

THE NEW PRISON POPULATION INFLATION (2001-2007)

Since 2002, French prisons have been overcrowded, with effects on detainees' living conditions that have been denounced consistently by observers such as the European Committee for the Prevention of Torture (CPT). In 2001 the Committee had already pointed to overcrowding in some detention centers (maisons d'arrêt). Its report to the French government after its autumn 2006 visits emphatically repeats this fact (Le Monde, December 7, 2007). What else could it have done? Between January 1, 2001 and January 1, 2007, the prison population increased by 22%, representing an additional ten thousand inmates, whereas prison capacity only increased by one thousand.

Detention centers¹ are overcrowded: their average density (of occupancy) is 128%, and density exceeds 150% in half of them. Theoretically, inmates there are people awaiting trial or final sentencing, or sentenced prisoners with no more than one year to serve. But others sentenced to longer terms stay there while awaiting transfer to a correctional institution. For the latter, the waiting period is long and probably getting longer, since the Corrections Administration policy is to maintain a normal population density in correctional institutions.

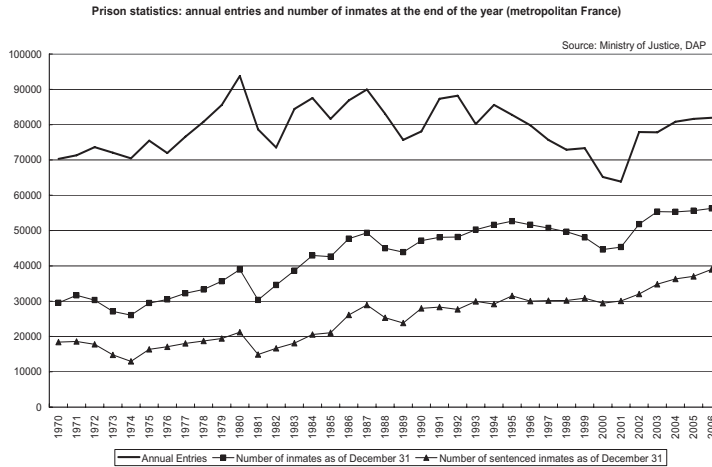
How did we get to this point? Corrections data shows the exact timing of this trend reversal, some of the reasons for

which date back further than 2002. From this starting point we will attempt to understand the upstream changes in prosecutorial procedures and offenses punished. These changes have resuscitated the central role of unsuspended imprisonment.

PRISON POPULATION INFLATION IN EUROPE

The prison population rate in metropolitan France rose from 75.3 per 100,000 inhabitants on January 1, 2001 to 91.5 on January 1, 2007. In spite of this marked prison population inflation, the French government repeatedly depicts this situation as average with respect to other European countries. In an interview published in reaction to the CPT report (*Le Monde*, December 7, 2007), the Director of the Corrections Administration actually contends that France has one of the lowest prison population rates in Europe. This is far from accurate: the lowest rates continue to be found in Northern Europe.² While being better than the Eastern European countries with a prison situation inherited from the Soviet era is no exploit, it is a fact that some of France's neighbors—England and the Netherlands in particular—do have higher rates. One certainly may contend that those countries also have higher crime rates, but comparative studies show no overall statistical link between prison population rates and rates of offending. Last, while security-oriented trends have produced inflated prison populations in much of Europe, comparable offending rates have had little or no effect on other neighboring countries (in Switzerland and Germany, or only very slightly in Italy). The discrepancies are therefore due to the penal policy orientations of the different countries.

Chart 1: Evolution of the Prison Population (1970-2006)



A SUDDEN REVERSAL OF TREND

Several factors contribute to variations in the prison population rate. Some relate to the serving of prison sentences, others to recourse to pretrial detention. In both cases, the number of inmates present at a given time (the stock) depends on the flow of prison entries and the length of detention. Following a long upward trend between the mid-‘70s and the mid-‘90s, the number of inmates decreased for five consecutive years starting in 1996 (chart 1). Prison entries had begun to decline earlier, but the increasing average lengths of detention had kept the stock figures up. From 1996 to 2001 the only stock to decline was that of pretrial prisoners, while the number of sentenced prisoners remained stable. The discrepancy is even greater for flows, with a large drop in entries of pretrial (not finally sentenced) prisoners and a rise in entries of sentenced prisoners. It seems, then, that the series of legislative reforms tending to

restrict recourse to pretrial detention had repercussions on judicial practices, at least in that more individuals under judicial investigation were released. The June 15, 2000 law on presumed innocence reinforced that trend. Its enforcement as of January 1, 2001 had visible effects, but these were suddenly interrupted late in 2001, following what was known as the “Chinese man” affair (the dramatic capture—in which two police officers were killed—of a released ex-prisoner caught in the act of committing burglary. The man had been released following pretrial detention.) From October 2001 on the number of pretrial prisoners increased considerably.

PRACTITIONERS A STEP AHEAD OF THE LEGISLATION

The year 2002 was marked by a sudden rise in prison entries. The annual flow rose by 22% from 2001. From the turn of the year, even before penal reforms set in motion following the elections, incarcerations increased sharply. With presidential elections in the offing and the media focusing on concern with crime, judges responded to calls for harsh sentences. Whereas Jospin’s [socialist] government was accused of being too lenient, the criminal justice system itself was critiqued as well, for not enforcing the sentences pronounced. The accusation actually came from within: according to a document written in 2001 by a judges’ union, the Union Syndicale des Magistrats (USM), and widely publicized in the press, half of unsuspended prison sentences were virtual, since they were never enforced. The Ministry of Justice then launched a study whose findings went unnoticed, and were only made available in April 2002. They showed that two thirds of the sentences pronounced in

1999 had been enforced. The discrepancy was smaller than claimed by the USM, and was accounted for primarily by the impossibility of enforcing a sentence when the offender cannot be found, as well as by the pardons and amnesties which interrupt the process, and last, by decisions by judges in charge of enforcement of sentences, who recommend arrangements avoiding imprisonment for very short prison sentences.

The study also showed that in more than half of the cases, enforcement was made possible by pretrial incarceration, either for an inquiry or in a summary trial. Suspects may then be brought to the *correctionnel* [first instance] court under police escort or following brief pretrial detention, and incarcerated immediately after the hearing if sentenced to an unsuspended prison term. Practitioners, and especially public prosecutors, had no need for that study; they knew how much the procedure influences the sentence pronounced and its enforcement. They certainly were not impervious to that criticism of “virtual” justice. So it was precisely those incarcerations before final judgment that rose sharply from early 2002 on (with a 27% increment between 2001 and 2002).

The number of entries after final judgment increased as well (by 12%). Available sources do not differentiate between entries due to more sentences and those indicating more systematic enforcement of sentences pronounced. On the whole, the outcome is an increased number of inmates given short sentences, and who, like pretrial prisoners, contribute to the overcrowding in detention centers.

The leap observed in 2002-2003 constitutes the largest part of the total variation between 2001 and 2007, both for

stock and for prison entries. This reversal of the trend was followed by spurts of growth, and each new height reached, rather than satisfying partisans of stiffer repression, seemed to serve as a take-off for the next phase of growth.

After the sudden reversal in 2002, mostly due to prosecutorial variables, we will now see that the increased number of inmates is also linked to changes in sentencing practices.

GREATER CRIMINALIZATION OF ACTS OF VIOLENCE

The types of cases dealt with by the criminal justice system may change more or less rapidly. Data based on types of offenses count individuals suspected at the police procedural stage and sentences recorded on the criminal record. The most clear-cut change since the mid-'80s is the definite rise in deliberate acts of violence, including assault and battery, sexual violence, threats, and disrespectful conduct. There is no saying whether or not the increase in sentences corresponds to an increased number of acts suffered by victims and of suits filed by the latter. It does essentially go along with reinforced legislative provisions punishing violent offenses. For instance, with the gradual addition of more aggravating circumstances for deliberate assault and battery causing work incapacitation of less than eight days, offenders now face imprisonment (for a misdemeanor) rather than a mere fine (for a petty offense). The number of police suspects for such misdemeanors rose by more than 60% between 2000 and 2006. Sentences did not increase at the same rate (29% between 2000 and 2006).³ The proportion of unsuspended prison sentences did not vary much (26% in 2006), and their average length is stable (6.4 months in

2006). When absolute figures rise from 10,400 in 2000 to 14,100 in 2006, then, it is mostly because of a greater number of prosecutions, especially for marital violence, and four-fifths of these sentences did not exceed one year.

One reason for this increment is therefore the increased number of short sentences inflicted for deliberate assault and battery.

ADJUSTMENT OF SUITS FOR PROPERTY OFFENSES

Conversely, the number of sentences for theft dropped, and unsuspended imprisonment was less frequent (about 31,600 in 2006 as against 34,200 in 2000), although average stays were slightly longer (6.2 months instead of 5.9). This trend is not new; it began in the mid-'80s. It is due both to fewer theft suspects and to the development of alternatives to prison (community service orders) and even to diversion, with prosecution replaced by mediation or reparation). Violent theft is not a separate category within statistics on thefts with "aggravating circumstances". The latter were stable between 2000 and 2006, so the drop in sentences mostly pertains to simple theft. There were slightly more sentences for receiving/handling, fraud and breach of trust, as well as for destruction or deterioration of property, as well as more unsuspended prison sentences.

Overall, these contradictory trends in violent acts and property offenses add up to about 4,100 more sentences; they are far from accounting for the additional 20,800 unsuspended prison sentences for misdemeanors in 2006, compared to 2000 (117,200 versus 96,400).

FREE REIN FOR POLICE INITIATIVE...

This increase in prison sentences for misdemeanors is primarily fed by three groups: 1) motoring offenses (about 11,000 additional sentences including 3,000 for drunken driving and 6,000 for driving without a license or despite a suspended license), 2) drug offenses (about 4,800 additional sentences), and 3) offenses against the “administration and judicial authorities”, the most frequent of which are offenses against a public official (in all, an additional 1,700 sentences).

The rise in custodial sentences pronounced between 2000 and 2006 is therefore mostly due to cases in which the police has the initiative, and does not directly involve private parties who fall prey to offending. There is no denying the importance of road safety, the impact of drug consumption and dealing, or the problems of public order-maintenance, but it is nonetheless clear that the official justification for accentuating repression (that is, to protect potential victims) and the acceptance of the resulting prison overcrowding is irrelevant here.

The 2001-2006 period does not show any sudden change for these three categories of offending. The rising number of short unsuspended prison sentences for motoring offenses, especially drunken driving, began long before the road safety campaign subsequent to the 2002 presidential election. What is new is their extension to cases of driving without a license, which is probably indicative of closer monitoring of the enforcement of what are known as “alternative” sentences, and which in the case of motoring offenses mostly involve drivers’ licenses. As for drugs, the systematic prosecution of offenses other than use and the harsh sentences (long prison terms) are not new either. They were one factor in the inflated prison

populations of the late '80s and early '90s. As for insults, rebellion and violence against public officials, police statistics show a constant, sharp rise since 1993, and these offenses have always been severely punished.

Last, in all three cases, and as opposed to those discussed earlier (acts of violence and property offenses), we find all the features of those “penal tracks”, fed at the start by police initiatives.⁴

...BY ACCRUING REPRESSIVE POTENTIAL

But practices have also changed here, owing to the creation of new possibilities for bringing cases to first instance court. From the mid-'90s to 2003, the annual number of sentences oscillated around 400,000, with no marked trend. A sharp rise is seen thereafter (528,000 sentences in 2006), resulting from the implementation of new procedures. Taken together, “*composition pénale*”, a sort of plea-bargaining, “*l'ordonnance pénale*” and appearance following prior admission of guilt (known as “pleading guilty”) represent about one third of cases prosecuted by first instance courts in 2006. All these new prosecutorial tracks ending with a sanction that appears on the person’s criminal record (and is therefore counted as a sentence) are mostly reserved for cases in which imprisonment is not envisioned. Importantly however, their very economizing on hearings has opened possibilities for increased prosecution in other fields. Freed of the chore of examining thousands of simple, often repetitive cases (like drunken driving) punished by applying more or less explicit scales, judges have had more time to devote to other cases. The

extension of summary trials, now applicable to a wider range of cases, could proceed at a faster pace.⁵

PROBATIONARY MEASURES, AN ANTIDOTE TO THE SAFETY CRAZE?

The decision of the President of the Republic elected in May 2007 not to grant any amnesty or collective pardon means that the high July level (62,000 inmates) stayed as high after the summer. Those early releases with no prior preparation have received widespread criticism.⁶ There is no assurance that they will be replaced by more probationary measures. Only electronic tagging has increased significantly, although it is still rather infrequent. There are reasons to doubt the effects of official injunctions recommending it, since paroling has declined and other types of probationary measures are stagnating.

Judges are in fact caught between two contradictory recommendations: on the one hand they are asked to pronounce more unsuspended prison sentences, and on the other hand, to fight prison overcrowding by encouraging probationary measures. Presumably, they have no desire to let the government pass the responsibility for “virtual sentences” on to them while retaining the supposed benefits of flaunting its policy of increased repression. Moreover, the importance of mixed sentences is too easily overlooked. In 2006, 22% of unsuspended sentences to personal restraint entailed a part with suspended imprisonment, 14% of which demanded probationary measures.⁷ When unsuspended imprisonment and socio-educational follow-up after release are combined from the start, there are that many fewer cases in which post-sentencing probationary measures are appropriate, especially for the shortest sen-

tences. In practice it is not unusual to see the combination applied in case of recidivism following a first totally suspended sentence.

RELENTLESS FOCUS ON RECIDIVISTS, A NEVER-ENDING SPIRAL

The last legislative episode of the summer of 2007 in which “minimum sentences” were set up for cases of second recidivism (3rd conviction within a fixed time) is one additional signal to judges encouraging them to resort increasingly to imprisonment. It is almost impossible to foresee the exact impact on the judges’ decisions. Also, if more months of prison are meted out to recidivists, it remains to be seen how those sentences will be enforced. Given the extent of overcrowding in the detention centers to which they should be sent, some people very aptly point out that the law in no way curtails the prescription of suspended sentences.⁸

What is most disturbing about this strengthening of sentences applicable to recidivists is the absence of any serious basis to the assertion that harsher—and especially longer—sentences are susceptible of reducing recidivism.⁹ When calls for minimum sentences argued that more sentences had been pronounced in 2006 for recidivism in the legal sense,¹⁰ the height of the non-evaluation of existing arrangements was reached. Those who used that argument deliberately ignored the existence of a previous law and official instructions specifically aimed at more systematic consideration of recidivism. Will even greater severity be required a year or two from now if, as we may surmise, the number of sentences for recidivism has fur-

ther increased, mechanically, owing to the overall rise in sentences?

The new 1994 penal code obliged judges, for the first time, to specifically motivate their recourse to unsuspended imprisonment. Soon thereafter (1995) the Court of Cassation allowed “standard” motivations again. Recidivism ranks first among motives that suffice to justify incarceration. This was taken a step further when a specific motivation was required for not applying that sentence automatically. Objections were raised, then; people saw this as calling into question the principle of individualized sentences. But it was very late by then; a path had already been traced, corroborating the role of past judicial history as the key factor in recourse to imprisonment, be it through prescribing either pretrial detention, a type of prosecution (summary trial) leading to rapid incarceration, or a sentence with at least a partially unsuspended prison term.

IN CONCLUSION

Owing to prison population inflation, budget arbitration has given priority to programs for building extensions to correctional “facilities”, in a never-ending race against overcrowding. The other sentence-enforcement sector, probation services, suffers from another, at least as serious form of overcrowding, but one which is most often neglected. As of January 1, 2007, a staff of 2,800 rehabilitation and probation officers monitored some 146,000 individuals in addition to their work with 59,000 inmates. There were 23,100 corrections workers assigned to surveillance at the time. The creation, since 2003, of 800 new positions for rehabilitation and probation counselors is significant but not of a nature to offset the imbalance

Bruno Aabusson de Cavarlay

favoring prisons. With programs for a 13,200 increment in prison capacity, this course will be difficult to follow, since more prison guards will have to be recruited. Isn't it time to ask whether an increase in the human and financial means devoted to developing alternatives to prison wouldn't do as much, and differently, to help reduce recidivism?

The New Prison Population Inflation (2001 – 2007)

NOTES

- 1 See P.V. Tournier, *Loi pénitentiaire, contexte et enjeux* (Paris: L'Harmattan, 2007).
- 2 B. Aubusson de Cavarlay, M. Aebi, N. Stadnic, "Prison Entering and Length of Detention. The Diversified Correctional Situation in Europe", *Penal Issues 2* (2007) (www.cesdip.org).
- 3 The reference year is 2000 because the 2001 findings are affected by the 2002 presidential amnesty.
- 4 B. Aubusson de Cavarlay, "Filières pénales et choix de la peine" in L. Mucchielli, Ph. Robert (eds.), *Crime et sécurité, l'état des savoirs* (Paris: La Découverte, 2002), 347-355.
- 5 B. Bastard, Ch. Mouhanna, *Une justice dans l'urgence. Le traitement en temps réel des affaires pénales* (Paris: PUF, 2007).
- 6 R. Lévy, "A Distinctively French Custom: Recurrent Pardons and Amnesties", *Penal Issues 2* (2006) (www.cesdip.org).
- 7 For an analysis of sentences pronounced, see B. Aubusson de Cavarlay, "L'emprisonnement ferme, au coeur des sanctions prononcées", *Informations sociales* 127 (2005), 32-41.
- 8 "Avis de la Commission des lois du Sénat sur le projet de loi de finances pour 2008", Justice – Administration Pénitentiaire.
- 9 A. Kensey, *Prison et récidive* (Paris: A. Colin, 2007).
- 10 The Attorney General (Garde des Sceaux), presenting a bill on recidivism to the Senate on July 2, 2007.