

CUSTODIAL SENTENCES : ADJUSTMENT OR EROSION ?

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The criminal code defines the sentences incurred, a judge or a jury decides the nature and amount of punishment to be meted out, after which the public prosecutor orders its implementation, and this is followed by the last phase, actual enforcement, mainly under the authority of the judge in charge of enforcement of sentences. But things are in fact not that linear and systematic, even if we consider custodial sentences only, as is the case in the present study.

Decision to enforce and actual enforcement

The decision to enforce a sentence may simply mean that it is recorded. This is the case for a simple suspended prison sentence, which is just written onto the person's criminal record. If the person is not put on probation, and therefore not registered with the Corrections Department Rehabilitation and Probation Bureau (SPIP in French), he or she may be under the impression of not having been punished. These people forget that, precisely, they have been sentenced to a *suspension of the enforcement of a sentence to personal restraint*, which may very well be enforced in the future, if the suspensive measure is totally or partially revoked. Unsuspended sentences may also not be enforced :

- temporarily, if the non-imprisoned, sentenced person resorts to some appeal procedure (appeal of default judgement, other appeal) ;
- definitively, when an amnesty, a collective pardon or prescription occurred before the sentenced person was found and/or before the public prosecutor's office and the police were able to complete the necessary formalities.

The public prosecutor may also decide to suspend the decision to enforce, and subsequently choose to refrain definitively from enforcement for circumstantial reasons.

Conversely, sentences are immediately enforced when the person is already detained and the court handing down the custodial sentence demands that he or she be maintained in detention. There is one paradoxical exception: when the sentence is "covered by pretrial detention" already served, enforcement results in release from prison.

Technically speaking, the question of the enforcement of sentences is highly complex. Endless discussion and controversy have waged over it for years, with people brandishing more or less extravagant "enforcement rates" at each other. But that issue should not be confused with the one at hand. What interests us is: for all those sentences involving at least partially unsuspended personal restraint which have been enforced, how, concretely, are they implemented ? The question is not whether they have been enforced, but how. The "forms

of sentence-serving" raise a series of questions, all pervaded by the quantitative approach. How long are prison stays with respect to the unsuspended prison term meted out ? Was such detention mitigated by leaves, semi-liberty or employment outside of prison ? (this implies the existence of periods of time during which the prisoner is on the prison rolls but outside the correctional facility). What fraction of sentences is not served owing to reduction of sentences, pardons and amnesties, and what is the relative weight of each of these measures ? How frequent is release on parole (RP) ? What proportion of the sentence is served outside of prison owing to release on parole ? How are these various measures combined ? Are they complementary or competing ? How much of their time in detention do prisoners serve as sentenced offenders ? How do all of these parameters vary with the particulars of the sentenced prisoners ? Only a few of these questions will be addressed here.

Sentences and actual length of detention: an inventory

The June 15, 2000 act reinforcing the protection of the presumption of innocence and the rights of victims includes a large section on the implementation of sentences. It withdraws the capacity of the *Garde des Sceaux* (Attorney General) to grant release on parole for people sentenced to more than five years of imprisonment. In procedures for granting outside employment, semi-liberty, splitting or suspension of a sentence, electronic monitoring and release on parole, the prisoner may be given a hearing and may be assisted by a lawyer, the decision must be motivated and is subject to appeal. Last, the conditions required of a prisoner as justification for release on parole are enumerated and are diversified.

The study briefly discussed here represents a thorough inventory of enforcement of custodial sentences prior to the complete application of these new provisions (in mid-June 2001). It constitutes a valuable point of reference for the future. The preliminary findings were published in *Penal Issues* (12, pp. 10-13 ; box, p. 13) in March 2001. The present paper addresses the crux of the issue: how do **sentences meted out** by the courts differ from the **time actually spent on the prison rolls**.

Table 1 shows the **average sentence pronounced** (unsuspended amount) and the **average duration of actual imprisonment** for each of the 17 sub-cohorts studied. For the sake of clarity, we have defined five groups of offenses on the basis of the sentences involved, ranging from major offenses punished by a prison sentence

of five years or more' (aggravated theft, sexual violence or other sexual offenses with under age victims, voluntary manslaughter) to offenses punished by less than 9 months of imprisonment (breach of the immigration laws, deliberate violence - insulting an officer or contempt of court -, driving offenses including drunken driving with no injury). Whereas the sentences pronounced ranged from an average of 10.2 years (for manslaughter) to 4.5 months (for drunken driving), average duration of actual imprisonment did not vary nearly as much: it ranged from 6.2 years to 3.1 months, but the hierarchy of offenses is practically the same for the two sets of figures.

We have compared the length of actual imprisonment with the length of the unsuspended prison sentence for each prisoner. This proportion, called **Po**, is 69 %, on the average, for the entire sample. The figures in the last column of table 1 are averages calculated on the basis of the

Pos for all prisoners in each sub-cohort. The proportion of time spent in detention ranges from 63 % for the murder sub-cohort to 75 % for people sentenced for "assaulting or insulting an officer or contempt of court" (all moderately serious offenses), a 12-point difference. But irrespective of the type of offense, the average Po proportion is systematically **over 3/5 of the sentence pronounced, and for the aggregate of all offenses the figure is actually over 2/3 of the sentence.**

An increasingly negative correlation is found between the quantum of the sentence and the Po proportion in the different sub-cohorts: groups 1 and 2 (sentenced to 2 years or more) have a Po proportion below 70 %, groups 3 and 4 (sentenced to between 9 months and under 2 years) have a Po of about 70 % ; last, in group 5, the Po is 70 % or higher. In other words, the harsher the sentence, the lower

Table 1. Sentences pronounced. time in prison

	Average sentence pronounced	Average length of actual detention	Time spent Po (%)
1. Major offenses: average sentence 5 years or more			
Murder (major offense)	10.2 years	6.2 years	63 %
Sexual violence or other sexual offense involving a juvenile (major offense)	6.2 years	4.2 years	69 %
Aggravated theft (major offense)	5.8 years	3.7 years	65 %
2. Moderately serious offenses: average sentence 2 years to under 5 years			
Sexual violence or other sexual offense with under age victim (moderately serious offense)	2.1 years	1.3 years	67 %
Drug offenses except sale only or use only (moderately serious offense)	2.1 years	1.4 years	67 %
3. Moderately serious offenses: average sentence 1 year to under 2 years			
Fraud. swindling. abuse of trust	1.1 years	8.6 months	66 %
Sale of drugs	1.1 years	9.3 months	70 %
Theft with violence	1.1 years	9.4 months	69 %
4. Moderately serious offenses: average sentence 9 months to under one year			
Theft without violence	10.6 months	7.1 months	69 %
Deliberate violence with adult victim	10.4 months	6.9 months	70 %
Forgery and use of forged administrative documents	9.7 months	7.0 months	73 %
Receiving	9.4 months	6.1 months	69 %
Drug use only (with no other drug offense)	9.2 months	6.2 months	70 %
5. Moderately serious offenses: average sentence less than 9 months			
Breach of immigration laws	6.6 months	4.7 months	74 %
Assaulting or insulting an officer or contempt of court	6.3 months	4.5 months	75 %
Failure to produce administrative documents, driving offenses	5.0 months	3.3 months	70 %
Drunken driving with no injury involved	4.5 months	3.1 months	71 %

is the proportion of it actually spent in prison.

Averages and dispersion: the example of manslaughter

On the average, people in the sub-cohort convicted of

¹ French law divides offenses into three categories, on the basis of increasing seriousness :

- *contraventions* (termed "minor offenses" in the text), which are judged by *tribunaux de police* ;
 - *délits* (termed moderately serious offenses), which are judged by *tribunaux correctionnels* ;
 - *crimes* (termed major offenses), which are given a jury trial by a *cour d'assises*.

² This is the average proportions method. Another method used in this study, the average duration method, calculates the total of all durations for each sub-cohort, the total of all sentences and the ratio between the two figures. See BARRÉ (M.D.), TOURNIER (P.V.), coll. LÉCONTE (B.), *La mesure du temps carcéral*, Paris, CESDIP, 1988.

manslaughter were sentenced to 10.2 years and spent 6.2 years, or 63 % of the sentence pronounced, in prison. This fact is definitely valuable in that it provides an order of magnitude, but it is also important to consider the dispersion around these averages. As may be seen in the findings time spent in detention ranges from 63 % for the discussed below, the judicial and correctional itinerary of this "average murderer" is very much an abstraction.

If we take the **sentence pronounced**, 27 % were sentenced to less than 5 years, 18 % to 5 to 10 years, 25 % to 10 to under 15 years and 30 % to 15 years or more. In 36 % of cases the sentence involved a safety period (no possible mitigation).

Time effectively spent in detention was distributed as follows : 39.3 % less than 5 years, 41.0 % from 5 to 10 years, 16.2 % from 10 to 15 years and 3.4 % 15 years or more (see figure 1). The distribution according to the **proportion of time spent in detention** is shown in figure 2.

Reductions of sentences and release on parole

For each released convict, we have broken the sentence down into three parts: time spent in detention, time not served because of reductions of sentence, individual or collective pardons and amnesties, and time served outside of prison in the framework of release on parole. Comparison of these figures with the quantum of the sentence pronounced yields three proportions: the proportion - P_0 - of the quantum pronounced actually spent in detention (the proportion discussed above), the proportion P_1 not served because of reductions, pardons and amnesties, and the proportion P_2 served outside of prison. By definition,

$$P_0 + P_1 + P_2 = 100 \%.$$

Theoretically...

- A sentenced offender given every possible reduction of sentence for good conduct (with no pardon, amnesty or release on parole) would have a P_0 of 75 %, a P_1 of 25 % and a P_2 of zero.

- A sentenced offender (non-recidivist) given the most liberal release on parole (with no reduction of sentence) would have a P_0 of 50 %, a P_1 of zero and a P_2 of 50 %.

- An offender (non-recidivist) sentenced to 10 years and given a 3-month reduction of sentence every year for good conduct would be in the position of having a 9-year sentence at the end of 4 years. After 4 and a half years, he would therefore have served half of his sentence and would be eligible for release on parole. The P_0 would be 45 % here, with a P_1 of 10 % and a P_2 of 45 %.

As seen above, for the sample as a whole, the proportion of the sentence spent in detention (P_0) was 69 %, with 27 % of the sentence not served because of reductions of sentences, pardons and amnesties (P_1), and only 4 % of the sentence served outside of prison following release on parole (P_2). This low figure is not surprising, since only 11.5 % of sentenced offenders were released on parole (see box). This is a far cry, then, from the maximum from which a sentenced offender may hope to benefit according to legal provisions.

Table 2 breaks down the quantum pronounced into P_0 , P_1 and P_2 for each of the 17 sub-cohorts. The proportion of the sentence not served because of reductions of sentences, pardons and amnesties (P_1) is relatively constant, ranging from 24 % to 30 %. The fraction served outside of prison is much smaller (8 % at most), but accounts for most of the variations in P_0 .

Last, table 3 distinguishes between those sentenced prisoners who were released on parole and those who left prison at the end of their term. For parolees, P_0 ranged from 47 % to 59 %, whereas it was between 67 % and 76 % for those discharged at the end of their sentence. The result is an amplitude of 29 points, with the variation depending on the type of offense and of prison-leaving.

Words...

Some people view the fact that custodial sentences are not entirely spent in detention as indicative of excessive laxness. They believe that any sentence pronounced should be served to the end. To denounce the gap between the sentence pronounced and the term actually served in detention, these people speak of "**the erosion of sentences**". Others, on the contrary, believe that once a sentence has been meted out, it should be adjusted to the prisoner's evolution while in prison, the objective being rehabilitation. The term used then is not erosion, but "**adjustment of sentences**". In Europe this latter position is definitely most prevalent. This is evidenced, for example, by the recommendation adopted by the Committee of Ministers of the Council of Europe on September 30, 1999 on *prison population inflation*. In France, it is also advanced by the

¹Council of Europe. Prison overcrowding and prison population inflation. Recommendation No. R(99)22 adopted by the Committee of Ministers of the Council of Europe on 30 September 1999 and Report prepared with the assistance of KUHN (A.), TOURNIER (P.V.) and WALMSLEY (R.), *Legal Issues*, 2000, 206 pages.

²Commission Farge, Commission sur la libération conditionnelle, *Rapport à Madame la Garde des Sceaux*, 2000.

Figure 1. Distribution of the sample according to sentence pronounced and time spent in detention
Sample : "Murder"

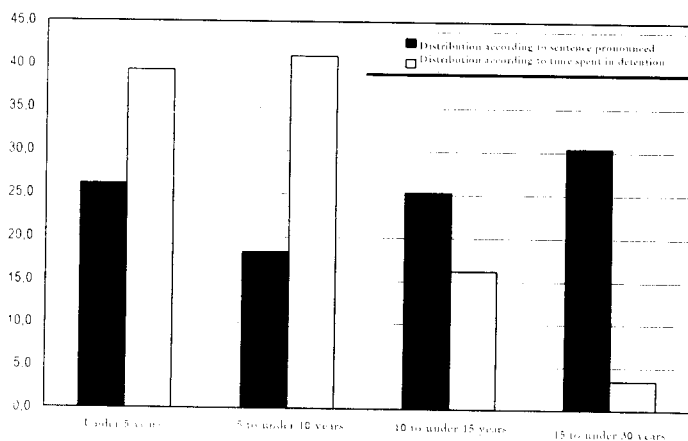
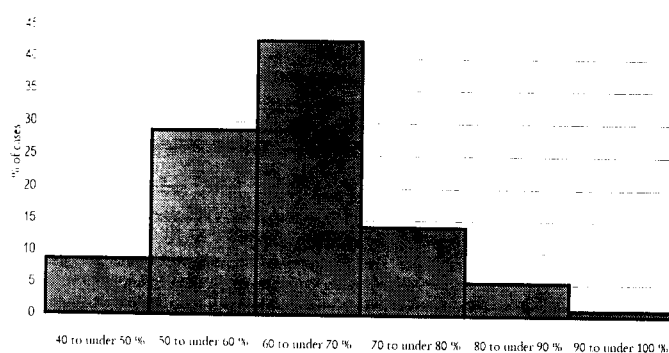


Figure 2. Distribution according to the proportion of time spent in detention
Sample : "Murder"



"Farge" report on release on parole³, as it was in the Cartier report⁴. The parliamentary reports on the situation in French prisons, published in June 2000 are in the same vein.

However, the concept of the adjustment of sentences cannot be meaningful unless procedures for granting such measures to sentenced prisoners are effectively individualized and personalized. Now it is a fact that for close to twenty-five years there is an overall trend in France toward lesser individualization and more "mass measures". This has translated into fewer releases on parole, be they granted by the judge in charge of enforcement of sentences or by the *Garde des Sceaux* (prior to January 2001), a reduction, in 1986, of the statutory possibilities for reducing sentences and the introduction and extension of safety periods. Conversely, reductions for good conduct are granted almost systematically (since 1973), and collective pardons are granted annually (since 1991). The findings discussed above show the outcome of these trends.

Much of the debate around the future bill on Corrections revolves around "the meaning of the sentence". Any attempt to address that question must necessarily answer another, less frequently asked question: that of the meaning of enforcement of the sentence; of the meaning society

wishes to give to the time spent in prison. How long should it be, how should it be modulated between imprisonment and the outside world, how can release be anticipated, to make it easier to return to life outside prison.

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For further information, the reader is referred to :
KENSEY (A.), TOURNIER (P.V.), coll. GUILLONNEAU (M.), LAGRANDE (V.) *Placement à l'extérieur, semi-liberté, libération conditionnelle. Des aménagements d'exception*, Guyancourt-Paris, CESDIP, Études & Données pénales, 2000, 84 et direction de l'Administration pénitentiaire, 2000, 2 volumes.

KENSEY (A.), TOURNIER (P.V.), *Base de données Aménagement. Peine prononcée, détention effectuée*, Guyancourt-Paris, CESDIP-direction de l'Administration pénitentiaire, Concepts & Méthodes, 2001, 22.

TOURNIER (P.V.), KENSEY (A.), *Aménagement des peines privatives de liberté, des mesures d'exception*, *Questions Pénales*, XIII-3, juin 2000.

Method

The sample : the study covered sentenced prisoners discharged between May 1, 1996 and April 30, 1997 for one of the following reasons: sentenced covered by pretrial detention, end of sentence (including pardons and amnesties), release on parole (judge in charge of enforcement of sentences or *Gardes des Sceaux*), payment in lieu of civil imprisonment or civil imprisonment completed, escort to the border. 2,859 records were examined and 17 sub-cohorts were defined on the basis of the national file on prisoners (FND). Sampling rates ranged from 1/30 to 1/5 depending on the offense. Given the frequency of the offenses selected, the 17 categories represented 85 % of all released sentenced prisoners.

Advance release : Only 1.5% had been granted employment outside of prison, while 7.5 % were granted semi-liberty. 11.5 % of all discharged prisoners had been released on parole. 82 % of all discharged prisoners had not received the benefit of any employment outside of prison, semi-liberty or release on parole.

³ Commission Cartier, Commission d'études pour la prévention de la récidive des criminels, *Rapport à Monsieur le Garde des Sceaux* 1994, 124 pages, annexes).

Table 2. Reductions of sentences and time spent outside of prison (release on parole)

	Time actually spent P _o (%)	Reductions of sentences (P ₁) (%)	Outside prison (RP) (P ₂) (%)	Sentence pronounced
Murder (serious offense)	62.6	28.9	8.5	100.0
Aggravated theft (serious offense)	65.5	29.0	5.5	100.0
Fraud	66.3	26.5	7.2	100.0
Sexual violence (moderately serious offense)	66.6	30.1	3.3	100.0
Drug offenses, except sale only or use only (moderately serious offense)	67.4	26.2	6.4	100.0
Sexual violence (serious offense)	68.6	27.0	4.4	100.0
Theft with violence (moderately serious offense)	68.9	27.2	3.9	100.0
Receiving (moderately serious offense)	69.0	27.4	3.6	100.0
Theft without violence (moderately serious offense)	69.5	28.5	2.0	100.0
Failure to produce administrative documents, driving offenses	69.6	27.3	3.1	100.0
Deliberate violence with adult victim (moderately serious offense)	69.8	26.8	3.4	100.0
Drugs (use only)	70.1	28.6	1.3	100.0
Sale of drugs	70.2	27.9	1.9	100.0
Drunken driving	70.7	27.0	2.3	100.0
Forgery and use of forged administrative documents (moderately serious offense)	73.5	23.5	3.0	100.0
Breach of immigration laws	74.2	23.9	1.9	100.0
Assaulting or insulting an officer or contempt of court (moderately serious offense)	74.6	23.6	1.8	100.0

Table 3. Proportion (%) of time spent in detention (P_o) for beneficiaries and non-beneficiaries of release on parole

	P _o discharges at end of sentence (%)	P _o of RP (%)
Murder (serious offense)	67	54
Aggravated theft (serious offense)	68	58
Fraud	70	51
Sexual violence (moderately serious offense)	68	52
Drug offenses, except sale only or use only (moderately serious offense)	71	54
Sexual violence (serious offense)	71	59
Theft with violence (moderately serious offense)	71	54
Receiving (moderately serious offense)	72	48
Theft without violence (moderately serious offense)	71	51
Failure to produce administrative documents, driving offenses	72	47
Deliberate violence with adult victim (moderately serious offense)	72	53
Drugs (use only)	71	53
Sale of drugs	71	59
Drunken driving	72	53
Forgery and use of forged administrative documents (moderately serious offense)	75	59
Breach of immigration laws	75	56
Assaulting or insulting an officer or contempt of court (moderately serious offense)	76	57