A LAWMAKER'S HEADACHE : PRETRIAL DETENTION

Some time ago the French *Conseil d'Etat*[1] drew attention to the difficulties of present-day legislative action : with the growing number of laws, there is increasing scepticism as to their ability to regulate life in society. Citizens are exasperated by the difficulty of comprehending an ever-changing set of laws, the work of magistrates is ever more precarious, while the lawmaker's authority may well be undermined. Whence the interest, when drafting bills, of investigating the reasons behind the adoption of previous measures.

Neither the analysis of legal texts nor the observation of their application is sufficient in this respect : the facts accounting for the creation of a law are rarely the same as those that actually govern its implementation. This probably explains the extension, during the last quarter of a century, of research in the sociology of law. This new specialty, originally exclusively North American or confined to English-speaking countries at the most, reached continental Western European countries about ten years ago[2].

The present paper describes the application of this approach to pretrial detention, through a collective research project[3] in which sociologists, historians, jurists and political scientists worked together for two years under the auspices of the *Groupe Européen de Recherches sur les normativités (GERN)*[4]. They analysed the main laws - or bills - which have affected this question since the late 18th century, and compared them with what transpired in neighbouring countries.

Apparently, the status of pretrial imprisonment is particularly difficult to stabilize in France. The most recent law (July 1993) retracted on the January 4, 1993 one, which deprived the examining judge of the right to order it, and ultimately aimed at putting this prerogative in the hands of a collective composed of *échevins*, local officials who are not in the profession, while tentatively leaving it to the president of the court or a representative thereof. Although the practicalities have varied at each turn, the intentions of the makers of the January law were by no means new : two previous laws - 85-1303 dated December 15, 1985 and 87-1062 dated December 30, 1987 - had created a collective decision-making entity[5]. Neither was ever enforced. These measures, voted unenthusiastically at the end of a legislative session, were revoked before their date of application, which had been put off in both cases. An immediate although partial implementation of the January 1993 law did not save it from the same fate. There has been a recent reformed that returned the power to incarcerate to the examining judge, with a proviso for possible referral to the president of the court of criminal appeal. Such recurring mishaps draw particular attention, owing to the fact that pretrial detention seems to be constantly being reworked : there have been no less than eight laws on the subject since 1970, not to mention those that affect it indirectly. It would seem that no stable solution can be found.

To tell the truth, pretrial detention - known as *détention preventive* at the time - has been a problem since the earliest Revolutionary times, since imprisonment has become *the* preferred sentence, at the very time when the legality of sentencing was being construed. Pretrial detention is not a sentence, it is simply a temporary security measure ; unfortunately, it is ever so difficult to distinguish it clearly from imprisonment as a sanction. Whence the suspicion that it is a *sanction without guilt*, in the words of one early author. Some of those who undergo it will not be sentenced to an unsuspended prison term, in the long run ; and especially, one suspects that for others, detention at the time of the court decision is an encouragement to pronounce a sentence to prison, if only to cover the time spent in pretrial detention and not disavow the examining judge. Last, it is accused of constituting a formidable means of pressure in the hands of the examining judge, in delicate cases. And yet, the profession cannot imagine doing without it : the absconding of suspects, the destruction of evidence and the bribing of witnesses must be avoided. It is even used, in some cases, to put an end to a threat, to protect the suspect himself, or even to alleviate excessive social tension. Nonetheless, its very existence is a threat to civil rights, and undermines the principles of our criminal law system. As a result, jurists have formulated the theory of a *necessary evil*. How can it be reduced to the minimum compatible with the enforcement of law and order ? The answer has constantly changed.

Law and order or civil rights ?

At the time of the *Constituante*[6], in an extremely agitated political context, the tiny group of *garantiste* deputies who were preparing the constitution and reforming the justice system succeeded in setting up a very liberal scheme, through the implementation of an entirely redesigned criminal justice system. It was not the *Terreur* and the creation of special courts that caused the break, but the *coup d'état* of the Directory, and it was Bonaparte who put the final touch to it. This initiated a swing in the opposite direction, with a very restrictive policy, whereas criminal justice became simply a part of civil service. It is a fact that remand then applied essentially to Assize court cases (very numerous indeed at the time) and much less systematically to *correctionnelle*[7] affairs,

1 - Conseil d'Etat, *Rapport annuel 1992*, Paris, Documentation française 1992, coll. Etudes et documents n° 43. The *Conseil d'Etat* is the Supreme Court for lawsuits against the State ; it functions at the same time as a legal counsel for the government.

2 - For an assessment, see Robert (Ph.), Ed., *La création de la loi et ses acteurs, l'exemple du droit pénal*, Onati, International Institute for the Sociology of Law, 1991.

3 - Robert (Ph.), Ed., *Entre l'ordre et la liberté, la détention provisoire : deux siècles de débats*, Paris, L'Harmattan, 1992.

4 - European Group of Research into Norms, a European scientific network composed of centers and researchers in different fields (sociology, history, law, political science) working on norms and deviance.

5 - Composed of examining judges in the first case, and excluding them in the second.

6 - Assembly of Representatives gathered to prepare the first constitution, at the beginning of the French Revolution ; it sat from 1789 to 1791.

7 - The French criminal justice system has three levels of courts :

in a period where many of those complaints were lodged by individual complainants or by public agencies such as the Forests administration, rather than by the prosecutor's office.

Only with the July monarchy (1830-1848) did another timid attempt at liberalization take place, with the suggestion that the civil rights principles asserted by the 1830 Charter be extended to ordinary laws. Above all, the opposition was concerned that remand would be abusively used to prevent demonstrations. The ministry, in turn, was willing to accept a trompe l'oeil reform which would in fact enable it to contain the jurisprudential turn begun by the Court of Cassation, and which was much too liberal for its liking. The controversy was confined to the circle of parliamentary representatives/magistrates, the most conservative of whom were successful in checking all attempts at reform.

The Second Empire succeeded in changing the code of criminal investigations, but with another concern in mind : as the police forces grew, there was a constant increase in the number of *correctionnelle* cases prosecuted, with an attendant rise in the number of pretrial detentions. This overload threatened the proper functioning of the criminal justice process. Whence a series of reforms aimed at accelerating the preliminary investigation process (contained in the 1855 and 1856 laws), extending the clauses authorizing release on parole and somewhat restricting the cases in which detention was prescribed (1865 law). But it was the officialization in 1863 of the summary procedure[8] which was most important for the present subject, in that it created an alternative procedure.

Under the Third Republic (1875-1940), there were initiatives by parliamentarians of all opinions aimed at changing the old Napoleonic criminal legislation to make it consonant with the new principles of civil rights. In our field, as in many others, the reform was delayed for so long by a bizarre mixture of timidity and perfectionism, fear of social agitation and of external threats, that it was ultimately quite short-lived, and succumbed to the misfortunes of the times. The 1905 Clémenceau bill, inspired by numerous parliamentary proposals and designed in accordance with a 1901 draft, was not voted until... 1933 ! But the magistrature, kept in a stranglehold by budget cuts imposed by deflationist economic policies, could not deal with such a complicated system, especially with the internal disorders[9] and external threats that prevailed at the time. The reform was undone in 1935, and a 1939 ruling erased every trace of it.

The subsequent Republic (1946-1958) spent much time preparing a new code of criminal proceedings, which saw the light with the Fifth Republic (1958-...). Despite the adoption of a system for the periodic renewal of the decision, the remand problem was not taken care of once and for all. Whence the 1970 reform, which changed the name to *detention provisoire*, created the obligation to account for decisions, and set up an alternative to detention : pretrial surveillance. All this was not sufficient, however, and the last quarter of the century has been compulsively punctuated by laws on the subject : 1975, 1984, 1985, 1987, 1989, 1993...

For nearly two centuries, laws on pretrial detention have consistently been the battlegrounds for jousting between *law and order* and *civil rights*. In fact, these are truly the ultimate stakes. It is essential, however, that the abstractive effect necessarily involved in the formulation in legal terms should not conceal the underlying concrete situations too completely, barring which each new law will only represent a symbolic bid aimed at raising the stakes, until the next law comes along.

On laws and practices

The conception of pretrial detention as a necessary evil implies that it be used as briefly and exceptionally as possible. It is in fact less and less brief : the average length rose from 2.1 months in 1970 to 3.9 in 1993[10]. It does seem to be somewhat more exceptional, on the other hand, with 61,216 committals to pretrial detention in 1990 in contrast to 488,279 convictions following a hearing (or assimilated situations) for major, moderately serious and minor, fifth class offences. Things are not quite that simple, however : the majority of people entering prison do so for pretrial detention (77.2 % of committals in 1993). While the latter is rare, as a whole, it is the usual entrance door in the particular penal track that ends in a prison sentence. France's rate of pretrial detention per 100,000 inhabitants is higher than that of any other large nation within the European Union. The outcome is the overcrowding of our prisons (123 inmates for a theoretical occupancy of 100 at the start of 1994).

Now, law apprehends an isolated decision - committal to pretrial detention - and sets the conditions, forms and duration. It hardly has any alternative, in fact. But in practice, that decision is not cut off from the rest of the process : what transpired beforehand and what may well occur afterward actually interfere in the decision-making process. This is the case for decisions previously made by the police or *gendarmerie*, or by the prosecutor's office, and especially those involving police custody and referral to court. At this stage, presence or lack of guarantees against failure to appear play a fundamental role. The endemic crisis in employment naturally increases the number of individuals who apparently do not offer the necessary guarantees against failure to appear, since they cumulate several of the customary traits of marginality, such as lack of an occupation, unemployment, no fixed address, no solid family ties, or in the case of foreigners, the fact of illegal entry. But one also suspects that this is at least as much, and perhaps even more so, a way of anticipating the extended delays involved in preliminary investigation and hearings - constantly on the rise with the increasingly heavy case load -, as well as of the chances of defaulting or of non-enforcement of sentences. It is a fact that in the large metropolitan areas, real difficulties are

– the c*our d'Assises* which judges *crimes* (major offences) and in which a jury sits ;
– the *tribunaux correctionnels* in which *délits* (moderately serious offences) are judged ;
– the *tribunaux de police* judge *contraventions* (minor offences), of there are five classes, the fifth beeing the most serious one.

8 - Lévy (R.), Un aspect de la mutation de l'économie répressive au XIXème siècle : la loi de 1863 sur le flagrant délit, *Revue historique*, 1986, CCLXXIV, 1, 43-77.

9 - This is the period of the Stavisky affair, and of the February 1934 uprisings...

10 - The national correctional statistics are taken from the CESDIP/SEPT data base and the European data from the Council of Europe/S.PACE survey, both furnished by Pierre Tournier.

experienced in summons-serving, so that people are often tried without having been regularly summonsed (although the increasingly frequent convening by criminal investigation officers instead of simple, direct issuing of summonses has put an end to this upward trend). At the same time, the chances of serving a prison sentence are statistically low if the offender is not already in prison when the sentence is handed down[11]. Pretrial detention serves as a way of getting around the delays and uncertainties of a criminal justice system that is terribly overloaded, lacks resources and has unenthusiastic collaborators. Law-making, for which the decision is necessarily abstract and limited to a point in time, is not well armed to combat the effects of these predeterminations and anticipations.

At best it may play an indirect, dissuasive role so to speak. Law number 84-576, dated 9 July 1984, for instance, seems to have been instrumental in reducing the number of pretrial committals, not so much because of the direct effect of the procedure it prescribed (a full hearing before an order of remand is issued) but because it "encouraged" the public prosecutor avoid resorting to preliminary investigation whenever possible.

The situation is even more complicated at present. While pretrial detentions have definitely declined in number since 1985, their length has scarcely been cut down. The latter is not so much the outcome of a deliberate decision as the consequence of (increasingly) drawn-out investigations[12] and scheduling of hearings, both for the trials themselves and for further recourse (the exercise of rights to appeal). It is even more difficult for legislators to structure these practices, which are now completely out of hand. The delays prescribed by law are usually too comprehensive to be really effective, and if they were to become too exacting, there would be a risk of backlash, with increasingly protracted proceedings.

At the present time, the stabilization, at long last, of the pretrial detention system essentially involves the reduction of the length of stays. This cannot be legislated into existence if the justice system does not avail of resources and of collaboration for controlling the length of its procedures. Barring this, we may well return to the days of ever-changing laws, through which various corporations of criminal justice professionals engage in symbolic battles.

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11 - Bernat de Célis (J.), *Peines prononcées, peines subies*, Paris, CESDIP, 1988 ; Le Toqueux (J-L.), Les condamnations pour délits un an après, la mise à exécution des peines, *Infostat Justice*, 1990, 16.

12 - On the average, a *correctionnel* court investigation lasted 12.4 months in 1990, and a *criminel* investigation 14.7 months.