Latest news of research

May 2012

Penal Issues

CESDIP
Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales
UMR 8183

www.cesdip.fr

The Relations Between the Courts and the Correctional Administration

In this paper, ***Christian MOUHANNA*** *discusses some findings from a study of relations between the courts and the Correctional administration. The study received funding from the « Law and Justice » Research Mission. It was conducted with the collaboration of* ***Joséphine BASTARD, Patricia BÉNEC'H-LE ROUX, Véronique LE GOAZIOU*** *and* ***Benoît GAUTHIER****.*

The enforcement of sentences pronounced by the courts has recently become – or again become – a major concern, not only for the Ministry of Justice and political spheres, but even for the mass media. Whereas the criminal justice actors' priority in the previous years has been on accelerating court procedures and increasing the number of sentences passed, attention is presently focused on their delayed enforcement, and on the conditions under which they are served. Public interest in issues pertaining to the efficiency of the criminal justice system as well as the repeated debates on recidivism and on prisons have generated renewed interest for a complex subject, namely the actual enforcement of prison sentences, especially in the case of short prison terms[1]. In December 2008, the Minister of Justice requested that the *Inspection Générale des Services Judiciaires* (General Inspectorate of Judicial Services) conduct a « precise estimate » of the number of sentences to prison terms awaiting enforcement, including a study of the « possible backlog »[2]. In January 2011, following what is known as the Pornic case involving a recidivist under supervision by correctional services[3], the President of the Republic assigned Éric Ciotti, a parliamentary representative, the drafting of a report aiming at « improving efficiency in the enforcement of sentences »[4]. From then on, the monitoring of sentenced offenders and of their imprisonment has been an issue for public debate.

Also, during the same period, repeated criticism of the deteriorated state of a number of correctional facilities[5] led to the definition of increasingly strict standards for detention conditions. This concern led the Correctional Administration (*Administration pénitentiaire*, *AP*) to adopt a plan for the enforcement and monitoring of the European Prison Rules (EPR)[6], which are a series of standards set up by the Council of Europe and dealing, among other issues, with prisoners' rights and conditions of detention. Moreover, the *AP* has developed a number of structures and arrangements aimed at combating violence and suicide attempts in prison. The creation, in 2007, of the position of *Contrôleur général des lieux de privation de liberté* (Controller General of Custodial Facilities), was consonant with the desire to improve the overall situation in prisons, although the results are not up to par. The November 24, 2009 Correctional Act reasserted and corroborated that priority.

Improving conditions of detention, on the one hand, and having sentences actually enforced on the other hand, are two simultaneous, and in practice relatively contradictory priorities for actors in the judicial and correctional systems. In fact, in the overall context of prison overcrowding, any increase in the number of inmates affects living conditions and security within prisons. In some places, and especially in correctional centres (*maisons d'arrêt*[7]) where the occupancy rate sometimes reaches or exceeds 150%, each increment means greater risks tied to promiscuity and more occupants per cell. Given the limited extent of socio-educational programs, access to them is necessarily more difficult when the number of inmates rises.

How, then, can the two directives imposed on actors in the judicial and prison spheres be reconciled? How can the courts and the prison administration work together, when they function according to two quite different rationales, although both are attached to the same Ministry and are interdependent? This research, intent on understanding the concrete practices of grass roots actors in these two spheres governed by the law, shows the difficulties inherent in handling the many priorities imposed by public safety policies. It covers the whole range of relations between, on the one hand, the court system ranging from Public prosecutors to court clerks and including examining judges and those in charge of the enforcement of sentences (*Juges de l'application des peines*, *JAP*), and on the other hand, the Correctional Administration, including heads of establishments, prison officers and the rehabilitation and probation services (*Services pénitentiaires d'insertion et de probation*, *SPIP*) staff.

[1] See ROBERT Ph., 1985, *et al.*, *Les comptes du crime, les délinquances en France et leurs measures*, Paris, Sycomore (2nd revised edition: 1994, Paris, l'Harmattan).

[2] INSPECTION GÉNÉRALE DES SERVICES JUDICIAIRES, 2009, *Évaluation du nombre de peines d'emprisonnement ferme en attente d'exécution*, Paris, ministère de la Justice, IGSJ.

[3] On January 20, 2011, a young woman was found strangled in a pond in the Loire Atlantique *département*. The presumed murderer had been sentenced about fifteen times and was under correctional services supervision at the time.

[4] CIOTTI É., 2011, *Rapport pour renforcer l'efficacité de l'exécution des peines*, June 5.

[5] See the report n° 449 (1999-2000) written by Jean-Jacques Hyest and Guy-Pierre Cabanel on behalf of the the Senate investigation committee and presented on June 29, 2000, *Les conditions de détention dans les établissements pénitentiaires en France*, and the report by Alvaro GIL-ROBLES (Commissioner for Human rights), 2006, *Sur le respect effectif des droits de l'homme en France suite à sa visite du 5 au 21 septembre 2005*, Strasbourg, Conseil de l'Europe, Commissaire aux Droits de l'Homme.

[6] See the Ministry of Justice brochures: *Les règles pénitentiaires européennes, notre charte d'action – Bilan 2008 – Perspectives 2009*; *Les règles pénitentiaires européennes, une charte d'action pour l'AP - Bilan 2007 – Perspectives 2008*; *Les règles pénitentiaires européennes, une charte d'action pour l'AP – avril 2007.*

[7] Where short term sentences are served.

cnrs
UNIVERSITÉ DE VERSAILLES ST-QUENTIN-EN-YVELINES
Liberté • Égalité • Fraternité RÉPUBLIQUE FRANÇAISE MINISTÈRE DE LA JUSTICE www.justice.gouv.fr

Adjusting Sentences: the Magical Solution?

Relationships between courts and prisons are not restricted to the management of commitment to and release from prison. Sentence-serving may take many forms. First of all, unsuspended imprisonment is not the only sentence pronounced by courts. There is a broad array of penal « responses », ranging from community service work to probationary suspended imprisonment, and including fines and seizure. Next, many sentences call for a mixture of incarceration and suspended imprisonment. Last, a growing number of committed offenders now serve their time « outside the walls ». « Adjusted sentences » enable offenders to serve their time under a different, non-custodial regime. The main measures are day-release, work release – on supervised worksites, for example – and electronic monitoring. In the latter instance, offenders serve their sentence at home, since tagging makes it possible to determine whether they leave the place they are assigned to at unauthorized times. Release on parole is another alternative to prolonged confinement. In all these cases, the *SPIP* is in charge of supervising the offender.

Adjusted sentences therefore provide a way to overcome the contradictions inherent in the system, since sentenced offenders are under constraint but do not suffer from the detention-related problems. Furthermore, the development of these measures saves substantial amounts of money, since the Correctional Administration needs not house or feed those offenders. They seem, in many respects, to be a solution to the problem of prison overcrowding in the context of a rising number of sentences. The November 24, 2009 Correctional Act reasserted the value of adjusting sentences, with the provision that all sentences to less than two years in prison should be converted into non-custodial measures, thus making short prison sentences the exception. And yet, inmates serving these sentences still represent a large proportion of the population incarcerated in correctional centres. The unsystematic enforcement of the provisions of the above Act is unsurprisingly one issue touched upon in our research, along with the limited resources available to the various agencies in charge of implementing the legal provisions. In addition to prison overcrowding, *SPIP*s suffer from the rising number of measures they must handle. The proliferation of adjusted sentences comes up against these services' limited ability to deal with them. This turns out to be a real problem, both for the individuals supervised and for the security requirements inherent in keeping check on those people. The Pornic case illustrated the potentially negative consequences of such shortcomings[8]. More generally speaking, judges are more reluctant to pronounce suspended prison sentences or to convert prison sentences into non-custodial measures, given the lack of assurance that surveillance will be conducted as strictly as is required.

Other material constraints account for the continuation, perhaps even the increase, of short unsuspended prison sentences, in spite of legal provisions calling for the reverse. The influx of sentences to immediate, post-trial, incarceration leaves judges in charge of sentence enforcement – and therefore of converting prison terms into non-custodial measures – unable to find time to work on every case. The first effect of the overall increase in the number of imprisoned individuals is a lack of resources for doing more such conversions. Furthermore, the convicts concerned have the possibility of refusing these adjusted sentences, which involve a much longer supervision period than the mere prison term. And many cannot provide the guarantees of a stable life needed for judges to pronounce a non-custodial measure. For example, it is unthinkable to prescribe electronic monitoring of a homeless person... unless the *SPIP* finds housing for him. But the structural weakness of this type of agency and the reduction in funding of organisations supporting prison inmates or people at risk of imprisonment curbs any such intentions.

In addition, enforcing short unsuspended prison sentences is an easy, relatively rapid way of improving the enforcement statistics on which evaluation of courts, in particular, is based. Purely managerial goals and lack of resources combine to limit the more systematic enforcement of the 2009 Correctional Act, then.

Public Prosecutors and Prison Facilities are Heavily Interdependent

Public prosecutors are among the actors most directly subjected to the numerous obligations resulting from the policies of the Ministry of Justice. Being a link in a chain of command increasingly concerned with productivity[9], they are now evaluated on the basis of the penal response rates produced by their Office, and on their ability to comply with criminal justice policies generating stiffer penalties. The trend toward automatic penalties, through the « minimum sentence » scheme for instance[10], reinforces that pressure. The enforcement rate of court decisions and the average time elapsed before enforcement of the sentence are among the criteria on which courts are evaluated[11]. Public prosecutors must monitor the courts' decisions and make sure the maximum number of, and ideally all sanctions are actually enforced. The upper echelons are especially concerned with short prison sentences, under 2 years, as a number of reports[12] have drawn the Ministry's attention to the shortest sentences, those involving less than six months or less than three months. There are practically never the same enforcement problems for longer sentences. The difficulty for the Public prosecutors' offices resides in the need not only to monitor the sentences pronounced day after day, but to succeed, moreover, in cutting back the backlog of past non-enforced sentences, what some people call the « enforcement closets ».

Within Public prosecutors' offices, sentence enforcement services therefore spend their time exerting pressure on the various departments so that sentenced offenders do their time, in the form of actual detention or adjusted sentences. This is not as simple as it seems, however. From the purely legal standpoint, all they have to do is issue an order with which the Correctional Administration must comply, but actually, their position is not that comfortable. The various services have arguments of their own to advance, to put a damper on the most zealous Public prosecutors' offices. First of all, prison directors, who are responsible for their establishment's inmates, allege prison overcrowding and its consequences in terms of human rights. Correctional Administration officials claim that the application of the EPR, France's conviction by the ECHR, and even their own personal ethics are strictly incompatible with any increase in the number of inmates in their establishments. In addition to or mixed with legal and ethical considerations, there are practical necessities. The lawyers of several inmates have succeeded in having the prisons condemned by administrative courts for improper conditions of detention. They may also appeal to criminal courts, a move which places judges in a most paradoxical situation, as they are asked to judge circumstances – overcrowded prisons – for which they are partially responsible. Furthermore, those same judges are in charge of reviewing the situation of prisons, a job which they do more or less conscientiously. The management of prison personnel is another problem. Without dwelling on their working conditions, it is nonetheless clear that the more inmates there are, the worse those conditions are.

Prison directors can adduce a number of arguments, then, despite the fact that the Public prosecutor's office has formal authority over them. This leads to frequent exchanges between the two entities over the enforcement of unsuspended prison sentences. Concretely, Public prosecutors and their services in charge of enforcement « negotiate » with the director of the closest correctional centre to determine how many people it can take in. The Correctional administration periodically provides the Public prosecutor's office with occupancy rates so that it can adjust

[8] See note 3.

[9] BASTARD B., MOUHANNA Ch., 2007, *Une justice dans l'urgence, le traitement en temps réel des affaires pénales*, Paris, Presses Universitaires de France.

[10] This was introduced by the August 10, 2007 Act which restricted the possibility for judges to pronounce a penalty below a certain minimum in case of recidivism.

[11] « Mission Justice » benchmarks 3.3 and 3.4 for performance (**http://www.performance-publique.gouv.fr/2100/pap/html/dbgpgmpresstratpgm166.htm**).

[12] See notes 2 and 4.

its policy to the constraints at hand in the establishment. These exchanges sometimes involve written agreements, but the *de facto* co-management of enforcement policy is often concealed, or at least discreet, given the risks involved[13]. There is actually a *de facto numerus clausus* limiting incarcerations as far as possible.

Public prosecutors' offices are therefore in a position they themselves deem schizophrenic. On the one hand, they must engage in penal policies leading to growing numbers of incarcerations, while on the other hand they are obliged to shoulder responsibility for the contradictions created by those policies, and this places them in a particularly awkward position. They are, moreover, accountable for the consequences of their decisions. If, for instance, a person sent to prison commits suicide there, they find themselves in the position of defendant, reproached with not having considered the inmate's « human » side, and the risks he runs in prison. Conversely, if a person sentenced to unsuspended imprisonment commits a more or less serious offence when he should have been behind the walls, the mass media, the public at large, and often politicians, looking for scapegoats, tend to adduce judges' « leniency ». In both cases there is no ideal solution, which makes things very uncomfortable for Public prosecutors offices and increases the need for them to work hand in hand with correctional centres.

For the largest Prosecutors offices, this institutional schizophrenia takes the form of strict partitioning of their various functions. Services in charge of responding to the police and of pre-trial supervision will tend to be unbending, since their objective is to increase the penal response rate and the severity of the submissions. Conversely, enforcement services tend to prefer non-custodial measures, considering the prisons' realities. In the smallest court districts, the same staff does both jobs, and one day those prosecutors face individuals for whom they will seek prison terms, whereas the next day they see the same people, for whom they will request adjusted sentences.

Concretely, it is obvious that Public prosecutors' offices are obliged to take the realities of prison « supply » into account when enforcing sentences. This does not apply to the most serious offences, of course, but to the great mass of misdemeanours dealt with by the courts. To a large extent, enforcement policies are dictated by the resources provided by the Correctional Administration, and which weigh indescribably on actual decisions.

[13] For example, in July 2011, Dunkerque's Public prosecutor was summoned to the Ministry of Justice to account for his decision to delay the incarceration of some inmates in an overcrowded prison. He was compelled to rescind that decision. A ministerial instruction dated February 14, 2011 signed by Michel Mercier reasserts the need to examine enforcement dossiers as rapidly as possible.

Sentence Enforcement Judges (*Juges de l'application des peines, JAPs*) : Critical Actors

Whereas the Public prosecutors' offices are weakened by such contradiction-filled situations, *JAP*s, although subjected to the same constraints, have succeeded in maintaining a central position within a sentence enforcement system that rests, to a large extent, on their own decisions. This centrality is all the more striking since various legal provisions defining the organisation of services are aimed at limiting their weight and the discretionary nature of their decisions, often viewed as excessive. In fact, the creation of *SPIP*s in the late 1990s and both the March 9, 2004 Acts, known as Perben II, and the 2009 Correctional Act were attempts to restrict the « power » of *JAP*s. In spite of this, they occupy an inescapable position in the operation of the post-sentencing judicial apparatus. It is up to them to adjust – or not – the sentences handed out by the courts, and they are also in charge of the permission to leave policy and of the fractioning of sentences as well as of other adjustments such as their conversion into day-fines. Upstream – or at the beginning – of incarceration, as well as during detention, *JAP*s continue to play an essential role. Their personal policy conditions not only the number of individuals incarcerated but the « general atmosphere » in the detention ward as well. An overly severe *JAP* or one who is viewed as unfair may cause growing tensions among inmates. This is one of a number of factors at play in the management of a correctional centre: it is a constant concern for the personnel and the hierarchy. For the latter, it is essential that inmates keep an element of hope and a goal, so that « bargaining » can be engaged for a reduction of the time served or for an adjusted sentence in exchange for good behaviour in prison.

The large number of *JAP*s in our sample led to a first discovery: *JAP*s do not all adopt the same policies. For whatever reason, they adopt a wide variety of orientations. This is made possible by their independent status. The options they choose are not totally controlled by a policy or institutional mechanism. The court of appeals does have the ability to reverse some of their decisions. It also sets precedents, which *JAP*s must take into account. However they retain a high *de facto* autonomy. Observation of their practices shows the persistence of highly varied « styles » within the jurisdiction of a same appeals court and within one single court. The existence of contrasting « styles » is particularly evident in two of the observed courts, where *JAP*s, sometimes only two individuals, apply completely opposite policies, to the great annoyance of the other actors, faced with divergences and dissensions affecting the whole organization. The actors in contact with *JAP*s have to « cope », which is to say to adjust to the practices of each of the judges with which they work. Those actors are at the mercy of a change in the position-holder, which may cause considerable upheaval in practices and force the Public prosecutor's office and above all the correctional staff – including the rehabilitation and probation officers – to restructure their action in accordance with the differing policies of the various *JAP*s.

The government's call for an increased number of adjusted sentences, plus the structural overcrowding of correctional centres result in additional work for *JAP*s, whose load is already considerable. As in other areas of the criminal justice system, the outcome is pressure calling for more decisions. Some decisions are made with no hearings, no meetings, more or less automatically.

On the whole, *JAP*s have no desire to apply systematic sentence-adjustment policies. While some have stable decision policies, many are tempted to reassert their power by repeatedly changing their ruling. Sometimes, then, a *JAP* will announce a decision that surprises the other actors. Above all, most of these judges are intent on avoiding being trapped in the « automatisation » of decisions, following fixed sentence-adjustment standards. All defend the need to fine-tune decisions to the offender's personality, a point on which they concur with prison directors. They mention that one of the risks inherent in the recent legislation on sentence enforcement is precisely that of « slipping » toward quasi-systematic adjustment of sentences without thorough inquiry into the particular individual's situation. Whereas presidential pardons were abolished following criticism of their excessively systematic character, the present extension of adjusted sentences would generate even greater automaticity. For this reason some *JAP*s, precisely those who support these measures most heartily, are reluctant to encourage them as much as they could. They refuse to be viewed as having a mere rubber-stamp function, a role that is intolerable in two respects. First, this sort of automaticity is totally incompatible with the *JAP*s' image of their work and with the need for « customizing », *i.e.* of making the right decision for each individual, even if that tailored measure corresponds more to each *JAP*'s conception of the situation than to the individual's very personality. The individualisation of decisions remains a priority to which all *JAP*s refer. Secondly, they also refuse to give in to the convenience represented by quasi-automatic adjusted sentences because they know that if any problem arises they will be held responsible for the decision, even if the managerial context in which it was taken partially escapes them.

This ultimately leads to extremely paradoxical situations in which *JAP*s put all their weight into the fight to curb the trend, to avoid losing out to automatization. This provides an additional argument for those *JAP*s who are opposed to adjusted sentences, justifying their restrictive policy. They feel their identity, their image as relatively « punitive » judges is at stake, and they try to defend it by more or less overtly working against the pro-adjustment

policy or by emphasizing its limits, on behalf of their own personal principles. As for the others, those who tend to favour adjusted sentences, they too may be tempted to proclaim their opposition to these measures for converse reasons. They are loath to be compelled to accept measures they view as insufficiently prepared for. In their opinion, adjusted sentences must be meaningful, be part of a process, have an educational goal. Moreover, the refusal to systematically adjust sentences is also a way of demonstrating their ability to resist policies viewed as overly punitive. They are opposed to the spirit of the text even if they fundamentally agree with the principle of adjusting sentences. All *JAP*s view it as the source of revitalized legitimacy of their personal – and personalized – review of the inmate's situation. These attitudes are facilitated by the mutually contradicting legal provisions, which provide justification for any stance whatsoever. As we see, independently of their inclinations, *JAP*s are united in the firm refusal to be the pawns of a prison administration which would make decisions all alone and merely have them endorsed by a judge. Their strategy, then, is to take the Correctional Administration at their word, through a management of adjusted sentences that infuses them with some purpose other than simply combating prison overcrowding.

*JAP*s are the only magistrates who, to some extent, take prison constraints into consideration. Indeed, lack of resources in prisons in no way interfere with the decisions of other judges be they investigating judges, liberty and custody judges (*Juge des libertés et de la détention*, *JLD*s), or heads of courts. These judges do not have to interact with the prison system and none of them is really interested in the conditions of incarceration. What is perhaps most surprising is the discovery that when *JAP*s sit on a court, they do not take a very different stance. Whereas courts are allowed to pronounce adjusted sentences *ab initio*, which is to say at the hearing, they practically never do so. *JAP*s have no qualms about subsequently « undoing » the unsuspended prison sentence pronounced at the hearing.

--*

The contradictions born of public criminal justice policies are clearly visible when their concrete consequences on the actors in charge of implementing them are analyzed. The combination of contradictory instructions serves to justify paradoxical and/or disguised behaviour. Public prosecutors, for instance, who are prisoners of the institutional schizophrenia generated by these policies, are *ipso facto* dependent on actors in the correctional administration. Directors of prison facilities cite Human Rights and the conditions of detention to curtail the influx of prison sentences decided by judges who are more concerned with penal response rates and with the public's and government's demands than with the actual usefulness and consequences of incarceration. *JAP*s adopt varying sentence adjustment policies, depending on their personal attitudes. A *numerus clausus*, called for by all actors as necessary for securing a thought out policy and for countering public demands for ever-increasing detention rates, is applied covertly. Evaluations of the consequences and effectiveness of prison for offenders, and especially for those given short sentences, are set aside.

Christian MOUHANNA
(*mouhanna@cesdip.fr*)

An investigation covering six sites

The research, conducted in 2010 and 2011, covered six sites and dealt with courts of various sizes and the correctional centres located on their jurisdiction. There were two large Paris area courts (*tribunal de grande instance* or *TGI*), three medium-sized provincial *TGI*s and one small one. The analysis also took the regional echelon into consideration, through interviews at 6 inter-regional Correctional administration head offices and 7 courts of appeal. In all, 210 interviews were conducted with actors of all sorts, at every echelon of the criminal justice and correctional systems, including judges (*JAP*s, liberty and custody judges, examining judges, criminal court presiding judges, heads of courts), Public prosecutors (« real time response » and sentence-enforcement departments), criminal court clerks, directors and clerks of correctional centres, rehabilitation-probation officers, Chief correctional officers, rehabilitation and probation service heads and personnel.

On-site, these interviews were combined with long periods of observation of practices and interactions between actors, both in the various official contexts and in less formal meetings and telephone calls. The data analysis aimed at reconstructing the systems of action and the interactions through which the actors involved operated.

Diffusion : CESDIP : Isabelle Passegué
Dépôt légal : 2e trimestre 2012 **ISSN** : 1155-4169

CESDIP - UMR 8183
Immeuble Edison - 43, boulevard Vauban - F-78280 Guyancourt
Tél. : +33 (0)1 34 52 17 00 - Fax : +33 (0)1 34 52 17 17

Directeur de la publication
Fabien Jobard

Coordination éditoriale
Isabelle Passegué (conception et maquette)
Bessie Leconte (relecture)

Traduction anglaise
Helen Arnold (révisée par **Renée Zauberman**)