

## Problem-Solving Justice in French Civil and Commercial Matters

Ludovic Pailler\*

### 1. Introduction

In the French legal system, the judge has two functions: the *disputatio* and the *jurisdictio*. The first one entitles the judge to settle a dispute on the basis of legal provisions after having heard the legal arguments of both parties in an adversary proceeding. The second one entitles the judge to declare what the law is. Therefore, judges use their legal powers by ruling on the cases referred to them. Their role is neither to give advice to litigants on the dispute, nor to anticipate the legal difficulties ensuing from their judgment. Indeed, the judge has to rule on opposing subjective rights not on rivalries of interests.<sup>1</sup> The fact that such rivalries would be exposed by the parties in front of the court does not allow the judge to depart from his/her role. The judge must apply general and abstract legal provisions to rule concrete and particular situations without taking into account the sustainability or the fairness of the applicable legal remedies. Even if this approach of the role of judges does not reflect faithfully the actual situation in France, it has shaped the French model. Thus, it limits the efficiency of problem-solving justice (PSJ), understood as the mechanisms aiming at solving problems from which legal disputes and delinquency ensue.

PSJ, when it exists, is mainly rooted in criminal law.<sup>2</sup> This new strategy for responding to offences replaces or supplements the traditional law enforcement system, so as to reduce recidivism and, more broadly, to prevent crime. To this end, various initiatives in the 1990s commonly focused on the causes of crime, and involved the community in the resolution of the problems that fuel juvenile delinquency, drug or driving offences or domestic violence. As a consequence, problem-solving courts have been created. They are multiple but mainly deal with drugs and alcohol dependency or mental health treatment.<sup>3</sup> These courts can be seen as ‘a new form of governance, promoting healthy democratic deliberation that is more participatory, legitimate, and flexible in its legal and social problem solving’ and leading to multi-stakeholders discussions and ending by a consensual solution.<sup>4</sup> This new way of dealing with disputes, looking for an agreed and then lasting solution, has also spread into civil law systems. Unified family courts have been created to widen the scope of jurisdiction over complex family cases with the aim of solving the multiple difficulties a family may face and that may give rise either to anti-social behaviours or to other family disputes such as ones regarding contact with the child.<sup>5</sup>

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\* Maître de conférences en Droit privé et sciences criminelles, Université Lyon III – Jean Moulin, EDIEC (EA 4185) – Centre de recherche sur le droit international privé, email: ludovic.pailler@univ-lyon3.fr. The author would like to express his sincere thanks to Laurence Francoz-Terminal for her valuable assistance in writing this paper.

1 F. Ost, *Dire le droit, faire justice* (2012), p. 21.

2 For an overview, see, for example, G. Berman & A. Fox, ‘The Future of Problem-Solving Justice: An International Perspective’, 10 *University of Maryland Journal of Race, Religion, Gender and Class*, issue 1, Art. 2.

3 See, for example, Hon. P. Fulton Hora, ‘Courting New Solutions Using Problem-Solving Justice: Key components, Guiding Principles, Stratégies, Responses, Models, Approaches, Blueprints and Tool Kits’, (2011) 2:1 *Chapman journal of Criminal Justice*, p. 7.

4 C. Menkel-Meadow, ‘Restorative Justice: What Is It and Does It Work?’, (2007) *Annu. Rev. Law. Soc. Sci.* 3:10.1-10.27.

5 Fulton Hora, supra note 3, pp. 13-14.

In French legal literature, the sociological objective of justice being done, the research of social harmony, which is close to the PSJ objective, is not controversial.<sup>6</sup> Admittedly, to ease a conflict is an important mission for the judge, the second one after ruling in a case.<sup>7</sup> However, the word ‘conflict’ is narrowly construed. It has the same meaning as dispute, that is to say a situation arising from an obstacle opposed to a claim, a claim only seen in a legal view.<sup>8</sup> A medieval maxim states *ubi jus, ibi remedium*. The trial only exists so as to be the stage where to exercise the rights given by the law to litigants. That is why the *disputatio* and the *jurisdictio* settle the legal dispute but neither end the conflict, nor solve concrete problems<sup>9</sup> that fall outside the scope of the law. As a consequence, many conflicts or problems are ignored by the judge whose role is restricted to dispute settlement.

Considering the narrow meaning of ‘conflict’ from a legal perspective, the only PSJ issue that was actually dealt with was limited to the application of general and abstract rules to factual situations. But, this mechanism usually ends with the judge ordering a legal remedy that fails to solve the problems at the origin of the dispute. Alternative dispute resolutions should also be pointed out and they will be presented below in this article, with the exception of those that are not related to state justice (such as arbitration, for example) and where no judge is involved in the dispute resolution.

Considering the increasing number of claims for legal and judicial intervention in social, economic and family disputes, the role of the courts has changed in the 1970s. Nowadays, they are asked to be a family or a personal manager, a social worker, a child care agent, an economist or even an administrator.<sup>10</sup> This mutation is due to an increasing specialisation of the court’s jurisdiction that has contributed to increase the social figure of the judge. This is especially obvious in family matters where there is a strong incentive on the judge to drive the parties to a consensus rather than to settle their dispute. The judge should do more to ease the conflict between the parties and to promote their wellbeing.<sup>11</sup> This objective has not entirely been achieved yet but the judge has become, in particular civil matters, ‘a careful advisor or a fairness minister’.<sup>12</sup>

However, PSJ is not an explicit goal, neither for the legislator nor for the judge. In French legal literature, PSJ is an issue that is not frequently discussed and is not a fundamental matter of concern. And when it is so, it is mainly incidentally. We have been able to find one author only, Martine Herzog-Evans, who has written an article dedicated to PSJ.<sup>13</sup> She has proposed to reform some areas of criminal justice, and more particularly the role of the judge in charge of enforcing criminal sentences, in line with the PSJ courts that exist in the United States. Most French legal literature focuses on the function of the judge in his/her relation to the law, leaving aside non-legal aspects. Studies on judicial offices usually concern the way the law is applied by judges but not the way they solve concrete difficulties that are beyond the legal field.<sup>14</sup>

Moreover, judges are increasingly expected to pay attention to legal certainty and predictability. Citizens ask for a uniform set of decisions,<sup>15</sup> not only from one court to another but even within the same court. The legislator has now given them a special tool so as to influence judges in this regard: the open data.<sup>16</sup> The processing of the numerous judicial decisions that will be made available to the public allows everyone to predict his/her chance of success and additionally to support the claim for consistency of case law, without

6 When it is, social harmony is seen as the main aim of therapeutic justice that will be discussed below (N. Fricero, ‘De la procédure équitable à la procédure civile thérapeutique’, in I. Petel-Teyssie and C. Puigelier (eds.), *Quarantième anniversaire du code de procédure civile (1975-2015)* (2016), p. 87.

7 M.-A. Frison-Roche, ‘Les offices du juge’, in J. Foyer, *Jean Foyer auteur et législateur, Mélanges Jean Foyer* (1997), p. 463.

8 P. Thery, ‘Le litige en droit judiciaire privé. Petits exercices de procédure élémentaire’, *Mélanges en l’honneur de Serge Guinchard, Justice et droit du procès*, spéc. n 2, p. 853.

9 About the different conceptions of conflicts, J. Carbonnier, *Sociologie juridique. Le procès et le jugement*, pp. 227-228, <<http://cujas-num.univ-paris1.fr/ark:/45829/pdf0603383001>> (last visited 20 November 2018).

10 R. Perrot, ‘Le contentieux économique, social et familial en droit judiciaire français’, in *L’évolution du droit judiciaire au travers des contentieux économique, social et familial. Approche comparative* (1984), p. 105.

11 A. Garapon, ‘Rapport français’, in *Aspects de l’évolution récente du droit de la famille, Travaux de l’Association Henri Capitant* (1988), t. 39, p. 707, spéc. pp. 707-708.

12 J. Carbonnier, *Essais sur les lois*, Répertoire du Notariat Defrénois (1995), p. 190.

13 ‘Révolutionner la pratique judiciaire. S’inspirer de l’inventivité américaine’, *Recueil Dalloz* (2011), p. 3016.

14 See, for a rare exception, A. Garapon et al., *La prudence et l’autorité. L’office du juge au XXIème siècle, Rapport de l’IHEJ* (2013).

15 Institut Montaigne, *Justice: faites entrer le numérique* (2017), p. 27.

16 B. Dondero, ‘Justice prédictive: la fin de l’aléa judiciaire’, *Recueil Dalloz* (2017), p. 532.

regard to the subtle differences that exist from one case to another. In doing so, there is high risk to give birth to a mechanical way of doing justice, far from the objectives of PSJ.

On the contrary, the growing number of alleged violations of fundamental rights compels judges to avoid mechanical implementation of legal provisions as it could produce unacceptable results. The possibility for the litigants to claim for an infringement of their fundamental rights leads the judges to pay attention to the individualisation of their judgments. Indeed, judges have to take due consideration of the particular situation of the parties, and sometimes they have to make an in-depth examination of the facts so as to settle a dispute. In France, the key role of fundamental rights in civil matters has been strengthened since the *Cour de cassation* decided to promote the proportionality test so as to overwhelm the traditional syllogistic reasoning of French judges.<sup>17</sup> The special facts of one particular case can now justify that the application of domestic law is eluded on the ground of superseding fundamental rights.

Such a promotion of fundamental rights is part of a wider and somehow paradoxical aspiration<sup>18</sup> for tailor-made and sustainable judicial decisions. For example, whereas in application of domestic law provisions, the destruction of caravans and cabins installed in a wildlife refuge in violation of town-planning and building regulations shall be ordered, the fundamental right to private and family life, that also protects the family home, allows their conservation.<sup>19</sup> However, such a position implies, in most cases, an increase of judicial work, costs and length that French justice cannot afford. The length of judicial proceedings that is implied by such a stream is the main reason why judges refuse to proceed to an in-depth examination of civil disputes.<sup>20</sup> When it is not possible to dispense with such a thorough examination, in a small number of cases however, other obstacles may arise: the lack of means, the lack of special training of judges in non-legal fields, such as psychology for example, and the heavy workload that prevents judges from scheduling time-adequate hearings and that reduce the time they spend on the ruling of one particular case. All these factors must be kept in mind, so as to better assess the efforts made by the courts in pursuing objectives that are close to PSJ ones.

In addition to these functional limitations to the development of PSJ in France, some legal limits also exist. Firstly, it is clear that the in-depth involvement of judges in the litigant's personal life that may be necessary to solve the underlying problems of a particular dispute may give rise to doubts on their capacity to remain impartial in the decision-making process. The objective impartiality of the judge could be undermined if he/she focuses on the underlying problems endured by one of the parties and that are at the origin of the legal dispute. It is also a matter of concern regarding the ethics imposed on French judges.<sup>21</sup> If they have to pay attention to the personality of the litigants and to duly hear their claim, they have to remain impartial and must not let personal feelings or antipathy show.<sup>22</sup> PSJ also requires the judge to use collaborative processes with the litigants, their representatives and the different stakeholders.<sup>23</sup> They should also anticipate the consequences their decision may have outside the legal field. By so doing, the judicial decision may be influenced by elements that are not submitted to an adversarial proceeding that would interfere with the litigant's right to a fair trial. Secondly, fundamental guiding principles of civil proceedings come to limit the power of the judge in France. Indeed, the *principe du dispositif* rules that it is up to the parties exclusively

17 See, for example, Civ. 1<sup>ère</sup>, 8 December 2016, n° 15-27.201: 'the right of Mrs. Z. (...) and Pierre X. (...) to marry has not been infringed, since their marriage was celebrated without opposition and they lived together until the death of the husband; (...) by annulling the marriage, the Court of Appeal did not disregard the convention requirements resulting from the above-mentioned text; (...) the infringement in the exercise of the right to respect for private and family life, which constitutes the annulment of a marriage between direct allies, is provided for in articles 161 and 184 of the Civil Code and pursues a legitimate aim in that it aims to safeguard the integrity of the family and to protect children from the consequences resulting from a change in family structure. It is, however, for the court to assess whether, in practice, in the case before it, the implementation of these provisions does not lead to the right to respect for private and family life guaranteed by the Convention being disproportionately prejudiced in relation to the legitimate aim pursued' (emphasis added).

18 Considering the claim for more predictability.

19 Civ. 3<sup>ème</sup>, 17 December 2015, n° 14-22.095.

20 One of the main reason given by the judges that have been interviewed in the course of this study.

21 *Recueil des obligations déontologiques des magistrats*, available at <[http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/recueil\\_des\\_obligations\\_deontologiques\\_des\\_magistrats\\_fr.pdf](http://www.conseil-superieur-magistrature.fr/sites/default/files/atoms/files/recueil_des_obligations_deontologiques_des_magistrats_fr.pdf)> (last visited 20 November 2018).

22 Ethical obligation E.17.

23 The principles of the PSJ mentioned in this paragraph are taken from the Bureau of Justice Assistance of the US Department of Justice unveiling best practices (R. V. Wolf, *Principles of Problem-Solving Justice* (2007), spec. p.2-7, <<https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=256751>> (last visited 20 November 2018); more principles of PSJ are available in Fulton Hora, *supra* note 3).

to determine the scope of the dispute.<sup>24</sup> As a result, the judge is bound by the opinions submitted by the parties, he/she cannot rule *ultra petita* or *infra petita*. The judge has no power to modify or add elements to those already submitted by the parties. Therefore he/she cannot rule on facts and legal issues that have not been submitted by the litigants<sup>25</sup> or on people that are not parties to the trial. With respect to PSJ, that means, in theory, that the judge does not have the power to solve the conflictual situation that gave birth to the law suit, unless the conflict raises legal issues that the parties have accepted to submit to the judge. However, two limits to this *principe du dispositif* exist and they are pushing for a PSJ approach. The first one is the possibility for the judge to take into consideration the facts that have been exposed in the debate by the parties although they have not expressly relied upon them in their opinion to support their claims.<sup>26</sup> The second one is the possibility for the judge to invite the parties to give some factual explanations where they seem necessary for the resolution of the dispute.<sup>27</sup> This allows the judge to go beyond the field of his/her legal office. Litigants also have the possibility to ask the judge to rule on their dispute as an *amiable compositeur*. However, matters that are concerned with PSJ are mainly matters in which parties cannot freely dispose of their rights. As a consequence the scope of intervention of the judge is limited to what the parties have agreed to submit to him/her. A third and last limit is partly legal and partly ethical. One of the principles ruling PSJ is to increase the information about the litigants' social and familial situation, where it has underlain the legal dispute. Thus, the judge is compelled to resort to more intrusive means of information and to generalise the reliance on social workers' reports so as to be aware of the familial, social, psychological or even economic context of the dispute. From a legal point of view, this could threaten the litigant's right to privacy when it leads to the disclosure of personal information, for example the mental illness that a litigant may suffer. From an ethical point of view, the judge would then become a keeper of conscience for individuals and families.<sup>28</sup> Is it up to the judges to assist people in difficult personal or family decision-making that goes beyond the legal sphere?

Notwithstanding these different obstacles, and the fact that PSJ is not even conceptualised in French civil justice, the mechanism does exist in other forms. Many traditional mechanisms that are currently used in courts can be either connected to PSJ or are getting closer to it. They achieve some of the PSJ goals without corresponding exactly to its definition (see Part 2 below). In addition, a new concept, currently emerging in France as in some other countries, could solve PSJ issues: the one of therapeutic justice. It aims to involve specifically the people concerned with the decision-making process, easing the conflict and taking into account the impact of the trial on individuals' well-being.<sup>29</sup> It is an equivalent to restorative justice,<sup>30</sup> a criminal law concept that is already in force in the French legal system.<sup>31</sup> Therapeutic justice therefore appears to be an equivalent to PSJ (see Part 3 below).<sup>32</sup>

## 2. Legal mechanisms achieving some problem-solving justice issues

Legal mechanisms could be seen as expedients to achieve PSJ issues, to implement each of its main principles.<sup>33</sup> They give the judges means to enhance information collected on the litigants' situation, the dispute and its context, to collaborate with traditional justice partners and with associations, to make tailor-made decisions and to ensure accountability. In contrast, there is no significant community involvement that allows the judge to know better the societal context in which problems arise. But such information could be brought to the attention of judges as they are members of several administrative groups. Moreover,

24 Art. 4 of the Civil Procedure Code.

25 Arts. 5 and 7 par. 1 of the Civil Procedure Code.

26 Art. 7 par. 2 of the Civil Procedure Code.

27 Art. 8 of the Civil Procedure Code.

28 V. Egea, 'La Fonction de juger à l'épreuve du droit contemporain de la famille', *Coll. De Thèses*, t. 43, éd. Defrénois, 2010, p. 80, n° 114.

29 Fricero, *supra* note 6.

30 *Ibid.*

31 See R. Cairo, 'Justice restaurative', *Répertoire de Droit pénal et de Procédure pénale* (2014).

32 In this regard, S. Goldberg, *La résolution de problèmes dans les salles d'audience du Canada. La justice thérapeutique: un guide*, Institut national de la magistrature (2011); Fricero, *supra* note 6.

33 R.V. Wolf, *Principles of Problem-Solving Justice*, Center for Court Innovation, Bureau of Justice Assistance (2007).

courts must organise a court board (*conseil de juridiction*) at least once a year.<sup>34</sup> It gathers judges and lawyers, representatives of the administrations that are regularly working with judges, representatives of associations that interested in justice matters, or elected representatives, so as to exchange and share information about local life. Informal meetings or communication certainly take place. But it could only be known and assessed after an in-depth survey of legal practice. These meetings at least allow the judge to feel the pulse of society and to get a better understanding of the peculiarities or difficulties that are specific to its jurisdiction, in order to adapt the court organisation or the decision that has to be made considering its foreseeable consequences.<sup>35</sup>

The mechanisms at stake are plenty and changing. Some of them will be presented in this paper using two different concepts of justice, to which they can be connected so as to emphasise how PSJ issues are achieved by each of them. Indeed, it is possible to distinguish the mechanism which contribute to a flexible justice settlement as they give the judge a certain margin of appreciation (see 2.1 below), and those which contribute to a collaborative justice settlement as they enable litigants and third parties to participate actively in their dispute settlement (see 2.2 below).

## 2.1 Flexible justice

Flexible justice implements the legal provisions considering the particular facts of the case. It results from an evolution of the function of the judge. He/she is still supposed to implement the law, which is abstract and general in its formulation, to a particular situation using a syllogistic reasoning. But, in certain matters, such as family matters, this is no longer true. The trend that began during 1970s was already mentioned above. In the French legal system, the making of statute law based on general rules prejudging the outcome of a conflict of interests, and choosing the one that should prevail, is progressively left aside. The judge is no more limited in his/her function to find the appropriate solution to a dispute considering the applicable legal provisions. The objective that the judge is pursuing is to be able to protect private interests as a regulator. François Ost has described this change in the function of the judge at the moment where the law was no longer made by fixed written rules but by judges. Inspired by sociological jurisprudence, the case law has seen its importance superseding the one of the Code-based law. The concrete application of the legal provision to the particular situation prevails over the law provisions themselves.<sup>36</sup>

This radical change, that reverses the starting point of the reasoning, is the result of legislative reforms that substitute rules forejudging conflicts of private interests for soft criterions allowing the judge to make a tailor-made decision.<sup>37</sup> Indeed, the Civil Code uses notions with flexible meaning, such as ‘the interest of the child’. It enables the judge to solve any conflict of interests by giving him/her guidelines. Moreover, the margin of appreciation given to judges encourages them to implement the law in family conflicts in some new way. The flexible meaning of the notions the judges have to implement allows them to make in-depth investigations and to held tailor-made and sustainable decisions.

The use of soft criteria was part of a wider public policy aiming at making the judge the protector of private interests in matters where he/she has to exercise a protective justice (*office tutélaire*),<sup>38</sup> that is to say in matters where the judge interferes into the litigants’ private life. Family law, law of incapacity or childcare law all contain notions with flexible content so as to widen the discretionary power of the judge. In these legal fields, judges have to cope with the part of the population that is temporarily or more permanently the most in need of protection. The case usually does not give rise to technical legal debate. The judge has to consult with the parties, based on a lighter formalism, in the course of private hearings where due attention is paid to what they have to say to the court. Underlying conflicts and problems are part of the tragedy the judge has to solve. So, they can and have to take the tragedy into account considering their wide margin

34 See Décret n° 2016-514 du 26 avril 2016 relatif à l’organisation judiciaire, aux modes alternatifs de résolution des litiges et à la déontologie des juges consulaires.

35 This information comes from preparatory interviews for the drafting of the French report for a study titled *HANDLE WITH CARE. Assessing and designing methods for evaluation and development of the quality of justice*.

36 F. Ost, ‘Jupiter, Hercule, Hermès: trois modèles du juge’, in P. Bouretz (ed.), *La force du droit* (1991), p. 33.

37 On this point, see C. Pomart, *La magistrature familiale* (2003), préf. F. Dekeuwer-Defossez, p. 91 et s., n°94 et s.

38 A. Garapon et al., ‘La prudence et l’autorité. L’office du juge au XXIème siècle’, *Rapport de l’IHEJ*, 2013, p. 85 et s.

of appreciation. As a consequence, the judge ought to behave as a confidant of the spouses confronted the marriage disorders, a conciliator and a marriage counsellor so as to allay matrimonial conflicts, make the litigants aware of their personal difficulties and capable of searching for remedies to them. He/she also needs to be an arbitrator and a psychologist.

Such a trend, which only concerns protective justice, is now growing bigger thanks to the rising influence of fundamental rights. The French *Cour de cassation*, in a case on 4 December 2013,<sup>39</sup> ruled that the solution resulting from the application of domestic law must be compatible with fundamental rights. In this case, the court has held that the French Civil Code provisions forbidding marriage between people who are in prohibited degrees of relationships without a special authorisation (a man married his ex-daughter in law) was not a sufficient ground to nullify that marriage, considering the fact that it has lasted 20 years without being challenged (by the son/ex-husband), and that nullity in such a particular case would constitute a violation of the defendant's right to private and family life. This new way to ensure the prevalence of the facts on the legal provisions can influence PSJ issues. Besides the individualisation of the decision, it can also facilitate the search for a solution to the problem that brought the parties to the court or even ease the conflict or the problems encountered by the litigants. In a case on 17 December 2015,<sup>40</sup> the right to private and family life seems to have been construed as an obstacle to the sanction that is usually ordered in cases of a breach of the right to private property, that is the destruction of the building, in that it would have evicted their inhabitants from their home and would have increased the precariousness of their personal situation.

However, giving the judge such a wide discretion to rule in a case increases the risk of arbitrary decisions and, to a lesser extent, of undermining the consistency of case law. Notwithstanding these drawbacks, flexible justice is a way to achieve directly the aim of individualised justice and indirectly to allay conflict and solve problems. To be compared with collaborative justice, the latter is directly fulfilling the objective of PSJ and possibly in better ways.

## 2.2 Collaborative justice

Collaborative justice should be construed in its broader meaning as covering the different ways to collaborate with the judge to find and enforce a judicial decision for both third parties and litigants.

### 2.2.1 Cooperation of third parties

Cooperation of third parties in the law suit can take very different forms. Indeed, this cooperation does not only concern *penitus extranei*, that is to say people who are not personally concerned by the case, such as experts who give information to the judge in a technical field. As a matter of fact, on the one hand, cooperation could be expected from close friends or relatives of the litigants. These interested persons could obviously be claimants. But, in relation to PSJ issues, they can be consulted so as to prevent conflicts or problems from emerging. For example, Article 494-4, paragraph 2, of the Civil Code requires the judge, when about to name one person to be the legal representative of an adult in need of protection, to ascertain the support from the relatives of the representee, or if not the absence of any reasonable opposition. To this end, he/she has to hear close friends and relatives who are in narrow and permanent relations with the adult in need of protection or who care for him/her. On the other hand, social workers and non-profit societies or charities may also be involved in the law suit so as to help the judge either to gather information about the litigants or to enforce the decision. This is closer to what characterises PSJ in criminal matters. Social workers could be appointed by judges to carry out investigations so as to collect information about the personality of one of the parties and/or on his/her personal life. For example, in child protection cases, the judge (*juge des enfants*) has to protect children whose health, safety or morality are in danger or whose conditions of education or of development are seriously endangered. To this end, he/she may order any

39 Civ.1<sup>ère</sup>, 4 December 2013, n°12-26.066, *Bull.I* n° 234.

40 Civ. 3<sup>ème</sup>, 17 December 2015, n°14-22.095, to be published.

educational or investigation measure<sup>41</sup> which will be performed by the agent of the child protection services. The cooperation even extends to enforcement of the judicial decision that has been ordered by the court. Social services or social workers who are in charge of the implementation of the child protection order must report to the judge about the child's situation on a regular basis. Non-profit societies and charities can also play an important role before and after the decision is made. For example, in domestic violence cases the *Association de politique criminelle appliquée et de réinsertion sociale*, provides the abuser with accommodation and ensures a tight follow-up, consisting in weekly meetings with a social worker member of the society so as to check his/her social situation up to the hearing of the case and after the sentence is ordered.<sup>42</sup>

### 2.2.2 Cooperation with litigants

Cooperation with litigants covers various mechanisms. One of the Civil Proceedings Code guiding principles states that 'to conciliate parties is part of the mission of the judge'.<sup>43</sup> Negotiated justice enables parties to reach a sustainable dispute resolution by easing conflicts and searching for a solution that will be accepted by both litigants. This is an increasing phenomenon in France, particularly because it should help to reduce the courts' workload by transferring part of it to an arbitrator, a conciliator or a mediator. As a consequence, before the hearing takes place, the law already encourages the litigants to find a negotiated solution to their problems. Indeed, if the writ of summons does not mention the steps that have been undertaken to reach an out of court settlement, the judge may refer the parties to conciliation or a mediation process. But still the judge retains the mission to reach the most acceptable solution for both parties. In some special law matters, the judge can validly be a member of the dispute settlement body. For example, a victim of a medical error or of a nosocomial infection may choose, instead of going to court, to apply to the Conciliation and Compensation Commission that is headed by a judge.<sup>44</sup>

In a larger part, PSJ is achieved in family matters with an emphasis on the conciliation mission of the judge, although the increase of alternative dispute resolution can also be observed in this matter. Since the 1970s, the function of the family judge (*juge aux affaires familiales*) has been shared with the family members so as to reflect the consensus management of the family.<sup>45</sup> Each member of the family, including children considering their age and understanding,<sup>46</sup> is involved in the family governance. The decision in family matters is then built by the judge and the members of the family<sup>47</sup> as the latter are supposed to be capable of solving their opposition of interests. The judge interferes in the family life so as to ease the dialogue between family members by hearing them and, if nothing comes out, he/she has to settle the dispute. Family law provisions support litigants in their reaching of agreements that can be homologated by the family judge. The search for a consensual solution obviously aims at easing the family conflict and at empowering the family members. For example, when the family judge (*juge aux affaires familiales*) has to deal with a petition for divorce, irrespective of the legal grounds, he/she has to try to conciliate the spouses. More precisely, his/her role is to avoid the conflict by bringing the spouses together to agree on the outcome of their problems, whether to reconcile them or to reach an agreement on their divorce and its consequences.<sup>48</sup> As a consequence, the family judge is likely to be one who is the closest to problem-solving courts in civil matters, particularly because family law insists on agreed solutions as the basis for conflict

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41 Art. 1183 of the Civil Procedure Code.

42 See <<http://www.apcars.fr/nos-actions/accompagner-pour-reconstruire/>> (last visited 20 November 2018).

43 Art. 21 of the Civil Procedure Code.

44 Art. L.1142-5 of the Public Health Code.

45 Egea, *supra* note 28.

46 'In any proceedings concerning him, a minor who is capable of discernment may, without prejudice to the provisions providing for his intervention or consent, be heard by the judge or, where his interest so requires, by the person designated by the judge for that purpose' (Art. 388-1 of the Civil Code).

47 'The task of the family affairs judge is to try to reconcile the parties' (Art. 1071 of the Civil Procedure Code).

48 Any divorce proceedings, except the one in which the spouses agree on the principle and on the consequences of the divorce, gives rise to a first phase of conciliation of the spouses in which the judge hears each of them separately and then together, and may grant reflection periods in order to reach an amicable solution. None of the words exchanged during this first phase could be used as basis for a subsequent divorce action (Arts. 252 to 252-4 of the Civil Code).

management. In the cases where no agreement can be contemplated the judge has to conciliate litigants and ultimately to settle the dispute. Solving conflicts and problems that exceed the legal field is a mandatory step in the process.

Outside family matters, there is another way to involve the litigants into the decision making. Collaborative justice also exists in other civil and commercial matters. To some extent the concept of collaborative justice is close to negotiated justice as it is an out-of-court way to solve a dispute. Nonetheless, to do so, the litigants have to pass a participatory agreement<sup>49</sup> in which they bind themselves to work together jointly and honestly in order to find an amicable solution to their dispute. There is no third party acting as an arbitrator, mediator or conciliator. Parties are assisted by their lawyers only. The agreement solving their dispute could be homologated by a judge in order for him/her to check that the interests that are at stake have been considered and to make the litigants liable for the enforcement of their agreement. The participatory agreement could also have the purpose to allow the parties to control the pre-trial of the case in place of the pre-trial judge. The legislator expects the agreement to be the first step of the participatory procedures in order to give the parties the opportunity to work together so as to determine the matter of their legal dispute. Therefore, such an agreement can help the judge to find a suitable way to rule in the case where the parties will not be able to reach an agreement, in that it allows the litigants to negotiate on an equal footing. As a consequence, participatory procedure is seen as a means to reach a therapeutic resolution of the conflict.<sup>50</sup> The desire to associate the litigants more closely to the resolution of their dispute was also supported by the wish to reduce the courts' workload, but it does confirm the emergence in France of a therapeutic justice that is an equivalent to PSJ.

### 3. Emergence of a therapeutic justice equivalent to problem-solving justice

Therapeutic justice is inspired by therapeutic jurisprudence which 'concentrates on the law's impact on emotional life and psychological well-being'.<sup>51</sup> The concept of therapeutic justice is not regularly discussed in French legal literature, however clear connection with PSJ has been made.<sup>52</sup> It has already been enshrined in criminal proceedings rules. Indeed, Article 10-1 of the Criminal Procedure Code states that measures of restorative justice, which can be proposed at each step of a criminal proceeding, as measures allowing the victim and the offender to participate actively to the resolution of problems ensuing from the offence, and more especially to the compensation of damage of all kinds suffered by the victim. It particularly aims to restore social harmony. Therapeutic justice and restorative justice could both be based on the preamble of the Universal Declaration of Human Rights that states: 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of (...) justice'.<sup>53</sup>

Therapeutic justice, as a means to solve problems, remains underused in French law. In family matters excepted, there is no national public policy that puts an incentive to depart from distributive justice to move to corrective justice, that is to say to pay more attention to non-legal problems and difficulties that led to the judicial decision or that may arise from them. Judges are not trained in therapeutic justice.<sup>54</sup> Some measures are punctually created in order to deal with problems that a judicial decision cannot solve. For example, over-indebtedness committees were created in 1989<sup>55</sup> so as to deal with the situation of people who are facing insolvency problems. The way these committees function are close to those of problem-solving courts. No judge sits in. They are composed of a representative of the state who presides, the general paymaster, the local

49 Art. 2062 of the Civil Code.

50 N. Fricero, 'Le décret du 20 janvier 2012: vers une résolution thérapeutique des contentieux familiaux par la procédure participative assistée par avocat', *AJ fam.* 2012, p. 66.

51 International Society for Therapeutic Jurisprudence, <<http://law2.arizona.edu/depts/upr-intj/>> (last visited 20 November 2018). The term 'therapeutic jurisprudence' comes from a conference organised by the National Institute of Mental Health in October 1987 and held by David B Wexler.

52 Ibid.

53 The Economic and Social Council of the UN, at its Bangkok meeting in 2005, stated that justice is an answer to crime that respects dignity and equality of humans, favors understanding and promotes social harmony through healing of victims, offenders and communities.

54 At least, judges are trained to improve their listening skills and to make enforceable decisions.

55 Law n° 89-1010 of 31 December 1989 relative to the prevention and to the resolution of difficulties of over-indebtedness natural persons and families.

director of tax authorities, a representative of the professional creditor, a representative of associations of consumers and a representative of the *Banque de France*. Over-indebtedness committees are not considered as courts but they perform a judicial function as they are entitled to hear the case, to make proposition to the parties and to conciliate them. This function allows over-indebtedness committees to encourage the debtor to seek a budget management program or a social support measure that will be adapted to the debtor's special situation.<sup>56</sup> Such a measure organises a special assistance to the debtor who will be helped by social workers to manage his/her budget and to carry out administrative and social proceedings, for six to twelve months, so as not to fall again into financial distress. But social workers also deal with the overall situation of the debtor and with his/her multiple difficulties. It implies a thorough and personalised follow-up in order to make the debtor to become able to avoid future difficulties and judicial proceedings, to make him/her become a responsible actor of his/her life and no longer a victim of the situation. However, only a fifth of the cases submitted to over-indebtedness committees give rise to recommendations for measures of social support. And, no particular measures are taken regarding the possible sufferings of the debtors whose goods may have already been sold when his/her situation has turned irremediably wrong.

On the contrary, remedies to the sufferings of managers of firms that are encountering economic difficulties have been created thanks to local and private initiatives. To provide psychological support for managers appears to be necessary as the protective function of the judge only extends to children, adults in need of protection, victims of domestic violence and worthy offenders (that is to say the offender whose good behavior justifies the sentence to be adapted). In addition, the trial can be a trauma for the manager as he/she is evicted from insolvency proceedings even if he/she has claimed for them.<sup>57</sup> Because insolvency law fails to take into consideration the manager's sufferings, an organisation was created in September 2013 to provide psychological assistance to managers who are acutely suffering (APESA).<sup>58</sup> This organisation developed a charter with a set of principles to which the signatories undertake to comply with. The special training of practitioners of insolvency law so as to identify the warning signs of suicide amongst managers and their close relatives, the creation of a special alert system, the active support to suffering manager and access to free care are example of the principles encompassed in the charter. But, this kind of therapeutic justice does not aim to contribute to the development of a better judicial decision as far as medical information must not be disclosed to practitioners of insolvency law.<sup>59</sup> There are already 17 commercial courts that have signed the APESA charter<sup>60</sup> and around 40 where its implementation is in progress.

It is likely that other initiatives that fall within the scope of therapeutic justice exist. For example, special agreements and/or cooperation between associations and courts so as for the former to prevent conflicts, to solve problems outside the legal field or to ensure assistance measure like a follow-up of persons subject to protective justice. Only an in-depth survey of several courts practice could draw the current and actual outlines of therapeutic justice in French civil and commercial law.

#### 4. Conclusion

PSJ is clearly not a main and official objective of French civil justice. But, PSJ is achieved by different and converging ways. So far, the initiatives in this direction are still scattered because no national policy aiming at allaying underlying difficulties of disputes exists in France. However, the progress made in French criminal matters so as to deal with PSJ issues, without saying so, gives us hope that a similar impulse could occur in civil matters as well. We need a substantiated demonstration, based on the study of the results of the existing initiatives, that such a policy has a true utility and could improve courts management and the quality of justice that are the main challenges the French justice system is currently facing. ■

56 Art. L.733-11 of the Consumption Code.

57 V. Martineau-Bourninaud, 'Les remèdes à la souffrance du chef d'entreprise en difficulté', *D.* 2016, p. 2529.

58 <<http://www.apesa-france.com>> (last visited 20 November 2018).

59 See, on this principle, M. Binné, 'Du traitement des difficultés des entreprises à la prise en compte des difficultés propres au chef d'entreprise', *Rev. des procédures collectives 2016*, dossier 27.

60 Angers, Angoulême, Béziers, Boulogne-sur-mer, Cahors, Châlon sur Saône, Cherbourg, Coutances, La Roche sur Yon, Laval, Le Mans, Meaux, Melun, Orléans, Rennes, Saintes and Tours.