



ENGLISH TRANSLATION  
ORIGINAL VERSION = FRENCH

United Nations Committee Against Torture  
44<sup>th</sup> session

*Observatoire international des prisons - french section*

information on  
the treatment of individuals detained in French prisons

*(consideration of France's 4<sup>th</sup> to 6<sup>th</sup> periodic reports)*

April 2010

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The *International Observatory of Prisons – French section* (« *Observatoire international des prisons – section française* ») (hereinafter OIP) is a non-governmental organisation with consultative status (*roster*) the United Nations. Since its creation in Paris in 1996, the OIP is dedicated to promoting the respect of fundamental rights and individual liberties of incarcerated persons. The organisation bases its action on norms of internal law and international instruments for the protection of human rights prohibiting torture and other inhumane and degrading treatments or punishments.

The OIP monitors and raises awareness on prison conditions in France, alerts public opinion, public authorities, relevant agencies and organisations on the ill-treatment that they may be subject to and the overall observed failures ; it informs prisoners of their rights and supports their steps to uphold them, in particular before the courts ; it promotes the adoption of laws, regulations and other measures aimed at guaranteeing the defense of persons and the respect of their rights; it favours the reduction of the scale of sentences, the development of alternatives to criminal proceeding and substitutes to sanctions of deprivation of liberty.

The aim of the present report is not to provide for an exhaustive description of prison conditions in France. It only focuses on certain elements affecting the implementing of the Convention against Torture and other cruel, inhumane and degrading punishment or treatment. Several issues relating to the respect of the human rights of prisoners are not dealt with, in particular with regards to economic, social and cultural rights and some civil or political rights such as the freedom of expression, of thought, conscious and religion or the right to privacy and family life.

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## I. Contextual overview

### (1) Penal Policy

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#### 1.1. Legislative inflation

Since November 2001, penal policy has been following a permanent and inflationary reform movement, jeopardising the fundamental principles of criminal law, and the principle according to which imprisonment should be a sentence of last resort. France first focused its action on the systematisation and acceleration of response to offences, through the law of 9 March 2004, strongly enhancing the powers of the accusation at the expense of the rights of the defence. Then it multiplied texts increasing the repression of crimes and offences, in particular for re-offenders, through the laws of 12 December 2005 *concerning the treatment of re-offending of criminal offences*, of 5 March 2007 *concerning the prevention of delinquency*, and the law of 10 August 2007 *strengthening the fight against re-offending of adults and minors*, the latter establishing minimum sentences for crimes and offences (punished of more than 3 years) committed as re-offences. The law of 25 February 2008 *concerning the safety detention<sup>1</sup> and the declaration of criminal irresponsibility due to psychiatric disorders* opens the possibility of an unlimited detention in Judicial Socio-Medical Centres on the grounds of a prognosis of dangerousness, despite being deemed incompatible with science data, in particular by the High Authority of Health. This subjection of individual liberty to the arbitrariness of a prediction amounts to a turning point in the country's criminal legislation, and aroused considerable opposition among lawyer and magistrate organisations, human rights defenders, psychiatry unions, and the four chaplaincies in prisons. Last to date, the law of 10 March 2010 *aimed at reducing the risk of criminal re-offending and carrying various measures of criminal procedure* sought to « draw consequences » of the reservations made by the Constitutional Council on the law concerning safety detention by implementing certain recommendations of the Lamanda report of May 2008 (named after its author the president of the *Cour de cassation*) on the « criminal re-offending of dangerous convicts ». To this end, it broadened the scope of safety supervision measures ("surveillance de sûreté"), thus enlarging the possibilities of placement in safety detention. The *Contrôleur général des lieux de privation de liberté* (CGLPL - national preventive mechanism according to the OPCAT) does not approve these provisions, but is not that surprised either : « *The instructions taken in the last twenty years have imposed the fact that the implementation in normative texts of concepts as heterogeneous as the principle of precaution, dangerousness, or risk, require the development heightened 'supervision' or 'detention' safety measures* », as can be read in his latest report published on 10 March 2010.

This penal policy goes against France's international commitments, in particular those consecrating the fact that the deprivation of liberty should be a sanction of last resort. A direction firmly criticised by the National Consultative Commission for Human Rights (CNCDH) in its opinion on alternatives to detention of 14 December 2006: « *The policies in criminal matters are marked with numerous contradictions, legislative changes, as well as a multiplication of criminal offences and aggravating circumstances. This lack of readability and of stability represent a major hindrance to the development of the use of alternative measures to detention by magistrates* ». Yet, continues the Commission, « *the use of alternative measures to detention will only be developed and have effects on the detention rates within the framework of a coherent, stable and readable criminal policy* ». Reason for which the CNCDH had asked the Ministry of Justice « *to elaborate and distribute each year orientations of criminal policy, bearing in mind the principle according to which the*

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1 = prolonged detention after the person has executed his entire sentence, without trial, and not based on the realisation of a new crime but on the supposed « dangerousness » of the individual

*deprivation of liberty should be considered as a measure of last resort* ». The Commission was in particular recalling « *that it is the responsibility of public powers to control the inflation of penal incriminations and aggravating circumstances* ». To this effect, it recommended « *to study the possibilities of transfer of certain litigation to civil jurisdictions* », considering as well that « *the legislator should, for more offences think of, indicating a sentence which does not deprive of liberty instead of the imprisonment as a benchmark sanction* ». But in this case, as in many others, the CNCDH was not heard.

Regarding the method, each text adopted in the last five years followed the same pattern : each time, it was motivated by a news story (*fait divers*) in order to appeal to emotion ; each time, the government resorted to the greatest populism to advocate for its adoption, often in emergency, and without any consultation (the CNCDH was never consulted on the bills, even though it is within its mandate to be referred to for opinions on any text relating to fundamental rights and individual freedoms). It should be noted that as of the law of August 2007, emergency was declared for each of these texts - as it also was for the Prison Law-. Emergency declaration is an exceptional procedure evading parliamentary debate by limiting it to only one reading in each chamber. And this emergency was not justified : to take only one example, the draft legislation *aimed at reducing the risk of criminal re-offending* was submitted by the government to the National Assembly in November 2008, and the government did not seek its registration on the agenda before declaring the procedure accelerated one year later following a news story. Each time, the newly adopted text amends the previous ones, broadening their scope of application, causing a generalisation of criminal measures initially announced as exceptional. And each time, these laws caused the ire of judicial, sanitary and prison actors, as well as human rights defenders.

Regarding the substance, the impact of this legislative inflation on prison population on the one hand, and on prison policy and prison conditions on other hand, is significant. They deserve to be particularly stressed.

## **1.2. Impact on prison population**

Prison overcrowding not only causes an imposed promiscuity and difficulties for the exercise of rights (overcrowding results in lesser possibilities of access to visits activities, and to fewer work positions or education, etc.) but also difficult material conditions, as well as recurring problems of general operation of the facility. All of this generates a climate of tension and violence.

The legislative inflation and the nature of the adopted texts aggravate even more these phenomena. Even if their impact is difficult to specifically quantify today, they encourage and facilitate the resort to incarceration of re-offenders, sexual offenders and minors - the primary targets of their object -, but also persons suffering from mental disorders. As was observed by the Council of Europe Commissioner for human rights, Thomas Hammarberg, following his visit to France in 2008, « *the reasons of (prison overcrowding) lie primarily in the harsher sentences handed down by criminal courts and the increasing use of imprisonment* ». Moreover, the juxtaposition of measures implemented following the laws of 12 December 2005 and 10 August 2007 leads to the application of a double mechanism for re-offenders : it increases the resort to strict imprisonment, substantial in its duration, and limits the possibilities of release, in particular anticipated release. Such a combination is all the more conducive to the aggravation of overcrowding in prison that it occurs in a judicial context where accelerated judgment procedures are increasing (*comparution immédiate*).

In July 2007, the Ministry of Justice made public its projections concerning the evolution of the

prison population, foreseeing 80 000 prisoners in 2017<sup>2</sup>. Hence the reason why the main credits are allocated to the construction of new prisons. This perpetual enhancement of prison estate remains the priority, contrarily to the opinion of the Council of Europe which, for a long time, has been condemning France for this inappropriate measure to deal with overcrowding.

**The so called « strong increase of sentence management » (*aménagements de peine*)**

The statement according to which there would be in France a « strong increase of sentence management » measures (*aménagements de peine*) should be put in perspective. Their overall increase observed these last few years is mainly due to the emergence of the use of electronic monitoring (*placement sous surveillance électronique*) and its priority development in comparison with other measures of sentence management. When analyzing the evolution of data concerning conditional release (*libération conditionnelle*), partial-release (*semi-liberté*) and placement in the community (*placement à l'extérieur*), one can find that their respective numbers are practically identical to those found in 1990, twenty years earlier (cf. Table 1) and that their total number is lower (14 783 in 1990, 14 003 in 2007). When relating this data to the average population of convicts at these two periods (27 670 in 1990, 45 464 in 2007) it would be more realistic to mention a considerable drop in sentence management rates in France over the two last decades.

	Number of prisoners				TOTAL
	Sentenced	Partial-release	In the community	Conditional release	
1990	27.670	6.229	2.193	6.361	14.783
2007	45.464	5.283	2.289	6.436	14.008

Source: National Prison Service (*Direction de l'Administration Pénitentiaire*), « persons placed under justice, the situation on 1 January 2008, national data », October 2008.

Moreover, the penal policy is increasing the imprisonment of offenders suffering from psychiatric disorders. To the point that the *rapporteur* to the Commission of laws of the Senate stated, on 3 March 2009 (during the parliamentary debate concerning the draft Prison legislation), « that in France, offenders suffering from psychiatric disorders are taken care of by the prison rather than the hospital ». The failure of sanitary and social systems, and in particular the crisis of public psychiatry account for this trend. But so do various elements of the criminal procedure : first, accelerated judgement procedures which, according to the CNCDDH, « the reason of an over-representation of persons suffering from psychiatric disorders in prison »<sup>3</sup>. A 2007 consensus conference of the French Federation of Psychiatry concerning criminal psychiatric expertise stressed that « very quick procedures are not suitable to reveal the existence of an intense psychiatric follow-up, when it exists ; the court-appointed lawyer does not have the opportunity to study the file in depth ; in the case where a psychiatric expertise is required, it does not prevent incarceration ». The study also deplored among other things within the accelerated judgement proceedings a « relative absence of procedures for the identification of psychiatric disorders at an early stage of the criminal procedure, in particular concerning offences »<sup>4</sup>. Secondly, concerning criminal procedures, the marginal and errant resort to the first provision of article 122-1 of the Criminal Code contributes to the increase of persons suffering from psychiatric disorders in prison. This provision establishes the principle of criminal irresponsibility for persons suffering, at the time of the facts, « of a psychiatric or neuropsychiatric disorder having abolished their judgement or

2 *Stakes of the Prison law*, Head of the Prison Service, July 2007.

3 CNCDDH, *Study on mental health and human rights*, June 2008.

4 French Federation of Psychiatry, Report of the Public Audit Commission on Criminal Psychiatric Expertise, 25 and 26 January 2007.

*control of their actions* ». However, courts seem more and more reluctant to acknowledge criminal irresponsibility of defendants suffering from psychiatric disorders. To such an extent that the number of case dismissals for cause of irresponsibility, already rather low, was divided by four in fifteen years. According to the National Medical Council<sup>5</sup>, « *the percentage of persons considered as irresponsible went from 0,9% in 1992 to 0,24% in 2007* ». Psychiatric experts play in this matter a major part. In the great majority of cases, they conclude to the impairment, at the moment of the facts, of the judgement of the accused, and not the abolition. The distinction is essential : the second provision of article 122-1 states that in situations of judgement impairment, the person « *remains punishable* ». This preference can be explained by several reasons, and in particular the pressure put on the experts for the prevention of re-offending. « *We no longer ask the expert if the accused can be rehabilitated but if he is dangerous ; we ask the psychiatrist to answer in a field which is not that of his knowledge, of his competence, but that of his personal conviction ; here is the prediction of re-offending and behaviour, whereas re-offending is by definition random, uncertain, protean, multi-factorial, with a high likelihood of error* »<sup>6</sup> In this context, of a great political and media-related sensitivity, very few experts accept to endorse responsibility for not having the author of a crime locked up. Moreover, the intention of the legislator to limit the duration of sentences for persons whose judgement was impaired at the time of the crime is not followed through. The Criminal Code specifies that in such cases « *the jurisdiction takes into account this circumstance when it determines the sentence and its regime* ». Yet « *the jurisdiction does take this circumstance into account, but in the wrong way !* »<sup>7</sup>. A statement reiterated by the Senator Jean-René Lecerf, on 3 March 2009: « *The impairment of judgement, which should at the very least amount to an mitigating circumstance, leads on the contrary to a longer sentence* ». Thus, persons suffering from psychiatric disorders deemed « punishable » are today condemned to longer prison sentences than those who do not suffer from any psychiatric disorder. An « *opposite use of the second paragraph of article 122-1* » which, according to the psychiatrist Gérard Dubret, is in itself « *a strong argument to request the abrogation of this legislative measure* »<sup>8</sup>. According to a 2006 opinion of the National Consultative Committee of Ethics, this apparent paradox originates in the « *increasing reluctance of our society to accept to provide care for, and not to punish, persons having committed a crime or offence for irrationality* ». This reluctance is so strong that some professionals denounce it as « *leaning towards the criminalisation of insanity* »<sup>9</sup>. Because « *psychiatric disorders, in its clinical behavioural expressions transgressing public order, tend to be criminalised ; and prison tends to be placed as a secure alternative when sanitary and social measures have failed or are outdated* ».<sup>10</sup> A tendency fed by the political choice to create specialised psychiatric structures dedicated to prisoners (the UHSA, see below VI-4).

### 1.3. Influence on prison policy and detention conditions

Secondly, the obsession around the concept of re-offending induces an approach to detention focused on social control and not on the rehabilitation of individuals. It also comes with an increasing lack of interest for the preparation for release from prison. In order to cope with the multiplication of short sentences and with the extension of medium and long sentences, a managerial approach to detention based on subjective concepts such as the personality and the

5 *Care and injunctions of care in prison and their consequences on the criminal situation of the concerned person*, Piernick Cressard, Report adopted during the session of the National Medical Council on 7 February 2008.

6 CNCDH, *Study on mental health and human rights*, June 2008.

7 Dr. Betty Brahmy, *Psychiatry and Prison*, journal *Etudes*, 2005-2006, volume 402, p.751-760.

8 Dr. Gérard Dubret, « *Prison, the ultimate psychiatric institution to heal and punish ?* » in *Psychiatric information*, volume 82, number 8, October 2006.

9 Dr. Paul Bensussan, psychiatrist, national expert, and Delphine Provence, jurist at the *Ecole de formation du barreau*, *The penalisation of insanity*, article published in *Le Monde*, 15 November 2007.

10 Dr. Catherine Paulet, public audit before the French Federation of Psychiatry, 25 and 26 January 2007, Paris.

dangerousness of persons has imposed itself (the differentiation of detention regimes being symbol of this tendency). Yet as the *Contrôleur général* noted in his latest report: « *It is possible to ask oneself if the mental personality, from which the predictable behaviour results, is the ultima ratio of this particular social life which is, after all, the deprivation of liberty. It is as if the not-yet-assessed danger of places of deprivation of liberty resulted from an insufficient analysis of personality. Thus inevitably inducing an unlimited quest for information and extra indications aimed at clarifying the mental state of the captive individual, which confines the person into a collection of data (registers, expertises...) and subjects professionals (in particular psychiatrists) to renewed requests* ». Because the medical profession, and in particular psychiatrists, are more and more called upon to participate in prison management, at the expense of their ethical rules, by being first in line to be approached to provide information on their patients, in particular within unique multidisciplinary commissions (*commissions pluridisciplinaires uniques*) or behavioural software programs (*logiciels de suivi comportemental*). The Commission for social affairs to the Senate warned against this once again during the examination of the latest text on criminal re-offending: « *The place of care in prison is based on the progressive construction of a double trust : between doctors and the Prison Service on the one hand, and between doctors and convicted persons suffering from psychiatric disorders, on the other hand. The respect of confidentiality and the freedom of treatment are the essential conditions for its success. Any ambiguity in this area can only foster fear of a will to instrumentalise medicine for social defence purposes.* »<sup>11</sup> Also, these texts have caused the multiplication and the broadening of the implementation of control measures after release from prison. The latest law on re-offending broadened the scope of application of supervision measures of safety (*surveillance de sûreté*), and, through this, the placement in safety detention, making one fear the « trivialisation » of these two measures, according to one of the magistrates union.

Indeed, with the advent of the law reinforcing the fight against re-offending in 2007 – then the Law concerning safety detention in 2008, the Prison Law in 2009 or even the Law aimed at lessening the risk of criminal re-offending in 2010 – a logic according to which the length of the deprivation of liberty, the level of control in the outside world, and the cost of the sanction for society must correlate with the detected risks of re-offending for convicted persons has imposed itself. For economic and managerial rationality reasons, in a saturated prison system, « low-risk » profiles must preferably be subject to sentence management measures and controlled more or less actively in the society where they will work and compensate the civil parties. Whereas the protection of society requires that « high-risk » profiles be neutralised as long as their dangerousness has not sufficient decreased to allow their reintegration into society under supervision. In this context, segregative courses have emerged, in terms of legal access to sentence management, according to the existence of a presupposed dangerousness of the individuals, with regards to the nature of the committed acts, the length of the sentence and/or the existence of a repetition of a same offence. To this end pre-decision exams of the risk of re-offending are to be realised, by analysing their personality and possible interaction with their socio-economic surroundings, in order to justify the fact that they will be kept away from society. The « *reality of the facts* » gave way to the « *plasticity of assumptions* »<sup>12</sup> as it was underlined by the previous Minister of Justice, Robert Badinter. Whereas inside prisons, the *Contrôleur général des lieux de privation de liberté* observed that « *we're going from the reality of a threat, justified by material facts, that can prove the existence of a danger and, consequently, of a certain infringement to public order, to an appreciation of the personality, based on his past and likely to show the renewal of the offence is more or less likely to occur in the future* ». The same occurs upon release. The principle of precaution is now mingling

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11 Opinion n° 279 (2009-2010) on the bill aimed at lessening the risk of criminal re-offending and carrying various measures of criminal procedure, of M. Nicolas ABOUT, on the behalf of the Commission for Social Affairs at the Senate, submitted on 10 February 2010

12 Robert Badinter, *Le Monde*, 27 November 2007.

with the principle of the individualisation of sentences, so as to legitimate the imposition of a control continuum, or even a post-penal imprisonment, for persons belonging to the « high-risk » profile group. According to the way an individual will be perceived, a person condemned to 15 years of imprisonment can from now on, « *for the purpose of preventing re-offending where the risk seems certain* »<sup>13</sup>, be subject to various obligations after his or her sentence, such as an injunction of care or house-arrest supervised by a GPS system, during the reduction of sentence time which they had already benefited from in detention due to their « *serious efforts of social rehabilitation* »<sup>14</sup>. And then, at the end of this period of time, restrained to respect the same obligations, due to the « *persistence of [their] dangerousness* »<sup>15</sup>, within the scope of a safety supervision measure, indefinitely renewable. And in case such obligations are not entirely respected, the person can be placed in safety detention for an undetermined period.

## **(2) Monitoring bodies**

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Together with the crisis of the French prison context (see below), the Government is currently seeking to operate a dreaded substantial regression on the question of monitoring prisons. These last years have been marked by the indispensable appearance of new eyes looking at French prisons : thus the expansion of the activity of the National Commission of Security Ethics (CNDS), and the creation of the *Contrôleur général des lieux de privation de liberté* following the ratification of the OPCAT by France, have considerably contributed, not only to the widening of proceedings capable of establishing the reality of prison conditions, but also to bring to an end the cultural conception according to which prison is a closed universe which comes under the Prison Service, and no one else. Thus fundamentally contributing to the prevention of ill-treatments. Moreover they had been noted as positive aspects by the CAT during its final observations during its previous report on France : the Committee took note « *with satisfaction* » of « *the establishment on 6 June 2000 of the National Commission on Security Ethics (CNDS), which provides comprehensive reports on the behaviour of (public) officers* », and of the « *signing of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 16 September 2005, and the steps being taken to ratify it* ». Today public authorities, through the Prison Law, have decidedly chosen to put aside of the agenda the in-depth reform of prisons though it was greatly awaited by the overall actors of the prison system. Now they are also deciding to put an end to the CNDS and to announce the prospect of the *Contrôleur général's* disappearance, a decision which is as coherent as worrying. The pretext put forward is the implementation of the constitutional reform creating the *Defender of Rights*, a new institution. Roger Beauvois, Chairman of the CNDS, sees the decision as « *a sort of tribute* »: « *maybe the reason why they want to get rid of us, is the fact that the Commission is embarrassing* »<sup>16</sup>. The Minister of Justice does not hide the fact that the bills currently in Parliament only amount to a first step in the construction of an important institution, which will eventually encompass the *Contrôleur général* and possibly other important institutions such as the High Authority Against Discriminations and for Equality (HALDE). This has not failed to worry the CNCDH, which thought it useful to « *express* » « *in anticipation* », in its *Opinion on the Defender of Rights*, on 4 February 2010 to « *its opposition to the future integration of the Contrôleur général in the scope of the Defender of Rights, underlining, as it did concerning the creation of the first institution, the necessity for our country to have such an independent monitoring mechanism in order to insure the respect of the prohibition of torture and cruel, inhumane or degrading treatments in any place whatsoever* ».

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13 Article 723-29 of the Criminal Procedure Code.

14 Article 721-1 of the Criminal Procedure Code.

15 Article 723-37 of the Criminal Procedure Code.

16 Interview in *Dedans-Dehors* n°70-71, December 2009.

The adoption without substantial changes of the bills instituting the Defenders of Rights (the examination of the first of these texts is scheduled on 27 May in the Senate) will amount to a phenomenal ten-year regress. It reminds of the time when, in 2000, the Prison Service tried to exempt itself from the scope of control of the CNDS and sought the incessant postponement of the implementation of the recommendation of the *Canivet* report concerning the external monitoring of custodial facilities<sup>17</sup>. Because the broad competences devolved to the Defender of Rights, called to merge functions of mediation, monitoring, protection and promotion of rights, *de facto* neutralise the effectiveness of the institution to effectively monitor the respect of rights. As the CNCDH indicated in its opinion, « *the mediation and monitoring functions follow different, even antinomic logics, that cannot and should not be merged* ». Quoting at the same time the study of the impact of the government which accompanies the bill, the Commission indicated that it is an assumed choice: « *The study of the impact recognises it when it indicates that the merger of the overall authorities dealing with the protection of rights and freedoms « would lead to combine a current mediation mission with a monitoring, decision or sanction mission, which are different [...], which could end up being counter-productive* ». The decision to put an end to existing institutions reflect the negation of the constitution of an expertise in terms of prevention of ill-treatment, by the CNDS, due to its effective ability to investigate individual cases relating to allegations of ill-treatment. And a renunciation of the considerable added value brought by the *Contrôleur général* in his last two years of activity, both through his visit observations as well as through his reports, recommendations, and public-awareness actions. And even if the Prison Service, in two years, have constantly proved that it refuted the legitimacy of an independent observer : the OIP finds unacceptable the absence of protection of prisoners speaking to the *Contrôleur général*, not to mention the register filed by the Prison Service to keep their identity, and even a case of complaint for defamatory accusations made against a prisoner. In addition, it believes essential that all communications between the *Contrôleur général* and a prisoner should be subject to an absolute guarantee of confidentiality, which supposes not only that letters not be read, but also that telephone conversations should neither be listened to nor recorded. When asked what the disappearance of the CNDS would mean to him, its Chairman stated that « *more than the change of an era, our disappearance would fall within a general pattern of security reinforcement* ».

### **(3) The prison situation and prison policies**

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*The Direction of the Prison Service (DAP) recently underwent the exercise consisting of drawing an assessment of the previous year and drawing some prospects. If the French penitentiary institution places « the recognition of the European prison rules by the vote of the prison law » in the first lines of its satisfactory grounds in 2009, it did not forget to congratulate itself also of « the reinforced prevention of suicides and violence in detention ». Both these points deserve commentaries.*

#### **3.1. On the consideration of the European Prison Rules by the Prison Law**

The ratification of the law of 24 November 2009, called « Prison Law », is in no doubt a prominent event of the previous year. It ended a process initiated in March 2000 with the publication of the Commission Canivet<sup>18</sup> report, which declared the necessity « *in prison as well as outside* », that « *coercion relations between the citizen and the public authority* » be « *set by law* ». Adding that «

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<sup>17</sup> *Report on the improvement of external control of prison facilities*, Commission chaired by Guy CANIVET, handed to the Minister of Justice on 6 March 2000.

<sup>18</sup> *Improvement of external control of prison facilities*, Commission chaired by Guy CANIVET, La Documentation Française, March 2000

*the rule of law implies, inside prisons, the implementation of ordinary rules and, at the same time, a new specific structuring of human and social relations. It is therefore a legal reconstruction of this incarcerated society that should be looked at* ». Such need was reiterated since then on several occasions, in particular in the reports of the investigative parliamentary commissions of the National Assembly<sup>19</sup> and of the Senate<sup>20</sup> (2000) or throughout the extended work of the National Consultative Commission on Human Rights (CNCDDH)<sup>21</sup>(2002-2006). It was also restated in 2006 during a nationwide review of prison conditions (*Etats Généraux de la condition pénitentiaire*), a novel process by which a group of judicial and prison representative organisations organised a wide individual consultation of all field actors (detained persons and their families, magistrates, lawyers, prison staff, prison stakeholders or structures in charge of receiving those released from prison), with the help of prison delegates of the Mediator of the Republic. All inputs received were then transformed into reform proposals.

The adopted text unfortunately did not operate the perspective reversal awaited for, no more than it can claim to respect the wording and the spirit of the European Prison Rules (EPR) adopted on 11th January 2006 by the Council of Ministers of the Council of Europe<sup>22</sup>. Indeed, as was underlined by prison law expert professor Martine Herzog-Evans, the Prison Law turns out to be « *well below the order that had been placed : among others, it was supposed to put France finally in line with international, in particular European, standards and recommendations* »<sup>23</sup>. In fact, the French Prison Service challenges both the extent of the discrepancies between the principles set by the Council of Europe and the current legislation, as well as the need to accurately and systematically integrate these principles into positive law. Instead, the Prison Service has proceeded to harness the EPR in the scope of a broad communication operation consisting of an experimentation phase of a reduced number of rules and a « EPR Quality Label » for custodial facilities. The experimentation applied 8 out of the 108 rules, specific to the receiving and orientation of convicts, considered by the Prison Service as priorities. Such « *à la carte* » implementation was clearly criticised by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg who, noticing that the trial phase « *tackles only a limited number of recommendations and only concerns certain prisons* »<sup>24</sup>, requested in November 2008 that it be rapidly broadened. Unresponsive to this request, the Prison Service continued in parallel his steps of progressively labelling its custodial facilities. While the labelling process is based on the assessment of « administrative management performance » criteria concerning a specific aspect of life in detention (reception of incoming prisoners, treatment of requests, availability of emergency call systems for prisoners , etc.), it aims at spreading the idea that the EPR are actually implemented.

### **3.2. On the climate of violence and suffering prevailing in prisons**

While claiming a « *reinforced prevention of suicides and violence in detention* », the DAP made public particularly worrying statistics. Indeed, 2009 figures concerning suicides and attempted

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19 Report of the National Assembly on behalf of the Investigative Commission on prison conditions in French prisons (29 June 2000)

20 Report of the Senate on behalf of the Investigative Commission on prison conditions in French prisons (29 June 2000)

21 Confédération générale du travail - pénitentiaire, Conseil national des barreaux, Emmaüs France, Fédération nationale des associations d'accueil et de réinsertion sociale, Fédération nationale des unions de jeunes avocats, Ligue des droits de l'homme, Observatoire international des prisons - section française, Syndicat des avocats de France, Syndicat de la magistrature, Syndicat national de l'ensemble des personnels de l'administration pénitentiaire - FSU, Union syndicale des magistrats)

22 Recommendation N. R(89)3 adopted by the Council of Ministers of the Council of Europe on 11 January 2006

23 HERZOG-EVANS Martine, Prison Law and Familial Links, *Actualité juridique famille* 12/2009, n° 12, p. 484-487.

24 Memorandum of Thomas Hammarberg, Council of Europe Commissioner for Human Rights following his visit to France on 21 to 23 May 2008, III § 19.

suicides ; acts of self-mutilation among the detained population (cf. infra chapter « punishment cell and suicide ») ; aggressions « among prisoners » and « against members of staff », are all increasing, some of them quite significantly. The same applies to collective protests, hostage situations and escapes. In this context, the Prison Service has decided to classify as « *priority action* » the « *strengthening of actions against all forms of violence* ».

	Escapes	Agressions against staff	Violence among prisoners	Attempted suicide and self-mutilation	Collective protest
2005	12	689	398		306
2006	11	648	376	506	265
2007	12	549	368		155
2008	5	595	464	3886	147
2009	21	739	509	5025	200

Source : National Prison Service (Direction de l'Administration Pénitentiaire), « 2009 key figures, 2010 perspectives », mars 2010

While it does appear desirable and sensible to tackle all forms of observed violence in detention, it is particularly regrettable that the DAP does not include violences other than physical nor violences committed by staff against prisoners. It is relevant to note that the Prison Service does not provide any information concerning these issues. This void attests of the ineffectiveness of the « *data transparency policy* » affirmed by the new Minister of Justice when she came into office in June 2009. Because these violences really do occur. The National Commission of Security Ethics (CNDS) has published an increasing number of opinions blaming a « *manifestly excessive use of restraint* » or other types of brutalities. A member of this Commission had observed that « *in some facilities the loss of landmarks was such that many unacceptable things were shown, and even assumed, by some staff members convinced not to be accountable to anyone outside the walls* ». In addition, in his recommendation (23 February 2010) following his visit to the prison of Mulhouse, Jean-Marie Delarue, the *Contrôleur général des lieux de privation de liberté*, deplored « *a borderline situation approaching the unacceptable* », after having observed all at once « *professional misconducts by supervision staff such as provocations towards prisoners and the pursuit of incidents* », « *a deleterious climate creating tensions between members of staff themselves and between staff members and prisoners* », « *the absence of respect of fundamental rights generating conflicts* », as well as a staff « *left to its own devices and abandoned by its hierarchy* ».

Beyond their fragmented character, the available data concerning violence from the Prison Service largely tends to be questionable. On 30 March 2010, during a press conference, the DAP released the number of 509 aggressions between prisoners in 2009. A few days earlier, on the 22 March, a quite different number was published by the statistician Pierre-Victor Tournier. His own work was based on « *Prison Service data* ». He stated that « *7 590 incidents between prisoners had occurred during the year 2009* ». Even though the category of « *incidents* » (including isolated events, riots, violences with weapons or objects, rackets, or acts of humiliation, sexual abuse and acts of torture) perfectly covers those of « *aggressions* », one may question the significant discrepancy of these two numbers.

Even though they are incomplete and to be taken with caution, the data made public concerning violence show an undeniable aggravation of the sources of tension, caused by a substantial degradation of the climate in detention. The question is so preoccupying that the DAP created a working group on « *the prevention of violence* » whose observations and recommendations – after

over three years work (2007, 2008 and 2009) – remain unknown, the DAP having decided to keep its report confidential. Nevertheless, it appears crucial to know if the conclusions of this working group are close to the *Contrôleur général's* approach. Analysing « *the endemic violence in certain custodial facilities* » Jean-Marie Delarue said he feels that « *there is obviously a continuum between the anger, the aggression against an officer, self-mutilation and suicide* ». Adding : « *violence does not only precede prison, it is also fostered by the conditions of captivity. The thesis according to which violence would be the fruit of the personality has as a result to exonerate firstly society, then the management of the places of captivity, of any responsibility in the occurrence of violence. Or, in other words, placing all danger on the account of the 'personality' and seeking to prevent it by identifying that personality comes back to seeking an elusive object. The most sophisticated instruments in the world (and also the most liberty-killing) will never achieve this* ».

Two fundamental axes, constitutive in numerous other European countries of the steps taken to prevent prison violence, seem unduly put aside by the Prison Service in France. It appears on the one hand that the freedom of movement of prisoners within a facility is from experience one of the ways of reducing tension caused by physical security constraints, characteristic of daily prison life. The beneficial effects in terms of violence reduction– among the detained population, and between prisoners and staff members – observed in the scope of this type of management, even in a few French prisons, should lead to a promotion of this model. Instead of the orientations currently being privileged, based on a heightened restriction of the freedom of movement of prisoners. Such a perspective is however undermined by the differentiated regimes, main axis of the current prison policy. This system of management, implemented in certain French facilities (*centres de détention*) at the end of the 1990s on an empirical basis, consists of regrouping prisoners considered as « difficult » by the Prison Service and to subject them to a harsher regime, with a heightened restriction of their freedom of movement.

On the other hand, the recognition of individual and collective forms of expression for prisoners should be encouraged. These include organising representation of prisoners towards prison authorities, through, for example, the creation of interpersonal spaces within the prison population and between prisoners and the different categories of prison staff and other professionals intervening in prison. Such initiatives would unquestionably contribute to the reduction of the climate of violence and suffering prevailing in prison, and to pacify all of the interpersonal dynamics. Because it opens the door for the individual to be in a way able to intervene in his life framework, and for professional practices to change. The words of the *Contrôleur général* following his visit to the prison of Villefranche-sur-Saône are emblematic: « *Following several interviews with prisoners, the inspectors observed a need to express themselves which is not taken into account today. Questions remain unanswered, answers are not understood, the discrepancy between the prescribed and the reality seem important on many levels... all of this feeds a lot of anger and tension but also despair...* ». And the inspector makes the link with violence: « *the recent events seem to illustrate this observation* (referring to several suicides, a hostage situation, an episode of large-scale violence in the recreation area, many individual incidents affecting the physical integrity of staff and prisoners). And yet « *the attention of the managing authorities seems more focused on strictly management problems, without sufficiently taking into account the human factor and the mood which is currently developing in detention* ».

## II. The management of behaviours inside French prisons

### (1) Differentiated prison regimes: indexing fundamental rights to the requirements of the Authority

*The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, had already made it clear in his last visit to France that he would remain « vigilant » that « the introduction of differentiated prison regimes is not legalised »<sup>25</sup> through the enactment of the Prison Law. The National Bar Association (“Conseil national des barreaux”) asked the Parliament on 14 March 2009 to « prohibit the differentiated regime of the execution of sentences that allows the Prison Service to condition the prisoner's living conditions to an arbitrary appreciation of his or her situation, which amounts to a disguised sanction. » However, and this is one of the main preoccupation of the moment, the Prison Law eventually ratified this regime.*

Its experimentation was formalized by the Ministry of Justice on 14 April 2003 in the scope of « nine measures for the reinforcement of security ». This system, implemented at the end of the 1990s on an empirical basis in a few prisons (*centre de détention*) consists of regrouping prisoners considered as difficult by the Prison Service and subjecting them to a harsher regime, in particular through a higher restriction of their freedom of movement. Any prisoner can suddenly find him/herself submitted to what is called strict regime, especially if he was found responsible for an incident that sent him to the punishment cell. In other words, it is a means to manage through contention prisoners whose behaviour is anticipated (for those arriving at the facility) or considered to be unsuitable.

The National Consultative Commission for Human Rights (CNCDH) condemned this aspect of the draft Prison Law which « increases tenfold the powers of the authorities over the detained individual and very clearly raises the risks of arbitrariness »<sup>26</sup>. The CNCDH underlined that « the acts or attitudes that entail a more severe regime are not listed in the preexisting text. This regime will be applied after a general appreciation of the person based on the carry-all criteria of dangerousness and personality. The Declaration of 1789 states however in its Article 5 that “The law can only prohibit actions [which are] harmful to the society. Anything which is not prohibited by law cannot be impeded, and no one can be compelled to do what it does not order.” ». The National Union for all Prison Service Staff (SNEPAP), the main organisation representative of insertion and probation officers of the Prison Service, underlined in February 2008 that « the said « differentiated » regimes, recently implemented, often amount to systems where the “progression”, limited to the consideration of behaviour in detention, encourage more the adaptation to the system than personal evolution. This system, enabling internal regulation of public order, is not a progressive regime orientated towards the preparation of the release and the prevention of re-offending. Moreover, in this framework, we are opposed and denounce the possibilities of abuse that make up the creation of a very closed regime. It does not amount to a differentiated regime for us but a *de facto* disciplinary regime. »

According to sociologist Gaëtan Cliquennois, who recently studied decision-making in custodial facilities, « the 'closed regime' and the punishment cell concentrate the restrictions of imprisonment and amount to a sort of opposite of the open regime ». He explains that staff select prisoners by using « an association of socio-criminal and prison characteristics and (considering) a behaviour that is deemed as acceptable or undesired, with regards to policing standards ». Thus, prisoners with long terms remaining to be served, those originating from certain neighbourhoods or who have

25 Thomas Hammarberg, Memorandum following the visit of France, 21-23 May 2008.

26 CNCDH, Study of the draft Prison legislation, 6 November 2008, p.38

been transferred from another facility for a disciplinary reason will often be sent to a closed regime, for fear of incidents. The researcher demonstrates that the regime causes «booming» effects, in that affectation to a closed regime impacts future disciplinary decisions, access to activities or work, and opportunities for obtaining conditional release or other probation measures. Thus, « *under the common regime and under the so-called trust regime, the staff will favour dialogue, in a gradual way, negotiation and cooperation ; whereas under the strict regime, they do not hesitate to adopt a more authoritarian and coercive posture by using threats, blackmail and incident reports* ». Therefore, « *anger, rage, fear, hate and hidden shame are the emotions or the chain of emotions the most frequently found under the closed regime* ».

The first recommendation by the *Contrôleur général*, M. Delarue, after his visit in the prison of Villefranche-sur-Saône, very clearly shed the light on the patterns created by this system, that privileges prisoners who show their adhesion to the institution and ostracises others. Concerning the « *individual course* » organised by the facility, he noted that « *this initiative appears at first glance as positive* », and that « *it approaches the 'execution of sentences course' provided for in the draft Prison legislation* ». And added that « *as observed locally however, this 'course' consists of sorting prisoners, offering an evolution to some of them, and leaving the others without any hope of improvement of their situation. The first ones are gratified with a 'contract', sometimes actually real, but sometimes also void of any content (no commitment of the prisoner and no activities offered by the administration) ; the latter do not receive any proposals of projects or activities. The illusion of the 'course' can therefore be translated as a pure and simple segregation between the different buildings or floors of the facility, with some prisoners likely to progress during their imprisonment and others who are to be left often irreversibly during their entire stay in detention, in a passageway known to be difficult both for themselves and for the prison staff* »<sup>27</sup>.

Moreover, in an internal document on the stakes of the Prison Law, the Ministry did not hide the opposition between its desire to classify prisoners and differentiate detention regimes and the principle of recognition of equal rights : « *In the name of an egalitarian approach for prisoners, which restricts the possibility to create categories, in the name of its non-predictability, which prohibits the consideration that such a characteristic predisposes to a certain behaviour, it has been impossible for us to reach a real classification of prisoners that is however the basis for all differentiated regime worthy of it.* »

To make the classification system work, the Prison Service illegally developed « *behavioural monitoring softwares* »<sup>28</sup> which include several sensitive personal data on all the prisoners in France. The legal declaration procedures in force for such registers, for personal data protection purposes, have not been respected. They are used, without the prisoners being informed, to express appreciation regarding them and decide upon their living conditions, particularly the facility or unit where they will be allocated. The *Contrôleur général* denounced an « *unlimited quest for information and extra indications aimed at clarifying the mental state of the captive individual, which confines the person into a collection of data* »<sup>29</sup>. Despite the fact that the data concerns all aspects of prisoner's life, its confidentiality is not guaranteed since a large number of officers, administrative agents, rehabilitation and probation officers and medical staff have access to it – not mentioning the fact that they are held without prisoners knowing. These registers allow the sharing of medical information, even though many medical services, on behalf of the principle of confidentiality, have refused to inform the behavioural monitoring databases, despite being urged to do so. The two unions of prison practitioners opposed the Prison Service attempt to abandon the medical secret and took sides against the steps taken to have the medical services fill in these

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27 *Contrôleur général des lieux de privation de liberté*, Recommendation of 24 December 2008 concerning the remand prison of Villefranche-sur-Saône, in the Official Journal of 06/01/09

28 The latest is called « *electronic liaison notebook* » (*cahier électronique de liaison*)

29 2009 Activity Report, p.156

registers. The national data protection authority (*Commission nationale de l'informatique et des libertés*) is currently examining a complaint brought by the OIP concerning this illegal data collection and use.

The logic of the differentiation of rights leads the prison institution to a dead end. Numerous collective incidents occurred in custodial facilities that have differentiated regimes of detention. During a meeting held on 17 December 2009 at the Ministry of Justice, seeking to remedy the difficulties arising from the implementation of these differentiated regimes, the participants found that *« the main difficulty lies in the fact that the differentiated regimes are only seen as the “management of detention”, which on the one hand gives them a disciplinary purpose, and on the other hand does not allow an appropriate targeting of beneficiaries : prisoners facing most difficulties in terms of behaviour do not have access to various activities or preventive programs when they are specifically the people who need them the most »*. In concentrating the difficulties in certain units, the administration did not learn from the past : in the aftermath of the French prison riots during 1974, the director of the Prison Service had warned : *« experience shows that it is very difficult to maintain several clearly differentiated regimes inside the same custodial facility »*<sup>30</sup>.

## **(2) Prisons inside prisons : punishment and solitary confinement**

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### **2.1. The punishment cell (*quartier disciplinaire*) : “high suicide risk area ”**

*Identified as the European country with the highest prisoner suicide rate<sup>31</sup>, France is also characterised by a greater suicide rate within the punishment cells of its prisons compared to elsewhere in the prison. It is about seven times higher than the rate found in a normal cell. Nevertheless, the Prison Law has maintained the harsher punishment duration in Europe. The increase of the phenomenon should have called the attention of public authorities : over 15% of prisoners who put an end to their lives in 2009 were undergoing a disciplinary sanction in punishment cells (18 out of 115 suicides in detention) against 12% in 2008 (13/109). The National Human Rights Consultative Commission's request that punishment cell would be replaced by solitary confinement in an ordinary cell – as is done in other comparable countries – appeared in this context as a compelling priority. All the more that the disciplinary procedures do not provide all guaranties against arbitrariness as the administration is in this field both judge and party. Nevertheless, the Ministry of Justice firmly refused to call into question a system based on the mortification of prisoners resistant to prison authority.*

In 2006, the French National Consultative Committee on Ethics highlighted the fact that *“putting prisoners in punishment cells represents a mental health hazard”*. The risk stems both from disciplinary procedures as well as the excessively restrictive living conditions in the disciplinary unit, which represents *“the apex of prison isolation”*. The Prison Service (DAP) is well aware that the available data *“indicate a worsening of the situation”*<sup>32</sup>. The head of the Prison Service (DAP) reminded its interregional managers in a note dated 13th July 2009 that whereas *“the disciplinary procedure is an essential element of detention management”*, it *“should be implemented so as to take into account the profile of prisoners, in particular those with a background of self-injury.”* This reminder was completed by two instructions for prison managers : *“impose proportional sanctions with regards to the seriousness of the facts and adapted to the personality of the author”* and *“systematically control the opportunity and the lawfulness of preventive placements”* in punishment cells (I.e. before the penalty is even considered by the disciplinary board). The content of this note not only shows that divergent approaches do exist at national, regional and local levels ; it also

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30 Jacques Mégret, *Revue de sciences criminelles*, 1976, p. 1000

31 Council of Europe, annual penal statistics (SPACE 1) - investigation 2008.

32 Note dated 13 July 2009, DAP.

reveals the limits - not to say the cynicism - of a suicide prevention policy which remains subject to the ins and outs of a disciplinary management of prison population.

The arguments used by the Ministry of Justice, a few months later, illustrate this approach. On 2 December 2009, in the prison of Saint-Quentin Fallavier, a prisoner had an altercation with an officer, shortly after his arrival in the prison. He was immediately placed in a punishment cell and was heard by the disciplinary board on 4 December for having uttered “*insults or threats towards a member of the prison staff*” and provoked “*a disturbance likely of troubling the order of the prison*”. He was sentenced to 30 days in a punishment cell. Shortly after acknowledging the sentence, he attempted suicide by hanging. He was examined by the prison medical staff and was sent back to his punishment cell. His lawyer lodged an appeal in urgency and the judge decided to suspend the execution of the sentence. Appealing to this order, the Ministry of Justice put forward two arguments before the administrative court. One illustrated the discrepancy between the suicide prevention policy and the reality : “*some customary precautions were taken such as the removal of any linen and personal clothes that were replaced by a tearable pyjamas (see below on the emergency protection kit) in order to avoid the repetition of the acts*”. The other points at the pre-eminence of the disciplinary logic over any other approach in the implemented prison policy: “*if we admitted that a suicide attempt would in itself systematically forbid the placement in a disciplinary cell, this would be understood by the prison population as a possible ‘means’ that could be simulated to get the suspension or the cancellation by the judge of similar decisions concerning them*”.

The suicide prevention policy implemented from 2003 aimed at reducing by 20% the number of suicides in five years. The evolution of the figures - 115 suicides in 2004, 125 in 2009 - show the failure of the actions undertaken, especially those aimed at stamping out the higher suicide rates in punishment cells. It appears crucial that the Prison Service resume the reasoning it had undertaken during the previous decade. In 1996, an objective analysis of suicides in punishment cells had led it to consider this place as “*eminently anxiety-provoking*”, “*inducing a loss of reference which amplifies the inherent destabilisation of punishment cells*”; And also stressing “*the inactivity, isolation and the feeling of helplessness that it creates*”<sup>33</sup>. A Circular of the Prison Service affirmed in 1998 that “*the placement in punishment cells is in itself an important suicide risk factor*”, because it “*represents another break in relation to prison which was already one in itself*.”<sup>34</sup> Based on these findings, the National Consultative Commission for Human Rights (CNCDH) recommended in 2004 to substitute the punishment cell with “*other types of sanctions, such as confinement in individual cells*”.

This perspective was put aside. Instead, some steps were taken, limited to enhancing staff awareness to spot suicidal prisoners with the aim of preventing them from committing the act. Such a reasoning is emblematic of a suicide prevention policy that does not seek to tackle in depth the risk factors, although they are known, but simply looks at limiting their consequences. Thus, even though the spotting of fragile persons, vulnerable to a suicide risk or undergoing a suicidal crisis, seems to have improved (73% of people who committed suicide in 2009 were identified “at risk”, against 25% in 2003), about half of the prisoners who put an end to their lives in punishment cells in 2006-2007 were placed there before being heard by the disciplinary board, the suicide occurring on the same day or the next after the sentence. Knowing that “*the uncertainty of the sanction contributes to the exacerbation of the fragile state of the prisoner*”, as noted Dr. Albrand<sup>35</sup>, reconsidering the possibility to place someone in a punishment cell prior to any decision of the

33 Report on the prevention of suicide in prison, Ministry of Justice, head of the Prison Service, directed by Sandrine Zientara-Logeay, 1996, *La documentation française*

34 Circular of 29 May 1998, DAP.

35 Author of the latest report to date on the question of suicide prevention.

disciplinary board seems an essential preliminary condition of the needed reforms. Moreover, the prison Service has decided to give prisoners an “emergency protection kit”, which includes untearable linens and tearable pyjamas, where “circumstances call for it”. Isn't the mere fact of giving such kit to a prisoner an indication that there is a suicidal risk, despite which the management still maintains prisoners in the punishment cells even though it is a high risk location ?

Applicable to punishment cells as well as any other section of detention, the current suicide prevention policy *de facto* sets aside the specific risk factors of such a cell and especially the extreme de-socialising conditions that characterises it. What is even more regrettable is that the provisions concerning discipline contained in the Prison Law of 24 November 2009 do not offer any significant perspective of improvement. The Law only reduced the maximum duration of a punishment cell placement, facing the very strong criticisms regarding the disciplinary cell punishment. The severity of such punishment, which comes with an automatic withdrawal of sentence reduction credits, thus increasing the duration of imprisonment, is all the more problematic that its procedural aspects do not satisfy the impartiality standards posed by the European Court of Human Rights. The government tried to respond to criticisms by including in the disciplinary board an external member to the prison Service. But such a concession remains superficial as the majority of the board will remain composed of prison staff, and, above all, according to the draft implementation decrees of the Law, the prison manager will remain the sole decision maker. The feeling of arbitrariness and helplessness in front of the authority's power throughout the disciplinary procedure does contribute to the anxiety-provoking aspects of the placement in punishment cell.

Nor did the law changed the detention regime which is imposed within this framework. The person placed in a punishment cell is deprived of any possibility of cultural, recreational or work activities, purchases at the prison internal shop. His or her outdoor walk is limited to one hour per day in a specific individual yard, and he or she can only make phone calls and receive visits from family and friends once a week. It should however be noted that in the scope of an “action plan 2009”, the Prison Service has decided to test “*the introduction of a radio in the punishment cell*”. This test, aimed at limiting the “feeling of isolation” of the prisoner, is carried out in only one prison (France has 194).

In May 2008 a prisoner hung himself in the punishment cell of Maubeuge prison, where he was maintained in spite of several acts of self-injury. He had been seen by a psychiatrist and a psychologist, and was followed on a daily basis. But, as the medical service stated « we thought he was blackmailing », adding that « acts of self-injury are very common, it's sad to say but they are very common ».

In March 2008, a prisoner committed suicide in the Nanterre punishment cell, where he had been placed after assaulting a staff member. He had already attempted suicide before and had been visited by doctors. A severe mental health disorder had been diagnosed, possibly requiring a hospital transfer, but the diagnosis had to be confirmed and in the meantime the prisoner was maintained in the punishment cell, despite his condition.

In Saint-Martin de Ré, in October 2008, the doctor head of the UCSA (medical outpatient unit in prison) and a psychiatrist had considered that a young man's condition was incompatible with a punishment cell sentence, which he was executing since 6 days, as he suffered from a serious mental health disorder. The prison management thus took him out of the punishment cell, and placed him in solitary confinement, with similar living conditions, where the prisoner hung himself.

At Fleury-Mérogis, the courtyards of punishment cells are often surrounded by walls and wire fences, and their size rarely exceeds 25 square metres. At the prison of La Talaudière, the area is “installed on the roof of the 4th floor, (...) of a dimension of 4 x 5 metre, (and) closed by a wire fence and barbed wire on the ceiling”, as described by a sanitary inspection in October 2007. The room on the third floor of the prison of Varcès which serves as a courtyard does not allow prisoners to “see the sky” as noted in 2000 several Senators<sup>36</sup>. This situation has not evolved as was observed by an architect expert who was there in 2009. At the prison

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36 Senate, Prisons: a humiliation for the Republic, 29 June 2000, t.1, p. 141

of Bois-d'Arcy (Yvelines) in 2007, the seven courtyards of the punishment cells are “concrete cubes with wired ceilings and rolls of barbed wire” according to the regional sanitary supervision authority (DRASS). At the prison of Metz-Queuleu in 2007, still according to a report of a sanitary inspection, the four courtyards of the solitary confinement section and punishment cells measure “about 20m<sup>2</sup>”. At the prison of Nantes, in 2006, the DRASS observed that “*the courtyards for prisoners in punishment cells are in the former activity room*” that “*does not have any access to the outside*”. The reasons put forward to justify such a configuration are classic: at the prison of Rennes in 2007, the sanitary inspection explained that the two courtyards in concrete had “anti-escape ceilings”. It is difficult to understand why more stringent security measures are necessary in courtyards in disciplinary units than in others. The consequences on prisoners' physical condition of the narrowness of the courtyards are increased by the fact that space available in the cells is reduced in such a way that it does not allow either any exercise. In Fleury-Mérogis, an expert found that strolling space in punishment cells was 4,15 sq. m. These are smaller than ordinary cells as they comprise a barred lock to which the prisoner does not have access.

## 2.2. The placement in solitary confinement

***Causing drastic living conditions, especially by the deprivation of social ties and activities, in oppressive material conditions, the noxiousness of solitary confinement for the physical and psychological health is proven. This administrative measure is nonetheless frequently used, during periods that can be very long, especially for persons considered as bearing a security risk, either as a precautionary and/or disciplinary measure. It has not been regulated by the Prison Law, and resorts against it are limited. The prison policy does not seem to lean towards a limitation or regulation of the use of this measure, despite condemnations and recommendations of national and international bodies ; nor is it seeking to improve the living conditions it implies.***

Solitary confinement for security reasons is one of the measures that was denounced by the CPT (European Committee for the Prevention of Torture) in 2007 when it observed that the “*most striking*” image of its visit was “*that of a ‘security’ prison system with ‘special detention regimes (...) as well as special security measures*”. The CNCDDH has underlined for several years the noxiousness of this measure, stressing its “*deleterious effects on the physical and mental condition of the prisoners*”, and recalling that “*the medical staff (in custodial facilities) refers to it as ‘white torture’*”<sup>37</sup>. In its opinion on the draft Prison legislation in 2008, the Commission had also recommended “*to alleviate the living conditions within the solitary confinement sections*”. It especially noted “*that the principle of the respect of the dignity of persons does not appear to be compatible with the fact that an isolated person is often in the dark, including in authorised exercise areas in open-sky yards where the view is often very limited because of the wire fencing, that he or she has very rare access to group activities, and that he or she has to go through frequent and excessive searches*”. In its Memorandum following its visit to France from 21 to 23 May 2008, the Council of Europe Commissioner for Human Rights asked the authorities “*to allow concerned prisoners to access ordinary prison activities*”. None of these recommendations were heard.

The procedure of solitary confinement was reformed by a Decree of 21 March 2006, meant to “*put French procedures in compliance with the recommendations of the Council of Europe*”, according to the Ministry of justice.<sup>38</sup> The government praised itself, thanks to this reform, of noticeably reducing the number of isolated prisoners, from 602 on 1st January 2005 to 399 on 1st January 2008<sup>39</sup>. The effect however did not last long because, since, their number has started to increase

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37 CNCDDH, Study on Human Rights in Prison, 11 March 2004

38 Answer of the Minister of Justice to a question asked by the member of parliament Armand Jung, published in the official journal 25 September 2007

39 Answer of the Minister of Justice to a question asked by the member of parliament Michel Lieb Gott, published in the official journal 4 March 2008

again. On 1st June 2009, 482 prisoners were in solitary confinement.<sup>40</sup> An increase that follows the prison policy conditioning the living conditions of persons to the appreciation of their alleged “dangerousness”. As was observed by Jean Bérard and Hugues de Suremain, “*conceived as a temporary measure aimed at facing, more or less punctually, an identified threat, solitary confinement tends to become a lasting measure to manage the detention of a certain number of prisoners seen as particularly dangerous by the authorities*”<sup>41</sup>.

During the consideration of France's previous periodic report, the CAT was “*concerned that the (2006 decree, then only a draft) does not set any time limit and that no special justification is needed until two years have been spent in solitary confinement. The Committee (was) worried that detainees can be held under this regime for many years despite its possible harmful effects on their physical and mental state*”. It therefore recommended that France “*should take the necessary measures to ensure that solitary confinement remains an exceptional measure of limited duration, in accordance with international standards.*”. Following the Committee, the European Court of Human Rights, in the case *Ramirez Sanchez v. France* (4 July 2006), had also “*regretted that no upper limit has been provided for*” for “*such measures, which are a form of “imprisonment within the prison”*”. The Court had to recall that it “*should be resorted to only exceptionally and after every precaution has been taken, as specified in paragraph 53.1 of the Prison Rules adopted by the Committee of Ministers on 11 January 2006.*”. Other requests in the same vein from national and international bodies have multiplied these last years. In 2008, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, also found “*regrettable that during this reform the authorities did not make the decision (...) to limit more strictly the maximum length of confinement*”. In its study and opinion on the draft Prison legislation at the end of the same year, the CNCDDH “*asked the legislator to intervene to drastically reduce the maximum duration*”. All of these recommendations went unheeded. The Prison Law does not give any temporal limit to this measure. Article 92 of the prison legislation provides for the possibility for any adult prisoner to be placed in solitary confinement by administrative decision, “*as a protection or security measure, at his request or automatically*”, “*for a maximum time of three months*”. This measure can be “*renewed for the same duration*”, “*after a contradictory debate*”, and extended beyond a year time “*after the judiciary's opinion*”. In other words, the time limitation was conceived in a very restrictive manner, leaving room for flexible renewal possibilities through an administrative decision. Thus opening possibilities for very long confinements periods, as it can be the case today.

In its final observations of 31 July 2008, the Committee for Human Rights of the United Nations had however underlined “*the inappropriate use of solitary confinement*”. To this day some confinements still last for very long periods of time. Moreover there is “*a tendency to institutionalise the management of detention through confinement for a certain category of convicts*”<sup>42</sup>. Even though the 2006 Decree reminds that confinement is not a disciplinary measure, it remains so in practice, as was denounced by the CPT during its 2006 visit, underlining that “*confinement was frequently a long - sometimes very long - measure*”. The same year, the *Cour des comptes* (the highest financial jurisdiction in France) had observed that “*the most difficult prisoners were often put in solitary confinement, sometimes for a long time*”. Moreover, as was noted by the CPT in its last report, the solitary confinement section is also “*the rejection place for difficult prisoners, psychologically affected and for some with serious and chronic psychiatric illnesses*”. It is also a regime institutionally used for prisoners registered as requiring special supervision

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40 Rapport Garraud, n° 1899 fait au nom de la commission des lois constitutionnelles, de la législation et de l'administration générale de la république sur le projet de loi pénitentiaire (n° 1506) adopté par le sénat après déclaration d'urgence, 8 septembre 2009.

41 Hugues de Suremain and Jean Bérard, « The management of long custodial convictions as indicator of legal struggle », *Champ pénal / Penal field* [online], Vol. VI | 2009

42 Hugues de Suremain and Jean Bérard, *ibid.*

(hereafter referred to as DPS, for "*détenus particulièrement signalés*"). The European Court of Human Rights condemned France in July 2009 (*Khider v. France*) on the grounds of article 3, specifying that "*solitary confinement does not constitute a disciplinary measure and the only reference, not supported, to the belonging to organised crime, or to an escape risk, is insufficient*", the prisoner in this case being a DPS for these reasons. The Court held that "*the decisions to prolong solitary confinement should be substantially motivated in order to avoid any arbitrary risk. The decisions should therefore allow to establish that the authorities proceeded to an progressive assessment of the circumstances, of the situation and of the behaviour of the prisoner. This motivation should be, as time goes by, more and more detailed and convincing*".

Finally, the possibility to end a measure of solitary confinement is very restricted when such a decision does not emanate from the Prison Service itself. As was noted by the CNCDH in its study on the draft Prison legislation, "*the Prison Service is not obliged to follow the opinion of the medical practionner concerning the opportunity to end the solitary confinement*". Remedies against such measures are limited whereas various official reports advocated an enlargement of "*référés*" review procedures (= chamber judges examining a case and taking a decision rapidly) (Report of the first president of the *Cour de cassation* on the improvement of the control of custodial facilities, 2000 ; "France facing its prisons", *Assemblée nationale*, 2000; "Human rights in prison", CNCDH 2004). The *Conseil d'Etat* did admit that a decision to prolong a measure of solitary confinement could violate the prohibition of inhumane and degrading treatments and could therefore be judicially reviewed by a *référé* process. However the case-law has until now been very unfavourable to prisoners. Of course, the administrative judge has expanded its control for acting *ultra vires* for solitary confinement measures, taken as a precautionary or a disciplinary measure. However, the judicial review is subject to a condition of urgency, which in this case is interpreted very restrictively. Thus, a prisoner presenting musculo-skeletal pathologies caused by prolonged confinement does not justify urgency ; nor does the extension of a confinement measure of twelve years. Consequently, prisoners often have to wait over a year for a court to examine their request. In line with case-law, articles 91 and 92 of the Prison Law provide for the possibility for a "*référé*" review procedure both against a decision of placement in punishment cells and in solitary confinement. It does not however enlarge the possibilities of judicial review, as it could have done by presuming the condition of urgency is satisfied in such situations, despite the approval of Senators to this end during the parliamentary debates. Considering the particularly difficult situation of a person subject to such a regime, it would have been necessary to presume the existence of an urgency in order to decide upon the support of this decision and to stop an infringement as serious to individual freedoms as soon as possible.

In an opinion of 17 November 2008, the CNDS examined the case of M.G., a prisoner who spent in total over twelve years and six months in solitary confinement, in periods, since October 1993. A situation "*contrary to every international recommendation on the matter*" as said by the commission, which concluded a "*cluster of inhumane and degrading treatments*". In its opinion, the CNDS related the chronology of certain mentioned facts to justify the continuation of the placements in solitary confinements of the prisoner, contested their legitimacy and the applied procedure, and noted an "*overabundance of use of security measures*" against him (body searches and excessive transfers as well as the prolonged isolation). The commission mentioned facts going back to April 2006, at the prison of Saint-Maur where the officers "*implied that weapons had been found*". Then "*M.G. had been handcuffed and taken to solitary confinement*" by a dozen officers. Interrogated by the commission on the motivations of this confinement, the director of the prison admitted that "*he had no concrete elements implicating (M.G.) in the presence of fake weapons in detention*". It was justified by the fact "*a person called upon by the (police force) had indicated that a massive escape plan was underway at Saint-Maur*" and that "*M.G. having access to the showers where the fake weapons where discovered and when taking into account his personality, his influence in detention and his history, it was believed to be impossible that M.G. would not be involved in the presence of these weapons or informed of their presence*". The day following, a "*contradictory debate*" was held, and several prisoners initiated a "*protest movement against the solitary confinement of M.G.*" and of another prisoner.

Immediately transferred to the security prison of Lannemezan, M.G. was “notified of his placement in solitary confinement” as soon as he arrived. “Two weeks later, during a contradictory debate, M.G. was able to present written observations, as with every renewal, M.G. was followed by a psychiatrist at Saint-Maur, because of the damage caused by twelve years of solitary confinement he had already undergone there. He blamed the Prison Service for not transferring his medical records with his transfers”. This new placement in solitary confinement, approved of by the Interregional Prison Service Director, was suggested by the Director of the prison despite the fact that “it had no precise elements on what had gone on in Saint-Maur, but specified that it was noted in M.G.’s record that he was at the origin of the protest movement without any elements affirming he was the instigator”. Then, the CNDS stated that “the responsible of the Etat-Major of Security of the Central Administration had justified that prolongation of the isolation of M.G. by listing several facts preceding 12 April 2006, some of which were only supposition, then reminded of the discovery of the fake weapons and the collective movement that followed the placement of M.G. in solitary confinement and finally on his criminal profile”. The measure was prolonged until the end of October, even though a “report of the Inspectorate of prisons given to the Commission indicated that the Central Administration had received information as early as July 2006 implying that M. M.G. could not be involved in this case”. An expert report written in March 2007 at the request of the *juge des référés* of the administrative court of Paris indicated that “M.G. presents without doubt an important socio-sensorial deprivation syndrome which appears as the consequence of his solitary confinement. This state entails negative consequences on his psychological health condition.”

In an opinion adopted on 6 April 2009, the CNDS reminded that “solitary confinement is a measure likely to worsen conditions of detention for persons subjected to it, mainly by restricting their human and social contact on a daily basis” and can “induce physical and psychiatric consequences which one should be attentive to”. The prisoner had been placed in solitary confinement on 31 August 2006, because of various comments he had made throughout the summer threatening the manager of the custodial facility of collective movements or legal steps, or even inviting an officer “to fight with him like boxers in a ring”. For the Commission, it was obvious that “the context in which these comments were made and their content is not of a nature to amount to ‘serious reasons and objective and concordant elements allowing to fear serious incidents from the prisoner’”. The measure was however prolonged in 2007 by the Interregional Director. He justified his decision by the comments held, but also made reference to a “proselyte behaviour”, and the “participation in a collective movement” and the fact “that a cell-phone had been found in his cell the 31 August 2006”. For the Commission, these justifications were “fallacious or debatable (...) unacceptable”.

The confusion between the placement in solitary confinement and in punishment cells is nurtured by the fact that, in most custodial facilities, these two units are adjacent, share the same court yard and sometimes the same staff. The CPT observed it in the security prison of Moulins-Yzeure and the prison of Seysses (*maison d’arrêt*), “which reinforced this impression of blur between the security measure and the disciplinary measure”. The CNDS said “it followed” this analysis by the CPT, indicating that this situation “prevails also in the security prison of Lannemezan and in several other facilities visited by the Commission”, “maintaining this blur between the isolation measure and the disciplinary measure”. During its visit at the remand prison of Villefranche-sur-Saône on 23-24-25 September 2008, the *Contrôleur général* (CGLPL) observed that “the isolation section adjoins the disciplinary section”, the both comprising “a small building separated of the three buildings of ordinary detention”. At Nice, where his team went in November 2008, there was no independent isolation unit but “two cells in the entrance of the disciplinary unit (that) allowed to fill this service”. During his visit in prison of Rémire-Montjoly (*centre pénitentiaire*) from 27 October to 1 November 2009, the *Contrôleur général* also observed that “the exercise area is common for both cells (isolation and discipline).”

### III. In the name of security : infringements to the dignity and the integrity of prisoners

According to a note published by the Ministry of Justice in February 2009, « *the measures aimed at preventing escapes are more and more cumbersome, as are the internal measures aimed at maintaining order : development of ad hoc equipment, the creation of the ERIS [équipes régionales d'intervention et de sécurité, Regional Security and Intervention Teams], the specialised functions of the internal security information. Far from promoting a « dynamic security » based on « positive relations » with prisoners, this generates fear and paranoia throughout all relationships.* »<sup>43</sup> This finding meets that of the European Committee for the Prevention of Torture (CPT) in its report published on 10 December 2007, according to which “*most striking*” image of its visit was “*that of a ‘security’ prison system with ‘special detention regimes (...) as well as special security measures*”. The European Court of Human Rights based itself on the observations of the CPT to condemn France twice for the excessive security measures imposed on prisoners registered as requiring special supervision (“*détenus particulièrement signalés*”, hereinafter referred to as DPS). The report of the *Contrôleur général des lieux de privation de liberté* did recall that « *few prisoners escape from prison facilities : a dozen a year, in other words, for 80 000 persons in prison each year, one and a half chances out of ten thousand. [...] One can say that the "French Prison Service is [in this case] one of the safest of Europe* » ». Yet, nothing changes. Despite the manifest effects on the climate inside the facilities and the relationships between prisoners and staff, the prison policy implemented these last few years has ignored the re-orientation called for by human rights bodies. The obsession of continued reinforcement of security measures remain central. While the Prison Law was specifically expected to set the limits to the Prison Service's prerogatives, the Parliament's intervention resulted in an increased discretionary power for the later in several areas, in the name of security.

#### **(1) Body searches : the endorsement of arbitrary procedures**

***The searches carried out on prisoners considerably vary in practice from prison to prison, both in their frequency and process. They are decided arbitrarily and often carried out in humiliating conditions. The Prison Law has endorsed this situation.***

Body searches were one of the crucial issues to be dealt with by the Prison Law. They were heavily criticised and their efficiency questioned. A decision by the *Conseil d'Etat* had undertaken to strictly regulate their operation, by requesting that “*they be justified, inter alia, by the prisoner's behaviour or previous acts or by the circumstances of his contacts with third persons, and also that they be performed under conditions and terms strictly and exclusively adapted to these necessity and requirements*”. It added the “*it belongs to the Service to justify the need for such searches and the proportionality of retained terms*”<sup>44</sup>.

However, the Prison Law of 24 November 2009 reinforced the large latitude already granted to prison officers to carry out “full body searches” (*fouille intégrale*) on a prisoner (forced to undress, to bend over or squat, and to cough in front of an officer who performs a visual inspection of the anus). Providing that “*the type and frequency of body searches*” should be adapted “*to the personality of the prisoner*” the Law gives full discretion to the prison authorities to submit prisoners whom they find “difficult” to repeated and systematic searches, despite two condemnations by the European Court for Human Rights. This concern is reinforced at reading the draft implementation Decree which was submitted to staff representative unions : “*more frequent*

43 Official Bulletin of the Ministry of Justice, 28 February 2009.

44 CE, 14 November 2008, *El Shennawy & Section française de l'OIP*

*searches can be performed on prisoners, in particular when they represent a manifest risk of dangerousness stemming from their violent behaviour; their penal situation or the risk they would represent if they escaped”.*

Even more worrying the new legislation adds from now on the possibility to subject the prisoner to internal body inspections (*investigations corporelles internes*) conducted by a medical practitioner requested by the judicial authority in case of “*specialty justified necessity*”, which nature is not determined by the Law.

This evolution is all the more regrettable that the future President of the Republic deemed it necessary in January 2007 that “*the body search system be revisited in depth*”<sup>45</sup>, confirming the displayed determination of his political party, in the scope of the electoral campaign. Aware that “*the infringements that they constitute to the dignity of the prisoners, and in a certain way of the officers, are disproportionate to their aims and results they incur (smuggling in prison)*”, Nicolas Sarkozy’s party stated in June 2006: “*It is urgent to adopt more regulated practices that comply more with human dignity, as have already done several occidental countries.*”<sup>46</sup>

The draft Prison legislation presented before the Council of Ministers on 23 July 2008 rang the toll for such an evolution. In addition to the possibility given to a Prison manager to call for an internal body inspection (carried out by a doctor upon decision of the legal authority), the text marks the hostility of the Ministry of Justice to any reform aimed at replacing body searches by a system combining the use of electronic detection means and the resort to palpation searches (inspection with officer’s hands on different parts of the prisoner’s body who remains dressed). The Government opposed the request from members of parliament from the entire political spectrum who, deploring the poor efficiency of body searches and their particularly humiliating character, suggested “*setting up a plan to equip prisons with electronic detection devices so as to avoid body searches*”<sup>47</sup>. An incomprehensible refusal since the Ministry of Justice itself, in exposing the reasons accompanying the draft legislation, noted the “*infringement to individual liberties, privacy of the person and their dignity*”<sup>48</sup> of body searches.

In this context, the measures now regulating full body searches, and all the more the internal body inspections, are by no means a satisfying answer to the reports of several national and international bodies or to their numerous recommendations. In its last report, the European Committee for the Prevention of Torture (CPT) had to remind the French government that “*such a high frequency of body searches - with systematic undressing of the prisoner - constitutes a high risk of degrading treatment*”. During their visit, the delegation had indeed noticed that “*security searches were, in several cases, of excessive frequency*”, noting the example of a prisoner at the prison of Fresnes “*who said he had been searched 14 times in one month*”. Also, the experts had recommended “*the French authorities to ensure that the criterion of opportunity and proportionality are respected.*” Moreover, the CPT recommended “*the French authorities to ensure that the modalities of body searches be revised in order to assure the respect of the prisoner’s dignity.*” Because full body searches, and *a fortiori* internal body inspections, amount to surveillance practices that infringe upon a person’s dignity, the Council of Europe Commissioner for Human Rights, Thomas Hammerberg, stated in November 2008 to the French authorities that he would “*remain vigilant that practices such as body searches are strictly regulated*”. Such reform was all the more necessary that certain treatments of prisoners, in the scope of these measures, were qualified as “*inhumane and degrading treatments*” within the meaning of article 3 of the European Convention of Human

45 After the General Assembly on Prison Conditions, 16 January 2007.

46 « Justice. The right of trust », 12 June 2006.

47 Amendment proposed by the Commission for Social Affairs of the Senate

48 Exposé of the grounds of the draft Prison legislation, 23 July 2008.

Rights. Indeed, the Court of Strasbourg, in a 2007 case against France, qualified full body searches as a “*degrading*” treatment (European Court of Human Rights, *Frérot v. France*) and recently held that the conditions of detention during which the person is regularly subject to full body searches amounted to an “*inhumane and degrading treatment*” (ECHR, 9 July 2009, *Khider v. France*).

In a judgement of 12 July 2007 (*Frérot v. France*), the European Court of Human Rights observed that the prisoner of the prison of Fresnes (Val-de-Marne) had been systematically subject to anal visual inspections which were not based on any security imperative. It concluded that “*the combination of that feeling of arbitrariness, the feelings of inferiority and anxiety often associated with it, and the feeling of a serious affront to dignity, indisputably prompted by the obligation to undress in front of another person and submit to a visual inspection of the anus, in addition to the other intrusively intimate measures entailed by full body searches, results in a degree of humiliation exceeding the (...) level that strip-searches of prisoners inevitably involve.*” The Committee of Ministers of the Council of Europe is still supervising the execution of this case. In October 2009, the Ombudsman of the Republic and the National Commission for Human Rights made known of that the ECHR judgment was not being enforced, underlying that “*the serious affront to dignity*” of full body searches and advocated several measures that “*should be adopted*” by France “*in order to prevent further condemnations*”. Among them were “*the appeal of the circular of 14 March 1986 concerning the searches of prisoners, the strict legislative framework of full body searches, in particular concerning prisoners registered as requiring special supervision (DPS), the substitution of the law to the criteria of presumption of infraction, as ground for justifying searches, that of the existence of plausible reasons to suspect the prisoner has committed, or attempted to commit or is about to commit an infraction*”, also “*the obligation to motivate the searches and the systematic recording in a register for this purpose in every custodial facility, the number of undergone searches on each prisoner, the name of the searched person and of the member of personnel who carried out the search, the time and date of the search, the reasons for and type of search, a register which the legal and administrative authorities can access if requested*”.

On 9 July 2009, the European Court of Human Rights condemned France for its high security regime applied to a prisoner registered as DPS since the beginning of his incarceration in 2001 (*Khider v. France*). This case blames in particular “*the repeated character*” of searches that “*combined with the strict conditions of detention the applicant was complaining of, do not seem justified by a convincing imperative of security, defence, order or for the prevention of criminal offenses and are, in the opinion of the Court, of nature to create in the prisoner a feeling of being the victim of arbitrary measures*”. According to the judges, “*such repeated searches, carried out on a prisoner presenting signs of psychiatric instability and psychological suffering, were of a nature to accentuate his feeling of humiliation and abasement to a degree that we can qualify as a degrading treatment*”.

The National Commission of Security Ethics (CNDS) has also had several cases referred to it. In an opinion adopted on 17 November 2008, the CNDS stated that a prisoner, held in a punished cell at the security prison of Lannemezan (Hautes-Pyrénées), had been subjected to “*a degrading treatment within the meaning of article 3*”, due to the frequent searches but also “*their absence of justification*”. Its investigation allowed it to hold that “*during the length of his isolation at the prison of Lannemezan, namely for over 6 months, M. M.G. had been subjected to three to four strip searches at every entry and exit of building C, including when he went to the UCSA (inpatient hospital unit in prison), and each time he had been visited inside the punishment cell*”. During his hospital transfers, the prisoner had been “*subjected to a first strip search at the exit of the isolation unit (quartier d'isolement)*”, then “*a second search prior to leaving the prison under escort*” ; “*at his return, he was searched again at his arrival to the prison, in accordance with article D.275 of the Code of Criminal Procedure, then at his arrival at the isolation unit*”. Assessing that the “*number of strip searches was disproportionate to the goal to be reached and the composition of the escorts*”, the CNDS asked “*that an analysis be started*”, in particular “*to reduce the number of strip searches during transfers, maybe to only resort to them when there are plausible reasons to think the person is concealing dangerous objects for themselves or others, such is the case in police custody*”.

## **(2) « Détenus particulièrement signalés » (prisoners registered as requiring special supervision), particularly exposed**

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*Some prisoners are moreover subject to a heightened security regime, which renders their conditions of detention particularly restrictive and often inhumane : they are the prisoners (currently 332), who, according to the Prison Service, are registered as requiring special supervision (« détenus particulièrement signalés » hereinafter DPS) in a special directory, which exists since 1967. All aspects of their living conditions are affected by this DPS status.*

According to a Circular of 18 December 2007, « *the registration in the DPS directory calls the authority's attention in order to ensure a heightened vigilance concerning the supervision of these prisoners* ». Such registration is decided by the Ministry of Justice, after an Opinion of the « DPS commission », composed of judicial authorities, the *Préfet*, the Interregional Director of the Prison Service and the Director of the facility, the Police and the *Gendarmerie*. The Opinion is merely formal since the opinion of only one member of the Commission is enough to seize the Ministry for the registration of a prisoner on the DPS directory. Can be registered : prisoners belonging to organised crime or terrorist movements ; prisoners having been reported for escapes or attempted escapes ; prisoners whose escape could have an important impact on public order because of their personality and/or the facts for which they have been convicted ; prisoners deemed as seriously violent having committed one or more murders, rapes or acts of torture inside a custodial facility. According to a Circular of the DAP of 18 December 2007, « *specific measures are applicable to them in certain situations* », including the placement in « *cells situated at proximity of officers' internal or peripheral posts* », a « *reinforced vigilance of staff during calls* » and also « *search procedures and controls of the facilities* ».

As summarised by the *Conseil d'Etat* (the higher administrative court in France) in November 2009, « *this measure is likely to impact the daily life of the prisoner through searches, inspection of correspondence or frequent inspections, as well as his detention conditions in orienting in particular the choices of the place of detention, the access to different activities, the modalities of escort in case of leave* ». A finding confirmed by the CPT, which adds « *an intensive surveillance of movements, regular transfers of cells or of facilities* ». And was particularly shocked by the conditions of access of DPS prisoners « *to medical and psychiatric care outside the custodial facility [which] are limited, because of the imposed security conditions during hospital transfers [...], even impossible for compulsory psychiatric hospitalisations* ». At the prison hospital of Fresnes, CPT experts have, for example, noticed that « *the rooms/cells of DPS prisoners can only be opened by the prison officers, a measure that the CPT had already qualified as completely misfit in a place of medical care, also raising the issue of access to the patients in situations of urgency* ». The CPT therefore reiterated « *its recommendation aiming at guaranteeing immediate access without delay, day and night, by the medical staff to DPS prisoners* ». It also qualified as « *inhumane and degrading treatment* » the deprivation of psychiatric care for prisoners of the prison of Moulins, a « *dramatic situation* » which « *generates completely inappropriate placements of patients presenting psychiatric illnesses in solitary confinement sections, even in punishment cells* ».

In its 2007 report, the CPT had recommended that the authorities « *review the registration and radiation modality for the DPS directory* » and that « *necessary measures be taken so that the DPS status of a prisoner be regularly examined* ». Until only recently, it was impossible for a prisoner to challenge his registration on the DPS directory. On 30 November 2009, the *Conseil d'Etat* held that the question was justiciable, allowing from now on any prisoner to challenge before a court his or her registration as a DPS as well as any refusal to strike him off the directory. Seized by a prisoner

challenging his registration in the directory, the judge considered that it was an act causing prejudice, since in fact it « *intensified the particular supervision, precaution and control measures the prison staff and authorities had to take with respect to the individual, affecting all the aspects of his living conditions* ».

On 9 July 2009, the European Court of Human Rights unanimously condemned France for the high security regime applied since the beginning of his imprisonment in 2001 to Cyril Khider, registered in the DPS directory. The Court considered that the conditions of detention of the applicant, subject to repeated transfers, placed under a long-term solitary confinement regime and submitted to regular full body searches « *are analysed, by their combined and repeated effect, as an inhumane and degrading treatment within the meaning of article 3 of the European Convention* ». The Court examined in detail each measure which constituted the imposed detention regime of the applicant. It firstly incriminates the applied security rotations, in other words, a continual transfer system from one facility to the next resulting from a confidential note from the Prison Service, which was cancelled on 29 February 2008 by the *Conseil d'Etat* seized by OIP. The Court held « *that such a high number of transfer [14] of the applicant during his incarceration [...] were of a nature to create a feeling of high anxiety for him concerning his adaptation in the different places of detention and the possibility to continue to receive family visits and rendered quasi impossible the implementation of a coherent psychological medical follow-up* ». The Court points out « *the placement in isolation for such a long time, combined with the degrading psychological and medical state of the applicant, who following the medical certificates is imputable to repeated prolongations of such a measure* ». It then condemns « *the repeated character* » of the searches which « *combined with the strict character of the conditions of detention the applicant was complaining of, do not appear justified by a convincing imperative of security, defence of order or prevention of criminal infractions and are, according to the Court, of a nature to create in him the feeling of having been victim of arbitrary measures* ». According to the judges, « *these repeated searches, carried out on the prisoner who presented signs of psychological instability, were of a nature to emphasis his feeling of humiliation and abasement to a degree which we can qualify as a degrading treatment.* » The Court finally condemned France for the violation of the right to an effective remedy, noticing that the applicant did not have any effective means to contest the transfer and body search regimes, concerning the case-law followed at the time by the administrative jurisdictions. Finally, it allocated 12 000 euros to the applicant as moral damages, considering that the applied treatment was of a « *nature to provoke despair, anxiety and tension* ».

After over a year of a complex procedure aiming at striking off a prisoner from the DPS directory, the Prison Service removed him from the directory the 26 November 2009. A few days later, the *Conseil d'Etat* was planned to examine the appeal of the prisoner E.A. against the decision rejecting the suspension of his registration on the directory. On 26 December 2009, the *Conseil d'Etat* while declaring the dismissal of the case affirmed at the same time that the measures taken towards the prisoner entailed, « *on the grounds of the respect of public order, the aggravation of restraint measures affecting as much his daily life as his conditions of detention* », did not « *exonerate the administration of its duty to reconcile these measures with its obligations concerning the respect of the fundamental rights of the prisoner, in particular the right to life and the protection of his health* ». E.A. was subject to a security regime since 2001, including in particular frequent facilities changes, solitary confinement, and hindered and restrictive access to care. However, suffering from a cancer diagnosed on 3 December 2008 (even though the cancer had been suspected for four months) he underwent surgery in January 2009. Undergoing chemotherapy, he had to go to the Security Interregional Hospital Unit (UHSI) of Toulouse every three weeks for three days. In February, during a meeting at the *Préfecture* of Tarbes, the prison doctor had then underlined that « *the treatment [was going to become] particularly aggressive in the following weeks* », that he risked « *at the time to suffer from secondary effects and have real health problems* », that he was « *worried of septic shock that are difficult to plan* » and that « *in such case he would not be fit to be moved* ». The commander of the *Gendarmerie* pointed out « *DPS status of E.A., a status that does not allow any flexibility* ». Contacted by the OIP, the *Gendarmerie* specified that the delays to organise the escort were comprised between 0h45 and 1h15, explaining that the status of the prisoner required that military supervision and intervention squads had to be called. A first dysfunction occurred on the night of 1-2 March 2009, when E.A. was suffering of nephritic colic. At 1h24, the emergency service (*pompiers*) and the *gendarmerie* were contacted to take him into care. Once on location, the *pompiers* took measures to transport him to the hospital of Lannemezan. The *gendarmerie* made up an escort at 1h55 but called the regulating doctor of the SAMU of the hospital of Tarbes to ensure the necessity of his hospitalisation. E.A. was finally treated in the courtyard of the prison, in a SMUR vehicle. He then returned to his cell in the night, after having believed he was going to be hospitalised. According to the *préfecture*, during the first alert, « *nothing worked, the guidelines were not*

*properly dispersed* ». In the night of 22 March, E.A. again suffered from violent pains in his kidneys and alerted the officers around 2h40. The *pompier*s, called for in the beginning, had to call the SAMU at 3h37. The SAMU tried to send the patient to the hospital of Lannemezan but were hindered by the refusal of the head of the prison. They contacted the *préfecture* at 4h30, to force the intervention of the SMUR on the premises. Arriving at 4h40, the SMUR took E.A. into care until 6h in his cell. At 16h45, he again suffered a crisis. According to the head of the prison, the doctor of the SAMU accepted « *after many negotiations to send the SMUR who decided to transfer E.A.* » to the hospital of Lannemezan. He returned to the prison at 21h30, after a transfer to the hospital of Tarbes had been considered. The head of the prison wrote a letter to the *préfet* the following day to complain that the SAMU doctor « *in no way wanted to hear the guidelines* ». The imposed conditions for hospital transfers imposed upon E.A. are very tough. From 8-11 January, E.A. stayed handcuffed to his bed in the intensive care unit of the hospital of Larrey, even though he had just undergone a lobotomy. The public Security of Toulouse explained to the OIP that police officers had followed the guidelines concerning dangerous prisoners. Friday 3 April, E.A. was escorted by no less than 18 police and prison officers, some who were hooded and armed in order to undergo an electromyograph after a chemotherapy session. He continued to wear shackles on his feet during the exam. It was three days later that an administrative judge called the Ministry of justice to re-examine the request to radiate the prisoner from the DPS directory, considering that « *the reasons that had justified his registration (...) had disappeared or, at least, that urgency justified the radiation of the prisoner from the directory* ». When questioned by the OIP, the *État-Major* of Prison Security declared that « *for the moment, for the administration, E.A. was still a DPS* » and retorted, concerning subjecting him to shackles during the exam, that « *the doctor did not object ; there is therefore no problem* ». The judge for the application of sentences of the TGI indicated to the lawyer of E.A. that he was examine for the summer the requests of sentence management presented by him.

### (3) Use of force

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#### 3.1. The ERIS or the strategy of tension

The Regional Intervention and Security Teams (« *Équipes Régionales d'Intervention et de Sécurité* », hereinafter referred to as ERIS), created in 2003, are founded on a doctrine of deterrence that on several occasions led to illegal violences. They carry substantial weaponry – flash-balls, Taser, “tonfa” defence sticks, telescopic clubs – and an outfit just as impressive – intervention combination, hood, helmet, shield, etc. -. In two cases for which it was seized, the National Commission of Security Ethics advocated « *a better grasp of professional technical intervention acts* » and a reexamination of the intervention conditions of the ERIS « *in such a way that force is only used after discussion with the prisoner* ». This same recommendation was made by the CPT in 2007, reminding that « *the general principle according to which the use of force (or the threat of the use of force) in prison – such as the interventions of the ERIS – can only be resorted to after attempts to dialogue with the prisoner(s) have failed.* » The CPT, in the same report as well as in the previous one, also pointed out the hoods worn by members of the ERIS, that « *can in particular impede on the identification of potential suspects, if allegations of maltreatment are made by persons deprived of their liberty* ». Commenting on the implementation of the ERIS, sociologists believed in 2005 that « *the violence which brought about their intervention illustrate the fact that violent means, in this case as in others, can win over the aimed ends, by aggravating the violence* »<sup>49</sup>.

A man, detained at the prison of Aix-Luynes complained of violent acts during two body searches carried out by members of the ERIS in October 2005. After each one of them, hematomas and bruises were noticed on the plaintiff. Classified as a DPS, following two escapes, one in 1992 and the other in 2002, the man appeared since 17 November 2005 before the *Cour d'assises* of Aix-en-Provence for attempted escape. Kept in solitary confinement, he was subject to reinforced supervision by the ERIS of Marseille.

49 A. Chauvenet, M. Monceau, F. Orlic, C. Rostaing, *Prison violence in question*, GIP research mission Law and Justice, CNRS-EHESS, June 2005.

Having been informed that the searches were to be undertaken by the prison staff, and not by the members of the ERIS, the prisoner refused to undergo this measure on 6 October 2005. According to the CNDS, who gave an opinion on this case, « *facing this refusal, the staff of the ERIS, instead of referring it to the staff of the prison, decided to go beyond the guidelines, and resort to the use of force in order to carry out themselves the body search of the prisoner who admits to having fought back* ». The prisoner affirmed having received punches, which the agents of the ERIS deny. « *However, notes the CNDS, M. D.M. had been examined, at his request, by a doctor, who observed different hematomas and bruises* ». A few days later, on 14 October 2005, « *the hard way was again used against him to force him to obey* ». Following its investigation, the CNDS advocated « *a better grasp of professional technical acts of intervention* » and that should be reminded « *the necessity to undergo a discussion and negotiation phase with the prisoner before resorting to the use of force* ».

Such use of force was also noted in another case dealt by the same CNDS, on 18 December 2006. Here again, the prisoner was registered as a DPS, who complained before the European Court of Human Rights. Having already been « *subject to 20 transfers in addition to a placement in solitary confinement since the 23 June 2003* », he had just been transferred on 2 November 2005 in a prison as far from his family as from his lawyer. As a security measure – the prisoner contested his transfer –, the director had called upon the ERIS of Toulouse. On 3 December 2005, the latter intervened to make him leave the disciplinary unit to take him to solitary confinement. The CNDS relates that, « *without any time of negotiation* », the prisoner « *was forced against the wall by a shield, held and handcuffed by two ERIS agents called "voltigeurs", and carried to solitary confinement nearby* ». He then « *was stripped naked and searched, which did not seem necessary within the provisions of article D.275 of the Criminal Procedure Code* ». In his appeal before the European Court, the prisoner maintained that the ERIS « *came into the cell, threw him against the wall, beat him with punched, and stroke him with the tonfa in the legs to make him drop, before handcuffing him in the back. They then picked him up by the handcuffs "like a suitcase" and transported him horizontally to the isolation cell* », adding that « *during the journey, an agent muzzled his mouth with his hand* ». Later in the day, during the exercise time, a new intervention took place. According to the CNDS, « *the ERIS suddenly opened the cell and noticed that M. E.A. had pushed the refrigerator in front of the door* ». « *As in the morning and in the same way* », the prisoner « *was pinned against the window with the shield, subdued by the "voltigeurs", frisked and forced in handcuffs to the exercise area, without asking him if he wished to go* », before being « *carried back by force to his cell* ». According to the memorandum brought before the European Court by the lawyer of the prisoner, he was twice victim of violence of the ERIS. One first time to carry him by force to the exercise yard and a second time on the way back. On 6 December 2005, the doctor of the prison signed a certificate of grievous bodily harm, noting lesions on the face, the wrists and pains in his ribs « *linked to a probably muscular contracture* ». Three months later, a broken rib was diagnosed by the doctor of another prison. The CNDS was again surprised that the ERIS assessed that it was « *necessary to make the prisoner go to the exercise yard by force, the prisoner being able to renounce that right* » and asked the government to reexamine the intervention conditions of the ERIS « *in such a way so that force is only used after discussion with the prisoner in the aim to obtain the understanding and the acceptance of what is being asked of him* ».

### 3.2. Violence perpetrated by prison staff

Such attitude in the use of force and restraint during professional acts has been observed in numerous custodial facilities, without necessarily concerning the ERIS, as the multiplication of referrals to the National Commission of Security Ethics (CNDS) show.

(NOT TRANSLATED) Les faits les plus graves que la CNDS ait eus à traiter se sont produits au centre pénitentiaire de Liancourt (Oise). Saisie à cinq reprises en 2006 sur cet établissement, elle y a relevé une série d' « *agissements non professionnels, graves* », des « *dérives individuelles aussi bien chez certains anciens gradés de Liancourt que chez certains jeunes surveillants sous influence, en perte de repères légaux et professionnels* » et « *un état de délitement généralisé des fonctions et des responsabilités d'une partie de l'encadrement* », aboutissant à un climat général « *de peur et de représailles, [de] brimades* », destinés à faire régner « *la terreur et l'ordre* ». L'une des saisines concernait un suicide survenu le 24 mars 2006. La veille, après avoir été « *maîtrisé* » par des surveillants, le détenu avait été hospitalisé, puis placé au quartier disciplinaire (QD). Deux autres saisines ont trait à des accusations de violences lors de

placement en QD, l'un le 10 juin 2006, l'autre le 24 août 2006. Critiquant le « *mode d'intervention des surveillants, arrivant en nombre, et faisant preuve de peu de discernement* », la CNDS s'est inquiété de la récurrence « *des incidents* » provoqués par des problèmes mineurs, mais « *conduisant aussitôt à des mises en prévention qui s'accompagnent de brutalités* ». Une autre saisine concerne des faits survenus là encore au QD, le 27 mai 2005. Ce soir là, le premier surveillant avait décidé de « *réunir son équipe d'intervention* », parce que, a-t-il expliqué à la CNDS, des détenus avaient accroché des couvertures aux grilles et refusaient de les enlever. Cette décision a été prise en violation des dispositions réglementaires, une note de service précisant que, lors du service de nuit « *le premier surveillant, assisté du piquet, ne doit intervenir dans les cellules ou dortoirs qu'après l'arrivée sur l'établissement du personnel de permanence préalablement averti* ». Le plus grave est cependant les faits qui s'en sont suivis : une « *intervention musclée des agents* » dans une cellule et l'utilisation de la lance à incendie dans deux autres. « *Les cellules ont été entièrement arrosées* » et la literie a été « *trempée* », explique le rapport de la CNDS. Les détenus y ont été laissés toute la nuit. À en croire certains agents, l'utilisation de la lance se justifiait par « *un début d'incendie* », mais cette version a été contredite par d'autres surveillants. Par ailleurs, « *aucune trace de papiers ou d'objets brûlés* » n'a été retrouvé. Pour la Commission, il y a eu clairement, « *de la part du premier surveillant et des deux surveillants, volonté d'humilier les détenus en les laissant le restant de la nuit dans des cellules rendues inhabitables* ». Quant à l'intervention musclée, elle ne semblait « *pas avoir été justifiée* » et constituait « *un manquement à la déontologie professionnelle sur l'usage de la contrainte* ». Enfin, le cas le plus récent est celui d'un détenu accusant deux premiers surveillants de l'avoir frappé au QD le 7 novembre 2006. Des faits pour lesquels ils ont été condamnés par le tribunal correctionnel de Beauvais.

La CNDS a relevé un pareil usage disproportionné de la force, ainsi que de moyens de contrainte, dans son avis du 20 octobre 2008 concernant un détenu non violent et dont la jambe était fracturée et plâtrée, à la prison de Meaux (Seine-et-Marne). Le 27 septembre 2007, au centre de détention de Meaux (Seine-et-Marne), constatant que ses affaires avaient été placées dans des cartons lors de la fouille de sa cellule, le détenu demandait aux surveillants à bénéficier de l'aide de l'auxiliaire pour les ranger. Trois semaines plus tôt, il s'était fracturé la cheville lors d'une chute ; plâtré, il marchait depuis avec des cannes anglaises. Sa demande fut pourtant rejetée. Sidéré, le détenu refusa de réintégrer sa cellule et, déclarant préférer aller au mitard, se dirigea vers ce quartier. L'alarme fut alors déclenchée. Recevant de nouveau l'ordre de réintégrer sa cellule, il réitéra sa volonté de se rendre au quartier disciplinaire. Selon l'enquête de la CNDS, « *le premier surveillant S. a soudain attrapé le bras de M. C.K. et a dit à ses collègues : "Allez-y". M. C.K. fut alors saisi par les fonctionnaires, et dans un même mouvement, ils ont tous chuté au sol* ». Le détenu a ensuite « *été menotté dans le dos* » ; « *un surveillant lui a saisi la cheville droite pour fléchir la jambe vers le dos, pendant qu'un autre surveillant faisait la même chose avec sa cheville gauche, immobilisée par le plâtre [...]* Puis les surveillants l'ont relevé et l'ont conduit sans ses béquilles, en le soutenant jusqu'au quartier disciplinaire ». De l'enquête, il est pourtant ressorti que le détenu « *n'a été violent à aucun moment* ». « *Au regard de l'attitude non violente [du détenu], de son souhait explicitement exprimé [...] d'être placé au quartier disciplinaire et de son handicap qui ne pouvait être ignoré* », la Commission a donc très logiquement estimé « *que l'usage de la force [...], la saisie de sa jambe fracturée et plâtrée, ainsi que l'emploi de menottes pour l'emmener au quartier disciplinaire étaient disproportionnés, contraires aux dispositions des articles susvisés et constitutifs d'un manquement à la déontologie de la sécurité* ».

Tout récemment, dans un avis du 16 novembre 2009, la CNDS a estimé nécessaire de recommander un « *rappel périodique à l'ensemble des agents* » du corpus réglementaire en la matière et la « *multiplication des formations* », exaspérée par le non respect « *trop souvent constaté* » du principe de nécessité et de proportionnalité des techniques de coercition. Les faits dont elle était saisie cette fois là remontaient au 4 janvier 2009 et s'étaient déroulés à la maison d'arrêt de Bois-d'Arcy (Yvelines). Une altercation avait eu lieu entre un surveillant et un détenu, alertant les personnels présents à proximité qui avaient appelé des renforts. Alors que le détenu expliquait à un agent arrivé sur les lieux qu'il avait des problèmes avec le surveillant, ce dernier l'« *a qualifié [...] de menteur en pointant son doigt sur lui* ». Selon le détenu, il l'aurait également poussé à deux reprises, puis aurait « *tenté de lui envoyer un coup de poing* », que le détenu aurait tenté de lui rendre. L'agent présent a témoigné à la CNDS avoir « *repoussé l'un et l'autre avec ses deux bras et [...] reçu le coup de poing* ». Pour la CNDS, le comportement du surveillant « *n'a, à cet instant, pas été approprié* » ; son attitude « *n'est pas acceptable* » et « *est incompatible avec les dispositions [...] du code de procédure pénale* ». Arrivés à ce moment là, les renforts ont maîtrisé le détenu et l'ont allongé au sol. Le détenu affirme qu'alors il a « *reçu des coups de pied* », que « *des surveillants lui avaient écrasé la main* » et qu'« *il s'agissait d'un geste volontaire* ». Un certificat médical a « *constaté une douleur à la palpation de la main droite avec légère augmentation de volume, sans lésion* ».

osseuse, et, une douleur à la palpation du genou droit », le tout justifiant « une incapacité totale de travail de 3 jours ». Si la Commission a dit n'être « pas en mesure [...] de déterminer si elles ont été occasionnées volontairement ou non », elle a précisé cependant qu' « il est permis de s'interroger, à l'occasion de cette saisine, sur les modalités de maîtrise des détenus agités et la formation des agents à ces techniques qui est manifestement insuffisante ». Ce qui aboutit d'ailleurs, pour les surveillants mêmes, à une « augmentation des contusions et écrasements » (41 en 2008 contre 16 en 2007), « principalement causées par les diverses interventions menées lors d'une ouverture de la cellule ou d'une intervention de maîtrise sur un détenu ».

Une enquête de police est en cours concernant des violences qu'un détenu du centre de détention d'Argentan affirme avoir subi le 8 janvier 2010. Ce jour-là, au moment de la mise en place des promenades vers 14 h, un incident a éclaté. Estimant que N.V. ne s'était pas montré assez prompt pour sortir de cellule, l'agent a refermé la porte. L'intéressé ayant ressenti ce geste comme une provocation, il a parlementé avec le surveillant du poste central via l'interphone et tambouriné à la porte de sa cellule. L'agent d'étage est revenu accompagné d'un autre surveillant. Les versions divergent sur ce qui s'est produit ensuite. N.V. explique que réagissant à une provocation, il a tenté de donner une gifle à l'agent et que les deux surveillants l'ont alors violemment frappé. Pour les personnels, N.V. s'est jeté sur eux, a tenté de leur assener un coup de poing et ils n'ont fait que le maîtriser. Selon les informations publiées dans l'édition du 20 janvier 2010 du journal Ouest France, ils soutiennent que, alors qu'il était ceinturé par l'un d'eux, N.V. a fauché l'autre, entraînant la chute des trois, au cours de laquelle lui-même se serait blessé en tombant face contre terre. Un surveillant se serait quant à lui blessé au revers de la main sur l'angle du lit. Toutefois, si les compte-rendus versés à la procédure disciplinaire font état pour certains de coups de poing de la part de N.V., aucun ne mentionne le balayage ou la chute des surveillants. Le rapport de l'officier pénitentiaire établi le 8 janvier fait état que les deux agents ont été « blessés aux mains (lésions + contusions [avec contact avec le sang du détenu] - éventuelles fractures aux mains) et ont été reconduit rapidement à l'infirmerie pour des soins. » Il estime souhaitable « de les envoyer à l'hôpital [...] et si nécessaire, de mettre le protocole prévu en cas de contamination au sang » et qu'ils « soient mis au repos quelques jours, également qu'il leur soit proposé le psychologue du personnel et que le médecin de prévention soit avisé. » En toute hypothèse, c'est le visage très fortement contusionné que N.V. a été conduit au quartier disciplinaire. D'après la direction du centre hospitalier d'Argentan, en charge des soins dans la prison, les services pénitentiaires ont sollicités l'intervention des personnels soignant au quartier disciplinaire, craignant la réaction de la population de l'établissement si N.V. traversait toute la détention pour se rendre au service médical. Son état de santé a cependant nécessité un transport aux urgences, où a été dressé un certificat faisant état d'une fracture du nez, de plusieurs plaies et d'hématomes au niveau du visage et de douleurs sur le haut du corps. Après sa condamnation par la commission de discipline le 11 janvier, prononcée sans que les protagonistes n'aient été entendus, N.V. a subi le 13 janvier une intervention chirurgicale au visage avant d'être replacé au quartier disciplinaire dès son retour de l'hôpital, le lendemain même. Contacté par l'OIP, le directeur du centre de détention concède que « les faits laissent interrogatifs » et qu'ils « s'apparentent à une bavure » mais déclare « attendre les conclusions définitives de l'enquête », qui sera « difficile ». Le procureur de la République d'Argentan affirme qu'il s'agit d'un « dossier sensible » et qu'il entend bien faire toute la lumière sur cette affaire. Plusieurs sources judiciaires ont par ailleurs indiqué que le climat du centre de détention était « tendu en permanence ».

The failure to respect procedures, combined with the law of silence prevailing in prisons, makes it very difficult for prisoners to lodge a complaint. Two prisoners said to be victims of violence qualified by the CNDS as « unjustifiable » and « inadmissible » had to wait over six years for the first indictments. In a case of 15 December 2009, the chamber of instruction (*chambre de l'instruction*) of the appeal court of Riom challenged the *juge d'instruction* in charge of the file, and ordered further information and the indictment of the prison manager and the Chief officer. The violence occurred immediately after a hostage taking on 24 November 2003. That day, the prisoners had sequestered prison officers under the threat of tools, in order to support their claims concerning their personal situations and the recent harshening of the detention regime of the prison. The negotiators of the GIGN, the elite unit of the *gendarmerie* sent on the premises, managed to bring the situation to an end without any harm to the hostages. However, soon after, the GIGN violently interfered on another prisoner, because he refused to follow an order. Afterwards, violent acts also occurred against four prisoners when they were brought to the punishment section by ERIS agents

accompanied by a large number of prison officers. During this transfer and then the placement in the punishment cells, the prisoners were severely beaten up, causing ten days of ITT (temporary interruption of work) for M.A., 2 days at M.B. for 5 for M.D. Referred to of the facts, the CNDS believed, in December 2004, that « *the responsibility of numerous officers of the prison present on 24 November 2003 was entirely engaged* ». The Commission declared holding « *for highly probable that the officers of Moulins belonged to a local intervention group, essentially made up of officers from Moulins, intervened hooded in the punishment section on M.A. and M.B. with a high level of violence, as reprisal [...] and in a deleterious atmosphere of “competition” with their recently-formed colleagues of the ERIS.* » The CNDS requested « *disciplinary action not only against the officers identified by the judicial procedure but foremost against the managers and the officers of the prison whose passiveness gave way for such abuse* ». On 27 November 2003, the prosecutor opened an investigation. An independent investigation (information judiciaire) was then open the 7 July 2005 for violence in groups by persons charged with a public service mission causing an ITT of more than eight days. On 10 February 2009, the *juge d'instruction* of the TGI of Moulins however decided to close the case for lack of evidence, considering that no sufficient charge could be held against anyone, the identification of the authors being impossible because they were hooded. The *chambre de l'instruction* considered that « *the reluctance to explain, the denials, the omission or the lies of civil servants refusing to testify, cannot outweigh the reality of the specific, detailed and concordant declarations coming from the molested prisoners, as well as from some of the attacked escorts and other persons under the Prison Service* ». Rejecting the argument of identification, the magistrates recalled that « *at several occasions the presence of civil servants affected to the punishment section within the U 12 team is observed on the premises* » and that, « *either way, persons who are used to working together for a long time, who were present together at the same place and at the same time, affected to the same task, can be identified even if they are in the same outfit and hooded* ». Also, it believed « *necessary to hear again the agents wearing such outfits* » and to organise « *confrontations [...] maybe of a nature to overcome the silence of solidarity they had adopted* » and to « *put each of them in their rightful place, facing their responsibilities* ». As for the manager of the prison, M. W, and the head of detention, M. M, it « *was appropriate to interrogate them once again [...] and to confront them so that their respective responsibilities be clearly defined* », and that « *under the statute of an indictment* ». Because, explains the opinion, « *it cannot be seriously contested that their mission was to be on the premises and that they were brought there to bring an end the operations of M.A and his co-authors after they had been handed by the GIGN who got them to surrender* ». This however did not stop M. W, the previous Prison Director, to remain in function until 4 September 2006, date when he was appointed Director of the prison of Dijon, before occupying the position, since January 2009, of head of the “Prison Security” office at the central Prison Service (DAP).

In several cases prisoners were condemned to pecuniary sentences, which can only have a deterrent effect for detained persons to go before the courts when they consider to be the victim of ill treatments by state agents.

(NOT TRANSLATED) C'est le cas par exemple du détenu ayant subi des violences de la part des ERIS de Toulouse et qui avaient porté plainte avec constitution de partie civile le 22 décembre 2005. Le juge d'instruction du TGI de Toulouse a rendu une ordonnance de non-lieu le 12 juillet 2007, au motif que l'intéressé avait adopté un comportement provocateur à l'encontre des surveillants, et que les agents des ERIS n'avaient fait usage de la force à son égard qu'en raison de son refus de se plier aux ordres. Il a condamné E.A. à une amende civile de 500 euros. Ses appels ayant été pareillement rejetés, le détenu a saisi la Cour européenne des droits de l'Homme. Dans un autre dossier, l'amende s'est élevée à 1000 euros. L'affaire remonte au 30 juin 2004 et porte sur les conditions dans lesquelles le détenu a été fouillé lors de son placement au quartier disciplinaire à la maison d'arrêt de Fleury-Mérogis (Essonne). Il affirme que les agents lui ont écarté les fesses de force lors d'une fouille intégrale. Dans un premier temps, une enquête avait été diligentée par le parquet après le dépôt d'une plainte du détenu. L'affaire avait été classée sans suite après un simple échange de courriers entre le parquet et la direction de la prison. C. K.

avait alors porté plainte avec constitution de partie civile, afin de provoquer l'ouverture d'une information judiciaire. À l'issue de cette procédure, au cours de laquelle certains des personnels ont été entendus par les gendarmes, le juge d'instruction a estimé que les surveillants n'avaient fait qu'écarter de force les jambes du détenu, sans toucher ses fesses et que, dès lors, l'infraction d'agression sexuelle n'était pas caractérisée. L'avocat du détenu a sollicité des investigations supplémentaires, affirmant que tous les éléments de preuve n'avaient pas été rassemblés par le magistrat, et qu'une confrontation s'imposait, d'autant que deux autres personnes incarcérées à la maison d'arrêt de Fleury-Mérogis se sont plaintes de faits similaires auprès de la CNDS. Le magistrat a considéré que ces demandes étaient à la fois irrecevables et infondées. Il a, le 16 octobre 2007, rendu une ordonnance de non-lieu et condamné le plaignant à 1000 euros d'amende civile. La Cour européenne des droits de l'homme est saisie de ce dossier, en ce qui concerne les faits de violences alléguées que sur l'absence de diligence des autorités judiciaires à faire la lumière sur ceux-ci. Après un premier examen de recevabilité, la Cour de Strasbourg a, le 13 décembre 2007, décidé de communiquer la requête au gouvernement français en vue d'un examen de l'affaire au fond.

### 3.3. Progressive introduction of a weapons culture in prisons

*Within a context of tougher security policies, prison staff are provided with more and more weapons, both in prisons and in the new hospital units reserved for prisoners. The Prison Law purposely omitted to strictly determine in which case firearms could be used.*

According to a note published by the Ministry of Justice in February 2009, « *the measures aimed at preventing escapes are more and more cumbersome, as are the internal measures aimed at maintaining order : development of ad hoc equipment, the creation of the ERIS [équipes régionales d'intervention et de sécurité, Regional Security and Intervention Teams], the specialised functions of the internal security information. Far from promoting a « dynamic security » based on « positive relations » with prisoners, this generates fear and paranoia throughout all relationships.* »<sup>50</sup> Another new fact is that within the scope of the new tasks performed by the Prison Service at the *Unités Hospitalières Sécurisées interrégionales* (UHSI – interregional hospital secure units), prison staff is entitled to carrying lethal weapons during transports. This should necessarily imply some training on regulations concerning the use of weapons in public areas and a clarification of the situations in which the weapon can be used. However, staff at the Toulouse UHSI regretted « *the gap between the time needed to integrate the reflexes appropriate for self-defense principles – which is necessarily very long – and the very-short training they underwent.* »<sup>51</sup>.

In fact, despite warnings made within the Prison Service itself, prisons are more and more equipped with weapons, in particular those qualified as “non-lethal”. This tendency has a particular influence on the practices of professionals and the modalities of conflict resolution in detention. In prison, one can now find, other than long weapons along the watchtowers, clubs and defence sticks, flash-balls, rifles equipped with rubber bullets, grenades with rubber shrapnel, aerosols and incapacitating-gas grenades, etc. In 2006, two prisons also chose to test TASER guns. Informed of this during his visit of France in 2006, the CPT stated to be “*more than reluctant at the introduction of such weapons in detention, due to their particular nature of the assumed functions of the prison personnel*”. According to them, “*the advantages of the use of Taser-like weapons in a close space, such as that of custodial facilities, where the personnel is traditionally unarmed, were still to be proven*”, as they “*inevitably (carry) considerable risks for the prisoner - personnel relationship and for the general atmosphere in detention*”. The experimentation was however subsequently extended, officially to two other facilities. The weapon is also available among the ERIS. In May 2006, the ERIS of

50 Official Bulletin of the Ministry of Justice, 28 February 2009.

51 « Évolution et enjeux du métier des surveillants pénitentiaires affectés à l'UHSI de Toulouse », Les Chroniques du CIRAP, Septembre 2008

Bordeaux used it on a prisoner of the prison of Mont-de-Marsan in the absence of any risk for the security of persons, and despite having initially been called because ten occupants of a dormitory were dismantling the furniture and the windows and refusing to comply with the staff. The ERIS are heavily armed, beyond a large panel of weapons called “intermediary” or of “reduced lethality”, the agents are also equipped with automatic pistols and can even be equipped with war weapons (assault rifles HK G36), under the terms of a service note from October 2009.

The administration invokes the deterrent effect of such an equipment. This argument was however countered in a study report published in 2008 by the national school of prison administration (ENAP)<sup>52</sup> itself. This study concluded that such an armament race may lead to “*an extension of the application scope and an intensification of the use of force, by favouring the use of weapons to obtain obedience and not simply for self-protection*”. And that it is also likely to lead to “*an increase in the level of prison violence for prisoners as well as for the staff*”. The study underlined that intervention of staff constantly armed, as is the case for the ERIS or for the officers of the secure hospital units “*alter the relationship of the staff with weapons and the scope of their use*”, leading to “*the progressive introduction, maybe even the normalisation, of a certain culture of weapons ‘lethal and non-lethal’ in a profession that does not have such a culture*”, without “*questioning the relevance in terms of necessity, efficiency, training and professional identity of this evolution*”. It was observed that, in a context where the security of officers is increasingly taken into account and where they seek to keep their distances with the prisoners, the “*equipment always more sophisticated of neutralisation and protection (...) allows to keep this immune distance*” and can therefore “*be considered as the best means, or rather the preferred means to insure order and security in prisons*”. However it recalls that “*most of the research on the profession of officer insists on all other skills*”, such as knowing to defuse the anger of prisoners and maintain a balance, “*hard to find and hard to maintain*” between the respect for prisoners, without which the legitimacy of the officer doesn’t exist, and its influence on the prison population. And yet, “*the development of technical tools of physical control can contribute to disturb this balance*”. First because “*they could be seen as the easiest and simplest solution to establish an influence on the prison population than the fastidious construction of an authority that is always to be created*”. And also because, due to their visible and deterrent character, “*an arsenal of neutralisation can only accentuate the asymmetrical aspect of the relationship with the prisoners at the expense of its reciprocity*”. A “*disproportionate asymmetry*” that “*implies a permanent risk of excess in the use of force and opposes itself directly to the legitimacy acquired thanks to the measure of the answers to incidents*”. Also, “*the relationships between officers and prisoners is likely to become limited to a simple relation of force, on which the authoritarian can certainly base itself, but certainly not the authority.*”

Abuses are all the more likely that the legal framework regulating the use of force and means of restraints appear so imprecise that, according to the aforementioned study, it justifies the use of “non-lethal weapons” “*in order to maintain order even in the absence of any danger*”. The Prison Law has not remedied this normative deficiency. Its article 12 thus provides that the staff “*should not resort to the use of force, if necessary by using a fire weapon, only in situations of self-defence, attempted escape or resistance by violence or physical inertia to given orders. When it is resorted to, they can only do so in limiting it to what is strictly necessary*”. The conditions in which the use of incapacitating materials or even lethal force is authorized are not defined. The only condition is that of “*strict necessity*” which indistinctly sends back to all means of force. Not relating to the principle itself of the use of force but to the method of its use, the text states strictly speaking more

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52 « L'utilisation des armes de neutralisation momentanée en prison. Une enquête auprès des formateurs de l'École nationale d'administration pénitentiaire », ENAP, Centre Interdisciplinaire de Recherche Appliquée au champ Pénitentiaire, Coll. Dossiers hématiques, July 2008

a principle of proportionality than a principle of necessity. The large latitude given to prison staff cannot be seen as the result of an editorial awkwardness ; but is on the contrary deliberate, since the government was opposed during the parliamentary to a series of amendments trying to define specific criterion for the use of force and to specify its concrete modalities.

## IV. Overcrowding and material conditions of detention

### (1) Prison overcrowding

In July 2000, the Senate made an undisputable finding : « *The dilapidated buildings, combined with the overcrowding, explains that the conditions of detention in prisons are not worthy of our country* »<sup>53</sup>. However, that year, the prison population and the operating capacity of French prisons were practically equivalent : 48,835 prisoners were incarcerated in prisons containing 48,802 places in September, the density was close to 100%. This situation has since then greatly deteriorated. On 1 July 2008, the prison population reached a historic record with 68,151 persons committed to prison, of which 64,250 actually behind bars, for 50,806 places. At this date, the average occupancy rate (a largely underestimated rate, cf. infra) had risen to 126.46%, hiding however important discrepancies between 68 prisons operating at more than 150% and 81 other ones at less than 100%. This rate then slightly decreased : on 1 December 2009, because of the slight decrease of prisoners (down to 62,974 prisoners) and the increase of operational capacities (at 54,974), the prison density rose to an average of 113.1 %. In fact 127.5 %, if we only look at *maisons d'arrêt* and *quartiers maison d'arrêt* types of custodial facilities (for un-sentenced prisoners and those with less than a year remaining to be served- two year since the Prison Law). Thus, 64% of prisoners (that is 40,010) were living in prisons with occupancy rates exceeding 100%, 17% (10,603 persons) in prisons with occupancy rates exceeding 150%. And 1,937 persons were detained in overcrowded prisons at more than 200 %. The most extreme situation being the prison of Camp Est (at Nouméa, New Caledonia), reaching 320.5 % density with 250 prisoners for 78 places.

This very significant deterioration of the situation throughout the last decade has brought on the deepest criticisms, because of the considerable impact it has on the living and working conditions in detention. « *Prison overcrowding leads to the non-respect of the right to hygiene, privacy, the salubrity of the facilities and living conditions that are not degrading to physical and mental health* »<sup>54</sup>, observed the National Ethics Advisory Committee in 2006. « *Two prominent aspects of conditions of detention render the living conditions in prison incompatible with a proper standard of health: overcrowding and the lack of hygiene* »<sup>55</sup> echoes the Commission for Social Affairs of the Senate, in 2009, at the dawn of the examination by the Parliament of the draft Prison legislation. As for the *Contrôleur général de lieux de privation de liberté*, the nature of his first observations forced him to draw up a similar finding in his first activity report for the year 2008 : beyond the « *quasi-compulsory promiscuity* » amounting in his eyes to « *a source of prison violence today outrageous* », he noted that overcrowding « *concerns everything that happens outside the cell* ».

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53 Conditions of detention in French custodial facilities, Report of the investigative Commission of the Senate, 29 June 2000.

54 National consultative Committee of ethics (CCNE), Opinion n° 94 of 26 October 2006, *Health and medicine in prison*, p.18.

55 Opinion n° 222 (2008-2009) of M. Nicolas ABOUT, on behalf of the Commission for social affairs, the 17 February 2009.

Facing this situation, prison staff expressed the fact that they were no longer able to fulfill their mission. Indeed an important prison staff mobilisation movement took place in 2009. Through their unions' voice, they hammered the fact that « *in front of the multiplication of tasks linked to infernal prison overcrowding, to new missions (RPE, placements under electronic monitoring, ...) without any extra means, staff members become saturated* ».

These same observations were affirmed during each visit of the CPT, constantly alerting the French authorities on the effects of prison overcrowding. After its visit to France in 2003, observing « *the overall detrimental factors* » to which were subject incarcerated persons in the prison of Loos and Toulon, it believed they could « *legitimately describe as akin to an inhumane and degrading treatment* ». It also asserted its deep concerns relating to the fact that the situations within these two prisons seemed identical to those in practically all *maison d'arrêt*-type prisons in France. « *This situation has considerably compromised projects aimed at improving the conditions of detention, even maybe ruined certain progress*», particularly in terms of single-cell accommodation, added the CPT in 2007. The latter then noted in 2009 that these observations were « *still up-to-date, as shown not only by the findings made during the 2008 visit (in Guyana) but also by the figures for the entire country, as published by the Ministry of justice* »<sup>56</sup>.

Despite its decrease in the last year, the overcrowding rate remains extremely high. Moreover, it is under-estimated in the calculations of the Prison Service. The Law Commission of the Senate noted it in its report on the draft Prison legislation: « *the operational capacity of a prison does not equate to the number of cells. It is superior. It therefore under-estimates the reality of prison density* »<sup>57</sup>. The national union for prison executives, in a press release of 15 September 2008, refers to a « *principle set out by the Prison Service to no longer take into account the theoretical capacity of prisons planned with single-cell accommodations, but to calculate overcrowding on the basis of an operational capacity in which the majority of cells are equipped with two beds in an area intended for one prisoner* ». A few days later, in an open letter to the President of the Republic, the union reiterated these accusations: « *We are trying to replace the concept of theoretical capacity with the notion of operational capacity. This means that the number of places of detention by square metre relates to the number of beds located in the cells independently of the size of the area. We're even thinking of what is acceptable in terms of overcrowding, making it no longer the exception but the rule for the management of prisons* ».

More and more prisoners are going to court regarding their material conditions of detention. For the first time, on 27 March 2008, the administrative tribunal of Rouen recognised their right to receive damages for indignant and unsanitary conditions of detention. The judges considered that the Prison Service, having incarcerated the applicant « *in conditions which do not ensure the respect of the inherent dignity of persons disregarding article D.89 of the Criminal Procedure Code* », as well as the measures of the same code relating to hygiene and salubrity, had had « *a wrongful behaviour capable of engaging its responsibility* ». On 7 May 2009, the same administrative tribunal condemned *en référé* (an urgent procedure) the State to pay three prisoners 3 000 € each, because they had been incarcerated « *in conditions which did not insure the respect of the inherent dignity of persons* » - decision confirmed by the administrative appeals Court of Douai on 12 November 2009 after the State had lodged an appeal. The administrative tribunal of Nantes (Loire-Atlantique) followed in the same steps as it condemned the State to pay damages to three ex-convicts from the prison of the city, on the same grounds. According to the judgment of 8 July, which came about five years of procedures, the State had to pay 6 000 euros to one of the applicants and 5 000 euros to each of the other two. In March 2010, no less than 38 prisoners filed complaints against the State for their conditions of detention in Rouen. Similar steps have been initiated in Lyon (Rhône), Fleury-Mérogis (Essonne), Caen

56 European Committee for the prevention of torture (CPT), Report to the French government concerning the *département* of Guyana, visited from 25 November to 1 December 2008, published the 10 December 2009.

57 Report n° 143 (2008-2009) by Jean-René Lecerf on the Draft prison legislation on behalf of the Law Commission, submitted on 17 December 2008

(Calvados), Brest (Finistère), Rémire-Montjoly (Guyana), Nouméa (New Caledonia), etc.

However, the judicial judge, to this day, refuses to follow the administrative judge, consequently preventing any preliminary investigations on the conditions of detention of a person. On 20 January 2009, the *Cour de cassation* held that the guarantees for the protection of human dignity by the legislator were inapplicable to the accommodation of prisoners. An appeal was lodged at the *Cour de cassation* against a case of 3 April 2008, whereby the appeals Court of Rouen had confirmed the refusal to litigate the complaint (*contre X*) of a prisoner concerning the accommodation contrary to human dignity (article 225-14 of the Penal Code). The person concerned had already the condemnation of the State by the administrative tribunal of Rouen for the conditions of detention of the prison of the city. After the *juge d'instruction*, the appeal Court held that the incriminated facts were a matter for the administrative judge and not the criminal judge. It also held that these measures « *condemning the subjection of a person to accommodation conditions incompatible with human dignity, induces as counterpart to accommodation, a form of exploitation of the accommodated person in order to profit to the operator of the place, thus excluding the situation of a prisoner in a custodial facility* ». In the silence of the law, the case brings out a system of exception concerning the material handling of persons deprived of liberty by judicial decision. In doing so, the judicial judge shelters the authorities in charge of prison services from any litigation concerning the indignant, even unsanitary state of the cells in which the majority of prisoners in prison rot. Considering the dilapidated state of custodial facilities, it fell to the national jurisdictions to ensure the preeminence of the law in prison, making sure in particular that the decision taken by public authorities to not take immediate necessary measures for the protection of the dignity of prisoners would not be criminally reprehensible, even though they were clearly informed of their indignant state, in particular by national monitoring authorities who regularly alert them. In particular, the local sanitary authorities have made it known in numerous unsanitary facilities and architectural experts have declared obvious violations of sanitary rules in places where they were assigned. But the managers of the prison Service, while making considerable efforts to clearly improve the level of security throughout custodial facilities, have abstained from taking measures insuring minimum hygiene and sanitary conditions in these facilities. This case therefore consecrates a sort of jurisdictional immunity in a case accusing of possible inhumane and degrading treatments.

## (2) Single-cell accommodation

According to the Law Commission of the Senate, the « *assessment method of occupancy rates acknowledges the renunciation of the principle of single-cell accommodation* ». In 2009, throughout the parliamentary debates of the Prison law, senators and members of parliament fought to preserve this principle in the law, provided for since 1875, whereas the Government sought its removal. Declaring itself « *convinced that single-cell accommodation for all should no longer be considered as the goal to reach absolutely* ». Whereas 84% of pre-trial prisoners and 82% of convicted persons consulted during the *Etats généraux de la condition pénitentiaire* requested single-cell accommodation, the Ministry of Justice has been trying for almost two years to accredit the idea that an important number of prisoners would be happy to share a cell, or that it would not be in their best interest to stay alone. The senatorial commission did not believe these arguments, « *convinced that single-cell accommodation remains one of the strongest guarantees of the dignity of the conditions of detention, as stated by the European Prison Rules to which France has committed to : "Prisoners shall normally be accommodated during the night in individual cells except where it is preferable for them to share sleeping accommodation"* ». Except that the Government has put all its weight in the balance, in the name of a « principle of realism », so that this provision be removed. In vain. Deputies joined the senators, who argued that « *single-cell accommodation must remain one of the essential objectives of the Prison Service to guarantee the conditions of detentions respectful of the individual* »<sup>58</sup>.

Thus articles 87 and 100 of the Prison Law provide for single-cell accommodation of prisoners, while providing that « *it can be derogated from on the grounds that the internal distribution of the facility or the number of persons detained present do not allow its application* ». But this measure is

<sup>58</sup> Report of the Laws Commission for the draft Prison legislation, 17 December 2008.

today threatened once more, since the *Conseil d'Etat*, caught up by the governmental « principle of realism » rejected on 29 March 2010 a case filed by the OIP, challenging the decree of 10 June 2008. The Court thus followed the recommendation of the public *rapporteur* who held that, with the prison overcrowding, the « *material modalities are not and will not be met* » to allow the « *total respect* » of the legislative provisions. And even though the Prison Law already planned for a moratorium of five years for its implementation. The *Conseil d'Etat* therefore held that the measure set out in the decree was adequate since it had been kept as temporary in the Prison law of 24 November 2009.

Consequently, nothing can legally stop the government from keeping applicable, after the moratorium of the Prison law, the decree of 10 June 2008, as soon as it will be deemed compatible with the legislative principle of single-cell accommodation of pre-trial prisoners. However this decree reverses the principle by stating that pre-trial prisoners can « *lodge a request to the head of the facility to be transferred, in order to be placed in a single-cell, in the nearest prison allowing such an accommodation* », imposing *de facto* that, without such a request, the rule remains collective accommodation. Is added to that a long and complex procedure for the prisoner, in eight steps, to assert his right. However, prisoners are aware of the global situation of prison overcrowding, and they also know the consequences of such a request, in that it can lead to an allocation to a very remote prison. Therefore, this mechanism amounts to imposing the concerned persons to sacrifice one or more fundamental rights : being alone in a cell or remaining close to their family, of the jurisdiction of the judgement, of their lawyer. In this context, it is not surprising that the number of requests addressed to the Prison Service remains limited : according to the information given by the Ministry of Justice to the *rapporteur* of the Commission of laws of the Senate on the draft Prison legislation, 370 requests by 28 November 2008 – 60 of which were cancelled by the applicant due to the remoteness of the proposed facility. In a document of 16 June 2009, the Minister declared « *significant to note that since the implementation of the decree of 10 June 2008, the Prison Service received 693 requests of single-cell accommodation from pre-trial prisoners that the Service was not able to satisfy.*» This low number of requests was an argument used by the Government to prevent the legislative affirmation of the single-cell accommodation principle : prisoners do not want it, declared the Minister of Justice. The Senate was not dupe : « *The aspiration to a single-cell remains strong* » for prisoners, as it explained in a report of the Commission of Laws. And to quote the example of the prison of Rouen where some « *wish to be put in confinement* » and « *even cause disciplinary procedures to obtain a single-cell in the punishment section* ». The low number of requests made after the decree is only explained « *by the deterrent conditions set* » and by « *the risk of being sent far from the family environment* ».

### **(3) Addressing overcrowding**

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The extent of prison overcrowding induces on the one hand the Government to resort almost constantly to construction programs for new prisons. On the other hand, while waiting for their delivery, the Prison Service (DAP) has not resisted the temptation of making use of every possible means to increase the capacity of facilities. Thus, the DAP has launched for the last few years an operation to increase the occupancy capacity of prisons with « *the recovery or the adjustment of cells in existing prison buildings, permanent extensions, or the creation of new accommodation buildings on existing prison foundations in order to pool collective spaces and reduce costs of personnel* ». This process, started in 2004, set itself as a goal to create 2 684 places until 2008. In Angoulême, two activity rooms were transformed into dormitories of five places. In Pau and Périgueux, the laundry rooms were turned into cells. In Dunkerque, in 2007, prefabricated construction in the courtyard created 17 places. This approach, since the end of its first phase, has been renewed. In the prison of Rémiré-Montjoly, in Guyana, 60 places were announced for 2010

and set up in a part of the building meant for workshops. Moreover, during a meeting of « mission ONE » (coordination for the opening of new facilities) at the Prison Service on 3 June 2008, it was specified that the provided beds for the facilities in general « can be doubled », in other words a bed can fit on top of another one (making bunk-beds). This scheme meant that the capacity at the new prison of Corbas, which relayed the old prisons of Lyon, went from 690 to 1 025 beds, according to the newspaper *Le Monde* of 4 May 2009. Consequently, six months after its opening, the facility reached 129,9% of overcrowding. In the scope of this approach of increasing by any means the capacity, the means multiply : in some facilities mattresses are put on the ground. At the prison of Seysses, a release of 22 June 2008 from a prison staff union counted 72 men sleeping on mattresses on the floor and 11 women on camp beds. At the remand section of the prison of Meaux-Chauconin, at least 110 persons were sleeping on mattresses on the floor. By 1 July 2008, 193 prisoners were incarcerated at the prison of Bonneville which only had 90 places and 63 cells. About forty of them were sleeping on mattresses on the floor. According to a local union, « *all types of facilities combined, about 2 000 prisoners were forced to sleep on mattresses on the floor in August 2008* »<sup>59</sup>. Some facilities have even resorted to a third level of bunk-beds meant for two people.

Faced with this situation, the Government does not see any other solution than to accumulate construction plans for new facilities, meant, each time, to definitely reduce overcrowding. However, each time, the same thing happens : the new prisons create a « draught » while criminal repression increases, and the number of prisoners unrelentingly goes up. Though the parliamentary investigative commissions had specifically urged the Ministry of Justice to « *end the vicious circle between increasing the number of prisoners and that of prison capacity* ». Nine years later, the Commission of laws of the Senate opportunely reminded that « *one of the keys to this ending could be found in changes of penal policies* ». An approach complying with the corpus of the Council of Europe which also meets the conclusions of the National Consultative Commission for Human Rights (CNCDH): « *Overcrowding and prison inflation will only be contained through a coherent and stable criminal policy, and not through the incessant development of estate programs* ». It depends on the angle by which one sees the issue of prison overcrowding : according to Sonja Snacken, a Belgian criminologist and expert for the Council of Europe. « *Either we consider that there are too many prisoners, she explains, or that the number of places are insufficient. The latter vision leads to the construction of new prisons. But then we only treat the consequences of overcrowding, and not the mechanisms and factors that are at its roots. If no action is taken at the same time on penal policy and the factors of increasing prison population, the new prisons will sooner or later find themselves in a situation of overcrowding.* »<sup>60</sup> Thus, the CPT, in its 2007 report recommended France to lead a strategy against prison overcrowding, « *inspired from the principles contained in the specific recommendations of the committee of ministers of the Council of Europe concerning overcrowding in prisons and prison inflation (R (99) 22), administrative detention (R (80) 11) and conditional release (R (2003) 22), as well as the new RPE (R(2006) 2) (paragraphs 146 et 176)* ».

#### **(4) Towards dehumanised material conditions**

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If the new facilities are an answer to the sanitary problems linked to the outdated infrastructures (even though these have as a main cause both overcrowding and negligence in the maintenance of facilities), the material conditions of detention are not limited to the unhealthiness prevailing in a large number of facilities in France. The design of new facilities, « *comfortable but despairing* », according to the words of a chaplain of the new prison of Corbas, goes against the needs and the recommendations of the stakeholders, researchers and observers. The prison staff themselves, in

59 AFP, « Number of prisoners dropping but 65 % of prisons still overcrowded », 21 August 2008.

60 Extract of an interview from the magazine *Dedans-Dehors*, n°53, January 2006.

unison, advocate for places of detention operating under a different model and « with a human dimension ». « *We'll be sorry that we built prisons for 600 prisoners*<sup>61</sup> », warned the *Contrôleur général des lieux de privation de liberté*, who believes that a « human size » facility should not have a capacity exceeding 150/200 prisoners. « *I told the Minister of Justice that we cannot continue to open facilities of that size [about 700 places]* » he declared in an interview with *Libération*<sup>62</sup>. « *She told me that she heard me, that she had reduced the planned size for future construction plans [some were to initially go beyond 1,000 places] and that none would exceed 690 places. She would not go further. For me, it's still too much* ». He insists on the fact that estate issues are not limited to material conditions of detention: « *Beyond 200 places, the human relationship between the staff and the prisoners is lost : the cost you save in the construction and management budgets, you lose in violent incidents. Movements are made so complex, there are so many doors to go through, that, in a report that we will hand to the government, we have calculated statistics on the loss of prisoners who are expected in one place, for an employment issue (with Pole Emploi), a family visit... and they never arrive ! We will unfortunately pay for the construction of such big prisons* ». With an average capacity of 650 places, the facilities of the latest construction program (program « 13,200 ») are based on an approach, the deleterious effects of which are however well known. The Minister of Justice admits that « *the facilities with the most [violence against members of staff] are usually those that receive the highest number of prisoners* »<sup>63</sup>. The design of these estate programs attest of a choice in an approach of security that favours technical means over human means. The specifications of the program « 13,200 » insists on plans « *with less personnel* », in line with the requirements of the general General Revision of Public Policies (RGPP). The resort to electronic systems of opening and closing doors, which limits the contact between the detained population and the prison staff, is favoured. During the delivery of his 2009 report, the *Contrôleur général* warned : « *There is in these prisons a multiplication of frustration, and consequently an inevitable increase of aggressiveness, leading to violence against oneself and against others* ».

The *maisons centrales* facilities, intended for long terms and security prisoners, due to the profile of the population within its walls, are an important area of focus of the prison authorities. Defensive measures constantly increase in these facilities, already the most secure ones of the country. Their security had already been considered a priority in the orientation and programming for justice law of 2002, with a five million euros budget specifically dedicated. But it was not enough. Following a double escape on 15 February 2009 at Moulins-Yzeure, the DAP deplored « *an act of war* » and stated in a press release sent the following day, that « *a global security expertise of Moulins, but also of other 'maisons centrales' (Saint-Maur, Clairvaux, Lannemezan) had been entrusted to the Inspection of prison Service and the État-major of security* ». A few months later, on 5 May 2009, the then Minister of Justice Rachida Dati explained that « *certain additional security measures are being studied, in particular concerning the facilities of Moulins, Saint-Maur, Lannemezan and Clairvaux* »<sup>64</sup>. The *maison centrale* which has gone through the most important work is in Arles. Closed in 2003 following a flood, the facility had re-opened after refurbishments on 8 October 2009. An important reinforcement of defensive measures had been carried out. The leaflet presenting the facility underlined that « *4800 extra metres of barbed wire have been put around the courtyards, electric fencing on the roofs of all the buildings less than two floors high (UVF – family life units -, administration, workshops)* ». Numerous cameras, the partitioning of four accommodation buildings and a circulation system aimed at avoiding any contact between prisoners are also to be found. But most importantly the detention regime has considerably harshened, corresponding to the choice to make it a high security facility of a new kind, without any equivalent

61 Ouest France, 24 November 2009.

62 *Libération*, 10 March 2010, Interview of Jean-Marie Delarue «*In detention, when faced with a vision of security, dignity remains silent*».

63 Answer to a parliamentary question, published in the Senate JO of 15/10/2009 - page 2424.

64 Answer to a member of Parliament published the 5 May 2009 in the JO (question n°43111).

to this day in France. In the weeks that followed their arrival, thirty or so prisoners requested their transfer to another facility and, during the month of November, protest movements were organised, the prisoners refusing several times throughout the month to participate in activities or take their meal trays. A petition, signed by three quarters of the incarcerated prisoners of the facility, refers to the security measures as « *excessive and intolerable* » and the « *inhumane and unacceptable living conditions* » and requests that « *[their] rights to the little liberty [they] have left as that of [their] friends and family be respected* ». The doors of the cells are closed during the day. It is thus impossible for the prisoners to go to a neighbouring cell to talk or share a meal. Likewise, the conditions for family visits do not allow any conviviality, contrary to what is planned for sentence facilities (*établissement pour peines*). The prisoners also undergo palpation searches every time they leave the cell ; movements go by groups of two prisoners maximum. « *Here, it's unlivable, it's not worthy of a prison, but rather of a massive punishment section. It will be impossible to take it in these conditions* », testifies in *La Provence* a prisoner whose release is scheduled in 2022.<sup>65</sup> Another one, who had already spent 21 years and could only be released in 2021, explains that « *the prisoner is subject to a regime which treats him like a child. He no longer has a tiny piece of autonomy. He is managed, from morning to night, subject to permanent controls. What's left to be human is a small autonomy space which we are deprived of here* ». For the head of the facility, however, closing the cell doors during the day allows to ensure the security of the prisoners and to avoid any racketeering. « *Now prisoners who used to never leave their cells go to activities* ». The tone is the same for the insertion and probation prison service (SPIP), the director of which assures that the detention regime amounts to a « *guarantee of serenity* » and that the objective of preparing for release is not compromised, because of the « *professionalism and humanity of the supervision* ». The *préfecture*, in charge of the supervision commission of the prison, declared that « *the regime is admittedly very secure but it results from a choice to have high-security prisons. The prison of Arles initiates what will be applied to all the prisons that will open in the future* ». From a judicial source, it was also confirmed that « *the prison is hyper-secure, its regime is aimed at limiting as much as possible contacts among prisoners. The administration decided to harshen the regime and to send prisoners with a particular profile here, consequently decided on means and strategies, and therefore a closed-door detention. For the activities, there is always an officer present, as well as during any trips. It's lived as an unbearable regime* ». « *For the moment, it is experimental, to see how far we can go.* » The experience however does not limit itself to Arles. A « *quartier maison centrale* » has in fact been created in 2008 at the prison of Lille Loos-Sequedin, replacing the unit for juveniles now closed. It receives thirty or so prisoners the administration sees as dangerous. According to Étienne Dobremetz, union delegate for Sequedin and Loos, interviewed by *Nord Éclair*<sup>66</sup>, « *the administration turned this section into a real bunker, completely inhumane for the prisoners incarcerated there. They cannot do any sport, they are isolated from the rest of the prison, have only a small courtyard and never leave their cells, which creates a very tense climate. They are like lions in a cage.* » Two other *maisons centrale* are being built at Alençon and at Venden-le-Veil ; and two other sections of this type, now called « *quartier longues peines* » (section for long sentences) and presented as a « *new concept* », are to be opened within the facilities currently being built at Lille-Annœullin and of Réau-Ile-de-France. The Prison Service should however be learning lessons from the past. As explained by the former prison advisor of Robert Badinter (former Ministry of Justice), Jean Favard, quoting the example of the *maison centrale* of Moulins-Yzeure, of which « *the security was reinforced, reinforced and reinforced again [and] ended by imploding from the inside, in 1992 : the stricter you make the security system, the harsher you make the atmosphere in the prison, and the more explosive it gets.* »

65 *La Provence*, 21 November 2009, « Detainees protest against the regime at the prison of Arles »

66 « The « breakout king » arrives in the North », *Nord Éclair*, Friday 18 December 2009.

## V. The health of prisoners endangered ...

### (1)... by security restraints and means that are detrimental to human dignity

*In particular, the conditions of hospital transfer and custody of prisoners, with the use of restraints (handcuffs and restraints) and of surveillance during the transfer as well as during the medical appointments, amount to, according to the OIP, an infringement to the dignity of the prisoner that hinders his access to medical care. The doctors are not in a position to care for their detained patients in conditions that comply with their ethical rules, and some prisoners refuse care for these reasons.*

When a prisoner cannot be treated within the prison, he or she is in principle transferred to the hospital affiliated with the Outpatient Consultation and Treatment Unit in prison (UCSA) or to the competent UHSI (Inpatient Consultation and Treatment Unit for prisoners in hospital). There are more and more transfers of prisoners towards hospitals. According to the Prison Service, 47,394 took place in 2009 for care (not including hospitalisations) and 36,987 in 2008. They raise both material difficulties and issues relating to the respect of the detained patient's rights. Their organisation, which relies on the hospital director, require considerable human and material means, accumulating such an amount of constraints that it obstructs the access to care, all the more so that in some areas, the escorts are carried out by the Prison Service, the police, or the *gendarmérie*. The transfer of persons registered as « *détenus particulièrement signalés* », which the administration believes require a reinforced convoy, are particularly difficult to put in place. Each service considers this task as unnecessary burden, the organisational and coordinating difficulties are recurrent. In fact, these difficulties lead to harmful severances of care for the patients. Several hospitals use a systems of « quota » for transfers, depending on the means they have at their disposal, independently of the actual real needs. Even though the head of hospitalisation and of the organisation of care, at the Ministry of Health, states that « *it is essential that the number of escorts adapts itself to the demands of care and not the opposite.* »<sup>67</sup> The 2008 activity report of the UCSA of prison Chambéry prison described the transfer problem in a significant way : « *It is of the utmost importance to mention the recurring difficulties and potentially heavy consequences that we face concerning emergency hospital transfers taking place outside of our day schedule and on Saturdays and Sundays (...). This question asks the problem of the quality and the availability of care granted to prisoners, medical or even vital potential consequences for the prisoners, of the dependency of medical services in relation with other administrations and finally the problem of the responsibility in case of delays in care in the event of complications* ».

Even though article 803 of the Code of Criminal Procedure provides that « *no one may be forced to wear handcuffs or restraints unless he is considered either a danger to others or to himself, or likely to attempt to abscond* », the handcuffs and restraints on the ankles during the hospital transfer have in practice become the rule, and their absence the exception. According to the *Inspection générale des affaires sociales* (IGAS, Ministry of Health), the complaints it receives as part of the sanitary control of prisons concern « *chronically (...) the difficulties to conciliate the security (handcuffs and restraints and sometimes the presence of prison officers in the examination rooms), and the confidentiality of the medical interview and the treatment* ». <sup>68</sup> Despite the low number of incidents occurring because of the transfer, the security instructions given to prison officers have

67 Ministry of Health, head of hospitalisation and of the organisation of care, May 2007, answer to the audit report *on the transfer to the Prison Service of the guard and escort mission of hospitalised prisoners*, in annex of the report.

68 IGAS, Activity Report 2007.

become harsher these last few years. After the escape of a patient during a medical transfer, a circular of 18 November 2004 set out three « *levels of security* » depending on the « *dangerousness* » of the prisoner: the highest level of security requires not only the use of handcuffs, but also the presence of officers during the medical examination or interview, the lowest level of security allows the possibility to use handcuffs during the transport and the appointment. Determining the level of security is the exclusive responsibility of the director, who in general almost systematically applies the highest level of security, « *no matter the present danger* » of the prisoner, as was highlighted by the Commission of Social Affairs of the Senate<sup>69</sup>, and this, despite the European Court of Human Rights condemned France on this issue<sup>70</sup>. The internal rules of the prison of Longuenesse are openly clear : « *Doctors can send you to external appointments or to be hospitalised. You will not know the date of the appointment (...) and during your transfer, you will be subjected to security measures (handcuffs and shackles)* ». At Limoges, the *Contrôleur général* observed that « *the transferred prisoners are always handcuffed in the back, except when a medical certificate mentions an explicit medical contraindication. The use of handcuffs in the back has been very criticised by several prisoners, being particularly painful in the transfer van. The police staff questioned confirmed this practice.* »

This practice is also imposed during the transfers within the hospital. Some medical staff do not question the use of restraints on their patients, and simply offer, in order to reduce the humiliation of the patients that can be seen handcuffed and sometimes restrained in the corridors, to transfer them in wheelchairs with a blanket covering the restraints. Several members of parliament, like national and international human rights bodies, have challenged this Circular before the government. On 20 March 2008, the Prison Service adopted a new Circular specifying « *a few practical rules* », « *in order to allow the proper implementation of the texts* ». But its impact is marginal because the new rules only apply to a very limited number of people. Thus, people over 70, minors of age, and at least 6 months pregnant women will only be handcuffed if their « *dangerousness is proven* »; the first will never be subjected to restraints, whereas with the two other categories of people, it must be « *exceptional* » and « *cannot be combined with the use of handcuffs* ». The prisoners who are « *heavily handicapped should not be subjected to the use of any means of restraint* ». DPS prisoners however are systematically subjected to the level of security 3, whatever their health condition, « *except when there is a written and motivated decision of the concerned director* ». For all the others, the head of the Prison Service defined a « *frame of reference* » according the three types of risk (escape, aggression and « *other public order risks* ») and three levels (high, medium, low). The patient only needs to show a « *medium* » risk to be handcuffed or restrained, and only one high risk for both to be imposed. The *Contrôleur général* underlined<sup>71</sup> that « *this way of doing is not (...) without consequence: the prisoners, feeling deeply affected in their intimacy, refuse to be treated.* » The refusal of treatment by people no longer willing to be transferred and treated in these conditions is indeed a new tendency.

During their stay in hospital, whether or not in a secure room, infringements to the dignity of the patients continue. To the pain and humiliation that these measures of restraint can create, is added the infringement of the confidentiality of treatment by the presence of prison staff during the appointments or the medical acts. The Ethical Committee underlined in 2006 that the presence of escorts in the rooms and corridors of the hospital, during the examinations and the appointments, as well as the use of restraints and handcuffs « *incontestably constitute an humiliation and inhumane and degrading treatment, jeopardising the trust relationship between the doctor and the patient, an essential element of the medical act, and can infringe on the quality of the medical examination and*

69 Opinion on the prison law project, Ibid

70 *Henaf c/France* - 27 November 2003 (n°65436/01) and *Mouisel c/France* - 14 November 2002 (67263/01)

71 *Contrôleur général des lieux de privation de liberté*, Annual Report 2008

*the treatment*<sup>72</sup> ». Two years later, after his visit to France from 21 to 23 May 2008, the Human Rights Commissioner of the Council of Europe deplored the fact that « *prisoners' hospital appointments take place under difficult conditions, mainly because handcuffs have to be worn, and prison staff are present for virtually the whole time. Yet the Commissioner had condemned these practices in his 2006 report.* ». All the more, the *Contrôleur général* underlined in his 2008 report, « *that the instructions sometimes take them to the appointment offices, when it isn't in the operating rooms, to guard a patient under general anesthetic* ». « *Such abuse can be explained by the personal responsibility that weighs on each member of the escort in case of an escape* », continues the inspector, « *but nevertheless it should be brought to an end* ».

In February 2010, a 64-year old prisoner in Loos was informed of the cancellation of his hospitalisation, necessary to treat numerous chronic pathologies, because of his request not to be subjected to restraining measures which hurt his wrists, and this even though the absence of dangerousness was proven. The main reason given by the administration was the date of his release, relatively far away, which for the Prison Service amounts to an intangible criteria for presuming a risk of absconding. When faced with the request of the prisoner to not be subjected to the restraints, the director decided to cancel the hospitalisation. This is not an isolated event. The 2008 report of the *Contrôleur général des lieux de privation de liberté* dedicated an entire part to the testimony of a prisoner who now refuses to be treated after undergoing a surgical appointment while handcuffed and in presence of a prison officer. "To be examined by a surgeon in front of officers was for me a huge humiliation" she told the inspector. "All that while staying handcuffed, with the chain! You'll understand why today I feel so much like an animal. And I told the director, as well as the medical service of the prison that these last events were too much for me, so I made my mind up, and I said that no matter what happens, I'll refuse another transfer... I prefer to keep suffering, in my cell, than to be transferred again in the same conditions. I might be putting my health at risk, if the situation gets worse, but I refuse to be humiliated one more time!" The 2007 activity report of the prison of Osny<sup>73</sup> (Val d'Oise) mentions 126 transfer cancellations, out of 142, due to the refusal of treatment by the prisoner. At the prison of Angoulême, the doctor responsible of the UCSA recognises that all the prisoners leave the prison in handcuffs and restraints and that treatment is often refused for that reason. The activity report of the UCSA of the prison of Lille-Loos-Sequedin specifies that out of 706 transfer cancellations in 2008, 489 came from « *a problem relating to the prisoner* ». The 2008 report of the DRASS also mentions concerning the transfer of prisoners from the prison of La-Santé, « *the refusals of transfers, confirmed by the prisoners during interviews with the inspectors, are mainly justified by the refusal of restraints* ».

The hospital centre of Creil, that receives prisoners from the prison of Liancourt, wrote on 18 December 2007 an Instruction addressed to the hospital staff and to the prison staff in charge of escorts. Attesting medical confidentiality, it specifies that medical appointments should take place « *according to defined criterion of the Prison Service* » and that, in case where the prisoner asks for the « *strict respect of the confidentiality of the diagnosis* », the appointment should « *take place in prison by the doctor of the UCSA* ». During his last visit to France, the CPT observed that the Secure hospitalisation unit (UHSI) of the hospital of Moulins-Yzeure (Allier), « *despite the fact that two rooms of the UHSI were secure, the prisoners were systematically shackled to the bed, without interruption, and most often with shackles on their ankles and one hand handcuffed to the bedpost* », the shackles and handcuffs being worn to the toilet and the showers. « *Furthermore, continues the report, three police officers were present beside the patient during the entire medical act, even the most intimate* ». At the hospital of Montpellier, according the investigation lead among nurses and manipulators of medical electro-radiology<sup>74</sup>, the results were « *the almost totality of prisoners taken in hospital for a appointment or a hospitalisation are subject to measures of restraint and that they are, for the most of them, under direct surveillance of the police during the medical exam* ». However, the nurses « *unanimously answer that they do not feel bothered by [this] presence* » and « *say to never have asked to have them remove the restraints to give treatment in the best conditions* ». As for the manipulators, only eight out of sixteen said to have asked the officers to leave during the exam, not to protect the confidentiality but to « *not expose them unnecessarily to ionizing radiation* ». At the hospital of Aix-en-Provence, a 24-year old prisoner, hospitalised following an epileptic fit in the night of 25 to 26 July 2007, whose

72 Nation Consultative Committee of Ethics Opinion° 94 of 26 octobre 2006, *la Santé et la médecine en prison*

73 Final report following the Inspection at Osny remand prison

74 Floriane Amaury, Sonia Bendjeddou and Mylène Garrigues, « The medical care of prisoners in hospitals », Institute for the training of manipulators of medical electro-radiology of Montpellier, 2008.

vital prognosis was at stake and who was under general anesthetic, was kept restrained to his bed for several days, before the doctors managed to convince the police officers to remove the restraints. They were put back as soon as he woke up, and kept on for two months. In 2008, a medical team from the hospital of Elbeuf accepted to do a colonoscopy on a prisoner of the prison of Val-de-Reuil while a prison officer was in the exam room. In 2009, a prisoner at the prison of Lannemezan registered in the directory of *détenus particulièrement signalés (DPS)* and suffering from lung cancer stayed handcuffed at the bed in the intensive care unit of the hospital, even though he had just undergone a lobectomy. In April, the same person was escorted by at least 18 police and prison officers, some hooded and armed, to undergo an electromyography after a session of chemotherapy. He remained restrained by his ankles during the procedure. When asked about the exam, the senior manager of Security replied : « *the doctor made no objections ; therefore there is no problem* ».

However, these practices were firmly condemned by national and international bodies, considering them as inhumane and degrading treatment. Already in 2002 and 2003, the European Court of Human Rights, in the cases of *Henaf v. France* and *Mouisel v. France*, considered that the restraints used on the applicant during the treatment received at the hospital were disproportionate to the security needs, considering their age, their health condition and their medical history<sup>75</sup>. In 2005, the CPT asked the French authorities « *to amend* » the current regulations, considering that « *all the exams/appointments/medical treatment of the prisoners must always be carried out beyond the hearing of and – except in particular cases where the doctor says otherwise – out of sight of the escorting staff* ». As a result, the National Consultative Commission for Human Rights (CNCDH) affirmed on 6 January 2006 « *the principle of medical confidentiality could not be derogated from* ». According to the Commission, « *the medical act must be carried out safe from sight and any hearing. As such, it can only disapprove the conditions in which the medical appointments of prisoners are carried out under constant surveillance at the city's hospital. It recommends the government to give a favorable follow-up to the recommendations of the CPT* », left unheeded.

In November 2007, the National Commission of Security Ethics gave two very severe opinions on the implementation of the Circular in three cases. The first concerned an 83-year old man, suffering from a serious illness and having one arm in a sling after a fall, had to cross the emergency room handcuffed and underwent an exam in the presence of two officers. The second concerned a prisoner who had been handcuffed and shackled during the trip, then left handcuffed for 25 minutes in the hospital waiting room before seeing a doctor in the presence of three officers. The man had however benefited from several prison leaves, the last one just a few days before. Having made a request for compensation for damages to the Ministry of Justice, the man was offered « *compensation amounting to 200 euros, the damage being limited* », according to the Ministry who in the same letter recognised that the man, « *non-dangerous prisoner* », had « *to wait half an hour in fact in the corridor of the hospital of Creil with handcuffs visible to all, what he [had] seen as humiliating* ». The Ministry recognised that « *the medical exam that followed was performed in the presence of three prison officers, which is contrary to ethical rules* ». The third case concerned a man who was overweight, suffering from sleep apnoea, cardiac problems and a coronary disease, all of which caused him great difficulty to move about. He refused to wear restraints to go to the hospital, which simply meant the transfer was canceled. The Circular of 20 March 2008, which applied indistinctly to transfers and appointments, does not deal with the problem of confidentiality since it doesn't address the question of the presence of prison officers during medical exams.

<sup>75</sup> In the case of *Mouisel v. France*, the Court held that there had been a violation of article 3 of the Convention after having established in particular that a medical report of 30 September 2009 indicated that the health condition of the prisoner “ *was not compatible with the use of restraints on his lower limbs* ” (§11) and that “ *having regard to the applicant's health, to the fact that he was being taken to hospital, to the discomfort of undergoing a chemotherapy session and to his physical weakness, the Court considers that the use of handcuffs was disproportionate to the needs of security.* ” (§47). In the case of *Henaf v. France*, the Court established a violation by the French authorities of article 3 of the Convention because the measure the applicant was subjected to, consisting of shackling his foot with a chain linked to his hospital bed the night before his medical operation and even though the applicant, whose dangerousness had not been proven, was 75 years old. The Court held that, “ *having regard to the applicant's age, his health condition, the absence of any previous conduct giving serious cause to fear that he represented a security risk, the prison governor's written instructions recommending normal and not heightened supervision and the fact that he was being admitted to hospital the day before an operation, (...) the use of restraints was disproportionate to the needs of security, particularly as two police officers had been specially placed on guard outside the applicant's room.* ” (§56). The Court therefore held that there had been a violation of article 3 of the Convention by the French national authorities.

To limit the transfers, the CNCDH recommended in 2006 to develop the « resort to prison leave » in order to allow prisoners to get appointments outside, and to « plan specific dispositions concerning pre-trial and convicted prisoners who do not fulfill the conditions for leave ». Experimented in a very limited number of prisons these permissions remain marginal.

## **(2) ... by the insufficient consideration of the health condition incompatible with detention**

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***When a prisoner sees his vital prognosis at stake or his health condition incompatible with detention, his chances to be treated properly or to finish his days outside are extremely limited because of the very restrictive conditions for the suspension of his sentence for medical reasons.***

In several judgements condemning France<sup>76</sup>, the European Court of Human Rights established that « Health, age and severe physical disability are now among the factors to be taken into account under Article 3 of the Convention », which prohibits torture and other inhumane or degrading treatment or punishment. The Court added that « the health of a detainee is now among the factors to be taken into account in determining how a custodial sentence is to be served, particularly as regards its length ». Since 2002, the possibility of sentence suspension for medical reasons (*suspension de peine pour raisons médicale*) provides for the possibility for convicted persons whose « vital prognosis is involved » or whose « health condition is durably incompatible with the conditions of detention » to be treated and/or to die outside of the penitentiary confines. A possibility which immediately excludes of its application scope several categories of sick people, who remain therefore deprived of the benefits of the law : the pre-trial prisoners, for whom the *juge d'instruction* rules, those suffering from mental health disorders, handicapped people without a progressive pathology (paralysed on one side, blind...).

The National Consultative Commission for Human Rights, in an opinion of 8 November 2008 on the Prison Law project, recommended that « prisoners with a handicap and/or dependent benefit from alternative measures of incarceration and, if necessary, sentence management [*aménagements de peine*] ». Likewise, the Human Rights Commissioner of the Council of Europe has committed France to « deal with prisoners either elderly or at the end of their lives with more humanity in applying more broadly the sentence suspension for medical reasons »<sup>77</sup>. Despite these converging positions, the law of 2002, initially with a humanist aim, maybe even humanitarian, is today applied in its more restrictive sense. Over 8 years, according to the Prison Service, 497 persons benefited from this law. In 2009, 73 persons were granted a sentence suspension for medical reasons, whereas in the same year, 140 people passed away « of natural causes » behind bars. Among them, at least 14 were convicted prisoners suffering from severe pathologies but were not granted a sentence suspension. For two of them, such a request was ongoing. Ten passed away in hospital, 9 of which in a UHSI. In 2008, 89 people were granted a sentence suspension for medical reasons, 81 in 2007, 62 in 2006, 57 in 2005, 73 in 2004, 67 in 2003. The granting procedure for a sentence suspension remains heavy, whereas it deals with health questions that are often urgent and serious. According to the Prison Service, the average delay for processing the requests, in 2007, varied between 4 days and 8 months. Two concordant expertise are required, to which must be added three preliminary psychiatric expertises if it is someone convicted of a crime on a minor of 15 years.

The *Cour de cassation* (High judicial Court) follows a pattern harshening the conditions and terms to grant the measure : in a case of 28 September 2005, the criminal Chamber believed that in cases

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<sup>76</sup> *Mouisel v. France* - 14 November 2002 ; *Matencio v. France* - 15 January 2004

<sup>77</sup> Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights of the Council of Europe on the effective respect for Human Rights in France, 15 February 2006.

of an illness engaging the vital prognosis, the death needed to be foreseeable « *in the short term* » and that this condition was not satisfied when the expertises established the impossibility to assess a foreseeable delay. By a decision dated 24 October 2007, the Court held that the jurisdictions for the application of sentences (*juges d'application des peines*) could from now on reject a request of sentence suspension for medical reason, without any prior medical expertise, because « *only the granting of the measure requires the prior collection of two assessments* ». Several refusals were justified by considerations outside of health criterion. Therefore, the absence of accommodation outside is the reason of one rejection decision out of five, according to an internal study by the *Association nationale des juges d'application des peines (National association of sentence management magistrates)* in 2007. Medical retirement homes are unwilling to receive people leaving prison. The medical care of people then relies almost exclusively on charity organisations, where financial means are limited.

On 26 November 2009, a 77-year old man, detained at the prison of Liancourt, passed away as the court, examining his request of sentence suspension for medical reasons, had ordered a complementary assessment four months earlier. On the day of his death, the experts still had not come, even though his health condition, his dependency and handicap were known, and that the Prison Service itself had given a favourable opinion to his sentence suspension.

The *Tribunal d'application des peines* of the TGI of Créteil, facing the almost systematic non-implementation of sentence suspensions, granted for the first time the 24 October 2006 a convicted man a sentence suspension for medical reasons while reserving its effective implementation until adapted accommodation would be attributed. This decision – which was followed in 2007 by other judgments of similar nature – made such procedures available before administrative jurisdictions in order to enjoin the Public Assistance-Hospitals of Paris, *Assistance Publique-Hôpitaux de Paris (AP-HP)*, in the name of continuity of care, to welcome the convict to a hospital adapted to his medical condition. This is what happened the 9 March 2007 : the *Conseil d'État* enjoined the AP-HP to assure the orientation in an adapted medico-social structure for a 64-year old man, who had been admissible for sentence suspension for over a year. But the difficulties concerning reception structures continue, and can lead to « *dramatic consequences* », according to the *Juge d'application des peines* of the TGI of Créteil which experienced in 2008 the death of a prisoner « *during the adjournment period of the request.* »

## VI. Prisoners suffering from mental health disorders

*The warning in 2006 by the National Consultative Committee of Ethics, calling « the public authorities, elected officials, legislators, and sanitary authorities to urgently take all measures so that prison no longer substitutes itself to psychiatric hospitals », was ignored. The transfer of psychiatry from the hospital to the prison proves a more judicial and prison-orientated handling of mental illnesses than it is sanitary, and it goes against the principle of criminal irresponsibility of persons suffering from mental disorders. In prison, the issue is two-fold : on the one hand the prison environment is incompatible with psychiatric care, and even in the scope of medicalised prisons and healthcare structures for prisoners. And on the other hand, pathogenic conditions of detention can aggravate disorders existing prior to detention or lead to the outbreak of important disorders that did not exist before, as was underlined the respective inspection corps of Social Affairs and Judicial Services (IGAS and IGSJ) in a common report of 2001<sup>78</sup>. The political response is not only failing, it is counter-productive : to every question concerning mental disorders in prison, the political response relates to the construction of hospital-prisons, which will only reinforce the incarceration of persons suffering from mental disorders.*

### (1) Degrading and inhumane treatments

This « *psychiatric disaster* », to use the expression of the medical practitioner and European parliamentarian Pierre Pradier<sup>79</sup>, is such that in July 2006, the European Court of Human Rights condemned France for inhumane and degrading treatments against M. Jean-Luc Riviere, held in detention « *without any appropriate medical supervision* » despite suffering from severe mental disorders. In the case *Riviere v. France*, the Court explains that a « *psychiatric pathology that appeared in detention* » made this prisoner « *a chronic mental patient, who, without the weight of his antecedents, would obviously come under psychiatric care rather than remain in prison* ». However, continues the Court in this case, « *the national authorities did not, in this case, and despite the undeniable efforts of adaptation (...), insure an adequate handling of the health condition of the applicant enabling him to avoid treatments contrary to article 3 of the Convention*<sup>80</sup> ». If the facts examined by the Court date from 2002, the European Committee for the Prevention of Torture considered in 2006 that « *the Rivière case (is), even according to the health authorities, (...) revealing of a “systematic and widespread” problem* ».

More recently, the national Commission for Security Ethics (CNDS) considered, in May 2008, that a schizophrenic prisoner had been « *subjected to what can be resembled to an inhumane and degrading treatment* », by being held in detention but going back and forth to the psychiatric hospital where he was compulsorily being hospitalised (*hospitalisé d'office*) during his de-compensation crises. Between February and November 2007, the CNDS noted that this prisoner had been hospitalised six times, in other words 152 days ; whereas in detention he was taken care of by fellow prisoners – in charge of giving him his medication – and by the prison staff. And the Commission specified that « *only the obstinacy of a fellow prisoner seizing the 'préfet' and the DDASS, then, when faced with the slowness of the expected answers, a parliamentarian, former Minister of Justice, who then seized the CNDS* », managed to allow « *finally (...) uninterrupted*

78 General Inspection of Social Affairs (IGAS) and General Inspection of Judicial Services (IGSJ), *The organisation of care for prisoners, evaluation report*, June 2001.

79 Pierre Pradier, *The management of health in facilities of the 13 000 program. Evaluations and prospects*, 1999.

80 Article 3 : “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

hospital care ». Deploring « *that a prisoner suffering from severe psychiatric disorders had been kept in detention without any judicial or medical authority ending this* », the CNDS deeply regretted that because « *of a lack of psychiatric doctors and nurses affected to detention, the insufficient presence of the 'juge d'application des peines' who rarely meets the prisoners, of the lack of places in qualified hospital structures* », a prisoner could undergo inhumane and degrading treatments. Heard by the CNDS, a psychiatric doctor said that « *a procedure of conditional release that could have been suitable had been envisaged* » for the case of this prisoner; « *but the measure had been rejected without any new assessments* ». In this opinion, the CNDS recommended the organisation of a « *real appointment between judicial, medical and prison authorities who intervene in prisons, in order to research solutions other than the continued detention of persons suffering from severe psychiatric disorders* ».

## **(2) The impossible prospect of psychiatric care for prisoners**

Article D398 of the Criminal Procedure Code however provides that prisoners whose mental disorders compromise public order or the safety of persons « *cannot be held in prison facilities* ». All the more important that incarceration conditions tend to worsen pre-existing disorders : beyond the promiscuity and the prison shock, the organisation of daily life in prison affects the psychological health of prisoners. Thus, « *the incapacity to intervene on ones life's framework, to appropriate oneself time and space can reveal a mental disorder or facilitate its occurrence* ». « *The more rigid the framework* », the more it will clear the path for the morbid evolution of number of pathological personalities. This strictness is attested by the prison policy focused on the management of behaviours of prisoners (cf. Section II), and most certainly applied in a context where « *the psychiatrist has little or no margin of management of the way of life of his patient to make it less hostile* »<sup>81</sup>. However, mentally ill prisoners have weak or non-existent care prospects. The suspension of sentences for medical reasons do not apply to psychiatric disorders. Furthermore, the conditions of care and treatment of prisoners in hospitals are subject to such derogations that they affect the therapeutic effectiveness and are paradoxically capable of sending the prisoner down an inexorable spiral likely to aggravate his disorders rather than lessening them. Thus, the compulsory hospitalisation procedure (*hospitalisation d'office*, hereinafter referred to as HO) can be resorted to even for sick persons who consent to care (it is a quasi-systematic rule for women). These last few years, the number of HO has considerably increased<sup>82</sup>. This sharp increase shows the inherent difficulties of the presence of persons suffering from mental disorders in prison. Furthermore, this number, already high, does not take account of the HO requests refused by the *préfets* (local administrative authorities). Late November 2007, the XIXth national meetings of the prison psychiatric practitioners denounced the frequency of these refusals. The situation is crucial in Lille, which records 20 et 30% opposition to their requests. The government itself explained these refusals in its answer to the European Committee for the Prevention of Torture (CPT), following its visit to France in 2006. It could be, notes the government, « *that the Préfet hesitates to place a particularly dangerous prisoner in a non-secure care structure for security reasons* »<sup>83</sup>. But this answer does not mention situations of vetoes concerning prisoners who are not « *particularly dangerous* ». The situation is all the more preoccupying that in cases where the HO is accepted by the *préfets*, the delays prior to admission are getting longer and longer. And the lack of beds in hospital psychiatric units undoubtedly plays a part in these delays. But the delay, like the refusal, is

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81 Dr. Cyrille Canetti, in *Guide to the practice of psychiatry in custodial facilities*, Laurent Michel and Betty Brahmy, Heures de France editions, 2005.

82 Recent definitive data have not been communicated, but in 2004, 1835 HO were registered throughout prison facilities, against a hundred or so in 1990.

83 10 December 2007, Answer of the Government to the report of the European Committee for the Prevention of Torture (CPT) concerning its visit to France from 27 September to 9 October 2006.

particularly linked to a great reluctance of practitioners to take prisoners in their unit. « *For at least three reasons. The risk of mobilising a bed for too long because of the severity of the disorder – however the lack of beds is obvious as is that of personnel ; the equation, un-established, between a prisoner and a dangerous person; and most importantly the threat of breakout* » Even though the breakout rate is extremely low, and that in a number of breakout cases the persons come back by themselves.

### **(3) Hospitalisation conditions contrary to the therapeutic imperative and the dignity of persons**

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Moreover, the mistrust of hospital teams concerning sick prisoners is such that their conditions of hospitalisation are different than those of other patients. Thus, for the Commission for Social Affairs of the Senate, compulsory hospitalisation measures for prisoners are subject to a « *triple drift* » : « *The reduction of the length of care for hospitalised prisoners, a rapid medication being often favoured to allow a rapid return to prison, at the expense of the therapeutic needs of the patient* »; « *the inadequate use of isolation rooms* » ; and the placement of certain prisoners « *in units for dangerous sick people (unités pour malades dangereux) when they do not represent a real threat* ». Thus, the length of the stay in HO of prisoners does not always obey the exigencies of care. Often, they only last a few days, which allows, at best, the treatment for a severe de-compensation phase, but in no case a real care of the pathology.

As a result, it is frequent for prisoners to go back and forth between the prison and the hospital : the first not being able to treat severe de-compensation phases ; the latter refusing to give long-term care to persons suffering from mental disorders from prison. However the briefness of stays in HO answer the wishes of detainees who can no longer handle their conditions of hospitalisation. As noted in the report of the DRASS, following its inspection of the remand prison of Bois d'Arcy in 2008, « *patients often prefer to return to prison than to stay in hospital in maladapted isolation conditions* ». Because the psychiatric units often put prisoners patients in isolation – even when that same isolation is not led by therapeutic imperatives. At the risk, notes senator About, « *of creating an aggravation of their crisis* »<sup>84</sup>. A sanitary inspection of the prison of Rennes observed, in a 2008 report, that « *in the majority of units, prisoners are systematically hospitalised in isolation rooms* ». Thus, the HO are very often brief, continues the report, « *insofar as once the severe phase has passed, the conditions of hospitalisation in an isolation room, despite the adjustments that can be made, are often more restrictive than the accommodation in detention* ». And the inspection specified that in the two units where the prisoners were not hospitalised in isolation rooms, there « *does not appear to have any more difficulties or dysfunctions* ».

A situation which, according to the *Contrôleur général des lieux de privation de liberté*, « *can be justified during the first days but becomes unbearable, as much for the patient than for the staff, as soon as the clinical state of the patient no longer justifies keeping them in isolation* »<sup>85</sup>. And the High Authority of Health is quite clear : an isolation measure answers a medical prescription, when « *the patient's disorder corresponds to indications to be placed in an isolation room* » and remains « *inadvisable in the following cases : use of the (isolation room) as a punishment ; clinical state not requiring isolation ; use only to reduce the anxiety of the medical team or for his comfort ; use only due to a lack of staff* »<sup>86</sup>. In other words, in all the cases justified by hospitals to put prisoners in

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84 Senate, Opinion presented on the behalf of the Commission of Social Affairs *on the draft Prison legislation* by M. Nicolas ABOUT, annexed to the minutes of the session of 17 February 2009.

85 *Contrôleur général des lieux de privation de liberté*, report of the visit to the hospital unit of Esquirol in Limoges (9-11 December 2008)

86 National Agency of Accreditation and Evaluation of Health (ANAES), *Clinical audit applied to the use of isolation rooms in psychiatry*, June 1998.

isolation rooms. Compulsory hospitalisation within article D398 of the Criminal Procedure Code does not therefore meet, in practice, the current medical standards. For official security reasons ; but also because of a principle « *more awkward to explain* » : « *If we give living conditions which are too favourable in care, it will make a draught* » for the prisoners « *who may seek to go to hospital to escape from the harsh conditions of detention* »<sup>87</sup>. A principle that leads some units to use, other than isolation, restraints devices. Which, beyond any therapeutic indication, amounts to an inhumane and degrading treatment. « *In these conditions, concludes the Senate report of 2009, temporary hospitalisation, far from bringing a psychiatric care, only worsens the mental health state of the prisoner* »<sup>88</sup>.

During its visit to France, the CPT observed, on two occasions, situations which amounted to inhumane and degrading treatments to prisoners suffering from mental disorders. Thus, at the prison of Fresnes « *patients presenting severe levels of pain were placed* », while waiting for a HO, « *in one of the isolation cells of the SMPR, treated by force if necessary, and forced to remain naked in the cell, subject to a regular visual control by the prison staff* ». « *It's beyond the shadow of a doubt, declared the CPT in its report, that such a situation pertains to an inhumane and degrading treatment for the concerned patient (and is equally degrading for the staff involved)* ». At the security prison of Moulins-Yzeure, the Committee observed in addition that « *a situation even more difficult for the "DPS" prisoners (détenus particulièrement signalés, registered as requiring special supervision, cf. chapter « Security »)* », for who a HO was impossible. « *These patients were thus deliberately deprived of any possibility of appropriate psychiatric care, whereas they were suffering from severe psychotic de-compensation, often characterised by a lack of care. This dramatic situation generated completely maladapted placements of patients presenting severe psychiatric disorders in isolation quarters, sometimes even in punishment cells* ». And the Committee concluded « *that such a situation resembles an inhumane and degrading treatment* ».

The summary of a meeting of the officers' commission at the prison of Bayonne in September 2008 underlines the « *difficulties* » concerning the HO, that « *rarely go beyond 48 hours and (...) therefore give rise to questions* ». Moreover, the prisoners in Bonneville with mandated hospitalisations stay, for most, a few days in hospital, then return to prison in the same general state – only the crisis phase having finished. « *We send someone because that person is not well, because they do not put up with detention, and we find them in the exact same state when they return* », relates volunteer working in a prison nearby Lyons in October 2009.

At the prison of Ajaccio, a sanitary inspection report from December 2007, observes moreover that « *psychiatric hospitalisations are carried out (...) in isolation rooms* », and that « *this state of fact creates difficulties for quality care* ». Same creed at the interdepartmental hospital unit of Clermont-de-l'Oise, where mandated hospitalised prisoners stay between 8 days and 3 weeks and are systematically isolated. « *It's hard for them* », states the psychiatric, but « *it greatly reassures the psychiatric teams* »<sup>89</sup>. At the prison of Fresnes, mandated hospitalised patients « *are systematically in isolation rooms, even without explicit therapeutic indications* », indicates the sanitary and social inspection report of 2008. Moreover, those of the prison of Limoges are permanently locked up in secure rooms.

A prisoner in Dijon, presenting an important suicide risk, had a mandated hospitalisation from 27 June to 17 July 2006. He was shackled around his pelvis, his two feet, and one of his hands for three weeks of his stay. Injections were administered to prevent any risk of phlebitis caused by the contention, before he was authorised to get up one or two hours per day in his room, but only six days before his return to prison. In September 2008, the family of a prisoner aged 20, suffering from a heavy mental handicap and had a mandated hospitalisation, were able to visit after one week to see he was in an isolation room, shackled to his bed with locked leather straps, his trousers drenched in urine.

87 Interview of the psychiatrist Olivier Boitard, 30 April 2009 for the "Zoumeroff Library", available on <http://www.collection-privee.org>

88 Senate, Opinion presented on the behalf of the Commission of social affairs on the draft Prison legislation by M. Nicolas ABOUT, annexed to the minutes of the session of 17 February 2009.

89 Interview of the psychiatrist Olivier Boitard, 30 April 2009, *ibid*.

#### **(4) Towards a worsening of the situation : the political choice legitimating the incarceration of persons suffering from mental disorders**

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To these severe gaps and failures of the psychiatric care for prisoners, public authorities answer by the project creating “specially equipped hospital units” (*unités hospitalières spécialement aménagées*, hereinafter *UHSA*). These confirm the entrance of the prison into the hospital, and consequently, the entry of mentally-ill people in prison. Their existence will officially confirm that it « *is lawful to imprison (persons suffering from mental disorders), and that it is moreover lawful to treat them and punish them in the same place* »<sup>90</sup>.

UHSA have already been greatly criticised among mental health care professionals. Such as the doctor Evry Archer, responsible for a long time of the Psychiatric care unit (SMPR) of the Lille prison, who denounced the UHSA as a « *regression* ». Especially because they amount to « *a reduction of individual liberties and at the same time a hijacking of the rules in terms of public health* », and because they « *will create a discriminatory course for the category of “prisoners suffering from psychiatric disorders”* ». For the association of the psychiatric sectors in prisons<sup>91</sup>, the UHSA are at « *the borderline of the evolution of psychiatric units in prisons* », because they involve « *an actual risk to constitute a segregative unit* ». Titled « *Hospital-prisons : the cure is worse than the disease* », a petition was launched by psychiatrists in April 2007 to ask for the suspension of this program. In a « *context of closure of psychiatric beds* », and where the units for difficult sick people « *are constantly saturated* », psychiatrists who started the petition advocate that « *less costly, more relevant and more ethical solutions solutions* » be implemented : to « *avoid prior to the incarceration of persons suffering from psychiatric illnesses* », and to reinforce the general care service in public psychiatry<sup>92</sup>. Referred to as « *asylums* », the UHSA to come revive the question of the reconsideration of « *the balance between justice and psychiatry, so wisely acquired throughout centuries* »<sup>93</sup>.

The prospect of such « *hospital-prisons* »<sup>94</sup>, according to the words used by the Minister of Justice Rachida Dati, had however caused « *strong reservations* » from the CNCDH prior to the parliamentary debate in 2002<sup>95</sup>. The latter had reacted by stating « *that the problem of psychiatry in prison cannot be dealt with by the only change of modalities of care of detainee-patients* ». And, considering that « *the important question of incarceration or of the holding in detention of persons suffering from psychiatric disorders remains unanswered* », it had insistently recommended the public authorities to « *plan some sentence management measures (aménagements de peine) specific to persons suffering from psychiatric disorders, taking into account the increase of psychiatric pathologies resulting from detention* ». A recommendation repeated on several occasion but, in vain.

Believing that the UHSA result « *more from a criminal logic than a therapeutic logic* », the parliamentary Office for the evaluation of health policies also stated in April 2009 in a report on « *psychiatric care in France* »<sup>96</sup> that the UHSA was not an adequate answer. It recommended that « *policies concerning the accompaniment of care of the most fragile populations should be reinforced, insuring that prison does not become the place to receive by default the deficiencies of*

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90 Jacques Mégret, *Criminal sciences journal*, 1976, p. 1000.

91 « *Psychiatric care in custodial facilities. Limits and breaking points* », news release of 4 June 2007.

92 “*Hospital-prisons : the cure is worse than the disease*”, petition at the initiative of Dr. Dubret, Carrière and Massardier, April 2007

93 Jean-Marc Chabannes, « *Specially equipped hospital units (UHSA), or the result of an unfortunate divorce* », in *Psychiatric Information*, vol. 80, no. 4, 2004.

94 Phrase used by Rachida Dati, Minister of Justice, during a debate session of 5 March 2009 on the draft Prison legislation.

95 CNCDH, *Observations on the pre-bill of the orientation and programming of justice*, 8 July 2002.

96 Parliamentary Office for the evaluation of health policies, *Report on psychiatric care in France*, recorded at the National Assembly the 28 May 2009 and at the Senate the 8 April 2009.

*psychiatric care* ». Joining the CNCDH for which « *the prevalence of mental pathologies in prison questions the adequacy of the penal answer put forward* »<sup>97</sup>.

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<sup>97</sup> CNCDH, Study on the draft Prison legislation, November 2008.