OF WHAT USE ARE LAWYERS FOR JUVENILE OFFENDERS?

Patricia ***BÉNEC'H-LE ROUX****, a researcher at the CESDIP, discusses the findings of her doctoral thesis in sociology, on the role of lawyers on the criminal justice scene for minors, supervised by Philippe ROBERT and defended at the University of Versailles-Saint-Quentin-en-Yvelines.*

This research deals with the role of lawyers in juvenile courts. Sociological observation of specific situations shows tension between the roles prescribed for one actor, the expectations of other actors and the roles actually played by that one actor. The present analysis addresses this tension, based on the sociology of professions and the sociology of juvenile justice. Data was collected through a qualitative survey based on observation of the lawyer's work during penal hearings (in the judge's chambers and in the courtroom) and on about fifty semi-directive interviews of lawyers for juveniles and juvenile court judges, as well as on informal talks with other actors in juvenile justice in three different court districts. Most data was collected over a three-year period: 1997-1998-1999.

Not so long ago, lawyers played a secondary role on the criminal justice scene for juveniles in France. On the one hand, they were uninterested in defending juveniles, leaving that unglamorous task to interns, new to the profession. On the other hand, juvenile criminal law was structured around an educational conception of justice, on the basis of the February 2, 1945 *Ordonnance*. According to this model, penal responses to juvenile delinquency should give priority to educational measures, with punishment as the exception. The juvenile court judge had an essentially protective role, resorting to punishment only for young offenders having committed a serious *délit*[1] or a crime. Hence, the lawyer's role was necessarily superfluous, since the child's interest was mainly in the hands of the judge, assisted by social and educational workers. But over the last decade, lawyers have tended to come to the forefront, thus justifying our interest in them, particularly since only a handful of legal specialists and practitioners have written anything about them.

The 1990s were a turning point in juvenile justice. Impelled by the international Convention on the Rights of the Child, legislators extended the rights of children within the justice system and the prerogatives of their lawyers in criminal and civil procedures. Restricting ourselves to criminal justice, we note that until recently lawyers were only compulsory for juveniles during the verdict phase. The January 4, 1993 Act made their presence compulsory throughout the criminal procedure, starting with the first appearance before a judge, whenever a minor is liable to be charged with a criminal offence. This reform also extended the right to counsel during police custody to juveniles, whereas they had no lawyers until then. Last, the June 15, 2000 Act authorized a half-hour talk with a lawyer for both adults and juveniles as early as the first hour they spend in police custody[2]. Alongside these legislative changes, encouraged by the Justice Department, groups of lawyers specialized in defending juveniles were set up in juvenile courts[3], under cover of the July 10, 1989 Act on child victims and the January 8, 1993 reform of family law. This collective action, spurred by "well-established lawyers, women for the most part, and by the *Syndicat des Avocats de France*, a lawyers' union, aimed at improving the defence of juveniles. Some factors tied to adjustment of the profession to a new context also contributed to the development of these groups of lawyers. This includes the merging of the profession with former legal advisers[4], the upgrading of legal aid and the facilitation of access to courts[5], along with transformations in the legal market, namely, among other things, a social fragmentation of the profession of lawyer. Other factors have to do with the changing social status and images of childhood and adolescence, an evolution which tends to make resemble adults by granting them greater autonomy and more rights, and turning them into partners to negotiate contracts with, with the prospect of making them feel responsible".

How does the lawyer for juveniles adjust to these changes in the legal, professional and social contexts? Setting aside professional discourse and ideologies, how can the actors' real practices be described? In whose name do lawyers of juvenile defendants speak, and how do they justify their role with respect to the judge and other actors? To answer these questions we must describe the lawyer's work in its legal framework, without overlooking the symbolic significance of juvenile justice (1). We must also consider that appearing with a lawyer in court is now compulsory for juvenile offenders, and that the specific roles of other professionals, tend to restrict the lawyer's role (2). However, since there is no clear definition of the defence of juvenile delinquents, lawyers take advantage of the leeway available for manoeuvring (3).

1. A working situation under normative constraints

The lawyer for juveniles works under conditions defined by the 1945 *Ordonnance*, where scripts are defined by the code of criminal proceedings, which gives the main role to the juvenile court judge, who is both the examining and the sentencing judge so as to provide continuity in the follow-up of juvenile offenders[6]. The same judge also orchestrates criminal hearings, both in his/her chambers and at court.

Hearings in the judge's chambers have four highlights: investigating the facts, assessing the minor's education and personality, remarks by the counsel, often brief and formal, and the judge's decision[7]. This hearing brings together the few actors involved, in an atmosphere where they may talk relatively freely. The presence of the lawyer is a sufficient reminder, however, of the existence of a conflict. As a rule, the penal stakes are low. In case of an indictment for a minor offence, entailing a sentence, the judge orders an educational measure (admonition, parental custody, parole or

[1] French law divides offences into three categories, on the basis of increasing seriousness:
- *contraventions* (minor offences), which are judged by *tribunaux de police*;
- *délits* (moderately serious offences), which are judged by *tribunaux correctionnels*;
- *crimes* (major offences), which are judged by *cours d'assises*, in which a jury sits.

[2] They may have another talk if the custody lasts more than 24 hours.

[3] Pilot experiences took place in the cities of Bordeaux, Clermont-Ferrand, Évry, Lille, Lyon, Marseille, Rochefort-sur-Mer, Rouen, Strasbourg and Versailles. Since then the number of groups has risen.

[4] December 31, 1991 Act.

[5] July 19, 1991 act modified on December 18, 1998.

[6] The March 9, 2004 Act *portant adaptation de la justice aux évolutions de la criminalité* (adjusting the justice system to current trends in crime), known as the Perben II Act, further reforms the 1945 *Ordonnance*. In particular, it turns the juvenile court judge into a sentencing judge (*juge de l'application des peines* who is responsible for enforcing criminal sanctions, whether custodial or non-custodial) as well.

[7] At hearings in the chambers, the presence of the public prosecutor is optional. He may attend the hearing, but the motion he presents is a written one.

commitment to an educational unit). In case of an indictment followed by referral to a juvenile court, the hearing focuses on the minor's explanation of the facts of which (s)he is accused. In both cases in practice, the lawyer has little leeway for action. The stakes may be heavy, however, as to civil liability, when the victim joins the case on civil grounds and sues for damages.

Youths having committed serious or violent *délits*, and those involved in "complex"[8] or "mixed" cases (involving an adult and a minor) are given a juvenile court trial. As a protection, the hearing takes place before a limited public, but the participating actors may be many. The judge assigns turns for speaking and directs the six phases of the trial: review of the facts, education and personality, hearing of the victim and plea for civil liability, the public prosecutor's final applications, plea of the defendant, court decision. The more theatrical judicial ritual involved in these hearings indicates that the stakes are higher for the defendant. Although the 1945 *Ordonnance* relegates repression to the background, the minor's freedom may be jeopardized or restricted, or he may be sentenced to a fine. But the risk is not as great as for an adult appearing before a "*correctionnel*" court: maximum sentences are halved[9]. Furthermore, since the trial is a place for debate and confrontation, the lawyer also plays a more assertive role.

The young offender's social perception of criminal justice and its professionals is another factor structuring the lawyer's work. The buildings and location of courthouses, as well as the setting in juvenile courtrooms and the costumes worn by the actors all contribute to the weighty symbolism surrounding juvenile justice. In hearings in chambers, novices, often confused by the ordinariness of the judge's office, and by the neutral appearance of the actors in their everyday clothing, are unable to distinguish their lawyer from the other professionals, neither a criminal procedure from a civil one, or to understand why a lawyer is required in one case and not in the other. In the last analysis, the lesser solemnity of the situation and the erasing of statuses may tend to make this type of justice incomprehensible for juveniles, and weaken its symbolic effect.

Juvenile courtrooms, on the opposite, are arranged much like those for adults, with each actor in a designated place. Nonetheless, the symbolic power of the trial seems to vary with the setting, which may be classical and solemn, modern and functional, contemporary and emptied of its "sacred aura". The actors, as jurists, do of course wear their long black robes, but this dress actually unifies their appearance, further neutralizing their status, so that most minors view their lawyer as just another actor in the criminal justice system and are loath to collaborate with him: "*some of them don't give a damn about whether they have a lawyer or not, if we weren't there it wouldn't matter..., it's not that they confuse us with the others, they see us as absolutely merged in the mass of actors!*"[10]. Last, during the hearing, the minor's perception of the lawyer's role is further blurred by the deference with which these professionals address each other: "whom does he stand for, and what side is he on?".

2. Difficulties in defending juveniles

Several factors make the work of these lawyers difficult, and their position as defence attorney ambiguous. There is, firstly, the compulsory character of the lawyer's attendance and secondly, the educational perspective in which the other judicial professionals work.

The relationship between lawyers and their young clients is a decisive factor in constructing their defence. As a rule, lawyers, who are usually court appointed, write a letter to the indicted minor (or occasionally, to his/her parents) asking for an appointment, so as to get acquainted and prepare his/her defence before the hearing. Now, generally, minors are uninterested in their defence, which is why they often meet their lawyer in the corridors of the juvenile court just before the hearing. So despite the lawyers' efforts, preparation of the defendant's case is often quite rudimentary. The compulsory nature of the encounter and the ambivalence generated by the minor's legal status (minors are under legal incapacity and insolvent) contribute to youthful defendants' loss of interest in their defence. Since they hardly ever choose their attorney, it is the law that imposes lawyers, who are paid out of the legal aid funds to which minors are automatically entitled. This produces an unnatural relationship in which the trust needed for cooperation in building a good case is hard to achieve. The content of the lawyers' mandate becomes unclear, making their position relatively untenable, since, in the last analysis, they are mandated by society at large. This uncertain position makes their work difficult. They must choose a line of defence, and constantly oscillate between strictly acting as their client's spokesperson when they come before the judge or defending the child's interest as construed by the traditional juvenile justice actors. Moreover, lawyers are obliged to juggle with these contradictions: they must defend their client, sometimes against his/her own will, so as to preserve their professional image in the face of the judge and the juvenile court, unless they manage the exceptional feat of transmitting the mandate to the minor, who then takes interest in his own defence.

When lawyers meet their clients under these circumstances, they are not always able to socialize them, that is introduce these young people to the world of the law, the courts and the customs of the juvenile justice system, so as to get them to adopt the behaviour expected of them at court by the professional actors. When such socialization does occur, it draws upon:

- popularisation of legal language so as to make the law intelligible and accessible (translation of the summons to court, the legal qualification of the offence, the articles of the criminal code, the nature of the decisions, including indictment, admonition, suspended sentence and so on);
- information and explanations on the defendant's rights and procedural guarantees, but also on the measures and sanctions incurred (their range and duration), with many concrete descriptions of the place, the actors and their role, the way the hearing and the procedure proceed;
- evidencing of the stakes of appearing at court, so as to convince the youth of the utility of being defended;
- advice on dress, behaviour and attitudes, aiming at having the juvenile offender show respect to the court and express his assimilation of social rules;
- lastly, the case must be prepared with the parents, much along the same lines, since their cooperation may give more weight to the defence.

When lawyers do not do this socialization work, the defence of the juvenile defendant tends to be no more than a technical job based on the analysis of the legal case record. The latter contains information of varying nature, quantity and relevance, including a legal qualification of the offence, the minutes of the hearing, police and *gendarmerie* reports, reports by social workers, psychologists and so on. The dossier, which serves as memorandum and basis for the work of both judges and law-

[7] At hearings in the chambers, the presence of the public prosecutor is optional. He may attend the hearing, but the motion he presents is a written one.

[8] These cases require several inquiries to establish the truth.

[9] Since the September 9, 2002 Act *d'orientation et de programmation pour la justice* (orientation and planification for the justice system), known as the Perben I Act, the court may decide to sentence minors aged sixteen to eighteen to adult penalties.

[10] A lawyer, 1998.

yers (it cannot be consulted by juvenile probation officers), is put together by various actors, for use in the legal debate preceding judgment. The technical dimension of the defendant's case rests on this dossier: "*the lawyer is there for a dossier*"[11]. It provides attorneys with arguments for their defence plea, thus offering the court a different professional reading of the facts. Lawyers try to uncover the truth of the facts by comparing the version given in the dossier and the child's version. Most young defendants end up admitting to the offence. When they do not, and the facts speak for themselves, and provided the procedure is legal, lawyers advise them to confess and to cooperate with the judge when asked to tell what happened. Indeed, acknowledgement of the offence leads to an agreement prior to the court debate, and makes it possible to consider rehabilitation of young offenders, whose confession is tantamount to shouldering responsibility for their acts. It makes it possible, if not easier, to defend them. In this sense, lawyers participate in the confession-oriented culture characteristic of juvenile justice. Again, it is the dossier that enables lawyers to assess the penal response their client may encounter. These responses are limited in number and more or less foreseeable, given the criminal code. A lawyer may anticipate, and construct his case according to the orientation of the procedure, the type of offence, the dossier, the client's criminal record and the case, his age, personality attitude and cooperation in defending himself. However, although confined to the range of legal possibilities, the outcome of any strategy for defending a case remains unpredictable.

Lawyers also construct the theatrics of their intervention in accordance with the role ascribed to the other actors on the juvenile justice scene. These actors have the advantage of playing a well-defined, perfectly legitimate and well-oiled role. More specifically, juvenile court judges have very broad powers and are often better acquainted with the minor, for whom they may be providing educational assistance. Lawyers also consider the presence of two assessors, lay judges who, along with the juvenile court judge, constitute the juvenile court. Since they rotate, they may be "new" actors to be persuaded. The attorney's strategy for the defence also depends intimately on the final applications of the public prosecutor, who poses as upholder of the social order and defender of the victims. Last, lawyers must take a stand with respect to juvenile probation officers and experts, perceived as the court's legitimate informers, and respond to the speech of the lawyer for the plaintiff, defending the victim, considered more important nowadays. Indirectly, too, court clerks and bailiffs, sorts of organizational mediators on the scene, also affect the social situation of attorneys by arranging some of their working conditions.

Nonetheless, in spite of these structural constraints which tend to put lawyers of juvenile offenders up a blind alley, so to speak, they are gradually succeeding in coming into their own on the juvenile justice scene – which is to say, in demonstrating their utility.

3. Lawyers gaining a foothold on the juvenile justice scene

In criminal cases, lawyers are perceived as having a legitimate position but their recognition depends on how they occupy that position. Legal and professional provisions on the defence of juvenile offenders are vague enough to leave them sufficient leeway to experiment a number of strategies and roles.

For instance, to enhance a line of defence and "speak" out of turn, a lawyer may resort to spatial strategies (use of space, standing still or moving around), body language (head-shaking, pouting, pointed glances, detachment, physical distance or proximity with the client), evidence of belonging to a distinctive group, different from the other actors (sometimes by being noisy, and by cooperating with colleagues) and exceptionally to creating a surprise by breaking with fellowship and turning against his colleagues.

Traditionally, lawyers have tended to develop connivance with the juvenile court in their speeches. This complicity rests on the actors' agreement as to the very purpose of the trial, which is to rehabilitate juvenile delinquents, to lead them to awareness of social norms and taboos, to achieve their integration in society before the hatchet falls with their reaching their majority. According to the spirit of the 1945 *Ordonnance*, the lawyers' roles must be played within the purview of this educational goal, barring which they would undermine the social rehabilitation of the offender and throw discredit on the juvenile justice system and its professionals. The trail for defending guilty minors is therefore strictly marked, and the speaking for them is a difficult skill.

Lawyers plead their client's cause after all other actors have spoken, including the deputy public prosecutor. Pleading means above all unfolding a line of reasoning in the client's defence. It is a response to the accusations and to the final applications, addressed by the prosecutor to the juvenile court. It aims at creating a debate, by suggesting a vision of the dossier, the facts and the offender that sheds a different light from the one given by the other judicial actors. It is both an objective demonstration grounded in law and in the facts, and a plea aimed at seducing and convincing the audience by soliciting the court's subjectivity and its indulgence. It begins, ritually, by greeting the court, and then tends to pursue the following eight themes: confession of the facts by the offender, points of law connected with the offence (the facts constituting the offence, evidence, degree of motivation, participation and responsibility of the defendant), mitigating circumstances (the youth was under influence, there was an element of chance), an assessment of the minor's education and personality, an overview of his or her delinquency (a reminder of previous tangles with the law, if any) an allusion to his or her age when the offence was committed and on the day of the hearing, suggestions for penal responses (a call for the court's indulgence, but also, occasionally, agreement with the prosecutor's motion) and last, matters connected with the plaintiff's suit for damages. These speeches, or this defence, may be divided into two broad categories[12]:

The socio-educational plea, or what we called connivance defence, is most frequent in juvenile courts. It involves professional cooperation between the lawyer and the other actors, tending to produce a consensual judgment in which the lawyer plays a formal, non-committed walk-on part, especially in hearings in chambers. This is a strategy of alignment with the educational principles of the juvenile court, in which the defence of the client's interest is assimilated with the interest of the child's education as construed by the juvenile court judge. Most of the time, since the young offender confesses, the lawyer does not have to work on the facts and legal evidence, but on the educational aspect. Or again, if there is a procedural flaw that would nullify the procedure, the attorney will not necessarily raise the point, since release is not educational for an obviously guilty minor. To the contrary, there is the risk that discharge would reinforce the youth's irresponsibility or even confer a feeling of impunity. In this way, the lawyer mainly plays the role of auxiliary to the juvenile court and its judge. Thus, the lawyer may give recent information on the minor's situation, provide an overview and open a debate, suggest penal responses, sometimes help the judge with his legal

[11] A woman juvenile court judge, 1999.

[12] These are ideal-types. There is a third kind of plea, but it is rarely heard in juvenile courts: it is the radical break, refusing any negotiation and challenging the legitimacy of juvenile justice and its professional actors.

drafting and above all, contribute to the decorum presiding over the hearing. Last, the lawyer's cooperation finds particular expression through the role played with respect to the young offender, focused on his/her education and encouraging his sense of responsibility. Now, these missions require a confession: "*they* [lawyers] *are absolutely convinced that if they* [the minors] *have committed something, that must be said, they also have to learn to say things, so I know they also work on getting youths to confess what they have done so that it is much more edifying, much more constructive, they are perfectly aware that the confession will not be held against them, to the contrary, and this leads them to give some explanations about all that*"[13], whence the paradox of a juvenile justice system in which the presumption of innocence prior to trial tends to be set aside so as to be able to start educational work. In this case, then, lawyers are in total connivance with the juvenile court and its judge, and almost always advise their clients to confess to their offences.

The opposite attitude, defence based on legal technicalities, produces a plea focusing on avoiding punishment. In this strategy, the legal logic and corresponding arguments tend to prevail over those referring to the child's education and personality. There can be no confusion of roles here: the attorney is a legal professional, a lawyer, defending the minor as he would an adult, using all of the tricks and tools of the profession. For example, it is the lawyer who decides to point out a procedural flaw although the evidence shows the young offender to be guilty, so that the youth may leave the juvenile court free, and avoid being convicted: "*First we look at the dossier, and that's where I say our role is purely to present a defence, that is, we look at the facts, the incriminating and exculpatory evidence, and any flaws in the dossier, and if there is a nullity, we will have to point it out, it's not something we will set aside simply because we have a minor here, the law is the same for everyone, everyone can make a mistake*"[14]. In this case attorneys mostly play the role of legal technicians, guaranteeing the legality of the criminal procedure, particularly with respect to the minor's personal freedom (as to notification of police custody) and making sure both parties are heard. This, essentially, is where their legitimacy lies. Given the present trend toward increasing empowerment of the juvenile court prosecutor and its services[15], toward the use of summary proceedings before the juvenile courts (Perben I Act) and heavier penal responses to juvenile delinquency (Perben I and II[16]), this role as a legal technician is developing. Juvenile criminal justice is becoming more formal and legalistic, then, and more like criminal justice for adults, favouring the swift response to a breach of the peace over against a time-demanding educational response. Then again, attorneys for juveniles who opt for a legal/technical plea put the judge back in the classical position of arbiter while relegating juvenile probation officers to the periphery of the judicial debate. However, this type of attorney also works on the negotiation level, shuttling between the role of legal technician, auxiliary of the juvenile court and its judge, and shield for children, against the adult world (serving as mediator, balancing out power relations, supporting and reassuring minors and serving as their spokesperson). By doing this, they find a subtle way of escaping the educational consensus around juvenile court justice, and recover a degree of freedom of action.

The strategies of attorneys' pleas and their various roles are aimed both at defending the minor properly and constructing an acceptable professional countenance while reinforcing their position in juvenile courts. Moreover, it is through these courts that attorneys negotiate their professional identity on the juvenile justice scene, an identity made complex by the ambivalence of their mandate.

In the last analysis, of what use are lawyers for juvenile delinquents, with respect to the traditional actors who occupy apparently more legitimate positions? Attorneys do much more than the public service of counselling and defending youthful offenders. They contribute to the regulation of the power of professionals, by activating a process of collective control of the work of each actor, including judges, police officers and *gendarmes*. They compel them to a stricter respect of the law, and to higher professionalism. They incite them to achieve more balance in their prerogatives, to re-evaluate the scope of their competences, their roles and their place in the juvenile criminal justice system. By serving as checks on the work of the court, attorneys also contribute to the overall functioning of the juvenile court as an organization.

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[13] A juvenile court judge, 1999.

[14] A woman lawyer, 1999.

[15] This trend may be dated back to the October 15, 1991 instruction sent to the prosecutor's offices by the Justice Department. This official instruction stresses the fact that juvenile courts are specialized institutions and defines how their responses to juvenile delinquency and their mission to protect under-age victims should be organized. The role of the juvenile court Prosecutor, viewed as secondary until then, was upgraded, especially as he was granted the choice of a "third option", called direct or independent treatment by the Prosecutor (the other two options being dismissal and prosecution by a juvenile court judge or an examining judge specialized in juvenile cases). This new procedure aims at dealing with "first offenders", responding rapidly to any offence and bringing the youth to break with delinquency, mostly through mediation and redress.

[16] The Perben I Act (September 9, 2002) creates a category somewhere between educational measures and punishment, known as educational sanctions and reintroducing the notion of the penal responsibility of juveniles. The Perben II Act (March 9, 2004) prescribes new responses to offences. For instance, it extends the possibility of committing minors aged thirteen to eighteen to secure educational units when released on parole, sets up attending a civic training program as a new sentence, and, as for adults, authorizes adjournment of the sentence with probation. For minors aged sixteen to eighteen, a suspended sentence with compulsory community service may be combined with other educational measures. Last, the ways in which sentences may be removed from an adult's criminal record are extended to minors.