



association for  
the prevention  
of torture



# Opinions and Recommendations of the French 'Contrôleur général des lieux de privation de liberté'

2008 - 2014





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## **Contrôleur général des lieux de privation de liberté**

Following the ratification by France of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted in 2002 by the General Assembly of the United Nations, the French Parliament passed a law to set up a *Contrôleur général des lieux de privation de liberté* (CGLPL) and gave it the status of an independent public body.

The *Contrôleur général* assumes the position of the National Preventive Mechanism (NPM) under OPCAT. He or she makes sure that persons deprived of their liberty are treated humanely and with respect for the dignity inherent to any human being. In this framework, the *Contrôleur général* can visit at any time, all over France, every place where people are deprived of liberty.

The first mandate holder from 2008 to 2014 was Mr Jean-Marie Delarue.

## **Association for the Prevention of Torture**

The Association for the Prevention of Torture (APT) is an independent non-governmental organisation based in Geneva, working globally to prevent torture and other ill-treatment.

The APT was founded in 1977 by the Swiss banker and lawyer, Jean-Jacques Gautier. Since then, the APT has become a leading organisation in its field. Its expertise and advice is sought by international organisations, governments, human rights institutions and other actors. The APT has played a key role in establishing international and regional standards, and mechanisms to prevent torture such as those mandated under the OPCAT.

The APT's vision is a world free from torture where the rights and dignity of all persons deprived of liberty are respected.

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ISBN: 978-2-940337-71-2

Lay-out: Anja Härtwig, APT

Photos: *Contrôleur général des lieux de privation de liberté*

Cover: Courtyard in the disciplinary quarters of a detention centre

Printing: Imprimerie Villi®, France, October 2014

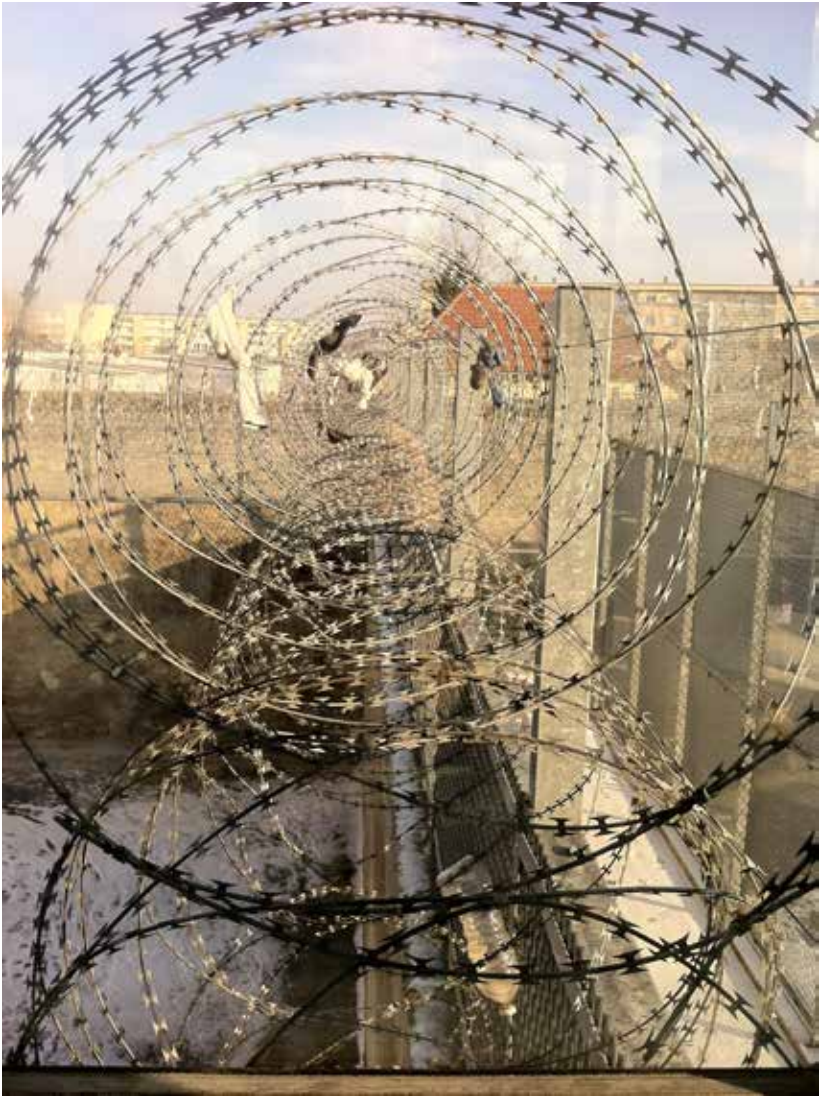
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Barbed wire of a detention centre

# Preface

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During the first six years of its existence, the *Contrôleur général des lieux de privation de liberté* (CGLPL)<sup>1</sup> has established itself as an institution with a certain influence on issues of deprivation of liberty in France. Often moving against the tide, Jean-Marie Delarue and his inspectors have above all managed to return dignity to those whom our societies tend to relegate to the back of the collective conscience: persons deprived of their liberty.

Since 2008 the *Contrôleur général* managed to positively influence the debate on issues of detention in France, as well as public policies in this area. Besides his regular visits to places of detention, he made use of the main tools within his reach: his words, reports and recommendations. He untiringly called out to both the authorities as well as to his fellow citizens about the realities of detention. In his annual reports, public opinions or interviews with the media, he gave a voice to those who had become inaudible.

The Association for the Prevention of torture (APT) is following the work carried out by the *Contrôleur* with a lot of interest. Every time he takes the floor, we are invited to reflect on the deprivation of liberty; every intervention is the product of work on the ground, the result of visits to places of detention, police custody, juvenile and pre-trial detention centres, health institutions and other closed places. In admiration of his analysis and sometimes brave positions regarding issues such as young children in prison and their imprisoned mothers, overcrowding, or the care and management of transsexual prisoners, we endeavoured to disseminate them amongst the other National Preventive Mechanisms (NPM) all over the world.

As of today, the NPM community is composed of fifty-nine active institutions on five continents. Being certain that the global movement

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<sup>1</sup> Controller General of Places of Deprivation of Liberty.



for the prevention of torture will benefit from a better dissemination of the *Contrôleur général's* opinions and recommendations, we are glad to participate in their publication as a collection, as well as in their translation into English and Spanish. We are convinced that NPMs, other monitoring bodies, but also authorities in charge of closed institutions and any person interested in these issues, will find a real source of inspiration in the opinions and recommendations published hereafter.

In the name of the APT, I would like to thank Jean-Marie Delarue for those six years of continued inspiration and wish a very long life to the vital institution *contrôle général des lieux de privation de liberté*. I hope that this collection will contribute, thanks to the analysis and recommendations it contains, to reinforcing the work of those who struggle daily for the prevention of torture and ill-treatment within places of deprivation of liberty.

Mark Thomson  
APT Secretary General

# Introduction

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The mission given to the *Contrôleur général des lieux de privation de liberté* (CGLPL) by the law of 2007 setting up the French National Preventive Mechanism,<sup>2</sup> is to ensure protection of all fundamental rights for persons deprived of their liberty, whether they are in prison, police custody (*garde à vue*), an immigration detention centre, the cell of a courthouse, a mental health institution, a juvenile detention centre, or in any other place where people are imprisoned upon the decision of a judge or other administrative authority.

Amongst the powers this law gives the *contrôle général*, is the right to provide the government with opinions or recommendations. Significantly, after announcing it beforehand, these opinions or recommendations can then be published in the *Journal officiel de la République française*.

During the six-year mandate of the first *Contrôleur général*, thirty-six opinions or recommendations were published. This represents on average one every two months. These published views complement or illustrate the other means of expression (and of providing further recommendations) of the National Preventive Mechanism, including the reports drafted after every visit, as well as its annual reports. Such reports are typically taken up and considered by the national press.

Experience leads us to distinguish between opinions which do not refer to any particular place of deprivation of liberty, but are focused on a certain issue (a group of people: foreigners, LGBTI; a procedure: the use of CCTV; or an object: mail, telephone); and recommendations which ensue from the visit of one or several places of detention. The law also makes it possible to publish urgent recommendations, in case of serious violations of fundamental rights. This procedure has been used four times.

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<sup>2</sup> French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cglpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)

But one shouldn't be misled. Whether opinions or recommendations, they all underscore a general issue, an all-encompassing idea, which goes beyond the boundaries of an institution or even of several institutions. The recommendation concerning the remand prison in Marseille (*les Baumettes*) of 2012, which was extensively echoed by the press, does not only reveal the unhealthy conditions and violence of this particular prison. It pinpoints more particularly the authorities' inactivity, who, despite having been informed for a long time through successive visits (notably by the European Committee for the Prevention of Torture) were not able to take the necessary measures.

Because these opinions and recommendations go beyond the situation in France, it seemed to us that they could also be of interest to a larger public. I wish that this collection may help those who work for human dignity.

Jean-Marie Delarue

*Contrôleur général des lieux de privation de liberté*

2008-2014

# Texts included in this collection

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## Opinion

"In his or her area of competence, the *Contrôleur général des lieux de privation de liberté* shall issue opinions, [...] and propose to the Government any amendment to applicable legislative and regulatory provisions. After having informed the authorities responsible, he may publish these opinions [...]." (Art. 10 law of 30<sup>th</sup> October 2007)<sup>3</sup>

An opinion is a document on any thematic issue, summarising the observations made by the *Contrôleur général* and his team following all their visits to places of detentions.

## Recommendation

After having sent the visit report to the Ministries concerned and taken note of their comments in response, the *Contrôleur général des lieux de privation de liberté* can formulate recommendations which he has the right to make public. In this way recommendations that are relevant to a group of places of detention (beyond the one visited) are published in the *Journal Officiel de la République Française*.

## Urgent recommendation

Article 9 of the law of 30 October 2007 gives the *Contrôleur général des lieux de privation de liberté* the right, if he observes a serious infringement of the fundamental rights of the persons deprived of liberty, to promptly notify the competent authorities of his observations, giving them a period within which to respond. At the end of this period he determines whether the infringement notified has ceased and if he deems necessary, he can publish the contents of his observations and the responses received.

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<sup>3</sup> French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cglpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)

### **Note for the English version**

The texts compiled in this publication were translated into English by different translators at different points in time between 2008 and 2014. An effort has been made to harmonise certain differences between American and British spelling (in favour of the latter) and some technical vocabulary. However, some variations originating from different writing styles cannot be excluded.



Passage in a detention centre

## Recommendations of 17<sup>th</sup> November 2008<sup>4</sup> concerning the immigration detention centre in Choisy-Le-Roi

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The detention centre for undocumented migrants in Choisy-Le-Roi (Val-de-Marne), management of which is under the responsibility of the central administration of the French national police force (central department for public security), was visited by two inspectors from the *contrôle général des lieux de privation de liberté* (CGLPL) from 11 a.m. to 8 p.m. on Tuesday 8<sup>th</sup> July.

Factual findings from this inspection were communicated to the Police Commissioner of the appropriate police department on 30<sup>th</sup> July 2008. A response to this was provided by the Prefect of Val-de-Marne dated 19<sup>th</sup> August 2008. The Public Prosecutor at the Créteil Court of First Instance for Criminal Matters, solicited in writing, gave his written response on 3<sup>rd</sup> September, 2008.

The final report concerning the visit was submitted for observations to both the Minister for Immigration, Integration, National Identity and Socially Responsible Development and the Minister for the Interior, Overseas Territories and Local Authorities on 15<sup>th</sup> September 2008. On 24<sup>th</sup> October 2008, the Minister for the Interior, Overseas Territories and Local Authorities made it known that he would leave it to the Immigration Minister to reply. The Minister for Immigration, National Identity and Socially Responsible Development provided his remarks in a note dated 25<sup>th</sup> October 2008.

Following this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* has made the following recommendations:

**1/** Detention centres have generally been set up in units that were not initially destined for the detention of foreigners who are the subject of deportation or expulsion orders. The centre in Choisy-Le-Roi is no exception to this rule, since its rooms (four bedrooms, a lounge, a vestibule, a room for the guards plus washing and toilet facilities) were originally designed as offices for the local police station. Although

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<sup>4</sup> Published in the *Journal Officiel de la République française* n°0274 of 25<sup>th</sup> November 2008, text n°58.

overall the premises are in a satisfactory state, the disposition and size of the rooms are not entirely satisfactory. In addition, certain deficiencies suffered by the police station and the personnel therein (inadequate electrical installation) have an effect on the way the unit operates. There is therefore a medium-term requirement to find premises in a building more adapted to the functions carried out in such a centre.

2/ The four bedrooms, one of which being reserved for women, are in a row (the 'male' bedrooms being separated from the 'female' bedroom by the room for the guards). To get to the washing and toilet facilities, the men need to pass in front of the bedroom reserved for women. This bedroom is separated from the corridor by a full-length glass partition which is naturally totally transparent. Whilst security concerns mean that the agents on guard need to be able to keep all detainees under surveillance, this should not be at the expense of a complete lack of respect for individual privacy to which all persons have a right. Such an arrangement is not to be found, for example, in any prison. No security instructions can justify such a situation, which is clearly prejudicial to human dignity. These arrangements need to be rectified as quickly as possible (for example by applying an opaque film to the glass).

3/ The conditions in which detainees can receive visitors are less than satisfactory, especially when one considers that one relies on third parties to bring what the detainees lack and to provide such comfort as can make their stay more agreeable. Indeed, these discussions take place in a corridor where no seats are available. In addition, they are limited to twenty minutes (as is the case in other centres) without any clearly established reason for such a limit (according to those who keep the register, out of 234 persons detained in Choisy-Le-Roi, only 78, i.e. 33%, received visits). The *Contrôleur général* is convinced that allowing third parties longer and more comfortable access to detainees would not constitute a security problem concerning the person's detention. In these conditions, extra resources will need to be provided.

4/ It is clear that most of the public security police officers assigned to guard the detainees, in Choisy-Le-Roi but also in other equivalent locations, are on their first assignments after initial training. Apart from the disappointment these officers feel at performing low-esteem tasks which they never expected, it is clear that their training

has not equipped them with the necessary and useful skills for managing a relationship with people who are very uncertain of their future, and for doing this in a cramped environment over an extended period. Through fear, suspicion and a legitimate concern for their own safety, their reaction can be to apply the relevant security measures in a much more draconian manner than is usual. Whilst the idea of specific training for people likely to be involved in guarding foreign detainees may not be contemplated, the conditions to be found when confronted with prolonged guarding of people form part of the characteristics of the profession which should be taken into account both during initial training for new recruits, and by the help of their more senior colleagues and their immediate superiors at the time of their first such assignment.

5/ The visit also enabled an inventory of positive elements to be made. In particular, an examination of the register - well maintained - showed that no-one was detained in the premises longer than the forty-eight hours allowed by the regulations in force. In addition, at the initiative of a local manager, an arrangement has been made with a local company for providing paper (strengthened) sheets, which ensures both rigorous standards of hygiene and savings on the laundry budget - the administrative authorities should investigate the possibility of extending this practice. Although incidents have occurred in the past, notably concerning swallowing or other use of dangerous substances by detainees (for example on 3<sup>rd</sup> January 2008), the period prior to the visit had not been witness to any such event. Lawyers (very few had come) as well as charitable and humanitarian organisations have satisfactory conditions for access to the premises. Access to healthcare and treatment is assured. Catering arrangements gave rise to no particular concerns.



## Recommendations of 24<sup>th</sup> December 2008<sup>5</sup> concerning the remand prison at Villefranche-sur-Saône

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The Villefranche-sur-Saône remand prison was visited by five inspectors from the *Contrôle général des lieux de privation de liberté* (CGLPL) from Tuesday 23<sup>rd</sup> to Thursday 25<sup>th</sup> September 2008.

The findings from this visit gave rise to an initial report submitted to the director of the institution on 7<sup>th</sup> October 2008. The director replied by letters dated 14<sup>th</sup> October and 4<sup>th</sup> November 2008.

The full report of the visit was submitted for observations to both the Minister of Justice and the Minister for Health, Youth, Associations and Sport on 27<sup>th</sup> October 2008. The Minister of Health gave his response in a letter dated 11<sup>th</sup> December 2008; and the Minister of Justice replied on 17<sup>th</sup> December 2008. These responses will be provided as appendices to the report.

Following this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* has decided to make the following recommendations public:

1/ The institution has put prisoners onto an 'individualised detention programme'. At first sight this would appear to be a very positive initiative. It is in line with the objectives of the European Prison Rules (n°s. 103.2 and 103.4) and with the 'sentence enforcement programme' contained in the Prison Act (article 51), currently before Parliament. But as it appears on the ground, this 'programme' consists of selecting those prisoners who will be offered some form of development or progress, whilst leaving the remainder with no hope of improving their situation. The first group have a sort of 'contract' - sometimes quite real - but also sometimes really empty (no commitment on behalf of the prisoner, no activity offered by the staff); the second group has no project and no activities proposed. Such a 'programme' is illusory, and might equally well be achieved by separating the chosen few into separate wings or separate floors of the institution and leaving the rest abandoned, often irretrievably, for the full duration of their

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<sup>5</sup> Published in the *Journal Officiel de la République française* n°0004 of 6<sup>th</sup> January 2009, text n°80.

sentence, in a form of cul-de-sac difficult both for the prisoner and for the prison staff. By using the principle of volunteers for designating the staff assigned to those with a 'programme', the situation is simply aggravated by placing the staff also into an unjustified system of segregation.

If individual prison programmes are to be implemented, it must be on condition that concrete proposals be genuinely available to all prisoners without exception, and that the corresponding resources be put in place.

2/ The ability for prisoners to appeal against decisions that affect them seems to be ineffectively applied: any letter can be opened by the person against whom the prisoner is complaining; there is no guarantee letters will arrive at their destination; letters can remain unanswered. It is true that some letters are abusive, and many will not achieve their aims. Nevertheless, however clumsy or error-strewn, prisoners' requests should not be simply ignored. In the absence of any response, violent and unpredictable protests are inevitable in the short or medium term - indeed the absence of any response is ample justification in the eyes of those involved.

All prisoners have the right of recourse to the prison authorities, as described in the European Prison Rules (rule 70.1); they must have the means of exercising this right. To this end, prisoners (including those who cannot write) must be given access to the means of communicating; the letters must be delivered directly to the addressee; the necessary confidentiality must be granted; a reasoned response must be provided. Considerable efforts need to be made in this area.

3/ Similarly, it is clear that the directors of these institutions and their deputies carry out their responsibilities in difficult conditions. They are responsible for managing the staff, the physical installations in the facility, discussions and meetings with those who have dealings with the prison and, naturally, fulfilling the missions that are implied by the nature of the institutions for which they are responsible. This multitude of tasks should not hide the fact that the essential item is a thorough knowledge of the establishment and of the people within. In this area, it is not acceptable that they delegate responsibility to just senior detention management (heads of detention and prison officers). It is important that they have a deep understanding of the prisoners and that they provide the prison staff with all the support they need.

It is therefore essential that the institutions' heads plan their working schedule so as to allow sufficient time to be spent within the facility, to meet those prisoners who have requested an interview, to reply to any written requests and, more generally, to have a precise and up-to-date understanding of the prisoners under their responsibility. The Minister of Justice is quite clear on this and has requested that the deputy directors of this particular prison spend more time at the facility.

4/ The exercise yards are places full of risks: threats, racketing, violence, trafficking, projectiles, etc. This was amply demonstrated in the establishment visited by the violent riot that took place on 31<sup>st</sup> August last, involving some fifteen prisoners. The yards are the ideal place to release all the tensions and frustrations which are all the more intense when prisoners are deprived of any activity. Prison staff never enter these areas at the same time as the prisoners and use video cameras or adjoining cabins to survey the scene. In an establishment where rules and regulations abound, the exercise yards are, paradoxically, places where no rules apply. In a way, they are abandoned to the prisoners to use as they wish, and who treat them as a release from the confinement of their cells and as a sort of market where they can compensate for what they lack. Whenever there is riot or other form of assault, one has to wait until all prisoners have regained their cells before bringing the situation under control. The consequences are threefold: the law of the strongest reigns; serious injuries are commonplace; a significant number of prisoners refuse to go to the exercise yards through fear of assault. And it is far from true that those responsible for such assaults or riots are always punished.

This situation needs to be addressed. Protection of the establishment's personnel is a priority for the *Contrôleur général* and it is not acceptable that any member of the prison staff, whoever he may be, be exposed to unreasonable risks. But re-taking control of the exercise yards, which can only be achieved over the long haul, must be an objective that the prisons administration should set itself. Progressively, in specific circumstances and in certain establishments, warders in sufficient numbers must be able to mingle with prisoners in the yards, as in all other areas of the prison, until this can be achieved in all establishments and in all circumstances. The exercise yard must become what it was designed for - a place for relaxation, for physical exercise and socialising or the simple possibility of remaining alone.

This recommendation is intimately linked with recommendations 1 and 2 above.

5/ Specifically to reduce the chances of projectiles being received from outside, but also to reduce throwing waste from the cells, a well-established practice in most institutions, the administration has quite logically speeded up the replacement of the standard window bars by a type of thick, very close-meshed, grating. Although throwing of objects (and also the inter-cellular communication of all sorts) is clearly reduced (rarely eliminated), the effect of these gratings is plunge the cells into almost permanent night-time, reinforcing the prisoners' sense of isolation. These installations can even go as far as depriving them of any view of the sky. This aggravates an already difficult or very difficult situation in the cells, and increases the sentiment of anger and/or depression.

The short-term advantage that these structures provide is undeniable. But it must not be allowed to hide the fact that they foment additional medium and long-term tensions among the prisoners who, through the additional feeling of constraint and pressure, feel invisible and even more anonymous behind the gratings. As a result, one should not be surprised if, in the long term, relations with prison staff become even more strained. Although the problems of safety and hygiene posed by projectiles and uncontrolled communication with the outside are significant, it is recommended that they be addressed differently (improved effectiveness in cleaning and in waste disposal, increasing opportunities for discussion - see recommendations 2, 3 and 6, presence in the exercise yards - see recommendation 4, protection from external projectiles at the height of the external wall).

6/ Attention must be drawn to the very difficult working conditions for prison staff. In particular the level of discouragement shown by those responsible for rehabilitation and probation (witness the high level of personnel rotation) has been noted, and this is reflected in the level of dissatisfaction that prisoners show towards these people. They are confronted with an overload of cases to handle, accompanied by considerable bureaucracy in completing the files required for enforcing sentences and for handling those leaving prison. Although these tasks are not those that motivated many of them to take up this role, the absolute need to complete them means that they neglect two major activities concerning the prisoners. Firstly, they do not have the time to listen to the prisoners' preoccupations,

particularly from those who are on short sentences and those from a fragile social environment, such that requests from this population often go unanswered within a reasonable time scale. Consequently, there is less and less real understanding of the individuals concerned. Secondly, they are unable to take any positive initiatives with the targeted population (except in the case of a 'new arrivals' procedure - where that exists) and the prisoners concerned therefore see no effective social support offered.

The social support offered to the majority of prisoners is today defective. It is recommended that the quality of this social element be restored. This will require more staff, a sustained effort to listen within the establishment (recommendation 3) which applies also to rehabilitation and probation counsellors, better appreciation of personal factors in the committees dealing with sentencing issues and a proper response to the daily preoccupations of all prisoners, without exception. It is also recommended that, as for the management personnel, rehabilitation and probation counsellors spend more time on site so as to be able to respond to requests and to implement (as well as monitor) the socio-educative and cultural activities that interest the largest possible number of prisoners.

## Recommendations of 8<sup>th</sup> April 2009<sup>6</sup> concerning the custody cell of the Court of first instance in Bobigny

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The custody cell of the Court of first instance in Bobigny (Seine-Saint-Denis) was visited by four controllers from the *contrôle général des lieux de privation de liberté* (CGLPL) on 13<sup>th</sup> October 2008.

Factual findings from this control were communicated on 22<sup>nd</sup> October 2008 to the Commander of the Brigade of Judicial Guards for the Seine-Saint-Denis Departmental Department of Public Security. A response to this was provided on 14<sup>th</sup> November 2008.

Following this response, the controllers revisited the site on 26<sup>th</sup> November 2008 in order to obtain supplementary information.

The full report of the visit was submitted for observations to both the Minister of Justice and the Minister for the Interior, Overseas Territories and Local Authorities on 28<sup>th</sup> November 2008.

The Minister of Justice replied on 13<sup>th</sup> February 2009.

The Minister for the Interior, Overseas Territories and Local Authorities made his response known on 12<sup>th</sup> March 2009.

Following this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* has decided to make the following recommendations public:

1/ A permanent house-keeping and maintenance process must be put in place and additional works undertaken to eliminate the unhygienic situation which, in the cells, is simply unacceptable: offensive smells, blocked toilets, presence of urine-filled plastic bottles, traces of excrement on the walls, etc.

2/ The configuration of the search area should be reviewed. In effect, despite the recess hidden by a partition, privacy is not guaranteed during physical body searching of persons on arrival: as the room in which the search takes place is not closed, a person undressing himself there can be seen by a third party.

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<sup>6</sup> Published in the *Journal Officiel de la République française* n°0088 of 15<sup>th</sup> April 2009, text n°58.

3/ The practice of removing brassieres and corrective eyewear should be stopped - this is prejudicial to human dignity and cannot be justified by any security imperative put forward.

4/ Discussions between persons referred to the court or discharged and their lawyers, social workers and interpreters must be held in confidence, but the current cabins used for this purpose do not guarantee such confidentiality.

5/ All persons must be able to be presented before their judges in a dignified manner; this requirement is part of the rights of the defence. The current situation does not allow this:

a) sleep is disrupted by permanent, including all night, lighting in the cells and the absence of anything that could truly be called a bed;

b) washing or showering is impossible;

c) persons discharged are given no breakfast before leaving the court building and the sandwich given to those referred to the courts can in no way be called a proper meal.

6/ Joint discussions need to be held as a matter of urgency between the Ministry for the Interior, Overseas Territories and Local Authorities and the Ministry of Justice to resolve the lack of clear dividing lines between the responsibilities of the appropriate administrative and judicial authorities. The current situation reveals a system that is broken and which is perceived by the public servants involved as demonstrating a lack of understanding and support.

## Recommendations of 30<sup>th</sup> April 2009<sup>7</sup> concerning the Nice remand prison

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The Nice remand prison was visited by four inspectors from the *contrôle général des lieux de privation de liberté* (CGLPL) from Wednesday 12<sup>th</sup> to Friday 14<sup>th</sup> November, 2008.

The findings from this visit gave rise to an initial report submitted to the director of the institution on 8<sup>th</sup> December, 2008. The director made his views known concerning this report in a letter dated 26<sup>th</sup> December, 2008.

The full report on the visit was then submitted to the Minister of Justice for his observations on 19<sup>th</sup> January, 2009. On the same date, the report was also submitted to the Minister for Health, Youth, Associations and Sport for any possible observations on his behalf. The Minister of Justice submitted his observations, which have been added to the report as an appendix, in a letter dated 12<sup>th</sup> March, 2009. The Minister for Health and Sports has not provided any observations.

Following this procedure, and in accordance with article 10 of the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* has decided to make the following recommendations public:

1/ Despite the work that has been carried out, the Nice remand prison is dilapidated and many of its installations, in particular those concerning the electricity supply and the fresh and soiled water distribution, do not comply with basic requirements for habitation. These deficiencies arise from the fact that there has been a long-standing project for the construction of a new institution in the Plaine du Var, to the west of the Nice urban area. The simple existence of this project has been a recurrent reason to refuse any significant request for investment from the current prison, situated in the centre of Nice. The question of any such reconstruction on the current site or of relocating elsewhere currently appears not to be completely decided.

It is natural that those who control the public purse should ensure that the State's money and other resources are well used and that unnecessary expense be avoided – the *contrôle général* is sensitive

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<sup>7</sup> Published in the *Journal Officiel de la République française* n°0109 of 12<sup>th</sup> May 2009, text n°63.



to this. But this argument is not relevant here, since this question has been on the table for many years. It is all the more unacceptable since the required decision concerns the daily existence, in its most basic form, of several hundred people.

The *Contrôleur général* is aware that the State has embarked on a significant building programme in recent years, but feels it necessary to highlight the need for some rigorous planning, the elements of which need to remain as stable as possible, and which must reconcile the need for tight expense control and the absolute necessity of ensuring the basic minimum level of comfort for those placed in the hands of the justice system, and for those with responsibility for looking after them.

2/ At the time of the inspectors' visit, the prison had 429 prisoners effectively on site for an institution with 315 places (occupation level of 136%). According to the information gathered on site, out of this population, forty-nine were employed as auxiliaries in the various departments of the institution and twenty-one in the workshops (fourteen men out of the 480 prisoners and seven women out of thirty-six). Thus less than 15% of the prison population had a paid "occupation". One cannot consider as participating in prison work, as has done the Minister of Justice, the jobs of those occupying the open wing who, by definition, work outside the institution.

Naturally it is appropriate to indicate that the question of work in prisons is one of the most difficult to resolve; that it is dependent on the state of the economy (the number of jobs available to prisoners has sharply diminished since the start of the economic crisis in 2008) and of the job market; that it is subject to the goodwill of companies; that one cannot compare 'professional' activity inside penal institutions with external work (partial release, external site working) the results of which are more positive.

It is no less true that the current situation is distinctly disquieting. It is essential to rapidly create active mechanisms for seeking out job offers, for encouraging new working methods (electronic), for increasing the activities within the penal system and for rethinking the ways of securing external placements (with an appropriate status). The current low volume of work available not only has an effect on the revenue to be shared around (less work means more poverty in prisons), on the level of boredom and consequently on the tensions that exist within prisons, but it completely removes the possibility of

reduced sentencing for those prisoners who could benefit from it, as one of the criteria for granting reduced sentencing lies in the knowing whether the person works or not. An action plan in this area would seem to be extremely desirable.

3/ It would also seem advisable to have a better organisation surrounding the types of activity available to prisoners such that the greater number becomes interested in them. It is certainly true that there are plenty of examples of interesting activities with motivated, well thought through and dedicated attention being paid to them. But they are too transient and seem to attract too few numbers. In addition, there appears to be little coordination and there is a great difficulty in discerning the reasoning behind certain activities, what they can lead to and how they improve the chances of rehabilitation.

In short, it would seem desirable to better define the aim of the activities and to increase the number of participants (this last point was already broached in the recommendation of 6<sup>th</sup> January 2009), without an unacceptable increase in the human flux within the institution.

4/ A permanent and rigorous count (it is often done de facto) should be made of the number of prisoners who refuse to take part in exercise. Attention has already been drawn (recommendation of 6<sup>th</sup> January 2009) to the extent of the violence that reigns in the exercise yard. Fear is the most frequent reason for these refusals. The number of prisoners who refuse to 'go out' is thus one indication which helps to characterise life in such an institution. Particular attention needs to be paid to this, as the Minister of Justice has indicated in his remarks.

On a more general front, particular vigilance should be exercised concerning those prisoners who remain completely passive, or who remain permanently in their cells, taking advantage of nothing or showing no desire to get involved in anything. It should be noted that several officers do this quite spontaneously. The ATF software should be a help here.<sup>8</sup>

5/ Precisely because of the violence in exercise yards, one could legitimately pose the question as to whether the systematic installation of telephones in the yards - they clearly are welcomed - is a good idea, whatever the call system chosen ('black list' or 'white list'). It is true that

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<sup>8</sup> ATF for *Activités, Travail, Formations* - Activities, Work, Training.

this choice does not add additional human flows within the institution, and thus does not add any extra burden to the job of the prison staff. However, this is but a fleeting advantage - the use of telephones in the exercise yards, with its lack of privacy, generates pressure, threats, 'racketing' of the users, and tensions which, sooner or later, will be felt throughout the collective existence of the institution. Moreover, more and more prisoners are asking the staff to be able to telephone from cabins that are under surveillance. It is still not too late to rethink the policy adopted for installation of telephones if one is desirous of reaping all the expected benefits from their use.

6/ The Minister's action concerning harmonisation of the reporting of incidents that occur in detention is warmly acknowledged. But it is no less true that prison directors need to be able to provide complete details of the manner in which the means of coercion have been used with prisoners (the use of these means is defined by article 726 of the code of criminal procedure). This possibility is far from being an innovation, since article D. 283-3 of the code obliges institution directors to report the use of such means to their regional director. These reports must obviously be available for consultation by the *Contrôle général*, for whom it is a most valuable means of appreciating the situation of both prisoners and prison staff.

# Recommendations of 11<sup>th</sup> May 2009<sup>9</sup> concerning the central police station of Boulogne-Billancourt

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Four inspectors from the *contrôle général des lieux de privation de liberté* (CGLPL) visited the central police station of Boulogne-Billancourt (Hauts de Seine) on 16<sup>th</sup> October 2008.

Factual observations recorded during the inspection were reported on 24<sup>th</sup> October 2008 to the Divisional Commissioner and District Manager. This gave rise to a response dated 8<sup>th</sup> December 2008.

On 22<sup>nd</sup> December 2008, the full report of the visit was sent to the Ministry of the Interior for comment. Its response was issued on 1<sup>st</sup> April 2009.

In the wake of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* has decided to make public the following recommendations:

1/ People placed in custody or held for sobering up are subject to disgraceful sanitary conditions: overflowing "squat" toilets in secure rooms; a nauseating odour emanating from the cells, even unoccupied ones; walls covered with inscriptions and various materials. Routine maintenance is entirely inadequate. This also creates working conditions that the personnel should not have to face. Work to correct this should be initiated immediately. In the absence of immediate improvement, custody cells and sobering-up cells should not be used.

2/ It is the responsibility of the police administration to verify the proper execution of cleaning services carried out by a private company, or to change the terms of the contract by applying the principle of mutability.

3/ The practice of confiscating a detainee's bra and eyeglasses should be abandoned: it is an affront to the person's dignity that is not justified by any demonstrable security imperative.

4/ Everyone is entitled to appear before a judge, a prosecutor or a

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<sup>9</sup> Published in the *Journal Officiel de la République française* n°0126 of 3<sup>rd</sup> June 2009, text n°63.

police officer in a dignified manner; this requirement comes under the right of defence. The current situation does not allow that:

a) there are no facilities that allow a person in custody to wash up in the morning;

b) shaving and brushing one's teeth are impossible and the police station has no toiletries kits available;

c) proper sleeping conditions are not provided for prisoners spending the night while waiting for their hearing: the mattress and blanket remain in the cell and are not changed when a new detainee arrives; there are no mattresses in the secure rooms.

5/ Real-time, comprehensive traceability of the custody process should be ensured by the register provided for in Article 65 of the Code of Criminal Procedure.

## Recommendations of 18<sup>th</sup> June 2009<sup>10</sup> concerning the Esquirol hospital in Limoges

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Four controllers duly authorised by the *Contrôleur général des lieux de privation de liberté* (CGLPL) visited the Esquirol hospital in Limoges (Haute-Vienne) from 9<sup>th</sup> to 11<sup>th</sup> December 2008.

The observations made during this visit gave rise to an initial report which was sent to the director of the establishment on 19<sup>th</sup> December 2008.

The director submitted his comments on this report in a letter dated 6<sup>th</sup> January 2009.

On 10<sup>th</sup> February 2009, the full report of the visit was sent to the Minister for Health and Sports.

The Minister submitted his remarks, which have been added to the report as an appendix, in a letter dated 6<sup>th</sup> April 2009.

In the wake of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* has decided to make public the following recommendations:

1/ Although information on patients admitted to hospital without their consent is supplied quickly and consistently throughout the entire establishment, the exercise of rights of appeal for patients is, however, not sufficiently guaranteed: the explanations given are provided exclusively by nursing staff in little accessible legal terms. A model national document targeting a non-specialised public should be developed, notably in cooperation with user associations.

2/ The right to privacy is not respected when letters sent by patients are subject to monitoring, even if the envelopes are not opened. The right to correspondence of patients hospitalised without their consent cannot be contested, including for measures to address health care and safety objectives.

3/ The hospitalisation of persons without their consent is not carried

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<sup>10</sup> Published in the *Journal Officiel de la République française* n°0151 of 2<sup>nd</sup> July 2009, text n°59.

out under the best conditions, as fewer and fewer patients have the opportunity to take part in organised activities outside of hospital wings. Care for patients without their consent, especially when the latter are hospitalised for often long periods, must be integrated into the organisation of services, to enable them to participate in activities as regularly as their state of health permits.

4/ In the absence of a regulatory obligation to outpatient care, the recourse to the release test procedure results in some patients being held under a regime of legal restraint which is no longer justified by their state of health and for a duration unrelated to a true transitional period. This question should be subject to discussion at the national level.

5/ The use of restraint must be subject to quantitative and qualitative monitoring by means of a report comprehensively completed by each unit receiving patients hospitalised without their consent. A standard model should be developed at the national level.

6/ The safety precautions applicable to prisoners, kept locked in their rooms in secure units, should not result in the delivery of separate and depleted health care within the hospital and in the suspension of the rights implemented in the establishment.

Patient equality with respect to the need for health care requires that hospitalised prisoners have the opportunity to participate in collective activities in order to incorporate the therapeutic components deemed necessary for all patients.

The rights accorded to persons held in detention, such as exercise, visits from authorised persons and the possibility for convicted prisoners to place phone calls, must be respected during periods of hospitalisation.

# Opinion of 21<sup>st</sup> October 2009<sup>11</sup> concerning detainees' exercise of their right to correspondence

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1/ The right to private and family life includes the right to retain the maximum possible proximity with one's family. In addition, the right to correspond in writing is a form of individual freedom that falls within the freedom of expression. Finally, an individual's ability to appeal to the author of a decision applying to that individual should be preserved. For these three reasons, we must pay particular attention to detainees' right to correspondence. Such a right can therefore only be restricted – and in a proportionate manner – if specific conditions requiring this restriction are simultaneously met.

That is why the French Code of Criminal Procedure (and curiously, today only in its regulatory part) provides for prisoners' freedom to correspond: "*convicted prisoners may write to any person of their choosing and receive letters from anyone*" ... "*every day, without limitation*". Moreover, upon entering the establishment, they are provided with paper and writing materials.

However, this freedom is subject to a double restriction. First, in general, all letters sent and received "may be read" (the reading of defendants' letters must be authorised by the examining magistrate, to whom they are transmitted). Second, the head of the establishment may "retain" (i.e. refuse to deliver) a recipient's mail, in two cases: when the content of the letter "appears to seriously compromise" the prisoner's rehabilitation or the establishment's security (unless the letter is sent to a spouse or family member) or when the letter contains specific threats to the security of the establishment (even if it is sent to a spouse or family member).

Finally, there is an exception to this restriction: correspondence between prisoners and their lawyers or certain administrative authorities specified in the code is not inspected.

2/ Correspondence deserves respect; this should lead the prison administration to treat prisoners' correspondence with care and to

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<sup>11</sup> Published in the *Journal Officiel de la République française* n°0250 of 28<sup>th</sup> October 2009, text n°87.



standardise their sometimes-disparate practices, according to the following principles.

3/ Tools to facilitate correspondence should be made available to detainees in two regards. Writing paper, writing materials and proper envelopes to hold correspondence should be regularly distributed free of charge, rather than only being available for purchase by the concerned parties. Moreover, people for whom writing presents a serious difficulty should be provided with a service to assist them, within their establishment, which respects their right to confidentiality.

4/ Metal mailboxes, closed in a secure manner, should be made available in different locations, accessible to inmates as they move within the establishment, or close to their cells for those who are permanently held there. There should be three mailboxes, clearly labelled for "internal mail," mail directed to medical personnel ("UCSA,<sup>12</sup> SMPR")<sup>13</sup> and finally, mail for "outside" recipients or non-professional third parties involved with the establishment (e.g. visitors, chaplains, students). The responsibility to place mail in the boxes can only be performed by prisoners when outside their cells, except in very special cases (e.g. disabilities, people refusing to leave their cells; in these cases, the prisoner should be able to choose the person who places the letters in the boxes). The amount of additional movement resulting from this requirement appears to be very limited.

Mail should be picked up regularly from these mailboxes: mail for the UCSA and SMPR should only be picked up by the staff of these units, at least twice a day; mail in the internal and external mailboxes should be picked up by the "*vaguemestre*",<sup>14</sup> who has exclusive authorisation to open them, at least once a day, and under their sole responsibility.

5/ At least two people per establishment should be authorised by the head of that establishment to be *vaguemestre* (without obliging these jobs to be full-time). To be eligible, they must be on the prison administration's staff and must prove, in particular, that they have been informed of the provisions relating to the right to correspondence and the restrictions that may be imposed.

The *vaguemestres* are responsible for delivering internal mail directly

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<sup>12</sup> *Unité de consultations et de soins ambulatoires.*

<sup>13</sup> *Service médico-psychologique régional.*

<sup>14</sup> Prison mail officer.

to its recipients and transmitting external mail to personnel or to the postal service.

6/ There is no reason to read internal mail, since it is for a member of the establishment's staff. However, any staff member who receives correspondence should, if necessary, report to management anything he deems threatening to the good order of the establishment.

Regulations providing for the possibility of disciplinary action against detainees in cases of abuse should be eliminated.

7/ Mail sent outside the establishment should always be able to be inspected, in accordance with the Code of Criminal Procedure. In practice, however, this inspection should be quite moderate in most circumstances for prisoners known to the establishment's administrators.

Solely the *vaguemestres* should read the letters. They must be bound by professional secrecy, with exceptions made, in accordance with the laws in force, for cases concerning the rehabilitation of the prisoner or the safety of people or property.

The *vaguemestres* should keep anonymous statistics concerning letters that are inspected and those that are retained.

8/ No other administrative employee should be aware of the content of detainees' correspondence, except its recipient, barring the case where the content must be brought to the attention of a third party in accordance with point 7 above.

In the particular case of the mail for UCSA staff, additional protection is necessary because of medical information that may be included. Only the UCSA or SMPR medical staff (excluding security personnel assigned to those services) should have access to prisoners' correspondence.

9/ Regarding mail addressed to prisoners, when the size of an establishment makes it impossible for mail to be distributed solely by the *vaguemestres*, the respect for correspondence should be guaranteed. In particular, letters opened by *vaguemestres* must be closed again using a method that will show that the letter was inspected, and will also prevent inopportune reopening. All inadvertently opened correspondence must be clearly flagged and be delivered to the addressee by the *vaguemestre*.

Correspondence addressed to the medical staff must only be delivered by the *vaguemestre*. Any mail from the UCSA or SMPR to prisoners is always private and cannot be opened.

**10/** Correspondence exempt from inspection (Articles D. 69 and D. 262 of the Code of Criminal Procedure) may never be opened. If such correspondence is opened in error, it should be closed according to the procedure described in point 9 above. This requirement does not apply when there is no external indication of the protected nature of the correspondence. The number of errors of this type constitutes an indicator of the quality of the *vaguemestres*' work.

From the point of view of correspondence, no distinction needs to be made between administrative authorities referred to in Article A. 40 of the CPP and the lawyer representing the prisoner in a trial. Correspondence they send, or that is sent to them, should be treated identically.

The register referred to in the last paragraph of Article D. 262 should be signed within 24 hours by the prisoner for each item of correspondence received or sent. This formality is carried out under the supervision of the *vaguemestre*.

**11/** When correspondence is flagged for possible retention by the *vaguemestre*, the final decision to retain it can only be made by the head of the establishment or his assistant, specifically delegated for this purpose.

**12/** These rules, which the *Contrôleur général* has already observed in some of the establishments it visits, and which should be systematised, do not require any modification of the code in force, with the exception of a new provision binding *vaguemestres* to secrecy.

**13/** They should be applied as soon as possible, pending further studies of methods to enhance the balance between security imperatives and the secrecy of correspondence.

## Recommendations of 15<sup>th</sup> October 2009<sup>15</sup> concerning the police station in Besançon

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Two controllers from the *Contrôleur général des lieux de privation de liberté* visited the police station in Besançon (Doubs) on 27<sup>th</sup> and 28<sup>th</sup> January 2009.

Factual observations recorded during the inspection were reported on 20<sup>th</sup> March 2009 to the Départemental director of public safety of the Doubs *département* (French territorial subdivision). This gave rise to a response dated 6<sup>th</sup> April 2009.

On 18<sup>th</sup> May 2009, the full report of the visit was sent to the Ministry of the Interior for comment. Its response was issued on 31<sup>st</sup> August 2009, along with a detailed memo from the Director General of the National Police.

In the wake of this procedure, and in accordance with law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* has decided to make public the following recommendations:

1/ The dilapidated condition of the custody cells and sobering-up cells and the frequency of their use subject detainees to poor material conditions. This also creates working conditions that police station staff should not have to face; they should truly be concerned with the dignity of people held in the custody cells and sobering-up cells.

Action should be taken to improve the conditions of persons placed in police custody, who are unable to maintain their personal hygiene due to lack of a proper hot water supply, shower facilities and provision of toiletries, and because they are dependent on staff members to get to the bathroom or to a location with running water.

It is noted that the installation of a water heater and shower are planned, and that police officers working as jailers receive written instructions to "*make themselves available to provide detainees with access to a source of running water, especially when they wash in the morning or when they are discharged from the jail,*" as was declared by the Director General of the National Police.

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<sup>15</sup> Published in the *Journal Officiel de la République française* n°0250 of 28<sup>th</sup> October 2009, text n°88.

2/ The inventory of items confiscated from people placed in custody or held for sobering-up is signed upon arrival by a police officer but not by the person being held. The reasons invoked – that the arrested person is usually intoxicated or seeking to “avoid making things worse” – are not deemed acceptable because of their overly general character that excludes an individualised case-by-case assessment.

We recommend that, unless it is absolutely impossible (in which case the police officer will then take note of it), people should sign an inventory of items confiscated from them upon their arrival in custody or for sobering up, so that, once released, they will be able to verify the accuracy of what is returned to them.

3/ Conditions for meetings with lawyers and examination by doctors cannot be significantly improved by the simple fact that the building will soon be “refurbished.”

Respect for detainees’ rights to defence and health necessitates a comprehensive review of the design and layout of the current facility.

4/ Medical examinations are carried out by GPs in the framework of an agreement signed with “SOS-médecins” (an on-call mobile medical service); the different doctors involved do not perform the examinations consistently.

The elements of the medical examination and the professional practices utilised must be made consistent. In particular, training must be implemented for GPs who intervene in the custody cells and sobering-up cells, building on the recommendations of the consensus conference on that subject held on 2<sup>nd</sup> and 3<sup>rd</sup> December 2004.

5/ Financial responsibility for medicine, in the case of people who are unable to pay or who do not have national health coverage, is handled by the operational management service of the Besançon police station on a specific budget line.

It would be useful to apply this solution more broadly, in view of difficulties observed in some places related to the abandonment of financial responsibility for medicine by the courts since the entry into force of the Organic Law Governing Finance laws.<sup>16</sup>

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<sup>16</sup> *Loi d'orientation relative aux lois de finances*, French organic law n°2001-692 of 1<sup>st</sup> August 2001 on financial laws: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000394028> (in French).

6/ The practice of confiscating a detainee's bra and eyeglasses should be reviewed. A case of attempted suicide of a woman placed in custody in the Paris suburbs in June 2009, using her bra, does not by itself justify the systematic implementation of what constitutes a violation of individuals' dignity.

In order to respect the principle of proportionality, the Director General of the National Police has proposed that *"the decision to confiscate underwear comes under the judgment of the police officer in charge of the procedure, and is automatically required when circumstances give rise to concerns for individuals' security."*

On this basis, it appears necessary to instruct all parties involved to no longer systematically confiscate a detainee's bra and eyeglasses, and that this practice be subject to specific, detailed elements that the police officer in charge of the procedure in question should note in the custody register and the individual's custody file.

7/ At the Besançon police station, as elsewhere, the name given to the prison register (*"registre d'écrou"*) generates confusion, including among officials and those in custody, as it carries the connotation that a person is imprisoned, even if he is only held for sobering up in the framework of a procedure concerning public drunkenness. Additionally, entries in the custody register do not distinguish between different custody arrangements, nor do they indicate the reason for the custody.

Noting that the Director General of the National Police supports changing the name of the prison register and initiating discussions with the Ministry of Justice to change the information recorded in the custody register, we hope to see these measures implemented.

8/ The custody register, which is not always properly maintained, does not permit precise and reliable oversight of how the process is carried out; this oversight is provided for in the CPP.

Maintaining reliable and complete registers is essential for any establishment responsible for ensuring respect for the fundamental rights of those deprived of their liberty.

The *Contrôleur général* recommends (and has already publicly proposed) studying a dematerialised implementation of this legal obligation, which would additionally permit real-time monitoring of the various phases of police custody and improved working conditions

for staff. The Minister of Justice has also expressed interest in this proposal.

This dematerialised implementation should be able to record all possible incidents, including events affecting the custody process currently logged only on the IT daybook, allowing extraction of a list of events, in order to permit centralised monitoring in the long run.

# Recommendations of 23<sup>rd</sup> February 2010<sup>17</sup> concerning the Territorial Brigades of the Gendarmerie Nationale of Chambray-les- Tours, Ecole-Valentin and Migennes

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The Territorial Brigades of the Gendarmerie Nationale of Chambray-les-Tours (Indre-et-Loire), Ecole-Valentin (Doubs) and Migennes (Yonne) were inspected by the *Contrôleur général des lieux de privation de liberté* (CGLPL) on 28<sup>th</sup> January 2009, 4<sup>th</sup> February 2009 and 19<sup>th</sup> February 2009, respectively.

The factual observations made during each control were sent to the brigadier commander of each of these units on 27 February 2009, 19<sup>th</sup> February 2009 and 19<sup>th</sup> March 2009, respectively. Responses were issued on 8<sup>th</sup> March 2009, 13<sup>th</sup> March 2009 and 3<sup>rd</sup> April 2009.

The complete reports for each visit were sent for comment to the Minister of the Interior, Overseas Territories and Territorial Communities on 27<sup>th</sup> May 2009, 29<sup>th</sup> May 2009 and 8<sup>th</sup> June 2009. The Director-General of the Gendarmerie Nationale issued his response on 21<sup>st</sup> September 2009.

Further to this procedure and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* makes the following recommendations:

1/ Emphasis should be placed on the favourable impression left by these three territorial brigades and the concern for humanity shown by the members of the gendarmerie who we met.

2/ In the majority of the brigades, the belongings or valuables of individuals taken in custody are placed in envelopes without a list being established by both parties. A joint inventory register must be set up to ensure the traceability of objects deposited and picked up in order to offer a guarantee for both the investigators and persons placed in custody. The willingness of the Directorate General of the *Gendarmerie Nationale* to disseminate good practices in this respect within the Territorial Brigade of Chambray-les-Tours was noted.

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<sup>17</sup> Published in the *Journal Officiel de la République française* n°0053 of 4<sup>th</sup> March 2010, text n°95.



3/ The directives issued by the Directorate General of the *Gendarmerie Nationale* only foresee that everyone in custody is served lunch and dinner. Breakfast with a hot beverage should also be served, officialising the spontaneous practice of the military as was generally observed by the *contrôle général*.

4/ Everyone should be able to appear before a judge, a prosecutor and a police officer with dignity. An installation should allow individuals that have been in custody since the previous day to wash in the morning and a hygiene kit should be made available.

5/ The supervision of individuals in custody is not satisfactory outside the business hours of service premises, especially at night. As a minimum, a device installed in the cells must allow detainees to alert a service member at all times.

6/ The custody register, foreseen in Article 65 of the Criminal Procedure Code, is an essential document to ensure that the fundamental rights of persons deprived of liberty are respected. It must be complete and reliable, and the traceability of the custody process must be ensured. The previous model, still in place in some units, should be replaced without further delay by the model defined in 2005 by the Directorate General of the *Gendarmerie Nationale* as it allows for better information confidentiality.

7/ Harmonisation of these registers, used by the *Gendarmerie* and the National Police, and dematerialisation should be sought, as already indicated by the *Contrôleur général des lieux de privation de liberté* in its annual report for 2008. This solution would allow the various phases of the custody process to be monitored in real time and to improve the working conditions of the personnel. The Minister has also expressed interest in this suggestion.

## Recommendations of 23<sup>rd</sup> February 2010<sup>18</sup> concerning the Mulhouse prison facility

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Five controllers from the *Contrôle général des lieux de privation de liberté* (CGLPL) inspected the Mulhouse prison facility (Haut-Rhin) from 20<sup>th</sup> to 24<sup>th</sup> July 2009.

The factual observations made during the inspection were sent to the prison director on 18<sup>th</sup> September 2009. The head of this facility responded to these observations on 2<sup>nd</sup> October 2009.

The complete report was sent for comment to the Minister of State, Keeper of the Seals, Ministry of Justice and Liberties, and to the Minister of Health and Sport on 30<sup>th</sup> October 2009. Their responses were received 23<sup>rd</sup> and 28<sup>th</sup> December 2009, respectively.

Further to this procedure and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* makes the following recommendations:

1/ Serene and peaceful relations must be restored in a facility where internal divisions between management and personnel under its authority have become predominant. Constant internal disputes seriously disrupt the operation of this facility. The inmates are well aware of this situation and know how to work it to their advantage in order to undermine the internal regulations. The usual inter-prisoner violence, noted in this prison, is one of the consequences of this uneasy and unhealthy climate. It should be mentioned that the French *Contrôleur général* has never encountered such a deplorable situation in a penal institution since the beginning of his mission. Nevertheless, he did note that an audit was commissioned in a very timely manner by the Interregional Directorate of Prison Services regarding the operation of this facility.

2/ The conditions in which the inmates are forced to live are unacceptable: the premises are run down, the floor is degraded, the paint chipping, and the furniture in the cells is in poor condition; the toilets are so small that it is impossible for the majority of people to sit down correctly. Hygiene suffers owing to the presence of many "pests" (cockroaches,

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<sup>18</sup> Published in the *Journal Officiel de la République française* n°0053 of 4<sup>th</sup> March 2010, text n°96.

rats). The showers, located on the upper floor and not in each cell, are ill-equipped and poor ventilation is blamed for numerous traces of mould on the walls and blistering paint. The electrical network and the plumbing are in very poor condition. Extensive renovation work must be undertaken rapidly so that the inmates can live decently. We note that some renovation work has been carried out since the inspection, including the installation of a controlled mechanical ventilation system in each of the showers, the progressive replacement of the windows within the scope of a multi-year plan and the renovation of the electrical network. Nevertheless, the fear is the progress level of the renovation operations over time, particularly since cells are repaired according to their vacancy, which will only lead to maintaining this disgraceful situation for a long time to come.

3/ The situation for persons with reduced mobility should better be taken into account since, in this facility as well as many others, nothing is adapted to their specific needs. The only improvement is a mobile ramp that was produced locally for one of the prison buildings. Rails are installed and then removed by the wardens for each entry and exit. This situation leads to isolation of these individuals who don't have access to the various activities.

4/ The condition of the holding cells located in the basement of the administration building, used during the transit of prisoners upon their arrival or departure, is particularly unacceptable and should not be used to hold detainees, even for a very short time. The inmate transfer circuits should be reviewed and the use of these cells should be prohibited. The very existence of these cells can only add to the "shock of incarceration", whereas everything should actually be done to alleviate it.

5/ The visiting rooms, in the form of a large collective hall without separations, are not conducive to preserving family ties. Having to deal with the indescribable ambient noise, families find it impossible to peacefully speak with their incarcerated family members.

6/ The management of prisoners' requests should be given special attention. Here, responses are not often provided, as in many other institutions, breeding resentment that inevitably degrades relations between inmates and the prison staff.

7/ The *Contrôleur général* noted with interest that there was, in theory, a medical on-call programme implemented by the hospital, and

consequently more developed than programmes that currently exist in the majority of prisons of this size. However, it still needs to be able to truly handle all situations requiring the presence of a doctor. In practice, it appears that this is not always the case. The investigation to be conducted by the regional hospital agency, announced by the Minister of Health and Sport, should pay particular attention to the cases that highlighted a lack of adequate medical intervention during the visit.

**8/** Access to psychiatric care should take the level of urgency into account. Indeed, the system encountered on site during the inspection involved simply administering "stocks", in which requests are handled in the order they are received by mail. This poor organisation could delay the examination of a patient in crisis and lead to serious consequences.

**9/** It was good to see that there is a desire to seek out companies willing to supply work to the workshops, despite the current economic difficulties. Similarly, the personal commitment of Judicial Protection of Young Persons staff in the juvenile ward and the free distribution of the regional daily newspaper are positive actions that should be highlighted.

**10/** The establishment's situation appears deteriorated to such a point that it would be advisable to focus on the construction of a new, reasonably sized prison facility.



Cell of a Police station

# Recommendations of 10<sup>th</sup> June 2010<sup>19</sup> concerning the Customs Service's Brigades for Interior Surveillance in Amiens and Reims

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The Brigades for Interior Surveillance in Amiens (Somme) and Reims (Marne) of the General Directorate for Customs and Excise were inspected by the controllers from the *Contrôleur général des lieux de privation de liberté* (CGLPL) on 6<sup>th</sup> November 2008 and 9<sup>th</sup> December 2008, respectively.

The factual observations made during each visit were sent to the Chiefs of these brigades on 19<sup>th</sup> December 2008 and 23<sup>rd</sup> December 2008, respectively. Responses were issued on 19<sup>th</sup> and 26<sup>th</sup> January 2009.

The complete inspection reports for each visit were sent for comment to the Minister of the Budget, Public Accounts and Civil Service on 27<sup>th</sup> February 2009 and 2<sup>nd</sup> March 2009. The Minister issued his response on 1<sup>st</sup> July 2009.

Further to this procedure and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* makes the following recommendations:

1/ The customs personnel encountered during these inspections show true humanity in the execution of their tasks.

2/ The time at which the customs detention begins should be that when the person has been effectively deprived of their total freedom of movement and not when the prohibited merchandise was discovered (caught in the act of committing an offence); a sometimes long research period may separate the two moments. The Customs Code – Article 323 – should thus be used to determine the periods of detention as is done for an infraction of common law (Article 63 of the Criminal Procedure Code).

3/ Body searches must not be performed systematically, but used

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<sup>19</sup> Published in the *Journal Officiel de la République française* of 2<sup>nd</sup> July 2010, text n°80.

only when necessary as the nature of the examination is prejudicial to human dignity. The reminder to which the General Directorate for Customs and Excise must proceed on this point is noted.

4/ Anyone deprived of liberty must be able to inform the person of their choice without delay, be examined by a physician and be given the opportunity to speak with a lawyer.

5/ The physicians, who fortunately intervene systematically although not yet foreseen by the regulations, are unable to perform examinations in satisfying conditions for a lack of facilities and suitable premises. Their arrival must be set out by the applicable regulations and the material conditions of their intervention provided in the premises of the Customs Service. Measures must be taken to allow the necessary medication to be purchased.

6/ The cells should be equipped with regularly maintained blankets and mattresses to ensure that the detained individuals are housed in dignified conditions, as agreed to by the Customs Service.

7/ The persons detained must not have to bear the cost of their meals. The Customs Service shall provide detainees a beverage and hot meal when the detention period takes place during meal time.

8/ The Customs detention register is an essential document to ensure that the fundamental rights of persons deprived of liberty are respected. It must be complete and reliable, and the traceability of the detainees' processing must be ensured. The *Contrôleur général* notes that the registers examined were kept carefully and accurately in the brigades visited.

# Opinion of 10<sup>th</sup> June 2010<sup>20</sup> concerning the protection of property of persons deprived of their liberty

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1/ Every natural person is entitled to the peaceful enjoyment of his or her possessions. This requirement of applicable law benefits persons deprived of their liberty just like anyone else. It therefore extends to the personal belongings that the detained persons may have with them on the day of their incarceration and during their imprisonment. The guarantee is all the more necessary for persons deprived of their liberty since they are separated from the majority of their possessions as a result of their detention and have only a few objects with them; moreover, the majority of these individuals, lacking significant resources, do not have the possibility to have a large number of belongings and have only those that are essential to them. But this guarantee is all the more easy to ensure since the detainees - with the exception of those serving out their sentence in a partial release regime - are subject to constant constraints and supervision by the administration which orders their remand in custody or enforcement of the sentence.

2/ Certainly, inmates do not enjoy unlimited use of these possessions. The administration can naturally regulate their use according to the requirements related to the compensation of the victims of the offense committed, the preparation for leaving incarceration and for safety reasons. As such, the Code of Criminal Procedure provides for a certain number of provisions regarding financial assets and valuables, and objects or property. Certain items may be retained by the individual being incarcerated; others must be handed over to the establishment's accounting department which stores them until the detainee is released. These include items on the list of prohibited objects, or those which must be managed by the administration (funds); and finally, others may be prohibited but not managed and are handed over to the family or to a third party "*owing to their value, their importance or volume*" (Article D. 337).

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<sup>20</sup> Published in the *Journal Officiel de la République française* of 2<sup>nd</sup> July 2010, text n°81.



In the case of a transfer, the code of criminal procedure also provides that the administration is responsible for transporting the possessions, unless they are too voluminous, in which case their shipment is borne by the prisoner; moreover, in the event of a prisoner's death, the possessions are released to the *Administration des domaines* (Land Office) if not claimed by the heirs within a period of three years.

3/ The application of these provisions, currently insufficient, raises significant challenges that must be corrected in order to effectively protect the right of detainees to the peaceful enjoyment of their possessions.

Numerous testimonies collected by the *Contrôleur général des lieux de privation de liberté* regularly report cases of missing and damage property, either in the locker rooms of the facilities where they are stored, during transfer operations, or following the death of detainees.

These cases of missing or damaged property are more likely to occur in cases where the prisoner is transferred on short notice. Such is the case when the assignment of the prisoner is changed for reasons of order and security (following an incident), when measures are taken to reduce prison congestion or when a medical emergency necessitates rapid extraction. This can also happen when relatives send clothing, a book, shoes, CDs or DVDs (now authorised) to the prisoner.

In addition to contradicting everyone's rights, the disappearance of property creates tensions within the prison and with the families that should not exist; they not only abnormally divest detainees of their property, but they also turn against the entire staff.

The facilities are aware of these crimes against property and certain have already sought to remedy the situation.

4/ To bring a stop to the problem, it is recommended that the penitentiary administration adopt the following preventive measures in the interests of prisoners, families and staff:

§1 Anyone who is incarcerated has the right to possess and use property for which its possession and use are not explicitly prohibited by a text, particularly by the internal regulations. Only its use may be subject to regulations required by collective life (hygiene, noise, etc.).

§2 The penitentiary administration is depositary of the property of detainees, regardless of the market value, when kept in a locker room or in any other location which prohibits its use by its owners. The

administration thus has custody and, consequently, the responsibility of the property, except when it is established that the loss, destruction or deterioration of said property are not attributable to it. With this one exception, it has the responsibility to ensure that the property is not lost, destroyed or damaged and, when it is, to compensate its owners for its value, as is currently foreseen in certain cases (see §14 below).

§3 As the Ombudsman (*Médiateur de la République*) noted in his last annual report, property of any kind must be inventoried in the presence of and authenticated by both parties each time the property, of any kind whatsoever, is:

- turned over to the accounting department of a facility;
- deposited or withdrawn in an establishment's locker room.

§4 The necessary personnel and time must be made available for this purpose, particularly in remand prisons, in light of the requirements that such inventories impose. Only trained prison wardens dedicated solely to this task must be able to carry out the duties in accordance with a formalised procedure and, as is already the case in certain establishments, computerised as early as possible. In their absence, especially at night, the property must be kept in a closed location in closed packages by means making it impossible to open until the inventory is taken no later than the next business day; in case of the departure of a prisoner, inventories are performed 24 hours in advance at the earliest and the packages are sealed in the same manner. Under no circumstances shall inmates assigned to general service intervene in these operations, except possibly for handling already sealed packets.

§5 To facilitate the implementation of controls, the locker rooms of penitentiary facilities (at least those in which the greatest number of transfers are conducted) must be equipped with X-ray baggage screening tunnels.

§6 The boxes in which the inmate's belongings are placed (except those submitted to the accounting department) are uniform and meet the requirements of the instructions issued in 2009 by the Prisons Administration Director. However, special packaging must be used to distinguish essential goods, all placed in a single priority cardboard box. These items shall be returned to the transferred prisoner upon his/her arrival at the new facility, pursuant to the previous recommendation regarding the inventory.

§7 The boxes containing property that must be stored in the locker room because it cannot be brought into cell, must be inventoried following the transfer as described in §3 and §4 above and then closed in the same manner after possible modification of the content in accordance with current regulations. They can only be reopened, if necessary, in the presence of the prisoner and then closed in the same conditions, particularly when the latter leaves the facility.

§8 During a transfer (or a release), and time permitting, the administration should provide the jailed prisoner the cardboard boxes necessary to carry the personal belongings he/she had available. Once the boxes are filled, they should be sent to the locker room in his/her presence so that the specialised staff, mentioned in §4 above, can conduct an accurate inventory in the presence of the prisoner. The prisoner is given a copy of the inventory, and then the packages are sealed.

§9 All administrations providing transport during transfers must admit the same number of boxes (harmonised) per prisoner in their vehicles. Interdepartmental meetings must determine this number, calculated to avoid the use of subsequent transport by a third party as much as possible, and devise the interior design of the vehicles used.

In any event, the priority box mentioned in §6 above must always be sent with the prisoner.

§10 If there is an excess number of boxes in a transfer, the current practice is that the additional transport is the responsibility of the prisoner, who bears the costs invoiced by the private transport company. In such a case, however, the additional boxes must be closed prior to the prisoner leaves, the facility must ensure the departure, and finally, for indigent prisoners, at least part of the financial expense shall fall on the establishment (within the limit of a ceiling).

§11 In case of sudden departure, the administration shall forward, at its expense, the following items to the dispatching facility: the funds in the amount on the day of the departure, the closed boxes stored in the warehouse, and the belongings left in the cell. When the property in the prisoner's cell cannot be transferred prior to the prisoner's departure, these items must be collected and kept under surveillance as soon as possible, particularly in the case where the prisoner shared a cell with others.

§12 In the case of emergency hospitalisations, the administration must have the prisoner sent the items he/she needs for the hospital stay as must be indicated in advance by the hospital (according to a list that should be included in the facility's internal regulations); measures must be taken to protect property remaining in the cell (for example, in the form of an inventory not in the presence of both parties, but in protected packaging, in the locker room). The same applies when the cell the prisoner occupied is not retained for his/her return.

§13 Prisoner queries issued in the case of loss, destruction or damage to property in connection with a transfer are the sole responsibility of the dispatching facility (possibly with the help of the receiving facility).

As an exception, if the transfers are made by the penitentiary administration's National Transport Service (SNT), it shall be this service's responsibility.

§14 Loss, destruction or permanent damage of property should result in a simple and fast compensation procedure at the current value on the date of the event, established by any means, in particular by using the joint inventory prepared prior to the move (therefore without a requirement for proof of purchase, which are often impossible to produce). This compensation is paid by the penitentiary administration (unless proof is established that the loss was sustained through a cause for which it is not responsible and except for property entrusted to a private company for care or transportation) within the possible limits of a maximum flat-rate sum that should, however, cover the vast majority of situations.

§15 In the future, a study should be conducted regarding the possibility of substituting washable baggage or cases made of resistant and material (without key lock but with "seals") for the boxes currently in use. However, baggage of this type (and possibly assistance in their transport) should be brought into service from now on for the recovery by family members of personal belongings of prisoners who have died in custody.

In addition, thought should be given to renewing the data concerning the problem of transporting the property of transferred prisoners. Currently assigned to various departments or private transports, it could be assigned exclusively to an extended national transport service, including at least prisons that are indeed major prisoner orientation centres and central prisons.



Room called *vestiaire* where personal belongings of detained persons are stored

## Opinion of 30<sup>th</sup> June 2010<sup>21</sup> concerning the care and management of transsexual prisoners

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Pursuant to the provisions of Article 6 of the law n°2007-1545 of 30<sup>th</sup> October 2007, several prisoners applied to the *Contrôleur général des lieux de privation de liberté* (CGLPL), describing their feeling of belonging to the opposite sex and the difficulties encountered in obtaining medical treatment. In the course of the lengthy and detailed investigation which ensued, several actions were taken: two inspectors interviewed first the prisoners concerned, then health professionals and managerial and supervisory staff within the prison administration. They discussed the matter with representatives of the directorate of prison administration and the directorate general of care provision in order to identify more clearly the nature of the difficulties encountered. Lastly, documents produced by other bodies and independent administrative authorities, such as the High Authority against Discrimination and for the Promotion of Equality (HALDE) and the High Authority for Health (HAS), were consulted.

This enabled three findings to be made:

- The prisoners concerned received no detailed information about the arrangements for providing them with long-term medical care and underestimated the effects this would have on their conditions of detention. At best, this information was supplied to them belatedly.
- In any event, they had no access to relevant care provision available outside the prison. Only one of them was able to be included in a protocol run by a specialist team, but only more than three years after taking the first steps.
- The prison regimes for these persons vary because, in the absence of guidelines, each prison director assesses the measures to be implemented on a case-by-case basis (whether or not the wearing of women's clothes is allowed, whether beauty products can be bought at the prison shop, normal detention or isolation, etc).

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<sup>21</sup> Published in the *Journal Officiel de la République française* of 25<sup>th</sup> July 2010, text n°22.

These findings therefore raise the issue of management of transsexual prisoners.

## **1. Definition of transsexualism**

The European Court of Human Rights defines transsexualism as being a term “applied to those who, whilst belonging physically to one sex, feel convinced that they belong to the other” and who “*often seek to achieve a more integrated, unambiguous identity by undergoing medical treatment and surgical operations to adapt their physical characteristics to their psychological nature*” (ECtHR, 17<sup>th</sup> October 1986, *Rees v. United Kingdom*, Series A n°106).

The international classification of diseases (ICD-10) describes transsexualism as the “*desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex*”.

## **2. The rights protected**

### **The right to personal development**

Article 8 of the European Convention on Human Rights provides that “*everyone has the right to respect for his private and family life... There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*”.

According to the European Court of Human Rights, in France “*no legal formality or authorisation is required for hormone treatment or surgery intended to give transsexuals the external features of the sex they wish to have acknowledged*” (ECtHR, 25<sup>th</sup> March 1992, *B. v. France*, Series A, n°232-C). In this same judgment, the Court holds that the refusal to rectify civil status documents violates Article 8 of the Convention because in this case, even having regard to the State’s margin of appreciation, “*the fair balance which has to be struck between the general interest and the interests of the individual has not been attained*”.

In its Grand Chamber judgment of 11<sup>th</sup> July 2002 in the case of *Christine Goodwin v. United Kingdom* (n°28957/95), regarded by all commentators as a leading case, the European Court of Human Rights notes that “transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief” and fully affirms the right to personal development and to physical and psychological security. The Court holds that “*the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved*” and that States have no discretion to refuse to recognise the legal implications of the result to which the treatment leads given that no insuperable difficulties arise with regard to the situation of operated transsexuals.

As a result of this case-law, the following rights are recognised to everyone in France:

- The right of access to hormone and surgical treatments
- The right to modification of civil status records following the change of gender.

### **Prisoner access to health-care**

Under the terms of the Law of 18<sup>th</sup> January 1994<sup>22</sup> (Article L. 6112-1 of the Public Health Code), the public hospital service is responsible for diagnosis and treatment in prisons. Furthermore, Article 46 of the Penitentiary law of 24<sup>th</sup> November 2009<sup>23</sup> provides that “*quality and continuity of care shall be guaranteed to prisoners under equivalent conditions to those enjoyed by the population as a whole*”.

It follows that prisoners are entitled not only to the care available in prison but also, should the need arise, to that which is available outside prison.

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<sup>22</sup> French law n°94-43 of 18<sup>th</sup> January 1994 on public health and social welfare: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000728979> (in French).

<sup>23</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).



### 3. Recognition of transsexualism in France

#### Care provision

There are currently a number of specialist multidisciplinary teams working not only in the public hospital service but also in private practice. Owing to the lack of a consensus on the care procedure to be implemented and following a request from the Ministry of Health, the organisations representing transsexuals and the sickness insurance funds, the High Authority for Health proposed<sup>24</sup> on the one hand the official setting up of multidisciplinary reference teams responsible for the assessment and overall management of transsexuals, and on the other, the implementation of a care procedure (differential diagnosis, real-life experience, hormone substitution and re-assignment surgery if appropriate).

#### Modification of civil status records

In two judgments of 11<sup>th</sup> December 1992 marking a reversal of precedent (*Marc X.* and *René Y.* cases), the plenary assembly of the Court of Cassation allowed the modification of a person's civil status records subject to four cumulative conditions being met:

- Gender dysphoria syndrome must have been medically certified;
- The person must adopt the social behaviour of the preferred sex;
- The person must have undergone medical and surgical treatment;
- The change of gender must be certified by a court expert.

The requirement with regard to a gender reassignment operation has been challenged *inter alia* by the Council of Europe Commissioner for Human Rights,<sup>25</sup> who recommended that changes in civil status should no longer be subject to an obligation to undergo medical or surgical treatment.

In a circular of 14<sup>th</sup> May 2010, the Minister for Justice and Freedoms informed public prosecutor's offices that they can give a favourable

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<sup>24</sup> *Situation actuelle et perspectives d'évolution de la prise en charge du transsexualisme* (Current situation and prospects for change in the management of transsexualism), HAS, report published on 18<sup>th</sup> February 2010 ([www.has.fr](http://www.has.fr)).

<sup>25</sup> Issue paper on "Human rights and gender identity" 2009 ([www.coe.int](http://www.coe.int)).

opinion on applications for modification of civil status records *"if hormone treatments resulting in permanent physical or psychological changes, combined where appropriate with plastic surgery, have brought about an irreversible change of gender, without however requiring the removal of genital organs"*.

Accordingly, in accordance with Law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* gives the following opinion on the management of transsexual prisoners:

1. The care structure recommended by the High Authority for Health must include care for prisoners. The multidisciplinary reference team(s) able to provide such care must be clearly identified.
2. For the time being, an existing specialist team should be identified which could provide care for transsexual prisoners.
3. An information and awareness campaign aimed at health-care personnel in the Out-patient Consultation and Care Units (UCSA) and Regional Medical and Psychiatric Departments (SMPR) should be promptly carried out.
4. Any prisoner who expresses the feeling of belonging to the other sex should be able to obtain assistance and be referred to the prison medical services.
5. Transsexual prisoners should receive clear and precise information from the UCSA about the care procedure (treatment stages, management by a multidisciplinary team, coverage of costs etc.) and from the prison administration about the implications for their conditions of detention.
6. Throughout the care procedure, transsexual prisoners should be able to receive psychological assistance within the prison if they feel the need.
7. During the preliminary differential diagnosis stage, the prison administration should, if necessary, assign transsexual prisoners to an establishment located close to the multidisciplinary team. Once the care procedure has started, the prison administration must guarantee the continuity and regularity of medical consultations that have to be conducted outside the prison and, for this purpose, the reference medical team must inform it as soon as possible of the dates of such consultations.

8. Throughout the care procedure, the prison administration must ensure that the physical integrity of transsexual prisoners is protected without this leading necessarily to their being placed in isolation, and must ensure that they are not subjected to any pressure or bullying of any kind from any other person by reason of their choice. If they ask to be placed in an individual cell, their wishes must be respected.
9. In view of the need to respect the right to privacy, transsexual prisoners should be able to wear clothes and use health and beauty products appropriate to their preferred gender when in their cells. They should therefore be able to purchase such items from the prison shop.
10. Once the care procedure has started, body searches should be conducted with particular restraint, in such a way as to respect prisoners' dignity. Once the irreversibility of the sex change process has been medically certified by the multidisciplinary team responsible, body searches must be conducted, in a manner that preserves the dignity of both prisoners and staff, by officers of the same sex as the prisoner following the sex change, without waiting for civil status records to be modified. These searches must be conducted by officers specially trained for this purpose by the prison management.
11. The interests of the particular individual and the imperatives of prison management must be reconciled as fully as possible when assigning transsexual prisoners to a prison or prison wing. For this reason, they should be assigned to a prison or prison wing corresponding to their new sexual identity at the earliest possible opportunity, once the irreversibility of the sex change process has been established<sup>26</sup> and, at the latest, when the person's civil status records are modified.

In the judicial process for modifying civil status records,<sup>27</sup> priority must in any case be given to prisoners in view of the implications which that modification has for their conditions of detention.

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<sup>26</sup> Article D 248 of the Code of Criminal Procedure might therefore be amended as follows: *"Men and women shall be imprisoned in separate establishments unless authorisation to the contrary, justified by exceptional circumstances, has been given by the authority responsible for prisoner assignment."*

<sup>27</sup> As defined in the circular issued by the Minister of Justice on 14<sup>th</sup> May 2010.

## Recommendations of 30<sup>th</sup> June 2010<sup>28</sup> common to the Mayotte remand prison and detention centre

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The *Contrôleur général des lieux de privation de liberté* (CGLPL) decided to simultaneously render public the two recommendations below, relative to the inspections conducted at the Mayotte remand prison and at the detention facility. Exceptionally, he would like to first make the following six observations with concern to both establishments:

1/ The living conditions of the individuals held in both the administrative detention facility and the remand prison are unworthy of human dignity. The premises are seriously inadequate and affect the right to privacy and personal integrity. The housing and hygiene conditions unquestionably breach the fundamental rights of the persons being held there.

2/ The ability of both facilities inspected is insufficient to fulfil their mission. The reconstruction or extension projects that were announced must take into account the need to adapt the administrative specifications to Mayotte's climatic, cultural and social environment. The personnel must be included in the design of the facilities.

3/ The improvements needed cannot wait for the foreseen reconstruction or extension.

4/ Particularly, the maintenance of family ties is not satisfactorily ensured, neither at the administrative detention facility nor at the remand prison. Decent and peaceful conditions must be established for families or relatives coming to visit the individuals in custody or incarcerated. The visiting arrangements must be improved. The fight against illegal immigration does not restrict the right to family life.

5/ Special care must be given to minors with regard to the clarification of their civil status and for the adaptation of the procedures for caring for them. Solutions downstream of custody, such as detention, must be conceived to prevent the breakdown of family ties and to ensure access to the educational system.

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<sup>28</sup> Published in the *Journal Officiel de la République française* of 25<sup>th</sup> July 2010, text n°25.

6/ The automatic processing of certain procedures (expulsion, parole) is clearly driven by the need to regulate the occupancy rates in the areas concerned. It would appear necessary to return to an individual approach in dealing with situations.



Shared cell in a remand prison of an overseas territory of France

## Recommendations of 30<sup>th</sup> June 2010<sup>29</sup> concerning the detention centre for undocumented migrants in Pamandzi

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The detention centre for undocumented migrants (CRA for '*Centre de Rétention Administrative*') in Pamandzi (Mayotte) was visited by four inspectors from the *Contrôleur général des lieux de privation de liberté* (CGLPL) on 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> May and 4<sup>th</sup> June 2009.

Factual observations recorded during the inspection have been communicated. A draft report was sent to the Director of Border Police in Mayotte on 24<sup>th</sup> September 2009. In response, a reply dated 14<sup>th</sup> October 2009, containing the Director's observations, was received by the *Contrôleur général* on 6<sup>th</sup> November 2009.

The full report was sent for observations to the the Minister for Immigration, Integration, National Identity and Cooperative Development on 10<sup>th</sup> February 2010.

The Minister replied on 27<sup>th</sup> May 2010.

In the wake of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* has decided to make public the following recommendations:

1/ The local authorities have fixed the capacity of the CRA at sixty places. This maximum capacity must be established using objective criteria and must be strictly observed.

2/ In accordance with the current regulations, a prefectural order must be issued to designate the police department in charge of the CRA and to nominate the head of the CRA.

3/ All aliens detained in the centre must be able, from the moment they arrive, to understand the procedures that will be followed. The officials responsible for implementing the procedures must ensure that detainees fully understand their particular situation vis-à-vis French administration, and also their rights in this area.

4/ Detainees must be in a position to be informed of their rights: the internal regulations must be displayed in the facility and handed to

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<sup>29</sup> Published in the *Journal Officiel de la République française* of 25<sup>th</sup> July 2010, text n°30.

the individuals. Details of one or more associations capable of helping detainees with their rights must be brought to their attention. The list of available lawyers must be displayed.

5/ The ability to seek asylum is a fundamental right. As it is likely that people passing through the Pamandzi detention centre will be seeking asylum, the conditions for a fully effective exercising of this right, notably concerning the information and assistance available to asylum seekers, must be in place. Today these conditions are not met.

6/ Because their parents were detained, some 2'901 minors were handled by the CRA in 2008 of which 2'711 were removed, without their ages and family relations being verified with any certainty. Such a situation cannot be allowed to continue; proper identification of people to be placed in detention and to be removed demands rigorous attention to the accuracy of such information, whatever the difficulties to be found in the local context. When establishing the absence of any family links is impossible, removal must be ruled out.

7/ The specific situation concerning children abandoned in Mayotte following the expulsion of their parents is particularly disturbing. In order for these children to be properly housed and schooled, it is urgent to put in place an operational unit which will coordinate the activities of the local authority's children's aid department and the various national institutions.

8/ Accommodation conditions are unacceptable - on the day of the inspection, 140 people, adults and children, were present, and occupied two rooms with a combined surface area of 137m<sup>2</sup>:

- the detainees living in such crowded conditions lacked any possibility of privacy;
- the centre does not possess any beds and no-one has his own bedding. The people were sitting or lying on the floor. Young infants were in their mothers' arms and were no better served than anyone else in terms of bedding;
- the men were not able freely to get to the toilets or to any tap;
- squat toilets and showers were insufficient in number and in a dilapidated state; they give directly on to the hall and are only closed by a simple swing door one metre high some fifty centimetres from the floor;
- the wall tiling was smeared with blood supposedly coming

from squashed mosquitoes.

Such a situation must be remedied forthwith without waiting for a new centre to be built.

**9/** The situation concerning the centre's hygiene needs to be totally re-examined in order for detainees to live in decent conditions:

- indeed the almost permanent occupation of the accommodation does not permit daily cleaning to be carried out.
- although the internal regulations require it, no distribution of simple hygiene products (toothbrush, toothpaste, razor or shampoo) is carried out when people arrive.
- after showering, the detainees have no towel and no clean clothes or underclothes.

**10/** Confidentiality must be guaranteed for all interviews:

- The single telephone made available to detainees cannot afford any confidentiality for conversations, situated as it is in the middle of the entrance hall and in front of the centre manager's office;
- the TAMA aid association for detainees conducts interviews in poor conditions, having no office and no dedicated telephone line.

**11/** The detention centre is not a place to receive people who are in police custody: and yet there is a police custody cell which has no right to be there.

**12/** The officials in the centre need to be reminded of the requirements concerning traceability:

- There are clear omissions in the registers of body searches and of prefectural expulsion orders. These should be kept with meticulous care;
- people who are kept apart within the centre, following public order incidents or threats to the safety of other detainees, do not appear in any register. This activity needs to follow a formalised procedure;
- requests to see a doctor are selected without any objective criteria by the officials designated to be on guard. The absence of any record of the medical requests makes it impossible to know what follow-up has been carried out.



13/ The centre must expect and plan for receiving families. Currently, detainees' families can wait several hours, sat on the floor or on the ground, covered with the dust created by every vehicle that enters the centre. Benches and parasols should be made available, and a wall constructed as protection against splatter from the road.



Arrival of a person in a detention centre for undocumented migrants

## Recommendations of 30<sup>th</sup> June 2010<sup>30</sup> concerning the remand prison in Majicavo

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The remand prison in Majicavo (Mayotte) was visited by four inspectors from the *Contrôleur général des lieux de privation de liberté* (CGLPL) on 28<sup>th</sup> and 29<sup>th</sup> May and 2<sup>nd</sup> and 3<sup>rd</sup> June, 2009.

The findings from this visit were submitted in a report to the director of the institution on 11<sup>th</sup> September 2009.

The director made known his observations in a letter dated 7<sup>th</sup> October 2009.

On 13<sup>th</sup> November 2009, the full report of the visit was sent for observations both to the Minister of Justice and the Minister for Health and Sports. The Minister of Justice submitted her remarks in a letter dated 24<sup>th</sup> December 2009. The Minister for Health and Sports submitted his comments in a letter dated 26<sup>th</sup> March 2010.

In the wake of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* has decided to make public the following recommendations:

**1/** An increase in the capacity in the Majicavo remand prison is essential given its constant dramatic over-population - at the time of the inspectors' visit there was a rate of occupation of 294% of the capacity in the adult section N°2, and 333% in the end of sentence wing.

It is essential that any new construction be carried out bearing in mind local conditions and with early involvement of the prison staff and other appropriate personnel in the project to ensure the new establishment is best suited to the prison's activities as well as taking account of the constraints.

**2/** Transferring inmates, in particular those from the Union of the Comoros, to prisons in Réunion Island, which would necessarily result in severing family links, should not be considered as the systematic and only solution to an easing of the over-crowding in the remand prison in Majicavo.

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<sup>30</sup> Published in the *Journal Officiel de la République française* of 25<sup>th</sup> July 2010, text n°31.

Each prisoner's individual circumstances must be taken into account. In addition, when a transfer to metropolitan France is considered, the clearly inadequate baggage allowance of 5 kilogrammes per person must be waived.

3/ The totally inhuman conditions for inmates (sometimes less than 2m<sup>2</sup> per person; a disabled inmate needed to use a close stool for going to the toilet, etc.) can not be allowed to persist until the proposed prison extension is commissioned, sometime in 2014 or 2015.

Certain organisational items must be adapted forthwith to local conditions:

- given the living conditions imposed by the establishment, the length of time during which inmates are confined into communal cells should be limited as much as possible. Opening and closing times for those cells that open directly onto exercise yards, which are de facto the only places where an acceptable existence is possible, should be aligned with the local times for sunrise and sunset, which are the same all year round - 6 a.m. and 6 p.m.;
- as for hygiene improvements in this establishment, the frequency with which bed linen is changed, currently every fortnight as in metropolitan France, should be increased to take account of the heat and the overcrowding in each cell. In addition, the remand prison authorities must ensure that products for dish-washing, cleaning the cells and personal hygiene are genuinely available - as also the possibility for prisoners to wash their own clothes.
- more account needs to be taken of the inmates' situation and that of their families, the majority of whom neither read nor speak French - as has been done with the prison welcome film produced in a language understandable by all; this is particularly necessary concerning fixing appointments in the visiting room, for letters addressed to the prison authorities and for confidential correspondence with the medical staff.

4/ Inmates' families should not be afraid of using the visiting room through fear of being apprehended for questioning by the security forces as a result of their own personal situation.

In these circumstances, respecting the right to maintain family

relations, guaranteed by law, should clearly take precedence over any concerns about illegal immigration. Instructions must be issued to this effect.

5/ Concerning inmates' diet, the prevailing Mayotte dietary culture should not be used as a reason not to establish balanced menus, in close cooperation with the health authorities. Nor should this influence the manner in which meals are served and the provision of a complete set of cutlery for each meal.

6/ There is no productive workshop within the establishment. This fact, coupled with the economic situation in Mayotte, means that there is very little professional activity available to inmates. It is thus appropriate that educational, cultural and sporting activities be developed. Organising access to the under-utilised library should be reviewed.

7/ The likelihood of Mayotte becoming a French *département* with effect from 1<sup>st</sup> January 2011, should be the catalyst for the Majicavo remand prison to start aligning itself with the normal French law and put in place a system for vocational training.

8/ The handling of young offenders needs to be organised such that all the various mechanisms provided by the law can be used in this establishment.

It would be opportune, by cooperating with all the available national organisations, to have recourse to suitable sentences other than imprisonment for young offenders, or for taking them into assisted educational structures, and to set up a psychiatric treatment unit for adolescents.

9/ The strengthening of the nursing staff in the UCSA (the prison medical consultation and out-patient treatment unit) planned for 2010 must be real in order to take into account the full range of healthcare needs and to continue the preventative actions already undertaken.

10/ The 'départementalisation' of Mayotte will ensure that the prison warders' status will be integrated into the standard prison administration system and will thus bring an end to the difference in salary and benefits between the locally recruited staff and those on assignment from metropolitan France.

## Recommendations of 1<sup>st</sup> December 2010<sup>31</sup> concerning the closed educational centres in Beauvais, Sainte-Gauburge, Fragny and L'Hôpital-le-Grand

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The closed educational centres of Beauvais (Oise), Sainte-Gauburge-Sainte-Colombe (Orne), Fragny (Saône-et-Loire) and L'Hôpital-le-Grand (Loire), which are under public (Beauvais) or associative governance for the other three establishments, and falling within the scope of Article 33 of Order N°45-174 of 2<sup>nd</sup> February 1945<sup>32</sup> relative to juvenile delinquency, were inspected by controllers of the *contrôle général des lieux de privation de liberté* (CGLPL) on 7<sup>th</sup> January 2009, and 17<sup>th</sup> and 18<sup>th</sup> March 2009, 18<sup>th</sup> and 19<sup>th</sup> March 2009 and 22<sup>nd</sup> to 24<sup>th</sup> September 2009, respectively.

The factual observations made during each visit were sent to the director of each of these centres on 19<sup>th</sup> March 2009, 15<sup>th</sup> May 2009, 27<sup>th</sup> April 2009 and 8<sup>th</sup> February 2010. The management representatives of the facilities at Beauvais, Fragny and L'Hôpital-le-Grand responded on 8<sup>th</sup> April 2009, 13<sup>th</sup> May 2009 and 11<sup>th</sup> March 2010. Despite several reminders, the Sainte-Gauburge-Sainte-Colombe facility did not send their observations.

The Beauvais inspection report was sent to the Minister of Justice and to the Minister of Health and Sport on 7<sup>th</sup> August 2009. The Minister of Justice and Freedoms issued a response on 29<sup>th</sup> September 2009 and the Minister of Health and Sport on 3<sup>rd</sup> December 2009. The report concerning the Sainte-Gauburge-Sainte-Colombe facility was sent to the Minister of Justice, to the Minister of National Education and to the Minister of Health and Sport on 17<sup>th</sup> November 2009. The Minister of Justice responded on 8<sup>th</sup> January 2010 and the Minister of National Education on 7<sup>th</sup> January 2010. The report on the Fragny facility was sent to the Ministers of Justice, National Education and Health on 4<sup>th</sup> August 2009. Answers were received on 29<sup>th</sup> September

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<sup>31</sup> Published in the *Journal Officiel de la République française* of 8<sup>th</sup> December 2010, text n°119.

<sup>32</sup> French order (ordonnance) n°45-174 of 2<sup>nd</sup> February 1945 on juvenile delinquency: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT0000006069158> (in French).

2009 from the Minister of Justice and on 7<sup>th</sup> October 2009 from the Minister of National Education. Finally, the report of the L'Hôpital-le-Grand facility was sent to the Minister of Justice on 16<sup>th</sup> September 2010 to which he responded on 5<sup>th</sup> November 2010.

Following this procedure and in accordance with Article 10 of the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* makes the following recommendations:

1/ Firstly, these are children who are continuously faced with serious and accumulated difficulties and who are assigned to these centres by the judicial authority. Placement in these institutions most often reflects the failure of other existing alternative care services. The law requires the young offenders' institutions to provide "educational follow-up" services.

Within these institutions, however, part of the personnel consists of individuals "acting" as educators, sometimes with no qualifications, and with little or no training in supervising minors. However, such qualifications are required to successfully supervise these young individuals; they are also necessary in the application of international texts, such as Article 3 of the international Convention on the Rights of the Child and Article 22.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"). This lack of training resounds on the relationships that could be established between adults and youth within the centre, and is susceptible to exacerbating tensions.

While it must be acknowledged that the recruiting of educators, for contextual or geographic reasons, is difficult, the fact of the matter is that the training of competent educators is a requirement for these young offenders' institutions that must be rapidly met. At the very least this could be accomplished through ongoing training, the existence of which should be included in the specifications of these facilities, for those agents who must feel the need. Everyone's efforts and real individual successes cannot replace this need.

2/ The respect of a minor's right to be involved in the decisions that affect his/her life and the respect of the rights of his/her parents to be consulted about such decisions requires a great deal of clarity on how measures for dealing with the young offender are designed.

To this end, the applicable texts foresee that a document on

individual measures for dealing with young offenders must exist. Such a document organises the time allotted to education by setting individualised objectives developed to give meaning to the child's stay in the institution. As a dynamic and regularly updated tool, it must allow both the adult and the minor to jointly assess the accomplishments achieved and those still remaining.

The use of such a document is highly irregular among the young offenders' institutions in question here. Providing the child and his/her parents with a copy is thus far from systematic.

In addition, some of the closed educational centres among those described here lack a service project. Here again, it is paradoxical to ask adults with no common objectives to be consistent with minors whose often chaotic histories leave them with no useful frame of reference. The absence of this project outlining the values, methods and a common end goal essentially undermines the credibility of the adults and causes the juveniles to feel insecure. This is why a service project, regularly updated within the scope of a programme in which all of the centre's professionals work together, is a priority around which the measures, and consequently, the daily life of the children in the institutions, are structured.

3/ In the closed educational centres, the controllers noted the abusive, even habitual, recourse to measures of physical restraint, which is sometimes established as an educational practice among the least qualified teams.

Generally speaking, there is high degree of uncertainty in the manner in which discipline is defined and how it is enforced.

One might think that the use of very different practices and the lack of formalisation mentioned above are a result of the geographic isolation of structures, which have the dual characteristic of being recent and representing a wide variety of management bodies.

The lack of a well-defined support structure at the national level (in the form of a support unit, for example) is part of this isolation and the highly diverse character of the measures taken to deal with these young offenders.

A more effective national framework, the regular organisation of meetings with associative and public professionals – be they local, regional or central – including those who are actually in charge of

the children, would make it possible to discuss practices and combine know-how and the values shared regarding education in a closed environment.

Providing education in a "restricted" environment is far from straightforward. It deserves careful and ongoing reflection, such as the pragmatic development of a "doctrine" that could initiate the necessary initial and ongoing training that was described above.

4/ Finally, there are considerable variations in closed educational centres in terms of the somatic and psychiatric care of minors, their psychological care, and their health education. The presence of a nurse is very unequal. Somatic care is often provided by a general practitioner who specially comes to the institution or to whom the minors are taken, without any agreement defining the respective rights and obligations of the physician and the institution. While one or two psychologists often offer consultations, connections are much harder to establish with psychiatrists, and agreements between the closed educational centres and a specialised medical centre are rare, even when the institution's population is clearly in need of such services.

While it is true that children in these centres generally do not have major difficulties from the somatic point of view, the same is not true in terms of mental wellness. Here again, a formalisation of outside expertise in the form of agreements with doctors, nurses and healthcare facilities is desirable. The central administration should be able to develop such "model" agreements that would allow for the standardisation of practices. Regional health agencies, under the aegis of the Minister of Health, should facilitate the signing of such agreements, with their application being checked by the local steering committee (the meetings of which are, in the cases mentioned, random).

These recommendations should be considered in the updating of the specifications currently being prepared by the Ministry of Justice and Liberties. The *Contrôleur général* has noted that these updates were preceded by active consultation with the directors of the closed educational centres.



# Opinion of 10<sup>th</sup> January 2011<sup>33</sup> concerning the use of telephones by persons deprived of liberty

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1/ The possibility for a person deprived of liberty to use a telephone to contact their family and administrative bodies is one of the provisions of the right to family life and the right to defence, recognised as fundamental rights, and one of the means of carrying out a number of necessary steps in preparation for release - for prisoners - or departure - for foreigners held in detention centres or in waiting areas.

## *The prison population*

2/ That is why for several years now the prisons administration has authorised convicted prisoners to use the telephone, the use of which has gradually become widespread. The Penitentiary law, late in coming into force on this point, now accords the same rights to defendants, subject to authorisation by the judicial authority. In any case, the use of the telephone is naturally subordinate to the requirements of proper order and security. That is notably why conversations are listened to, except where otherwise provided by the regulations.

Yet although the principles widen the scope of possibilities for prisoners' links to the outside world and although the *contrôle général des lieux de privation de liberté* (CGLPL) has noted that, for the most part, official instructions followed along these lines, the practicalities of telephone use should not limit this scope. In light of the observations made during visits of the establishments, several important recommendations have been formulated in this respect.

3/ In the first place, telephones are often installed in exercise yards, or sometimes in activity rooms.

The interest of this location can be understood, both to facilitate a certain freedom of use of the telephone by prisoners and to avoid the additional movement of institution staff (closed detention centres). But these advantages are outweighed by the major drawbacks. On the

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<sup>33</sup> Published in the *Journal Officiel de la République française* of 23<sup>rd</sup> January 2011, text n°25.

one hand, the only regulation of telephone use (other than the rarely implemented call duration) is the one established between prisoners: the weakest among them therefore are far less likely (if at all) to have access to the telephone than others. On the other hand, there can be significant pressure from fellow prisoners to use the telephone to dial numbers that have not been previously approved. Finally, confidential conversations are not possible.

In institutions where the telephone is installed in the passageways, no additional precautions are taken to preserve confidentiality with respect to third parties. In detention centres with an "open" cell regime, telephones are often installed near the gate that closes off the passageway, where prisoners are most inclined to congregate. This configuration also facilitates all forms of pressure.

Respect for private and family life necessitates, on the one hand, stopping the practice of installing telephones in exercise yards or collective rooms; and on the other hand, constructing veritable phone booths - as is already the case in some institutions - which enable conversations to remain private from other prisoners, as the *Contrôleur général* has already underlined in several recommendations.

4/ The number of telephone numbers approved by the administration, based on requests from the prisoners concerned, varies from one institution to another despite its establishment in a memorandum from the director of the prisons administration dated 29<sup>th</sup> October 2009. It would be highly desirable, subject to the necessary approval for each, that this number be standardised, otherwise, in the case of transfer, the prisoner may have to relinquish calls to certain persons. Furthermore, this number cannot be too small without compromising the scope of the principle set out in article 30 of the Penitentiary law.

5/ Certain obstacles to telephone authorisation raised by the procedures currently in place must be removed. There is thus no reason that the authorised recipients of calls should be those with visiting permits (in fact there are grounds for the contrary): this is not provided for in the legislation. Furthermore, in all cases authorisation cannot be subject to the production of telephone bills by the persons who should be the recipients of calls: not only is this production impertinent to legal entities (e.g. the *Pôle emploi* employment centre), but there are some countries in which paper invoicing does not exist (Belgium, for example). Prisoners' correspondents must therefore be

able to establish the authenticity of their telephone number by any means of proof and these means must be regarded with flexibility. With regard to consent to receive calls, it would be more appropriate to consider the designation of a family member or friend as presumption of consent, unless otherwise specified by this person, and subject to communication bans.

**6/** Calling hours are often problematic. It is natural to limit the length of calls where this is justified by the size of the prison population (and only in this case). In general, however, these calls can only be made during the day. Notably, in all institutions, the telephone is inaccessible after 5:30 p.m. Prisoners, women in particular, therefore argue that they can never contact their family and friends who arrive home after this time. Additionally, prisoners detained in mainland France whose family and friends live overseas encounter great difficulties in contacting them due to the time difference. The implementation of the right to telephone thus implies, despite the additional charges that it entails, that the calling hours be extended, particularly in the evening, at least up until the night team takes over service in the detention centre (7 p.m. or 8 p.m. as the case may be). It must also enable prisoners housed or working in facilities without a telephone to have access to one (for example assistants working in an open wing).

**7/** The cost of local telephone calls was substantially increased in February 2010, as a result of national decisions, by the operator with which the administration has a contract. Although no one denies the need for prisoners to finance their calls (the administration usually and gladly bears the cost of one euro of communication on arrival at the institution, in order to inform convicted prisoners' family and friends), they must also be able to do so in similar conditions to those prevailing outside of institutions; all the more so as they do not have any choice of operator. The question of telephone access for deprived persons also merits examination in commissions dealing with "poverty", in the form of a flat rate that covers a minimum number of communications, as provided for in institutions with a delegated management system.

**8/** International calls, in particular for foreign prisoners (who often have no contact with their family), must be authorised under the same conditions as national calls. The formalities imposed (cf. above on the production of invoices) must not present an obstacle: again, the forms of proof (relation, address etc.) by any means (passport, letter envelopes etc.) must prevail, particularly in the case of nationals

of distant countries. Calling hours must take into account time differences, in line with the above statements: without this flexibility, the right to call family and friends remains a dead letter.

**9/** There is currently no material possibility for spouses or partners who are both imprisoned to communicate by telephone, as it is not possible to place calls to telephone booths in prisons.

This barrier must be removed, as, even imprisoned, these persons have equal rights, evidently adapted to the circumstances, to maintain links to family life.

More generally, the interest in being able to call a telephone booth inside a prison from the outside, particularly in penal institutions for convicted prisoners, as is possible in waiting areas for example, should be considered. This solution would present advantages in terms of sharing the cost of communication.

**10/** Approved numbers must be able to be quickly modified at the request of the prisoner. Thus when a family member or friend is taken to hospital, the delay in authorising calls to the corresponding establishment is currently too long; these delays can be a source of concern in the case of hospitalisation for serious medical conditions or when the correspondent is very elderly. The administration should be able to adapt to these situations and therefore eliminate a source of unnecessary tension.

**11/** Some telephone numbers are not taken into account by the telephone software installed. Such is the case for numbers with the prefix 800 or numbers which, once dialled, require additional options to be selected on the dial pad (dial "1" or "2" for such option, for example): this may be the case for numerous service organisations (e.g. employment or credit agencies). Since many steps towards rehabilitation must be undertaken by the prisoners themselves (moreover, due to the workload of integration and probation staff), there is no obstacle in principle to making these numbers accessible, provided of course that they are duly identified. The software should be adapted to this effect.

**12/** It should be noted that, while telephone conversations are listened to on principle, some are subject to confidentiality, as the prisons administration has reiterated in its circulars. Institutions should therefore ensure that telephone numbers which trigger the

disconnection of the listening system (lawyers, the *Contrôleur général* etc.) are set out in the procedures.

**13/** The more restrictive telephone access is in practice, the greater the temptation for prisoners to resort to mobile phones, the existence of which is recognised in prisons, despite their being prohibited. As jamming devices are ineffective in most cases, consideration must be given to the conditions in which these mobile devices could be used, provided that legitimate security and control measures could be found to apply.

### ***Foreigners held in detention or in waiting areas***

**14/** The equipment in ordinary detention facilities for illegal immigrants, often located in police stations, does not include a telephone, contrary to paragraph 3 of article R. 553-6 of the Code for Entry and Residence of Foreigners and Right of Asylum. The solution of authorising detainees to use a service phone in the presence of police officers cannot be deemed as satisfactory in regard to the right to respect for private and family life.

**15/** Detention centres and waiting areas include - in most cases - the necessary telephone equipment (in accordance with the respective provisions of articles L. 551-2, L. 221-4 and R. 553-3 of the Code for Entry and Residence of Foreigners and Right of Asylum). However, the operating instructions are poorly distributed and, generally, only available in French. In particular, the indications (notably given by representatives of the French agency in charge of migration and welcoming foreign people, OFII) for buying cards, payment for communications, and dialling international numbers should be provided in the form of written instructions in several languages and be issued on arrival at the centre or the waiting area, even when the expected duration of stay is short.

**16/** The confidentiality of conversations should be generally improved, as there is no guarantee of sound insulation for most telephones.

**17/** All mobile phone devices comprising a photographic device are confiscated on arrival at a detention centre or waiting area, on the grounds that photography could infringe upon the image rights of other persons detained in the facility. Insofar as a large number of devices are nowadays thus equipped, in practice this rule leads to the confiscation of most telephones and complicates the access to

telephone communication provided for. It is desirable that these telephones be retained by their owners, who may be advised that the taking of pictures is forbidden during their stay, and that a posteriori sanctions may be imposed (confiscation of the mobile phone, for example) in the event of failure to comply with this prohibition, as defined by the rules of procedure.

These simple measures impact the full effectiveness of a right that the law or rules of procedure already accord to prisoners or foreigners held in detention or waiting areas.



Isolation room in a psychiatric hospital

## Recommendations of 15<sup>th</sup> February 2011<sup>34</sup> concerning the psychiatric infirmary of the Paris police headquarters

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Four inspectors from the *Contrôleur général des lieux de privation de liberté* (CGLPL) visited the psychiatric infirmary of the Paris police headquarters, located at 3 rue Cabanis in Paris (14<sup>th</sup> *arrondissement*), from 15<sup>th</sup> to 17<sup>th</sup> July 2009.

The observations made during this visit gave rise to an initial report which was sent to the Chief of Police to request his comments. These were issued on 22<sup>nd</sup> December 2009.

On 18<sup>th</sup> June 2010, the full report of the visit was sent to the Minister of the Interior and the Chief of Police for accreditation, and to the Minister for Health and Sports on the same day for information. The Chief of Police replied on 7<sup>th</sup> September 2010; the Minister on 24<sup>th</sup> September 2010.

In the wake of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général des lieux de privation de liberté* has decided to make public the following recommendations:

It must be stated first that the psychiatric infirmary of the Paris police headquarters, dating back to the Consulate under different names, is rapidly developing in numerous areas, in particular with regard to relations between staff and the patients admitted (revision of the rules of procedure and the reception charter, registers) and the material conditions of management for individuals, their family and their lawyers, the latter now able to enter without difficulty, the need for which has been reiterated by the Council of State (20<sup>th</sup> November 2009, Chief of Police, n°315 598). It drew the conclusion that the materiality of the right to remedy is guaranteed, as at least the person admitted has the material possibility of contacting the outside world.

Without calling into question the intrinsic quality or the shared awareness with which staff at the establishment exercise their functions, the inspectors expressed deep regret for the confusion of

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<sup>34</sup> Published in the *Journal Officiel de la République française* of 20<sup>th</sup> March 2011, text n°38.



roles resulting from the identical uniform for security staff and medical staff. The Chief of Police has indicated that badges will henceforth enable the differentiation of the two. Warders should no longer wear nurses overalls.

Likewise, it should be kept in mind that the stay in the establishment, which performs an exclusively guiding role, can only be temporary. The organisation of the presence of medical staff during the visit resulted in persons arriving after 2 p.m. being required to stay on site until the following day, even though this was not justified by any therapeutic or care necessity. A solution has since been found at least in the short-term. Steps should be taken to ensure its continuation.

Above all, there is some confusion in the orientation decided on site between procedures for hospitalisation by court order and hospitalisation at the request of a third party, the procedures for which are nevertheless carefully distinguished by the law. This confusion is a result of difficulties that family members and friends have in obtaining authorisation to visit patients, and therefore being able to initiate the procedures for hospitalisation at the request of a third party if they so wish. Clarifications must be made on this point.

The foregoing points alone do not require the publication of recommendations. However, the very principle of the existence of the psychiatric infirmary of the Paris police headquarters warrants clear choices.

As recalled in an opinion of the *Contrôleur général* published on the same day, hospitalisation without consent, of which admission to an establishment is one of the tools, is notably a deprivation of liberty. This must therefore be accompanied by the necessary guarantees for balance between the preservation of public order and the rights of the individual. These guarantees require that the decisions taken be done so by their caregivers solely on these grounds.

It is indisputable that the specific organisation in Paris results in hospitalisation by court order, as established in the Public Health Code: on the one hand, the Chief of Police, and not the Prefect of the department, is responsible for ordering the hospitalisation of persons on court order, and the extension of this measure or its withdrawal; and on the other hand, on the principle that the municipal police powers are exercised by the Chief of Police, the police superintendents and not the Mayor, take provisional measures with respect to persons

*"whose behaviour reveals obvious mental disorders"* (article L. 3213-2 of this Code).

Yet this specific competence cannot provide grounds for the existence of the psychiatric infirmary of the Paris police headquarters. Indeed, the same would be true if the provisional measures were taken in ordinary hospitals, covered by article L. 3222-1 of the Public Health Code. In other words, while the establishment derives from the competence attributed to the Chief of Police in 1800, the retention of this competence does not require that the establishment maintain its current form.

It is clearly not the role of the *contrôle général* to issue an opinion on the choice of administrative organisation. However, it is concerned with the question of whether this organisation provides the sufficient guarantees as aforementioned. As things stand, this would not appear to be the case.

On the other hand, the psychiatric infirmary of the Paris police headquarters does not have any autonomy. It is a service of one of the departments of this prefecture (the department of transport and public protection), in particular falls under the scope of the health and environmental protection division. Its resources are provided through the intervention of the police headquarters. Assuming that the doctors who work there are not under the direct authority of the Paris police headquarters, as the Minister is careful to reiterate in his observations (no more than, concerning the practice of medicine, hospital practitioners are under the authority of hospital management), they are paid by it, the material conditions of their employment and their career management depend on it. The establishment therefore falls outside the realm of a hospital authorised to receive mental health patients. Consequently, the provisions relating to the rights of persons admitted to hospital do not apply (for example the "rights of the individual" set forth in a preliminary chapter of the public health code) and no health authority has the power to verify the content and modalities of care.

On the other hand, although a departmental commission for psychiatric hospitalisation, responsible for dealing with all measures of hospitalisation without consent and visiting the establishments to hear patients, exists in Paris as in the other departments, its members are appointed by the Chief of Police in the capital (article R. 3223-1 of

the Public health code). As a result, inspections of the establishment do not provide the guarantees of independence of those carried out in the other departments.

Finally, as it does not fall under the category of hospitals covered by article L. 3222-4 of the code, the psychiatric infirmary is not visited by judges of the competent courts and, in particular, by the State Prosecutor's Office. Certainly, the Chief of Police emphasises that these visits are carried out *de facto*. They are not, however, guaranteed.

In these conditions, it would not seem feasible to suggest that the orientation decisions taken are done so with all the necessary assurances. The provision raises doubts over the distance between considerations of public order and medical considerations. At the same time, it is not a matter of placing responsibility for this doubt on the professional conduct and commitment of the doctors and medical staff, who do not incur criticism. But why is the competent assessment of a pathological situation connected to a police institution? Herein lie the conditions of confusion in the delicate matter of the deprivation of liberty for psychiatric reasons, which need to be eliminated.

It is argued that the establishment provides a welcome emergency medical service, which in particular can deal with incidents of violence. Yet, besides means of physical restraint being increasingly employed in this service, it is pertinent to question whether its affiliation with the Paris police headquarters does not increase the outbreaks of violence among certain patients. In any case, only 41% of patients are hospitalised by court order after their stay at the establishment: therefore, they are not all violent.

In any event, while the psychiatric infirmary of the Paris police headquarters was unparalleled at the time of its creation, more than two centuries ago, this is no longer the case today. Ordinary hospitals ensure care of the same nature: in Paris, hospitals receive a much higher number of psychiatric emergencies than the psychiatric infirmary - approximately a one-to-eight ratio - which is, moreover, unprecedented in any other French urban area.

That is why it is recommended that the Government makes the transfer of assets from the psychiatric infirmary of the Paris police headquarters to the ordinary hospital service possible, without of course modifying the health certification competences attributed to the Chief of Police and the police superintendents.

## Opinion of 15<sup>th</sup> February 2011<sup>35</sup> concerning certain methods of compulsory admission to hospital

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1/ Prefects are authorised, by law, on the basis of a specific medical certificate, to have persons who are suffering from mental disorders and “pose a serious threat to the safety of persons or to law and order” admitted to hospital against their will. This exceptional measure (which is taken in more than fifteen thousand instances each year), is known as “compulsory admission to hospital”<sup>36</sup> and can be renewed, for an unlimited period of time, such that the person concerned remains in hospital. They are only discharged when a psychiatrist reaches the conclusion that the patient is fit to be discharged and recommends this to the prefect, who then decides whether to lift the order prescribing compulsory hospitalisation. However, before they are discharged, the person’s stay in hospital may be preceded by a number of “trial discharges”; these are authorised by the prefect, and are usually designed to last for longer and longer periods before the patient is finally discharged. The average length of stay in hospital of persons who undergo compulsory admission to hospital is 95 days, and this figure is tending to rise.

2/ The exercising of such prerogatives, which is now undertaken with the assistance of regional health agencies, involves striving to achieve a delicate balance at all times between the conflicting needs of law and order, the patient’s need for treatment and showing consideration for the fragility of the persons in question. The danger that the latter may pose, both to themselves and to others – which is not necessarily proportionate to external events of a sometimes spectacular nature, and with which it should not be confused – undoubtedly calls for restraining measures. This is why compulsory admission to hospital is a measure that involves deprivation of liberty, and is classified as such both under domestic law (e.g. Paris Court of Appeal, 1<sup>st</sup> Ch., A, 13<sup>th</sup> April 1999) and by the European Court of Human Rights (e.g. ECtHR, 3<sup>rd</sup> section, 16<sup>th</sup> June 2005, *Storck v. Germany*, n°61603/00). The

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<sup>35</sup> Published in the *Journal Officiel de la République française* of 20<sup>th</sup> March 2011, text n°39.

<sup>36</sup> in French: *hospitalisation d’office*.

need to provide treatment for the persons in question cannot mask this reality, contrary to what the staff providing treatment sometimes say – though this in no way means classifying a hospital as a “prison”. Such deprivation of liberty must therefore be surrounded by all necessary guarantees, particularly since the persons concerned do not necessarily find it easy to assert their legal rights. This is where the *Contrôleur général des lieux de privation de liberté* becomes involved.

As it happens, such deprivation of liberty can only be maintained if – and only if – two conditions are met: firstly that a serious threat to law and order has been established; and secondly, that treatment such as that provided in hospital, is required.

3/ At the present time, four elements are disrupting the balance that needs to be achieved.

4/ Firstly, the management and medical staff of the establishments concerned should be particularly vigilant regarding the option open to persons undergoing compulsory admission to hospital, of disputing the measure applicable to them, before the competent court.

This is not the case where, firstly, the rights that people must be informed of as soon as they are admitted to hospital are often presented in abstract terms, and indicated expeditiously; in other cases, such notification is itself deferred. Secondly, in cases where recourse to a lawyer is not always immediately available, and certain psychiatrists take the view that a time of adaptation to hospital is required, the latter then decide the length of this period on the basis of the patient’s condition: however, while a phase of this nature can be prescribed, it cannot be applied to the lawyer, access to whom must be unconditional. And finally, it does not apply in cases where the person admitted to hospital is not told – which is the case in around one half of the establishments visited so far – that they are entitled, under the legislation governing patients’ rights, to nominate a “trusted person” who will be responsible for “accompanying them in the action they take”: this person can provide effective assistance to patients who, having been admitted under the regime of compulsory admission to hospital, undoubtedly pose a threat to law and order but in many cases, at the same time are very vulnerable and sometimes have no family support network whatsoever.

5/ Secondly, in contrast to the policy initiated during the 1960s, nowadays the doors of a growing number of psychiatric hospitals are

kept locked. Their patients cannot leave freely, even if they wish to take a walk in the park, visit a cafe or take part in a religious service. These restrictions have consequences in terms of patients' lives (e.g. the range of therapeutic activities on offer or the difficulties encountered in smoking a cigarette) and on their relationships with those close to them. However, the *Contrôleur général des lieux de privation de liberté* would like to draw attention here to just this one point: the effect of placing such units under lock and key, and thus locking up the people inside them, is to incarcerate patients who have been admitted under the compulsory regime under identical conditions to "freely hospitalised" patients, i.e. those who have consented to come to hospital.

We may therefore wonder what has happened to this freedom if, in fact, no more than other people, freely hospitalised patients are not allowed to leave as they wish, and in other words, in reality, are denied their freedom to come and go. In particular, it should be noted that this confinement is not accompanied by any special procedures: it is solely the consequence of the choice made by those in charge of the unit where these patients are staying (they are known to be assigned by geographical "sector"), who have applied for and obtained permission to detain them. Such a situation has not been determined by an individual decision, nor by the notification of any grounds for appeal, nor in particular by the intervention of any court. Questions need to be asked about this way of operating. It might be desirable for a "free patient" to at least be able to choose between an open unit and a secure unit, and if they choose the latter, to ensure that they are advised of their rights, and in particular their right to contest the measure applied to them, without undue delay.

6/ Thirdly, in a growing number of départements of France, fears of a threat to law and order are making it harder to obtain trial discharges and rendering the lifting of compulsory measures prescribing admission to hospital a more uncertain process.

Traditionally, representatives of the State broadly kept to the recommendations of the medical opinions submitted to them, and as a result, agreed to the measures requested. However, this is no longer the case today, in three areas.

a) The first concerns trial discharges.

The authorities responsible for granting permission to discharge a detainee implicitly but necessarily consider that when a trial

discharge is applied for, the patient continues to pose as much of a danger to themselves or to others as they did on the day they were first admitted to hospital. Regardless of the circumstances, they sometimes commission a police investigation which, since it takes place in the area where the person in question was living before they were compulsorily admitted to hospital, cannot reveal anything further than the initial facts that led to hospitalisation. And since these facts highlight a danger, there is a great temptation to continue to reject the psychiatrist's proposal.

Indirectly, this amounts to acknowledging that nothing has happened between the date of hospitalisation and the moment when the psychiatrist, based on full knowledge of the facts, recommends easing the restrictions applicable.

This idea, which in any case, involves disregarding the conscientiousness of care staff, is incorrect and misjudges the spirit of the law in force. In point of fact, the latter is based on the idea that if the treatment provided to the patient – especially any treatment that is prescribed or administered – fails to restore them to a stable condition, in which they no longer pose any danger, on a permanent basis, then it may at least guarantee that the patient no longer poses a danger for more or less extended periods of time. Consequently, based on this assumption, the law allows the restrictions imposed to be eased, in the form of a trial discharge. Admittedly, this is only an option. However, since it involves deprivation of liberty, it can only be held in check on the grounds of a proven risk of danger or serious threat to law and order. It seems to be impossible to base a refusal on historical facts: only current facts should be admissible. A reminder of past facts that led to hospitalisation cannot establish the reality of such reasons.

b) The second relates to measures for ending compulsory hospitalisation.

Likewise, the opinion expressed by psychiatrists relating to compulsory hospitalisation coming to an end is viewed by the public authorities with a similar degree of mistrust. Identical investigations are ordered, but by definition, these can only relate to facts preceding hospitalisation, which cannot therefore provide any indication regarding the patient's state of health at the end of the treatment dispensed in hospital. In the words of the Constitutional Council, only "medical reasons" and "therapeutic purposes" (QPC decision n°2010-

71, dated 26<sup>th</sup> November 2010, recital 25), combined, as it happens, with the current protection of law and order, can constitute grounds for deprivation of liberty.

c) The third relates to compulsory admission of prisoners to hospital.

The authorities responsible for public order fear that the conditions under which detainees are compulsorily admitted to hospital (this is now a growing phenomenon, affecting approximately 1 200 people every year), might facilitate a possible escape, insofar as, at the present time, such hospitalisation takes place in a hospital environment under ordinary law. This is why, in some départements, when the competent doctor submits a "detailed" application for such a measure, under Articles L. 3214-1 et seq. of the Public Health Code and Article D. 398 of the Code of Criminal Procedure, its enforcement is subject in some cases to investigations conducted by the police or the gendarmerie, or to the opinion of the public prosecutor's office. The effect of this information is to delay the admission to hospital applied for, and in some cases, even to cause permission to be denied. It always results in appropriate therapy being withheld (which is the responsibility of prison staff, on the one hand, and care staff, on the other,) from people who are deemed to require a more intensive course of treatment as a matter of urgency. In the case in point, the risk is not an arbitrary one of deprivation of liberty, but a risk of healthcare that is known to be unsuited to the patient's state of health: yet the detainee's human rights entitle them to receive care appropriate to their state of health (European Court of Human Rights, 5<sup>th</sup> sect., 16<sup>th</sup> October 2008, *Renolde v. France*, n°5608/05).

The effect of these three practices, such as they are currently being implemented, and especially the first two, is to bring about a global increase in the number of hospitalised patients and the length of their stay, to impede any trial discharges that the patient's condition might allow and in particular to keep in hospital people whose condition, as assessed by doctors, does not warrant keeping them there against their will. In some cases, as noted by the Contrôleur général, these practices may lead to high levels of occupation of hospital beds and delay the admission to hospital of people who, unlike those in the former category, might genuinely need treatment. Consequently, this is a short-sighted policy that may have the opposite effects to those desired.



7/ In fourth and last place, the widespread practice of necessarily placing, regardless of their state of health, detainees who have been compulsorily admitted to hospital (the abovementioned Article D. 398 of the Code of Criminal Procedure) in isolation (i.e. secure) rooms, and above all, keeping them there throughout their time spent in hospital, even though they have agreed to receive treatment and there is no medical justification for keeping them in isolation, also gives rise to serious concern. This state of affairs, which is often dictated to the management of such establishments, and consequently to medical staff, by the authority responsible for law and order, compromises the health of the patient-detainee in two ways. Firstly, it denies them access, in contrast to other patients who are not held in isolation, to the collective therapies on offer (discussion groups, occupational therapy, etc.). And secondly, as a result of the restrictions imposed, it frequently prompts the patient to apply to be returned as soon as possible to the prison where they were originally held, even though they still need to be cared for in hospital.

At some establishments, detainees who have been compulsorily admitted to hospital are not systematically placed in isolation, without there being a higher risk of them escaping (which is the usual justification for keeping people in secure accommodation), and this enables patients to receive care appropriate to their condition. This approach should prevail over that of automatically placing patients in isolation, which ignores the obligation to adapt care to the prisoner's own characteristics.

As previously stated, it should be emphasised that the increase in the numbers of people kept in hospital or in isolation rooms without justification may in fact create problems with managing the beds or secure accommodation available, as already observed on occasions, and with arranging admission for people whose state of health appears to call for urgent hospitalisation.

8/ As indicated at the outset, arbitrating between conflicting needs linked to protection of law and order and the patient's state of health is a delicate task. Here, it is not possible to claim to adhere to any obvious truths representing easy solutions. However, the uncertainties and risks that remain cannot be allowed to lead to an alarming increase in the number of people whose illness no longer dictates that they be deprived of their liberty or held in isolation, without any acknowledged medical justification, on the grounds of a threat to law

and order that is neither proven nor current. While we are entitled to insist that practitioners give the necessary medical assurances, we are also entitled to expect the authorities to establish the risk they are invoking in order to justify an ongoing deprivation of liberty.

9/ In these conflicts involving medical practitioners, patients, the authorities and the protection of third parties, the legal authority should play its part to a greater extent. At minimum, therefore, it is desirable that in the event of an administrative disagreement between the medical profession and the administrative authority, the competent court should pronounce judgment, in which case the prison governor would be required to refer the matter to court without any formalities.



Isolation room in a psychiatric hospital

# Opinion of 24<sup>th</sup> February 2011<sup>37</sup> concerning the practice of worship in places of deprivation of liberty

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1/ The practice of worship in places of deprivation of liberty must of course be understood in accordance with the principle of secularism, derived from Article 1 of the French Constitution. As we know, this principle is based on the State not recognising any particular form of worship; another of its effects is to prohibit *"any person from using their religious beliefs as a pretext to avoid following the common rules governing relations between the public authorities and private individuals"* (Constitutional Council, n°2004-505 DC of 19<sup>th</sup> November 2004, recital 18).

The principle of secularism, which guarantees freedom of worship, has to be implemented, as indicated by Article 1 of the Law of 9<sup>th</sup> December 1905,<sup>38</sup> subject to public order imperatives, the safeguarding of which is an objective of constitutional value.

The scope of secularism and of freedom of conscience, a fundamental principle recognised by the laws of the French Republic (see also ECHR, 25<sup>th</sup> May 1993, *Kokinakkis v. Greece*, section 30), neither disappear nor are even diminished in custodial establishments. This point is made, in respect of prisons, by the Law of 24<sup>th</sup> November 2009, Article 26<sup>39</sup> of which provides that *"detainees are entitled to enjoy freedom of thought, conscience and religion. They may practise the religion of their choice..."*. On the other hand, the application of both principles must be reconciled with more acute needs relating to public order (as the Penitentiary Law also points out) and given the particular nature of these places, i.e. the fact that it is impossible for those held there to leave. This is why Article 2 of the Law of 9<sup>th</sup> December 1905 expressly

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<sup>37</sup> Published in the *Journal Officiel de la République française* of 17<sup>th</sup> April 2011, text n°13.

<sup>38</sup> French law of 9<sup>th</sup> December 1905 on the separation of the Churches and the State: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749> (in French).

<sup>39</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000021312171&categorieLien=id> (in French).

stipulated, notwithstanding the general principles laid down therein, that the budgets of public corporations can be used to finance "chaplaincy services" to guarantee *"freedom of worship in public institutions such as grammar schools, colleges, schools, old people's homes, asylums and prisons"*.

2/ It follows that when people are no longer at liberty to come and go as they please, the State should finance the cost of services the necessary for "freedom of worship". The term "public institutions" used by the law should not be taken in its precise legal sense as used today, but only in the sense of independent services controlled exclusively by the authorities. Since the list contained in the 1905 Law is not exhaustive, it should be taken as referring to any place in which, beyond a reasonable period of time, people do not enjoy access to the form of worship corresponding to their own religious denomination, in cases where they belong to one, on account of their "isolation".

As far as prisons are concerned establishments, the Code of Criminal Procedure (Articles R. 57-9-3 sq.) has specifically laid down the conditions governing access to worship. The same goes, to a lesser degree, for hospitals (Articles L. 3211-3, 7 and R. 1112-46 of the Public Health Code; see also circular n°DHOS/G/2005/57 of 2<sup>nd</sup> February 2005). In the case of detention centres, there are no legal requirements: however, practices do exist in some cases, and are successful.

As far as secure educational centres are concerned, nothing appears to have been defined, seemingly because no request has been submitted. In any event, the obligations incumbent upon the authorities responsible for these establishments are no different in nature as regards their various types of occupants, other than in a few ways.

3/ Based on the principles set out above, the authorities are not under any obligation to:

- Accept as a chaplain any representatives of a de facto or legally constituted body, the religious nature of which is not established;
- Accept a chaplain who has not agreed to abide by the public order rules necessary to the running of a custodial establishment;
- Authorise forms of worship that cannot be reconciled with

public order requirements, and in particular with the running of communal life within the establishment, in that they might create tensions; nevertheless, the impossibility of so doing should be clearly established.

- Organise chaplaincy services in the absence of any request (but they cannot prevent any such applications from being submitted, nor can they ignore them);
- Assume responsibility for the fact that it is impossible to appoint a chaplain because the competent religious authorities have failed to put forward a suitable candidate.

Subject to these reserves, the authorities responsible for custodial establishments must *"be able to meet the requirements of the religious, moral or spiritual life"* (Code of Criminal Procedure, Article R. 57-9-3) of the persons for whom it is responsible.

4/ This is not always the case today. In the current circumstances, the authorities are likely to be accused not only of failing to apply the necessary principles, especially in terms of equal treatment and non-discrimination, but also of being unable to justify to detainees some of the choices made, which gives rise to incomprehension vis-à-vis the necessary religious neutrality of the State and, sometimes, to tensions.

5/ Generally speaking, just as *"detainees are permitted to receive or keep in their possession objects of religious practice and the books they need for their spiritual life"* (Article R. 57-9-7 of the Code of Criminal Procedure), the same should apply to all persons held in custody on a long-term basis, wherever they are held.

Consequently, all staff who work in such places, should not decide what is and is not a religious object, but, after being trained to do so, should be able to identify objects of prayer (e.g. phylacteries or a ciborium) and, to the extent compatible with the smooth functioning of communal life, they should pay special attention to this issue.

- People should be allowed to keep unobtrusive religious signs or symbols in their possession, regardless of the nature of such items.
- The introduction of books that are *"necessary to spiritual life"* should be allowed, in the ways provided for by the Code of Criminal Procedure, especially where they are introduced by

chaplains, without the need to draw any distinction between paperback and hardback books inside custodial establishments.

- Detainees should be allowed to keep religious objects that are not likely to pose a threat to security. Respect should be shown for such objects, regardless of their owner's denomination (neutrality as an expression of secularism) and regardless of the beliefs of the staff supervising such establishments (neutrality of public sector employees). Although it has been unable to check whether such allegations are true, the *contrôle général des lieux de privation de liberté* has received a number of complaints relating to the disappearance of or deliberate damage to such objects, or behaviour that clearly demonstrates contempt.
- In more general terms, tendentious comments made by staff, whether employed by public or private bodies, regarding religious beliefs and practices of any kind, are not covered by the rules applicable to custodial establishments: they never serve any useful purpose, and they are usually prejudicial.

6/ In point of fact, certain religions are not widely practised, particularly on account of the diversity of current religious practice in France. Nevertheless, as soon as a request is submitted for assistance relating to a form of worship, the religious nature of which is not in doubt, and for organisational support for this religion in response to such request, the principle of secularism cannot be applied as a justification for rejecting this on any grounds, other than those stated in section 3 above, in terms of principles.

As a result, two obligations are incumbent on the authorities.

On the one hand, while they themselves must clearly not determine which groupings or claimed denominations do or do not constitute a form of worship, they must abide by the courts' recognition of the religious nature of legally constituted bodies provided that such recognition has been granted. By way of illustration, this applies to one such body, some of whose activities were not only recognised by the courts as a public form of worship (Lyon Administrative Court of Appeal, 18<sup>th</sup> January 1990), but some of whose groupings were also recognised as a religious organisation (Council of State, Section, 23<sup>rd</sup> June 2000, Minister of the Economy, Finance and Industry, n°215 109), within the meaning of Part IV of the Law of 9<sup>th</sup> December 1905, following the example of certain administrative bodies (e.g. the

Consultative Committee on Worship, at its session held on 26<sup>th</sup> October 2001). These decisions clearly take precedence over the “sectarian” orientation previously attributed to events organised by this religion. Such recognition of the religious nature of legally constituted bodies and therefore the right enjoyed by the followers of such religions to have their own chaplain, certainly does not constitute recognition of practices prejudicial to persons. It is an expression of the neutrality laid down by secularism.

Secondly, the authorities likewise cannot play down the status accorded to chaplains, on the grounds that the religion in question is a minority one. As soon as a religion is recognised as such by the governing law, its chaplains, just like any other chaplains, should be allowed to enjoy identical prerogatives and cannot be limited, e.g. within prisons, to having visitor status, which in turn creates a “visiting-room religion” (i.e. meetings held with “the chaplain” are restricted to this location, rather than taking place in a cell or in purpose-built premises). On the other hand, the authorities should of course keep the number of approved chaplains proportionate to the number of people claiming to practise a particular religion. This is the only possible interpretation of the laws, and especially of European penitentiary rule n°29, section 2 (which, incidentally, cannot take precedence over the 1905 Law and Penitentiary Law), unless we specifically take the view that, as soon as the activities undertaken by this legal entity are recognised as a form of worship, the authorities, abandoning the principle of secularism that ought to apply in full here, decide that they will be responsible for assessing which forms of worship are acceptable in custodial establishments, and what prerogatives should be associated with them.

What applies to this denomination applies to all those whose organisations are religious in nature, even where they are classified as minority religions in France (and, incidentally, possibly as majority religions in some regions or locations).

7/ Several denominations, represented by varying numbers of detainees held in custodial establishments, impose rules on those that recognise them, in terms of what they can eat and drink.

The question of prescribed food is one of particular significance, given that food (quantity consumed and quality) is an issue of fundamental importance for anyone who is deprived of their liberty. At the present



time, with few exceptions, all custodial establishments are able to supply meals of various kinds. However, very few of them offer food that complies with ritual regulations. This has two consequences: firstly, a corruption of practices, with detainees requesting vegetarian menus for example, even though they have no desire to refrain from eating meat; secondly, with insufficient quantities of food being consumed: young men, particularly those held in prisons, frequently complain that they are not given as much food as they could eat.

The circumstance, argued by the authorities, that the current menus provided meet the needs of a balanced and varied diet, coupled with food hygiene requirements, does not really answer the question.

From now on, custodial establishments should be organised in such a way that they can provide menus that meet special dietary requirements, provided of course that they comply with denominational practices, other than in circumstances where medical instructions are being followed.

- Subject to compliance with requirements linked to human health or to the smooth running of establishments, the option of observing fasting periods should be available; this is frequently the case already.
- Provided that the conditions prevailing in the market for foodstuffs permit (which is normally the case in France today), a supply of meats or other foodstuffs prepared according to rites approved by the competent religious authorities should be sought out and used. Incidentally, the information gathered by the Inspectorate has not indicated that the price of such foodstuffs is prohibitive; on the contrary, the prices in question sometimes appear to be lower than those of the products usually purchased.
- On the other hand, persons who are deprived of their liberty and have no special dietary requirements should not be subject to any dietary restrictions not applicable to them. There is no reason, for example, why people who wish to eat pork cannot do so.

If the contracts needed to broaden the scope of dietary practices cannot be concluded in the near future, then the following steps should be taken:

- Chaplains should be authorised, subject to the necessary checks being made, and under their own responsibility, to introduce quantities of such foodstuffs where there are no alternatives; such quantities will necessarily be limited.
- A wider range of products should be offered in the context of “canteens” (detention centres) or cafeterias (hospital complexes).

These are only stopgap measures towards compliance with the principle of eating according to the precepts of one’s own religion; the European Court of Human Rights recently had occasion to establish this principle in respect of a detainee (ECHR, 7<sup>th</sup> December 2010, *Jakóbski v. Poland*, n°18429/06, section 44 and 45 - violation of Article 9 of the European Convention on Human Rights). At least these measures can be quickly arranged.

**8/** Collective practices that are religious in essence call for the following observations:

- It should be possible to hold collective prayers or services on premises specifically designed for this purpose; these premises should be large enough and fitted out for their intended purpose (e.g. the *contrôle général* has seen rooms that had no electrical sockets), provided of course that they comply with the requirements covering public order (especially as regards the number of people who can gather there) and neutrality vis-à-vis the various religions, their use being placed under the responsibility of chaplains of the various denominations.
- When services are held on these premises, according to timetables arranged to suit the wishes of chaplains and accepted by the governor, they should provide a minimum level of peace and quiet and no events should knowingly disrupt any prayers or services held there (especially the untimely entry of third parties into the room or any superfluous interventions on the part of staff). It is therefore desirable that, whenever possible, and certainly in the case of new establishments, premises should be set aside exclusively for holding services, and their religious dimension should be made apparent.
- In addition to regular services, within the necessary limits of good order, these premises should be able to accommodate those who wish to celebrate known and identified religious festivals; the authorities should be informed of the timetable

of such festivals, and when the latter are held, the authorities should provide the necessary facilities (food, desired menus, various objects, etc.), under the responsibility of chaplains.

- No one denomination may claim exclusive use of rooms of this nature (however, to the extent possible, this stipulation does not apply to chaplains' offices).

**9/** Spiritual guidance may also include various events such as discussion groups, meetings held for thinking or festive purposes linked to the religious calendar, choir performances, etc. The only grounds, duly established, on which those in charge may object to the holding of such events, are that of maintaining good order or the fact that the premises are unsuitable.

**10/** Spiritual guidance also implies that anyone requesting this, even if they are unable to move (because they are ill and confined to bed or held in detention, for example) should be entitled to receive a visit from a chaplain. Consequently, chaplains should be authorised to move around as they wish, within areas where persons held in custody are accommodated; they should be able to hold personal discussions with such persons and have the material resources for this purpose placed at their disposal; finally their relationships with the persons they visit, including any correspondence, should be protected from intrusion by third parties.

**11/** The presence of persons deprived of their liberty at services or other communal events requires that the authorities draw up lists of names, indicating people's denomination. The necessary authorisations required under the data protection laws must be obtained. Staff must also maintain the necessary confidentiality associated with this data. The lists should be carefully updated, based on the information provided by chaplains and events that have occurred (transfers, etc.), so that, in contrast to too many current practices, there are no substantial lead-times, and therefore delays, in the arrival of persons held in custody at such events. Finally, the authorities cannot use the fact that a person is registered on the list relating to a particular religion as grounds for declining a request on the part of this person to attend worship organised by another religion, if he or she so wishes.

**12/** Today, as elsewhere in society, custodial establishments are characterised by the co-existence of various denominations, and

also of people without any religion. Personal and collective religious practices require, on the part of those who engage in them, respect for freedom of conscience, i.e. spiritual options for other members of the community. No constraints or threats are acceptable, either in terms of observance or absence of observance of religious instructions, and particularly in terms of organisation of the department, which can only be governed by the rules laid down by the responsible authority. Rules of procedure, institutional-level plans, the various rules governing prisons or detention centres, public hospitals and accommodation centres for minors should prevail on these issues in all circumstances, and for everyone, in practices relating to everyday life, e.g. in the use of showers, activities on offer, care provided or teaching given, as well as to occupations in which both men and women are engaged.

## Opinion of 17<sup>th</sup> June 2011<sup>40</sup> concerning supervision of monitoring and security staff

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1/ Persons held in custody must not be denied their human rights, and therefore conditions must be imposed in such places, relating to the legislation applicable, the material condition of the premises, the way in which loss of liberty is organised, the instructions issued by management and the ways in which employees are trained to behave. The *Contrôleur général des lieux de privation de liberté* (CGLPL) is attentive to these various aspects, in accordance with his remit under Article 9 of the Law of 30<sup>th</sup> October 2007.

2/ However, he has consistently indicated, from the outset of his mission, that respect for human rights in prison, in police custody, detention centres or in the context of hospitalisation without consent, is also dependent on staff working conditions. The level of commitment demonstrated by staff, the length of service, the quality of the initial and in-service training provided, the difficult nature of the tasks involved, the isolation suffered by some staff, the distances involved in travelling to and from work, the relationships maintained within the professional environment, and the development or absence of technological alternatives to human presence (see the report issued by the *Contrôleur général* for 2009, Chapter 3 on vidéosurveillance) are all significant factors in apprehending the missions to be accomplished. Consequently, insofar as these missions still place a high degree of emphasis on human relationships, when it comes to loss of liberty, the relationship between the staff running an establishment and the persons held captive there are determined to a significant extent by these factors.

3/ A number of more topical factors are also pertinent to this inter-relationship between human rights and working conditions, which is growing ever closer. The recruitment of a number of younger staff over the past twenty or twenty-five years, in the wake of concerted efforts to do so, coupled with their rising levels of education, the increasing numbers of women working in this field, the arrangements made in

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<sup>40</sup> Published in the *Journal Officiel de la République française* of 12<sup>th</sup> July 2011, text n°81.

terms of compliance with ethical rules,<sup>41</sup> rising tensions among the population held in custody, and in particular increasing recourse on the part of the latter to auto- or hetero-aggressive violence, the fact that this population includes a number of people who have completely lost their way or lack any solid foundations, including psychological reference points, means that it is a different, delicate and sometimes very difficult task for the public sector employees responsible for monitoring and security in such establishments to discharge the missions entrusted to them, regardless of whether they work for the police, the gendarmerie, the customs service or the prison authorities. The relationships maintained with the competent authorities, the themes raised by professional bodies and the confidential interviews widely practiced by the *contrôle général* at the places it has inspected, all highlight a number of issues causing suffering for employees at work. This is something that is undeniable: it has internal consequences for staff, in terms of the career choices they make, prompting them to turn down jobs that are assumed to be uncomfortable or risky, and gives rise to anxiety regarding a number of situations.

4/ Traditionally, such events are handled within the security services in two ways: firstly via the line-management structure, which is of course responsible for providing functional responses to such difficulties; and secondly via the solidarity which, in the face of real danger, binds together police officers, prison officers, customs officers and gendarmes. It is not the place of the *Contrôleur général* to pass judgement regarding the current effectiveness of these two mechanisms. He cannot, nor does he wish to interfere in what is a matter either for the responsible authorities or one that concerns how staff work closely together.

5/ Nevertheless, in his view, in order to enhance the quality of the link between working conditions and respect for human rights, the time has come to go further and to systematically implement the practice of supervision of civil servants and military personnel responsible for monitoring and security missions. In his view, this is relevant to three developments: a more general initiative being promoted right across the civil service, as evidenced by the November 2009 agreement on health and safety at work; to plans set out at ministerial level (e.g. the

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<sup>41</sup> N.B. decrees passed in 1986 and 2010 imposing a code of ethics on the French police force and prison service respectively.

working party set up on 20<sup>th</sup> November 2008 to examine the working conditions of prison service staff); and lastly to practices encountered during the course of his inspections (an establishment for minors in the Paris region; a prison in Eastern France; a number of secure educational centres, etc.).

6/ Supervision is where employees are given the option, either during or outside their working hours, and either at their place of work or away from it, to discuss, on a one-to-one basis and in complete confidence, in the context of a peer-to-peer relationship, how they are discharging their duties, especially in circumstances where the latter are posing particular difficulties for the employee, which may impact on his or her personal life; the aim is to control the situation more effectively.

7/ Such instruments already exist today for certain professions or institutions: they are to be found in the healthcare professions (e.g. for nursing staff at psychiatric hospitals), in the field of education (e.g. tutors working at secure educational centres) and even for representatives of charities and other organisations working at detention centres. These instruments, whose value has been recognised, should be available on a comparable scale and organised in a similar way, for the benefit of staff working for the security services.

Some of them are already in place. Firstly, the occupational medicine and employee welfare departments offer a good initial illustration of what can be achieved. Secondly, a variety of forms of support (notably psychological support) are available in a number of situations, notably where staff have been the victim of a major incident, such as an attack. Thirdly, in some establishments or departments, the authorities have already successfully implemented the idea of supervision, in the form recommended here: what follows is based largely on their example.

Nevertheless, despite the efforts made by the people implementing them, these initiatives are limited in scope because they are exceptional, because they may rapidly take on a ritual nature, because they cannot be isolated from the line-management structure (e.g. the psychologist reports to a regional prison service directorate); and above all they are limited due to the fact that, given the way they are currently viewed, having recourse to them represents an admission of weakness on the part of the employee. Staff therefore face a choice between being regarded as "fragile" or keeping silent about any serious incidents encountered in their working life.

**8/** The *Contrôleur général* suggests that staff supervision instruments should be developed and systematically implemented in the public security services.

**9/** These instruments should take a variety of forms, and be presented and discussed on the joint employee-management representation bodies: they should involve development or individual interviews between the employee and a qualified contact person who is experienced in techniques for establishing dialogue, and is bound by professional secrecy; or collective discussions with other staff at the same hierarchical, professional (by occupation), inter-professional or even interinstitutional (justice/health, police force/nursing, etc.) level, for different locations. Such interviews and discussions are not intended to be fed back in the form of reports, but merely to provide a forum for comparing rules and realities, capabilities and achievements, wishes and fulfilment, and resolving the issues that arise here.

**10/** Recourse to supervision should be based solely on the employee's own personal decision. Within limits which must of course be reasonable and compatible with the department's requirements, the employee should be granted the time needed for this purpose. Line management should not check the content of supervision: on the contrary, within these occupations, which are quite rightly very hierarchical in nature, staff need to be granted complete freedom of expression regarding the service and the way in which they execute it, provided that it remains confidential. Moreover, if necessary, line management can suggest the idea of a supervision to the employee; however, they should not impose it as an obligation, nor should they be notified of the outcome of any proposal that the employee is at liberty to make.

**11/** Such recourse assumes the existence at all times of dialogue instruments that are available close at hand for the employee, i.e. near to his/her place(s) of work, and can be accessed without undue delay, under satisfactory conditions of discretion (premises, time slots, etc.) and in a variety of forms. It is up to the authorities to provide the means and to implement them, without any further interference.

**12/** It is desirable for professional bodies to support these initiatives in such a way that their members are encouraged to take advantage of them. Incidentally, they in no way release governors and administrative



managers from the obligations incumbent upon them to try to improve difficult working conditions, to strengthen social dialogue and to be attentive to the issue of human resource management in general. Within the security services, there is a tradition requiring everyone to be strong; this can undoubtedly be maintained without impeding the option of calling on the services of a trusted third party for professional support, and discussing matters with them in confidence. Finally supervision can help management to concentrate more effectively on its own tasks related to overseeing staff. This will help to meet one of the conditions essential to dynamic respect for the human rights of persons held in custody, by ensuring that the professionals who are responsible for them discharge their mission more effectively.

# Opinion of 20<sup>th</sup> June 2011<sup>42</sup> concerning access to IT facilities for persons in detention

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1/ Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789 provides that *"the free communication of ideas and opinions is one of the most precious of the rights of man: every citizen may, accordingly, speak, write, and print freely, but shall be responsible for such abuses of this freedom as shall be defined by law"*.<sup>43</sup>

This right is one of particular relevance to persons held in custody in that, as indicated by the Constitutional Council, *"freedom of expression and communication is all the more precious, in that exercising it is a pre-condition of democracy and one of the guarantees ensuring that other people's rights and freedoms are observed"* (Constitutional Council, decision n°2009-580 of 10<sup>th</sup> June 2009, recital 15). It is therefore incumbent on the prison authorities to guarantee this right, subject solely to the reserves necessary to maintain security and good order in prisons, to prevent re-offending and to protect victims' interests (as indicated by Article 22 of the Penitentiary law of 24<sup>th</sup> November 2009).<sup>44</sup> In other words, this authority cannot impose any limitations on freedom of information other than those dictated by the requirements of security, the future of persons held in custody and the well-being of their victims.

2/ The information and communication tools of our own era include on-line services, to which the principle set forth above also applies. Again, as indicated by the Constitutional Council (in the abovementioned decision, recital 12), *"having regard to the widespread development of on-line services and to the growing importance of these services in terms of participating in democratic life and expressing ideas and opinions"*, the right to free communication of ideas and opinions

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<sup>42</sup> Published in the *Journal Officiel de la République française* of 12<sup>th</sup> July 2011, text n°82.

<sup>43</sup> Declaration of the Rights of Man and the Citizen of 1789: <http://www.historyguide.org/intellect/declaration.html>

<sup>44</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).

*"implies the freedom to access such services"*. This freedom is especially important for persons held in custody in that, since they are denied their freedom to come and go, and thus denied many of the facilities that this entails, the Internet represents an excellent way of accessing much of the information emanating from the outside world (the media, training, job adverts, administrative formalities, education, games and information of various kinds).

Needless to say, in the case of persons held in custody, this freedom is subject to the same restrictions as any other freedoms not withheld from them by the courts. It has to be reconciled with requirements linked to security, law and order, the future of such detainees and to victims' rights. This reconciliation process will result in these requirements being met, provided that any resulting restrictions or bans are indeed necessary and proportionate to the risks posed in these areas.

3/ This is not currently the case.

Since the Decree of 20<sup>th</sup> March 2003,<sup>45</sup> Article D. 449-1 of the Code of Criminal Procedure has stipulated that persons held in custody are entitled to purchase computer equipment, but the methods and characteristics of such purchases shall be decided by the authorities in the form of a general instruction; it also stipulates that documents can be kept in electronic format solely for the purposes of training, education and socio-cultural activity; and finally – in a provision whose legality is far from being obvious – it specifies that in some cases, this equipment may be confiscated by the authorities until such time as the purchaser has completed their sentence, solely on the basis of the "written observations" gathered under Article 4 of the Law of 12<sup>th</sup> April 2000.<sup>46</sup> The "general instruction" took the form of

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<sup>45</sup> French decree n°2003-259 of 20<sup>th</sup> March 2003 modifying Article D. 449-1 of the French Code of Criminal Procedure: <http://www.legifrance.gouv.fr/affichCodeArticle.do?sessionId=7E0C073E7D5B930C4AA68B9B0A580F56.tpdjo08v.1?cidTexte=LEGITEXT000006071154&idArticle=LEGIARTI000006516400&dateTexte=29990101&categorieLien=cid> (in French).

<sup>46</sup> French law n°2000-321 of 12<sup>th</sup> April 2000 on rights of the citizens and their relationship with administration: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005629288> (in French).

To be compared with Article R. 57-7-33 of the same code, which provides for confiscation, for up to one month, of computer equipment purchased by the detainee, in the wake of disciplinary proceedings.

a circular issued by the Director of the Prison Authority (written in two versions, one of which is “communicable” to detainees, the other being “non-communicable”) dated 9<sup>th</sup> April 2009, and amended on 13<sup>th</sup> October that year. It sets out what prisoners are allowed to do in terms of using computers, firstly in their own cell, and secondly in communal areas. It defines the measures involved in supervising and monitoring equipment and activities, and also what equipment can and cannot be used.

4/ Firstly, the foregoing provisions are applied in ways that differ widely from one place of detention to another. In particular, a number of situations have been referred to the *Contrôleur général des lieux de privation de liberté* in which a certain type of equipment could be used in the cells in one prison but was not allowed in another; a prisoner transferred from another establishment might find that a particular peripheral, software program or data storage medium they may have been using for a long time was then confiscated. We should add that transportation charges covering computer equipment are not paid by the authorities, in cases where its owner decides that this equipment cannot be stored in the ordinary cardboard boxes used for such transfers (regarding this point, see the opinion of the *Contrôleur général* of 10<sup>th</sup> June 2010, concerning the protection of property of persons deprived of liberty). Lastly, before the prisoner is released, this computer equipment is “searched” and data is erased, by formatting the hard disk: this formatting has already taken place (even though these files are regarded as lawful) without the agreement of the person concerned, even though this is required under section 6.3.2 of the abovementioned general instruction.

Secondly, certain bans on computer equipment, which for example may limit (drastically in relation to current standards) its capacity or power (e.g. a maximum permitted storage capacity of 500 Gb for hard disks) are in no way linked to the necessary security measures but simply to the authorities’ ability to control their use or content. In other words, the considerations prevailing over these restrictions are not linked to the need to maintain order or to uphold the interests of the persons concerned, but to the inadequacy of the authorities’ supervisory instruments.

Thirdly, while lending mechanisms have been introduced in some establishments for equipment purchases, all too often the authorities are linked to a single local supplier charging prices that are frequently

unrelated to market rates or whose prices have not been approved: for example, one estimate amounted to 3'152 euros when, according to experts consulted by the *Contrôleur général*, a price of between 1'500 and 1'700 euros was deemed more realistic.

Fourthly, in some prisons, the state of the electricity supply network means that all computer equipment is banned from cells.

Fifthly, some bans lack any logic enabling them to be explained and understood. In establishments like this, printers are allowed (to some extent) but blank paper is not. In particular, the authorities are resolutely hostile towards any techniques or equipment allowing communication with others. For this reason, no "new-generation" games consoles can be purchased, nor, in general terms, can any wireless peripherals. As far as information storage media are concerned, only diskettes are allowed, but USB sticks and external hard disks are not, for example. Lastly, there is no access to on-line services, either within cells or from supervised communal areas.

5/ Relaxing the rules governing access to IT facilities is necessary not only in order to reconcile the conflicting requirements of freedom of information and of security imperatives, but also with a view to improving the reintegration of persons held in custody and reducing the levels of reoffending, thereby leading to enhanced security for our society. To this end, drawing inspiration in particular from experiments already under way (the "Cyber-base®Justice" experiments in Marseilles, Bordeaux-Gradignan, Amiens, Saint-Martin-de-Ré and Metz-Queuleu prisons, in association with the *Caisse des dépôts et consignations*):

6/ The distinction introduced by the 2009 circular should be maintained: the options opened up by owning and using computer equipment should be extended further into communal areas, rather than restricting their use to cells.

7/ The authorities must be able to check on the use and storage of computer equipment, in order to satisfy security requirements. However, the reasons for carrying out such checks cannot be any different from the long-standing checks applied to mail and phone calls, the sole purpose of which must be to ensure that any data used or stored is not likely to compromise the reintegration of the person concerned or to compromise law and order, and security. Furthermore, the protection of personal data, as provided for by the

Law of 6<sup>th</sup> January 1978,<sup>47</sup> and overseen by the National Commission for Information Technology and Liberties (for comparison purposes, see its *Guide pour les employeurs et les salariés*<sup>48</sup>), is an issue that is clearly applicable. In addition, the exceptions applicable to correspondence with the persons mentioned in Articles 4 and 40 of the Penitentiary law should be implemented in this area. Lastly, the staff in charge of carrying out such checks, though specially authorised, are still subject to discretion imperatives (see what has been said about staff responsible for the delivery of mail, allowing for a few minor variations: opinion of the *Contrôleur général* of 21<sup>st</sup> October 2009, published in the *Journal Officiel* of 28<sup>th</sup> October 2009).

8/ Inside cells, no computer equipment or data storage facilities should permit direct communication, either by wire or any other means, with a third party. On the other hand, any limitations relating to useful capacities should be lifted. Persons held in custody should be allowed to have in their cells firstly computers that meet their needs, secondly whatever data storage capacity they see fit, and lastly any peripherals and so-called “external” computer programs (software, etc.), provided – and these should be the sole conditions – that they do not compromise either the reintegration of the persons concerned, or good order within the prison, or victims’ interests, and provided that the detention centre has the necessary electrical installations and space.

In particular, the authorities cannot object to data (especially photos) associated with prisoners’ private lives and families, and to items relating to activities they have opted to follow, even in an individual capacity (e.g. preparing for an examination). This data – and not just that linked to socio-cultural, education, training or professional activities – should therefore be saved, under the conditions mentioned in the previous paragraph, on an external medium at the time the hard disk is formatted. Detainees who own a computer should also be allowed to retain their data at the time they are released.

9/ In premises shared with a third party (e.g. a trainer, teacher, etc.) and/or with administrative staff, equipment and data allowing communication should be accepted and even encouraged.

In particular, arrangements must be made in the near future to

<sup>47</sup> French law n°78-17 of 6<sup>th</sup> January 1978 on IT, files and liberties: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460> (in French).

<sup>48</sup> Guide for Employers and Employees.

ensure that each establishment can provide an Internet link from these premises, though the authorities may reserve the right to deny access to some of them, for the same reasons as those – and only those – indicated previously, and in a way that can be controlled and identified.

Access must also be provided to e-mail, solely within the limitations currently applied by law for mail sent by post (e-mail messages should be treated in the same way as this). These limitations consist of a prior check on messages prior to dispatch and on messages received.

Persons held in custody should be able to make use of the services mentioned above, using equipment that corresponds to their requirements, for work, training, education and all activities open to them. The authorities should be able to take the necessary precautions to prevent thefts of equipment or data.

Lastly, it should be possible to use “new-generation” games consoles on the same premises, in the context of the leisure activities normally organised in prison.

**10/** In order to comply with the prescriptions set out above, persons held in custody should be free to purchase the equipment necessary, either by post or on line, from any service provider whose corporate name is clearly identified and subject to the authorities carrying out a prior check, the sole purpose of which is to ensure that the equipment selected meets the conditions referred to in item 8 above.

Any mechanism facilitating such acquisitions, and consequently reintegration, should be encouraged.

These are the principles that the *Contrôleur général* recommends for implementation in the near future. They are likely to facilitate the reintegration of persons held in custody, without compromising the obvious imperatives of short-term security; and thus, in the medium term, to promote greater peace and harmony, and security for everyone.

# Opinion of 14<sup>th</sup> October 2011<sup>49</sup> concerning the use of video conferencing vis-à-vis persons deprived of liberty

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1/ Respect for the rights of the defence during court proceedings, in a disciplinary action or any formality affecting the exercise of a fundamental right is a cardinal principle of the fair trial derived from Article 16 of the Declaration of the Rights of Man and the Citizen of 1789.<sup>50</sup> It presupposes, in criminal proceedings especially, for the person whose "case must be heard", the possibility of submitting his observations, consulting the case file, being defended by counsel, and being able to lodge an appeal against the decision taken. It materialises in *"the existence of just and equitable procedure ensuring balance of rights and parties"* according to the formula consistently reiterated by the Constitutional Council and since 2000 incorporated into the preliminary article of the Code of Criminal Procedure: *"Criminal procedure must be fair and adversarial, and preserve the balance of the parties' rights"*.

Preservation of balance between the parties in criminal proceedings is indeed one aspect of the rights of the defence. According to the European Court of Human Rights, it is a matter of guaranteeing that *"every party to civil proceedings should have the opportunity to present his case to the court in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party"* (ECHR, 27<sup>th</sup> October 1993, *Dombo Beheer B.V. v. Netherlands*, Series A n°274).

It is also a matter of the accused's being able to participate genuinely in the proceedings; in the context of a trial, he must be able firstly to attend the hearing, and secondly to understand what happens there.

2/ These principles have no absolute effect, however. Other considerations such as security or proper administration of justice are also material.

3/ International conventions thus acknowledge the possibility of using

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<sup>49</sup> Published in the *Journal Officiel de la République française* of 9<sup>th</sup> November 2011, text n°65.

<sup>50</sup> Declaration of the Rights of Man and the Citizen of 1789: <http://www.historyguide.org/intellect/declaration.html>



video conference: the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters contemplates the possibility of hearing a witness or an expert from one state to another via this technical device. The European Court of Human Rights for its part has countenanced the use if it were necessitated by "legitimate aims under the Convention", namely, prevention of disorder, prevention of crime, protection of the right to life and liberty and the safety of witnesses and victims, together with the "reasonable time" requirement in judicial proceedings (ECHR, 5<sup>th</sup> January 2007, *Marcello Viola v. Italy*, n°45106/04, §72).

4/ France makes use of video conferencing in a number of instances that now concern, firstly, places of deprivation of liberty for foreigners, secondly psychiatric hospitals, and finally criminal procedure, including execution of sentences.

With regard to places of deprivation of liberty for foreigners, it is prescribed that the intervention of the ordinary court, whether to extend the stay in a holding area of a foreigner without the necessary documents to enter France or to extend the administrative detention of a person subject to an expulsion measure, may take the form of exchanges by way of audiovisual telecommunications. Articles L. 222-5 (as to the holding area) and L. 155-12 (as to administrative detention) of the Code governing foreigners' entry and residence and the right of asylum make this process subject to threefold condition that there be a request for that purpose by the administrative authority (the prefect), that the foreigner, duly informed, has not objected to it, and that transmission is confidential.

For care without consent involving hospitalisation, whose termination or continuation is subject to examination by the judge supervising releases and detention, the judge may hold court in a suitably equipped room of the hospital or have the patient placed there and communicate with him via audiovisual telecommunications. Article L. 3211-12-2 of the Public Health Code makes their use subject to two requirements: a medical opinion certifying that the procedure is compatible with the person's condition, and no objection on his part.

The same applies in the numerous eventualities of criminal procedure, particularly (Articles 706-71, 712-6, 712-13 of the Code of Criminal Procedure) to the examination or questioning of a person (chiefly one held by an examining judge) or of several persons to compare their

testimony, for the hearing prior to the remand in custody of a person already held in connection with another case, for the extension of remand, for a person's examination before the police court or magistrate's court when already held in connection with another case, for adversarial hearings conducted by the judge supervising the application of sentences and the court for application of sentences, and appeals brought before the bench for the enforcement of sentences. In contrast to the foregoing cases, the choice of video conferencing scarcely carries conditions. The Code provides that it may be made "*where justified by the needs of the inquiry and the preparatory proceedings*", which is tantamount to giving the investigator or the judicial authority wide discretion. However, the text says nothing about the conditions which might apply to the other uses which it permits. The only protection which it contemplates is to guarantee the confidentiality of the exchange between the person and his lawyer, if any and if at a distance.

Two points should be added.

A provision of the Judiciary Code allows the presiding judge of any trial court, in all other cases than those specified above, to order that the hearing be held concurrently in several rooms linked by audiovisual telecommunications. No other conditions are laid down but the agreement of all parties to do so and the presence of the public in all court rooms thus opened.

Video conferencing is employed for asylum requests made by foreigners subject to a measure of administrative detention. The asylum request procedure in fact provides that the applicant is heard by the French Office for the protection of refugees and stateless persons (OFPRA), except in specific cases (Article L. 723-3 of the Code governing foreigners' entry and residence and the right of asylum). A foreigner not corresponding to any of these specific cases must be heard. Video conferencing is used for this purpose where the detention centre is equipped with it, moreover without any statute circumscribing this practice to date.

5/ Several circumstances suggest that video conferencing may develop very significantly in the future.

In the first place, various ministerial instructions have recommended its development, relying essentially on the expediency of avoiding "extractions" (displacements) of persons deprived of liberty.

In the second place, it is true that these extractions generally require the use of officers of the security forces in strength, and above all for protracted periods. The economies sought in the use of these forces, as part of the general revision of official policies, naturally prompt an effort to reduce extractions.

In the third place, where persons in detention are concerned, recent decisions assign responsibility for judicial extractions to the staff of the prison administration. The experimentation in progress may be expected to demonstrate the expediency of holding video conferencing on more occasions, rather than resort to extractions with limited staff numbers.

In the fourth place, the recent law of 5<sup>th</sup> July 2011,<sup>51</sup> concerning psychiatric treatment without consent, opened a new area of court intervention which is to prove significant in terms of volume (some 84'000 measures of hospitalisation without consent before the reform). Having regard to the congestion of the courts, efforts of productivity will have to be made. Use of video conferencing is one possible aspect of this.

In the fifth place, under the same reform of detention on remand, the multiplication of procedures and the growth in their volume lead to the overloading of barristers, particularly those acting as officially appointed defence counsel. In legal professions of small or average numbers, it will be materially impossible for the barristers to cope with all the attendances expected of them in places sometimes distant from the chief towns. There too, more time-saving will be necessary, and video conferencing is an instrument of it.

Consequently, for a number of apparently unarguable reasons inferred mainly from practical necessities, video conferencing is destined to develop.

**6/ Injudicious development of such technology carries the risk of interfering with the rights of the defence.**

In certain cases, video conferencing can assist these rights. Indeed, this way of operating can, where a person's appearance in court is obviously difficult, obviate the judge's postponing the case (thereby

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<sup>51</sup> French law n°2011-803 of 5 July 2011 on the rights and protection and management of people in psychiatric care: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024312722> (in French).

extending the time limits) or even deciding to rule without hearing the person summoned to appear. In such instances, it is beneficial.

In many other cases however, video conferencing weakens the rights of the defence in that it eliminates the party's physical presence which is also a means of expression (all the more because many persons charged have great difficulty with their oral expression). It presupposes ease of expression in front of a camera or console and equality of persons in that respect, which are by no means assured, particularly for those who suffer from mental afflictions. Where the person has the benefit of counsel, the lawyer is compelled to choose between standing near the judge (which is done in the majority of cases) or staying close to the client: contact with either is thereby inconvenienced and the counsel's job made more difficult. Technical contingencies can aggravate the difficulties (showing a document, protesting an exhibit...).

While the use of video conferencing is a sometimes unavoidable palliative, it is not to be regarded as an unconditional facility. In order to safeguard the fundamental right held by all to make their defence, it is consequently necessary that the use of this technique, with persons deprived of liberty, be subject to perfectly clear conditions, common to the situations with which persons deprived of liberty may meet, a first approximation of which may be provided by the following principles.

**7/** There can be no video conferencing without a statute that institutes it and establishes the conditions under which recourse may be had to it. In particular, even if the asylum request procedure is not judicial it constitutes, even for a foreigner in administrative detention, the exercise of a fundamental right. It is therefore desirable that a legislative provision should govern recourse to audiovisual telecommunications, today purely discretionary. The advent of such a statute is all the more necessary considering that purely factual questions predominate in this field.

**8/** Video conferencing cannot be used in proceedings unless the informed consent of any plaintiff or defendant in the proceedings has been obtained. This is the case particularly in matters regarding entry and residence of foreigners, psychiatric treatment without consent, those specified in Article 706-71 (4) of the Code of Criminal Procedure and in the procedures for adjustment of penalties.

If the person is not in a condition to give consent, the agreement of another responsible individual selected outside the administration having charge of the person, where deprived of liberty, must be obtained. For foreigners not proficient in French, an interpreter must be made available before obtaining their consent.

In cases where the person has been able to choose a lawyer (apart from officially appointed counsel), the latter can supplant the client in the agreement to be given beforehand.

**9/** Even where the person's agreement to it is secured, the judicial or police authority must be able, in the actual course of proceedings, to decide against the use of video conferencing of its own motion or at the request of the person or of his/her counsel, if such use is shown by the facts of the case or by any other circumstance to be liable to impair their discernment, if the examination of the case requires a hearing in the presence of the person concerned, if a technical difficulty has arisen, or if the confidentiality of the means of transmission is not certified.

**10/** Where proceedings are public, the courtrooms needed for audiovisual telecommunication must without exception be open to the public. Where not public, confidentiality must rather be ensured. In particular, a record of both parties' submissions, drawn up by a person authorised to do so by whoever issues the decision, must certify retrospectively that the admission of the public was made possible or, conversely, that the staff responsible for the custody of the person deprived of liberty did not intervene in the proceedings on any account; it must mention the general conditions under which the operation was carried out.

**11/** In every case, it must be ensured that counsel (or any third party, if authorised to act in defence) is present and, if not present, must at all times be able to confer with the person on trial with guaranteed confidentiality. The aforementioned record must establish this.

**12/** In matters to be determined where factual questions (particularly of evidence) outweigh strictly legal questions, or where the character or the explications of the person concerned are a decisive factor in the decision to be taken.

On the other hand, video conferencing must be possible in a very general way for hearings of a purely formal or purely legal nature.

At all events, there can be no obligation to employ video conferencing, except in the following three (alternative) circumstances, which a legislative text should settle: if counsel could not otherwise assist the person concerned; if a hearing with the person present is liable to pose a serious and documented threat to public order, particularly the physical integrity of the person appearing, of third parties, of victims or of witnesses; finally, if it constitutes the sole means of complying with the reasonable time within which the procedure must be completed.

**13/** The savings made on extraction costs or the difficulties of marshalling the necessary escorts do not in principle constitute adequate grounds for resorting to video conferencing.

**14/** Whatever the circumstances of its use, the decision to employ video conferencing must be taken case by case and solely by the authority holding responsibility for the proceedings and for the decision. As provided by the Public Health Code for psychiatric treatment without consent, it must be linked with the possibility for the judge, where the person to appear cannot be moved, to resort to an external hearing. This must be conceived, far more so than video conferencing, as an alternative to the hearing in court where the situation precludes transport for appearance.

These are the considerations that should guide a policy yet to be determined, which cannot be the upshot of immediate necessities.

## Urgent recommendations of 30<sup>th</sup> November 2011<sup>52</sup> concerning the Nouméa prison

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1/ As an exception to the standard provisions of the law under which the *Contrôleur général des lieux de privation de liberté* (CGLPL) exercises his functions, the legislator has provided, in §2 of article 9 of the law of 30<sup>th</sup> October 2007, an emergency procedure as follows:

*"If the Contrôleur général des lieux de privation de liberté is aware of any serious violation of the fundamental rights of persons deprived of their liberty, he may immediately communicate his findings to the appropriate authorities, giving them a date by which they must respond and, at this date, he may determine whether the said violations have ceased".* If he deems it necessary, he may *"immediately render public the contents of his findings and the responses received"*.<sup>53</sup>

The *contrôle général* has not misused this procedure. Up to the present, in urgent cases, concerning specific individuals, efforts have been made to stop such serious violations of fundamental rights uncovered during visits by dealing directly with the local authorities concerned.

2/ What was observed during a surprise visit by four inspectors to Nouméa prison, called Camp Est, in New Caledonia,<sup>54</sup> from Tuesday 11<sup>th</sup> to Monday 17<sup>th</sup> October 2011, is a clear example, by its extent, of a serious violation of the fundamental rights of a significant number of people. The *Contrôleur Général* thus deemed it appropriate to invoke the above-mentioned emergency procedure and, in consequence, sent his findings to the Ministry of Justice in a letter dated 25<sup>th</sup> October 2011. The Ministry was asked to respond with its observations by 18<sup>th</sup> November of the same year, thus allowing a period of slightly more than three weeks. These observations were received on 2<sup>nd</sup> December, some fifteen days after the deadline fixed. The *Contrôleur Général*

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<sup>52</sup> Published in the *Journal Officiel de la République française* of 6<sup>th</sup> December 2011, text n°72.

<sup>53</sup> Emergency procedure under §2 of article 9 of the French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cglpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)

<sup>54</sup> Overseas territory for which the *Contrôle général* has jurisdiction according to article 16 of the law of 30<sup>th</sup> October 2007 as well as the 1<sup>st</sup>§ of article 6-2 of the modified organic law n°99-209 of 19<sup>th</sup> March 1999.

therefore decided to publish the following recommendations, which in no way prevents the usual procedure from following its course - the situation uncovered during the visit to the prison will naturally be the subject of a full report in the coming days, a report that will be sent to the usual authorities and follow the usual procedure.

3/ The way the establishment is run and its current state can be described as follows.

Prisoners are crammed into filthy cells where they suffer from chronic overcrowding that is close to 200% in the long-term detention centre and partial release section and reaches 300% in the remand prison. At the time of the visit, there were 438 persons incarcerated and accommodated<sup>55</sup> in an institution designed for 218 people.<sup>56</sup>

3.1/ The remand prison building consists of 12m<sup>2</sup> cells accommodating up to six people, whereas the prisons administration norms allow for just two. Each cell has three bunk beds on one side, two bunk beds on the other side and frequently a mattress in between the two sets of beds, simply placed on the filthy, damp floor where rats and cockroaches abound. At the time of the inspectors' visit, twenty-seven of the thirty-four cells that comprise the remand prison section had such a mattress on the floor, giving a total population of 204 for a nominal capacity of sixty-eight places. At night, the person occupying the mattress risks being trodden on by a fellow prisoner getting up to go to the toilet, which is squat type, and situated in a corner of the cell with no possibility of privacy, despite the efforts of the prisoners to hang some fabric around it. The heat inside the cells rapidly becomes unbearable; fans either do not work or are non-existent in some cells, where they are frequently not replaced if the prison management believes that the prisoners are responsible for the damage. The usual practice to combat the excessive heat is to periodically flood the cells. The pipes bringing water to the toilets have been by-passed to provide a shower without the slightest protection for the electrical installations, which are frequently damaged (exposed wires, broken switches). Many washbasins - which only provide cold water - have

<sup>55</sup> The prison also handles people under electronic tagging or placed in an external facility.

<sup>56</sup> The occupation rate by section was as follows: 300% in the men's remand prison, 198% in the open detention centre, 188% in the closed detention centre, 100% in the general services section, 61% in the young offenders' unit, 57% in the women's prison and 200% in the partial release centre.



no permanent means for evacuating the water; a bucket under the plughole suffices. Cells have no refrigerator, no kettle and no heating stove. The ventilation grills are often obstructed to prevent rats from entering the cells. Nonetheless, these rodents do manage to get in and feed on the the left-overs from meals which, through a lack of any closed space, are left on shelves or in door-less cupboards. Frequent backing up of sewage produces a disgusting stench in the cells. All the cells are encumbered with clothes drying on improvised clothes' lines made from cut-up sheets.

3.2/ The open detention centre section comprises five 'units'. Each unit consists of rooms measuring  $8\text{m}^2$ , each occupied by two people, with no more separation than thin walls 2.5m high topped with, for a ceiling, a grating placed beneath the roof of the building. To protect themselves from the rats that roam around above, the prisoners have suspended sheets beneath the grating. In each room, a toilet occupies a corner separated on just one of the open sides by a small 'wall' 90 cm high. Prisoners are free to walk around in the unit. In the absence of any door, they place soiled linen at the entrance to the rooms. Electrical circuits are in large part damaged: absence of lamps, broken switches, exposed wires. Several of the drainage pipes for dirty water from the washing area - three showers without shower-heads and three toilets - were blocked. In front of each unit there is a  $120\text{m}^2$  (12m by 10m) garden enclosed by wire netting which prisoners can use for a few hours each day. The rest of the time, prisoners amble around inside the unit, with no other distraction available than watching the sole television screen provided. These buildings have no video surveillance system. At the time of the visit, some 113 individuals were accommodated in this section, designed for fifty-seven people.

3.3/ The long-term closed detention centre section houses people serving long sentences - including life - and comprises two units with two-person cells of between  $8$  and  $10\text{m}^2$  and one unit with communal sections comprising three contiguous cells, which means that seven or eight people are housed in a space of some  $24\text{m}^2$ . Almost all cells have several clothes' lines strung across them. The striking lack of storage furniture means that the prisoners pile their personal belongings where they can, mainly under the beds. Storage space is built using whatever is found to be suitable: the protective wire casings of electric fans are used as suspended baskets to hold food out of the reach of rats, and planks of wood have been attached to the window bars to

act as shelving. The communal sections benefit from very little natural light and are generally in an extremely untidy state caused by the overcrowding. The toilet area is in the central part and there is clear evidence of damp from the leaking sanitary installations. There is no possibility for single occupation of cells. At the time of the visit, sixty individuals were accommodated in this section, designed for thirty-two people.

3.4/ The partial release section is a unit similar to those in the long-term detention centre. Five door-less rooms of less than 6m<sup>2</sup>, each containing two or three bunk beds without a ladder, adjacent to the toilet from which they are separated by a low barrier one metre high. Various fabric materials have been stretched across the doorways and in front of the toilet. Four cells with two beds each have been added in metallic structures similar to those used temporarily on construction sites. At the time of the visit, for a theoretical capacity of nine there were eighteen people accommodated here. At the end of the building there is an area for ablutions with a single zinc washbasin and two shower cubicles, none of which has hot water. In the middle of the unit there is a space, taking the whole width of the building, which serves as a 'common room'. It is furnished with a large table and a metallic sink. There is also the the only television as well as a hammock and two mattresses which have been removed from another room, which is now used as the toilet by all the prisoners.

4/ The punishment and solitary confinement cells are in a quite disgusting state. At the end of each cell there is the 'toilet corner': the walls are abominably filthy with excrement and marks of damp, and the toilet bowls are indelibly stained. In the solitary confinement cells showers are taken with no protection on the floor although the 'cubicle' is fully contiguous with the squat toilets. Sewage smells are particularly strong and persistent. The cells are frequently flooded.

There are almost no activities available: there is no workshop employment and the only vocational training on offer attracts no more than a dozen people. In the remand prison, exercise sessions are for just half an hour per half day, which means that prisoners spend between 22 and 23 hours a day confined to their cells. The poor state of the sports field - uneven and full of stones - causes frequent injuries, especially since most of those who use it have no financial resources and so play either barefoot or wearing just flip-flops.

Prisoners have no access to a telephone, contrary to the requirements of article 39 of the Penitentiary law of 24<sup>th</sup> November 2009.<sup>57</sup> The institution has no telephone booth and has never arranged for any prisoner to use the department's telephones.

It is impossible to make an appointment to use the visiting rooms. Families arrive having sometimes made very long journeys, for example from the Northern Province - a few hundred kilometres by coach - or even from the Loyalty Islands.

They have to wait outside and are admitted to the visiting room on a first come first served basis. Lengthy conversations are not always granted to those who come from afar – there are even cases of some having to leave without having seen the person concerned.

The medical centre is situated within the remand prison. This creates problems for transiting prisoners and for women and minors to gain access and, coupled with the shortage of medical staff and the small capacity of the waiting rooms, means that access to healthcare is problematic - to such an extent that there is frequently a greater than 60% of absenteeism among those expected to attend. Drugs, medicines and other medical supplies are given to prisoners in their cells without any guarantee that they are given to the correct person, due largely to the overcrowding and the frequent reallocation which render proper identification uncertain.

5/ The running and the physical state of the prison thus appear to constitute a serious violation of the rights of the prisoners; the staff – remarkably dedicated and committed – are clearly both exhausted and very concerned about the absence of any perspective for the institution.

The *Contrôle général* shares the opinion given concerning the drama that occurred during the present mission<sup>58</sup> which stated that it "*could not be dissociated from the inevitable consequences brought about by the overcrowding and the prevailing conditions of detention*".

6/ Such circumstances are clearly not unknown to the local

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<sup>57</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French). Applicable throughout New Caledonia, according to article 99.

<sup>58</sup> A murder was committed during the night in one of the remand prison's cells occupied by six people.

representatives of the State, and the people to whom the inspectors spoke did not hide their concerns. Some of these people had also made these concerns known on several occasions to the municipal authorities in Nouméa. At a national level, the Chancery made public on 5<sup>th</sup> May 2011 a project for "*the restoration and extension of the Nouméa prison bringing the capacity to close to 500 places, with the first stage being ready in 2016*".

7/ The situation is all the more worrying in that today there is no alternative solution available for a rapid alleviation of the current serious difficulties.

As has already been notified to the Minister of Justice, it is possible to address the current situation by a phased programme of replacing the existing dilapidated buildings one by one with new ones. The first operation would be the already planned new centre for reduced sentence prisoners within the grounds of the existing institution.

However, this construction is currently blocked. According to the 17<sup>th</sup> paragraph of article L. 122-20 of the New Caledonian Urban Code, the granting of building permits is the responsibility of the City of Nouméa. To date the permit for this operation has not been granted. According to the information at hand, this permit will only be granted if the State commits to relocate the prison elsewhere, since the current site is considered as a prime location for urban development.

Thus, the High Commission, working with the the local authorities, has been actively seeking appropriate alternative sites. It has become apparent, though, that none of the seven possible sites identified offers any real solution, either because of the institution's way of working or because of the likely budget.

8/ Whatever the situation, rebuilding on the existing site is in no way equivalent to moving to another site. The first option will enable a solution, albeit gradual, that can start immediately, something that offers much-needed respite for prisoners and prison staff alike. The second option, even supposing it to be feasible, means a much larger project and a probable lead-time of around a decade before any new facility would see the light of day.

The current imbroglio, implicating both the State and the Nouméa city authorities, results in a continuation of the serious violations of the rights of the prisoners of *Camp Est*.

9/ In the current circumstances, the *Contrôleur général* is obliged to conclude that the stated violations have not ceased.



Shared cell in a remand prison of an overseas territory of France

# Opinion of 22<sup>nd</sup> May 2012<sup>59</sup> concerning the number of prisoners

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1/ Data concerning the number of prisoners give cause for concern and attract a great deal of attention, in particular from the authorities, which is why the *contrôle général des lieux de privation de liberté* has not until now considered it appropriate to publish an opinion exclusively dedicated to a subject which has often been studied by national leaders<sup>60</sup> and various international authorities.<sup>61</sup> Furthermore, drawing inspiration from the assessments of the European Court of Human Rights,<sup>62</sup> French judges have already found the State to be liable in this area.<sup>63</sup> Finally, the question was, in a certain manner, settled by the Penitentiary law of 24<sup>th</sup> November 2009<sup>64</sup> which provides that "*cells shall be suitable for the number of prisoners accommodated in them*" (article 716 of the Code of Criminal Procedure). The *contrôle général* was all the less inclined to assert its own point of view since the difficulties of the national prison system are not accurately reflected by the number of persons imprisoned, when taken in isolation, while unfortunately being too often reduced to the latter consideration.

However the current scale of prison overcrowding and the size of the growth thereof calls for an analysis of its causes in order to distinguish

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<sup>59</sup> Published in the *Journal Officiel de la République française* of 13<sup>th</sup> June 2012, text n°86.

<sup>60</sup> cf. for example the *proposition de loi* ["private member's bill"] of Messrs Raimbourg et al., n°2 753 (amended) of 13<sup>th</sup> July 2010.

<sup>61</sup> cf. for example the Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on the effective respect for human rights in France, following his visit from 5<sup>th</sup> to 21<sup>st</sup> September 2005, Strasbourg, 15<sup>th</sup> February 2006, in particular §§ 70 to 81; the various reports of the European Committee for the Prevention of Torture, including the most recent to date, following its visit to France of 28<sup>th</sup> November to 10<sup>th</sup> December 2010, adopted on 8<sup>th</sup> July 2011 (§§ 59 and 60).

<sup>62</sup> In particular, ECtHR, 26<sup>th</sup> October 2000, Kudla v. Pologne, in *Les grands arrêts de la CEDH* ["Major Rulings of the ECtHR"], 5<sup>th</sup> ed., n°14, p.152, §94; 6<sup>th</sup> March 2001, *Dougou v. Greece*, n°40907/98 (Sect. 3), ECtHR 2001-II, §46; 19<sup>th</sup> April 2001, *Peers v. Greece*, n°28524/95 (Sect. 2) ECtHR 2001-III, §72.

<sup>63</sup> For example, Administrative Court of Appeal (CAA) of Douai (1<sup>st</sup> ch) 12<sup>th</sup> November 2009, n°09DA00782; ord. pdt. [order by the presiding judge] CAA Douai, 26<sup>th</sup> April 2012, n°11DA01130.

<sup>64</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000021312171&categorieLien=id> (in French).

a number of sustainable solutions.

2/ Overcrowding cannot in itself be defined, independently of any analysis of the facts, as an infringement of prisoners' fundamental rights. However, the considerable worsening of conditions of existence and the breakdowns that can result therefrom with regard to personal and collective life within each institution can lead to such infringements, as both national judges and the European Court of Human Rights have ruled. In the reports handed over to the authorities, the *Contrôle général* has often called attention to this aspect.

3/ This is not the first time that French prisons have suffered from this difficulty. In the past, institutions were even fuller than they are today. Overcrowding is a chronic problem within them. For twenty-five years, the number of prisoners has continually been greater than the number of available places, with the exception of a balance attained at the beginning of this century. However, rapid growth in recent months constitutes a worrying trend and makes it necessary to identify the causes of this phenomenon in the most precise manner possible.

The increase in the prison population does not reflect national demographic growth. The former is much more rapid than the latter. Above all, it is necessary to thoroughly rid oneself of the common idea that the number of prison inmates is linked to the state of crime in the country and that the greater the increase in the crime rate the fuller the prisons become (and moreover, as a consequence, that a higher number of prisoners constitutes more conclusive proof of levels of insecurity). The relation between the latter and the prison population is very indirect. Moreover, the observed number of indictable offences and serious crimes (the only source of criminal convictions and therefore of imprisonment) for every 1'000 inhabitants has fallen continuously over recent years (51.7 in 2001, 34.8 in 2010).<sup>65</sup>

Almost twenty-four thousand persons were on remand or serving sentences in France at 1<sup>st</sup> May 2012. If from this number one removes those serving their sentences in whole or in part under various different regimes on the outside, there remain more than sixty-seven thousand persons in permanent detention for a total of more fifty-

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<sup>65</sup> 'Criminality in France', Report of the *Observatoire national de la délinquance et des réponses pénales* (French National Supervisory Body on Crime and Punishment) for 2011; Report of the *Contrôleur général des lieux de privation de liberté* for 2011.

seven thousand prison places. Furthermore, on the one hand, the ratio of overcrowding (117%) drawn from comparison of the number of places and occupants is nothing more than a meaningless average, since a *de facto* *numerus clausus* operates in prisons for convicted prisoners, leading to levels of occupation which never exceed 100%. Conversely, however, occupation levels can, by way of consequence, be much higher in remand prisons. In one of the latter institutions, in the East of France, inspected by the *Contrôle général* last year, 163 prisoners were living in a facility providing seventy-seven places (i.e. a rate of overcrowding of 212%); the same year, another institution inspected, in the Centre West region of France, numbered seventy-eight inmates for thirty-five places (i.e. a rate of overcrowding of 223%). Moreover, the concept of a prison "place" is remarkably flexible. Thus, one West Indian remand prison inspected in theory contained one hundred and thirty places, but 244 beds<sup>66</sup> (that is to say an excess capacity of 188%); another in the centre of Metropolitan France theoretically possessed twenty-two places, but actually had 154 "in practice" (i.e. an excess capacity level of 126%); in order to increase the "theoretical" number it suffices, for example, to simply place two bunks in an individual cell or three in a double cell, without moreover the rest of the furniture generally being increased to the same extent, due to lack of space. This situation prevails in spite of the assertion of the principle of placement in individual cells, which is subject to a moratorium until 2014 in remand prisons.<sup>67</sup>

4/ Three causes of increase in the number of persons imprisoned should be identified.

In the first place, offences which lead to the pronouncement of prison sentences vary over time, according to changing definitions of offences and contemporary sensibilities. By way of example, without any intention of here making value judgements about these changes, in contrast to the past, simple larceny henceforth hardly ever leads

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<sup>66</sup> The particularly worrying situation in French overseas territories (cf. Opinion of the French *Contrôleur général des lieux de privation de liberté* of 30<sup>th</sup> June 2010 concerning the remand prison of Mayotte – *Journal Officiel* of 25<sup>th</sup> July 2010 – and recommendation concerning the prison of Nouméa – *Journal Officiel* of 6<sup>th</sup> December 2011; also cf. the report of the French *Contrôleur général des lieux de privation de liberté* for 2011, loc. cit. p.71) merits special examination which will not be undertaken within the framework of this opinion.

<sup>67</sup> Article 100 of the Penitentiary law of 24<sup>th</sup> November 2009.



to prison; on the other hand, "road traffic violence" is now punished with imprisonment, which represents a change as compared with the recent past. Offences which were not prosecuted in the past now give rise to charges and, possibly, to the imprisonment of greater numbers of people than was previously the case.

In the second place, the law has developed more rapid trial procedures and judges now give harsher sentences than in the past for similar offences. The prison population is therefore growing with numerous prisoners placed in detention, that is to say pending trial, for short sentences; however, it is also increasing "at the other end", due to considerable growth in the number of long and very long sentences passed. In addition to these long term considerations, well-known specific measures, which have the result of making imprisonment easier through the introduction of mandatory sentencing, a common practice under Anglo-Saxon law, have been adapted in France by means of "minimum sentencing" measures. A report from the French Senate has pointed out that, pursuant to measures of this kind (the Californian Three-Strikes Law of 1994), an American citizen having committed similar previous offences ended up serving life imprisonment for the theft of a spare car wheel.

In the third place, short-term measures can be a factor adding extra prisoners. Current overcrowding is partly explained by the efforts made in the courts, in the course of the last eighteen months, to ensure faster enforcement of (short) sentences passed, until then unevenly followed up due to overloading of the courts.

These factors provide the principal explanation for the fact that, were current rulings to resemble those of forty years ago, all things being equal, the number of prisoners in French prisons would be approximately halved.

5/ The consequences of this situation are less well-known, apart from the ritually (but well-justified) mention made of mattresses on the ground.<sup>68</sup> It naturally worsens lack of privacy and risks of conflict within cells; consolidates inactivity due to greater shortage of access to work and activities; reduces possibilities of dialogue and care on the part of prison officers and the possibility of relations (telephone, visiting room sessions) with the outside; reduces the effectiveness of

<sup>68</sup> In this field see the Report of the *Contrôle général des lieux de privation de liberté* for 2008, pp.28-30.

rehabilitation efforts; and damages working conditions for staff, as manifested in the current strong feeling of abandonment, and all the more so since workforce levels are calculated according to prisoner numbers that correspond to the number of places. The European Commissioner for Human Rights thus notes (aforementioned report) with regard to persons accommodated in overcrowded cells: *"Their life becomes even more difficult since the State does not succeed in procuring the conditions that are provided for them under its legislation. These persons are thus doubly punished"*. In short, by making prison into a caricature of itself,<sup>69</sup> the current prison system is at great risk, against its role and in spite of the resources invested, of leading to inadequately prepared releases, which therefore, *nolens volens*, promote repeat offending and recidivism.

6/ For more than ten years, it has been believed that difficulties could be resolved by attempting to identify the "dangerousness" of each convicted person in order to personalise their penal sanctions and, within certain limits, by using such personalisation to separate the length of the stay and type of imprisonment from the seriousness of the offence. However, this approach is largely illusory. Apart from endangering the principles of our criminal law and raising questions as to the possibility of determining the risk of reoffending present within an offender's personality, the fact cannot be ignored that all prisoners are ultimately intended for release and that the question of their rehabilitation is therefore posed: our society should be organised accordingly, rather than pretending to believe in some impossible (because unrealistic) *lex talionis*.

Over the last twenty-five years the construction of new institutions was also believed to provide a response. Several justifications were put forward in support of this choice. Two of these can hardly be disputed: in the first place, it is necessary to put right the dilapidation typical of far too many prisons, which gives rise to living and working conditions unworthy of the persons deprived of liberty and staff employed there; the second justification was the attempt to succeed in offering individual cells to prisoners who so wished, in accordance with the principle of French law recalled above. However, other justifications, of a clearly more security-oriented tone, have also been put forward,

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<sup>69</sup> In this situation, the principle of placement in individual cells, once again reasserted by the Penitentiary law of 24<sup>th</sup> November 2009 and continually deferred, obviously cannot be applied.

dispensing with the need to determine levels of effectiveness as far as prison is concerned, including with regard to security, justifications which are, all in all, paradoxical in a society in which observed crime is decreasing.

A programme of this kind cannot be pursued without reflection on its cost<sup>70</sup> and above all about the kind of institutions to which it leads, a difficulty to which the *Contrôleur général* has already called the authorities' attention. Public funds should be redirected to the renovation of remand prisons, wherever possible. Only where existing premises do not enable the development of activities pertaining to a prison worthy of the name should the reconstruction of urban institutions of small dimensions be considered.

However, the number of prison places that our country intends to have at its disposal indeed needs to be determined in a rational manner and, to this end, a certain number of short and long-term projections need to be made with regard to crimes leading to prison sentences, the length thereof, the use made of pre-trial detention, the scope of reduced sentencing and the place of individual cells in prison. The only justification provided in the impact study for the recent act on the enforcement of sentences was the "average annual level of growth" in the number of custodial sentences observed for the 2003-2011 period, which constitutes a weak basis.<sup>71</sup> In all probability, on the condition of the implementation of the whole of the measures suggested below, it is unnecessary to go much further than the construction programme currently in course of completion, except in the specific cases of certain institutions requiring replacement, in Metropolitan France and overseas.

Under these conditions, is it necessary to introduce a *numerus clausus*, as has been called for, applicable to the system as a whole,

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<sup>70</sup> The planned public-private partnerships will place a long-term burden upon ministerial operational funding and endanger the Ministry's adaptation to future changes.

<sup>71</sup> The reference to the average number of prisoners in relation to the number of inhabitants (100 out of 100'000) in the countries of the Council of Europe is similarly fragile, France being judged to be below this average (from which it is inferred that the prison population should be increased): this is to forget that, for reasons connected to their history, which is very different to our own, in many Eastern European countries (members of the Council of Europe), the number of prisoners often remains considerably higher, in Russia in particular.

so that prisons are only able to accommodate numbers of inmates that correspond to the number of places they possess? Apart from the fact that the latter is, as already mentioned, relatively flexible, it appears highly delicate to make committal to prison or the shortening of sentences dependent upon practical factors devoid of any relation with the principles governing criminal law, the offender's personality and the seriousness of the act committed, and carries the risk of endangering the principle of sentencing according to defendants' individual requirement, which the Constitutional Council (of France) draws from article 8 of the Declaration of the Rights of Man.<sup>72</sup> On the other hand, as the *contrôle général* has already observed, knowledge of the situation in prisons coming within the jurisdiction of courts among members of the national legal service within the State Prosecutor's Office, may be an element for reflection with regard to prison committal intake flows.

7/ There is no single solution for putting right a state of fact, which nobody truly controls at present. On the contrary it requires a whole range of reflection and both long and short-term measures.

8/ Naturally, in the first place it is appropriate to question the economic and social effectiveness of current forms of imprisonment. This involves three considerations: the enforcement of sanctions – it is important pay attention thereto and, in this respect, the principle of enforcement of judicial decisions cannot be questioned; the security of persons and property; released prisoners' capacity to lead their existence without committing offences; the latter two factors being connected. More practically speaking, one may ask the question of whether prison is effective, for example, in order for dependent drug addicts to free themselves from drug use having led them to commit repeated thefts. In doing so, the need for punishment is in no way called into question: this need can never be placed in doubt. The question is only concerned with the adaptation of its form to the offence committed.

This question is all the more pertinent insofar as prisons, in spite of unquestionable progress, based upon numerous praiseworthy undertakings on the part of staff, are very lacking in resources as far

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<sup>72</sup> See for example *Conseil constitutionnel* n°80-127 DC, 20<sup>th</sup> January 1981 (Law reinforcing security, consid. 15 and 16) and n°2011-625 DC, 10<sup>th</sup> March 2011 (LOPPSI, consid. 20, 21, 26 and 27).

as this point is concerned. Provision of specialist services to prisoners who request, or may be required to receive them (orders for medical treatment etc.) is very insufficient and in some cases even pathetic. Only a minority of persons in prison follow courses of treatment or learning and engage in making fundamental changes to their behaviour. The necessary staff, space, equipment and even regulations are too often lacking.<sup>73</sup> It is not inconceivable to imagine that prison might be a convenient place for people (and persons suffering from mental illness in particular) in the absence of more suitable places and means elsewhere.<sup>74</sup>

The need for adaptation of the punishment to the crime committed and to give real attention to security requires twofold reflection: with regard to certain punishments provided for in the Penal Code; as well as with regard to new forms of criminal sanctions, more effective than those currently existing, in the light of the factors mentioned above.

9/ It would also be appropriate to reflect upon the manner of operation of our criminal courts, which are in an even more delicate situation, in spite of the efforts accomplished by the authorities and those who work in them. Five questions, which are at the heart of this subject, need to be mentioned in order to enable their detailed examination.

Access to the courts for the most modest social categories – one is here thinking of both the victims and perpetrators of offences – constitutes a real concern. Finding a counsel able to devote their time to one's case and being able to pay them for their commitment still presents great difficulties. This causes many people to feel, rightly or wrongly, that they were not defended and that they have therefore been the victims of injustice. Most prisoners endure the prison system as best they can; few give credit to the functioning of the legal system, above all with regard to the possibility provided to them of explaining themselves. It is impossible not to make a connection between these feelings and the large number of sentences delivered against persons lacking financial resources.

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<sup>73</sup> cf. Opinion of the French *Contrôleur général des lieux de privation de liberté* concerning access to IT facilities for persons deprived of their liberty (*Journal Officiel* of 12<sup>th</sup> July 2011).

<sup>74</sup> The opening of three UHSA (Specially-equipped hospitalisation unit) in Lyon, Toulouse and Nancy is a considerable improvement; it should be followed by other planned openings. However, it should be recalled that epidemiological studies count around fifteen thousand persons suffering from mental conditions in prison.

The time allocated to judges, the latter having had occasion to bring their questions in this respect to public attention, also deserves consideration. On the one hand, there is a striking dichotomy between the preparation of difficult cases for trial and criminal trials for which time is no object (Assize Court trials are longer today than in the past) and, on the other hand, the handling of the series of what are considered to be banal cases, which are nevertheless of decisive importance with regard to individual futures. Many persons encountered rightly or wrongly feel that they were not heard. Improved balance would be desirable. On the other hand, there is a lack of time for more invisible but nevertheless equally necessary occupations. These include the need to see the prison: admittedly, judges responsible for the execution of sentences and deputy public prosecutors in charge of the enforcement of sentences regularly go to the latter. But what about other judges, and in particular those who deliver prison sentences? *"I am obliged to urge professionals to go and visit prisons"* explains one renowned public prosecutor. The presence of members of the national legal service in prison should be increased alongside greater control on their part.

Although the proportion of prisoners on remand within the prison population as a whole henceforth corresponds to the European average (it was long higher in France than elsewhere), in line with what is also being sought in Europe, efforts should be undertaken in order to substantially reduce use of pre-trial detention<sup>75</sup> and develop alternatives (of the "house arrest" type in use elsewhere).

The results and effectiveness of the legislative mechanisms that lead to the virtually automatic pronouncement of prison sentences (subject to special grounds) need to be closely examined, in accordance with the abovementioned criteria, in order to determine whether or not they should be maintained in the light of this examination.

Similarly, the reduced sentencing policy, which for several years has been in turn promoted and limited, requires consideration. In this respect, the penitentiary law of 24<sup>th</sup> November 2009 represents a real step forward which needs to be consolidated. A large increase in reduced sentencing is currently noted, in particular as part of the expansion of alternatives to imprisonment (which increased by almost

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<sup>75</sup> cf. Recommendation of the Committee of Ministers of the Council of Europe of 27<sup>th</sup> September 2006 (Rec (2006)13).

29% between May 2011 and May 2012). However, this data should not give rise to excessive enthusiasm: it is principally based upon an increase in the use of electronic tagging (2'500 tagging device "straps" at 1<sup>st</sup> January 2008; 9'500 at 1<sup>st</sup> May 2012), of which trials in countries using them henceforth indicate that they are not bearable for periods of longer than a few months. In other words, electronic tagging is a means of regulating prisoner numbers, the effects of which will remain quantitatively limited.

On the other hand, efforts need to be made in the field of day-release (neglected due to growth in the number of tagging "straps") and partial release (for various different reasons, certain open prisons remain underused and national regulations – with regard to opening times for example – should be applied to them).<sup>76</sup> Deferment of sentences on medical grounds, defined under the law of 4<sup>th</sup> March 2002,<sup>77</sup> is not sufficiently used: the conditions thereof have subsequently hardened and need to be re-examined, at least insofar as the appointed experts need to be better informed of the realities of prison (use of doctors practicing in UCSA prison medical consultation and outpatient treatment units). Seriously handicapped persons are encountered in prison, whose conditions of existence are shameful. Finally, reflection needs to be conducted with regard to the old-fashioned mode of judicial supervision, which needs to be overhauled, as well as concerning community service, which due to the lack of a sufficient number of offers, is hardly increasing.

**10/** Finally, in the short term, the implementation of short sentences that have remained unenforced for periods of one or two years, due to lack of provision of the necessary means to court registries, results in damage to the social rehabilitation of those convicted prisoners who, after the trial, have recommenced a professional life and social relations. Although no exceptions should be made to the application of sentences, as pointed out above, the latter still need to be implemented within reasonable deadlines. A decision needs to be taken in order to ensure that this principle will henceforth be strictly applied, alongside provision of the necessary means to registries.

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<sup>76</sup> The *Contrôleur général des lieux de privation de liberté* reserves the right to come back on this issue.

<sup>77</sup> French law n°2002-303 of 4<sup>th</sup> March 2002 on the rights of ill persons and the quality of the health system: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000227015> (in French).

However, the past (unenforced sentences passed before 2012) needs to be wiped out by means of a special amnesty, which would apply – this point needs to be emphasised – solely with regard to offenders having received light sentences; and if a measure of this kind were to appear impossible, judges responsible for the execution of sentences should give favourable consideration, within the framework of article 723-15 of the Code of Criminal Procedure, to the manner in which sentences should be enforced with regard to this population, giving preference to alternatives to imprisonment: however, in order to have an impact, this measure requires the holding of conferences aimed at establishing real reduced sentencing policies within the framework of each court of appeal, which of course need to respect the independence of judges.

More generally speaking, the authorities will be confirmed in this measure insofar as, on the one hand, no amnesty was voted at the time of the Presidential elections of 2007 and 2012 and, on the other hand, that no decree of pardon is henceforth made at the time of the *Fête Nationale* (national holiday). Although the latter point ought to have unanimous support, and it would be desirable for amnesties to no longer have the character of measures taken by force of circumstance, it should nevertheless be acknowledged that amnesties constitute neither a legal incongruity, nor a strange practice within a democratic context and that the disappearance thereof from the national legislative arena should be cause for surprise. It would probably be harmful for Parliament not to be able to vote measures of this kind - though the reasons for such a situation be evident - the appropriateness and shape of which it is incumbent upon it to determine: the justification for a measure of this kind at the present time is scarcely questionable.





Corridor of a remand prison

## Opinion of 26<sup>th</sup> September 2012<sup>78</sup> concerning the implementation of the partial-release scheme

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1/ Partial release is a specific procedure for serving a sentence. The convicted prisoner is placed under this regime in three cases: either when the sentencing judge decides to do so, in the case of a sentence of less than or equal to two years of imprisonment (article 132-25 of the Criminal code); or, according to the same condition concerning the length of the sentence to be served, when the judge responsible for the execution of sentences, to which the matter has been referred by the prosecution, decides that this sentence must be executed according to this procedure (article 723-15 of the Code of criminal procedure); or, lastly, when this same judge decides, in principle after hearing both parties, that a sentence that has already begun may continue under the partial-release regime. Most of those under partial release therefore come directly from a state of liberty; persons who were previously in prison under general law are a minority.

Partial release is granted subject to probation (for example, Cass. Crim. 2<sup>nd</sup> September 2009). This means that it may be revoked by the judge responsible for the execution of sentences if its beneficiary does not comply with the obligations associated with the regime. These are numerous (see the case of partial release under the probation regime, articles 132-44 and 132-45 of the Criminal code). They most often consist of setting the times during which the person concerned may exercise a professional activity or seek work, outside which they must be present in the penal institution, meaning either an independent open prison or an open wing within an ordinary prison. They also take the form of interviews with social workers from the prison administration (prison advisers on employability and probation) and, frequently, include the obligation to receive treatment or any other activity to promote employability, intended to prevent recidivism. These conditions appear rather lax. They are, in practice, very onerous; this is why partial release can, in reality, only last for a limited period (several months).

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<sup>78</sup> Published in the *Journal Officiel de la République française* of 23<sup>rd</sup> October 2012, text n°62.

2/ The persons placed under this regime by the judge are therefore subjected to restrictions. They are committed to prison and deprived of their freedom of movement. The fact that it may be possible for them to leave the institution at certain times does not, of course, exempt the public authorities from "*ensuring that all prisoners are held in conditions that are compatible with human dignity*" (European Court of human rights, Gr. ch., 26<sup>th</sup> October 2000, *Kudła v. Poland*, n°30210/96; for a recent application of this established legal precedent: European Court of human rights, 3<sup>rd</sup> sect., 24<sup>th</sup> July 2012, *Fülöp v. Romania*, n°18999/04).

3/ On 1<sup>st</sup> January 2012, 1'857 persons were placed under this regime. The prisons administration department has eleven open prisons and seven open wings offering 768 places, representing a rate of occupation of 241%, greater than the rate of occupation of institutions coming under general law. This rate is probably less: many institutions have cells assigned to those under partial release, which do not come within the seven duly listed sections. This uncertainty is also indicative of the interest shown in it. In any case, the rate of occupation is high. To increase the available capacity, beds have been added: in one centre of seventy-four places that was visited, there were one hundred and forty beds (practically a doubling). It is therefore common, as found by the *Contrôleur général des lieux de privation de liberté* in an institution, to have three beds (two of which are superimposed) in 9.14m<sup>2</sup>. Consequently, partial release means, for many beneficiaries, living conditions in which overcrowding and lack of privacy is the rule. The dimensions of the cells make it impossible to add furniture; for example, their occupants have one table for three and one, or at most two, cupboards for three, and one or two chairs for three.

What is more, the premises assigned to partial release are often old and not renovated. In this respect, some centres visited are constantly criticised. Thus the *Contrôleur général* was obliged to request (and obtain) the immediate closure of a dormitory in which bare electric wires were dangerously close to very damp partitions.

Lastly, there is the fact that, in many open prisons or wings, few checks are made on the state of the premises. Dormitories and cells are frequently in a state of pronounced disorder, with each new arrival settling in as best they can in a state of material discomfort, the elements of which are determined by the relative strengths of the cohabitants. This situation is most often because, for the sections or

cells, no dedicated personnel are assigned to them. Partial release is often neglected in remand prisons: no particular rules apply to it and sometimes it is not even mentioned in the institution's internal regulations. Everything happens as if no particular attention needs to be paid to it.

4/ The social workers (prison advisers on employability and probation – CPIP) are present in the open prisons in the form of office hours (most often having an “open” environment, for which the head office in the administrative Department may be distant from the institution) and in the open wings in the form of appointments in the prison (in this case, these are often of the “closed” environment, which are attached to the institution). Their numbers are often insufficient. Thus, in one prison visited in 2011, there were theoretically eleven staff, nine in practice and this had to be reduced to eight a few weeks later. A single adviser was responsible for the persons held in the open wing, the “outgoing” section and those placed under electronic surveillance. Their times of presence are not necessarily adapted to the times during which those under partial release are present: in one centre, the office was open from 9 a.m. to 12 a.m. and from 2 p.m. to 6 p.m. With the CPIP, either time off must be taken from work or interviews must be missed.

While the social workers should be concentrating on the effects of work, or treatment, or job seeking and employability, many interviews are for much more urgent purposes, particularly to obtain identity documents, which those under partial release do not have. At least for those who were previously in prison, it would be better to perform these operations during the prior detention period. It was not possible to do this, either due to staff shortages amongst social workers or because of the inflexibility of certain administrations. This means that under partial release, the support of the CPIP is related to subjects that are admittedly decisive, but have nothing to do with the personalities and the effort that has been deployed.

The consequence is that certain necessary support procedures are impossible to perform. For example, concerning alcohol, the transition from being a prisoner under general law to partial release involves an absolute prohibition on drinking. Although alcoholic drinks are prohibited in the open prisons or wings, it is possible to consume them during release hours. One of the routine problems of these places is of those under partial release coming back in the evening in a state of intoxication. Support in the matter is almost non-existent.

It should be concerned with the practical difficulties of persons, when the transition from full detention to partial release causes them.

5/ Treatment constitutes an important shortcoming of partial release as it currently functions.

Concerning health conditions and treatment to be dispensed for pathologies, those on partial release no longer have access to the arrangements covering prisons. They therefore have to find the necessary resources (often in a town where they have no knowledge of anything). They need social-security protection: certain institutions, but not the majority, have made agreements with the social-security system to accelerate the necessary applications.<sup>79</sup> They also need local health-care services: some institutions have made agreements with health centres (municipal, for example); but not all. Treatment centres do not accept those on partial release because they consider that they are not residents of the municipality.

Concerning obligations for treatment imposed by magistrates (notably in cases of addiction), the specialised centres are often overloaded and the waiting times are in weeks or months. Because partial release does not exceed several months, the obligations are not wholly, or only partly, actually followed.

6/ The access to work or training, and especially to a job when one has to be found, is made difficult for several reasons.

The primary difficulty is that certain open prisons or wings may be far removed from employment pools, even more so because as we know, over the last 25 years, new prisons have been built outside towns. Consequently, a means of transport must be found, which may be distant and scarce. One institution had planned "two wheeler" rental to resolve this difficulty: it had to abandon it due to lack of resources; its residents walk several kilometres in all weathers to reach their work, and to come back. These distances are difficult to reconcile with the hours imposed. A prisoner who is "seeking work" states that he is entitled to go out from 9 a.m. to 12 a.m. *"I have an hour's journey to get home, collect my documents, telephone or travel to companies, then I have to be back at midday"*.

The choice of establishing open prisons or wings should always favour

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<sup>79</sup> On this point, see the 2011 annual report of the *Contrôleur général des lieux de privation de liberté*, chapter 3, "Access to social rights for prisoners".

significant employment basins: this is far from being the case today. Partial release “blindly” follows the geography of penal institutions, thus causing profound inequalities. To say the least, existing means of transport and their costs should be examined. Some open prisons allow “two wheelers” belonging to prisoners to park within their premises. This practice should be general.

As these concerns are not taken into account, some open prisons or wings remain largely unoccupied, with magistrates rightly reluctant to order employment plans to take place there that carry high risks of failure.

Secondly, it is the case that the opening times of centres or wings are too restricted and incompatible with the hours of some jobs that prisoners have less difficulty finding than others (catering, building, ...). Restricting the hours is an operation that, in reality, results in reducing the chances of holding down a job. Many open prisons allow exit and return day and night. This rule should be generalised, including for the open wings.

Thirdly, the assignment of those on partial release must take into account the place of their planned employment, so that it has the greatest chance of success, given the opinion of the Court of Final Appeal (Cass. Crim. 21<sup>st</sup> November 2005) that ruled that a person on partial release could only be assigned to a place specifically planned for partial release. In a centre in the Paris suburbs, the inspectors met a person who worked as a lorry driver in the Loiret. He left the centre at three o'clock in the morning and returned after eight o'clock in the evening. However, there is an open prison at Montargis where it would have been judicious to locate him. Even if the assignment cannot always be made from the outset in relation with the place of employment, transfers should at least be able to be made upon request, with the agreement of the judge responsible for the execution of sentences. The administration has no difficulty in ordering transfers for perfectly legitimate security reasons. Successful integration into society is just as legitimate.

If these considerations are important, it is because they partly determine the future of the measure. Indeed, one of the main causes of revocation of the partial-release regime by magistrates is lack of compliance with the times of presence in the institution. The more distant it is from the place of work or various obligations, the greater

the hazards related to returning to the place of imprisonment by the deadlines (some are obviously related to the persons in question). Generally, the rate of failure of partial release, either due to revocation by the magistrate or due to escape, was 24% in one centre visited and 15% in another. This rate of failure would be reduced by improving the adaptation of partial release to the realities of the activity imposed.

7/ Partial release can only be granted if the persons to whom it applies have the necessary papers for getting a job. The practice of prefectures, which consists of not renewing the residence permits of foreign prisoners who are legitimate residents at the time of their imprisonment and whom, it is assumed, intend to remain in France, effectively deprives some of these foreigners from the option of benefiting from a partial-release measure (with no current residence permit, no job is possible, therefore no employment plan can be approved by the judge). This is a case of discrimination that has no justification with regard to the criminal penalty. It must be ended.

8/ Discipline in the sections or centres is obviously much less disrupted than under ordinary detention circumstances.

They often contain disciplinary cells, that certain managements, questioned on this point, refuse to call as such and call "waiting cells". They are used to hold persons who are detained when they return in a state of intoxication or if they commit offences (violence) during their hours of release, while they are waiting to be placed in custody, or in case of disorder (making a noise, damage, ...) on the premises, or when the judge has been requested to revoke partial release and the persons in question are waiting to be transferred to a prison (usually) or a detention centre. These confinements occur without any disciplinary procedure, simply by administrative decision, most often upon return from work in the evening.

These confinements can only be seen as either preventive measures, meaning confinement in a discipline cell by the head of the institution or his/her agent while waiting for the meeting of the discipline commission, in accordance with the provisions of article R. 57-7-18 of the code of criminal procedure; or the immediate return to ordinary detention decided by the head of the institution in application of article D. 124 of the same code. But, in the first case, none of the guarantees of the disciplinary procedure are applicable; in the second case – the most probable – the reintegration period and its conditions

are not associated with any detailed instructions and therefore no precautions. Therefore, no doctor comes to check the state of health of the person (article R. 57-7-31 of the Code): a conscientious head of an institution who wanted to call the emergency medical services for this purpose was unsuccessful in calling them out. Consequently, partial release also involves a reduction in the guarantees provided under general law to prisoners.

This measure should be precisely regulated, by distinguishing punishment from waiting (one cannot be put in a disciplinary cell while waiting for custody or return to a prison), by specifying a maximum period of holding, the rights that the person concerned still has and, above all, by defining a subsequent procedure, adapted to these institutions, allowing the person concerned to defend themselves, all the more so as such a measure may have a serious effect on his/her external activity. Encouragement should also be given to the signature of protocols between the judicial authorities and the managements of the penal institutions concerned, for the awareness and handling of incidents that occur, for a better assessment of their gravity and more appropriate follow-up.

9/ Moreover, one must wonder whether discipline in places of partial release should not be relaxed, at least in the matter of objects or substances that are prohibited. Here is the list of the latter shown in the internal regulations on an open prison: *"drugs, alcohol, canned soft drinks, portable telephones, cash, cassette recorders, DVD players, personal stereos [and necessary equipment], camera, hi-fi players, computers, hot plates, weight-training equipment, motorcycle helmet, food, coffee maker"*. Although some of these restrictions are in place for obvious reasons, others are not. For some of these goods (money, computer) the aim is probably to avoid theft, which is widespread in these places. But why not leave it to the persons concerned to determine what they want to do with their own goods? Furthermore, although the prohibition on portable telephones is justified in an open wing included in a prison where these appliances are forbidden (on this point, the *Contrôleur général* requested a change in his/her opinion of 10<sup>th</sup> January 2011 – *Journal Officiel* of 23<sup>rd</sup> January), to prevent the risk of transmission from one section to another, it has no basis in independent open prisons. Lastly, although the question



of full-body searches must be raised again for all institutions,<sup>80</sup> their performance in every case does not appear to be necessary in the open prisons. The restrictions of all kinds must be reconciled with the imperative of making a success of the ongoing employment plan (those on partial release have professional obligations) and of everything that can contribute to the social inclusion of the person in question. In this respect, partial release may be more successful in the independent centres than in the sections of institutions coming under general law, especially ordinary cells in remand prisons.

**10/** The presence of the telephone is important because no open prison or wing visited had a phone booth as is now found in conventional penal institutions. The reason sometimes given is that the concession-holder chosen for these appliances would consider such an installation unprofitable. Whatever the reason, this absence means that the right given to prisoners to telephone (article 39 of the Penitentiary law of 24<sup>th</sup> November 2009)<sup>81</sup> does not apply to those on partial release. Furthermore, the regime applied to letters lacks coherence: generally, in the independent centres, they are not opened but if (for a former “ordinary” prisoner”) they transit via the prison, they arrive opened (and sometimes stapled on arrival at the centre). Lastly, there are few provisions for family and friends to visit, which may be acceptable if they live in the neighbourhood, but this is often far from being the case.

Such restrictions, by which partial release is, again, regressive in relation to the regime applied in ordinary detention, are even less justifiable in the case where those on partial release are obliged to remain in the institution at weekends or for whom the hours of release are very limited; and also for prisoners under general law who work as cleaning or maintenance “auxiliaries” in the independent centres, who are disadvantaged compared to those in other institutions. These discriminations should be ended.

**11/** Lastly, one of the most sensitive matters concerning partial release is relative to the role that magistrates play.

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<sup>80</sup> See the annual report for 2011, chapter 7, “Body searches, security and public order in places of deprivation of liberty.”

<sup>81</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).

They have been told that when a custodial sentence of less than two years is imposed, the sentence may take the form of subjection to partial release. The periods within which, after the sentence, the judge responsible for the execution of sentences defines the procedures for its execution may be very long. In twelve cases examined when a centre was visited it was an average of two years and three months. It may be advantageous to use these waiting periods to assess the overall situation of the person. They nevertheless have many disadvantages: during this time lapse, firstly the sentence is not executed and secondly, the convicted person (who is often employed) and his/her family, live with the uncertainty (and anxiety) about the measures to be taken. In truth, the reduction of these barely-acceptable waiting periods involves better coordination between the prosecution and the presiding judge, quickly transmitting the necessary elements and increasing the number of civil servants responsible for shaping the decisions taken by the magistrates.

The waiting periods stemming from the decision of a judge responsible for the execution of sentences to place a prisoner in an open prison are admittedly shorter (out of eighteen cases examined, thirteen months on average). They are nevertheless excessive and compromise plans for social inclusion (a place with an employer, for example) which the person in question and his/her prison adviser on probation and employability may have been able to design.

Prisoners' plans are also greatly compromised by the periods during which the application is submitted to the necessary hearing in the presence of both parties. The pace of integration, in the prevailing employment situation and with the intrinsic difficulties related to the capacity of prisoner, is often much quicker than that of the procedures intended to agree to it.

Generally, the insufficient number of magistrates and social workers means that the idea of individualised case management of those on partial release is illusory. Also, as the dispensation of treatment is the responsibility of these social workers, one of the prisoners may, after a consultation, need to go to a pharmacy outside the fixed hours of release to buy the medicines that were prescribed to him/her. An authorisation from a magistrate is necessary. It is in reality either given late or the decision is taken hastily without verification, which is pointless. Greater effort should be addressed towards getting the person in question to take responsibility.

There should doubtless be an increase in staffing levels, but certain responsibilities should also be delegated (we know that, since the prisons act, the head of the institution can change the release hours: article 712-8 of the code of criminal procedure) and encourage subsequent checks on behaviour, to assess the validity of the plan, both concerning its results and its original content.

12/ Those on partial release represent 20% of persons in custody who are not accommodated in ordinary detention, and less than 3% of prisoners under general law. Although their number on 1<sup>st</sup> January 2012 was up compared to the previous year, the number of partial-release measures decided over the last four years has been regularly decreasing (-16% compared to 2008). This is a paradox that is probably partly due to the increasing use of electronic surveillance, a rather scant arrangement in which there is usually absolutely no social support. Partial release, a sentence given subject to probation, is, however, a very useful instrument, well-designed in principle, which can contribute significantly to the reintegration of sentenced persons and the prevention of recidivism.

Still, those in question need to be given the desire to succeed. This depends on them, but also on the circumstances that the material conditions of life and the rights that are associated with partial release combine to bring about; that the individualised support and attendant measures are sufficient, particularly for controlling difficulties that have previously been highlighted; and that the persons in question do not have to manage numerous unexpected and complex procedures as well as their working time. It is under these conditions that the number of those on partial release could be increased and the successful proportion of those subject to the measure, already high, could be improved still further.

## Urgent recommendations of 12<sup>th</sup> November 2012<sup>82</sup> concerning the Baumettes remand prison in Marseille

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1/ When the *Contrôleur général des lieux de privation de liberté* (CGLPL) is aware of any serious violation of the fundamental rights of persons deprived of their liberty, article 9 of the law of 30<sup>th</sup> October 2007 authorises him to send his observations forthwith to the competent authorities and to demand that answers be provided.<sup>83</sup> On receipt of the response, he determines whether the said violations have ceased; he then publishes his findings and the responses obtained.

Using this emergency procedure, which he is using for the second time, the *Contrôleur Général* publishes his recommendations, as follows:

2/ In effect, the findings from the team of some twenty inspectors that visited the Baumettes remand prison in Marseille between 8<sup>th</sup> and 19<sup>th</sup> October remove any doubts that there have been a serious violation of fundamental rights, particularly in regard to the obligations on public authorities, laid down in the applicable laws, to ensure that no prisoner is subjected to any inhuman or degrading treatment. As a result of these findings, the *Contrôleur Général* was granted a meeting, at his request, with the Minister of Justice on 16<sup>th</sup> November 2012; he asked the Minister to issue her comments, before the 4<sup>th</sup> December 2012, concerning the documents which he presented to her and, in particular, concerning this current report. In parallel, in a letter dated 12<sup>th</sup> November, the *Contrôleur Général* sent the same findings to the Minister of Health and Social Affairs, asking for a response by the same date.

3/ It goes without saying that the usual procedure, involving the drafting of an exhaustive report by the inspectors, is following its usual course and this report will be submitted to the appropriate ministers to benefit once again from their observations. It will be made public at the end of the due process.

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<sup>82</sup> Published in the *Journal Officiel de la République française* of 6<sup>th</sup> December 2012, text n°123.

<sup>83</sup> Emergency procedure under §2 of article 9 of the French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cgpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cgpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)

4/ There is an irrefutable fact. In general, the extremely dilapidated state of the prison facility is perfectly well known. At the end of 1991, the (European) Committee for the Prevention of Torture (CPT) visited the institution and noted in its report that *"detention conditions... left a lot to be desired"* (§91) and that *"accommodation conditions in wings A and B of the Marseille Baumettes prison were one of the immediate findings by the delegation"*. The report underlined in particular that *"the cells and their fittings were in an advanced stage of deterioration. A number of them were filthy, as was the bedding"* (§92). It concluded, notably, that *"to submit prisoners to such a combination of detention conditions constitutes, according to the CPT, nothing less than inhuman and degrading treatment"*. On a follow-up visit in 1996, the Committee acknowledged that the authorities had carried out certain works, had reduced the prison's population and had increased the frequency of showers, but insisted that the major renovation of the establishment should be given *"top priority"* (Report §93). A delegation from the Senate, visiting the prison on 18<sup>th</sup> April 2000, indicated that some one hundred cells were unoccupied *"because of their squalid condition"*, that wings A and B were dilapidated and that *"several cells had open toilets"*. Finally, the European Commissioner for Human Rights visited the establishment in September 2005 and stated that he *"was shocked by the living conditions he observed (...) in the Baumettes prison"*. *"Holding prisoners in such an environment seems to me"*, he added, *"to be at the limit of acceptability and at the limit of human dignity"*.

5/ Despite these regular observations made over the past twenty years, and despite the efforts of the establishment's successive management teams, the *Contrôle général* is obliged to note that no substantial progress has been made. As an example, here is the description that two prisoners gave concerning their cell, a description that has been scrupulously verified by the *Contrôle général*: *"absence of the upper part of the window; television cable severed (no plug); no lighting (missing bulb), no night-light for the night warder; no emergency inter-phone; WC recently installed but not fixed to the floor, almost non-existent toilet flush and no privacy, washbasin good but leaks from the U-bend; no mirror; refrigerator very dirty and infested with cockroaches both inside and outside; dirty, damaged walls covered in graffiti of all sorts, numerous spiders and lice; floor dirty, covered in rubbish, no shower cubicle or hot water; no cupboard or shelves, nothing on which to sit, no table"*. Another person added: *"it's made to drive us insane"*. Out of a sample of ninety-eight cells carefully examined by the inspectors, only

nine incited no serious remarks. There are, nevertheless, considerable differences between one cell and another. Depending on the cell one is allocated, living conditions can be very different; this explains notably the small number of disciplinary measures taken (as they say "there are other means [of bringing people into line]").

Waste treatment is also a problem in these buildings. The recently installed goods hoists break down frequently - thus everything is carried up or down manually. The electricity supply is insufficient for the institution's needs: the neon tubes are fragile and one warder has been obliged to carry out his nightly round along the passageways in pitch darkness using his own torch. Between three and five out of the ten showers were in working order in the filthy shower rooms, which means that not all those who are allowed to shower can do so within the prescribed time (the improvements noted in 1966 did not last long). Rats abound in the past two years (they can even be seen during the day) adding to the other nuisances: warders tap with their feet to disperse them when carrying out their rounds at night, not always successfully. The kitchen in the basement was renovated in 1998 but the corridors on this level are in a filthy state. In short, a lack of basic hygiene and cleanliness is to be found throughout a large part of the institution. The clerks of the judges responsible for the execution of sentences (and therefore the judges) and the nurses from the psychiatric unit of the Regional Mental Health Department for Prisons (SMPR - for *Services médico-psychologique régionaux*) categorically refuse (the latter evoking their independence) to set foot inside the prison. And this is not all: on 29<sup>th</sup> April 2011, the departmental sub-committee for fire safety called for the institution to be closed.

6/ Certain work has been undertaken. A new wing (building D) was built in 1989, with more comfortable cells usually given to 'privileged' prisoners. However, having been badly designed, it allows significant quantities of rainwater to spread into the passageways and cells with every passing shower. There are significant structural faults following certain ground movements such that the building can not be considered a long-term prospect. Admittedly, the small courtyards adjacent to the older buildings have been cordoned off. The new ones are sparsely equipped and above all not protected against the weather. The conduits were refurbished in 2009 without any noticeable effect. The external gates were recently restructured (the "Baumettes 1" project), in particular those where vehicles pass: given

the gates' dimensions, one interlock entrance is now unusable and one of the doors of the the other has been damaged (significantly endangering the life of a warder).

7/ The state of the buildings is simply accepted with resignation by a large number of staff, who continue to carry out certain duties which are sometimes devoid of any sense, such as the night-time checking of cells with no lighting and no protection covering the doors' peepholes, or the 'visual search', or, conversely, do not carry out instructions which, given the state of things, would not have any effect.

8/ The Baumettes prison buildings do not just suffer from design and construction deficiencies. There is also a maintenance problem. As has already been noted, "*the State knows how to build, but it does not know how to maintain*",<sup>84</sup> especially concerning prisons. Yes, the prisoners cause plenty of damage – and yes, one can complain but one should not be surprised – and the older the institutions, the greater the effect of such vandalism. But above all, neither the maintenance headcount nor the budget is equal to the task. In just two years, the operational maintenance budget has been reduced by close to a quarter. At the time of the inspectors' visit, the maintenance team consisted of two genuine technicians, five assistant technicians and six contract employees. There is a back-up of two warders per wing, but these can easily be called to other duties. Each member of the team does what he can, demoralised, handling the most urgent cases as they arrive, without any organised follow-up of the works: their dedication can in no way disguise what should be done and has not been done.

9/ Overcrowding remains the rule: as at 1<sup>st</sup> October 2012, in an institution designed for 1'190 places, there were 1'769 prisoners actually present. This number continues to increase, specifically concentrated in the men's wing, where the occupation rate is 145.80%. Indeed, Marseille takes in prisoners to relieve the 'overcrowding' in other remand prisons in the region. Overcrowding in institutions with a delegated management system – a public/private management system - triggers the penalty clauses which the State would then be required to pay. Yet, at the same time there are staffing constraints: not only are staff numbers not at the required level (in particular for

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<sup>84</sup> The 2010 Annual Report from the *Contrôleur général des lieux de privation de liberté*, Paris April 2011, p.30.

front-line warders) but working conditions are responsible for a high level of absenteeism - between 1'600 and 1'900 man days per month (2.6 days per person) are thus lost, increasing the load on those who are present. Sometimes there is just a single warder to handle a complete floor (around two hundred prisoners). In these conditions, certain services are simply not maintained.

**10/** This is even more the case since the establishment's initial operating budget was significantly reduced in 2012 compared with 2011 (-7.2%). As certain expenses cannot, by their nature, be reduced, the provision of certain services is compromised. The sum under the heading of "prisoners' hygiene and cleanliness" thus dropped from 72'323 euros to a budget of 30'000 euros (-58%). The major expense item for the prison, "supplies and general works", went from 284'611 euros in 2011 to 180'000 euros in 2012 (-36.7%). The Marseille Baumettes prison, being one of the rare institutions in the region under public management, suffers from the fact that most of the others are under private management and, naturally, the outside private service providers have to be paid according to their contract terms.

**11/** Budget restrictions offer a partial, but not complete, explanation for another characteristic of the institution - the dearth of activities on offer to prisoners. Paid occupations are limited. Although the vocational training courses are well designed, they concern relatively few people. At the time of the visit there were nine people in the workshops, and in general there are no more than a few dozen. Then there remain the 'auxiliary service workers' who are paid and who may benefit from being assigned to a wing that is less dilapidated than the others. But here again, budget restrictions have reduced the number of positions available (from 204 to 169) and the average pay per person (from 214 to 169 euros per month). Those who are offered such jobs (the 'auxies' for auxiliaries) are selected by the senior staff based on management criteria and not on criteria concerning the prisoner's skills or needs. In addition, it is no doubt necessary to pay to be granted such a privileged status: *"the auxies recruit the auxies"*.

As for sport, there are only two qualified instructors - there were others who have left but who have not been replaced. Five warders thus act as instructors but can at any time be called away to cover for absent colleagues or other reasons (during the visit a prisoner set fire to objects in his cell and one of these 'temporary instructors' was called to help another warder deal with the problem). In such conditions, the



activity of supervising prisoners using the fitness apparatus or boxing bouts gets few candidates - there were eight changes in 2012.

There are certain permanent cultural activities available, run by some very devoted external people, ('cyber-base' in the women's wing, a 'multi-media centre' for the men, 'mysterious places' for creativity). But financing these activities is not guaranteed. Some exceptional shows have been put on. However, there is no position for a coordinator and the remarkable theatre that the women's wing boasts will disappear when reconstruction begins (the "Baumettes 2" project). Given all this, the only real 'activity' for all is exercise - up to six hours a day.

**12/** But exercise can be far from relaxing. For another characteristic of this institution is the rising level of violence, which often occurs in the exercise yards. Violence is directed towards the staff - fortunately proportionally less than in other institutions - and frequently occurs between fellow prisoners. Although the list clearly cannot be regarded as exhaustive (only violence in the exercise yards has a real chance of being identified), since the beginning of this year, doctors have recorded fourteen cases of multiple bruising, eight deep wounds, seven diverse wounds and fractures, three traumatic skull injuries and one case of rape. Not all of the cases known to the medical staff are necessarily communicated to the State Prosecutor's Office.

An explanation for this violence is often cited - it reflects life in Marseille, in particular in the 'northern districts'. It is also the result of the rivalry between gangs of youths or delinquents from different cities (*"if the guys from Marseille get done in Avignon, then those from Avignon get done in Marseille"*). This is however only a partial explanation. Moreover, residents of the northern districts of Marseille are not particularly numerous in this prison. On the other hand, the institution is a veritable souk for goods and services where everything can be bought and where everything is sold at elevated prices. Access to a telephone, for example: as a senior staff member says, *"here, there are two telephone providers, company X (the exclusive official provider) and the gang bosses"*; telephone calls are payable, but so is access to the telephone, facilitated and made more expensive by the fact that the majority of telephones are in the exercise yards and are regularly vandalised (organised supply limitation). This all generates loans and debts, demands for payment, racketing and threats. Violence is meted out to those who cannot or who refuse to pay. However many of these are simply indigent (about 15% of prisoners "lack sufficient resources"

as defined by the prison regulatory norms). And if the 'customer' is really insolvent, the threats are carried out on his family outside the prison. It is not surprising that, in these circumstances, people dare not leave their cells, even for a shower, for exercise or to get medical treatment. Nor is it surprising that requests to transfer to another wing abound (to escape the more insistent creditors) and become urgent (fires in the cells, 'cuts'). Overcrowding is frequently the reason for refusing such requests and the disparity between the physical conditions from one cell to another means that, if a request is granted, living conditions can vary quite significantly, as mentioned above. The physical environment, the lack of activities, violence - they are all linked.

**13/** Staff manage the situation as best they can with the personnel and equipment available. Most of the warders (but not all, which itself creates some underlying tensions) adopt a 'local' method based on dialogue and a familiarity with the prisoners, which certainly helps to overcome numerous difficulties at the cost of a certain indulgence *vis-à-vis* the rules, notably concerning relations between prisoners, but also in the functioning of the internal 'market'. Thus, everyone the inspectors met complained about the disorganisation concerning the 'prison shops' (external purchasing). Managing the accounting and physical checking of deliveries for 1'800 people is problematic. There is a lack of staff to ensure distribution, during which pilfering takes place on a significant scale. In addition, plenty of personal effects circulate secretly within the prison. According to the State Prosecutor's Office, more than 1'200 mobile telephones were found in 2011.

**14/** For prisoners, but also for prison staff, such a situation produces conditions that are doubtless inhuman and certainly degrading. Given that these conditions persist, despite repeated warnings over the past twenty years, urgent solutions are required. The Government has committed to rebuilding the women's wing (the least dilapidated) and create a new men's remand prison on part of the site from 2013 onwards (the "Baumettes 2" project already mentioned). But this project will leave untouched the current men's remand prison, i.e. the oldest and most dilapidated buildings: the commitment to rebuild this or to renovate the buildings in their entirety (the so-called "Baumettes 3" project) must be made without delay.

**15/** While waiting for this to become reality some ten years from now, it is essential to,

**a) Concerning conditions of accommodation:**

- Reduce the number of new arrivals in the establishment to bring the population down to a sustainable level, i.e. to the number of places in the design capacity (1'190);
- Update the organisational structure, which dates from 1989, in order to ensure a sufficient level of staff and, in parallel, to reduce the degree of absenteeism;
- Strengthen the maintenance team and provide it with the appropriate means to perform its role;
- Carry out the work necessary to render the buildings watertight (building D), and to repair the water conduits (buildings A and B) and the goods-lift;
- Institute effective and long-term measures for cleanliness and hygiene, particularly for eliminating rats, cockroaches and other similar pests;
- Review the procedures for meal service, particularly in respect of hygiene.

**b) Concerning the dearth of activities:**

- Bring the operational budget to former levels in order to rapidly increase the number of auxiliaries employed and their remuneration;
- Use other means of finding service providers for offering workshop type employment, rather than relying solely on the prison management;
- Find alternative activities, such as vocational training, to counter the fact that the "Baumettes 2" project will reduce the available space for men's workshop activity by almost half and remove some fifteen (out of between thirty and forty) employment opportunities for women;
- Preserve the existing cultural activities, rethink the role of the socio-cultural association and strengthen its links with the SPIP (*Service pénitentiaire d'insertion et de probation* - Prison Service for Rehabilitation and Probation).

**c) Concerning violence:**

- Provide to the Marseille 9<sup>th</sup> *arrondissement* police station the necessary means for investigation so that, under judge

supervision, information gathered can be used, the breaches of the law can be followed up and those responsible can be charged;

- Bring senior management closer to the work of staff carrying out their daily duties, so that the latter do not feel alone and lost when faced with difficulties;
- Review and rigorously monitor the organisation for distributing goods for the prison shops;
- Re-conquer the control of the exercise yards, as has already been requested by the *Contrôle général*;<sup>85</sup>
- Establish a better balance between the differential management of prisoners (affectation, use of privileges) and disciplinary measures;
- Define precise limits to the degree of familiarity between prisoners and warders, useful in reducing tension; establish a 'Baumettes prison project', which should demonstrate the institution's concern for the more vulnerable population and rehabilitation of prisoners, and also define the expected transformation of the establishment once all the building works have been completed.

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<sup>85</sup> Recommendations concerning the remand prison of Villefranche-sur-Saône, *Journal Officiel* of 6<sup>th</sup> January 2009.



Confinement cell of the men's quarters at the Baumettes remand prison in Marseille

## Opinion of 17<sup>th</sup> January 2013<sup>86</sup> concerning unjustified stays in units for difficult psychiatric patients

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1/ The fundamental right according to which nobody can be arbitrarily deprived of liberty obviously applies to persons suffering from mental illness (European Court of Human Rights, 24<sup>th</sup> October 1979, *Winterwerp v. The Netherlands*, n°6301/73). The latter cannot be deprived of liberty unless three concurrent conditions are satisfied: the illness shall be indisputable; the mental disorder must be of a kind or degree warranting compulsory confinement; finally, "*the validity of continued confinement depends upon the persistence of such a disorder*" (European Court of Human Rights, 5<sup>th</sup> October 2004, *H.L. v. The United Kingdom*, n°45508/99, §98).

However, respect for fundamental rights is not solely a matter of the existence or absence of compulsory confinement measures. It should also include, in cases where such measures are taken, the means implemented in order to protect patients from danger to themselves and to other people: such means should be proportionate to the identified danger. The respect due to the dignity of the person may be entirely disregarded in case of inappropriate use of unnecessary means of physical restraint, for example, or unnecessary placement in a special institution not warranted by the patient's condition. Moreover the reasoning followed by the national judge of penal affairs can be transposed on this point: the judge supervises the transfers between institutions "*with regard to its nature and the significance of the effects thereof upon prisoners' situations*" (*Conseil d'État* [French Council of State], *Assemblée* [Combined Court], 14<sup>th</sup> December 2007, *Garde des sceaux* [French Minister of Justice] v. *M. M.A.*, n°290 730). It is necessary to pay attention to the nature and effects of placing a patient in an institution, when the conditions prevailing in the latter are different from those which would be the rule elsewhere.

2/ Furthermore, there exists a special category of psychiatric institutions, referred to as "Units for Difficult Psychiatric Patients" (UDPP). The law (Public Health Code article L. 3222-3) provides for

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<sup>86</sup> Published in the *Journal Officiel de la République française* of 5<sup>th</sup> February 2013, text n°85.

the placement of persons subject to psychiatric treatment within them *"when they present a danger for other persons of such a nature that the necessary treatment, surveillance and security measures can only be implemented in a specific unit"*. In such scenarios, the prefect is responsible for making a committal decision according to the procedure of committal to psychiatric treatment at the request of a representative of the State -formerly *hospitalisation d'office*<sup>87</sup>-, in most by transfer from an ordinary psychiatric hospital. The regulations (article R. 3222-1 of the same Code) provide that UDPPs shall implement *"intensive therapeutic procedures and special security measures adapted to the patient's condition"*: that is to say that the transfer of a patient from an ordinary specialised institution to a Unit for Difficult Psychiatric Patients has significant effects upon that person's situation, insofar as it considerably increases the constraints placed upon them.

Unjustified maintenance of patients in units for difficult psychiatric patients therefore constitutes an infringement of their fundamental rights.

3/ Yet, cases still occur of patients being thus maintained in units of this kind without any justification, due to release procedures that remain a dead letter.

The conditions of release from UDPPs are defined under articles R. 3222-5 and R. 3222-7 of the Public Health Code. Within these units, the medical treatment committee (defined by the Code) is responsible for assessing whether the conditions provided for committal are no longer met, in other words whether the danger presented by the patient is no longer of a kind warranting a stay in a UDPP. In scenarios of this kind, it has to refer the case to the prefect of the department in which the unit is based or, in the case of Paris, to the Metropolitan Police Commissioner, who issues a decision ordering the patient's release.

There are four possible forms of such release:

- Either the treatment is brought to an end, or treatment is provided in a form other than full hospitalisation;
- Or the patient is transferred to a health institution catering for patients suffering from mental illness;

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<sup>87</sup> Hospitalisation by court order

- Or the patient is returned to their institution of origin;
- Or, in the cases of prisoners, they are returned to a penal institution.

When release is ordered in the form of return to the institution of origin, which is the most frequent case, the latter institution then has to admit the patient within a deadline of twenty days of the prefectural decision ordering the patient's release from the unit for difficult psychiatric patients.

In order to guarantee this return to the institution of origin, §2 of article R. 3222-2 of the Code provides that the dossier handed over to the prefect of the department in which the UDPP is based, for the purposes of implementation of the order for committal to the latter unit, shall include in particular *"a commitment signed by the prefect of the department of the establishment in which the patient is hospitalised or held or, in Paris, by the Metropolitan Police Commissioner, to subsequent hospitalisation or imprisonment of the patient within their department once again"*.

4/ In spite of the existence of these entirely unequivocal provisions, the *Contrôleur général des lieux de privation de liberté* has been led to ascertain, in the course of inspections conducted in units for difficult psychiatric patients, as well as by means of cases referred to him in writing, that patients are maintained in UDPPs in spite of the opinion - or successive opinions - issued the medical treatment committee and notwithstanding orders issued by the prefect of the department in which the unit is based for the release of the patient from the UDPP and their return to the health institution of origin.

The reasons for this deadlock which, as has been pointed out, disregards patients' fundamental rights, are of two kinds: in the first place, arising from disregard of the provisions of the Public Health Code; and, in the second place, from the difficulty of determining and imposing the institution of origin to which the patient is to be admitted on their release from the UDPP.

5/ As far as the first scenario is concerned, certain cases have been ascertained in which the patient's institution of origin purely and simply refuses to readmit the patient - in general on the grounds that the latter has committed acts of violence against staff or other patients; or again that the institution considers that it has "fulfilled its side of the bargain" by agreeing to admit a patient released from the



UDPP “in exchange” for the committal of one of its patients to the latter unit<sup>88</sup> - in agreement with the prefect of the department.

Although it is of course understandable that spontaneous apprehensiveness can arise among staff who may, at one time or another, have been confronted with both verbal and physical assault on the part of the patient committed to the UDPP, it is nonetheless unacceptable for such past acts, which sometimes occurred several years previously, to be used to justify refusal of readmission to the institution of origin. Indeed, this amounts to disregard – and moreover on the part of professionals - of the benefits of the therapeutic treatment implemented within the UDPP<sup>89</sup> and to calling into question the validity of the opinion issued by the medical treatment committee, which is composed, in accordance with the Public Health Code, of a doctor possessing the status of health inspector and three hospital psychiatrists not practicing within the UDPP. In other words, although such fears may be natural, they are groundless.

6/ The second scenario involves specific situations which make determination of the institution “of origin”, to which the patient is to be admitted on their release from the UDPP, a complex matter. There is no current text enabling the resolution of such difficulties, which are manifested in real negotiations between the heads of UDPPs and regional health agencies in order to find an appropriate institution which agrees to admit the patient. In particular, cases of this kind arise when:

- patients have been hospitalised for many years in one or several UMDs; it is possible for the patient’s institution of origin to have changed insofar as their family ties have successively moved between several different departments;<sup>90</sup>

<sup>88</sup> Situation resulting from the negotiations mentioned below in section §6.

<sup>89</sup> cf. for similar disregard of the opinion of the *Contrôleur général des lieux de privation de liberté* of 15<sup>th</sup> February 2011 concerning certain methods of compulsory admission to hospital (*Journal Officiel* of 20<sup>th</sup> March 2011).

<sup>90</sup> A situation was thus submitted to the *Contrôle général* involving one person, initially hospitalised in French department A and then committed to a UDPP located in another department B on a long-term basis, whose parents resided nearby the UDPP in order to be present, who was then committed to another UDPP for a break-off stay. The aged parents returned to department A, from which they originally came. There are grounds for considering that the institution of origin was successively that of department A, then that of department B, and finally that of department A, since the patient had no family or other ties constituting a connection with department B.

when the medical treatment committee considers that, although the patient can be hospitalised within the traditional framework of psychiatric treatment, this treatment cannot take place in the patient's institution of origin, in most cases because relations between the patient and the psychiatrists and nursing staff are too tense.

when a court order has been issued with regard to the patient prohibiting them from staying in the department in which their institution of origin is located.

7/ In each of these different scenarios, the absence of any authority in a position to determine and impose the institution to which the patient should be committed on release from the UDPP leads to such release being dependent upon the uncertain results of the negotiations conducted, rather than upon the sole condition determined by the Code of Public Health, that is to say that the patient no longer presents any danger for other people warranting special treatment.

When the UMD and regional health agencies do not succeed in finding an institution to admit the patient in spite of numerous formalities of a time-consuming nature, certain patients are maintained in UDPPs, without any medical justification, for periods of several months, or even several years.<sup>91</sup>

8/ Unjustified maintenance of this kind infringes the patient's fundamental rights in several different regards.

On the one hand, although these patients are in most cases assigned to units with reduced security measures in preparation for their release, the fact nonetheless remains that their psychiatric state of health no longer calls for the implementation of special security and surveillance measures as mentioned under article L. 3222-3 of the Public Health Code.

On the other hand, committal to a Unit for Difficult Psychiatric Patients in most cases leads to their being moved far from their families and, therefore, incurs considerable expense for families who wish to visit their hospitalised relation; their unjustified maintenance in UDPPs therefore infringes the right to respect of their family life, which also numbers among fundamental rights.

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<sup>91</sup> By way of illustration, among the cases referred to the *Contrôle général*, one patient is maintained in a UDPP, while the medical treatment committee has been calling for their release **for more than two and a half years**.

Finally, the unwarranted prolongation of a particularly restrictive stay compromises the person's chances of proper rehabilitation under conditions of life and treatment which are as normal as possible.

In addition, these patients are maintained in UDPPs, without any medical justification, while other patients, who present a danger for other people according to the meaning of article L. 3222-3 of the Public Health Code, remain hospitalised in ordinary general psychiatric wards, due to a shortage of UDPP places.

9/ For these reasons, it is recommended that the public authorities should, by means of a circular: on the one hand recall that, when prefects issue orders bringing UDPP stays to an end, these shall at the same time be followed by orders from the prefect of the department of the institution of origin, readmitting the patient to the latter, such orders naturally being binding upon the institution, with the latter becoming liable for any failure to act with regard to the patient and their close relations; on the other hand, define a procedure enabling the regional health agency concerned (or the central administration in case of several different agencies), to which this point is duly referred in good time by the management of the UDPP, to fulfil the task of immediately determining, in case of doubt, the institution to which the patient is to return, the essential criterion to be followed in this regard being the capacity for rehabilitation of the patient, in particular with regard to their family ties; the prefect of the department which has thus been determined shall then issue the required order.

Although it may be admitted that organisational necessities may stand in the way of the transfer of a patient from a UDPP to an ordinary institution, after the medical treatment committee has pronounced its decision, it is incumbent upon the authorities to implement the latter within reasonable time in order to ensure that patients' fundamental rights are respected. Such is not always the case at the present time.

10/ For its part, the *Contrôle général* will remain vigilant with regard to persons subjected to constraints which their state of health does not justify.

# Opinion of 13<sup>th</sup> June 2013<sup>92</sup> concerning the possession of personal documents by persons deprived of liberty and their access to documents that can be made available for discovery and inspection

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1/ Several different fundamental rights have to be taken into account with regard to the manner in which the possession of personal documents by prisoners is organised within penal institutions. The first of these rights is respect for private life, that is to say the “*right to live out of public view*”. This right comprises two different aspects: that of the protection of documents of which the personal nature is established (correspondence, statements of facts, family documents, personal case files etc.) (European Court of Human Rights, 25<sup>th</sup> February 1997, *Z. v. Finland* n°22009/93, §95 sq.); and conversely, that of the possibility of access to data of a personal nature, in the possession of the authorities, in case of vital need (European Court, Grand Chamber, 13<sup>th</sup> February 2003, *Odièvre v. France*, n°42326/98, §42). The second of these rights concerns the protection of property: the right to dispose of one’s property being one of the elements thereof (European Court – plenary –, 13<sup>th</sup> June 1979, *Marckx v. Belgium*, n°6833/74, §63; 24<sup>th</sup> October 1986, *Agosi v. United Kingdom*, n°9118/80, §48). Thirdly and finally, defence rights may also be involved, which means having the benefit of the guarantees necessary to one’s defence and therefore the right of access to the documents required for this purpose, including one’s own.

In the case of prisoners, these rights need to be properly balanced with the requirements of security and proper order within penal institutions: thus with regard to correspondence (European Court, 12<sup>th</sup> June 2007, *Frérot v. France*, n°70204/01, §59) and defence rights (European Court, Grand Chamber, 9<sup>th</sup> October 2003, *Ezeh and Connors v. United Kingdom*, n°39665/98 and n°40086/98, §131). However, such restrictions made to these rights cannot go beyond what is called for by the intended goal.

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<sup>92</sup> Published in the *Journal Officiel de la République française* of 11<sup>th</sup> July 2013, text n°86.

2/ The importance that, for a prisoner, is attached to the possession of certain personal written documents cannot be understood unless one is aware of the fact that, in prison, everybody is on the lookout for information concerning other people, about whom one wants to find out everything, beginning with the reasons for their imprisonment. The protection that needs to pertain to documents is not only intended to ensure the protection of privacy in general but also, in a concrete manner, protection from bodily harm and psychological duress, since the misplaced disclosure of personal data can lead to insults, threats and assaults, in particular on the part of fellow prisoners, applied to those whose personality is judged, for various different reasons, not to correspond to the standards imposed by "prison morality". Discovery by a third party of the offence committed by a prisoner, in an administrative file or notification of a ruling, can lead to great difficulties for the latter in their daily existence, as often ascertained by the general inspectorate. In other words, the need to ensure that personal documents are kept out of view in prison also frequently involves the fundamental right of prisoners not to suffer torture and inhuman or degrading treatment.

3/ It is therefore highly important for the protection of personal documents to receive special attention within penal institutions, in order to ensure respect for the abovementioned fundamental rights.

It needs to be possible to protect from the view of third parties, subject only to the controls mentioned under articles D. 269, D. 274 of the Code of Criminal Procedure and article 32-II of the model of house rules and regulations appended to article R. 57-6-18 of the Code of Criminal Procedure,<sup>93</sup> personal documents:

- concerning any offence that the person may have committed or acted as an accomplice to or concerning the presence of the person in prison (article 31 of the model of house rules and regulations)<sup>94</sup> and in particular those mentioning the reasons for their imprisonment;
- concerning any administrative or judicial proceedings, including documents written by and for lawyers, administrative authorities and courts, whether the person concerned be plaintiff, defendant or simple witness;

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<sup>93</sup> Former article D. 431 of the Code of Criminal Procedure.

<sup>94</sup> Former article D. 429 of the Code of Criminal Procedure.

- concerning private and family life, whatever the form of the written document, and photographs mentioned under articles 24-I and II of the model of house rules and regulations;<sup>95</sup>
- concerning the management of private property in prison and outside (invoices etc.);
- arising from the exercise of teaching, professional and cultural activities and activities within associations, prior to imprisonment, or from any activity exercised in prison, including the instrument of engagement mentioned under article 3 of the penitentiary law of 24<sup>th</sup> November 2009<sup>96</sup> and the documents required for work defined under article 718 of the Code of Criminal Procedure;
- concerning the person's state of health and the reimbursement of treatment under the health insurance system or social security benefits, whatever the origin of such documents;
- relating to the exercise of spiritual assistance of which prisoners may have the benefit;
- written by the person concerned with a view to exercising an activity within the institution or solely for their own needs (diary, exercises, statements of facts etc.).

However, the prisons administration needs to have access to the documents that it requires in order to identify the person and make up their criminal case file and the files provided for under articles D. 155 and D. 156 of the Code of Criminal Procedure; as well as to the documents that it has to file at the property office (store) in accordance with current rules.

4/ The legislature has recently become aware of the importance of this protection. Article 42 of the penitentiary law of 24<sup>th</sup> November 2009, which mentions the "right to confidentiality" with regard to prisoners' personal documents, establishes a two-tiered system for the latter.

On the one hand, documents mentioning the grounds for committal must be filed at the registry, regardless of the prisoners' wishes in this respect. The latter cannot therefore avoid this obligation.

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<sup>95</sup> Former article D. 420 of the Code of Criminal Procedure.

<sup>96</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).

On the other hand, other personal documents can be handed over to the registry at the discretion of the person concerned. If they do not wish to entrust them to the registry, it is possible for prisoners to keep such documents in their cells.

This system was specified by articles R. 57-6-1 to R. 57-6-4 of the Code of Criminal Procedure, which provides for the optional filing of personal documents in sealed envelopes at the registry and sets out a procedure for the consultation of documents mentioning grounds of committal (though not of other documents that may have been entrusted to the registry) by prisoners; as well as by the Ministerial circular of 9<sup>th</sup> June 2011.<sup>97</sup>

5/ This system is unsatisfactory insofar as it does not guarantee the application of fundamental rights, by virtue of both the principles on which it is based and the practices that it implements. It therefore needs to be clarified and amended to this end.

Firstly, as far as documents mentioning grounds for committal filed at the registry are concerned, prisoners are, in principle, aware of their content, having at one time or another been notified thereof. However, in the first place, the latter cannot themselves easily gain access to these documents, since they have to apply to go to the registry in order to consult them, which is dependent on the (uncertain) rapidity and effectiveness of movement within the prison. In the second place, the registry may be unavailable, due to the activities of the officers and the uses made of the premises, and of the consultation room in particular. In the third place, they cannot obtain copies thereof for themselves, the administration considering this right to be prohibited by article 42 of the law. Finally, more generally speaking, access to criminal case files may pose difficulties: either because, due to lack of staff, the documents constituting such files have not been properly gathered together; or because the administration wants to separate documents that can be disclosed from those that cannot before consultation by the prisoner, without having the time necessary for this task at its disposal (documents of judicial origin can only be made available for discovery and inspection by the courts – article D. 77 of the Code of Criminal Procedure); or because the transformation of the file from physical to IT media (on digital “CD”) poses difficulties

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<sup>97</sup> Circular (circulaire) of 9<sup>th</sup> June 2011 on the disciplinary regime of detained adults: [http://www.textes.justice.gouv.fr/art\\_pix/JUSK1140024C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSK1140024C.pdf) (in French).

of implementation or consultation; or finally because copies of documents required by the prisoner from the criminal case file, which can be made available for inspection and discovery, cannot be made within the procedural deadlines. As a result of these uncertainties, in a great many cases the persons concerned may have good reason to consider that they do not have the means at their disposal in order to prepare their defence in case of appeal to a higher court or to the final court of appeal.

Secondly, as far as personal documents voluntarily filed at the registry are concerned, they have to be taken there in a sealed envelope (which presupposes the availability of envelopes), the latter being opened for checks before being placed in the prisoner's file by the head of the registry. However, in the first place, practices are far from guaranteeing this process; in the second place, confidentiality of the prisoner's file is in no way ensured; in the third place, access to the registry is dependent upon authorisation for movement, which may or may not be granted; finally, and above all, although applications for copies of these documents are indeed authorised (as long as they are financed by the prisoner), the fact that they can often be made in front of or through the agency of a member of staff stands in the way of any confidentiality.

The *contrôle général des lieux de privation de liberté* has observed cases and collected numerous testimonies of this kind, from prisoners as well as from prison staff, in particular those assigned to the registries of institutions, who told of their difficulties in the application of article 42. The law was intended to create protection for prisoners, in a traditional context in which all of the latter's actions are supposed to be open to scrutiny. However, paradoxically, this protection backfires on its beneficiaries, who see it as another manner of preventing them from having the documents that they require freely at their disposal, and a reinforcement of the prisons administration's suspicion in their regard.

6/ Nevertheless, there is no question of returning to the previous state of affairs, that is to say the depositing of confidential documents in the cell of the person concerned without any protection.

On the one hand, as far as grounds for committal are concerned, this approach, in common moreover with that taken under the current article 42, does not deal with information that members of staff could



take from prison IT files (in which these grounds are included) and, for various different reasons, disseminate to fellow prisoners, in disregard of article 10 of the Code of Ethics applicable to them (decree of 30<sup>th</sup> December 2010).

On the other hand, searches of cells (article D. 269 of the Code of Criminal Procedure), conducted in the absence of the occupant or occupants, invariably lead to the reading or seizure of personal documents, whether or not protected by law or regulations (letters from lawyers, the *Contrôle général*, etc.). In various different situations, fellow prisoners can also gain unwarranted access to such documents.

The current system therefore needs to be reviewed as far as the keeping of personal documents is concerned, from the double point of view of possession, on the one hand, and of making them available for discovery and inspection, on the other hand.

**7/** All prisoners should be able to choose between keeping the personal documents that they have in their possession in their cells, to the exclusion of course of those prohibited in prison (identity papers, French national health care electronic insurance card (*carte vitale*) etc.), or of entrusting them to the registry of the institution, including documents mentioning grounds for committal. These documents cannot be subject to any checks, except when entering or leaving the institution, within the framework of current provisions.

**8/** It is incumbent upon the prisons administration to ensure respect for the personal nature of documents, subject to the necessary checks, whether in cells or in the registry.

To this end:

- every prisoner should be able to obtain the accessories enabling protection of confidentiality (sealable envelopes, adhesive tape, ad hoc labels etc.) whether in prison shops or by the intermediary of visiting rooms, as well as in the form of free distribution for those unable to gain access thereto due to lack of adequate resources;
- all cells should be equipped with a number of small metal lockers corresponding to the number of occupants, in proper condition and locking with a key or a padlock placed at the prisoner's disposal; model lockers of this kind have already been designed and trialled; they should be brought into general use;

- documents found in these lockers, at the time of searches, should only be able to be examined, in the prisoner's presence, by officers or graded officers specially appointed by written note from the head of the institution (building head), for the sole purpose of verifying that no prohibited property or substance is concealed inside these documents, to the exclusion of any examination, and a fortiori any reading, of the documents themselves: the second paragraph of article 19-V of the model of house rules and regulations<sup>98</sup>, which is clearly contrary to the principle set out under article 42 of the penitentiary law, should be rescinded; only documents sent outside of the institution or received from the exterior can be read and controlled under the conditions provided for under article 40 of the penitentiary law;
- in any case, no personal document, whether or not placed in the lockers, can be destroyed at the time of inspections and searches of cells.

9/ The documents that each prisoner entrusts to the registry should be placed in an individual, closed storage space, apart from individual administrative files of persons placed in custody and files made up of the documents passed on to the penal institution pursuant to the Code of Criminal Procedure; all documents belonging to a given person are separated in a sealed file, after the head of the registry, the sole person to whom access to the storage space is authorised, has been able to verify the contents of the document envelope in order to ensure that it does not conceal prohibited items or substances. It should be possible for the owners of documents to obtain or bring to an end this filing in the registry, at any time, by simple expression of their will.

10/ Each prisoner should be able to have access to personal documents of which they are the owner, as well as to documents concerning them, when they so desire.

However, it needs to be understood that personal documents entrusted to the registry should be regarded as property, to which the protection of the 1<sup>st</sup> article of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms is attached, access thereto therefore constituting a right,

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<sup>98</sup> Former article D. 444-1 of the Code of Criminal Procedure.

including for persons placed under the closed regime, in solitary confinement or in punishment cells, within registry opening hours.

Both consultation and copying of these documents (at cost price and at the prisoner's expense) should guarantee confidentiality, that is to say the impossibility of third parties gaining access to their content. The passing on of such documents and the issuing of copies thereof to the person concerned cannot give rise to any controls. All provisions should be made in order to ensure that consultation and copying take place without any third party being present. A reproduction tool should be provided for this purpose. The same provisions should apply to copies of personal documents not entrusted to the registry.

**11/** Prisoners can gain access to non-personal documents of an administrative nature under the terms and according to the conditions determined by the law of 17<sup>th</sup> July 1978<sup>99</sup> and, in cases presenting the character of data processing of a personal nature and in the absence of any provision to the contrary, in accordance with the provisions of articles 39, 40 and 41 of the law of 6<sup>th</sup> January 1978<sup>100</sup> concerning data processing, data files and individual liberties. The application of these laws cannot be opposed by any specific decision. Such access shall take place within reasonable time, in an integral manner (subject to the legal precautions concerning personal documents) and can be freely used by the prisoner. Moreover, it is recalled that correspondence sent to or received from the president of the Commission d'accès aux documents administratifs [independent government agency with the role of facilitating and ensuring proper access to administrative documents] cannot be controlled (I - 9° of article D. 262 of the Code of Criminal Procedure).

Similarly, disclosure by staff to third parties of personal information contained in data handled concerning prisoners, whether or not in IT form, is prohibited, as provided for under article 34 of the law of 6<sup>th</sup> January 1978 as well as by the aforementioned Code of Ethics. It is incumbent upon the administration in charge of handling such information to take the necessary measures in order to ensure

<sup>99</sup> French law n°78-753 of 17<sup>th</sup> July 1978 on various measures to improve relations between administration and the public as well as different provisions of administrative, social and fiscal nature: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339241> (in French).

<sup>100</sup> French law n°78-17 of 6<sup>th</sup> January 1978 on IT, files and liberties: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460> (in French).

compliance with this prohibition, disregard of which is punishable under articles 226-17 and 226-22 of the Penal Code.

All of the provisions of article L. 1111-7 of the Public Health Code, concerning the disclosure of data of a medical nature, also apply to prisoners, including those regarding action on the part of third parties.

**12/** Prisoners are entitled to have access to the rules applicable to them, in accordance with the provisions of article 2 of the law of 12<sup>th</sup> April 2000.<sup>101</sup> Such access applies not only to the specific rules of each institution, but also to national rules, whether issued by Parliament, the Government or the Minister of Justice. Exceptions can only be made thereto in the case of the documents mentioned under d) 2° of article 6 of the law of 17<sup>th</sup> July 1978, that is to say documents whose disclosure is liable to prejudice security and proper order within the institution. Accordingly, a regularly updated compendium of documents of this character (including public circulars issued by the prisons administration) should be kept in each institution and placed at the disposal of persons placed in custody who so request, without any formalities, distinction or waiting time.

**13/** The registries of courts of competent jurisdiction need to be organised in order ensure the diligent handling of applications sent to them by prisoners for the discovery and inspection of documents to which the latter can have access by decision of a member of the national legal service. When the original or a copy of the requested document is found within the penal institution, instructions may be issued to the registry of the latter to disclose them according to the procedures provided for above.

**14/** Implementation of the rules recalled above, and in particular amendment of article 42 of the Penitentiary law and revocation of §2 of article 19-V of the model of house rules and regulations, constitutes the only suitable means of ensuring respect for prisoners' fundamental rights in the field of written documents, as enumerated under section 1 of this opinion.

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<sup>101</sup> French law n°2000-321 of 12<sup>th</sup> April 2000 on rights of the citizens and their relationship with administration: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005629288> (in French).



Nursery of a prison

# Opinion of 8<sup>th</sup> August 2013<sup>102</sup> concerning young children in prison and their imprisoned mothers

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1/ When parents are deprived of liberty, the need arises to choose between the inherently unsatisfactory alternatives of either separating them from their children, or including the latter in the deprivation of liberty, in order to avoid the effects of separation.

Because a positive response cannot be given to these alternatives, in his annual report for 2010, the *Contrôleur général des lieux de privation de liberté* expressed a desire for reflection to begin in order to ensure that mothers imprisoned with children should either be granted reduced sentencing, have the benefit of deferment of their sentences for maternity<sup>103</sup> or be granted release on parole.

Since more than two years have passed without any change in the situation in this regard, the *Contrôleur général* is now obliged, on the one hand, to renew his proposal and, on the other hand, to once again take up the condition of mothers and their children in prison in France.

2/ Under French law, mothers who have committed offences constituting grounds for placing them on remand or for their committal as convicted prisoners, can be imprisoned with their children. Article 38 of the penitentiary law<sup>104</sup> provides that the institution which accommodates them shall enter into an agreement with the French department in order to organise the necessary social support.

The Code of Criminal Procedure limits this simultaneous presence (since the decree of 6<sup>th</sup> December 1998).<sup>105</sup> Children can only stay

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<sup>102</sup> Published in the *Journal Officiel de la République française* of 3<sup>rd</sup> September 2013, text n°48.

<sup>103</sup> CGLPL, *Rapport d'activité 2010*, cf. the developments devoted to "mères incarcérées avec enfants" (pp. 190-193), photographs n°5 and 7 and proposal n°41, p.296.

<sup>104</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).

<sup>105</sup> Previously, the measures to be taken resulted from a simple circular of 6<sup>th</sup> August 1987.

with their mothers in prison up to the age of eighteen months; for the subsequent twelve months<sup>106</sup> “short periods” of contact with the mother (which are not otherwise defined) are possible. It should be understood that, after this time, the normal visiting room system in force within the institution becomes applicable. Exceptions may be made to the eighteen-month age limit, but only by an exceptional decision and after consultation of a commission: in practice, few extensions are granted; and only when the mother’s date of release follows shortly after the eighteen-month limit, or due to the occurrence of exceptional events. This limit of eighteen months is necessarily arbitrary. It cannot be seriously called into question: the age at which the child begins to move about easily coincides with their becoming aware of their confinement.

The Code also provides that mother and child shall be accommodated in “specially equipped premises” and that the prison service for rehabilitation and probation *“in association with the appropriate departments with regard to childhood and family matters, and with the holders of parental authority”* shall organise the child’s stay and outside visits, and make preparations for the time of its separation from its mother.

Any further issues are dealt with by means of the circular from the Minister of Justice of 18<sup>th</sup> August 1999 (AP 99-2296 PMJ2).

3/ The fundamental rights of the child need to be implemented with special vigilance. Article 3 of the Convention on the Rights of the Child imposes “the best interest of the child” upon authorities and courts as a “primary consideration” in all decisions that they make and the European Court of Human Rights has taken up this requirement (for example, ECtHR, 28<sup>th</sup> June 2007, *Wagner and J.M.W.L. v. Luxembourg*, n°76240/01, §120), by interpreting the protection of the right to respect for family life,<sup>107</sup> in particular, in the light of the abovementioned article 3.

On the one hand, this interpretation leads to each State not only protecting family life from arbitrary interference on the part of the authorities; but also deciding upon positive measures, that is to say

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<sup>106</sup> Since the decree of 23<sup>rd</sup> December 2010, prior to which a six-month period was applicable.

<sup>107</sup> And, therefore, article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

ensuring *"the right of the parent to appropriate measures for reuniting them with their child as well as the right of the child to appropriate measures for reuniting them with their parent"* (ECtHR, 7<sup>th</sup> March 2013, *Raw v. France*, n°10131/11).

On the other hand, however, it cannot disregard the obligations that the Convention on the Rights of the Child imposes upon States: in case of imprisonment of one or both of the parents, to provide the rest of the family with information about their whereabouts (article 9); to provide the child with the opportunity to be heard in any judicial proceedings, either directly, or through a third party (article 12); to respect the right of parents to guide the child with regard to liberty of thought, conscience and religion (article 14); to refrain from any arbitrary or unlawful interference in the private life of the child (article 16): to use their best efforts to guarantee the parents' responsibility for the upbringing of the child (article 18); and to protect the child from all forms of violence, abandonment and negligent treatment (article 19).

Finally the Convention states (article 37) that no child shall be subjected to torture or cruel, inhuman or degrading treatment: that the imprisonment of children shall only be used as a *"measure of last resort"* and *"for the shortest appropriate period of time"*. Children deprived of liberty shall be treated with humanity *"and in a manner which takes into account the needs of persons of his or her age"*.

4/ The imprisonment of mothers with children is only a palliative measure aimed at reconciling the irreconcilable: the presence of a child with its mother and the intolerable nature of the presence of young children in prison. Admittedly, it is emphasised children do not accompany their mothers in prison as the result of having committed an offence; a fact to which the prison administration in France gives expression, with good reason (cf. article D. 149 of the Code of Criminal Procedure), by not carrying out the committal formalities as far as the child is concerned. However, this consideration of a legal nature is not likely to change the facts. Indeed, from the point of view of the presence of these children in prison and of the capacity of their mothers to play their role towards them, fundamental rights make it absolutely essential to examine the reality of prison *"mother and child wings"*.

5/ It emerges from the above principles that everything needs to be done, as indicated at the beginning of this assessment, in order to



avoid the imprisonment of women with children. Awareness needs to be raised among judges, some of whom take a restrictive view of these principles, concerning the application of article 3 of the Convention in this respect. What view should one take of the case of one woman encountered in prison, who had long been pregnant, sentenced to a four month term of imprisonment, which was left in abeyance and then suddenly implemented by the State Prosecutor's Office? It should no longer be possible for these kinds of situation to be ascertained: they are more numerous than might be thought.

6/ It clearly emerges from the above principles that, when it has not been possible to avoid imprisonment, the obligations incumbent upon the authorities with regard to the mode of organisation of the life of the mother and child in prison have the objective of:

- Helping the mother to effectively take care of the child;
- Refraining from any measure which could harm the normal development of the child;
- Facilitating relations between the child and its parents, including its father, at least on the assumption that the latter has legally recognised the child, as well as with the rest of the family;
- Not to allow any of the child's vital needs to consequentially remain unsatisfied;
- To ensure that the ordinary public services in matters of early childhood and infancy play their full role, in the health and social fields in particular.

7/ These objectives may conflict with prison rules and, in certain respects, with each other. Their fulfilment is therefore a matter of balance, to be maintained by both the prisons administration and by members of the national legal service in charge of the execution of sentences. For all that, in case of conflict between security norms and the requirements of mothers and children, "the best interests of the child shall be a primary consideration" and the status of mother should take priority over that of prisoner.

Moreover, it needs to be acknowledged at the outset that an imprisoned mother accompanied by a child obviously presents a far smaller risk with regard to the security of persons (for example in terms of escape) than is the case for other prisoners. This necessarily needs to be taken into account in adapting the rules of institutions

with regard to wings accommodating mothers and children. In other terms, the balance between the imperatives of security and of dignity of persons is not the same in “mother and child” wings as in other wings of institutions. The pursuit of this balance within each institution is a source of markedly different practices. It is a first necessity for rules and regulations specific to these wings<sup>108</sup> to be elaborated and issued to the women whom they accommodate within prisons.

8/ The current circular also sets out a number of principles: they are aimed at assigning the tasks of preparation for the separation of the child from its mother and prevention of the development of any excessively close relationship between them, which might be encouraged by prison life, to the prison service for rehabilitation and probation. This may be well and good. Nevertheless, the essential objectives need to be unambiguous: since the mother is informed of the necessity of separation at a very early stage, the obligations recalled under §6 above constitute the foremost imperative.

9/ The *Contrôleur général* has inspected, with three exceptions, all of the penal institutions that possess a “wing” for women. The latter account for 1 794 places, of which seventy-six (4.3%) are reserved for women accompanied with children. The manner in which this number of places was estimated by the administration is not known. However, overall difficulties of accommodation have not been taken into account. In principle, as is advisable, the prisons administration never assigns excessive numbers of women with children to cells devoted to this purpose or to any other type of cell: however, judges’ decisions can lead to the occurrence of situations of this kind. In any case, the committal of a mother and child to prison at a time when the cell or cells reserved for this purpose are already occupied can lead to her being transferred to a different institution, at the risk of hindering provision of care for the child as well as the latter’s relations with its family. Indeed, with the notable exceptions of the women’s remand prison at Fleury-Mérogis, which has a wing of fifteen places (and fifteen for pregnant women) referred to as the “nursery” wing, and the women’s prison at Rennes, which has five places of the same kind, in most cases other institutions for women only comprise one or two places for mothers with children, sometimes three (Corbas,

<sup>108</sup> It is to be regretted that the model rules and regulations, resulting from decree n°2013-368 of 30<sup>th</sup> April 2013, taken for the application of the Penitentiary law, is silent with regard to the questions here mentioned.

Rémire-Montjoly and Toulouse-Seysse) and exceptionally four (Roanne). Some women's wings do not have any "mother and child" cells and a change of institution is therefore necessary in case of a birth: such is the case of the detention centre at Joux-la-Ville. These transfers need to be avoided, unless they contribute to a reduction of geographical distances required by the mother and child. When no transfer is foreseeable, it would be desirable for pregnant prisoners who should subsequently be staying in "mothers and children" wings to be able to visit the latter in advance.

**10/** With regard to practical living arrangements, mothers with children need to be separated from other prisoners in the women's wings in which they are accommodated and have suitable spaces at their disposal. The serenity of the child and the quality of its relationship with its mother are dependent upon suitable arrangements of this kind. In many premises inspected the dedicated cells are separated from other wings by a grille, in some cases combined with Perspex. A partition with a door would in any case be preferable; less important for its strength than for providing sound insulation and protection from outside view. There are still a few institutions in which no separation exists: mothers and children are therefore housed in the ordinary prison. The placing of "mother and child wings" above the ground floor (as is the case at Dijon and Baie-Mahault) complicates the process of separation, which nevertheless needs to be firmly implemented.

Though in most cases avoided within the buildings, lack of privacy is much more difficult to avoid in the case of exercise yards. With the exception of a few particularly well laid out yards (Fleury-Mérogis), actual practice either gives rise to very poorly laid out yards dedicated to mothers and children, with small surface areas (at Toulouse-Seysse – a new institution – the mother and child exercise yard represents a surface area of 24m<sup>2</sup>; while that of Corbas – an even more recent prison – occupies an area of 28m<sup>2</sup>), covered in security fittings (grilles, concertina wire etc.) as in the detention centre of Roanne; or else in solitary access to yards serving the women's prison as a whole, but at special times, which are often inconvenient and of short duration (remand prison of Nîmes). Since access to the open air remains an imperative for mothers and children, provision should be made for separate yards, at least in wings comprising two or more places; these yards need to be equipped for the needs of young children (spaces

and facilities for play), while limiting the sensation of confinement and encouraging their perception of the outside world (green spaces, unobstructed view, absence of grilles etc.), as well as being visually separate from other exercise areas.

The possibility of overly intrusive surveillance also needs to be limited. Dedicated exercise yards should not be positioned at the bottom of a watchtower or in direct view of prison officers inside the latter, as is the case in the detention centre at Roanne.

**11/** Cells need to be equipped with all of the basics. In most cases, two cells have been joined together, thus providing a suitable surface area and two separate spaces, one reserved for the mother and the other devoted to the child. However, such is not always the case: the surface area is often smaller than the minimum of 15m<sup>2</sup> fixed by the circular of 1999 (under §4.1.1 of the latter), even in recently designed institutions such as the prison at Nancy-Maxéville (in contrast, the only specialised cell in the old remand prison of Pau has a surface area of 29.5m<sup>2</sup>). The authorities are requested to ensure compliance with their own prescriptions and to make sure that premises comprise two separate areas, for the mother and for the child, in order to enable the former to stay up and attend to her activities (such as watching television, reading, writing etc.) while respecting the child's sleep.

In general, reasonable facilities are provided, at least for the child, for which a baby bathtub is always provided when the cell does not possess a shower (although the plumbing fixtures still need to enable the latter to be filled, which is not always the case). Apart from all of the basics required by the mother and child for feeding and care (including in terms of storage space and bathroom facilities – the latter being partitioned up to the ceiling), waterproofing of the premises against damp, adequate ventilation, the possibility of shutting out light, a night light for checks at night, a supply of hot water of adjustable temperature, suitable heating, adequate storage capacity and facilities for direct contact with the warders (for example by intercom) need to be considered indispensable in these areas. Bars and gratings on the windows, whatever the size of the mesh, and ordinary light fittings which can be lit at night are to be excluded. Cleanliness always needs to be meticulously ensured (by an "assistant helper" and not by mothers in the case of communal areas).

In addition to the facilities inside the cell, an adjoining area should

also be provided offering the possibility of washing and drying linen, as well as kitchen and food storage facilities (refrigerator, freezer) when the latter are not provided in the cell. In addition, the institution should possess an activity room for children: some have very well laid out rooms of this kind (Fleury-Mérogis); such is not always the case, in spite of the modest cost of these facilities; in the prison of Marseille (in the women's wing now closed for reconstruction) the prison corridor served as a playroom for children.

**12/** Because the child is being cared for by its mother, the latter's wishes and liberty need to be respected, as long as they do not conflict with the rules of protection of the child, with regard to the principles of the upbringing that she intends to provide. Such provision of care for the child also means that the mother needs to be able to fulfil the responsibilities incumbent upon her in this capacity in an independent manner. This is made easier if relative freedom of movement prevails for her in the "mother and children" wing (with a key to the cell being placed at her disposal) enabling her, for example, to move around between the washing machine cell and the activity room. In this respect, it is to be regretted that in most institutions "nursery" cells are closed in common with other cells at 5:30 p.m., at the very moment when young children need to expend their energy and mothers become anxious about being alone in taking care of their child's needs. The mother needs to be able to speak freely with the doctor (by telephone) who is or who is going to be responsible for the healthcare of the child, as well as being able to accompany the latter to medical examinations outside and, finally, to be present at its side in case of hospitalisation, insofar as the hospital allows this. Placement in punishment cells needs to be avoided by means of alternative disciplinary sanctions, which do not lead to separation.

On the other hand, however, in order to ensure proper mental stability of the mother and, by way of consequence, of the child, it is essential that the former should sometimes be able to have a means of childcare, whether internal or external, at her disposal, enabling her to have access to activities that take her away from her role as a mother and to go to medical and legal consultations etc. on her own.

**13/** Provision of care for the child also presupposes that the mother has resources at her disposal in order to buy the items required for the child's basic needs (because infants are not prisoners, the prisons administration is not financially responsible for them). Such

is not always the case. All the more so in view of the insufficient availability of work in prison, a fact emphasised by the *Contrôleur général*<sup>109</sup>, which is often in even shorter supply in women's wings than in men's wings. Yet, pregnancy and subsequently taking care of a child constitute an obstacle to work in prison for women (and moreover without there being any provision made for inspection of the rules concerning maternity leave – article L. 1225-17 of the Labour Code – application of which is not implemented in prison: dismissal of pregnant prisoners from their employment should therefore only occur on medical grounds and not solely as a result of the wishes of the head of a workshop or of any other person).

Indeed, after the birth of a child, the presence of the mother in a workshop needs to coincide with provision of childcare by a third party, either within the prison or outside. Provision is often made for the placement of children in day-nurseries outside of the prison (but sometimes cannot be provided). However, such placements are in any case not possible before the child reaches three or four months of age; they also presuppose the mother's agreement thereto, as well as practical conditions enabling the child to leave and return to the institution. Childcare within prisons is not based upon any rules: a mother can entrust her child to a fellow prisoner, though this requires the presence of such fellow prisoners (which is not always the case when a separate "nursery" wing is only comprised of a single cell) as well as the existence of relations of trust, which is never easy in prison. It may be possible to appoint a trusted person: this possibility is however variously applied (implemented at Fleury-Mérogis but not at Rennes).

Indeed, these difficulties explain why many mothers do not have access to work. Many of them receive benefits from the social security office (*caisse d'allocations familiales*). However, in certain cases they can encounter serious difficulties in caring for their child. Admittedly, the institution takes care of the basics in case of financial distress. However, it is not strictly obliged to do so and such basics vary from one institution to another (the costs of fresh vegetables and mineral water are taken care of in some institutions and not others). It is therefore requested that the criteria applicable to persons without resources be defined in a specific and more flexible manner as far as

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<sup>109</sup> See Annual Report for 2011, section 4, p.149.

mothers and children are concerned, and that the allowances paid in case of insufficient resources also be considerably increased. In view of the number of persons concerned the cost thereof would be negligible.

“Prison shops” (outside purchase) should offer a sufficiently wide range of items of good quality to satisfy the needs of children in terms of diet, care, hygiene and beauty, clothes and activities. It has often been noted that only pots of baby food were available for sale, at the expense of fresh products.

**14/** Provision of care for children by persons from outside is necessary in the first place with regard to health. Generally speaking, the services of the PMI child protection system (*Protection maternelle et infantile*) are active within prisons, whether or not through agreements entered into for this purpose. In order to make the conditions of their action stable and ensure the regularity thereof, which is sometimes inadequate, agreements should always be in place, as intended by the law, and provide in particular for cases of paediatric emergencies. Some such agreements make provision for action by doctors (when the health unit of the institution does not provide healthcare for the child), if possible paediatricians.<sup>110</sup> This set-up is much better than the, entirely theoretical, liberty left to the mother to choose a doctor for her child. It presents the advantage of allowing the doctor to ascertain the conditions of existence of the child and its mother on the spot. It also guarantees the regularity of medical examinations – not subject to removal of the child from prison. For this reason priority should be given to this solution. The same applies to possible postnatal treatment: visits to prison from a gynaecologist are preferable to removal from prison, which is often marred by uncertainties and humiliation (handcuffs and chains; presence of prison wardresses during treatment).

The mobile unit that works in the remand prison of Fleury-Mérogis, which provides care and assistance in the fields of health and child development (psychomotor development etc.) as well as with regard to administrative formalities, should be adapted to other prisons, with the assistance of the territorial authorities concerned.

In the second place, provision of care is also necessary with regard

<sup>110</sup> In the case of one institution possessing a “nursery” wing, the agreement entered into with the doctors was signed eight years after its opening.

to social welfare. Early childhood workers, volunteer workers from associations specialised in parent-child relations and prison visitors (if the mother so wishes) should be able to act in “mothers and children” wings, in association of course with the officers of the prison service for rehabilitation and probation, in order to promote the proper development of the child through the organisation of activities within institutions, as well as, and above all, through the provision of support for the child outside the institution. For this reason, the signature of agreements with these external actors should constitute a priority for the prison service for rehabilitation and probation. When preparing for the separation of the mother and the child, the latter service also needs to make sure that it organises the connections necessary to ensure quality provision of care for the child after it reaches 18 months of age, in accordance with its interests and the desires of its mother and, assuming that he has parental authority, of its father. With regard to this point, it should be possible to give every assurance to the mother, who remains in prison and for whom what happens to the child who has left her will be a source of frustration and anxiety. Social security cover and, in particular, allocation of benefits available to families with children, possible accommodation needs, enrolment in a day-nursery etc. should be organised with the authorities concerned in close contact with the mother, who cannot make all of the necessary contacts on her own and who needs to be able to meet the agents concerned (social security office, social workers etc.) on the spot.

15/ Access to its father and to other members of its family is a fundamental right of the child, the family needing to be understood in the broad sense (cf. children of homosexual couples). For this reason measures should be taken enabling application of the principle of freedom for the child to go out of the prison and access to the child for any person whose visit has been authorised by the mother, as is moreover recalled in the circular of 1999, without it being necessary to obtain a visiting permit for this sole purpose. Family life units, whose bringing into general use has been requested by the *Contrôleur général*,<sup>111</sup> constitute the preferred framework for such family meetings: access thereto is a priority for mothers with children.

Such access for the father commences on the day of the birth, at which he should be able to be present. Visiting room sessions involving young

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<sup>111</sup> See Annual Report for 2010, proposal n°29, p.295.



children require special provisions with regard to their frequency and duration and the premises in which they take place. At the very least, the movements of mothers and children need to be organised in such a way as to be separate from those of other prisoners (as is the case at Nancy-Maxéville). As recommended by the circular of 1999 – seldom implemented on this point – the premises that are referred to as “lawyers” visiting rooms should provide the preferred settings for these meetings, or even other premises, provided that they enable the necessary controls. In addition, telephones should always be installed in “nursery” wings (at Rennes, a telephone booth is easily accessible) – which is not always the case at present – and the entrusting of mobile telephones to mothers should be trialled. It should be made easier for the child to go on outings with its father or grandparents – in particular its grandmother – due to the importance thereof in preparing for the separation at 18 months of age.

Access of fathers to their children has the same force when the father is also imprisoned. For this reason, both parents should be assigned to the same institution in such situations, except in case of wishes to the contrary.

**16/** According to current regulations, children are compulsorily searched before and after leaving the institution and after each visiting room session. In most cases the warders carry out this task with tact: as far as they are concerned searches consist of being present while the child’s nappy is changed (search rooms sometimes equipped with a table for changing nappies). Clumsy and excessive actions cannot however be ruled out. Such searches, of which the very principle may appear surprising, moreover raise difficulties with regard to article 57 of the Penitentiary law of 24<sup>th</sup> November 2009,<sup>112</sup> which stands in the way of systematic bodily examinations.

The *Contrôleur général* has made known its position on searches in a previous report.<sup>113</sup> However, as far as children are concerned, it needs to be understood that they can only be searched, as required by law, if, and only if, there are serious presumptions that a breach of the regulations may be committed. The search should be strictly limited to

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<sup>112</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021312171&categorieLien=id> (in French).

<sup>113</sup> See Annual Report for 2011, section 7, p.231.

the child's nappy being changed by its own mother, in front of a third party, to the exclusion of any contact between the latter and the child. Any search of the child shall be subject to a written note, recording a request made in this regard by an officer or graded officer. Finally the mother, searches of whom are subject to the same requirements of presumption, is never to be searched in the presence of her child.

17/ Finally, as far as the management of these cells and "nursery" wings is concerned, it would be desirable for a multidisciplinary approach to be given priority in all cases and for volunteer warders to be assigned to them, selected for their composure and having received special training (for example in order to gain understanding of children's touching, the mother breast-feeding etc. and to acquire the necessary professional habits, which can be very different from those legitimately learned),<sup>114</sup> as is often the case for other wings.

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<sup>114</sup> In one institution, it was noted that the prison wardresses carried out the night patrols wearing slippers, in order to avoid disturbing mothers and children's sleep.

## Urgent recommendations of 17<sup>th</sup> October 2013<sup>115</sup> concerning the closed educational centres in Hendaye and Pionsat

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1/ Article 9 of the law of 30<sup>th</sup> October 2007 allows the *Contrôleur général des lieux de privation de liberté* (CGLPL), if he observes a serious violation of the fundamental rights of persons deprived of their liberty, to immediately submit these observations to the competent authorities and ask them to respond.<sup>116</sup> After the response has been received, he observes whether the indicated violation has been corrected; he may make public his findings and the responses.

Using this urgent procedure for the third time, the *Contrôleur général* hereby publishes the following recommendations concerning the closed educational centres (CEC) "Arverne" in Pionsat (Puy-de-Dôme) and "Txingudi" in Hendaye (Pyrénées-Atlantiques), visited by two inspection teams, respectively from 27<sup>th</sup> to 30<sup>th</sup> August and from 23<sup>rd</sup> to 26<sup>th</sup> September 2013.

2/ These recommendations have been addressed to the Minister of National Education, the Minister of Justice and the Minister of Health and Social Affairs. They were given 17 days to respond with their observations. The Minister of Justice provided her response, shown below. The other ministers did not respond. The standard procedure, which requires the inspectors to draft an exhaustive report of their visit, is in process and the final reports will be submitted to the competent ministers to once again request their observations. They will be made public at the end of the procedure.

3/ The Convention on the Rights of the Child, signed and ratified by France, provides that "*the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.*" (Article 3, §3).

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<sup>115</sup> Published in the *Journal Officiel de la République française* of 13<sup>th</sup> November 2013, text n°43.

<sup>116</sup> Emergency procedure under §2 of article 9 of the French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cglpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)

Safety and health are therefore indispensable objectives for institutions that admit children. Given the risks inherent in the behaviour of minors and, a fortiori, of children who have already experienced varying degrees of criminality, these requirements are simply another way of asserting the right to life and the right to not be subjected to inhuman or degrading treatment, as both are part of the European Convention on Human Rights and Fundamental Freedoms as well as the Convention on the Rights of the Child (Articles 6 and 37).

Two observations made at the Hendaye CEC are inconsistent with these principles.

4/ A choice was made to establish this CEC on public land that formerly was assigned to the Navy. Access to the site is difficult and is worth describing in detail:

- The road providing access to the CEC (via a tunnel) is inaccessible to pedestrians and there is no plan to change that;
- There is a pontoon used as a landing stage on the shore of the Bidassoa River. It was clearly used in the past by the Navy sailors. Now it is used only occasionally by the CEC for recreational outings. An improvement project raises doubts about this facility;
- The only way for a young person to leave on foot is to cross two railroad tracks and the Hendaye - Irun tramway line. The latter is protected by a level crossing, but the railroad tracks are prohibited to pedestrians and are not fitted with safety fixtures.

Of course, pedestrians frequently cross the tracks. But for the children living at the CEC to cross railroad tracks, even under supervision, let alone during an impromptu outing or when running away, is not consistent with the safety required by the legal principles mentioned above. It exposes these children – who may escape the vigilance of their educators at any time – to significant risks and is therefore, by reason of its permanent presence, a severe infringement of their right to life.

5/ We note that the CEC will soon move to the nearby town of Bidart. However, this move is only temporary, in order to allow works that, in accordance with national directives, will increase the capacity of the CEC, while degrading the living conditions for some of the minors who are admitted. When the CEC returns to Hendaye, with an expanded staff, risks will increase. The choice of location, made in 2003, speaks

volumes about how seriously the safety and educational dimensions were viewed at that time.

6/ The presence, in the CEC's freezers, of a large stock of meat several months past its expiry date, also flies in the face of the Convention's stipulations. Perhaps this meat would not have been fed to the children: there is no proof. In addition, once the situation became known, management immediately took the required measures. However, it is established that, at the very least, the minors in the CEC's care ran a health risk due to the mismanagement of food intended for their consumption. Moreover, when the inspection visit was conducted, the most recent veterinary services inspection dated from 2008 and no periodic inspection by an independent food hygiene laboratory was planned.

7/ Article 29 of the Convention on the Rights of the Child emphasises education and the orientation it must take, concerning "*development of the child's personality*" and "*mental and physical abilities*". The statutory instrument of 2<sup>nd</sup> February 1945,<sup>117</sup> as amended, provides that CEFs should be subject to ongoing supervision and inspection "to ensure heightened educational and pedagogical support adapted" to the personality of the minors who are admitted.

8/ This is contrary to the inspectors' observations at the Pionsat CEC. Without questioning the goodwill of the educators – who are lacking in skills and training – the inspectors noted the total absence of an educational project. An institutional project, written in June 2010, before the facility opened, is being used in the absence of a service project. But, in any case, the staff is not familiar with this document.

During the inspection visit, the children's activities for the day were determined that same morning. As the day began, neither the young people nor the educators knew what they would do; no advance planning had taken place. During interviews, children complained about the institution's lack of organisation.

The "activities" taking place during the visit were largely improvised (cutting weeds, outings with the maintenance man to buy supplies, four-person ball games on the paved sports area) and evinced little

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<sup>117</sup> French order (ordonnance) n°45-174 of 2<sup>nd</sup> February 1945 on juvenile delinquency: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158> (in French).

or no educational value for the young people.

Nothing was planned to fill the gap left by the absence of schoolwork during the summer holidays. In addition, at the time of the visit (27<sup>th</sup>-30<sup>th</sup> August 2013) – just a few days before the beginning of the school year, in an institution that receives children subject to compulsory education – no teacher had been assigned by the school district administration.

In view of the gravity of these breaches, clearly perceived by the new director, who began duties a few days before the visit, they constitute a serious violation of children's rights to education as defined by the aforementioned texts.

9/ These observations lead the *Contrôleur général des lieux de privation de liberté* to strongly recommend:

- Permanently relocating the Hendaye CEC to another site compatible with the health and safety of children who are admitted;
- Realising a comprehensive, multifactorial written analysis prior to the selection of sites where CECs are to be established;
- Focussing additional attention on the initial and continuing training of educators, as previously recommended (cf. "*Recommandations du 1<sup>er</sup> décembre 2010 du contrôle général relatives à quatre centres éducatifs fermés*",<sup>118</sup> *Journal Officiel*, 8<sup>th</sup> December 2010);
- Requiring all CECs, including Pionsat, to draft an educational project that is clearly identified, known to all concerned, updatable, susceptible to inspection, and inspected by the competent territorial services;
- Requiring competent authorities to appoint teachers in a time frame compatible with the children's needs and which provides educational services in a continuous manner during the summer holidays.

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<sup>118</sup> Recommendations of 1<sup>st</sup> December 2010 in view of an overall inspection of four CECs.

## Opinion of 6<sup>th</sup> February 2014<sup>119</sup> concerning the implementation of post-sentence preventive detention

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1/ A new detention order in the penal code, called *réétention de sùreté* and providing placement in secure medical jurisprudence centres for prisoners having served sentences for serious crimes but presenting very high risks of recidivism due to personality disorders, was inaugurated in France by the law of 25<sup>th</sup> February 2008<sup>120</sup> and widened by the law of 10<sup>th</sup> March 2010.<sup>121</sup> It is not part of the remit of the *Contrôleur général des lieux de privation de liberté* (CGLPL) to re-open the debate concerning this new post-sentence preventive detention measure. It is, however, part of his prerogatives to give his views on the organisation and the day-to-day running of the "socio-medico-judicial" centres where people subjected to this new measure are detained. In effect, such a decision from the courts has the effect of depriving people of their liberty - and preventing abuses concerning people's fundamental rights is at the core of the General Inspectorate's responsibilities. It is perhaps appropriate to recall that such fundamental rights need to be taken into account whatever the person's previous criminal record or the potential danger that such a person may present in the future.

It is for this reason that the *Contrôleur général* visited the socio-medico-judicial centre within the National Public Health establishment in Fresnes (Val-de-Marne) on the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> October 2013 following a referral concerning two people who had been placed in detention there. This had been done under article 6 of the law of 30<sup>th</sup> October 2007, applying the combined dispositions of chapter III under the title XIX of the fourth book of the criminal procedure

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<sup>119</sup> Published in the *Journal Officiel de la République française* of 25<sup>th</sup> February 2014, text n°71.

<sup>120</sup> French law n°2008-174 of 25<sup>th</sup> February 2008 on post-sentence preventive detention and on the declaration of penal irresponsibility because of mental health problems: <http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=?cidTexte=JORFTEXT000018162705> (in French).

<sup>121</sup> French law n°2010-242 of 10<sup>th</sup> March 2010 aiming to decrease de risk of reoffending and including various provisions concerning criminal procedure: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000021954436> (in French).

(articles 706-53-13 onwards) and of chapter II (section IX) under title II of the fifth book of the same procedure (in particular article 723-37).

2/ The visit gave rise to a report, the terms of which were communicated to the head of the establishment, the Director of the National Health Establishment. The current opinion has been based on the fundamental points raised in the report and on the responses to them that have been received. Prior to publication, the report was drawn to the attention of the Minister of Justice and the Minister of Health and Social Affairs in letters dated 6<sup>th</sup> February 2014; neither of the two ministers has provided any observations.

3/ The conditions in which this post-sentence preventive detention is carried out give rise to two series of observations, one concerning the population to which this measure is currently applied, and the second concerning the conditions in which such people are held.

4/ The law of 25<sup>th</sup> February 2008 allows sectioning people who, having received a prison sentence equal to or greater than fifteen years for serious crimes, are considered at the end of their sentences to pose a particular danger to the public.

However, the Constitutional Council rejected any idea of retro-activity concerning this particular measure, *"having regard to the fact that it involves depriving of liberty, to the length of this deprivation, to the possibility of its being renewed sine die and to the fact that it was promulgated after a court had given sentence"* (decision n°2008-562 DC of 21<sup>st</sup> February 2008, clause 10). It follows that, as long as persons judged by a criminal court - whose sentence was qualified by a possible post-sentence preventive detention - are not close to the end of their sentences (i.e. at least fifteen years after the law's promulgation, from which would need to be subtracted any remission, doubtless not particularly frequent), no prisoner should yet have been detained in any such socio-medico-judicial centre.

5/ How is it then that four people have been so detained between 2011 and 2013? As has been pointed out elsewhere, there is another category of persons who could be detained under this provision - people having received prison sentences of fifteen years or more for crimes of the same nature as mentioned earlier, but without any provision for post-sentence sectioning, having been placed under post-release supervision (article 723-29 of the Criminal Procedure Code), extended by mandatory supervision, and who have ignored



their obligations under these conditions (article 723-37).

It is this sequence of events that resulted in four people (as at the date of the visit) being detained in the Fresnes socio-medico-judicial centre. These people were detained under the 2008 law, complemented by that of 10<sup>th</sup> March 2010 (article 4-II, a law which had not been taken to the Constitutional Council), the first of them arriving on 23<sup>rd</sup> December 2011, and the last of them leaving on 24<sup>th</sup> November 2013. Such a small number of cases is not a reason for not carrying out an investigation into the sequence of events that caused such detention.

**6/** The four people concerned were all detained for failure to comply with the obligations that had been imposed upon them using the mechanisms laid out in article 723-37:

- The first for ignoring the obligation to undergo psychiatric treatment and to domicile himself in a designated place;
- The second for having frequented bars and been in establishments accessible by minors in contravention of the restrictions imposed on him;
- The third for repeated refusal to undergo the prescribed treatment;
- And finally the last one for similar reasons.

This last is a special case. In effect, whereas article 723-37, which authorises mandatory supervision and then post-release preventive detention, demands a sentence of at least fifteen years, this person had only received a ten-year sentence. Having been sectioned in error on 24<sup>th</sup> August 2013, the person had to wait until a decision was handed down by the relevant court - on 22<sup>nd</sup> November 2013 - before being released after 88 days of unlawful detention.

Can the three other cases be considered as complying with the fundamental principles governing criminal law, particularly those contained in articles 5 (law on liberty and security) and 7 (no conviction without law) of the European Convention for the Protection of Human Rights and Fundamental Freedoms? It must be remembered that their post-release preventive detention was occasioned by their ignoring obligations placed upon them during post-release supervision extended by mandatory supervision.

**7/** As is well known, the Constitutional Council considered that this post-release preventive detention was not a sentence in the criminal

sense of the term. The European Court of Human Rights gave a contrary verdict in a similar case under article 66 §1 in the German Criminal code: 5<sup>th</sup> section, 17<sup>th</sup> December 2009, *M. v. Germany*, n°19359/04, §133; see also two other similar decisions of 24<sup>th</sup> November 2011).

8/ In those cases where post-release preventive detention was applied after 2008 for failure to comply with the obligations under mandatory supervision, the concept of retro-activity does not exist: the person placed under such a surveillance program - which the Constitutional Council admitted could be applied to people already sentenced - knows from the outset that, in case of non-compliance with the appropriate obligations, he is likely to be subject to this measure. However, in reality the punitive and the preventive aspects are inextricably linked. In part, this is because of their intrinsic nature. But above all, in the current hypothesis, because of the overlapping of punitive measures, preventive measures without detention and preventive measures with detention. In fact, the cases considered here need to meet the following conditions (article 723-37):

- Have been sentenced to prison for at least fifteen years for one of the crimes for which post-release preventive detention can be ordered;
- At the end of their sentences, have been placed under post-release supervision;
- At the end of that, have been placed, by the post-release preventive detention judge, under mandatory supervision for a period of two years renewable at the end;
- If, and only if, the obligations imposed by the last of these have not been respected, have been sectioned by the same judge.

9/ However, such a sequence would appear to be tarnished by discontinuity. At the time of their conviction, no judge could have envisaged placing any of the people concerned here under a mandatory supervision scheme as this did not exist at that time. We need to remind that this particular measure is not aimed at all those under a supervision regime (article 723-29), but only those individuals in such a group who have been sentenced to the longest terms of imprisonment for having committed the most serious crimes against another person. Moreover, the simple failure to comply with the obligations of some security measure can evidently not lead to a 'sentence' as heavy as post-release preventive detention. It is because they have been

convicted of serious crimes, and therefore considered as dangerous, that they have been placed in this establishment. But such a measure also did not exist at the time of their conviction. Each stage does not therefore arrive "as a result of and following" the previous one, as the European Court of Human Rights would say (see 24<sup>th</sup> June 1982, *Van Droogenbroeck v. Belgium*, §35, series A, n°50), but rather as a function of an assortment of different items gathered over the years following the initial conviction. And the Court in Strasbourg adds "The Court does not exclude that measures taken by the legislator, administrative authorities or the courts, after a sentence is passed or during the serving of a sentence, can lead to a redefinition or a modification of the scope concerning the 'sentence' applied by the judge who handed the sentence down" and by that, consider them as retro-active and therefore open to criticism (CEDH, *G<sup>de</sup> Chambre*, 21<sup>st</sup> October 2013, *Del Río Prada v. Spain*, §89, n°42750/09). It therefore would seem justifiable to question both the reason that was used to authorise post-release preventive detention and the use of such a measure over that time, and thus the validity of the conditions in which such placements are decided, particularly in view of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

10/ Such an examination also has some very practical aspects. Post-release preventive detention has as its objective the protection of society from dangerous individuals. It cannot be argued that the simple failure to comply with the obligations imposed by mandatory supervision be a defining characteristic of such a population. The two people that the inspectors met during the on-site visit in October 2013 are a perfect example. One of them deliberately failed to honour the required obligations during mandatory supervision because he believed (for reasons linked to his own personality) that post-release preventive detention was the right solution for him; the cognitive capabilities of the second were such that he was clearly unable to comprehend the scope of the constraints that were imposed upon him. An absence of self-respect and limited intellectual abilities do not by themselves demonstrate, and even less, aggravate a state of 'dangerousness'<sup>122</sup> which is supposed to be the basis for a decision to impose mandatory supervision; and a fortiori for a decision to post-release preventive detention.

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<sup>122</sup>For a critique of the use of this term, see the Annual report for 2011 of the *Contrôle général*, p.62 onwards.

One should add that, out of the four people that were subject to this provision, half benefited from an unfavourable response from the 'inter-disciplinary committee for security measures' (article 763-10 of the penal procedure code), the advice of which is necessarily required before any placement (article 706-53-19). And on top of this, it is worth pointing out that the time spent in post-release preventive detention by these four were respectively 41 days (twice), 86 days and 88 days - i.e. periods during which one can hardly expect to see a change in their state compared with what it was before sectioning. Isn't it rather the original state that should be questioned?

**11/** But it is not just the principles and practices used for deciding to section these people that raise questions. The regime to which they were subjected is equally questionable.

**12/** The law of 25<sup>th</sup> February 2008 is very clear in its intent: the retention de sûreté is the placing of an individual in a socio-medico-judicial centre where the person is offered a "*series of treatments - medical, social and psychological - designed to bring an end to such a placement*". In other words, far from being an end in itself, implying being deprived of one's freedom for life, this post-release preventive detention is a process designed to eliminate the 'dangerous' character of the individual. In short, the socio-medico-judicial centre is not a kind of special place where one comes to die, but a tool for rehabilitation and thus reinsertion. This is one of the reasons that the person's case is examined every year (leaving aside any requests from the person concerned for release).

**13/** The socio-medico-judicial centre in Fresnes was inaugurated on 6<sup>th</sup> November 2008. It occupies part of the ground floor and the third floor (linked by a stairway) of the EPSNF (National Centre for Public Health) in Fresnes, which is physically next to, but distinct from, the Fresnes remand prison with which it should not be confused. The ground floor is given over to administration formalities (including space for the clerks of the courts), visits, interviews and exercise. Accommodation facilities occupy the third floor where, either side of the entrance are two corridors, one having six individual studios and the other four, with the two sections being separated by closed doors. The *Contrôleur général* found that the physical conditions in this accommodation unit were perfectly satisfactory.

**14/** A first set of difficulties relates to the definition of the applicable

regime. Although, naturally, security measures need to be taken, the regime cannot be a penal one as the centre is not a prison. However, the prison staff present (infrequently, as there are not sufficient numbers in the centre to be looked after) make no distinction in reality between the two regimes. Internal regulations contained in article R. 53-8-78 of the penal procedure code forbids, in its appendix 2, a certain number of objects being in the possession of inmates, among which are mobile telephones - precisely the situation with the people detained here. However, it is expressly stated (N°7 of article R. 53-8-68 of the code) that individuals in post-release preventive detention may telephone to whomsoever they wish and any additional restriction has to be duly justified by security considerations. The Council of State has judged such unfounded restrictions - specifically concerning telephones - to be cases of incompetency (6/1, 21<sup>st</sup> October 2011, *Section française de l'observatoire international des prisons*, n°332 707, C. Roger-Lacan, published report). In addition, the exercise yard, as in far too many prison establishments, is devoid of any toilet or sports facilities, and gaining access to it is not rendered simple. Medical visits are performed exactly as in prisons (obligatory presence of warders during treatment), in contradiction with the applicable rules. Disciplinary measures do not mention what recourse is possible, nor in what time frame (in particular, with post-release preventive detention, there is no mandatory preparatory administrative recourse). The warders' night-time rounds frequently involve waking the residents every two hours without any justification. Finally, the question of searches and the measures to be taken in cases of disruptive behaviour are unclear (article R. 53-8-72 talks only of "all appropriate measures" if good order is at risk). In summary, many items, when not simply remaining very vague, are based on practices carried out in penal institutions where, as is well known, responsibility for the inmates is not the primary objective. This trend is reinforced by the fact that, whereas article R. 53-8-76 of the penal procedure code specifies for the Fresnes centre joint responsibility between a prison services director and a hospital director, only the former is present on-site. A convention agreed with the Paul-Guiraud hospital specifies that the EPSNF hospital director is also the director of the socio-medico-judicial centre - but this position has remained vacant for a long time.

In addition, the controlors found that certain constraints imposed on the people concerned whilst they were on mandatory supervision were simply re-imposed during their period of post-release preventive

detention - in particular with regard to restricting visits. But in no case can the mandatory supervision regime be the basis of any measures imposed during post-release preventive detention - only measures essential for maintaining order can be imposed (article R. 53-8-66).

15/ A second set of difficulties diminishes the effect of post-release preventive detention because the "treatment" on offer falls a long way short of meeting the objectives set by law. In the first place, there is nothing organised to occupy those detained - inactivity is the rule. At the time of the inspection, there was no training project, no professional activity, and not even any open-air activities. The only distractions were a sports hall and an IT room (with Internet access "filtered"). Not surprisingly, each one of those interviewed during the inspection spoke of boredom, of their isolation, and their feeling of being abandoned. Secondly, medical/psychological treatment is satisfactory on the medical side when the EPSNF treatment is available for those detained (but admission to the hospital on this site is debatable when this is reserved for prison inmates, a status that the people concerned here do not possess). At first glance, psychiatric treatment would appear to be assured by the three-year agreement signed with the Paul Guiraud Hospital group in Villejuif on 28<sup>th</sup> May 2001, and since extended, whereby the Fresnes centre benefits from the availability of high quality medical and caring staff (respectively for 0.4 FTE and 4 FTE<sup>123</sup>). However in practice, the small number of 'patients' detained has meant that implementing the required psychiatric treatment has not been possible, as it is based largely on group therapy. The medical staff has suggested that the 'detainees' concerned join the therapy groups organised for those detained for sexual offences in the psychiatric unit (UPH) of the Fresnes remand prison: the prison administration has refused this. There is nothing in the rules that would allow this, and the idea of authorising an escorted visit to the UPH to take advantage of the service offered there was not operational at the time of the inspection. The fact is, therefore, that the two people detained were not receiving any psychiatric treatment of their own, and neither were they able to take advantage of the treatment offered to inmates at the Fresnes prison. They were able to see a psychiatrist regularly (in principle once a week) and to have nurses visit them (once a week and not twice as was the case for the first person detained), all of which can hardly be

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<sup>123</sup> Full time equivalent.

considered as a proper treatment programme. In addition, not one of the four people detained, on leaving the establishment, received any specialised follow-up such as that open to those who have committed sex-related offences. Thirdly and finally, help of a social nature was provided - with pleasure - entirely thanks to the personal commitment of the EPSNF's social worker, whose job description does not mention this responsibility. In these conditions, it is difficult to see how the legislator's intent of a socio-medico-judicial treatment programme can have been implemented.

16/ Uncertainty over principles and shortcomings in treatment are intimately linked: the less effective the treatment, the longer the person is likely to remain in detention since the person's state is unlikely to improve. Thus, implementing post-release preventive detention on such fragile foundations raises more questions concerning fundamental rights the longer such detention continues and where ending the procedure would seem impossible, contrary to the provisions of the law. It is only due to the conscientious vigilance of the courts believing that basic requirements had not been respected that the length of the detentions suffered by these four people was so short.

17/ Today, therefore, implementation of the rétention de sûreté requires:

- first, clarification of the appropriate regime which, as written in the law remains vague in the manner in which one needs to distinguish between "people detained" and "people in post-release preventive detention" (establishments designed for the former category are in principle inaccessible to the latter, and *vice versa*). Whereas in practice, many elements of the penal regime are retained for persons sectioned. An example - in which hospital should a sectioned person be treated?;
- secondly, considerable strengthening of the treatment provided, i.e. adapting the means to a population which is likely to remain for sometime small in number and quite likely transient;
- and finally, considering the principles behind criminal law, a serious re-think of the validity of depriving people of their freedom for having failed to honour the obligations of mandatory supervision.

## Opinion of 24<sup>th</sup> March 2014<sup>124</sup> concerning the use of individual cells in prisons

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1/ The material conditions under which a prisoner is held are crucial for ensuring respect for their fundamental rights. In this regard, it is incumbent upon the public authority to “ensure that every prisoner is held in conditions that are compatible with human dignity” (European Court of Human Rights, Grand Chamber, *Kudła v. Poland*, 26<sup>th</sup> October 2000, GAECR, §94). This obligation of the State means that the State cannot hold a prisoner under conditions that are objectively unacceptable (European Court of Human Rights, *Dougoz v. Greece*, 6<sup>th</sup> March 2001, n°40907/98, §46). Conditions to be avoided by the authorities include overcrowding and cell configurations devoid of basic amenities (*Karalevičius v. Lithuania*, 7<sup>th</sup> April 2005, n°53254/99, §36 and 39).

2/ The individual cell system (which is now referred to as the Philadelphia, or Tocqueville system) was introduced in France with the law of 5<sup>th</sup> June 1875 on the departmental prisons regime for altogether different reasons. This system was used for all prisoners in remand and those serving short custodial sentences (one year or less), and was applied day and night. It was accompanied by other measures, such as the wearing of hoods for all movements in prison and the construction of cavities in chapels so that the faithful could not be seen, and even compulsory silence during work. The aim was to deprive the prisoner of any relationship with their fellow inmates, forcing them into a state of isolation that would enable them to mend their ways. Thus, the use of individual cells ensured the effectiveness of their punishment.

3/ Now, individual cells are used for an altogether different purpose. The purpose of individual cells is to offer each prisoner a space where they are protected from others and where they can therefore protect their privacy and remove themselves from the violence and threats associated with social relationships in prison. By allowing each prisoner to pursue the (authorised) activities of their choice, to study, to reflect, and to empower themselves, the use of individual cells is no longer a

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<sup>124</sup> Published in the *Journal Officiel de la République française* of 23<sup>rd</sup> April 2014, text n°117.



condition of the punishment itself; rather, by enabling each prisoner to retain their own personality, it ensures that they can reintegrate into their community upon their release. As such, it is conducive to the effective enforcement of fundamental rights. As a result, the *contrôle général des lieux de privation de liberté* pays particularly close attention to this issue.

4/ At present, the Code of Criminal Procedure contains two rules in relation to cells.

Article 716 applies to suspects in pre-trial detention: it states that these suspects be placed in individual cells except in the event of an exemption, made at the request of the interested parties, on the grounds that it would be in their best interests not to be alone; or where so required by the employer or professional training body with which they are registered. This article also states that "*the security and dignity of suspects placed in shared cells must be assured*".

Article 717-2 addresses the situation of convicted individuals. At remand prisons, they are held in individual cells day and night; at correctional facilities, they are held in individual cells only at night. However, exceptions to this rule may be made for the reasons described above (on the (hard to fathom) condition that no mention is made of professional training).

5/ It is difficult to implement these provisions, due to what one university student has described as "the crisis in prison accommodation" (Pierrette Poncela, *Revue des Sciences Criminelles*, 2008, p.972). While the prison administration practices a de facto *numerus clausus* that only affects prisons as places become available, thus ensuring compliance with the provisions of article 717-2 applicable to these prisons (as they relate to the principle of the use of individual cells, but do not necessarily limit their use to nights), the same cannot be said of remand prisons, where overcrowding has led to cells designed for one prisoner housing two, cells designed for two prisoners housing three, and so on. From the outside, it is hard to see how these prisons function in a permanent state of tension that is exhausting for both staff and prisoners. Individual cells have long been very rarely used at remand prisons; they are used to hold inmates from particular sections of the prison (isolation, discipline), often as punishment or for desocialisation purposes, or inmates in a particular situation (those who have self-harmed, etc.).

6/ Faced with this situation, the legislature envisaged provisional palliative measures to momentarily broaden the scope of the principle of the use of individual cells set forth in the Code of Criminal Procedure. The legislature suspended an exemption that was limited to this principle: in other words, it left in place the option to broaden the scope of this principle with greater ease. In the law of 15<sup>th</sup> June 2000 (II of article 68),<sup>125</sup> it deferred the implementation of a strictly limited exemption until 2003. It should be noted that as at 1<sup>st</sup> January 2000, the prison population was 51 441 –16 979 fewer than at present – and that the remand prisons and remand sections of prisons have a population density of 114 per prison – 23.5 fewer than at present. Three years later, the deadline was again deferred for five years via article 41 of the Act of 12<sup>th</sup> June 2003.<sup>126</sup> thus, it expired in 2008.

7/ At that time, the government envisaged a system, incorporated into the regulatory section of the Code of Criminal Procedure (article D. 53-1, repealed and inserted into the standard rules of procedure of establishments, article 38, in 2013); under the terms of this system, when a prisoner requests a cell of their own and their request cannot be met at their prison, they can request a transfer to a prison where they can have a cell of their own. In other words, the principle of the use of individual cells should not be seen in terms of the establishment where the prisoner is incarcerated, but in the context of the remand prison system as a whole. The Council of State has validated this approach (6/1, 29<sup>th</sup> March 2010, n°319043, to rec., Mr. Guyomar, rep. publ.). What is of importance for the prisoner (subject to the agreement of the magistrate), is the need to choose between the proximity of the prison to their loved ones (and therefore access to a visitor room) and the use of individual cells. Such an alternative is not satisfactory in terms of fundamental rights, in particular respect for the right to a family life.

8/ This system has been retained as an alternative in the Penitentiary

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<sup>125</sup> French law n°2000-516 of 15<sup>th</sup> June 2000 strengthening the protection of the presumption of innocence and the right of victims: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000765204> (in French).

<sup>126</sup> French law n°2003-495 of 12<sup>th</sup> June 2003 strengthening the fight against road violence: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000603464> (in French).

law of 2009.<sup>127</sup> However, contrary to the opinion of the government, the law has retained as a primary concern the principle of the use of individual cells and the system of a new suspension to the application of exemptions restricted to this principle, the entry into force of which has been deferred until five years after the publication of the law. Given that the law was published on 25<sup>th</sup> November 2009, the principle of the use of individual cells should be seen more strictly as entering into force on 25<sup>th</sup> November 2014.

What can be expected on this deadline?

9/ Despite the construction of prisons, the increase in the number of individuals being held in remand and in the duration of sentences handed down has resulted in unbearable overcrowding in prisons. Since the opinion handed down on this point (cf. opinion of the *Contrôleur général des lieux de privation de liberté* of 22<sup>nd</sup> May 2012 on the number of prisoners, *Journal Officiel* of 13<sup>th</sup> June 2012), there has been no improvement in the situation. According to figures provided by the prison administration, population density in prisons stood at 117.8 per prison as at 1<sup>st</sup> March 2014. However, due to the abovementioned *numerus clausus* practiced in prisons, population density in remand prisons and remand sections of mixed prisons stands at 137.5.

10/ Under these conditions, the system devised in 2008 not only has serious disadvantages for people who wish to benefit from it, but is presented in a very theoretical manner: at the remand prisons chosen, even those some distance from the initial place of incarceration, there is in fact no chance of being given an individual cell. It must also be said that this system is only applied at the outset to suspects, with the prison administration having expanded it in a circular sent to inmates in remand prisons. And yet, as recalled above (article 717-2), all inmates held in remand prisons are also meant to be in individual cells. Yet in these prisons, these inmates are in the majority (during inspections by the *Contrôle général*: at Grenoble-Varces, 65%; at Basse-Terre, 75%; at Bois-d'Arcy, 70%; at Lyon-Corbas, 56%; at Nîmes, 61%, etc.). As a result the system, due to the extent of overcrowding in prisons, is totally inoperative, and can therefore only be an illusion.

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<sup>127</sup> French penitentiary law n°2009-1436 of 24<sup>th</sup> November 2009: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT0000021312171&categorieLien=id> (in French).

11/ To these numerous effects, one must also add the effects of their management by the prison administration. Rules for the allocation and separation of inmates, placements in solitary confinement, and transfers conducted as a method of preserving order, render the regime for the detention of some prisoners more restrictive, without providing effective protection to the most vulnerable inmates. This is borne out by inspections by the *contrôle général* and letters it receives.

12/ There are three theoretically possible solutions.

13/ The first solution consists of adopting, without altering other data that determine the prison population, a new legislative provision that provides for a new period of several years before the implementation of a "normal" regime for the use of individual cells, as has already been done on three occasions in fourteen years, despite a prison building programme that will increase the number of places available.

Such a solution is unsatisfactory, in that it merely provides a record of a situation that is very detrimental to individuals held, both suspects and convicted criminals, with no prospect for improvement except in the medium-term. The *contrôle général* receives numerous letters from prisoners complaining about overcrowded conditions in their cells, unaware of the rules adopted by the prison administration in 1988 (our DAP n°88G 05G of 16<sup>th</sup> March 1988: one space in a cell with an area of less than 11m<sup>2</sup>). Moreover, the more it is delayed, the less credible the use of individual cells will be. A necessary evil, the report is a convenient expedient so as to avoid adopting the measures required.

14/ The second solution, on the other hand, would allow the deadline set in 2009 to expire and, as a consequence, allow the provisions of articles 716 and 717-2 of the Code of Criminal Procedure to take full effect without no amendment to the law. Of course, this is a solution that would be seen favourably by inmates, who would be able to derive from the law, except for restrictive exemptions, a "right" to their own cell, a right that was suspended fourteen years ago. The *Contrôle général*, the purpose of which is to prevent degrading living conditions in prison, should of course be in favour of such a choice.

Nevertheless, one must wonder how realistic it is. If it was considered necessary in 2000, when prison population density was much less of a problem, to defer the date of implementation of the principle, how can we expect to implement it today, when prison population densities are considerably higher? The law must be prospective, and

even voluntarist. It is not without risk; this would be quite unrealistic. Without doubt, it can anticipate certain situations, provided that it is provided with the resources to do so. This is not the case. The uncertainties that surround the effects of a new penal sanction (the “penal constraint”) yet to be adopted by Parliament (the impact study on the draft law relating to the prevention of recidivism and the individualisation of sentences finds it difficult to quantify these impacts) mean it is not possible to be absolutely free of restrictions in place. This choice would also create vain hope among prisoners, hope that would give rise to tensions that must be avoided in prisons, which have no need for such tensions. Therefore, a solution that is as swift and moot should be discarded.

15/ There is a third, more modest solution: to resume the use of individual cells in strict accordance with the principles of the Code of Criminal Procedure for certain categories of inmates, as stipulated in regulations; and, in doing so, reintroduce the principles of the code to the reality of prison life over time.

a) In order for this solution to succeed, two preconditions must be met.

The first is to secure relief from the overcrowding of prisons, as the United States, which spends so heavily in in this area, started to do several years ago, and as provided for in the draft law tabled before Parliament, as defined in reports and studies and whose instructions, which reduce the inflow of prisoners and increase the outflow of prisoners, will not be discussed here. A number of local initiatives formulated by the judicial authority, in conjunction with the governors of each prison, reduced the inflow of prisoners by taking into account the number of places available, or increased the number of prisoners released via an active sentence adjustment policy. Using this approach, remand prisons recovered some of their margin for manoeuvre, enabling them to place more prisoners in their own cells.

The second must ensure the protection of individuals subject to pressures that violate their dignity, i.e. ensure the effectiveness of this provision of the Penitentiary law, which states that “*prison administration must ensure the effective protection of the physical integrity of all persons in all common and personal areas*”. To this end, based on express regulatory provisions of the Code of Criminal Procedure, all prisons, in particular male prisons with more than a certain number of inmates specified in regulations, must have areas

to house these prisoners. The housing of prisoners in such areas could provide great support for the use of cells shared by two inmates, as this would not result in threats or violence. Naturally, prisoners held in these areas must retain access to all rights in force in detention (separate walkways, access to activities, etc.). Providing protection to persons under threat will avert transfer requests and incidents, which can at times be brutal, due to fear resulting from the presence of the prisoner at a facility where they find themselves in danger. This approach can be reconciled with subparagraph three of article 44 of the Penitentiary law.

b) Once these preconditions have been met, it is up to the authorities to enable prisoners to develop on a personal level, a condition that is necessary for their reintegration into the community upon their release. With this aim in mind, some categories of prisoners, which will grow over time, must have an assurance that they will benefit from the principle of the use of individual cells. The experience of prison staff and the *contrôle général* means that these categories are easily identified: prisoners with disabilities that result in a loss of independence, in particular disabling pathologies and deaf and dumb prisoners, and even blind prisoners; prisoners aged over 65; prisoners rendered fragile as a result of illness, in particular the most serious mental illnesses; and foreign nationals who do not understand French. These people must be allocated a cell of their own as soon as possible (in particular foreign nationals), unless they express in no uncertain terms their wish to share a cell (in this case, the prison administration must endeavour to place them with a prisoner agreed to by them).

c) Consequently, the draft provision below could be subject to a vote in Parliament.

*"An exemption may be made for individual placement in remand prisons, based on the capacity of the prison in question and the fact that the number of suspects held do not allow this law to be implemented, for up to five years from the date of publication of this law.*

*However, this exemption is not applicable to persons defined in the regulations as those persons whose particular situation as regards their incarceration, taking into account in particular their age, health, and serious communication difficulties, requires greater attention as regards their right to a private life. These persons are placed in individual cells at all times, except if they submit an express request to the contrary or*

*pose a threat that justifies a decision 'that they never be left alone!'*"

16/ The scope of the decree will be extended to include other categories of prisoners in line with their possibilities to benefit from the use of individual cells. Therefore, the law will be content to pose the principle of a diversified application of the rule, a diversity legally based on situations that are objectively different to prison life.

17/ This approach must also result in a more selective use of solitary confinement in prisons: it must only be used for individuals the prison manager considers could pose a threat to prison staff or other inmates, not to people seeking protection from others, as occurs at present, which could give these areas an unsuitable hybrid feel. Thus, solitary confinement should be more strictly overseen in accordance with provisions in force, in particular so that the maximum duration of this confinement is reduced due to its consequences (on this point, refer to ECHR, *Öcalan v. Turkey*, 18<sup>th</sup> March 2014, n°24069/03, §§ 104-106).

18/ Finally, a specific investment programme should result in the prompt elimination in prisons, including those overseas territories, of cells referred to as "cookers", where five, six, or more people are crammed in under particularly harsh conditions, in particular given due to the fact that at remand prisons where cookers exist, the regime in force and the absence of activities mean that prisoners remain in these cells most of the time.

For individuals who, clearly and under no pressure whatsoever, freely choose to serve out their sentence in a shared cell (no more than three prisoners), prison plans and budgets must make real provision for collective cells that are of an adequate size (12-14m<sup>2</sup> for two prisoners, 15-19m<sup>2</sup> for three) and have adequate furniture.

In view of the above, the following two subparagraphs must be added to the draft provision referred to in §15 above:

*"When individuals held in pre-trial detention or convicted are placed in a collective cell, the area and amenities of this cell must be limited to a maximum of three people and be suitable for the number of people held there, so as to protect their safety and dignity. These individuals must be able to coexist.*

*Each year, the Government will submit a report on the application of this provision to Parliament, in particular on the expansion of the categories of individuals who have been given their own cell."*

# Urgent Recommendations of 26<sup>th</sup> March 2014<sup>128</sup> concerning the minors' wing at Villeneuve-lès-Maguelone remand prison

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1/ Article 9 of the Act of 30<sup>th</sup> October 2007 states that upon confirming that there has been a serious violation of the fundamental rights of prisoners, the *Contrôleur général des lieux de privation de liberté* (CGLPL) must provide the competent authorities with its observations immediately and request a response to these observations from said authorities.<sup>129</sup> Once it has received a response, it shall confirm whether or not the specified violation has ended and can publish its observations and the responses received.

Pursuant to this emergency provision, which was implemented for the fourth time since the start of its mandate, the *Contrôleur général* has published these recommendations in relation to the minors' wing of Villeneuve-lès-Maguelone Remand Prison (Hérault), visited by two controllers from 17<sup>th</sup> to 20<sup>th</sup> February 2014, to assess information relating to violence at the prison that was first provided to the *Contrôle général*.

2/ The *contrôle général* forwarded these recommendations to the Minister of Justice and the Minister of Social Affairs. These Ministers were given six days to provide their observations.

At the end of this procedure, and in accordance with the law n°2007-1545 of 30<sup>th</sup> October 2007, the *Contrôleur général* published the following findings and recommendations.

3/ Locally, the controllers interviewed the director of the remand prison, the head of detention, the manager, the officer responsible for Building A (which contains the minors' wing), prison staff allocated to the same area, a warder responsible for courtyards, the head of the education unit within the Montpellier territorial non-residential education service (STEMO), educators from the Juvenile Protection

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<sup>128</sup> Published in the *Journal Officiel de la République française* of 23<sup>rd</sup> April 2014, text n°116.

<sup>129</sup> Emergency procedure under §2 of article 9 of the French law n°2007-1545 of 30<sup>th</sup> October 2007 establishing a *Contrôleur général des lieux de privation de liberté*: [http://www.cglpl.fr/wp-content/uploads/2009/04/Loi\\_CGLPL\\_EUK-v.pdf](http://www.cglpl.fr/wp-content/uploads/2009/04/Loi_CGLPL_EUK-v.pdf)



Service Directorate, the local education manager (LEM), the psychologist, and the doctor from the health unit of the prison and for incarcerated juveniles. These persons held at a meeting on the operation of the minors' wing.

After the visit, telephone interviews were held with the deputy prosecutor, the substitute of minors, at the Court of First Instance of Montpellier, a children's judge, the director of the Montpellier STEMO, and the member of the military in charge of the remand prison at Villeneuve-lès-Maguelone police station.

4/ During and after the visit, the *Contrôleur général* found it very difficult to obtain from the authorities responsible the information required to establish the facts.

From day one of their visit, the controllers asked to be informed when disciplinary committees where minors would attend would be held. Two disciplinary committees hearing the cases of minors were held during the visit. The controllers, who had not been informed of the commissions or were given the incorrect information, were unable to attend either.

The controllers requested access to documents, in particular the reports of incarceration commissions for 2013, video recordings of incidents that occurred in the exercise yard on 4<sup>th</sup> January and 11<sup>th</sup> February, all reports on incidents and disciplinary procedures, and telephone incident reports (TIR) prepared between 1<sup>st</sup> January and 17<sup>th</sup> February 2014.

The report of the incarceration commission of 7<sup>th</sup> May 2013, which addressed the issue of juvenile aggression, and the video recording of 4<sup>th</sup> January were only provided at the express request of the controllers, who confirmed that these documents had not been sent. The other documents received are far from exhaustive, as demonstrated by the fact that the controllers have serious incident reports without the subsequent disciplinary procedures, TIRs without the incident reports that prompted their publication, and disciplinary decisions without prior staff reports. A request for video footage and reports on violence that occurred after the visit (28<sup>th</sup> February) was not met. In other words, despite reminders issued, the inspectors are far from certain that the violent incidents identified below have been recorded in full.

Their certainty is further undermined by the fact that similar

difficulties were encountered with the Montpellier STEMO, which sent none of the situation maps requested of the head of the education unit for 2013, and with the prosecution, which believed it could cite the confidentiality of investigations to avoid providing a note from a children's judge – which he had been sent – on violent incidents within the juvenile section of the remand prison.

5/ Thus, the *Contrôleur général* can do no more than recall that in accordance with article 8 of the law of 30<sup>th</sup> October 2007, it shall obtain from the authorities responsible for the prison visited all information and documents of use to its mission, unless this communication could breach a protected secret, none of which was in question in the documents requested, since they cannot be bound by administrative secrecy.

Naturally, the *Contrôleur général* was prompted to question the meaning of the voluntary restrictions imposed on it. It was all as if there were a desire to downplay the scope of the violence in question on the one hand and, on the other, the absence of an effective response from certain individuals responsible. In any event, the absence of the transparency required by law in cases of violence is not an argument in support of those who did not wish to provide the necessary clarifications.

6/ The incidents of violence recorded in the minors' wing of Villeneuve-lès-Maguelone remand prison, insofar as they have been recorded (and which, most probably, have been understated), are serious.

7/ On 18<sup>th</sup> February 2014 twenty minors were being held in the minors' wing, six of whom were being incarcerated for the first time. In the whole of 2013, 114 minors were held in this section for an average of sixty-three days each. 13% of these minors were under 16 at the time they were admitted, according to their prison admission form. All of these inmates were held in individual cells, except when there was a shortage of cells (as occurred in the spring and summer of 2013). As a result, most of the incidents of violence recorded occurred outside cells, during movement within the prison and in the exercise yard.

Children are divided into two groups of almost the same size (twelve and eight, respectively, as at 18<sup>th</sup> February). Each group has access to the exercise yard at different times, for one-and-a-half hours in the morning and again in the afternoon. Except for a water point, the exercise yard, which is exclusively for minors, has no equipment,

bathroom facilities, sports facilities, or facilities of any other description. On the other hand, it is a place of exchange and traffic where children go to neutral areas on the edges of the yard in search of objects thrown for older inmates and later sent to them (due to the porous borders between different areas of the prison), with these older inmates sharing the spoils to younger inmates.

8/ Twenty-four serious violent incidents were recorded in the exercise yard from 1<sup>st</sup> January 2013 to 11<sup>th</sup> February 2014. For the reasons stated, the controllers believe that violence between children is much more common than the incidents identified would suggest. Moreover, representatives have mentioned that not all of these incidents were recorded in an incident report. One child told the controllers that they had *"bashed up"* another child in the yard and *"broken the nose"*: the victim explained that he had fallen *"doing push-ups and the warder was satisfied with this explanation"*.

Violence is apparent in the reports sent: on 4<sup>th</sup> July 2013, the victim was punched in the head several times and *"fell unconscious several minutes before being taken to the infirmary and was removed [from the prison] for further examination"*; on 4<sup>th</sup> January 2014, three youths attacked a fourth youth, *"punching and kicking him several times in the face simply because he was a new arrival to the prison"* (the victim would be removed to the CHU<sup>130</sup> in Montpellier). Instruments used for specific purposes (such as razor blades) were used.

9/ Of the incidents of violence recorded, nine (more than one-third) involve children who had arrived at the prison a day or two before. This would indicate that there is probably a *"rite of passage"* upon arrival at the prison, as suggested at a committee held on 7<sup>th</sup> May 2013, or the frequent settling of scores in relation to disputes that occur outside the prison. The place of origin of the victim is also of significance: during the visit, eight minors were found to come from Montpellier, five from Nîmes, three from Marseille, two from Sète, and one from Toulouse. However, irrespective of the reasons for these incidents, the controllers collected via indirect sources eyewitness accounts from certain prisoners who have either been released or transferred, providing a record of *"traumatised children"*. No complaint has been submitted (with the notable exception of that submitted by a mother in February 2014).

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<sup>130</sup>Centre hospitalier universitaire.

10/ As at the date of the visit, there were no effective measures in place to prevent these incidents and, as a result, they continue to occur. Prison staff appear under-resourced. Surveillance of the exercise yard is not without its problems; the yard has blind spots that are not covered by fixed view and camera systems, except with a mobile camera and provided that the sun does not obscure the view of these blind spots (in the morning); eyewitness accounts reveal that a number of incidents were not witnessed by the warder responsible for overseeing the exercise yard remotely. Procedures for intervention by warders, whose physical safety must of course be protected, in the event of an incident in the exercise yard are cumbersome and slow. Above all, disciplinary procedures are also slow. An inmate can wait several months to appear before the disciplinary committee; in view of the average period of incarceration for children, many are never punished for acts of physical violence they have committed. The six aggressors pursued in relation to violence committed on 18<sup>th</sup> April 2013 were referred to the disciplinary committee the following 27<sup>th</sup> June; however, by that time at least four had already been released. In addition, the "*measures of good order*" defined in regulations (note of 19<sup>th</sup> March 2012) for minor misconduct are never used, except by the local education manager. Under these conditions, "*agents do not believe in anyone anymore*", says one manager. At the very least, their belief in the effectiveness of measures to counter violence would appear to be severely diminished.

11/ In accordance with regulations in force, a multidisciplinary approach has been taken to the care of children in prison. However, at the meeting attended by the inspectors, the approach adopted meant that it was not possible to examine the situation of each child. Contrary to the Circular of 24<sup>th</sup> May 2013, the area has no instructions; in other words, the transmission of information cannot be guaranteed. For their part, carers in the health unit, who have good reason to be aware of the effects of violence, do not wish to be involved in legal proceedings. The head doctor refuses to provide certificates to anyone other than interested parties who are considered "*sufficiently mature*" to appreciate the follow-up required, although he is at pains to point out that these certificates are available to any expert named by the judicial authority. For its part, the prosecution has indicated that it will open a judicial inquiry into each incident of violence committed by underage inmates. However, on the one hand it is impossible to determine how many such incidents have been brought to its attention

(in particular, the legal software programme CASSIOPEE does not identify cases according to where the offence was committed), and therefore does not reconstruct all violent incidents and follow-up of the same; on the other hand, most of these surveys are met with silence on the part of victims and their parents.

**12/** The sole factor driving change identified is the initiative of the Juvenile Protection Service Directorate to call an interdisciplinary committee from October 2013 with an emphasis on a “violence action plan”. Above all, the lines of action of this committee will result in training days.

**13/** The persistence of violent practices in the young offenders’ section visited constitutes a very serious threat to the physical safety of minors incarcerated in the prison. This serious, urgent situation has prompted the *Contrôleur général* to formulate the following observations.

**14/** First of all, it should be remembered that under article 37 of the International Convention on the Rights of the Child, signatory states ensure that *“every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age”*. Moreover, as recalled by the Constitutional Council, *“the need to seek out the educational and moral development of young offenders using measures that are suitable for children of their age and personality... [has] been recognised on numerous occasions by the laws of the Republic (...) [however], the original provisions of the ordinance of 2<sup>nd</sup> February 1945<sup>131</sup> does not eliminate the criminal responsibility of minors and does not rule out, where required, the possibility of measures applicable to minors such as placement under supervision, surveillance, detention, or for children over the age of 13, imprisonment; that such is the scope of the fundamental principle recognised in the laws of the Republic in the area of juvenile justice”* (Constit. Council n°2002-461 DC of 29<sup>th</sup> August 2002, Consid. 26). Therefore, while imprisonment is permitted, it should not mean the end of attempts at “educational development”.

**15/** And yet, there is a resignation of sorts to the forms of aggression recorded, based on the belief that these children are clearly prone to violence and that nothing can be done to effectively counter something that appears to be in their nature. This point of view is

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<sup>131</sup> French order (*ordonnance*) n°45-174 of 2<sup>nd</sup> February 1945 on juvenile delinquency: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069158> (in French).

unacceptable: while it is true that children, in particular those in prison, willingly resort to violence, this situation cannot be accepted as beyond remedy. The non-residential education system and the penitentiary system must adapt their approach to the children in their charge. It is neither motivating nor helpful to look back to a time – the reality of which is very much in doubt – when children were different. Analyses have been carried out, and must be amplified and put into practice in each young offenders' section. To this end, regular audits must be conducted.

**16/** Since its first public recommendations in relation to a prison,<sup>132</sup> the *Contrôleur général des lieux de privation de liberté* has emphasised that prison courtyards "*paradoxically constitute an area devoid of rules in facilities that are subject to multiple and incessant regulations. In a sense, they are abandoned to the inmates, who consider the courtyard an escape from confinement in their cells and as a market, a substitute for privation. In the event of a brawl or aggression, one must wait for the inmates to re-enter the building in order to gain control of the situation. This situation has three consequences: the strong impose their will on others; serious injuries are commonplace; and many inmates refuse to use the courtyard, lest they be subject to aggression. Those guilty of offences are almost never punished*". It is claimed that "*reclaiming courtyards, which can only be seen as a long, drawn-out process, must be recommended as an objective of the prison administration. Over time, under certain conditions and in certain prisons until it can be applied in all circumstances at all prisons, warders, present in sufficient numbers, as well as any other agent, must be able to coexist in all areas with inmates. The courtyard must once again become what it was originally meant to be: somewhere to walk, spend time, socialise, or spend time alone*". Five years later, no effort has been made in this regard. The presence of prison staff in courtyards, provided that it is known and appreciated, could start on courtyards in juvenile sections, in order to prevent the resumption of "emissions", traffic, and violence. Clearly, this should be accompanied by the necessary security measures, in particular much earlier intervention procedures.

**17/** At the same time, the provision of education to children, as expressed by the presence of educators from the Juvenile Protection

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<sup>132</sup> Recommendations relating to Villefranche-sur-Saône remand prison, Journal officiel of 6<sup>th</sup> January 2009, §4.

Service Directorate at a prison, must include instruction on conflict resolution, mutual respect, and the denunciation of mythologies (differences supposedly based on different geographical origins). At the same time, educators in prisons must receive the support and tools required for this learning to take place from their professional environment. Children who are suffering must be identified and receive the appropriate support.

**18/** The prison must develop bonds of trust with families, even more so in the particular case of children and even with the families of inmates serving short sentences. The absence of complaints in the event of violence is a sign of resignation or fear, or both: dialogue at regular intervals should facilitate the necessary rapprochements and approaches. At the same time, perpetrators of violence must be identified and their nearest and dearest made to face their responsibilities.

**19/** Directorates and prosecution (as well as police forces and the gendarmerie) must pursue these perpetrators in order to impose disciplinary sanctions and, where necessary, criminal sanctions. To this end, procedures must be reconciled, bearing in mind due process considerations, with terms of imprisonment that are most often short. It has also been indicated on numerous occasions that procedures held shortly after an incident of violence are infinitely more educational than those held long after the commission of a crime. This assertion is also confirmed in prison, both for perpetrators and staff. It is unacceptable that violent perpetrators can develop in prison a feeling of impunity similar to that which they felt on the outside. Naturally, efforts will be made to ensure that the relevance of the facts be established: juvenile sections must be equipped as appropriate.

**20/** Finally, there is the issue of the judicial authorities receiving information from doctors called on to assess the physical consequences of violence. The rapprochement of the two applicable provisions of the Code of ethics applicable to the medical profession (articles R. 4127-10 and R. 4127-44 of the Public Health Code) should authorise this provision of information. Indeed, if they discover that the person they have examined has been the subject of physical abuse or mistreatment, the doctor cannot inform the judicial authority without the consent of the interested party. However, this consent is not required in the case of a minor or a disabled person (in which case, the matter can also be referred to the administrative authority).

The application of these provisions requires that the consequences of blows received in the exercise yard be recognised as “physical abuse”, as defined here. Said recognition also requires that the doctor not cite “particular circumstances”, of which article R. 4127-44 recognises the right to cite them knowingly in order not to inform the authorities. However, there must be no doubt as to the scope of regulations: children in particular are protected from violence from others. Moreover, while particular circumstances can be cited in the case of incarcerated minors, the only such circumstance is that they are held in isolation, as they are cut off from their families, and that they are paralysed by a fear of reprisals should they register a complaint. These circumstances require that doctors be even more attentive than on the outside and that, as a result, they use a broad description. The protection provided to the patient by medical secrecy, which is clearly essential, will not backfire on him; it is what will happen to him if no description is provided. That is not our understanding of the code of ethics. It is up to health authorities to remind them of their scope in correctional facilities.



## Opinion of 9<sup>th</sup> May 2014<sup>133</sup> concerning the detention of foreigners in France

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1/ The criminal law in France applies perfectly normally to foreigners, except for those people covered by international conventions in the specific instances of diplomatic immunity or cases of extradition. Thus, the presence of foreign nationals detained in France should not be a surprise.

2/ The legal conditions covering such detention are based on simple principles laid down by the Constitutional Council many years ago. *"The legislator may take specific measures with regard to aliens as long as those measures adhere strictly to any international commitments made by France and to the basic fundamental constitutional rights accorded to all those who reside on French soil"* (n°89-269 DC of 22<sup>nd</sup> January 1990, consid. n°33). Although some of these rights are inalienable, such as the right to life and the right not to be subject to torture and inhuman and degrading treatment, there is however *"no principle nor any constitutional rule [conferring] on foreigners the absolute right to enter onto and to reside on French soil"* (for example, n°2005-528 DC of 15<sup>th</sup> December 2005, consid. 14). It is therefore up to the law to reconcile other freedoms and fundamental rights with any other objectives having a constitutional connotation, in particular the maintenance of public order. Thus, specifically for maintaining public order, there is nothing that prevents the existence, applicable only to foreigners, of penal sanctions (e.g. the ban on residing in France, art. 131-30 of the Code of criminal procedure) or administrative restrictions (e.g. expulsion, art. 521-1 of the Code governing entry and residence of foreigners in France and the right of asylum).

In theory, for this specific objective, there is nothing to prevent the law from providing detention regimes for foreigners different from those for French citizens. The Code of criminal procedure provides a specific conditional release mechanism designed to facilitate the expulsion of detained foreigners (art. 729-2), as will be seen later. However, a contrario, when the law does not allow for any distinction, there is no place for differences in the prison treatment based solely on

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<sup>133</sup> Published in the *Journal Officiel de la République française* of 3<sup>rd</sup> June 2014, text N°69..

nationality. Thus, the principle of equality, subject to the distinctions based on other criteria (e.g. accused versus convicted, etc.), carries its full weight including the *"fundamental guarantees accorded to all detained persons"*, for which the legislator is responsible for defining the rules (Constitutional Council, decision n°2014-393 QPC (Constitutional question) of 25<sup>th</sup> April 2014, consid. n°5). But, in these circumstances, *"the principle of equality does not prevent the legislator from handling different situations differently, nor to depart from such equal treatment when this is in the public interest"*, but on condition *"that, in either case, the difference in treatment applied is directly related to the subject of the law that established it"* (n°2003-483 DC of 14<sup>th</sup> August 2003, consid. n°23). But if these conditions are not fulfilled, no difference in treatment can be justified.

In practice then, the result is simply that, except in exceptional circumstances, nothing justifies treatment in detention for foreigners that is different from that provided to French citizens. On the other hand, the absence of specific administrative provisions can, in certain circumstances, give rise to an improper breach of this equality rule.

3/ As of 1<sup>st</sup> January 2014, 18.5% of the 77'883 persons sentenced to terms of imprisonment in France were of foreign nationality.

This fact requires several comments.

First, the prison administration does not publish separate data concerning the foreign proportion of the effective prison population (67'075 at the same date). It is probably not very different from the information concerning the number of foreigners sentenced. It is possible that it is slightly higher, given the greater difficulty experienced by foreign nationals in achieving any adjustment in their sentences, as shall be seen later.

Secondly, it is clear that this proportion is greater than the proportion of foreigners in the French population (6%). This difference has long been the subject of careful explanation, often giving rise to unfortunate comments, around three principal factors - the offences, specific to foreigners, concerning entry and residence in France; the institutional practices linked to the law and the courts; the nature of the foreign population, in large part similar to the most disadvantaged sections of the French population, which is the section that provides the greatest population in the prisons.

Thirdly, from a legal point of view, the reality of a foreign aspect is clear. But this shows up a wide variation concerning detention - those charged, those sentenced and also those concerning extradition detention. And the same with the social aspect: certain foreign nationals are very similar to ordinary French citizens be that by their way of life, their length of time on French soil or their income level; others, however, understand nothing of the French language any more than they do about the procedures that they are obliged to follow. It is this population that interests the *Contrôleur général*, without this being its sole and abiding mission.

Fourthly, the situation of foreigners in French prisons varies depending on the penal institution concerned, both qualitatively (for the reasons enunciated above) and quantitatively. Although the percentage of foreigners in long-term prisons is relatively close to the national percentage of foreigners incarcerated (the Joux-la-Ville prison, 16.5% at the time of the last inspection in 2009; the Muret prison, 16.3% in 2013; the central prison in Saint-Martin-de-Ré, 19% in 2009, etc.), this is not the case in remand prisons (or in those penal centres where the 'remand prison' part is significant) where the 'recruitment' is more local, in which the prison population reflects the national percentage, or the proportion of criminal cases (the Aurillac remand prison, 8.85% in 2012; the Gap remand prison, 16% in 2011; the Nice remand prison, 33% in 2008; the Paris La Santé remand prison, 42.45% in 2010; the Fresnes prison complex, 36.1% in 2012; the southern Ile-de-France prison complex, 21.8% in 2013, etc.). The characteristics of this foreign population are not always comparable from one establishment to another, particularly in respect of the nationalities to be found in each - twelve different nationalities are to be found in the prison complex in Baie-Mahault (Guadeloupe), with one nationality accounting for two thirds of the foreigners, but in Fresnes there were over one hundred nationalities among the 2,165 detainees as of 1<sup>st</sup> January 2012. It is not difficult to understand from the latter situation just how demanding it is to cater properly for the foreign prison population, but this in no way removes the obligation to ensure that these peoples' fundamental rights are guaranteed.

4/ Those in charge must clearly see that the absence of being able to express oneself in French simply increases the inherent vulnerability of the detainee, and that it is essential to implement simultaneously for this population the three facets of providing complete information

on completing their sentences; learning French and, if need be, the practice of their native language.

5/ The first requirement to be satisfied is a clear understanding by the foreign detainee of his rights and obligations while in detention. The law of criminal procedure of 24<sup>th</sup> November 2009 (article 23) stipulates that this information is to be given orally "*in a language understandable*" by the new arrival as well as through a welcome booklet provided on arrival.

a) A first difficulty arises with this mechanism and concerns both its aspects. Translating the documents and instructions necessary for life in the prison environment is required. Law n°2013-711 of 5<sup>th</sup> August 2013 and its enactment decree of 25<sup>th</sup> October that year fixed the problem of interpretation concerning legal cases (the judge in charge of sentence administration takes care that this happens) but did not address the administrative procedure area. That is why:

The distribution of translations (six foreign languages) of the administrative guide booklet *Je suis en détention* needs to be effective - in one remand prison housing many foreigners these translated documents were not stocked in the arrivals area, but in the administration section, the economat. The number of languages needs to be increased, for example to include Turkish and Mandarin Chinese. Standard documents, such as request forms, should also be translated, as has been done in the Melun establishment. But again, their availability needs to be effective. For example, a guide prepared by a Spanish-speaking association for the inmates of a prison in the Paris area remains unused and is stored in the offices that deals with release and probation, and a *vade mecum* produced in some nineteen languages by a prison visitors association is not available in one Parisian prison nor in one in Lyon;

In those establishments which receive many non French-speaking inmates, canteen vouchers and simple understandable pictogrammes representing the basic house rules should be produced and made available to those new arrivals who need them;

If there is an internal video channel, it should be used as a tool for disseminating useful information to the foreign population.

b) A second difficulty resides in the insufficient use of interpreters. There are certain circumstances and occasions where the detention

regime or the health of the individual is at stake. These critical moments are many and varied - the initial interview with a new arrival, disciplinary procedures of all types, the notification of activities allowed and prohibited, any adversarial proceedings (article 24 of the law of 12<sup>th</sup> April 2000), discussions with the release and probation adviser and medical treatment, in particular for having the patient understand and agree with the treatment that is to be administered. There has been an agreement signed between the Paris inter-regional department and an interpreting company (including by telephone). Its funding needs improving (just thirteen thousand euros in 2013 for the 'open section' and the 'closed section') and, if it has not already happened, its scope needs widening to other regions. Similar agreements have been signed by certain hospitals that treat prisoners, but the doctors are unaware of their existence. The controllers met one non-Frenchman who had had one lung removed without his giving an agreement, nor even knowing the reason, in complete ignorance of articles L. 1111-2 and L. 1111-4 of the public health code. Misunderstandings of this nature can lead to serious life-threatening mistakes or, more frequently, refusal to accept treatment, putting the health of the interested party at risk.

c) A third difficulty lies in the fact that foreigners are unable to formulate their demands. Such silence can at best be rewarded by passing up certain benefits to which the inmate is entitled (for example the sentence modification procedures, like the elderly Turk, both 'releasable' and 'conditionable', who remained completely forgotten in a central prison), and at worst by being regarded as anti-discipline and treated as such. The controllers were witness, through an interpreter, of such a case involving a Somalian inmate. For these isolated foreigners, it is necessary to provide regular discussions, with interpreters, to ensure that the absence of requests is not caused by an ignorance of how to proceed.

d) A fourth difficulty stems from the choice of interpreters. Using a fellow inmate should be avoided if at all possible as this involves sharing information with people who might take advantage of what they hear. Professional interpreters are always preferable. In the absence of this, recourse to members of various associations or to employees of private suppliers could be used, if these people are selected with care. To this end, recruitment agencies, supplier companies and relevant associations should be encouraged to have

language proficient personnel who could be used. For example, although it is an isolated example, the job offers at the medical centre in the Villepinte remand prison require several language skills.

6/ The second requirement, as a corollary to the first, which must be met for foreign detainees is without doubt access to the French language and, at the same time, the ability to continue speaking their own native tongue. Access to French is not just necessary for the benefit of the individuals concerned - understanding orders and instructions is essential for security in the establishment.

a) A first difficulty concerns the appreciation by prison staff of the level of understanding of French by foreign inmates. Such appreciation seems to depend on the requirements of the staff, and would appear to be based on observation or even quite arbitrary at times. During one visit, inspectors attended a disciplinary hearing during which it was manifestly obvious that the inmate did not understand French. When consulting the file forty-eight hours later, the inspectors found that the box indicating that the individual understood and expressed himself in French had been ticked. There are also inexplicable differences of appreciation between departments and between individuals. It is therefore necessary that the language test administered by the teachers for individuals entering into detention be, on the one hand, carried out systematically and, on the other hand, constructed in such a way as to be able to measure the level of understanding of French and, if possible, the level of mastering the native tongue. Such appreciation should then be imposed on all relevant personnel.

b) The conditions for learning French are not necessarily appropriate. The majority of teachers rely on 'French as a foreign language' courses. But it is essential that such courses be available to those people most in need of them. Thus they should not be given at times that conflict with the hours in the workshop or when working as 'auxiliaries' - foreign inmates, being often the most impecunious, will obviously choose the working option in such cases. Teaching methods need to be appropriate too - one foreign inmate owed his success in the written test to a perfect memorisation of the visual images, without having really learned the language.

c) Access to radio, television or any other means of improving language skills (newspapers and, when appropriate, Internet) should be facilitated. Covering the cost of television for indigent inmates

should be carefully considered and continued for as long as possible.

**7/** In the same way, the right of foreign detainees to practise their own language must be recognised.

Very careful attention should be paid to the choice of establishment and to the placement within an establishment, so as to ensure that any linguistically isolated person (certain people from eastern Europe or faraway countries like Mongolia or the South-East Asian countries) may find a person with whom to communicate, whilst avoiding the creation of complete wings with a single nationality, something that can cause its own problems. In the case of very isolated individuals, a transfer should be considered.

Access to own-language media - books, CDs, DVDs - should be sought. In this respect, prison library funding leaves a lot to be desired. Approval should be given to suspend the prohibition of using short-wave radios.

**8/** Living conditions for foreign inmates also need to be carefully considered and effective measures taken when these do not in any way compromise the maintenance of order and security.

**9/** Foreigners detained in France are far more isolated than their indigenous counterparts. In particular, appropriate means need to be found to be able to respect family life - in practice, this means contact with the immediate family circle.

a) Current practices in this area are inappropriate for those foreigners who only have relations living in other countries, often countries a long way from France.

A sum of one euro is credited to the telephone account of new arrivals to enable them to inform their families of their incarceration. In the light of the objective, this sum is insufficient for communication with other countries. It should be adapted to the cost of communicating with the country of residence of the inmate's relations, spouse or children. A similar situation exists with the provision of postage stamps, which are only usable for correspondence within France and therefore of no use for any international communication (an exception was observed in one remand prison). It must be possible to provide identical facilities for international correspondence.

b) For those who wish to have access to the telephone, the

prerequisites are often insurmountable (providing an invoice, etc.), as was raised in the opinion of the *Contrôleur général* of 10<sup>th</sup> January 2011 concerning the use of the telephone by detainees (*Journal Officiel* of 23<sup>rd</sup> January 2011). The costs are prohibitive given the level of resources available - a five-minute conversation with someone in Bangladesh or in Brazil costs 6.25 euros, whereas it is only 0.625 euros to call a landline in France and 1.50 euros to call a mobile phone. Finally, the hours during which telephoning is permitted in prison are often incompatible with the relevant time zones. All these elements were raised in 2011, since when no improvement has been observed.

c) The *contrôle général* requests that access be provided (under suitable control) to mobile telephones and to Internet for this population. An initial and urgent measure would enable telephone use (and also electronic messaging) by isolated inmates. One could make available, in a dedicated area, a computer loaded with software such as Skype© which could enable messages to be exchanged, the content of which could be checked on each occasion.

d) The inability of the prison administration to understand a letter written in a foreign language in order to verify the contents should never be a reason for not allowing the letter to proceed to its destination. Deficiencies in the prison administration cannot be used as a reason for infringing the rights of detainees to correspond by letter (article 40 of the prison code). In the same vein, article 25 of the Prison Code guarantees the right to speak to a lawyer, and for that conversation to remain confidential, whether the lawyer be also a foreigner and living in another country. The telephone numbers requested must be recorded in the list of authorised numbers as long as there is no security reason for refusing this. As for letters, any inability on behalf of the administration to carry out the necessary checks cannot be allowed to count against the detainee.

e) Writing a letter can be difficult when the authors do not know how to write. Public scribes have almost completely disappeared from penal institutions, and it is frequently other inmates (those who handle the library, for example) who play this role. This is just a stopgap solution and needs to be improved.

f) Special facilities should be made available for families living abroad who wish to visit their family members in detention. In view of their particular constraints, fixing a meeting should be simplified (using



Internet for example -the *contrôle général* has already requested that each establishment has its own website and email address), flexibility should be exercised for those arriving late for a planned meeting, and a certain latitude should be granted for the length of any such meeting. They should also have access to the relevant information (procedures for obtaining a visit permit, how to reserve an interview room and a safe place for guarding their personal effects) in a language that they understand. In the same way, there is an obligation on the prison administration to inform the families (using the same means) of any hospitalisation, transfer or any other reason which renders a planned meeting impossible.

**g)** The French Red Cross should be authorised (as it is now in Somalia by ICRC<sup>134</sup> mandate) to meet any detainee who is unable to contact his/her family or is, de facto, in total solitude.

**10/** The financial situation of foreigners isolated in France is generally very poor. They can usually expect no outside help. And it is well known that only a minority of inmates can benefit from the income sources within penal institutions - work and paid training. In one remand prison with a large number of foreigners, 53% of the latter had less than 50 euros in their personal accounts, against 37% for French citizens. In addition, foreigners are much more involved in providing for their families in need using international money transfers. In this same remand prison, out of twenty-eight such transfers listed during a given period, seventeen were for destinations abroad.

This situation frequently puts the foreigner at a disadvantage compared with his fellow inmates, with the associated abuses that such a situation produces (the latter treating the former as servants).

In such circumstances, the right to financial help and benefits in kind that the law allows must be regular and expanded over time just as long as the foreigner's situation demands. The decree planned under article 31 of the prison code could be usefully used to modify the size of this aid to suit the inmates' needs when these are, as laid out above, demonstrably not the same as for the indigenous prison population.

**11/** The possibility of working or of receiving training must be open to all without any discrimination against foreigners.

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<sup>134</sup>International Committee of the Red Cross.

It is totally discriminatory to refuse classifying foreigners as suitable for work on the sole basis that they are undocumented. Such refusal is usually justified on two grounds. First, no foreigner can be allowed to work without the appropriate approval issued by the French administration (see, for example, article L.5221-2 of the Labour Code concerning salaried personnel). However, one needs to be reminded that work in a penal institution is not covered by the standard labour laws and, thus, such reasoning cannot be accepted. Secondly, the penal establishments claim that a definitive social security number is required by the appropriate authorities so that the institutions can submit their social contributions. The *Contrôleur général* questioned both the appropriate Social Security department and the appropriate Pensions department, and both replied that a provisional number was all that was required for the annual declaration of social security contributions required by the regulations currently in force (article R. 243-14 of the social security code). Thus, both grounds advanced for this refusal are not relevant.

12/ Finally, practices that are commonplace in countries of origin should be allowed, when such practices are fully compatible with good order and security within the penal establishment.

The provision of cooking elements and foodstuffs that reflect local customs (in a similar way to that already done under a doctor's prescription) should allow certain foreigners, whose way of life can be very different, to avoid health problems due to the ingestion of food cooked according to French standards. The *Contrôleur général* has received precise information concerning such difficulties.

Within the sphere of religion (both services and foodstuffs), reference should be made to the opinion of the *Contrôleur général* of 24<sup>th</sup> March 2013 concerning the practice of worship in places of deprivation of liberty (*Journal Officiel de la République française* of 17<sup>th</sup> April 2013) as well as to chapter 8 of its 2013 annual report (p.247).

13/ Applying the provisions of the laws relating to foreigners entering and residing in France also requires some precise improvements.

a) As a general rule, certain institutions with a large foreign population do not possess a "legal access point" or any presence of community associations. It is well known that such facilities are in heavy demand concerning the rights of foreigners. Where they do

exist, the numbers of people available (and therefore their time spent on site) and the presence of interpreters are not necessarily in line with requirements. The foreigners' departments in the *préfectures* have difficulties in 'finding' their real role and the signing of agreements or conventions would be a great help.

b) The possibility of requesting asylum is a fundamental right, and any attempt to limit this right can only be entertained for very serious reasons. However, this right suffers from two significant limitations neither of which has any real foundation. First, it is extremely difficult in fact to lodge a request during the period of incarceration - no information is provided; the "legal access points" frequently recommend postponing the asylum request until after release (that is once the detainee concerned has been held in detention); there is no interpreter available; the necessary documents can be difficult to obtain (see the *Contrôleur général's* opinion of 13<sup>th</sup> June 2013 concerning the possession of personal documents by prisoners, etc. *Journal Officiel* of 11<sup>th</sup> July 2013). Secondly, the provisional residence authorisation is required to be issued by the prefect. This authorisation, which is required by the French department for the protection of refugees and stateless persons in order for it to examine the request using its normal procedures (article L. 723-1 of the code covering the right of entry and residence of foreigners and of the right of asylum) is systematically refused, or simply filed with no action taken, by many *préfectures*. This is not because the request is not necessary, but because the presence of all foreign detainees is, *ipso facto*, without any particular scrutiny, considered to represent "a serious threat to public order, public or State security" (3° of article L.741-4 of the same code). The circular dated 1<sup>st</sup> April 2011 defined this "serious threat" as one that would likely give rise to an expulsion order (art. L. 521-1 of the code). However, from the procedural point of view, committing a criminal act does not dispense the prefect from examining all the circumstances of the case (Conseil d'État, 24<sup>th</sup> January 1994, M'Barki, n°127 546, au rec., concl. Abraham); and on the other hand, with regard to the substance of the case, all the offences for which the offenders have been imprisoned cannot be considered as serious threats, and all the more so if there are family relationships on French soil. The European Court of Human Rights (*I.M. v. France*, n°9152/09, §§ 140 to 150) has ruled that the impossibility of lodging a request for asylum before being in detention, coupled with the systematic recourse to a priority procedure for such requests, totally ignores

the right to have an effective request (article 13 of the Convention). The habit of prefects to refuse systematically the provisional right of residence necessarily entails using the 'priority' procedure, which does not guarantee a sufficiently thorough examination of the case, despite the apparent safeguards. It thus attracts the same criticism as those from the European Court.

c) Obtaining or renewing resident permits is also fraught with real difficulties. In particular, completing the necessary documents, producing correct identity photographs, presenting the completed dossier in the *préfecture* and meeting deadlines all present problems. Since the publication of the circular of 25<sup>th</sup> March 2013 however, these formalities are no longer subject to the physical presence in the *préfecture* of the individual concerned. Nevertheless, all the necessary protocols have not yet been signed. When all is said and done, nothing is really easy, and such foreigners can find themselves deprived of identity papers during incarceration (and thus deprived of the right to certain social benefits) or at the end of such imprisonment (thus provoking serious problems of rehabilitation), when in reality they have theoretically the right (for example as the legal partner of a French citizen). Precious time is lost. No foreigner having the right to a residence permit should cease to be a perfectly legal citizen as a result of being detained, unless there is a judicial ruling or administrative measure forbidding the person to be on French soil.

d) In order for foreigners to accomplish all the formalities for acquiring or renewing residence permits, certain judges responsible for applying sentences freely grant such people the right to be absent in order to submit their dossier to the relevant departments in the *préfectures*. But others do not, alleging some form of irregularity with regard to the individual's residence situation. However, it is accepted (circular of 25<sup>th</sup> March 2013) that someone who is incarcerated cannot be regarded as being in an illegal situation *vis-à-vis* the laws on residence. Above all, a decision not to proceed on the basis of this argument simply means maintaining precisely the situation for which the individual has been refused. The prison rehabilitation and probation counsellors, with the help of the appropriate associations and the legal access points, should be sufficiently informed about the legislation concerning foreign nationals to be able to advise the magistrates on the likelihood of a particular detained foreigner being granted a residence permit.

e) When leave is granted for visiting the *préfecture*, the refusal of the latter to be precise in fixing the time of the appointment means that it is very difficult to adhere to the time-limit fixed for such leave of absence. By taking proper account of the demands implied by incarceration, one should be able to put in place a sequence of formalities that is specific to detained persons on leave of absence.

14/ All other things being equal, adjusting sentences frequently discriminates very clearly against foreigners.

a) Not only does the absence of a residence permit prevent obtaining leave to be absent, but in addition it prevents the individual from looking for employment or seeking some training or even to receive certain social benefits. Thus these foreigners do not, for example, meet the conditions which would enable them to benefit from partial or conditional release. Such obstacles should not exist if these persons have the right of residence.

b) When they do not have the right of residence, it should be possible to arrange a period of probation in their country of origin. But this hypothesis is never explored, even for neighbouring countries, as is demonstrated by a case involving a Belgian citizen that the *contrôle général* has monitored. As a consequence, prison sentences for foreigners are likely to be longer than for French citizens.

c) Article 729-2 of the Code of criminal procedure allows a judge to order conditional release of a foreigner who has been the subject of an exclusion order, even without the individual's consent, as long as the exclusion order has been carried out. This arrangement can soften the absence of sentence adjustment. But it relies in the first instance on an agreement between the judge who gives the ruling and the prefect who implements it - if the latter refuses, the order is not carried out. It also supposes that the country of origin accepts the person on its own territory, which is not always the case even when the question of nationality is not debatable. The *contrôle général* is aware of the situation of one foreigner given a life sentence a long time ago, with no expectation of release since a "conditional release-expulsion" request has not been agreed by all concerned. In this situation, 'life' means life, and the European Court of Human Rights believes that, "in these particular circumstances", this is covered by article 3 (inhuman and degrading treatment) of the Convention (for example, Grand Chamber, 30<sup>th</sup> March 2009, *Léger v. France*, n°19324/02, §91). Certain

judges use the conditional release “voluntary return” procedure - a practice that should be encouraged.

**15/** Foreigners who have been sentenced may also request that their sentences be served in their own country. But such transfers are only possible when there exists an appropriate bilateral agreement. In one central prison, the inspectors met a native of Dominica who has remained for more than thirty years estranged from his country and family (not a single visit) and who, in the absence of an agreement, has no hope of finishing his life sentence anywhere other than several thousand kilometres from his kin. France should work with the United Nations to produce an international convention in this area which would work in the absence of bilateral agreements (as has been achieved in Europe, long ago, for cases of extradition).

**16/** The situation of detained foreigners calls for specific measures in order to install the principle of equal treatment in prison and, at the same time, avoid the development of inhuman and degrading incarceration conditions. The recommendations described here should be taken very seriously into consideration.



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Following the ratification by France of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), adopted in 2002 by the General Assembly of the United Nations, the French Parliament passed a law to set up a *Contrôleur général des lieux de privation de liberté* (CGLPL) and gave it the status of an independent public body.

The *Contrôleur général* assumes the position of the National Preventive Mechanism (NPM) under OPCAT. He or she makes sure that persons deprived of their liberty are treated humanely and with respect for the dignity inherent to any human being. In this framework, the *Contrôleur général* can visit at any time, all over France, every place where people are deprived of liberty. This includes, among others, custodial establishments, health institutions, premises of police custody, detention centres for undocumented migrants, closed educational centres, vehicles for the transport of people deprived of liberty, etc.

This collection includes all public opinions, recommendations and urgent recommendations that were published in the *Journal Officiel de la République Française* during Mr Jean-Marie Delarue's mandate (2008-2014).

As it was found that those opinions and recommendations could prove to be useful for other NPMs worldwide, the *Contrôleur général*, in cooperation with the international NGO Association for the Prevention of Torture (APT), decided to translate them into English and Spanish, in order to make them accessible to a larger number of actors active for the prevention of torture and other cruel, inhuman or degrading treatment.

ISBN: 978-2-940337-71-2

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