EUROPEAN JUDICIAL AND INSTITUTIONAL CONTROL AND IMPACTS ON FRENCH AND BELGIAN PRISONS

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ABSTRACT

While most of its arguments related to the inefficacy of human right law in prison are convincing, the main sociological, legal and criminological literature downplays the very significant changes to prison structures induced by the European human rights law. The main reason of this underestimation is that these changes are related to the prison and judicial structures, the socio-professional profile of prison staff and do not directly affect interactions in prison. While these changes seem to be invisible from an interactional perspective, we show that they are massive and contribute to the renewal of the prison world through major shifts in prison structures (notably those dealing with healthcare, suicide prevention and prison renovation), the socio-professional profile of the prison staff (with many more lawyers than in the past) and more poorly in judicial transformations (domestic remedies and investigation powers given to the judiciary). We limit our study in this article to two European countries which embody European diversity in terms of the number and type of condemnations pronounced by the European Court of human rights (ECtHR) against them. Indeed, Belgium, unlike France, has been subjected to ECtHR pilot and quasi-pilot judgments related to prison overcrowding, poor and bad prison conditions and lack of healthcare for mentally ill detainees.

Keywords: *Human rights, changes, prison structures, prison staff profile, domestic remedies.*

INTRODUCTION

A bulk of the sociological literature casts doubts with some convincing arguments about the integration of human rights and their efficacy and efficiency in confined institutions such as prisons and psychiatric institutions. It also questions the ability of human rights institutions and law to make penal and prison

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Rom. Jour. of Sociological Studies, New Series, No. 1, p. 37–51, Bucharest, 2018

institutions accountable and transparent, to limit and soften harsh penal policies and the state's right to punish, to improve access to justice and legal aid for prisoners in this specific context and to fight persistence of human rights violations in the face of reform. The literature in sociology and criminology mainly convincingly argues that the authoritarian nature of the prison administration is in contradiction and even clashes with human rights law (Chauvenet et al. 2005) and undermines its efficacy. In this way, prison litigation could make no significant changes to prisoners and could even rigidify interactions between prisoners and prison staff, and lead to a backlash in the form of so-called 'disciplinary governance' from the prison authorities that oppose and fight this trend (Herzog-Evans 2012). Sociological studies also underline the distance of prisoners and prison officers' culture and habitus from human rights law (Piacentini and Katz 2016). The negative effects of the human rights framework and litigation efforts on the prison complex constitute an additional argument which is twofold: human rights legitimatize prison institutions by improving superficially its conditions (Cartuyvels 2002; Kaminski 2002) and prison conditions litigation even increases the prison population as litigators (such as NGOs) require indirectly the building of new prisons to put an end to bad and poor prison conditions characterizing old prison facilities (Gottschalk 2006; Schoenfeld 2010; Boyland and Mocan, 2014; Guetzkow and Schoon, 2015). Nevertheless, this argument related to the increase in prison population seems to be a little bit exaggerated as the institutional context, the adoption of harsh penal policies such as the war on drugs and on terrorism (Cliquennois and Herzog-Evans 2017) and the privatization play a significant role (Cliquennois 2013; Feeley 2017). Finally and according to this sociological and criminological literature, prison litigation is also counterproductive as it usually reinforces the bureaucratization of the prison services to the detrimental of prisoners (Feeley and Van Swaeringen 2004).

While most of these arguments are very convincing and even though a more optimistic socio-legal literature exists and points out the progressive integration of human rights into the prison world (Van Zyl Smit and Snacken 2009; Van Zyl Smit 2010; Simon 2014; Cliquennois and Snacken 2017; Cliquennois and de Suremain 2017), the main sociological and criminological literature downplays the very significant changes to prison structures induced by the European human rights law. The main reason of this underestimation is that these changes are related to the prison and judicial structures and are quite invisible as they do not directly affect the interactions in prison. While these changes seem to be invisible from an interactional perspective, they are massive and contribute to the renewal of prison structures (I), of the socio-professional profile of the prison staff (II) and of national judicial structures (III). We limit our study in this article to two European countries which embody European diversity in terms of the number and type of condemnations pronounced by the European Court of human rights (ECtHR) against them. Indeed, Belgium, unlike France, has been subjected to ECtHR pilot

and quasi-pilot judgments[1] related to prison overcrowding, poor and bad prison conditions and lack of healthcare for mentally ill detainees[2].

I. IMPACTS OF THE EUROPEAN JUDICIARY AND INSTITUTIONS ON FRENCH AND BELGIAN PRISON STRUCTURES

1. Renovation and closure of old prisons and the building of new prisons

While France was spared from ECtHR pilot judgments on its prison overcrowding and ran several ambitious – and costly – programmes of prison construction (Cholet 2015), several pilot judgments were pronounced by the European Court of human rights denouncing prison overcrowding and bad prison conditions in Belgium: lack of cell space, absence of running water and flush toilets, absence of partitions separating the toilets in shared cells from the rest of the cell, passive smoking, lack of activities[3]. In response, the current Belgian government led by Prime Minister Charles Michel vowed to replace short prison sentences with alternative sanctions (mostly electronic tags and probation and improvements in the monitoring of sentencing and probation) thanks to new Belgian laws of 7 February 2014 (on electronic tags and probation) and of 5 February 2016 (on suspension, suspended sentence and probation) which amend current penal laws in favour of suspected and accused persons[4]. – Additional measures such as the more limited use of pretrial detention, less execution of short prison sentences and the creation of new psychiatric units were also adopted by the Belgian authorities to tackle the issue of prison overcrowding[5].

Nevertheless, the main focus is on the building of new prison institutions. In a recent policy statement, the Belgian Minister of Justice stated indeed that more prisons needed to be built, despite the increase in capacity offered by the opening

[1] Pilot judgments gather large group of identical and repetitive cases that derive from systemic problems and share the same root cause (the dysfunction under national law) of human rights violations. Moreover pilot judgments, which have been delivered by the Strasbourg Court since 2004, are characterized by a specific proceeding among which action plans that have to be submitted by condemned states in response to pilot judgments. These action plans give details about the way the state will put an end to systemic human rights violations and will create a domestic remedy capable of dealing with similar cases, see www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf

[2] Pilot judgments condemning Belgium are: ECtHR, W.D. v. Belgium, 6 December 2016, no 73548/13; ECtHR, Bamouhammad v. Belgium, 17 November 2015, no 47687/13; ECtHR, Vasilescu v. Belgium, 25 November 2014, n° 64682/12.

[3] ECHR, Bamouhammad v. Belgium, 17 November 2015, no. 47687/13; ECHR, Vasilescu v. Belgium, 25 November 2014, n° 64682/12; ECHR, Sylla and Nollomont v. Belgium, 16 May 2017, n°37768/13 and 36467/14.

[4] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2017)1234 in the Group of Cases Sylla and Nollomont and Vasilescu v Belgium, 7 November 2017, p. 6.

[5] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)827 in the Group of Cases Vasilescu v Belgium, 8 July 2016, p. 5.

of three new prisons at Beveren, Leuze-en-Hainaut and Marche-en-Famenne which can house a total of 936 prisoners[6]. According to the Belgian government, these new prisons meet current standards for detention: (i) the minimum space in an individual cell exceeds 4 square meters, (ii) cells are equipped with running water and flush toilets (iii) and partitions separate the toilets in shared cells from the rest of the cell[7]. Another seven new prisons are due to open in the next few years, at Dendermonde (444 places), Haren (1,190 places), Antwerp (444 places), Bourg-Léopold, Vresse-sur-Semois, Verviers (240 places) and a new jail (312 places) housing pretrial prisoners and replacing the old jail of Lantin[8]. Furthermore, the prison of Ypres will be enlarged from 68 places to 113 places and the prison of Merksplas will be renovated[9]. Other measures should also reduce the prison population as new places are offered to internees, including the opening of three new secure psychiatric units at Antwerp (182 places), Tournai (30 long-stay places) and St Kamillus Bierbeek (30 long-stay places) due in 2016[10]. In addition, the new secure psychiatric hospital in Ghent now houses 260 former prisoners[11].

Lastly, a new Masterplan was adopted in November 2016 and planned to build new prisons and to make current prisons bigger, to renovate existent prisons and to set up differenciated prison regimes allowing prisoners to have access to low security regime at the end of their sentences[12].

As a result, the Belgian government's statistics showed a 25% decrease in prison overcrowding by June 2013 and a further 8% fall by September 2015. Government statistics also show a fall in the overall prison population from 11,854 on 15 April 2014 to 10,354 on 30 October 2017[13]. The Belgian government has announced its ambition to reduce the overall prison population to below 10,000, while continuing to increase capacity (which is no more than 8820 prisoners) in order to reduce prison overcrowding that represents 124%[14].

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[6] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)153 in the Group of Cases Vasilescu v Belgium, 12 February 2016, p.4.

[7] *Ibid*., p. 5.

[8] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)827 in the Group of Cases Vasilescu v Belgium, 8 July 2016, p. 5; Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2017)1234 in the Group of Cases Sylla and Nollomont and Vasilescu v Belgium, 7 November 2017, p. 6.

[9] *Ibid*., p. 5.

[10] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)827 in the Group of Cases Vasilescu v Belgium, 8 July 2016, p. 5.

[11] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)153 in the Group of Cases Vasilescu v Belgium, 12 February 2016, p. 5.

[12] See https://www.koengeens.be/news/2016/05/13/masterplan-prisons-et-internement-reduction-de-la-surpopulation- dans-les-prisons-et-accue

[13] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2017)1234 in the Group of Cases Sylla and Nollomont and Vasilescu v Belgium, 7 November 2017, p. 5.

[14] Ibid., p. 5.

2. New prison structures dealing with healthcare

The lack of sufficient healthcare and medical staff in prisons and in psychiatric sections of prisons, and the lack of independence of these healthcare services from the prison authorities in terms of functioning and medical confidentiality, have been regularly denounced by the CPT regarding Belgium and France[15] and more recently by the Strasbourg Court (Cliquennois and Herzog-Evans 2017).

In a number of recent rulings, the ECHR has condemned the Belgian prison system and reinforced the pressure on the Belgian government to radically reform it and to offer adequate facilities to mentally ill prisoners. The ECHR has accused the Belgian prison authorities of failing to provide sufficient onsite medical supervision or to offer an alternative to prison for the mentally ill[16]. For instance, in *Claes v. Belgium*[17], the ECHR raised the more general question of the supervision of mentally ill offenders in need of treatment when it denounced the inadequacy of prison psychiatric units for mentally ill prisoners, the shortages of medical and psychiatric staff in prisons, the lack of healthcare in prisons, prison overcrowding, and the shortage of prison psychiatric facilities.

In response response to pressure from the ECHR and the Council of Europe's Committee of Ministers, in particular following the LB[18] grouped cases before the ECHR (originally the LB, Claes, Swennen and Dufoort cases[19]), the Belgian government devised an action plan on psychiatric facilities for mentally ill prisoners in 2014 and launched a reform of prison mental health services. Its Plan for Internment aims, as far as possible, to gradually remove mentally ill offenders from prisons to secure outpatient care facilities where they can be offered treatment and prepared for social reintegration after their release. As part of this process, the 1964 Offenders and Recidivists Act has been repealed and replaced by the Internment Act of 5 May 2014, which limits the conditions under which a released

[15] CPT report on its visit to France from 15 to 27 November 2015, Strasbourg, 7 April 2017, pp. 37-44; CPT Report on its visit to France from 28 November to 10 December 2010, Strasbourg, 19 April 2012, pp. 44-48; CPT report on its visit to Belgium from 24 September to 4 October 2013, Strasbourg, 31 March 2016, pp. 35-38.

[16] ECHR, *Claes v. Belgium*, 10 January 2013; ECHR, *De Donder and De Clippel v. Belgium*, 6 December 2011; ECHR, *Duffort v. Belgium*, 10 January 2013; ECHR, *Sweenen v. Belgium*, 10 April 2013; ECHR, *Saadouni v. Belgium*, 9 January 2014; ECHR, *Gelaude v. Belgium*, 9 January 2014; ECHR, *Lankaster v. Belgium*, 9 January 2014; ECHR, *Van Meroye v. Belgium*, 9 January 2014; ECHR, *Plaisier v. Belgium*, 9 January 2014; ECHR, *Oukili v. Belgium*, 9 January 2014; ECHR, *Moreels v. Belgium*, 9 January 2014; ECHR, *Caryn v. Belgium*, 9 January 2014.

[17] ECHR, *Claes v. Belgium*, 10 January 2013, n°43418/09.

[18] Action Plan (with additional documents) - Communication from Belgium concerning the L.B. (L.B/, Claes, Swennen and Dufoort cases) grouped cases v. Belgium (application n° 22831/08), DH-DD(2014)208F, Committee of Ministers of the Council of Europe, 11 February 2014.

[19] ECHR, *Claes v. Belgium*, 10 January 2013, n°43418/09; ECHR, *Duffort v. Belgium*, ECHR, 10 January 2013; ECHR, *Sweenen v. Belgium*, 10 April 2013.

prisoner can be re-interned in a closed institution (Article 59) and strengthens the judicial review of such decisions (Articles 60-65). Lastly, the Belgian government has built two new secure psychiatric hospitals at Ghent and Antwerp, which comply with the ECHR's requirements and now house 450 mentally ill offenders. The Ghent hospital received its first patients on 1 January 2014, with the Antwerp hospital following in 2015. According the Belgian government, these new secure psychiatric hospitals will provide better conditions for mentally ill offenders than the old prison psychiatric units[20].

In the case of France, the ECHR has similarly held in several cases, particularly in *Rivière*, that France had breached Article 3 of the Convention by having kept vulnerable psychotic and mentally ill prisoners in prison and not having transfered them to psychiatric hospitals, as requested by medical doctors, and for not having transferred physically ill prisoners to hospitals[21]. Following these judgments, the French government reformed the medical and psychiatric care available to prisoners. In 2002, it set up a procedure allowing the prison authorities to release terminally ill prisoners and prisoners whose medical conditions were incompatible with their detention[22]. This procedure was recently extended to cover mentally ill prisoners[23]. Moreover, secure psychiatric units specially designed for treating prisoners have gradually opened within existing psychiatric hospitals[24]. In addition, the *Unités pour maladesdifficiles* (secure psychiatric units for patients who pose a threat to the public), which had been created back in 1910, were expanded in 2008 to enable them to receive mentally ill offenders from prisons[25]. Lastly, also in 2008, a special maximum-security psychiatric unit was set up in Fresnes prison near Paris[26], which has so far only been used to house three highly dangerous offenders transferred there from the prison[27].

3. New prison structures dealing with suicide prevention

The very abundant ECtHR jurisprudence on prison suicide requires the member states of the Council of Europe to develop suicide prevention with a view

[20] Action Plan (with additional documents) - Communication from Belgium concerning the L.B. (L.B/, Claes, Swennen and Dufoort cases) grouped cases v. Belgium (application n° 22831/08), DH-DD(2014)208F, Committee of Ministers of the Council of Europe, 11 February 2014.

[21] ECHR, 14 November 2002, *Vincent and Mouisel v. France*, n° 67263/01.

[22] Penal Procedure Code, Art. 721-1. One might argue, however, that the main influence was a Senate report of 2000, rather than European case-law. French Senate. *Les conditions de detention dans les établissementspénitentiairesen France. Unehonte pour la République*. Inquiry Committee led by J.J. Hyest and P.G. Cabanel. Report n° 449, June 29, 2000.

[23] Law of 15 August 2014.

[24] Public Health Code, Art. L. 3214-1

[25] Public Health Code, Art. L3222-3

[26] Penal Procedure Code, Art. 706-53-13 s

[27] Herzog-Evans, M. (ed.), *Offender release and supervision: The role of courts and the use of discretion*. Nijmegen, Wolf Legal Publishers, forthcoming.

to avoiding or at least limiting suicide occurrence. In reaction to *Renold v France* and two extremely critical reports from the CPT in 2000 and 2003, which denounced the lack of effective prevention of suicide risks in prisons[28], France created a prison department exclusively in charge of prison suicide prevention (Cliquennois 2010; Cliquennois and Champetier 2013). This department composed of 3 former prison governors has developed a warning system and specific prevention on suicide risks. This suicide prevention system has been translated in prisons into the building of naked cells equipped with video surveillance and systematic suicide risk assessment[29] and into plenty of security measures (removal of belts, the provision of disposable, anti-tear clothes and / or blankets). In particular, video surveillance of naked cells for up to 72 hours has been authorised[30]. This video surveillance is used in conjunction with regular suicide-watch rounds, and may be renewed for periods of three months in exceptional circumstances[31]. Suicide prevention has been also integrated into the architectural design of new prisons[32] (in particular within the technical specifications of the building) and French prisons have been extended provision of emergency telephones intercoms and cardiac defibrillators[33]. Furthermore, the French prison service inspection has been reframed to investigate prison suicide and collect clues and evidences with a view to produce its own version of suicide in case of complaint and trial.

In pursuance of the quasi-pilot judgment in De *Donder and De Clippel v. Belgium*, an action plan and a revised action plan were submitted by the Belgian authorities to the Committee of Ministers detailing the action taken in the field of suicide prevention in response to the hostile judgment of the ECtHR[34]. In June 2010, the Belgian prison authorities introduced several measures to prevent and manage suicide risks in response to the ECtHR's criticism. A multidisciplinary and collective system of suicide warning and a multidisciplinary group in charge of risk management (including prison officers, prison managers and the prison medical psychiatric services) were set up in a number of prisons for the purpose of

[28] Report of the CPT to the Government of France on its visit to France from 14 to 26 May 2000, Strasbourg, 19 July 2001, CPT/Inf (2001) 10, §§ 98-100; Report of the CPT to the Government of France on its visit to France from 11 to 17 June 2003, Strasbourg, 31 March 2004, CPT / Inf (2004) 6, §§ 43–46.

[29] Circular of the French Prison Service, 15 June 2009, R3585H61; Circular of the French Prison Service, 17 December 2009, R4126.

[30] Ibid. p. 130.

[31] Article 1, Decree of 9 June 2016 concerning the management of personal data and video surveillance and video protection of prison cells, JUSK1615877A.

[32] Commission chaired by Louis Albrand, "The Prevention of suicide in prisons", supra, p. 26.

[33] Ibid. pp. 121-129.

[34] Action plan - Communication from Belgium concerning the judgment in *De Donder and De Clippel v. Belgium* (Application No. 8595/06) – DH-DD (2012) 1038E, Committee of Ministers of the Council of Europe, 8 November 2012.

assessing and responding to suicide risks[35] through medical and safety measures correlated with the level of risk identified[36]. The suicide warning systems vary according to the structure of the facility and the nature of the prison population, but the intention is to make each prison officer aware of suicidal behaviours and risks and able to raise the suicidal cases of such detainees with the authorities[37]. For instance, the warning system set up in the Ghent prison involves the establishment of a contact point for suicide prevention (Zelfmoordpreventie – ZMP) made up of staff from different prison services (prison officers, prison management, psychosocial service and medical service) and the provision of a multidisciplinary team composed of specialists. A prevention policy has been developed so that each staff member becomes aware of suicidal behaviours and suicidal risk factors and clues. When a prison officer is the witness of such a situation, he is to notify the ZMP which in turn carries out a risk assessment. The ZMP then presents its analysis to the prison governor, with a particular focus on the level of risk, the safety measures that need being put in place, the maintenance or installation of preventive procedures and a care package. The prisoner is then directed towards an appropriate service team, i.e. a healthcare team, or a psychosocial service center for mental healthcare[38].

II. EFFECTS OF THE EUROPEAN MONITORING ON THE SOCIO-PROFESSIONAL PROFILE OF THE PRISON STAFF AND ON TRAINING

1. New prison staff profile and the dominance of lawyers

The new recruited prison staff profile has changed on national and local level and has been adjusted over time to the increasing influence of human rights on the prison world. In France, while the major profile and the main school background of prison governors was in social sciences twenty year ago, the global trend is then to recruit lawyers with expertise in penal and prison law[39]. In this way, some curricula in penal and prison law and in sentence implementation and human rights law have been created in 2000 in partnership with the French prison administration school with the aim of responding to a crucial need of new prison governors profiles for the French prison administration[40]. What seems to be important and significant to the French prison administration is indeed the ability of prison governors to apply

[35] Ibid., p. 3.
[36] Ibid., p. 4.
[37] Ibid., p. 4.
[38] Ibid., p. 3.
[39] See https://www.enap.justice.fr/directeurs-des-services-penitentiaires
[40] See http://executiondespeines.univ-pau.fr/ and https://droit.u-bordeaux.fr/Formations/Masters/Mention-Droit-penal-et-sciences-criminelles/Master-2-Droit-de-l-execution-des-peines-et-droits-de-l-homme-Agen

an approach which is compliant with the European prison law and jurisprudence, to deal with legal issues and complaints lodged by prisoners and NGOs and to communicate adequately with barristers[41]. The same process and trend also exist in Belgium where prison governors are in majority lawyer and no longer criminologist as in the past (Lemire and de Coninck 2011). This shift also appears to be applying to the recruitment of new prison officers who have for some of them a background in law (Gras and Boutin 2010) in contrast with their older colleagues who were less certified[42]. These new professional profiles might imply new professional practices turned towards prison law and human rights.

2. Development of prison litigation services and new professional profiles

As expected but overlooked by the main literature, the prison services charged with litigation activities grew over time in relation with the increase in litigation made by NGOs that push prisoners to complaint about human rights violations and their prison conditions. This is particularly the case in France which was subjected to growing litigation made by quite powerful NGOs, such as the International Prison Observatory (OIP), before national courts and the ECHR[43]. For instance, the OIP initiated a campaign[44] by taking to the European Court thirty appeals from detainees in several French prisons and communicated to the French government with a view to getting a pilot judgment delivered by the Strasbourg against France and recognising the structural nature of prison overcrowding and bad prison conditions[45].

In addition, the French administrative courts have limited the scope of the discretional power traditionally held by the prison authorities and have decided to put most of the decisions made by the prison administration under judicial control (Durand et al 2017). Furthermore, prisoners, in particular those backed up by NGOs, have a better knowledge of their rights and domestic remedies. Lastly, a growing number of barristers are expert in prison law and lodge complaints with national courts and the Strasbourg Court. Barristers are mainly represented by the *La3D*[46] network of defence lawyers which gathers 70 barristers litigating at national and European levels, whose aim is to create a 'legal blitzkrieg' in favour of the rights of prisoners and their families (Cliquennois and Herzog-Evans 2017).

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[41] http://www.metiers.justice.gouv.fr/directeur-des-services-penitentiaires-12601/le-metier-12602/

[42] https://www.enap.justice.fr/lieutenants

[43] International Prison Observatory (2012). Défendreen justice la cause des personnesdétenues. 10 ans de jurisprudence OIP-SF (2002-2012). Conseild'Etat- CAA-TA- Coureuropéenne des Droits de l'homme. Paris : Senate.

[44] Jacquin, J. B. (2016) Prisons: le risqued'unecondamnationpar la CEDH. Le Monde, 12 September 2016, available at http://www.lemonde.fr/police-justice/article/2016/09/12/prisons-le-risque-d-une-condamnation-par-la-cedh_4996181_1653578.html#LRXRG7shjAtZrwkF.99

[45] ECHR, 5th Section, Communication of 11 February 2016, *J.M.B. v. France and 9 other applications*, No. 9671/15 et seq.; *F.R. v. France and 3 other applications*, No. 12792/15 et seq.

[46] See https://twitter.com/associationa3d

In response, the French prison service charged with litigation was extended from 12 legal officers in 2010 to 21 in 2016 to cope with this increase in litigation in excess of 36% from 31 December 2009 to 31 December 2016[47]. This prison litigation service, which is composed of former judges, prosecutors and lawyers, massively deals with complaints grounded on Article 3 of the European Convention on Human Rights related to the right to dignity and concerning more precisely prisons prison overcrowding and poor prison conditions. This new prison structure attracts some funding and staff to the detriment of other services as the budget has not increased over years due to austerity policies conducted by successive governments[48].

3. New training integrating human rights and European law for prison staff

New trainings on prison law, administrative case law and human rights law and their European aspects have been set up over time for prison governors by the French prison administration school and by the Belgian training centre[49]. These new trainings are supposed to acculturate new and former prison governors to human rights issues in prison. Furthermore, one of the ascribed internship in France has to be carried out in a European institution[50].

In particular, a new training on suicide prevention and on the right to life has been also made available to prison staff to raise awareness of suicide risk factors and to improve the care of at-risk prisoners since 2010[51] in Belgium and since 2008 in France. On this respect, prison officers have been sensitised to the problem of suicide and its prevention through the establishment of basic and continual training which can be considered to be an effect of the ECtHR case law on prison suicide prevention. More precisely, a training course entitled *Suicide Prevention in Prisons* has become part of the basic training of all prison officers in Belgium and France. The goal of this training is to help prison officers to identify prisoners at risk of suicide, to assess the urgency of such risk, to transmit information about such risk to the prison authorities and to provide primary care. In Belgium, the prison staff working at an Institute for Social Defense (housing mentally ill detainees) has also benefitted from specific training in health care and mental illness[52].

[47] French Prison Administration (2016) Mi4 Litigation Office. Paris; French Prison Administration (2010) PMJ4 Litigation Office. Paris.

[48] French Prison Administration (2015). Annual Report. Paris.

[49] French Prison School (2013) Training for prison directors. Agen: ENAP.

[50] French Prison School (2017) Training for prison directors (2017–2019). Agen: ENAP, 27.

[51] Revised Action Plan, Communication from Belgium on the case of *De Donder and De Clippel v. Belgium*, DH-DD (2015) 336, Committee of Ministers of the Council of Europe, 25 March 2015, p. 2; Action report updated (29/07/2016) – Communication by Belgium on the case of *De Donder and De Clippel v. Belgium*, 1,265th meeting (20-22 September 2016) DH-DD (2016) 878, pp. 2–4.

[52] Annual report of the Belgian Prison Administration (2010). Brussels, 41.

III. IMPACTS OF THE EUROPEAN JUDICIARY AND INSTITUTIONS ON NATIONAL COURTS AND DOMESTIC REMEDIES

1. Development of new domestic remedies

The ECHR noted the introduction under Belgian law of a specific right of prisoners to lodge complaints with the Complaints Board attached to the Supervisory Committee of each prison. However, according to a rather controversial opinion by the Belgian authorities' opinion, in order to enter into force and be effectively be implemented the Optional Protocol to the UN Convention against Torture first had to be ratified by Belgium via Royal Decree.

In response to the call from the Strasbourg Court for the creation of a new domestic remedy in Belgium[53], the Belgian government refused to create it as requested, but only offered to improve the effectiveness of the existing remedies[54] in contrast to Italy which has set up new domestic remedies in order to comply with the ECtHR requirements (Caputo and Ciuffoletti 2017). Subsequently, it reported new developments in the use of applications for interim measures and claims for compensation relating to poor prison conditions[55]. In addition to the civil courts, the administrative courts have powers in this area, since they can annul general measures enacted by public authorities, including the prison authorities.

Nevertheless and despite its higher openness to the ECHR case-law, the French government has adamantly refused to provide its inmates with more efficient legal remedies than they already have. In fact, a recent trend in sentencing is to view 'due process' as being an obstacle to efficiency (Herzog-Evans 2015). This trend is coupled to the general desire of politicians and the prison authorities to regain the ground recently lost to the judiciary and its procedural requirements. This is most obvious in the areas of early releases and alternative sentences to imprisonment with a series of law reforms deliberately reducing due process, judicial intervention, and offender agency (Herzog-Evans 2016). With regard to disciplinary sanctions, France has been the subject of three adverse judgments by the ECHR for its failure to offer prisoners efficient legal remedies[56] (French prisoners cannot directly access the administrative courts, but are required to first inform a member of the prison management hierarchy) but, to date, has ignored all of them.

[53] ECHR, Vasilescu v. Belgium, 25 November 2014, n° 64682/12, §128.

[54] Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2017)1234 in the Group of Cases Sylla and Nollomont and Vasilescu v Belgium, 7 November 2017, p. 9; Committee of Ministers, Action Plan communicated by Belgium, DH-DD(2016)827 in the Group of Cases Vasilescu v Belgium, 8 July 2016, pp. 7–9,

[55] Ibid.

[56] ECHR 20 January 2011, *Payet v. France*, n° 19606/08; ECHR 3 November 2011, *Cocaign v. France*, n° 32010/07; ECHR 10 November 2011, *Pathey v. France*, n° 48337/09

2. Domestic integration of the jurisprudence of the European Court of human rights

Unlike its French counterpart, which has considerably extended its regulation of measures pertaining to prisons and accepted to integrate the ECtHR jurisprudence it its own case law (especially with regard to the right to dignity and to the right to respect for one's "private and family life) (Cliquennois and Herzog-Evans 2017), the Belgian *Conseild'Etat* ('Council of State', the highest administrative court) has very little case-law on prisons (Cliquennois et al. 2014), restricted to rejecting actions for annulment. In order not to jeopardise the functioning of the prison system and to avoid overlapping the prerogatives and competences of the criminal and civil courts, the Belgian Council of State has limited its sphere of intervention to 'internal measures' that can be considered as being of an administrative nature (Cliquennois et al. 2014). This definition has been used by it to declare appeals to it inadmissible on the grounds that the contested measure is governed exclusively by the internal functioning of the prison authorities (Cliquennois et al. 2014).

3. New investigation powers given to the judiciary

According to the Strasbourg Court, Article 2 (the right to life) and Article 3 (the right to dignity) ECHR obliges national authorities to conduct investigations into all deaths and torture (or inhumane and degrading treatments) in custody that are formal, independent (in the sense that the investigators are not connected in any way to the officials involved in the death), impartial, prompt, and effective. These investigations must determine the cause of death (suicide, homicide or accident) and breach of dignity, the exact circumstances, and the liability of individuals or institutions, with appropriate sanctions in the event of suicides[57] or inhumane and degrading treatments. The primary purpose of the investigation should be to ensure the effective implementation of domestic laws protecting the right to life and the right to dignity and, in cases where national government agents or bodies are involved, to ensure that they are held accountable for either the deaths or breach of dignity of people under their responsibility[58]. In particular, the investigation must be based on eye-witness accounts, expert opinions, medical and forensic evidence, an autopsy to accurately and fully report injuries (where appropriate) and an objective clinical analysis, including the cause of death[59].

[57] ECtHR, *Troubnikov v. Russia*, 5 July 2005, n°49790/99, §§86-88.
[58] ECtHR, *De Donder and De Clippel v. Belgium*, 6 December 2011, n° 8595/06, § 61.
[59] Ibid.

Consequently, this involves increasing the number of police, judicial and professional views on the situations, with hearings of eye-witnesses, prison officials and forensic pathologists and the production of photographs of the deceased and their detention environment. These investigations also require the prison authorities concerned to carry out their own inspections and investigations to brief their lawyers if they are sued by the family of the deceased prisoner or by an association for the defence of the rights of prisoners. In addition, there is some professional and hierarchical oversight of penitentiary practices, albeit lacking any independence, but which is undoubtedly real and effective. At the very least, these reports produced by the prison authorities represent additional oversight and scrutiny of their practices (and those of the police) and they are often used by associations for the defence of prisoners when they bring cases before the domestic courts[60].

CONCLUSION

We have shown real changes to prison structures induced by the European human rights case law. While these changes are generally underestimated by the literature, they really affect the prison and judicial structures, the socio-professional profile of prison staff and more poorly domestic remedies. While these changes seem to be invisible from an interactional perspective, they are massive and contribute to the renewal of the prison world through major shifts in prison structures (notably those dealing with healthcare, suicide prevention and litigation activities), the socio-professional profile of the prison staff and in domestic remedies.

In particular, one of the most overlooked change is related to public scrutiny, whether by individual citizens or the media, can be exercised through the obligation (imposed by the Strasbourg Court) of investigation into death in custody and breach of the right to dignity. This process would contribute to what has been called "inverted panoptism" (Cliquennois and Snacken 2017; Cliquennois and de Suremain 2017), that is to say, the possibility for detainees, their relatives and Society more generally to monitor and examine police and penitentiary practices. This reversal of the traditional view of prison (in which prisoners are monitored by prison officers), although not crystallised into the architecture of the prison system, may partly be to blame for the security excesses in the implementation of prison policies.

[60] Ferran, N. (2017). "Droit à un recourseffectif. Formalisme, traçabilité et contournements". ("*The right to effective redress. Formalism, traceability and work-arounds*") Presentation made at the Conference "Le revers des droits de l'hommeen prison – Ressortsthéoriques et enjeuxpratiques" ("The other side of human rights in prison – Theoretical competences and practical stakes"), Paris, 3 September 2017.

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