Research project EUPRETRIALRIGHTS

Improving the protection of fundamental rights and access to legal aid for remand prisoners in the European Union

EMPIRICAL STUDY

Actors of legal protection, their professional practices and the use of law in detention

Report on FRANCE

Dr. Carolina S. Boe
Dr. Nicolas Fischer

Centre de recherches sociologiques
sur le droit et les institutions pénales (CESDIP)
CNRS

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1. THE NATIONAL CONTEXT

1.1 Spaces of pre-trial detention

In France, pre-trial detainees may be held in:

- **police custody** (garde-à-vue), pursuant to being arrested by the police;
- **remand centres/jails** (maisons d'arrêt). In principle, only detainees awaiting trial should be held here, for a maximum period of two years. In reality, prisoners who have already been sentenced to prison terms are often held in these remand centres for far longer periods of time, while they await their transfer to penal detention centres;
- **penal detention centres** (centres de détention), when a convicted prisoner is detained pending trial for a separate case.

Detained persons are separated by gender, and separate wards also exist for juvenile prisoners.

Police custody:

Several comparative studies, including those undertaken in France, have pointed to various obstacles to the access of legal assistance for suspects before and during police interrogations. In a comparative empirical study of police custody in four countries (France, Scotland, England & Wales and the Netherlands), Hodgson[1] highlights differences in the duration of time allocated to legal assistance in police custody, which – in those countries – amounts to only 30 minutes, whereas the duration of time made available for legal assistance in other countries is indefinite. Most lawyers, Hodgson stresses, do not however take advantage of the entire 30 minutes allocated for this purpose. Such lack of engagement is due to another obstacle, of a more financial nature, which is the fact that the legal fees provided for this type of work are very limited. Furthermore, this scarcity of funds leads legal firms to send their most underpaid (and, hence, most under-qualified) lawyers, who are, more often than not, junior practitioners with little experience. The question of practical experience is of fundamental importance, as the last obstacle to effective legal assistance identified by the author concerns the lack of curricular training in academic law departments, which seldom offer courses in these matters.

Another study stresses that lawyers and policemen alike often remain unclear about what exactly is expected of them, and what they are allowed to do[2], sometimes leading to misunderstandings or even conflicts between lawyers and policemen[3], with reports of resistance by certain police officers who consider legal assistance as a potentially obstructive factor in their investigation. This perception explains why officers may engage in a range of rights avoidance strategies, such as "encouraging the suspect not to exercise their right to council, claiming that they will have to wait a long time for the lawyer to arrive and that this will delay the case and thus the suspect's release from custody; failing to inform the suspect that the lawyer is free of charge; and allowing the suspect to think that the case is very straightforward so that no lawyer is necessary."[4] These findings are corroborated by our respondents.

These conclusions point to the necessity of organizing practical training for police and lawyers alike. Cases of pressure and intimidation from policemen toward younger or

[1] Blackstock, Jodie, Cape, Ed, Hodgson, Jacqueline, Ogorodova. *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions (Ius Commune Europaeum)*, Intersentia, 2014.

[2] Mols, Violet (2017) Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers, *New Journal of European Criminal Law*, Vol. 8(3) 300-308.

[3] M. Vanderhallen et al., *Toga's in De Verhoorkamer : De Invloed Van Rechsbijstand op Het Politieverhoor* (Den Haag Boom Lemma, 2014), pp. 140-146. Mike McConcille et al., *Standing Accused : The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford : Oxford University Press, 1994), pp. 102-127 ; Lee Bridges and Jacqueline Hodgson (1995) 'Improving custodial legal advice', *Criminal Law Review*), pp. 101-113, in Mols (ibid. 305)

[4] Hodgson 2017, *ibid* 25.

inexperienced lawyers were reported as well. Some officers pretend to have a right to actions that are obviously illegal, or insist that lawyers refrain from reporting certain facts they have witnessed in the course of custody. An additional obstacle identified by one of our interviewees is the problem of space in police stations in major cities. Indeed, there is usually only one room designated for attorney-client interviews, and lawyers sometimes have to meet with their clients in rooms otherwise intended for medical examinations. Much time can be lost for lawyers waiting their turn to meet with clients. Some respondents have pointed to additional problems in cases of mass arrests – as during the Yellow Vest demonstrations since November 2018, or those of high school students in April 2018 – where demonstrators in police custody did not receive the opportunity to see a lawyer, due to a lack of space and the transferral procedure from one overcrowded police station to another[5].

Remand Centres and Penal Detention Centres

In prisons, the conditions necessary to obtain legal aid, including aid for litigation related to incarceration, are often unknown to prisoners. This is why social counsellors and members of NGOs are often key in helping prisoners obtain legal aid[6].

Once they have obtained legal aid, prisoners can finance legal assistance by a barrister. However, barristers benefiting from the legal aid program are poorly compensated with regards to both the burden of work required and also the specific obstacles inherent to dealing with incarcerated populations. One such obstacle concerns the duration of transportation to and from prisons, especially facilities that are located far away from city centres; another relates to the time wasted in waiting for client meetings in prison, a result of the lack of mobility within such institutions. Consequently, the legal aid program often involves young barristers with little experience. The report also stressed the lack of funding and unequal legal assistance among barristers, which led the Ministry of Justice to launch several consultations on legal aid in view of its reform, on 16 December 2014.

The right to a lawyer in disciplinary hearings is provided for in the 'partie législative' of the CPP, and as such, it is one of the few rights respective to disciplinary proceedings that can only be changed with approval of the Parliament[7]. In addition to this basic guarantee, the law also explicitly states that a prisoner has the right to talk with his or her lawyer after a disciplinary decision[8], in light of a possible appeal. Emphasis on this point in a legal code is rare, appearing in only a few other European countries, although in theory a prisoner should have the right to do so everywhere.

A recent comparative empirical study of Belgium and France conducted at the University of Gent[9] (based on interviews, attendance at disciplinary hearings, analysis of disciplinary files and prison visits) showed that, in practice, the effective use of a lawyer during disciplinary proceedings may vary from 10% to more than 50% depending on the prison in Belgium, and from 50% to 75% in France depending on the prison.

1.2 Main social characteristics of the general detained population

[5] https://www.liberation.fr/checknews/2019/04/09/gilets-jaunes-en-garde-a-vue-le-droit-a-l-avocat-est-il-bafoue_1720074

[6] Sophie Joissains and Jacques Mézard (2014), *Aide juridictionnelle : le temps de la décision*, Paris, Sénat.

[7] Vincent Eechaudt (2017). *Penitentiair tuchtrecht en internationale detentiestandaarden : naleving in België en Frankrijk*. Antwerpen: Maklu, p. 129-133, Martine Herzog Evans (2012) *Droit pénitentiaire*, Paris, Dalloz.

[8] Ibid.

[9] Eechaudt, Vincent (2017). *Penitentiair tuchtrecht en internationale detentiestandaarden : naleving in België en Frankrijk*. Antwerpen: Maklu, p. 129-133.

All statistical data were taken from reports by the French Penitentiary administration (statistique mensuelle – statistique trimestrielle des personnes détenues et écrouées) unless stated otherwise.

On December 1st, 2018, France counted 71,061 prisoners, among which 20,880 were in pre-trial detention, with a ratio of 68,520 male to 2,541 female prisoners (3.6% of the total population of detainees). 814 minors were under penitentiary custody, of which 614 were in pre-trial detention, itself a growing concern in France[10].

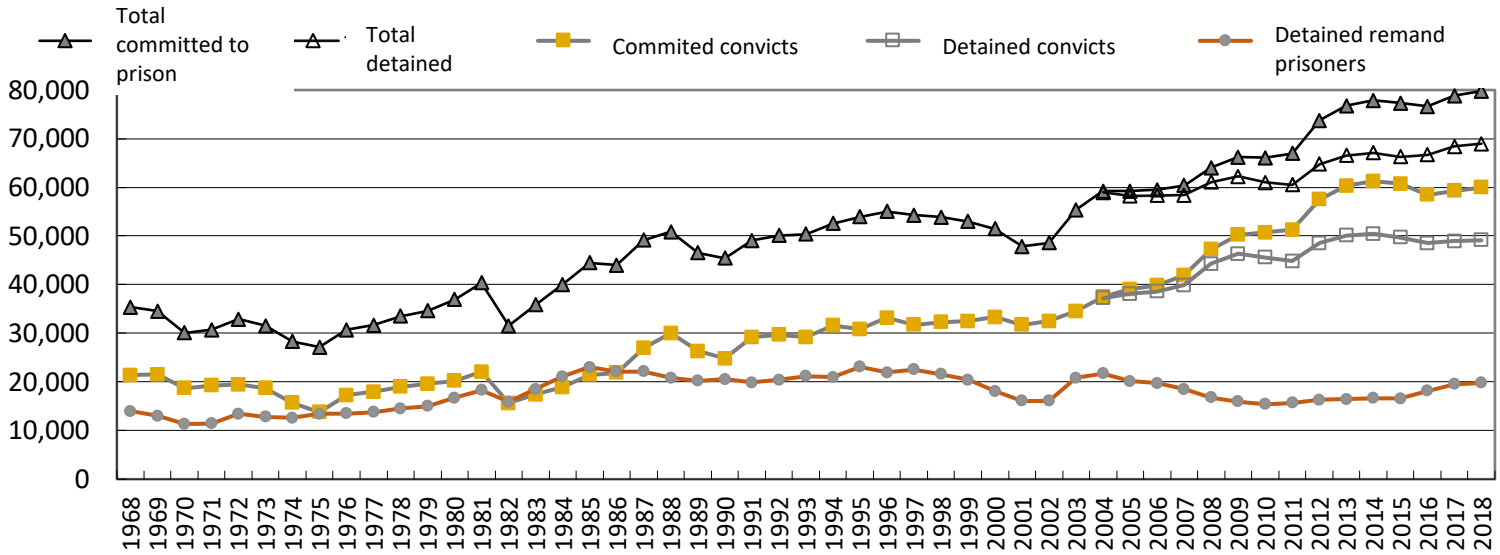
The average age of all prisoners was 31.7, and slightly less for pre-trial detainees (31).

A total of 15,418 prisoners were foreign-nationals (22.4% of the total detained population), with 5,704 European citizens, 7,541 Africans and 1,365 from American countries.

5% of all prisoners were reported as illiterate, 6.7% had received elementary education, and 75.2 % had received secondary or higher education.

22% of the entire population (including detained persons and persons serving an outside sentence) had been indicted for robbery, 19% were charged with a drug-related felony, 14% for physical assault, and 10% for sexual assault.

The general trend of the detained population is as follows:



The condemned population has been increasing steadily over the last 40 years; but the rate of pre-trial detention has evolved differently, having remained steady between 1985 and 1997, and even decreasing for several years until 2010. However, the numbers of pre-trial detainees have been rising steadily since 2010 and even more so since 2015. According to French Prison Administration statistics from 1 January 2018, 19,815 pre-trial detainees made up 28.7 % of the general prison population, of whom 78% were waiting to be tried, versus 18,000 in 2016 and 16,500 in 2014 and 2015[11]. Further, the average duration of pre-trial detention has risen from 24.2 months in 2011 to 28.5 months in 2016.[12] One possible explanation for this recent development could be connected with the 2015-2017 state of emergency in France, which took effect after the November 2015 terrorist attacks. This situation

[10] On this development of pre-trial detention for minor offenders, see Commission de suivi de la détention provisoire, *Rapport 2017-2018*, Paris, CSDP, 2018.
[11] "La detention provisoire des personnes jugées en 2014", *Infostat Justice* n°146, December 2016
[12] Mollaret Oriane: La détention provisoire, une mauvaise habitude française in Politis, 2 April 2019

might have made judges more reluctant to release on bail persons whose criminal profile and history seemed similar to those of reported terrorists[13].

According to the Council of Europe, pre-trial detention is a major reason why France has the third-highest prison population among all member-states, with a density of 116.3%, behind Northern Macedonia (122.3%) and Romania (120.5%). Statistics from the Council of Europe show that, on 31 January 2018, pre-trial detainees made up as much as 29.5% of the total French prison population, well above the European average of 22.4%. In 2014 (the last statistical survey available), pre-trial detainees were mainly charged with robbery (49.4%), drug-related felonies (45.3%), physical assault (44.1%), and sexual assault (38.3%).[14]

1.3 Recent evolutions of initiatives to compensate juridical inequalities among detainees/prisoners

The budget for legal aid was lowered from 320 million euros in 2009 to 295 million in 2010, in spite of a significant increase in the number of applicants during the same period[15]. In 2016, 971,181 persons were eligible for legal aid, among which 401,909 cases concerned penal matters.

1.4 Litigant information

Practical means of litigation

Means of litigation include recourse to individual barristers and networks of barristers (such as the *Réseau Défense Droit des Détenus*), legal help from private or state-financed NGO representatives (such as *Observatoire International des Prisons*), and organizations present in the *Points d'Accès au Droit*, including *Arapej* and *Droits D'urgence.*

No formal university-affiliated legal clinics currently exist with respect to prison litigation issues.

The organisation of legal aid: an institutional limit to prisoners' access to justice

In case of a lack of resources, a litigant prisoner can be granted either total or partial legal aid in accordance with a set of pre-established criteria. The legal aid request form involves filling out a certificate of presence and delivering it, via barristers, to the appropriate jurisdiction. The form is complicated for most prisoners to understand and to complete, due to a general lack of reading skills and difficulties in understanding the complexities of the law and its enforcement.[16]

France has a system of legal aid for both judicial courts and administrative courts, the latter being in charge of examining most cases related to detention conditions.

Depending on a defendant's resources, all or part of his or her legal costs will then be paid by the state directly to the lawyer. Defendants must submit a claim for legal aid to the court

[13] Commission de suivi de la détention provisoire, *Rapport 2015-2016*, Paris, CSDP, 2016, pp. 27 sqq

[14] See "La detention provisoire des personnes jugées en 2014", *Infostat Justice* n°146, December 2016.

[15] https://www.nouvelobs.com/rue89/rue89-nos-vies-connectees/20110520.RUE2308/scandaleuse-indemnisation-des-avocats-a-l-aide-juridictionnelle.html

[16] Claire de Galembert and Corinne Rostaing (2014) Ce que les droits fondamentaux changent à la prison, *Droit et Société*, n°87, pp. 291-302 ; Corinne Rostaing (2007) Processus de judiciarisation carcérale : le droit en prison, une ressource pour les acteurs ? *Droit et Société*, n°67, pp. 577-595 ; Corentin Durand (2014) Construire sa légitimité à énoncer le droit. Etudes de doléances de prisonniers, *Droit et société*, n°87, pp. 329-348.

before or after the instruction of their case has started. They are allowed to choose their lawyer, or to ask for an on-duty lawyer.

Legal aid is calculated in terms of *unités de valeur (UV)*, an amount set at 32 euros in 2017, after a series of raises that took effect since 2015. In cases of probation, a lawyer will be paid 4 UV (128 euros) plus an additional UV (32 euros) to cover expenses related to transportation to prison. A lawyer is paid 20 UV (640 euros) for litigation over disciplinary measures. The next section of this report will elaborate on the viewpoints expressed by interviewed lawyers, who note the low level of legal aid as well as the fact that bar associations rarely participate in helping lawyers who defend indigent persons.

As regards prison law, the low level of remuneration is particularly problematic as prison litigation requires frequent visits to prisons. Lawyers often spend their days driving from prison to prison, with no funding to match the cost of transportation. One proposed solution has been the organization of hearings through video conferencing, a possibility which few lawyers are comfortable with. Though such an option might prove more convenient for lawyers themselves, many point to the risk that it might discourage some lawyers from actually visiting their clients in prisons – turning prisons into closed-off domains run by prison administration officials without supervision or monitoring. Another remuneration-related issue raised by respondents concerns the fact that all actions taken outside the legal process (collecting information, making interviews, phone calls) are not counted as activities included in the calculation of legal aid.

Some of our respondents pointed to another problem, with respect to the payment of legal aid: this payment occurs only after a long delay, as lawyers must wait for the Legal Aid Bureau's approval of each case. Second, the remuneration issued to the lawyer becomes effective only once the case has been settled (often two to three years after the proceeding was initiated). This makes the initial stages of a lawyer's career rather difficult, as a dynamic of delayed but regular payments has to be initiated. After the first years, however, such consistency can guarantee a stable source of income.

One respondent considers that the amount of legal aid is only adequate when he litigates before administrative courts, as this type of litigation – which generally refers to objective matters – does not require a lawyer to travel and meet with the detainee. Before judicial courts, however, lawyers and detainees have to develop a closer relationship and negotiate a line of defence, all of which is more time-consuming. In these cases, a greater number of procedural decisions also have to be made. One respondent stresses that administrative trials enable him to be paid for a type of case that experienced lawyers master well and for which they can prepare easily. In this sense, he stresses, legal aid is more "profitable" during administrative trials than during judicial trials. The system also allows lawyers to disregard financial concerns in their approach to cases: that is to say, they can fully focus on the case regardless of the prisoner's financial means, and without having to moderate their rates. No lawyer, however, can rely financially on legal aid cases only. According to this respondent, all lawyers have to take on more lucrative cases pursuant to other legal matters.

One lawyer reports having accepted some cases out of sheer interest in the cases themselves, or because they represented emergency situations, while knowing that the legal aid refund would be both insufficient and difficult to obtain. "We don't make it in the end, but it makes everybody else happy, because they can use us [lawyers] as an alibi. The Ministry of Justice is very pleased to see lawyers working along with that system, without any additional cost for them. […] Nobody has even imagined, say, to have a reduced VAT rate for such expenses. Now we get a 20% VAT, that's no simple cost to afford." This type of strategy seems to be largely shared among our respondents.

2. LEGAL PRACTITIONERS - LAWYERS

Although prison itself has been turned into an object of concern for legal practitioners since the 1990s, prisoners' rights remain rather inconspicuous both as a public matter and as a professional specialty for legal practitioners.

The relative indifference of bar associations for prison litigation

At the institutional level, our respondents agree on the lack of interest of most local bar associations for prison litigation in general, whether for sentenced prisoners or pre-trial detainees. The **French National Bar Association** has organized conferences on prison litigation; though one of our respondents, a lawyer, bitterly noted that such meetings are but mere occasions to repeat general statements about the importance of detention issues and detainees' rights, with almost no practical consequences in terms of political initiatives toward the Ministry of Justice, or in terms of much needed support for lawyers who specialize in prison litigation. One of our respondents, a former prison director, became the National Bar Association (Conseil National des Barreaux)'s prison referent three years ago. She started out by creating a survey meant to identify what kind of initiatives existed, in order to support prisoner litigation and the concerns of lawyers in this regard. She was shocked to discover the extent of her colleagues' lack of knowledge, with respect to basic prisoners' rights (see below). She organized a joint training course for lawyers with the participation of the National School of Magistrates ENM (École Nationale de la Magistrature) and the National School of the Prison Administration ENAP (École Nationale de l'Administration Pénitentiaire). This initiative was supported by the National Bar Association's *Commission Liberté et Droits de l'Homme*. However, such types of initiatives often remain rather discreet, and have not yet been systematized.

Few local bar associations have direct relations with the French prison administration. One of our respondents regretted that no direct contact was ever initiated between her local bar, which is located in a larger city, and the local prison administration. As a result, prison-related events may occur regularly, but they **never bring enduring attention or lead to long-term political initiatives on the issues from local bars.** One of our respondents related how incidents between lawyers and local prison staff had been dealt with by disciplinary commissions with a gendered bias: while young female lawyers had faced hostility and disrespect from prison wardens – in contrast to their male counterparts – their claims were not taken seriously by local bar representatives, and had no notable consequences for the prison staff involved.

Differences exist among **bar associations**, due to the size of their respective cities, which partly determines the number of lawyers and the (unequal) amount of resources dedicated to certain types of litigation. Major cities such as Paris or Lyon are also major business centres, making business law or taxation the main concerns for bar associations as these sectors are most profitable. Also, the small number of lawyers specialized in **prison litigation often hold minority positions within their firms,** in such larger cities. In smaller cities, on the other hand, prison litigation lawyers can more easily meet and share information with each other, while enjoying closer access to local bar representatives. Some of these smaller bar associations organize specific training sessions, depending on the initiatives and general motivation of their representatives, as well as on the presence of a remand centre in the city's vicinity. Such bars may be fairly active in matters of prison litigation – hosting regular events, sometimes co-organized with specialized NGOs – but in **many local bars, training focuses on general penal**

law, with little or no attention to prison litigation. Similarly, some penal lawyers create relevant discussion groups on social networks, an initiative which, however useful, may not compensate for a lack of proper training.

In certain regions, brief training sessions are organized by the bar as part of a broader presentation of duty lawyers' services, and attending such sessions may be required to join the service itself. **Many of these initiatives, however, emerge without the intervention of the bar,** and are often organized by lawyers' unions such as the *Syndicat des Avocats de France*. In Paris, a specific 20-hour training session on prison law has been offered since January 2019 at the initiative of the "3D" network, a network of lawyers dedicated to the defence of prisoners (see below), whose members deliberately contacted the bar to facilitate such training. Finally, law schools sometimes organize specific training sessions on particular issues surrounding detention law. The average training sessions bring an audience of 20-30 persons each, usually the same small group of dedicated lawyers. **Local bars do not edit written material on detention law**, generally speaking, and such documents are rarely available outside of academic texts. Major exceptions are publications by NGOs, such as the "Prisoner's Guide" issued by the *Observatoire International des Prisons* (OIP). This handbook on detainee rights is popular with both prisoners and professionals: In 704 pages, the book follows the entire journey of a prisoner, from the first day of prison to the last, with an extensive set of questions and answers (873 in total). The various stages of incarceration – entering prison, living in prison, enforcing one's rights, preparing for release – are discussed successively, followed by clear explanations of the rule of law and examples of its daily application, and illustrated with testimonies, analyses and press articles.

In conclusion, most training sessions, information exchanges, and publications on prison litigation largely depend on individual initiatives from lawyers – who are themselves part of dedicated networks – and above all on the work carried out by NGOs.

The economy of prison litigation: a professional specialty under strain

This crucial role of individual lawyers gives renewed importance to the sociology and economy of prison litigation and of defenders who specialize in this field. Both lawyers and NGO representatives among our respondents described a set of common systemic and economic denominators: **Most lawyers who specialize in this field tend to be younger and more active**; they work on their own or in **small-scale law-firms** (typically consisting of one lawyer and his/her associate); they are on-call lawyers or lawyers hired directly by their clients; finally, they generate **little profit** from this particular form of litigation. In the major or average-size French cities referenced in the survey (e.g. Lyon, Grenoble or Clermont-Ferrand), most of the specialized lawyers work as individual, free-lance practitioners, and only a minority of law firms participate in prison litigation.

An Administrative Court magistrate notes that most lawyers working on detention condition cases are specialized, with a thorough knowledge of relevant issues. They tend to refer to past cases they have worked on. Lawyers may be even more specialized, for example on issues of detainee labour and wages in prisons. One responding lawyer regretted that such lawyers are sometimes used to represent the "good conscience" of the bar, for purposes of "window dressing." At the same time, though, lawyers working in the field receive increased visibility and recognition, which in turn provides them with the means to negotiate improvements to the bar's policies regarding prison litigation or police custody.

The low levels of available legal aid, and the unreliable schedule of its remuneration, play of course a crucial part in this economic strain. Law firms respond to these circumstances in different ways: small firms tend to multiply the number of cases they take on – with the risk of sacrificing time needed to reflect on the legal strategies of each case – while larger firms often

compensate for the unprofitability of prison litigation by combining it with legal work in other, more financially lucrative areas, such as corporate law or taxation.

Selections of cases and clients

The selection of cases depends on the lawyers' proximity to a certain profile of cases or clients, as well as (and particularly) the chances that a potential case may have a favourable outcome. The "size" or "scale" of the case also matters: a small case requiring emergency work will only be accepted if the necessary time is available on the lawyer's side. Lawyers may also prefer cases that offer the possibility of delegating some casework to their associates. Finally, the geographic proximity of a client is an important factor in case selection. Again, the existence of a lawyers' network is important in this respect: "It's a specialty where you will never make much financially, and we cannot always work *pro bono*, so what I will do is, if I have a case at the other end of the country, I will send an email on our list and ask if anyone will take the case. I have never seen a case left behind."

This situation demonstrates **the importance of the formal or informal networks of NGOS and lawyers**, the former being typical supporters of the latter (*see below on the importance of French NGO Observatoire International des prisons in the organization of the main prison litigation lawyer's network*). One of our respondents emphasizes that work on such complex and specialized matters is difficult in any case, even without being able to rely on a network of dedicated colleagues. This type of network provides the possibility to share questions, landmark legal decisions and good practices. As a result, many initiatives are either left to lawyers' unions, such as the **Syndicat des Avocats de France**, or to more informally organized networks of dedicated lawyers – particularly the "**3D**" network ("**Défense des Droits des Détenus,**" or *Defense of Detainee's Rights*), which unites the majority of the otherwise disparate lawyers who specialize in prison law. In certain cities, such as Paris, Marseille or Lyon, the network is very active, although it gathers a relatively small number of practitioners. One of its members stresses that the network was a considerable source of learning for her, pursuant to helping her to realize, in the first place, that a number of other lawyers were actually working on prison cases. Another lawyer stresses, however, that the total number of members in the "3D" network is no higher than 50 to 80 persons nationwide. Some of these members are less active as practitioners, but they support others by regularly posting messages and disseminating information, a task requiring time that practitioners can rarely spare. As this respondent states, "I have a firm to manage, a few hundred cases on my hands, and I have to travel around, so I have a hard time doing that job… I made up my own data bank with the decisions and case law I obtained on previous cases, so I fish into that and send decisions to colleagues when they need them. But that is a personal initiative, entirely on my side. I have to say [prison litigation] lawyers in general are loners."

Other networks deal with specific issues and specific categories of detainees, such as the ADDE (*Avocats pour la défense des étrangers*) network. The ADDE is dedicated to defending immigrants' rights and, through its mailing list, regularly hosts discussions on issues related to incarcerated foreign-nationals, and more specifically regarding deportation litigation, which must be prepared before their clients' release from prison and detention in immigration detention centres.

The specificity of litigation on pre-trial detention means that it remains a rather limited legal specialty – as opposed to, say, immigrant deportation litigation, a more populous field of litigation that attracts greater attention and more frequent collective debate.

Informal networks are also common, e.g. systems of informal mutual exchange of legal tips and information between colleagues who have known each other for a long time, and on

certain types of incriminations (for instance, charges of terrorism). But such networks often involve a small number of dedicated, specialized, lawyers.

2.3 Access of lawyers to their clients

The simple issue of transportation to prisons is a pressing one for most lawyers. As in most other European countries, French prisons are located far away from urban centres, in areas such as suburban neighbourhoods (in the cases of most remand centres) and more remote, countryside areas (in the cases of most detention centres). Public transportation is often complex, infrequent and unreliable, and driving can be difficult, especially in major cities where outgoing highways are usually jammed. Visiting hours, which are restricted to two slots of two hours a day (11pm - 13pm; 14pm - 16pm), are also perceived to be excessively restrictive to most lawyers. Geographic distance matters for the defence. One lawyer relates that travel to remote, rural prisons is only possible for important cases, and for detainees he has a "meaningful" relation with.

Another respondent mentions his uneasiness at being repeatedly contacted by detainees using cell phones – which are legally banned in prisons. Certain bar associations have provided shared call centres for lawyers, thus helping to avoid questions about their calls' origins and especially whether they were made from cell phones or legal public phones inside the prison. Regular delays in mail delivery are reported. One respondent mentioned the case of a detainee whose mail correspondence to his lawyers had been blocked.

Relations with the prison staff are generally considered courteous, but distant. As one lawyer states, "the main rule is that the Penitentiary does what it wants inside, it is part of what they call internal measures… and they aren't getting used to that new situation where external people go in and control them, where detainees themselves can have some kind of control through the litigation they initiate. But they have a hard time getting used to that, it's in their DNA. So their own organization comes first, and if it doesn't work for us, well that is the way it's going to be. […] Each warden has his or her own interpretation of the rules, and of security measures" (R6).

Problems when entering prisons were reported. In some cases lawyers are not allowed to carry a digital tablet into a detention facility but may bring a laptop; but this right is unequally enforced, as laptops are not allowed within some prisons. There appears to be no coherent national instruction to prison wardens on this matter, which has important consequences for lawyers: as one respondent puts it, "I can't bring my 3-volume paper file with me to the jail, so the laptop is required." This matter of concern is often voiced in the internal mailing lists within professional networks.

Female lawyers reported problems when entering detention facilities. Some women were requested to remove their brassiere before entering the prison, as in the prison of Villefranche sur Saône, where a public statement was issued by a lawyers' union, and at the Fresnes prison, which incident was briefly covered by the media. It is not easy to assess how often such practices take place. Another lawyer had the opportunity to enter one of the prisons she regularly visited at the same time as a film crew working on a documentary. Entering the prison with them, she decided not to mention she was a lawyer, and noticed how prison wardens acted with more courtesy than usual towards her, greeting her and generally adopting a less aggressive attitude.

All interviewed lawyers spoke of **having to wait to enter the prisons, for even longer durations at the moment when their clients are being taken from their cells for interviews**. As one respondent states, having to wait before being able to enter or leave the prison may be

a form of "revenge" or retribution from penitentiary staff against lawyers who engage in aggressive litigation against a prison's administration. Prison staff members are even more commonly overworked, and are often unable to respond quickly to lawyers' requests in due time. Another lawyer describes the same type of conduct – in one case, a violent verbal argument with a warden after an hour-long wait for the interview room door to be finally opened – a direct consequence, in his opinion, of his having won a series of cases against the Penitentiary.

This lawyer goes on to report that, because of delays due to the transfers of prisoners within detention, "having an agenda for conversations with four detainees on a given morning is very ambitious – if you get to see two or three, you are already a champion […] It got to the point where court experts won't come along, because meeting a guy is too complicated. The same goes for social workers. I remember we tried to alert the bar, but nothing happened – while this is a structural problem that is truly serious, and a real obstacle to the right to defence, and to prevent the isolation of prisoners […] I think the Penitentiary never asked for this type of opening to the public, they had to accept it after successful litigation and because the law on the French Prison Inspectorate was voted [by legislation]. But they only move at gunpoint."

Visiting rooms are reportedly dirty and overcrowded. **Lawyers mentioned the difficulty of creating a relationship of mutual trust in a situation where lawyers**, already too often associated with the police and judicial systems because they are legal practitioners, cannot easily access their clients nor ensure that their conversation with clients can stay confidential. Several respondents report that the soundproofing of visiting rooms is ineffective, which allows persons in the next room to hear what is said between a lawyer and his or her client. In the Vars and Riom regions, for example, the walls are said to be very thin.

Another important issue is the confiscation of all legal documents that may be found in a detainee's cell; while these documents are indeed banned in all cells, their confiscation actually allows prison wardens to read part of the detainee's file. A respondent summarizes the problem of staff members' access to documents related to prisoners' cases with the following phrase: "Each prison, a different rule." Some prisons are cooperative, and immediately send requested documents; others require the prisoner to send them himself. One prison (Saint-Quentin Falavier) required prisoners to pay for photocopies of case-related documents. Finally, larger prisons usually take more time in sending documents. Relatedly, a magistrate in an Administrative Court also stresses problems with the transportation of legal documents and evidence from the prisoner to the courtroom: when the prisoner himself is not able to attend the hearing, lawyers often face difficulty in going to local jails and collecting the documents. To avoid postponing hearings on this ground, more time is given to lawyers even in cases of emergency trials.

Cases are initiated either by the lawyer or the prisoner, depending on the type of case. In cases involving prison searches, the matter appears to be too sensitive for detainees to bring cases on their own; litigation usually comes from a lawyer, often in connection with an NGO such as the OIP (see next section). This is also the case for issues that may affect the entire prison organization. One respondent gives the example of a case that demanded a standard system of payment for all working detainees: initiating such a case may have negative consequences on a prisoner, so it seems wiser to enter this type of litigation with the help of an NGO and a dedicated lawyer. In less sensitive cases (on issues such as individual labour conflicts or disciplinary measures in prison), prisoners may initiate legal action on their own.

3. LEGAL PRACTITIONERS – NGOs

As stated earlier, the French penitentiary system has gone through an important transformation since the mid-1990s. Detention conditions became subject to judicial review – but more broadly, prisons opened up, to a certain degree, to the critical gaze of public or private independent actors. This evolution lends increased importance to the actions of public bodies such as ombudsmen (as the French *Défenseur des droits*), Inspectorates (such as the *Contrôleur general des lieux de privation de liberté*), and finally NGOs, which are now key actors in the field of prisoners' defence, and which constantly interact with bar associations and individual lawyers.

NGOs were the main actors to be impacted by this relative openness of detention facilities. One main difference among these organizations is indeed their relationship with the penitentiary administration. Some may choose to cooperate with the prison administration – often entering prisons and working inside them – while others opt to remain independent from detention and its enforcement, thus criticizing the penitentiary apparatus from the outside.

At first sight, the French system may seem quite attentive to the question of access to rights in prison, which played an important role in the debates surrounding prison reform. In 1999, the President of the Supreme Judicial Court, in charge of a mission to improve the management of prisons, insisted on prioritizing prisoners' access to rights; a year later, two parliamentary committees of inquiry – which issued landmark reports on prisons – took similarly strong stands on the issue[17]. Despite such a compelling political mandate, the emphasis on legal access was watered down as part of the reform that led to the 2009 Penitentiary Act, and the Ministry of Justice's guidelines for implementation have largely gutted it. The Penitentiary Act provides that "*every detained person must be able to know his rights and to this end benefit from a system of free legal consultations set up in each facility.*" This system of free legal consultations is provided through "*legal-access points*" **(*Points d'Accès aux Droits* or PADs**), which are not specific to the prison system, and are also located in town halls. Most of these organizations are part of the PAD system, which comprises associations of different partners, public actors (*Conseils départemental de l'accès au droit*), private actors (bar associations), and non-profit organizations and networks. The system operates under a public independent authority (magistrates), and is financed by a central administration (the Ministry of Justice). According to the Ministry of Justice, most French prisons have a PAD (154 out of 191 prisons), which works closely with the local prison administration. The services offered to prisoners by PADs are highly inconsistent, according to all respondents. Several organizations act within the PAD system, notably the **ARAPEJ (**a network of organizations created in 1991 to assist prisoners, and which is present in the PADs of six prisons[18]) and ***Droits d'Urgence*** (a network of lawyers paid through legal aid and with paralegal lawyers on staff). *Droits d'Urgence* is also present in the legal-access points in town halls or prisons. The organization was created in 1995 by lawyers who had been volunteering with humanitarian organisations (*Médecins du Monde*) or organizations that fight poverty (Emmaüs), and who believed that the access to fundamental rights is central to combatting

[17] The Commission of Inquiry of the Senate stated that "*most detainees were unaware of their rights and remained distraught about some of the measures taken by the prison administration and found to be arbitrary. The generalization of lawyers' consultation services would provide them with a competent contact person. These consultations could make it easier for them to access legal aid.*" The Commission of Inquiry of the Lower House, expressed that "*[it] is difficult to ask the prison to play a role as a reminder of the law when you do not know which law applies. The detainee thus suffers the proliferation of rules as an oppressive straitjacket and not as a guarantee against arbitrariness. He is ignorant of both external laws and internal rules. The least that can be said is that this access to the law is overlooked, if not totally ignored, in the definition of the missions of the prison administration.*"

[18] Namely in the *Maison d'arrêt de Fleury Merogis*; in the *Centre pénitentiaire de Meaux Chauconin*, in the *Maison d'arrêt de Nanterre*, in the *Centre de détention de Melun*, and in the *Centre pénitentiaire de Réau*.

social exclusion and marginalization – notably for the most precarious populations, such as the poor, homeless, or undocumented foreign-nationals. Notably, the organization states that it provides **humanitarian support**, and is neither activist nor politicized.

According to the law, the consultation services provided by such groups are intended to respond to any request for legal information from detained persons, with the exception of those relating to their own criminal cases or the implementation of a sentence, or those for which a lawyer is already assigned. The lack of mention of issues related to prisoners' rights undermines the actors' understanding of what legal advice covers. The prison administration considers that questions relating to life in prison and conflicts with prison services are excluded from the scope of the legal assistance provided by the PADs. The legal information guide published by the penitentiary administration states, as regards the PAD, that *"[its] role is not to inform you or assist you with questions related to penitentiary law (administrative procedure and probation). These questions are the responsibility of the Prison Probation Service.*" The agreements reached between the Ministry of Justice and the actors involved in rights access are in line with this understanding. As a lawyer who formerly worked in a PAD explained:

> "As lawyers within the PAD, we are not allowed to intervene in a prisoner's penal case or in any contentious issues that he may have regarding prison conditions or disciplinary measures. This is a point that the Bureau of Prison always insists on, every time we renew our contract. So what do we do when we hear about an instance of violence in detention, or any other kind of grief? When prisoners express their wish to complain over their conditions of detention? I always referred to the *Défenseur* (the NPM), and I made sure that their letter to the *Défenseur* was not intercepted by the guard in charge of dispatching letters, by sending the letter for the prisoner from a mailbox situated outside of detention. I have often helped prisoners who didn't have the necessary skills to write such letters. Sometimes, I have spoken directly to the hierarchy about instances of violence against prisoners, and the director of the prison has taken it seriously. Sometimes, prisoners write to the OIP, but this also supposes that the letter gets out of detention."

The clandestine interception of letters from prisoners is a recurrent cause for concern, including when it comes to correspondence with the NPM, as stated repeatedly by the *Contrôleur Général des Lieux de Privation de Liberté*[19]. In a case concerning the practice of systematic body searches in a prison in northern France, the Supreme Administrative Court even found that letters from the OIP, the main human rights organization in this field, were regularly intercepted by prison staff in order to prevent them from reaching prisoners[20].

Several respondents, among them PAD-affiliated lawyers, referred to the 2018 *Génépi* case, when an independent NGO – which had provided educational support for prisoners for some 46 years – was suddenly excluded from prison in November 2018 by the prison administration. Génépi, whose members have always included many law students, has increasingly taken a critical stance concerning prison conditions in past years, including abolitionist positions. When its contract was terminated, the prison administration stated that there was no reason to fund an organization that wished to end the prison institution itself. Another case which respondents called attention to was that of probations worker Mylène Palisse, who was sanctioned by her supervisors in 2016 after criticizing, in the daily newspaper *l'Humanité*, the methods used to detect "radicalization" in French prisons. These incidents have

[19] « « Je n'ai qu'à défendre les droits fondamentaux, si je puis dire » ! », *Droit et société*, vol. 87, no. 2, 2014; https://www.lemonde.fr/societe/article/2019/03/27/lieux-de-privation-de-liberte-un-rapport-denonce-la-culture-de-l-enfermement_5441862_3224.html?xtmc=controleur_general_des_lieux_de_privation&xtcr=1

[20] Council of States, 3 October 2018, OIP v. Minister of Justice, n°413989

clearly had an effect on members of other non-profit organizations who work within the prison system, and who wish for the ability to publicly criticize its shortcomings.

The organization and accessibility of the PAD network deserves a few comments, as there seem to be great discrepancies in its material conditions, and thus in the work conditions of PAD staff and their ability to reach prisoners. For instance, the organization *Droits d'Urgence* is present at the Fresnes and La Santé, both late-19th century prisons located in the Paris region. In the former, lawyers have been given a large office with three computers and an internet connection, while in the latter, the lawyers' office is located in a small, windowless room with no internet. Lawyers from the PAD are prohibited from introducing laptops or tablets to the prison (as are all lawyers), and are only allowed to carry paper documentation. One of our respondents, who works for a PAD, stated that access to legal databases could facilitate his work within the prison; but he also stressed that employees of the PAD have access to offices within the prison itself which are equipped with a computer and an internet connection. Hence, they can respond more quickly to prisoners' requests than is the case of lawyers who may be at great distance from their offices.

Another problem is overcrowding, which prevents lawyers who work within the PAD system from meeting all prisoners who request their assistance. In the newly re-opened Santé prison, a part-time position provides legal aid for 1,600 prisoners, a situation which led one lawyer to comment that the PAD system is bound to become "complete chaos, a fiasco." A lawyer from a PAD at an overcrowded prison – its population at 200% capacity – had, at the time of the interview, been working alone for six months, and was looking forward to the arrival of both a part-time colleague and an intern. In the meantime, he found it humanly impossible to attend to all the requests for legal support that he received from prisoners, and he profoundly regretted not being able to adequately assist every prisoner who wrote to him.

PAD respondents also conveyed their sense of **a certain isolation with respect to local bar associations**. One respondent stressed that one of the reasons why he isn't familiar with the local bar is that he is prohibited from intervening in prison litigation and penal cases, and that he only knew a few barristers' names by hearing about them from prisoners.

As a result of the working conditions of lawyers working in the PAD network, questions related to the exercise of rights in prisons are referred either to the lawyer (although such transmissions are limited in practice) or to prison staff. While some issues – related to social rights or administrative formalities outside the prison – are unproblematic, such is not the case in situations where the prison administration's lack of knowledge about a right is at stake. As a matter of fact, **penitentiary officials have no interest in disclosing extensive information on possible litigation**. In this case, when information circulates, it usually does so informally, or through prisoner contacts with NGOs.

In this context, due credit should be given to the *Observatoire International des Prisons* (International Prison Observatory, or OIP) for its major role in the history of prison litigation, as well as its current state of affairs. The NGO stands out for its key role in drawing attention – of the media, of politicians, and of the public – to general prison issues, notably through its publication of books and of its magazine, *Dedans Dehors*. Also, the OIP's role is central in the general organization of prison litigation facilitators in France.

Since its creation, the organization has used active legislation to support the judicial review of penitentiary affairs. Many of their most crucial cases have concerned the matter of prisoners' effective access to court. The organization played a prominent role in the landmark decisions that made it possible for cases on prison conditions to be examined by French administrative courts in the 1990s, and its members have been active ever since in ensuring the efficiency of these new remedies. Legal issues with which the OIP is currently involved include, for example, that of prisoners' ability to have their case expeditiously judged if it concerns a short-term restriction of their rights, such as disciplinary confinement. Indeed, court rulings

against confinement measures are often issued after the measure has ended, or after it has been extended by a new decision that will have to be brought to court as well. These situations are described as "frontline battles" by OIP executives.

OIP representatives may also act as lawyers and follow individual cases, but only as long as the outcome of such cases can have significant consequences for prisoners' rights in general; this supposes a selection of cases, according to certain themes the organization wishes to act upon. Members may also file motions in the name of their organization to obtain judicial condemnation of a certain practice or policy that has been reported in a detention facility, or to request the repeal of a government regulation pertaining to detention conditions. The core of the group's action has been to reinforce prisoners' ability to act judicially and to bring their grievances to court.

Due to its particular organization, the OIP acts not only as a personal defender for prisoners who wish to litigate against their conditions of detention, but also as a facilitator and network for lawyers who engage in prison litigation. The connections between OIP and law firms providing *pro bono* contributions enable such collaboration, as the OIP is the only actor with the ability to take on – for no fee – cases that have almost no chance of being granted legal aid (or any other financial support). As explained by a respondent from the OIP:

> "Very often lawyers contact us to see if we can take over their case. Particularly… we have an unusual organization. Apart from my wages, litigation does not cost the OIP anything. Because the law firm that is working with us, does everything *pro bono*. So we don't charge anything, but nonetheless, if we win before the court and we get legal fees, they will go to our organization. And, our partner law firm has never told me they would not go on with a case I wanted to bring to court … and lawyers from our close network know that. So when they lose a case, before an administrative court of appeals for example, they will say OK, I lost this case, are you interested? If you are, take over. And I will take it [to a higher court] because it raises this or that issue. But if the guy wants to go on alone, he can try to get legal aid to go before the Council of State on his own – but if he fails, it's all over. If we take the case, the law firm we work with will go to court, but the case will have been prepared by us."

This particular partnership also enables OIP members to **remain alert and react quickly to legal evolutions in available remedies** – giving them an opportunity for quick response that, according to our respondent from the OIP, overworked law firms may miss. Likewise, the OIP can rely on its own investigation department if an inquiry is needed to build a prisoner's defence, and on a dedicated litigation department, with specialized staff working full time to build a coherent strategy for legal action. Further, the OIP is in regular contact with the French Ombudsman (*Défenseur des droits*) and the French Inspectorate of Prisons (*Contrôleur general des lieux de privation de liberté*).

Such widespread and constant activity explains the prominent role of the OIP in the creation of the "3D" lawyers' network (see above, section 2). The network was directly inspired by an equivalent network of immigration law practitioners, which had been created for the defence of deportable immigrants. OIP members initially connected a dozen lawyers who were either part of their organization or whom they had worked with on a regular basis. The idea was to create a second structure to augment legal campaigns and to make up for the lack of time, training and broader strategy that plagued most smaller law firms working in prison litigation, deficits that resulted from the financial obstacles described above. The network also provided lawyers working on prison litigation with some sense of relief from their isolation. Our respondent from the OIP notes that after a legal victory that enabled bar associations to act before court in challenging detention conditions, almost no response came from bars

themselves, and in fact a negligible number of cases were brought forward. This situation, he stresses, is largely due to the economic organization of the prison litigation field, which dissuades most lawyers from engaging in costly, lengthy and uncertain legal action. He also notes that financial support from the bar to the OIP has been increasing in recent years, a movement that shows a rising awareness both of prison issues and of the importance of collective work with NGOs. For the part of lawyers, one member of the 3D network confirms that the presence of the OIP is fundamental to gaining a comprehensive view of prison issues nationwide, a vision only an organization like the OIP can provide.

Another significant campaign undertaken by the OIP is that of **fighting judges' lack of knowledge about detention conditions.** Few magistrates are aware of the pressures and constraints that detainees face inside prisons, and are seen by OIP members as inclined to defend the Penitentiary and its overall freedom to manage prisons with little oversight. In response, some OIP organizers have gotten involved in cases not by providing legal counsel, but rather by making empirical enquiries and writing affidavits – in their capacities as specialized lawyers – describing to the court the legal and material obstacles prisoners face when they want to file a complaint. In this way, such practitioners work to ultimately raise awareness among judges and court personnel on these matters.

Regarding pre-trial detainees more specifically, the OIP has obtained a series of decisions from the Constitutional Council over the last two years, concerning their right to litigate over access to written or telephone communications, or their right to see visitors when denied by a judicial authority.

The **Prison Litigation Network** has also organized training programs for French and European judges on prison litigation[21].

Other possible litigators include the ***Contrôleur général des lieux de privation de liberté* (CGLPL),** a public monitoring body. An independent public agency created in October 2007, the CGLPL is in charge of "ensuring the efficiency of the fundamental rights of all persons deprived of their liberty by decision of a public authority," with competence on all prisons, police custody facilities, immigration detention centres and psychiatric hospitals. Since its creation, the agency has conducted some 150 inspections of confinement spaces every year, each inspection leading to a report submitted to relevant ministries, and finally published on the CGLPL website. The CGLPL also publishes statements, annual reports, and specific studies. The agency's day-to-day inspection work is undertaken by a team of 49 *contrôleurs*, who conduct inspections in teams varying from 2 to 20 in size. Most of them are former members of inspected institutions, detached from their original administration (e.g. former prison directors, probation officers, police officers…). Only exceptionally does the agency include members of NGOs, but the institution itself has several connections with such organizations, notably with the *Observatoire International des Prisons*. Prisoners can also contact the CGLPL directly by writing a simple letter; each letter receives a specific response, and possibly leads to a special inspection *("enquête sur place"*), which is distinct from common inspections. Not all cases motivate this type of inspection, which remains rather exceptional and is generally motivated by suspicion of "serious" violations of fundamental rights. Finally, it should be noted that the CGLPL is seriously understaffed and underfunded, in view of the over 5,000 spaces of confinement its members theoretically have to check.

Le ***Défenseur des droits*** is another independent public agency, with a mission that is broader than prison monitoring, and closer to the role of an Ombudsman. In charge of "defending all persons whose rights are disregarded," and "promot[ing] equality of all in access

[21] See PLN, *Atelier-formation à destination des avocats Le contentieux des conditions de détention devant les juges français et européen*.

to law," the Défenseur relies on a staff of 250 persons who can receive requests from all French citizens and foreigners living in France. They inquire on each submitted case and attempt to settle it by proposing an agreement with the accused administration, or by proposing sanctions. They may also testify before court, if required. Among the different internal commissions of the Défenseur, one commission, the "**Deontology of security**" (*Déontologie de la sécurité*), is focused on complaints involving police or prison officers, making the Défenseur a possible recourse for prisoners.

Finally, there exist more informal means of facilitation. One lawyer notably mentions the importance of **prison chaplains**: "They are fundamental intermediates … They are concerned by prison law and once invited me to give them basic legal training […] Because of their position inside prisons, they receive a lot of confessions from the detainees, so even if it is not their official duty, they cannot keep saying they don't know the law, it's important for them to be able to respond. I know a nurse in the X remand centre, when you meet her you feel like you are talking to a probations officer. She has a capacity to alert on shocking detention conditions."

4. PRISONERS AS LITIGANTS

4.1 Assessment of the shortage of juridical and economical capital among remand prisoners

A former pre-trial detainee, who was detained at the Fresnes prison for six months before being discharged at his trial, described the conditions of detention as inhumane and degrading. When he was detained, the Fresnes prison had an overpopulation of 204%; that is, 2,600 prisoners resided in a prison built to accommodate 1,300. He shared his 9m2 cell with two other prisoners, and his 3-hours-per-day recreation was spent with 24 other prisoners in a 45m2 court. The building – dating from 1898 – has been insufficiently renovated, and during the summer heatwave the water was cut for several days for a reason unknown to him. Each day, each prisoner would receive a 1.5L water bottle to drink, wash, and cook.

In spite of the harshness of his detention conditions, he never once thought seriously about litigating against the facility. His upcoming trial was the most important case for him, and that was where he wanted to invest his scarce legal resources, his time with his lawyer, and his energy.

Similarly, another former prisoner was shocked to discover the conditions of detention at Fleury-Mérogis, Europe's largest prison, located in a suburb of Paris. When he met prisoners who had caught dermatological diseases from bathing in showers that were "green of mold," he decided to do something about it. He smuggled in a camera and photographed the prison from the inside, intending to send the images to a newspaper. When the camera was discovered, he was sentenced to three weeks of solitary confinement. Not once had he considered litigating against his prison conditions: "It would have been useless to even try. First of all, a lawyer is expensive and I needed him for my legal case. Second, the guards intercept your letters if you write to an NGO. Plus, before anything changed, I'd already have been released."

This corroborates the claims of lawyers who reported that their clients **would rather litigate after their detention time is over, to avoid any retaliation while they are inside.** Prisons are generally perceived by prisoners as law-free zones, where everyday detention conditions may change according to the relations prisoners have with key members the prison staff, but do not depend on universal legal provisions.

Another obstacle toward litigation relates to prisoners' lack of knowledge of the workings of the legal system, which for many is very opaque. A lawyer from a *Point d'accès aux droits* often notices the difficulties prisoners have in understanding even how to ask for a lawyer:

> "When they write 'I'd like judicial aid, please,' in a letter, there is often a confusion with the *commission d'office* [duty shift lawyers]. They do not know that the *aide juridictionelle* [legal aid] only pays a lawyer – but that that lawyer needs to have already been designated. So when the person is placed *sous mandat de depôt* (under penitentiary custody), the first step would be to ask to get a designated lawyer" (R9).

A lawyer among our respondents stressed that *Points d'accès aux droits* do not work efficiently when it comes to prison litigation, as their staff is not fully competent in prison law. This respondent was not aware that lawyers from PADs are not allowed to intervene in prison litigation (see above). He however pointed to one of the reasons why prisoners are often reluctant to ask for the help of a PAD, which is that most of them rely on their lawyer or on the informal advice of fellow prisoners. Some lawyers are aware that some of their clients are indeed referred to them by previous clients, who move to different prisons and tell other inmates about their services. Prisoners are also known to read and share NGO publications such as *"Dedans Dehors"* or the "Prisoners' Guide," two publications from the *Observatoire International des Prisons*.

A magistrate, who is also the president of the division that specializes in detention cases in a major administrative court, notes that **many detainees initiate legal action against their conditions of detention without the help of a lawyer, forcing judges to amend their cases and sometimes modify misspelled claims.** When the case is too badly written to be understood, a request for "adjustment" and specification is made. **Court attitudes regarding detainees' litigation may, however, vary from one judicial precinct to another**. The same administrative magistrate notes that it is the division's policy to examine these cases with clemency, accepting remedies that may have been filed slightly too late, taking into account the uncertainty of the actual notification to the detainee of the legal decision that he or she wants to challenge. Such types of actions are rarely repealed on the grounds of such delay. This appears to be a common practice among courts, although no extensive study has been conducted as yet.

4.2 Access to legal information

Wardens and probation officers generally provide adequate information about penal issues and probation, and detainees are generally well informed on these matters. The situation differs, however, when it comes to information about administrative issues concerning the everyday enforcement of detention, as **the Penitentiary has no interest in disclosing extensive information on possible litigation**. In this case such information usually circulates informally, though it should be noted that false rumours regularly circulate inside prisons.

A lawyer notes **a major lack of awareness on the part of prisoners about their rights**, as well as the fact that the economy of informal bargains that characterizes the prison environment, and the relations between the prison staff and detainees, too often obscures the respect for legal provisions.

An 86-page leaflet, written in 10 languages[22], is distributed to incoming prisoners on intake; it explains the daily functioning and rules of penal institutions, including two pages entitled 'Should you have a grievance'[23].

> Should you have a grievance:
>
> The establishment's rules and regulations provide the list of judiciary and administrative authorities to which you may write by sealed letter. You may, in order to appeal a decision made by the governor, • ask to have the grounds for the ruling explained to you; • ask the governor to reconsider a ruling; • write to the inter-regional director if you are not satisfied with the response, particularly if you have been placed in confinement; • write to the head of the inspectorate of prison services at the Prison Administration or the Minister of Justice and Liberties, if you are not satisfied with the response from the interregional director; • in a sealed envelope, write to all of the establishment's departments.
>
> If the problem relates to the execution or the enforcement of your sentence, • write to the legal authorities (sentence enforcement judge, public prosecutor, investigating judge, judge on liberties and incarceration, Children's Court judge if you are a minor).
>
> If the question relates to your health, • write to the director of the hospital to which the UCSA [Prison medical unit] is connected, the physician inspectors from the Regional Health Agency (ARS) as well as the head of the national inspectorate on social affairs (IGAS).
>
> In the event of a serious problem regarding the establishment's workings, • write to the Head of Inspection of Prison Services, at the Prison Administration.
>
> You may also • write to the President of the Establishment Assessment Committee (prefect or underprefect); • write directly to the Human Rights Commissioner; • write to the General Inspector of Confinement Centres to inform him of any events or situations that violate fundamental human rights. The Inspector may also talk to inmates confidentially, during his visits to the establishment; • write to the Chairman of the Committee on Access to Administrative Documents; • file a complaint by writing to the Public prosecutor to bring a criminal offence to his knowledge; • exercise recourse before the administrative court against the prison administration decisions regarding you.
>
> Should you be in disagreement with a disciplinary sanction, you must first file an appeal with the inter-regional director, within 15 days, from the date on which you are notified of the ruling. The inter-regional director shall have one month to respond. Lack of response shall be considered a rejection of your request. In such event, you may turn to the administrative court.
>
> You may seek appeal before the European Court of Human Rights, after having exhausted all other forms of recourse in France.

[22] French, English, Spanish, Romanian, Russian, Arabic, Portuguese, German, Italian, Chinese.
[23] http://www.justice.gouv.fr/art_pix/Guide_Je_suis_en_detention_V7_FINAL_novembre2017_opt.pdf

All of the above correspondence, provided it clearly bears the name of the addressee, will remain uninspected by the administration.

Reference is made to recourse mechanisms only in regard to the possibility of contesting a disciplinary sanction, and again in terms too brief to allow for an appeal to be lodged in accordance with admissibility requirements. The standard internal regulations contain information on internal administrative remedy but do not mention appeals to the courts. A circular also provides for a standard "extract" from the house rules to be delivered to each prisoner, which sets out in a fairly brief manner the possibilities for challenging prison conditions. In practise, however, the dissemination of this document is very irregular, as shown by the NPM visit reports. One lawyer considers this leaflet as insufficient, and does not understand why detainees are not provided with a complete set of internal prison rules upon arrival.

4.3 **Organisational and practical issues related to legal aid**

Formalities for filing a claim for legal aid:

For disciplinary measures taken by the administration of a prison, no claim forms are made available to prisoners. Forms are available for judicial litigation on probation, but such demands may also be written on ordinary paper. When requesting legal aid, prisoners often receive the relevant forms from their lawyer. Forms are available inside prisons, but respondents have noticed that different forms sometimes circulate within the same prison. These forms are sometimes complex, but are usually filled in by lawyers in order to avoid additional paperwork for prisoners. Some lawyers decline to complete the forms themselves, but risk facing complications if their unadvised clients fill them out inadequately. One administrative court magistrate indicates that administrative judges working on a case may deliberately send the legal aid application form to a prisoner when his or her case deals with issues that will require counsel from a lawyer (generally cases were prisoners demand financial compensation for damage): in these cases, judges anticipate the detainees' limited means and include the form without waiting for their response. The Ministry of Justice has issued guidelines (*circulaires*) that encourage magistrates to act thus "proactively" in cases involving detainees and other vulnerable persons.

Organisation of financial aid for litigation and its concrete implementation

Prisoners must fill in a form and address it to the Office for Judicial Aid (*Bureau d'aide juridictionnelle*, or BAJ). According to a PAD lawyer, there are numerous obstacles to receiving judicial aid:

> "Prisoners rarely know to whom they should address their request for judicial aid, and different forms that they can fill out are being circulated within this prison, with no fluent cooperation between guards, social workers and the bar. The *greffe* [court administration] often sends these requests to me at the PAD, even though I have explained to them ever so often that taking care of judicial aid is not part of my job duties. So far, it has been impossible to make this clear, even though it seems fairly easy to put a single form into circulation, which the *greffe* could then send off to the bar that

> designates a lawyer and sends him to the prison. I really don't see any obstacles for this happening, except maybe the usual lack of time within this institution."

When no income certification is provided by prisoners, officers require a tax notice. Generally speaking, officers examine prisoners' income, their spouse's income (if any), and the prisoners' type of housing. According to an administrative magistrate, this last qualification points to a difficulty in the attribution of aid: per government regulations, only the means of the detainee is taken into account (excluding the means of the person housing him or her), leading to the risk of granting aid to a prisoner who has no income, but who is housed by a high-income relative and may not need additional help. Another, more frequent problem arises in cases involving foreign-national prisoners, who, if they are undocumented, may have difficulties finding useful evidence of their income. According to this same judge, cases are usually quickly assessed, and few of them raise doubts on the litigants' means. Rejection is rare, which is important given crucial role of lawyers when preparing a case. One respondent reports that in Grenoble, some legal aid bureaus have requested a document attesting "on the honour" that the prisoner has no income, following a request from the judge in charge of the case.

4.3 Prisoners belonging to various minorities, or under-represented or isolated groups within prisons

LGBTQI prisoners: Detained persons are separated by gender, which makes the detention of transsexual persons particularly difficult. Self-identified women who are detained in men's prisons are often isolated from the male population for their protection, or to maintain order within detention. Though this separation protects the detainee from abuse from other prisoners, it also brings about a heightened isolation when it comes to access to rights, as well as access to vocational training, work, outdoor recreation time and other activities.

Foreign-national prisoners encounter several unique obstacles when it comes to effective access to legal information and legal remedies, due to their particular **legal status as detained non-citizens**. As foreign-nationals, their entry and presence within French territory is defined by French administrative law; hence, they are managed by French *Préfectures* (local immigration boards) and administrative courts. On the other hand, as prisoners, their incarceration is governed by penal and penitentiary law – and these two sets of law frequently contradict each other. One respondent, an advocate from CIMADE (an NGO specialized in the defence of immigrants) who acts as a counsellor in deportation law inside prisons, was able to provide many examples of the absurd situations which can arise from this tension between immigration law and penitentiary law. When it comes to probation, for example, officers will not grant an undocumented foreign prisoner a temporary release from prison unless the prisoner obtains a residence permit proving his or her "integration" in France. At the same time, the local *Préfecture* will never grant such a resident permit, unless the prisoner is granted a temporary release from prison, as evidence of this person's capacity to show "integration." In other cases, immigration boards of *Préfectures* have used probation officers as informants, not only for their assessment of foreign-national prisoners, but also to justify their repeal of residence permit applications on the basis of behaviour behind prison walls.

The second major problem concerning some foreign-national prisoners is that of **translation**, an issue that was also raised by many lawyers we met. Three general alternatives for translation are offered in prison: (1) asking for an external professional interpreter to come to the prison and translate (an almost impossible task, since this interpreter would have to get special permission from the prison administration, a process that can take up to three months); (2) asking the prison administration itself (the *Direction inter-régionale*, or DISP) for an

interpreter. A lawyer states that since no budget exists for interpreters in prison, this solution is usually unavailable. When funding does exist, a professional interpreter told us that she and her colleagues are often reluctant to go to prisons located far away from city centres, as they only get paid for the time spent within the facility, not for the time spent on transportation. The third and most common solution consists of (3) relying on a detainee who acts as an informal interpreter, with obvious consequences on the confidentiality of the discussions. In these cases, information which has been overheard by prisoners or staff can very quickly circulate inside a prison. Tablets with software allowing the translation of ten different languages into French have been installed within the Fresnes prison on an experimental basis. However, the tool has been reported as less efficient than Google Translate, to an extent where it has been necessary to ask a bilingual prisoner for help. Further, the software does not provide access to certain languages or dialects, e.g. Sranan or other languages spoken in Guyana, which concerns many prisoners.

The dilemma of foreign-national prisoners is all the more problematic as, according to one of our respondents, prison staffs usually have no knowledge of immigration law – a topic that is not taught in the French National Penitentiary School. Volunteers from the non-profit CIMADE support foreign-national prisoners who have been issued deportation orders, by working with the prison staff, members of PADs, and the different lawyers representing such prisoners – usually one lawyer working on criminal law per case, and another one on immigration law. However, CIMADE is not present in all prisons in France, and the plight of the foreign-national population still remains mostly unacknowledged, with very few exceptions[24].

Prisoners with disabilities: Some apparently minor disabilities – for example, that of a deaf detainee who can read on people's lips, but is not able to make an emergency phone call to his lawyer – have been reported, which can jeopardize a prisoner's access to court.

The particular case of individuals detained for terrorist acts, or suspected of "radicalization": A rising issue in France is that of litigation over specific conditions of detention for prisoners considered to be "radicalized" (i.e. professing radical religious and/or political views possibly leading to violent terrorist activity), or those detained for terrorist acts. Since the perpetrators of several acts of terror since 2012 (among them Mohamed Merah, the Kouachi brothers, Amedy Coulibaly, Mehdi Nemmouche) were previously incarcerated persons who crossed from delinquency to violent extremism during their stay in French prisons, politicians and media commentators have increasingly called for measures to counter the problem referred to as "radicalization in prisons." At the same time, concerns about returnees from Middle East battle zones – and the notion that they should be met with punitive measures and incarceration – also brought prisons to the fore of public discourse, as an arena where "radicalization" is both punished *and* prevented.

Budgetary funds have been increasingly diverted from some areas of administration and justice, and allocated to programs aimed at the prevention of "radicalization," or in support of the "de-radicalization," of prisoners[25]. Some of these programs are developed by non-profit organizations or individual consultants outside the prison institution, while others are designed by prison staff themselves. In some aspects, such measures to counter "radicalization" hark back to earlier debates on so-called "proselytism," the concern that lay prisoners might be converted to Islamic radicalism by fellow prisoners. Many programs and measures meant to counter "radicalization," which has come to refer to Islamist radicalization leading to extreme violence, treat the phenomena as a wholly unprecedented one; such approaches are entirely removed from earlier practices that were

[24] Commission Consultative des Droits de l'Homme, *Étude sur les étrangers détenus*. Adoptée par l'assemblée plénière du 18 novembre 2004.
[25] CNCDH *ibid.*

implemented to handle prisoners who had committed acts of violence in the name of far-right or far-left ideologies or regionalist claims (notably in the Basque region, Brittany, or Corsica).

A central issue in the debates concerns **whether to concentrate these detainees in dedicated units, or to spread them out into the prison system**. Myriad experts voiced disagreement on this matter: Should "radicalized" prisoners be dispersed, to avoid opportunities for collusion with fellow, potential perpetrators of extreme violence? Or, should they be held together, in order to prevent their influence on susceptible prisoners and to avoid the contagion of ideas that might lead to terrorist acts? Such debates ultimately lead prison officials to believe that the only workable answer was the isolation of so-called "radicalized" prisoners.

On the ground, these debates resulted in the implementation of short-term programs that were often altered entirely after shifts in the media or political conversation. France's prisons have experimented with several models (e.g., Units for the Prevention of Radicalization, or UPRA; *"quartiers d'évaluation de la radicalisation,"* or QER), and these have changed so quickly that – as all of our respondents agree – there is no way in which a serious evaluation of any of these measures could have been made. One of our respondents stresses the fact that these units are created in a highly politicized context, where the institution is obliged to adapt to the edicts of politicians, without even having the time to evaluate experiments as they are undertaken. Both within the prison administration and among concerned human rights defenders and lawyers, respondents express that it is very difficult to understand what is going on. There is much confusion, and several respondents expressed the idea that the prison administration has no unified strategy. One respondent labelled the situation "total chaos." "Once you've created these units, you have to find people to fill them up," said one lawyer. Several respondents pointed to the arbitrariness and even absurdity of the criteria on which it is decided who should be transferred to such units. As the reasons are never given in writing, it is impossible to litigate against placement in one of these units.

By 2017, 460 prisoners were detained or incarcerated for having committed terrorist acts, (a number that had multiplied by more than four in three years). 75% of them were pre-trial detainees. Of these 460 prisoners, 35 were held in so-called units for the evaluation of radicalization (*"quartiers d'évaluation de la radicalisation,"* or QERs); 65 were in solitary confinement; 15 were held in units for violent prisoners (*"quartiers pour détenus violents,*" or QDVs); and 350 remained in ordinary detention, of whom 320 were in the Paris region. Another 1,300 prisoners or pre-trial detainees had been charged with non-terrorist related activities (droits commun) were suspected of "radicalization", and these prisoners often went by the colloquial name of "TIS", for "*terroristes islamiques*", or "Islamic terrorists," in detention[26].

The current QERs (units for the evaluation of radicalisation) are located within three pre-trial detention centres in the Paris region. These highly secured units hold a dozen prisoners at a time, who are to be observed and evaluated over a period of four months – by guards, educators, psychologists, and probation officers – in order to decide which type of detention regime they should be held in (ordinary detention, solitary confinement, units for particularly violent prisoners, or QPR, *"quartiers de prise en charge de la radicalization"*). Sociologists Gilles Chantraine and David Scheer wonder whether the QER is a kind of isolation or solitary confinement that doesn't say its name, and which is legally impossible to contest because it concerns a collective of twelve prisoners. Another respondent states that these regimes are *de facto* **"regimes of infra-isolation," where prisoners are disconnected from any possibilities of litigation**. An additional, QER-related problem is linked to penitentiary intelligence, and to the possibility for the penitentiary to bug a cell. An enormous accumulation of information is thus generated about inmates, with no clear idea about where that knowledge goes or how it

[26] *Chantraine G., (dir.), Scheer D., Depuiset M.-A., « Enquête sociologique sur les "quartiers d'évaluation de la radicalisation" dans les prisons françaises », rapport DAP-CNRS, CLERSÉ, université de Lille, 2018.*

may be used. This development reveals a broader, more problematic concern, which is the fact that penitentiary intelligence units are getting more and more influential within prison institutions themselves, to the point of imposing their decisions without having to justify them with actual evidence.

All the members of the prison administration who discussed the issue with us agreed that **the grounds on which such designations are decided remain very opaque**. One reason for this lack of consistent clarity is that each non-profit organization and administration uses a different set of evaluation methods. One respondent stressed that these evaluations often contained the largest amount of criteria possible, "a compilation of all the items that have ever been mentioned in the literature," and that these qualifications combined and accumulated to make up the grounds on which placements were decided. She noted that these criteria included "the possession of a Quran, beards of a certain length, having grown up in the Moelenbeck neighbourhood in Brussels, expressing criticism of Bashar al Assad's regime in Syria, having a clean, well-kept cell with a made-up bed, ..." She mentioned how a detainee who asked to be granted the right to re-enter an ordinary detention regime was seen as well-spoken, respectful and likeable, which was also perceived to be a possible sign of *taqiya*, or dissimulation.

All the acts of prisoners are scrutinized and potentially interpreted as possible signs of radicalization. As one respondent states, "People are actually prohibited from expressing their points of view, as everything they say can be held against them!" Another example is that of the only surviving perpetrator of the November 2015 Paris attacks, who has been placed in solitary confinement and is the object of 24/7 video surveillance as a measure to prevent his suicide, "because his suicide might have an impact on public opinion."

In detention, such administration scrutiny raises confidentiality issues, especially with respect to prisoners' contact with lawyers, or to communication which concerns their private and family lives. Several lawyers point out that not knowing if and when one is under surveillance, or being listened to, has profound effects on one's ability to speak freely to a lawyer. Lawyers have reported how details that had been told to them in prison by their clients were later quoted in court.

This also explains, according to several respondents, why certain prisoners speak out as little as possible – sometimes refusing to talk to guards, judges, and even their own family members – as in some terrorist cases that received the most media coverage, where the accused have refused to answer questions from judges or even from their lawyers.

Litigation for detained suspected terrorists or "radicalized" prisoners: Concerning litigation, it is often impossible to contest this type of surveillance, as no legal action is possible **without an actual decision to challenge**. A member of OIP who has followed the evolution of the treatment of "radicalized prisoners" says that it is very difficult to find such a prisoner who is ready to go into active litigation when it concerns their conditions of detention and detention regime. Indeed "many prisoners, especially pre-trial detainees, do not want to draw attention to themselves and their cases," and other respondents stressed that when prisoners are in pre-trial detention, they are afraid of jeopardizing their cases. A respondent mentions that a unit in Melun which holds many pre-trial detainees is considered to be reserved for *"les irrécupérables,"* and asks, rhetorically, what kind of signal might be sent to a judge, if a lawyer's client is labelled as "*irrecupérable*" before his trial has even begun? As the system is designed for men, women who are suspected of "radicalization" are held in solitary confinement for long periods of time. A respondent points out that the only way such solitary confinement can be litigated against is if there is evidence of "psychological degradation," which thus implies having to wait to be able to note negative psychological consequences on their client. Hence, even if the decision is positive, it always comes too late.

Other difficulties that prisoners qualified as "radicalized" must face include transfers far away from their families, exclusion from probation programs, and lack of communication about

prison rules. Their situation may unfortunately worsen, as politicians make frequent calls for the suppression of judicial aid when it comes to terrorist cases.

4.5 Organisation of remedies inside prison facilities among prisoners

There have never been any official inmate committees inside French prisons, although a short-lived experiment between 2010 and 2012 included the creation of "Detainee consulting committees" (*Comités consultatifs de détenus*) in ten prisons, whose directors volunteered for the experiment. This venture notably led to the adoption of the 2014-442 ruling of April 29 2014, which, however, focused narrowly on the adoption of a rule pertaining to the consultation of detainees in proposing cultural activities within their prisons. As sociologist Joel Charbit[27] notes, the actual enforcement of this ruling remains uncertain.

While there are no organized bodies inside prisons for detainees to express their grievances or share legal or practical information, there are many "litigant" prisoners who initiate multiple cases and litigative actions, and who achieve a good understanding of prison law and procedure. Such inmates carry out their own personal litigation while often providing fellow detainees with advice on their cases. They then act as gatekeepers and "go-betweens," connecting prisoners to lawyers and writing claims for their fellow detainees. Sometimes, they litigate intensely for their own sake, sometimes to help others. However, as one lawyer notes, these practices occasionally pave the way for the circulation of out-dated, false or unreliable information about prison law, thus disseminating throughout the prison network a deformed vision of legal proceedings or of lawyerly duties:

> "On prison transfers, almost all detainees are convinced that calling upon a lawyer will facilitate their transfers from a prison to another. But that is not the case. In terms of transfers, if you look at case law, we are only at the very early stage of bringing that type of issue to court – but you can repeat to prisoners that on this issue there is almost nothing to do legally speaking, because litigation can only be tried in certain exceptional cases – they keep calling you and asking you to help their transfer, as if I could just do it like that. […] so jailhouse lawyers have good and bad effects."

One possible solution, to prevent such inaccurate legal information from spreading within prisons, would be to have lawyers on duty inside prisons, as can already be seen in town halls in many French cities, where lawyers hold free-access desks for legal counselling. This would also enable independent lawyers to establish a permanent presence inside prisons, and ensure that basic monitoring is provided. However, the implementation of such a program would necessitate a collaboration between bar associations and the Prison Administration.

5. ACCESS TO THE INTERNET/DIGITAL TOOLS FOR PRISONERS

No project or experiment to grant inmates access to the internet has, as yet, been reported in France. The very presence of telephones in prisons has been an issue in the past years. French minister of Justice Nicole Beloubet recently agreed to the presence of Penitentiary-monitored landline phones inside prison cells. These phones are expected to be installed within the two

[27] Charbit, Joël, *Entre subversion et gouvernementalité : le droit d'expression collective des personnes détenues en France (1944-2014)*, PhD Thesis, University of Lille 1, 2016.

coming years, and will only provide access to four pre-registered phone numbers, thus enabling detainees to reach their families and lawyers or legal counsellors. This initiative is coupled with additional technical measures to jam possible cell phone signals emanating from detainees' cells. It has been specified that none of these phones will provide internet access.