign legal consultant (French acronym: CJE) to enable lawyers belonging to the bar of a non-Member State of the European Union to practice as legal consultants and to draft for others private documents under the law of their nation and international law, excepting European law. In addition, Decree No. 2019-849 of August 20, 2019 establishes that a request for such authorization shall be made electronically to the Conseil national des barreaux. The CBN, as the authority empowered to investigate a CJE application, has set up an electronic platform for admitting foreign lawyers.

8. Open data and legaltech

- Decree No. 2002-356 of March 27, 2020 (“DataJust”) authorizes the development of a database including the amounts of compensation awarded, claim by claim, by administrative and civil courts, and implemented by an artificial intelligence algorithm to analyze court cases, which is now in the process of being designed. In a motion adopted in April 2020, the CNB made a request to partner in the design of the algorithm so as to ensure transparency and the absence of bias and demanded that the government ensure equitable access to the output of the algorithm by the entire legal profession, so that the playing field remains level. The government has since then announced the creation of a task force which is to include the CNB. We await the start of work.
- In July 2020 the CNB, the French State Council and the association of attorneys before the State Council issued a joint declaration calling for the creation of a system for regulating and monitoring the algorithms used to implement databases of legal decisions, and for the designation of a public authority to carry out that regulation and monitoring in conjunction with the administrative and civil courts, the association of attorneys admitted to practice before the councils and the Conseil national des barreaux. This joint declaration follows on the declaration adopted in 2019 by the CNB and the Court of Appeals concerning civil court decisions. The CNB also rendered an opinion on Decree No. 2020-797 of June 29, 2020 concerning the public access to civil and administrative court decisions. It criticized the great discretion given to the judge concerning the disclosure of information that might endanger the safety or privacy of persons cited in the decision, without addressing how such individuals, whether

parties or not, can contest the (non)disclosure before the court's decision is published on the website provided for that purpose.

The government has since announced and undertaken efforts to study the further use of judicial data. The CNB is a part of these efforts, which began in mid-January.

Furthermore, in a decision of January 22, 2021 the State Council ordered the Ministry of Justice to publish within three months an edict defining the technical and formal means by which judicial decisions will be made public as open data, which had been expected since the summer of 2019.

- On October 09, 2020 the CNB adopted 14 recommended actions concerning legaltech in the area of jurimetrics (i.e., predictive justice). These include a charter of transparency and ethics in the use of legal data that presents a set of principles meant to ensure the self-regulation of practitioners regarding both the algorithms that implement the legal decisions database and the reuse of the information it contains—specifically the principles of honesty, transparency, equality, protection, accessibility and predictability.

9. Policing and justice

- **Request to institute identity check confirmation slips**

At its general meeting of July 03, 2020 the Conseil national des barreaux adopted a resolution asking the government to create receipts for identity checks. French law provides no way to trace an identify check unless it leads to a proceeding (as for contempt and obstruction) or is refused by the person being checked pursuant to Article 78-3 of the Code of Criminal Procedure. As a result, if the check is not covered by either of the aforementioned cases, the absence of a written trace prevents any appeal in the event of misconduct or any way for a judge to ascertain proper conduct, even though this right to effective appeal is provided by Article 13 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union. The CNB has therefore asked for the reform of Article 78-2 of the Code of Civil Procedure and the institution of identify check receipts issued by police officers each time an identity check is performed, thereby ensuring the citizen's right to appeal and respect for the principles of equal treatment and non-discrimination.