# European Issues Concerning French Criminal Law on Foreigners

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## Abstract

*The Law concerning foreigners is distinguished by the jurisdictional split in its contentious nature as well as the multiplicity of its sources, which are national and European. Where the law of the European Union strongly restricts resorting to prison sentencing on the subject, French law is characterized by widespread penalisation of illegal immigration, albeit without the intention of being repressive. The offenses of illegal entry or stay often act as an aid for a criminal procedure, which is needed for the efficiency of the administrative procedure of return of illegal immigrants. Indeed, most of the time, the identification of an illegal immigrant and the ensuing period of custody, only lead to escorting them back to the border. The articulation of the European and French law, however, throws up some tricky issues concerning the validity of the initial criminal procedure, the effectiveness of its guarantees and the right to a judge as well.*

## I. Introduction

Faced with the phenomenon of illegal immigration, the State members of the European Union and/or parties of the Schengen accords[1] have chosen to adopt common rules guaranteeing both the effectiveness of the policy of returning people found to be in an illegal situation and the respect of their fundamental rights.

Following on from directives 2009/50/CE, 2009/52/CE and especially 2008/115 of 16th December, 2008, called "*return directive*" and faced with the problems of conformity, which arose from national provisions, the French Parliament adopted, on 16th June, a transposing legislation, profoundly modifying the French law concerning foreigners. It would be too overwhelming to deal with all the implications which define the word foreigners[2] in French penal law in this paper, neither is there any intention to reopen the exclusively administrative provisions governing the residence of foreigners in the national territories of the member-states. Nevertheless, it seems primordial to tackle the question of penalties due to administratively non-uniform positions concerning nationals of non-member countries and their procedural implications.

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[1] The accords of Schengen of June 14, 1985 and of June 19, 1990, were signed by 15 European States: France, Germany, Belgium, the Netherlands, Italy, Greece, Spain, Portugal, Denmark, Austria, Finland, Norway and Iceland. The object of these agreements is the suppression of controls over people, over common borders among these States and the reinforcement of police, customs and judicial cooperation.

[2] "Foreigner", addressed later on in this study and as in the directives mentioned herewith, refers to a person of a non-member country, foreigners who are nationals of a State in the European Union or are members of the Schengen space who benefit from "freedom of circulation".

While it was supposed to transpose the "return directive", the law of 16th June, 2011, didn't put an end to the controversies concerning the conformity of French legislation to European Union rights.

In fact, if the support of the procedure of return in the penal code is not endorsed, recent developments regarding the content of the European plan have brought up new questions and strong doubts concerning the permanence of the French system.

Like other specific States that are also submissive to the above directives, France has indeed chosen to maintain its traditional system, largely founded on the penalization of illegal residence. Although the administrative procedure of return does not necessarily imply the intervention of criminal law, criminal proceedings are frequently the cause of those leading to the return of the illegal foreigner. In fact, French law recognizes charges penalizing entrance or illegal residence and the non-execution of an obligation to leave the territory[3]. These open the way for legal police controls of identity as well as of custody, permitting the loss of the foreigner's liberty for a necessary period of time until the prefect has requested an order for the individual to leave the territory if none yet exists and to organize administrative placement in retention while awaiting the execution of the decision of return.

As is clearly expressed by the French government and illustrated in official statistics, these criminal procedures, founded on the penalization of illegal foreigners, do not tend to have a repressive end in the absence of another infraction. Thus "the public prosecutors have received instruction not to exercise penal action when the national of a member states country is made the object of removal"[4]. The principle of opportunity for prosecutors allows classification of criminal proceedings and a swing towards return procedures that are administrative in nature. The effects of this policy are easily observed in practice; in the year 2009, police custody figures ran to 80,063 cases in relation to the law on foreigners, while official figures indicate that there were on 5,306 criminal convictions of the basis of article L.621-1 of the CESEDA, with only 597 cases of unlawful residence as the sole infraction that was committed[5].

If this situation already appears shocking on a theoretical level insofar as it exploits criminal law, even beyond its sanctioning function, the debate today "is no longer

[3] Article L. 621-1 and following the Code of the entrance and stay of foreigners and the right of asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile, CESEDA).

[4] Observations of the Government of the French Republic before the ECJ in the matter of C-329/11. These instructions had been formalized in a Circular, now void, of February 21, 2006, concerning arrest conditions of a foreigner in an illegal situation, custody and penal consequences (Circulaire relative aux conditions de l'interpellation d'un étranger en situation irrégulière, à la garde à vue d'un étranger en situation irrégulière et aux réponses pénales), which indicated not to take the foreigner to penal court if he had not commited any other offence or did not have a criminal history. These indications were repeated in the Circular of May 12, 2011, in relation to the impact of the El Dridi case of April, 28 2011 giving interpretation of articles 15 and 16 of the "return directive" (Circulaire ayant pour objet la portée de l'arrêt de la CJUE du 28 avril 2011 portant interprétation des articles 15 et 16 de la directive 2008/15/CE dite«directive retour»).

[5] Observations of the Government of the French Republic before the ECJ in the *Achughbabian* case, September 27, 2011. Of the 597 convictions, only 197 carried a sentence of imprisonment without suspended sentence, a number that the government compares with the 29,288 removal measures executed out of 94,693 verdicts.

only philosophical"[6]. In fact, French law regarding foreigners and its conformity to European law is strongly contested in light of the law of the Council of Europe on the one hand, and of that of the "return directive", on the other. In a national context, it is particularly sensitive where uncertainty concerning the hierarchy of standards feeds what some could be tempted to refer to as a "war of the judges"[7]; criminal law concerning immigrants thus appears to be particularly undermined ground.

Thus, even though the decision *El Dridi* of the ECJ, taken on 28th April, 2011, seemed to question the possibility of penalization of illegal residence[8], the French Legislature proceeded with the adoption of the law of June 16, 2011, without questioning this penalization, even extending certain incriminations of CESEDA[9]. Ratified, except for an interpretation[10] by the Constitutional Council, the new law has not changed the traditional management of the return of illegal immigrants. In practice, these remain, therefore, largely dependent on the liabilities of criminal proceedings, prior to the administrative procedure of expulsion.

However, if the Constitutional Council did not question the penal dimension of the return process, it is otherwise the responsibility of the Judicial Courts. Indeed, undoubtedly encouraged by the decisions of the Plenary Assembly of April 15, 2011[11], some did not hesitate to extract all the consequences of the sentence *El Dridi* and to rule out provisions judged contrary to European Law, thereby endangering the entire structure of French Law on immigration. Indeed, since 1st June, 2011[12], resorting to police custody (*garde à vue*) is limited to crimes, investigations and offences punished by prison sentence[13]. Yet as the "*return directive"* seemed to forbid punishing the offenses related to administrative rules of staying on territory by imprisonment, several decisions consequently considered that custodies based on these offenses were now impossible and pronounced their nullity. This fact leads to the release of foreigners regardless of the legality of their situation[14].

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[6] *Madam C. Papazian* used the term in the course of a presentation before the ECJ in the *Achughbabian* case of two proposals, which set the Member States between -legal or non-legal treatments of Illegal Immigration.

[7] The articulation of Constitutional and Conventional guarantees, particularly since the introduction into French law of a control of constitutionality *a posteriori* requested by the priority question of constitutionality ("question prioritaire de constitutionnalité", QCP), has, indeed, led to strong tensions among the Constitutional Council, the Cassation Court and the Council of State. See *infra* no. 19 on the controls of identity and no. 24 about custody.

[8] European Court of Justice (ECJ) 28. 04. 2011, case C-61/11 (*Hassen El Dridi*). See *infra*, no. 29.

[9] Art. L. 621-2 of the CESEDA.

[10] Constitutional Council (C. Const.), 9. 06. 2011, Decision 2011- 631. See *infra*, no. 44.

[11] Out of four judgments made on April 15, 2011, Appeals nos 589, 590, 591 and 592, the Plenary Assembly of the Cassation Court has clearly posited the direct application of the judgments of the European Court of Human Rights (ECtHR); a solution which can, without doubt, be extended to the decisions of the ECJ: "Whereas the States, conceding to this agreement are required to respect the decisions of the European Court of Human Rights, without waiting to be impeached before it, nor to have modified their legislation" ("Attendu que les Etats adhérents à cette Convention sont tenus de respecter les décisions de la Cour européenne des droits de l'homme, sans attendre d'être attaqués devant elle ni d'avoir modifié leur legislation*")* .

[12] Date of the effectiveness of law n° 2011-392, April 14, 2011.

[13] Articles 62-2 and 78 of the Code of criminal procedure (CPP) from law n° 2011-392, April 14, 2011. See *infra,* no. 35.

[14] See more explained, *infra,* no. 32.

The impact of the *El Dridi* case concerning Italy, was, however, fiercely questioned. In order to put an end to this uncertainty, an appeal Court complained to the European Court of Justice about the compatibility of the French penalty attached to the irregular stay offenses in the context of European law[15].

Source of fears or hopes, the potential tsunami regarding the law on foreigners never came to pass. In the *Achughabian* case[16], 6th December, 2011, the ECJ did indeed adopt a median solution and an ambiguous one from several points of view. The Court carefully uses the possibility of restriction of liberty through custody without going back on its precedents regarding the impossibility to impose a prison sentence for simple offenses that are committed in view of administrative rules. Almost incompatible with national dispositions, this decision is far from solving the problem of the place of criminal law inside the return procedure for foreigners.

Finally, beyond the issue of the impact of questioning the prison stay for illegal residence, arise those of the principal guarantees attached to this criminal phase and of the consequences of leaning towards an administrative proceeding. Although devoid of repressive finality inherent in criminal procedure, this initial phase of deprivation of liberty remains of a criminal nature, as much from a formal point of view as from a material one. Without questioning the recognized rights and guarantees of an individual, deprived of liberty in a criminal framework, the law of June 16, 2011, has strongly compromised its effectiveness.

Indeed, based on the risk of contradiction between administrative and judicial decisions, this law altered the speaking order of the judges during the proceedings. Thus, the administrative judge making a decision on the legality of the order to leave the territory[17] and of the detention, intervenes, henceforth, in a delay of 48 hours of detention, while the judicial judge, guarantor of individual freedoms and the only one with authority to rule on the legality of the penal phase in question, intervenes, henceforth, only at the end of 5 days, that is to say, more often than not, once the immigrant has been sent home. This is the conformity of French law to the law of the Council of Europe, which this time appears largely uncertain, rendering difficult the work of the judicial courts in the matter.

The law pertaining to immigrants, disrupted by the confrontation of judges in the articulation of national and European laws, does not seem able to save criminal law as an instrument of the Administrative Procedure of Return (I) but objects to fully accepting the consequences of it while using (II).

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[15] Court of appeal (CA) Paris 29. 06. 2011. (A. Achughbabian).

[16] ECJ 6. 12. 2011, case C329/11 (*Alexandre Achughbabian vs Prefect of - Val-de-Marne*).

[17] Since the Law of June 16, 2011, the order to leave the territory (OQTF) almost constitutes the unique administrative decision of return, the expulsion orders no longer having only a marginal domain outside of the assumptions where the ban on an area under jurisdiction results from an additional penalty pronounced by a legal claim.

## II. Penal Law as an instrument of the Administrative Procedure of Return

In practice, the Administrative Procedure of Return is very frequently initiated by a prior penal phase (1) founded on the specific infractions attached to the nonconformity of the immigrants to the administrative directive (2).

### 1. Penal coercion as procedural initiation

The French law provides effective instruments permitting the identification of illegal foreigners (a), and the necessary deprivation of liberty by the engagement of the administrative process of return by placement in custody (b).

#### a) Identification of illegal foreigners

Along with the general requirement applied to all foreigners to be *"able to present papers or documents under the guise of which, they are authorized to travel or stay in France"*[18], French law recognizes several types of identity control of administrative or legal Police[19].

#### aa)The general obligation to present documents attesting to the legality of the stay (Article L.611-1 of the CESEDA)

This obligation permits officers of the judicial police to order or to process the verification of documents attesting to the validity of the stay of all foreigners, outside of the conditions put forth by the Code of criminal procedure (CCP) in the matter of identity control. Not penal, this possibility of verification of legality has, however, been very greatly limited by the Cassation Court, which only authorizes it when "*objective elements deduced from exterior circumstances of the very person of the foreigner, are likely to bring to light his condition as foreigner*"[20]. Furthermore, to absolutely exclude such an identification being based on the "physical type" of the person; this unreasonable requirement of objective elements has led jurisprudence to consider as insufficient the single fact that the person expresses himself in a foreign language[21].

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[18] Article L. 611-1 of the CESEDA.

[19] According to a study, 60 000 foreigners were put in administrative detention in 2010. Statistics show that 25,2% were arrested following a control in a territorial border or in a station and 30% following a control on the highway. See: CIMADE, Report 2010 about centers and units of administrative retentions (Rapport 2010 sur les centres et locaux de rétention administrative*)*, December 2011, p. 8 and 12.

[20] Criminal Chamber of Cassation Court (Cass. Crim.) 25th April ,1985, Bulletin criminal (BC) no 159.

[21] *D. Mayer*, Nullification of identity inspection carried out on a person on the sole grounds that he/she speaks a foreign language in a place propitious to flights in a trailer (Nullité du contrôle d'identité effectué sur une personne au seul motif qu'elle parle une langue étrangère dans un lieu propice aux vols à la roulotte), commentary of *Cass. Crim.* 10th November, 1992, Dalloz (D.) 1993, p. 36.

### bb) "Schengen" Controls (Article 78-2 al. 4 of the CCP)

Instituted to compensate for the suppression of border controls, resulting from the enforcement of the Schengen Agreement, these inspections allowed for verification of "*papers and documents*" of "*every person*" who happens to be " *in an area between the shared territorial border between France and the States party to the Schengen Agreement and a line drawn this side of 20 kilometers"* as in " *areas which are accessible to the public: ports, airports, train or bus stations, open to international traffic."* These inspections were solely based on a geographic criterion, the Cassation Court having clearly indicated that the existence of "*particular circumstances establishing a risk of interference in public order*" were not a condition for the validity of such inspections[22].

However, in a decision, famous for having led to a declaration on inspections regarding constitutionality and conventionality, on 22nd June, 2010, the ECJ clearly condemned this position of French Law. It thus declared that European Law " *precludes national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometers from the land border of that State* (…) *the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order* (…) *where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks*[23]". The Cassation Court conformed to this jurisprudence[24]. Modified by law n° 2011 – 884, July 27, 2011, to conform to Europeans standards, this type of control is still possible "*for prevention and research of offenses linked up with cross- border crime* (…) *for 6 hours running at the most in the same place*" even if it " *could not be a systematic control of people*".

### cc) Inspections by judicial police (Article 78-2 al. 1 to 6 of the CCP)

The inspections by judicial police permit the inspection of identity of persons who could be suspected of having "*committed or attempted to commit an infraction"* or that they are preparing to do so, but also of those "*who are likely to furnish useful information to the investigation in the case of a crime or offense",* that is to say witnesses or even victims of acts being the subject of a preliminary investigation or of flagrancy. If the inspection of identity cannot, in principle, be based on discriminatory criteria and if jurisprudence also excludes an anonymous denunciation being able to be scrutinized in its own right as a "*plausible reason*" to suspect the illegality of the person[25], this inspection is nevertheless allowed for someone who "*has tried to hide upon spotting a police vehicle*[26]*."* It is, however, also possible to proceed to "proactive" controls, which are not calling for plausible reason to suspect that the person who is

[22] 2nd Civil Chamber of Cassation Court (Civ. 2), 23rd May, 2001, D. 2002, p. 992.

[23] ECJ 22. 06. 2010, case C-188/10 (*Melki and Abdeli*).

[24] Plenary Assembly of Cassation Court (Cass. ass. plénière), 29th June, 2010, *Appeal no 10-40.001* concerning control at borders, and 1st Civil Chamber of Cassation Court (Civ. 1) 23rd February, 2011, Appeal no. 09-70462, concerning International airports and trains stations.

[25] Cass. Crim., 31st May, 2005, D. 2005, Information rapide (IR) 1657.

[26] Civ.1, 17th January, 2006, Bulletin civil 1(Bull. civ.1) n° 21.

controlled has committed an offence[27], by " the *prosecutor's written requisitions for the purposes of research and legal proceedings of offenses that he specifies*[28]"; breach of foreigners' residence can be a part of it.

Whether or not the inspection of identity carries the necessity of retention for checking the identity[29], it generally leads, if it reveals the illegality of the foreigner's stay, to placement in custody.

### b) Custody of illegal foreigners

As we have already briefly discussed, custody, in French procedure, is often an indispensable step in the implementation of the administrative procedure of return. It permits the deprivation of the liberty of a foreigner, thus the time to obtain an order to leave the territory (if one does not already exist) and the placement of the foreigner in administrative detention while awaiting his removal. Almost always bereft of its natural repressive finality in the absence of another infraction than that relative to the entry circumstances and of the stay in the territory[30], this custody of foreigners is no less of a penal nature. Evidently, this affirmation has, however, been recently discussed in a particularly sensitive national context.

When the matter of custody in dispute is, in theory, within the competence of criminal jurisdiction, the rocking back and forth, typical of the law on foreigners, in a process of a penal nature to an administrative procedure, is accompanied by an absence of criminal pursuit and thus by the absence of submission of the case to a criminal jurisdiction. The inspection of legality in the initial criminal phase, a domain reserved for judicial authority[31], does not take place until after the immigrant has been placed in administrative detention by administrative authority, the time when the judicial judge must intervene in order to authorize the lengthening of this detention[32]. That said, if the lateness of the intervention by the judicial judge is a problem in regard to the implementation of the rights attached to this criminal phase[33], one cannot deduce from the civil nature of these jurisdictions, which are competent here, the absence of submission of this custody to legal and European penal guarantees. The highest level of the Cassation Court implicitly confirmed this in its consequential decrees of 15th April, 2011[34].

In further reference to the astonishing position of the criminal court[35], the plenary Assembly of the Cassation Court was thus led to declare a decision on

[27] About the distinction between proactive and reagent and the weakening opposition between legal and administrative control of police, See: *M. Murbach*, General theory of the powers of investigation: the proactive investigation (Théorie générale des pouvoirs d'investigation : l'investigation proactive ), Actualité Juridique Pénal Dalloz (AJPénal), 2011, p. 506.

[28] Art. 78-2 al. 6 of the CPP.

[29] See *infra,* no. 29.

[30] See *supra*, note 4.

[31] See *infra*, no. 41.

[32] As grounds for the issue of separation of powers in the law of August 16 and 24, 1790. The Cassation Court has qualified as an excess of power, the admission of the eligibility of the petition formulated in regard to it by a Judge of liberty and detention (JLD) before the renewal of administrative detention. See Civ. 1, 25 March 2009, n° 08-13496.

[33] *See infra*, no. 42.

[34] Cass. Ass. Plénière, April 15, 2011. Appeals n° 589, 590, 591 and 592.

Article 6§ 1 of the European Convention of custody prior to the law of April 14, 2011, and on the application in times past of the effects of their eventual unconventionality. The custodies in question here had been brought within the framework of that which is the object of our present study, that is to say that they concerned persons in an illegal situation in opposition to which no criminal pursuit had been involved. According to the First prosecuting attorney of the Court of Cassation, being devoid of the repressive finality normally inherent to criminal procedure, custody of foreigners would lose its criminal nature and would escape the guarantees of Article 6§1 of the European Convention. The instrumentation of custody by the administrative right of immigrants, and therefore its revelation in regard to its finality[36], then became an argument in order to reduce the procedural guarantees[37]. Fortunately, the Plenary Assembly did not echo this argumentation and admitted the instantaneous application of Article 6§1 and the lack of validity of custodies, which did not respect its conditions, including custody of foreigners.

If custody of illegal immigrants really is of a criminal nature, however, independent of the ulterior toppling toward a purely administrative process, it must still be based upon the commission of an infraction. If French law still recognizes several "infractional" supporting reasons for custody, the durability of this position today is strongly compromised.

## 2. Specific offenses as procedural support

The criminal law on foreigners is the subject of very heavy penalization. As such, with the offense of irregular entrance and stay on French territory[38] or in the Schengen area[39] and the offense of non respect for the administrative decisions of removal[40], the direct or indirect help to the irregular stay[41] are widely punished and unions or filiations used to obtain a residence permit or French nationality as well[42]. Yet if these last incriminations, closely related, do not seem really threatened by the European law[43], the case *EL Dridi*[44] casts a serious doubt over the corresponding

[35] Cass. Crim. October 19, 2010. Appeals n° 5699, 5700 and 5701. These decisions had admitted the opposition of the custodies controlled by Article 6 of the ECHR, but had decided in consideration of "the principle of judicial security and the proper administration of justice" (au principe de sécurité juridique et à la bonne administration de la justice) to report the effects of it the moment it is enforced before putting custody in conformity with the Constitution.

[36] Articles 63 and 77 of the CCP limit custody to "necessities of the inquiry" (nécessités de l'enquête).

[37] Mrs Petit's opinion, First prosecuting attorney of the Court of cassation. http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/petit_premier_19691.html

[38] Article L. 621-1 of CESEDA.

[39] Article L. 621-2 of CESEDA.

[40] Article L. 624-1 of CESEDA.

[41] Article L. 622-1 of CESEDA.

[42] Article L. 623-1 of CESEDA.

[43] The wide definition of the offense of irregular stay and the legal limit of the domestic immunity to the family in the legal meaning has recently been contested before the European Court. Yet, it excluded the violation of article 8 of European Convention by noticing that the sentence of the claimant for having invited his future son in law was going with a sentence exemption. See ECtHR, *Mallah vs. France,* Application n° 29681/08, Judgment 10 November 2011.

[44] Aforementioned decision, no. 8.

nature of offences punishing the irregularity of the foreigner's administrative situation by imprisonment. This is a fundamental question, as it now determines, under French law, the possibility of whether custody may be used[45]. The highly expected decision *Achughabian,* should have closed the debate regarding the impossibility of planning a prison sentence in the case of irregular entrance or residence.

If, however, the Court's position is relatively clear on this point and makes essential a future reform on the subject (a), its position is still ambiguous regarding the question of the possibility to use custody before the implementation of the return procedure (b).

### a) The conflict between offense of irregular residence and European law

While the law n° 2011-672 of June 16, 2011, was still debated, the decision *El Dridi* of April 28, 2011, involving Italy, had set down that the directive 2008/115/CE "*must be interpreted as precluding a Member State's legislation* (…) *which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period*[46]*"*. After these judges' different decisions[47], the French Government decided to specify the impact of this decision and defended a restrictive interpretation, consisting in the limitation of its consequences to article L. 624-1 alone. The Government considered that the scope of the interdiction to use an imprisonment sentence did not include the offenses of the article L. 621-2 of the CESEDA[48], nevertheless, it is a less serious offense.

Highly contestable, yet this governmental stance was very easily understood from the point of view of the efficacy of the return procedure: if every offense connected with illegal residence could not be sentenced to prison, custody could no longer be used without another offense being committed by foreigners in an illegal situation. It would, therefore, be impossible to deprive them of liberty while a sufficient period of time elapsed in order to commence the administrative procedure of return and for the installation of the administrative retention measure. Indeed, in the absence of custody, a retention for checking the identity is the only possible measure and the loss of liberty is consequently limited to "*the time strictly demanded by the establishing of his identity"* without exceeding 4 hours[49].

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[45] Articles 62-2 and 78 of the CPP from law n° 2011-392, April 14, 2011 about the custody. See infra, no. 35.

[46] Aforementioned decision, no. 8.

[47] See with the reprinting of several decisions: *S. Slama*, The foreigner's spring: Return directive, retention and criminalization; after the case *El Dridi*, ECJ, April 28, 2011 (Le printemps des sans-papiers: Directive "retour", rétention et pénalisation ; les suites de l'arrêt *El Dridi*, CJUE, 28 avril 2010), http://combatsdroitshomme.blog.lemonde.fr, May 13, 2011.

[48] Circular of the Justice minister, May 12, 2011, aforementioned note 4. Charging the prosecutors to not "put in custody and to not sue a foreigner on the basis of article L. 624-1 CESEDA any more" (ne plus « faire placer en garde à vue et à ne [plus] poursuivre un étranger sur le fondement de l'article L. 624-1 du CESDA) when no other offense has been committed by him. Yet, "it is only when a removal order has been taken that the directive is an obstacle for a prison sentence to be pronounced" (c'est seulement une fois qu'une mesure d'éloignement a été prise que la directive fait obstacle au prononcé d'une peine d'emprisonnement). This position was repeated in the Observations of the French Republic Government before the ECJ in the case C-329/11*, Achughabian,* September 27, 2011.

[49] Article 78-3 of the CPP.

While some national courts subscribed to the governmental interpretation, however, on the contrary, others considered that the impossibility to pronounce a prison sentence against a foreigner under a return decision for the reason that there was a lack of proportionality in the sanction should lead, *a fortiori,* to consider this sentence as being impossible for a foreigner who is only in illegal residence[50]. Faced with the situation of a highly insecure judicial situation, a French court took the initiative of asking a prejudicial question to the ECJ regarding the compatibility of Article L. 621-2 of the CESEDA with European law[51].

Rendered by the Grand Chamber, September 6, 2011, at the end of an accelerated procedure, the decision *Achughabian*[52] is more extensive regarding the question of the criminalization of the illegal entrance or residence of foreigners. Full of subtleties, the decision does not exclude the use of a prison sentence on this subject, and insists on the liberty of the State to criminally punish offenses related to the law on foreigners[53]. This criminalization is, however, limited because if the European law *"permits the imprisonment of a third-country national to whom the return procedure established by the said directive has been applied and who is staying illegally in that territory with no justified ground for non-return",* it is "*precluding the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, in the event of placing in detention with a view to the preparation and implementation of his removal, reached the expiry of the maximum duration of that detention*[54]*"*. Reduced to its natural sphere of *ultima ratio,* criminal law can only punish with imprisonment, foreigners to whom all administrative measures, including those that are coercive, would be applied and who would have been staying on the territory without legitimate reasons.

Undoubtedly, while the lawmaker has not proceeded to the necessary rewrite of the offenses of illegal stay, this decision has immediately raised new questions on the essential question of the consequence of this limitation in relation to the criminalization of illegal residence vis-à-vis the validity of custody.

### b) The compatibility of preliminary custody with the European law

The essential stake in the possibility of the national lawmaker to plan a prison sentence for offenses in respect of the regulation on foreigners lies in the validity of custody prior to an administrative procedure of return taking place. As the paper has already emphasized, custody indeed appears to form an essential step, in practice if not in theory, for implementing the return policy. Yet, if the judicial judge believes

[50] See the reprinting decision and comments by *S. Slama*, Criminalization of the illegally: a pressing prejudidicial question about the article L. 621-1 CESEDA (Pénalisation de l'irrégularité: une question préjudicielle en urgence sur l'article L.621-1 du CESEDA (CA Paris, June 29, 2011, *A. Achughbabian*), http://combatsdroitshomme.blog.lemonde.fr. October 25, 2011.

[51] Aforementioned decision, no. 15.

[52] Aforementioned decision, no. 16.

[53] §28.

[54] §51 (hereby rules).

the case to be unfounded[55], his decision can lead to the prevention the foreigner from being deported. In fact, it is from evenly precedents that the illegality of the preliminary criminal stage leads to the nullity of the entire subsequent procedure and, consequently, to the foreigner's release[56]. It would seem that except for the specific hypothesis of a foreigner who has already used up all the coercive measures set out under the administrative law, the combining of national conditions of custody and European law, blocks any use of custody as it is interpreted by the *El Dridi* and *Achughabian* decisions.

Within its observations before the Court, the French government has stressed the practical necessity of custody and the conflict with the goal of efficacy of administrative procedures that the impossibility of using it would entail. The ECJ has been sensitive to these arguments as it emphasizes that "*the objective of Directive 2008/115, namely the effective return of illegally-staying third-country nationals, would be undermined if it were impossible for Member States, by deprivation of liberty such as police custody, to prevent a person suspected of staying illegally from fleeing before his situation has even been able to be clarified"* [57]. Immediately interpreted by the French government as validation of the use of custody in cases of illegal residence[58], this decision appears to be far from putting an end to the difficulties brought by the conciliation of French and European laws. Due to the fact that European Union law permits a foreigner's loss of liberty to take place during "*a brief but reasonable time*[59]"in the preliminary phase prior to the administrative procedure of return, the validity of such custody seems nevertheless, threatened. In its decision, the ECJ did indeed specify that: "*the conditions for the initial arrest of third-country nationals suspected of staying in a Member State illegally remain governed by national law*[60]*"*. National dispositions are, however, unequivocal: custody is only possible in the case of an investigation concerning "*a crime or an offense punished by a prison sentence*[61]*"*. The implicit governmental position, consisting in making a difference between a prison sentence incurred and pronounced, and in considering that only the pronouncement of a prison sentence is prohibited by the Union law, except the incurred sentence that permits custody[62], does indeed seem particularly contestable. Custody, traditionally, can be solely

[55] The Conflicts Court (TC) has clearly said that the "Article 13 of Law August 16-24, 1789, should not be interpreted as an authorization for Judicial courts to be an obstacle to the execution of the decisions made by the administration excluding the arbitrary detention cases. See: TC, 12. 05. 1997.

[56] About this procedural consequence, see *infra,* no. 42.

[57] Aforementioned decision, no.16, §30.

[58] See the judicial release of December 6, 2011. from Michel Mercier, Minister of Justice, and Claude Guéant, Minister of the Interior, overseas, national collectivities and immigration: "A decision of the ECJ confirms that the use of custody in illegal residence cases is compatible with European law" (Un arrêt de la CJUE confirme que le recours à la garde à vue en matière de séjour irrégulier est compatible avec le droit communautaire).

[59] Aforementioned decision, no. 19. §31.

[60] §30.

[61] Articles 62-2 and 78 of CPP.

[62] A circular from the Minister of Justice explains that "it's only at the phase of penal prosecution (…) and not at the stage of custody that the decision of the ECJ can produce any consequences" (ce n'est qu'au stade de l'engagement des poursuites pénales (…) et non lors du placement en garde à vue que l'arrêt de la Cour serait susceptible de produire des effets). See circular of the Minister of Justice, December 13, 2011, n°11-04-C39 concerning the impact of the decision *Achughbabian*.

founded on an incurred sentence: and yet it has been shown that the ECJ excluded, with the exception of the aforementioned hypothesis[63], the validity of legislation likely to lead to the foreigner's imprisonment, or in other words an "*offense punished by prison sentence"*. As national texts that are in opposition to internationals conventions have to be removed by national courts[64], offenses regarding illegal residence should not be able to serve as the basis of custody in the context of the current condition of national law.

Consequently, it seems more reasonable to interpret the decision of December 6, 2011, as affecting the validity of custody based on current dispositions of the Code of Criminal Procedure but which authorizes the lawmaker to modify it in such a manner as to open the way for custody to be applied to offenses that are non-punishable by imprisonment. Unless the Constitutional Council, submitted by a QPC on the compatibility of Article L. 621-1 CESEDA to the Constitution[65], settles the question once and for all by erasing this offense, another period of judicial insecurity may ensue[66]. Bearing in mind the traditional caution of the Constitutional Council, it is unlikely that such a position will be adopted in relation to the control of the offenses necessity, and shall instead be limited to the "*obvious error of assessment"* and to the practical stakes that an abrogation of current and future procedures could have, expecting a necessary modification in the legislation. Whether the Constitutional Council accepts the constitutionality of this offense or defers the impact of an eventual conflict with the Constitution, the Cassation Court will have to pronounce itself on the consequences of the *El Dridi* and *Achughabian* decisions regarding the validity of foreigners placed in custody. Yet despite the position clearly exposed by its decisions of 15th April, 2011[67], the possibility of the Cassation Court giving preference to the "*proper administration of justice"* over the strict application of the traditional legal explanation has not been ruled out.

As fundamental as the question of the possibility of placing a foreigner in custody may be, we have to put the importance of this question into perspective in the current context of the French law on foreigners. Indeed, whether the criminal preliminary stage is or fails to be respectful of legality and that its eventual absence of legality concern the conditions of developments of identity controls or custody, foreigners still have to have access to a judge for this question to be of practical significance. It would seem, however, that French law concerning this question is no more respectful of the standards of the efficacy of the rights of those to be tried who are in illegal situation.

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[63] See *supra*, no. 29.

[64] See more *infra,* no. 50.

[65] The Court of cassation submits to the Constitutional Council by a QPC (2011-217 QPC) on this question, November 23, 2011.

[66] The first decisions rendered since December 6, confirm that some of them admit the validity of custody based on the offenses of illegal residence, whilst others dispute it with similar explanations to those being put forward here. See, *S. Slama*, Same causes, same judicial cacophony; consequences of *Achughbabien,* ECJ, December 6, 2011 (Mêmes causes, même cacophonie judiciaire; les suites d'Achughbabian – CJUE 6 décembre 2011); http://combatsdroit-shomme.blog.lemonde.fr, October 25, 2011.

[67] See more *supra,* note 11.

## III. Administrative procedure of expulsion as eviction of guarantees of a criminal nature

In the absence of criminal pursuits, the leaning towards the administrative procedure involves the exclusion from the criminal field of the guarantees of a criminal nature. This logical consequence is not indisputable, considering the interference by national law in the effectiveness of the guarantees of the criminal phase (1) and of the impotence of the courts in the face of the unconventionality of the law (2).

### 1. The interference by national law in the effectiveness of the guarantees of the criminal phase.

Legal impediments under the control of the judge (a) have been validated by the Constitutional Council (b).

#### a) The legal impediments under control of the judge

#### aa) The French duality of orders of jurisdiction

At the root of the confusion of powers between the judicial judge and the administrative judge in French criminal law, lie foreigners, who are found to be the fundamental principle of separation between administrative and judicial authorities[68]. This system is opposed to that of jurisdictional unity, which is the system used in Anglo-Saxon countries in which, with exceptions, the same tribunals judge the private cases and the cases that implicate the administration. In France, each order of jurisdiction has a role and a precise sphere of intervention in matters concerning the rights of foreigners. To be sure, in France, this principle of separation can be beneficial in "*the interest of proper administration of justice*"[69] but this possibility of departure does not seem to justify foreigners' disputed entrance into and stay in France being subjected to a unique order of jurisdiction or their removal from the area of jurisdiction. In fact, if as the Constitutional Council affirms, "*the effective guarantee of the rights of the interested persons (…) can be satisfied, as well by legal jurisdiction as by administrative jurisdiction*"[70], it would seem sensible to question whether this is due to the tangle of the competences of the two jurisdictions.

As a direct consequence of the separation of powers, the administrative judge has sole control over the "legality" of the administrative detention, in the strict sense, whilst the administrative procedure of return, to the exclusion of the criminal phase, falls under sole the jurisdiction of the judicial judge[71]. When placement in custody

[68] Law of August 16-24, 1790, Article 13: "judicial functions are distinct and will always remain separate from administrative functions. Judges will not be able, under pain of forfeiture, to create a disturbance, by any means whatsoever, in the operations of administrative bodies" (Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler de quelque manière que ce soit, les opérations des corps administratifs).

[69] C. Const. 23. 01. 1987, decision n° 86-224 DC.

[70] C. Const. 28. 07. 1989, decision n°89-261 DC, law relative to the conditions of the entrance and of the stay of foreigners in France. Actualité Juridique Droit Administratif (AJDA) 1989, p. 619.

is not accompanied by criminal pursuits, civil jurisdictions are thus found solely competent to judge the legality of the criminal phase (inspection of identity and custody) implemented by the administrative procedure of return[72]. Their control is not, however, systematic since it does not intervene, if necessary, until the time of the renewal of the decision on placement in administrative detention. This position had been validated by the Council of State[73] who did not see in this a violation of the right to equitable proceedings in the sense of Article 6§ 1 of the European Convention, and considered that the absence of access to a judicial judge, and therefore control of the criminal phase, presented no obstacle in the "escorting-to-the-border" of the foreigner. Already debatable, under an empire of ancient provisions, this inefficacy of the guarantees of the criminal phase is, since the law of June 16, 2011, considerably far-reaching.

### bb) Ineffective control of the judicial judge

Previous to the reform brought in by the law of June 16, 2011, the principle was that a foreigner could not be placed or maintained in detention, except for the time strictly necessary for his departure and the initial decision of the prefect, valid for 48 hours. The intervention of the judicial judge was consequently organized at the end of these 48 hours. We previously emphasized that the removal could happen before the intervention of the judicial judge. When the removal did not happen within the 48 hours following the placement in detention, it could have been that the JLD prolonged the detention of a person who was unable to make an objection to the ruling of return, but also and especially that he put an end to the deprivation of liberty of a person for whom the administrative jurisdiction had subsequently pronounced their escorting to the border. To avoid this last situation, which was at the root of more than 26% of failed cases of the removal procedure in 2008[74], the law of June 16, 2011, came at the time of modification of the order of intervention by the judicial and administrative judges. The risk of the total absence of control of the judicial judge is thereby augmented.

In its new drafting found in Article 44 of the law of June 16, 2011, Article 551-1 of the CESEDA states that the foreigner, faced with expulsion and "*who cannot immediately leave French territory can be placed in detention by administrative authority in localities not within the jurisdiction of the penitentiary system for the duration of five days.*" This results in the intervention of judicial authority with a view to authorizing the prolongation of the measure, and to control the initial penal phase, deferring the legal terms of this delay of five days of administrative detention[75]. To thus delay the intervention of the judicial judge is to necessarily increase the number of circum-

[71] Aforementioned decisions, no. 70 and no.55.

[72] Civ. 2, 28 June 1995, Appeal n° 94-50002 concerning interpellation and Civ. 2, 28 June 1995, Appeal n° 50006 concerning custody.

[73] Council of State (CE), 7. 12. 2005, n° 275128.

[74] See the study of the impact carried out in March, 2010, within the legal framework relative to immigration, integration and nationality. http://www.assemblee-nationale.fr/13/projets/pl2400-ei.asp.

[75] Article L. 552-1 of the CESEDA modified by law n° 2011-672, June 16, 2011.

stances likely to undermine individual liberty as the person in question will not be subjected to examination by judicial authority, notably since the essence of the measures of expulsion will be carried out during the delay of these five days[76]. These measures therefore seemed incompatible with Article 66 of the Constitution, but the position of the Constitutional Council was not the same.

### b) The Constitutional validation of the deferment of control of the judicial judge

The incompatibility of these dispositions appeared, at first, to need to be led by that which they misunderstand of the needs of the Constitutional Council, according to which: "*No one can be arbitrarily detained. The judicial authority, guardian of individual liberty, assures the respect of this principle in the conditions foreseen by the law"* and "*individual liberty can only be held as a safeguard if the judge intervenes with the shortest delay possible*[77]*"*. Equally, in this regard, the delay of five days did not seem to be regarded as the shortest possible. However, in its decision of June 9, 2011, the Constitutional Council admitted to the constitutionality of this delay[78]. It has simply expressed a reservation of interpretation, limiting to a maximum of seven days of deprivation of liberty, the verification of the judicial judge. This reservation has only one weak implication in practice, since it permits 48-hour custody, followed by a detention of five days, without control of the judicial judge. One could be led to think, therefore, that the control of the penal phase would have been able to be assured by the administrative judge during his control of the "legality" of the measure of detention but this "hypothetical palliative[79]" is ruled out by the principle of separations of powers and the administrative jurisdictions refuse to apply the principle of nullification of subsequent acts. In fact, the commentary from the notebooks of the Constitutional Council[80] formally excludes this hypothesis.

If, however, the control report of the judicial judge has been validated by the Constitutional Council, the late nature and the practical inefficacy of these guarantees bring up serious difficulties considering European Law.

## 2. The legal powerlessness to face up to the non-conventionality of the national law

The report of the judicial judge's control to a five-day time limit following the retention hardly seems acceptable in relation to European law (a). It places judicial judges, guarantors of the conventionality of the law, in a particularly tricky situation (b).

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[76] According to a common report of several NGOs, the average length of administrative retention went down from 5 days in 2009 to 2,7 days in the year 2010, notably because the deportation are prompter. See: Report 2010 about centers and units of administrative retentions, December 2011, p.11.

[77] C. Const. 9. 01. 1980, *Decision* n° 79-109 DC, based on the Article 66 of the Constitution.

[78] C. Const. 9. 06. 2011, *Decision* n° 2011-631 DC, §73.

[79] GISTI's observations in preparation for the consideration of the law n° 2011-672 by the Constitutional Council.

[80] Commentary from the notebooks of the Constitutional council relative to decision n° 2011-631-DC,www.conseil-constitutionnel.fr/decision/2011/2011631dc.htm.

### a) The incompatibility of French law with the law of European Convention

Although the European Court considered that the return procedure of foreigners is exempt of Article 6 §1 of the European Convention standards, the Court admits that the restriction of liberty had to respect the article 5[81]. More precisely, the return procedure of foreigners in an illegal situation in Article 5§ 1 f) meaning, has to respect nationals dispositions and guarantees of Article 5§ 4 of the ECHR[82]. As with any person deprived of liberty, the immigrant has the "*right to submit an appeal before a tribunal which quickly take a decision about the legality of his detention and decide the release if the detention is illegal"*. If the European court, however, doesn't automatically require that the relevant tribunal is a judicial jurisdiction in the sense expressed in Article 5 , it is essential for this tribunal to be able to pronounce release in case of illegal loss of liberty. The control made by the administrative judge in the 48 hours following the retention cannot be considered as being sufficient, as he only checks the conditions of the administrative procedure without checking the legality of the arrest and the custody as well. As the judicial judge is the only one able to check the original legality of loss of liberty, it is then essential that he is able to intervene during a *"short time limit"*. This condition does not appear to be respected by the report of the control at the end of the 5-day time limit, all the more so since this retention happens after 24-48 hours in custody.

However, the conflict with the European Convention is obvious regarding the right of an effective return stated in Article 13, whereas in the case of France the immigrants would have been removed from the country prior to the intervention of a judicial judge. Such a hypothesis entertains the possibility that an illegal arrest takes place, followed by illegal custody leading to the return of a foreigner prior to any observation on the part of a judicial judge, nor any legal consequence.

The exclusion of criminal law guarantees by the administrative procedure is consequently obvious and clearly shows the exploitation of a criminal procedure stripped of its guarantees. That said, the establishment of the highly probable conflict of the legal hindrances to the control of the criminal procedure before the administrative retention can hardly produce any juridical consequences.

### b) The non efficacy of the non-conventionality of the French law

As Article 55 of the French Constitution states, conventions and international treaties have a superior authority to the law. The Constitutional Council, however, refuses to control, itself, conventionality of the law. Thus, judicial and administrative courts impose this control. Indeed, they are obliged to remove a national law conflicting with a case that they may have to deal with. Henceforth, well-known

[81] Remember that articles 6§1 and 5§1 c) however are applicable to foreigners during the penal phase. About the application of the European convention to foreigners law, see: *F. Sudre*, European and International Law of Human Rights (Droit européen et international des droits de l'Homme), PUF, 2010, p. 664.

[82] See ECtHR, *S.D. vs Greece,* Application n° 53541/07, Judgment 11 June 2009.

and strengthened by the decisions of the Plenary Assembly of April 15, 2001[83], this control is made difficult in the hypothesis we are interested in.

### aa) The limit of the control of the conventionality of the law

As we have already emphasized, the judicial judge is the only one able to establish the conflict between the penal procedural phase and European standards, and to draw legal consequences as well. However, the clause of the current conventionality control in French law only permits the judge to remove the non-conventional dispositions when applied to an open case. Therefore, each time a foreigner is removed before the extension of the administrative retention, no judges would have been able to notice the violation of the Europeans guarantees. When a judge intervenes, at the end of the first five days of retention, he is not able to pick out the hypothetical violation that could have happened because his intervention arrives all too late. In fact, in this case, he cannot remove the unconventional text without deleting the basis of his jurisdiction. As such, the powerlessness of the judicial judge seems complete; he cannot base his competence on conventional stipulations. Despite this, some national courts have not waited for the potential intervention of the Justice Court or for a drawn out appeal before the European Court to conclude, and have instead defied national law in order to assure their competence before the 5 days time limit expiry.

### bb) The difficult resistance of the judges

Although in a marginal sense, some judges of liberty and detention decided to declare themselves competent to operate control of the initial penal phase, and in particular custody, judged illegal in these cases, from the time of placement in detention of the foreigner. Executed on the foundation of Article R. 552-17 of the CESEDA[84], a judge of Bordeaux recognized his competence[85] by omitting to take into consideration a statutory disposition entered in a chapter related to the "*prolongation of detention by the judge of liberties and of detention*". Not struck by a call but not executed[86], this decision, clearly contrary to the *ratio legis* concerning the rights of foreigners, gave rise to a governmental dispatch making explicit the impossibility of using this prescribed text as a basis for the competency of the judicial judge before the delay of 5 days[87]. Despite this, at least 2 other decisions of the

[83] Aforementioned decision, no. 34.

[84] "The detained foreigner who asks, out of audiences of the articles R 552-9 and R 552-15, that his retention be ended,must submit a simple request to the Judge of liberty and detention" (L'étranger en rétention qui demande, hors des audiences prévues aux articles R. 552-9 et R. 552-15, qu'il soit mis fin à sa rétention saisit le juge des libertés et de la détention par simple requête adressée par tout moyen au juge).

[85] JLD, Bordeaux, 30 July 2011, Cahiers de Jurisprudence d'Aquitaine et Midi Pyrénées, 3/ 2011, *forthcoming*.

[86] The prefecture allowed the deprivation of the foreigner's liberty to continue and proceeded with his expulsion. After having revealed the incompetence of the JLD, the prefecture of Bordeaux recognized an "exceptional dysfunction" (dysfonctionnement exceptionnel). See: "The detention of a foreigner, liberated by the judge provokes anger" (Le maintien en rétention d'un étranger libéré par le juge suscite la colère). www.lexpress.fr, August 5, 2011.

[87] Dispatch of the Minister of Justice, August 16, 2011, with the objective of the "application of Articles L. 551-1, 551-2 of the Code of entrance and stay of foreigners and of the right of asylum" clearly affirming that "the JLD is

Judge of liberty and detention of Bordeaux were upheld by specifying their argumentation[88]. While admitting that Article R. 552-17 of the CESEDA should not normally permit the jurisdiction of the Judge of liberty and detention prior to the prolongation of the administrative detention, they showed that such an interpretation of the national dispositions would lead to a violation of Article 5 of the European Convention. In fact, the control by a judicial authority of loss of liberty has to operate in a sufficiently short delay while he is the only one to have jurisdiction to control the criminal stage[89].

This position is particularly audacious because the Cassation Court has clearly affirmed that an intervention by a judicial judge before the restoration of the detention constituted an excess of power[90]. The Court of Appeal of Bordeaux has weakened this application of European law[91] but its decision has been struck down by an appeal of annulment. The High Court's jurisdiction, therefore, greatly risks finding itself in an inextricable position: taking the risk of condemning France, which is highly probable, based on Article 5 of the European Convention, or admitting the competence of the judicial judge previously envisaged by the law by curtailing regulations prescribed by French law[92].

At the end of this brief presentation of the current problems of French penal law concerning foreigners, it seems clear that the law of June 16, 2011, has failed in its task to restore calm in the matter of European requirements. Laid down by the *Achughbabian* case concerning the penalty for incriminations relative to illegal residence, the new reform on the matter should take into equal account the difficulties brought to light as to custody and to the effectiveness of the control of the judge. Contrary to European policy, the organization of the respective controls of the judicial and administrative judges cannot remain as it is. The ineffectiveness of the rights attached in the preexisting penal phase is furthermore found to be judicially contestable. Indeed, this is revealing a voluntary exclusion of the field of Law, which is an application of the "*Criminal law for the enemy"* theory[93]. The outcome of the battle against terrorism, this criminal right of the enemy is characterized by its derogatory character and can lead to the negation of the person as the subject of rights[94]. If the French legislature wishes to maintain the criminal

incompetent to pass decree on the demands restoring liberty which would be able to be presented by a foreigner in the course of this period" previous to "the flow of a delay of 5 days counting from the decision of placement in detention".

[88] JLD of Bordeaux, Ordinance of September 15. 2011, Appeal n° 37/2011 and of September 22. 2011. Appeal n° 37/2011.

[89] Concerning instances when custody, initially judged illegal was intervened, the two aforesaid ordinances rest on the ECtHR*, Brogan vs. the United Kingdom,* decisions of November 29, 1988, and ECtHR, *Moulin vs. France* of November 23, 2010, the former having judged that a detention of 4 days and 6 hours without control of a judge violated Article 5 of the European Convention.

[90] Aforementioned decision, no. 32.

[91] CA of Bordeaux, 16 September 2011, Appeal n°11/00032.

[92] Article 5 of Civil Code.

[93] See among others: *G. Jakobs*, Penal law of citizen and penal law of enemy (Bürgerstrafrecht und Feindstrafrecht), in: HRRS Ausgabe 3/2004; *G. Portilla Contreras,* Penal law between cosmopolitan universalism and post-modern relativism (El Derecho Penal entre el cosmopolitismo universalista y el relativismo postmodernista), Valencia, Tirant lo blanch, coll. U alternativa, 2007, p. 141 et s.

dimension of the rights of foreigners, it is essential that it assumes the juridical consequences which are accrued according, while assuring full and entire control of respect for the guarantees attached to the penal contents. If, however, as would seem to be the case, the right of the European Union encourages it, a unification of disputed matters concerning illegal stay would take place in the control of a specialized administrative jurisdiction, thus the ousting of penal law could be prejudicial to foreigners. Given that the essential objective of such a unification of disputed matters would be to render more efficacious the putting into effect of a governmental system for the expulsion of foreigners, the jurisdictional guarantees, which surround the expulsion of foreigners, would risk being weakened. Regarding the difficulties of the combination of the principle of separation of powers and of Article 66 of the Constitution, it is feared that the guarantees attached to each deprivation of liberty, in the sense of Article 5 of the Constitution would not be assured. How could the administrative judges put on the robes of the judicial judges without a profound reform of the French judicial system[95]? Whatever the chosen path will be, it would seem that there is a long stretch of the road until the French legal system applied to foreigners arrives at a desirable equilibrium between the efficacy of the policy of return chosen, and the guaranteed fundamental rights of foreigners.

[94] *G. Jakobs*, Terrorist as a person in law? in Penal law of citizen and penal law of enemy, op cit.

[95] This is these difficulties of the separation of powers that the *Mazeaud report* initiated, solicited by the Minister of Immigration, the hypothesis of a unification of the litigation. See: Commission on the constitutional scope of the new policy of immigration. For a policy of complete openness, simple and united immigration, (Commission sur le cadre constitutionnel de la nouvelle politique d'immigration, Pour une politique des migrations transparente, simple et solidaire), July 2008.