The Functional Ambiguities of Pre-Trial Detention in France

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Pre-trial detention as it is practiced in France seems to be the paradigm of the “indetermination postulate” that founded the critical legal studies: changes in “words” cannot easily create changes in legal practices. While pre-trial detention has been reformed countless times since the second half of the 20th century, there is little evidence that any of these reforms has had an impact on judicial practices. Most impressively, even though the use of the contrôle judiciaire (judicial control of a suspect that is ordered by a judge instead of detention) has nearly quadrupled in the last three decades and even if a specialized judge was created to handle remand hearings in 2000, the ratio of detained suspects has not flinched since 1980, the first year for which the data was available (Aubusson de Cavarlay 2006, p.3). Pre-trial detention has always been an issue in the last two centuries of French political debate (see Robert 1992), and the debacle surrounding mass acquittals in the French “satanic sex scandal” (the Outreau case) of 2005 shows the terms of this debate have not drastically changed during this period. The “Law on the Books”, as we call it in sociology of law (Erhlich and Isaacs, 1922) has considerably been amended, but there is little evidence that the “Law in Practice” is at all different before and after each reform.

One possibility is that we are not able to reform the institution because we do not understand its unofficial social functions. Beyond the most pragmatic remand cases, which in practice seem to be much rarer than expected, one can hypothesize that pre-trial detention fills other societal needs: (1) the need for a quick punishment after the fact, thus compensating for the growing length of criminal procedures, (2) the need for a “bargain tool” that the agents of the criminal justice system might present to the suspect in search of a confession, just as the physical tools of torture were shown to the suspect as the first step of the inquisitorial Question, the only step allowed for women and children, and (3) the need for governing social marginality, by replacing objective considerations of seriousness by subjective considerations of dangerousness and social threat, as indicated by social and personal factors.

A multi-functional model of pre-trial detention mirrors the current theories of a multi-functional punishment. Of course, in legal theory, punishment and pre-trial detention are two completely separate institutions defined by their completely separate aim. The aim of pre-trial detention is to protect society and the judicial investigation, whereas the aim of punishment is, tautologically enough, to punish. This oversimplification is
very symptomatic of legal positivism, even though a large number of European Court of Human Rights (ECtHR) cases showed that defining punishment—mostly in contrast to post-sentence detention, another so-called “non-punitive” practice—was an uneasy affair. For instance, in the latest high-profile case on this subject, *Del Rio Prada v. Spain* (July 2012) it was decided that a modality in the enforcement of sentences was “punitive” mainly because the length of prison time added by this modality was substantial. However, in the view of a minority of academics including the present author, pre-trial detention, at least as it is currently practiced in France, is much closer to punishment than to other pre-trial institutions often seen as similar such as police custody. Not only does a structural analysis of the “the law on the books” show that pre-trial detention is much closer in the legal realm to prison punishment than as suggested by legal theory, an empirical exploration of the “law in practice” suggests that pre-trial detention is commonly consciously or unconsciously understood as a form of punishment in its daily practice, and has—not unlike contemporary punishment—several ambiguous functions.

**Hidden structural similarities between the legal conditions of prison punishment and of pre-trial detention**

As one can see in table 1, the oversimplified view offered by classical legal theory supposes that punishment rests solely on guilt, while pre-trial detention merely rests on safety considerations. However, if one digs deeper into the legal conditions that set out practical modalities of pre-trial and post-trial detention, those conditions are in fact much closer to each other that they seemed at first glance.

If punishment rests solely on guilt in classic positivist legal theory, this theoretical view, taught in basic criminal law classes to students alongside *mens rea* and *actus reus*, is only true of a virtual form of punishment. In France, and in many other countries, actually enforced prison punishment requires several other conditions than guilt to be imposed. Firstly, choosing prison over other kinds of punishment; secondly, deciding that the sentence will be non-suspended; thirdly, properly enforcing this non-suspended prison sentence. These are three distinct stages in legal reasoning that each necessitates supplementary legal conditions. An assessment of guilt is obviously still necessary but is no longer sufficient, and considerations of safety are no longer irrelevant.

Similarly, if the decision to order pre-trial detention supposedly rests solely on safety considerations, although it will be demonstrated later that this is not true in practice, not all criminal procedures provide pre-trial detention in the first place. In France, the only two procedures providing pre-trial detention are the *instruction* (the inquisitorial or judicial investigation conducted for serious and/or complex crimes by a judge, in
which case pre-trial detention can last years) and *comparution immédiate* that can be translated as “rapid summoning,” the procedure that allows a fast-track judgment to be made, and for which the suspect will be detained until a judge is ready to see him usually for one to three days depending on which day of the week he was arrested. These two procedures providing pre-trial detention have supplementary conditions that show that safety is of course necessary but not sufficient to detain someone before trial. Especially, those conditions are often phrased around “heavy clues of suspicion” and other considerations that reveal that an assessment of guilt is not irrelevant to pre-trial detention. The results are shown in table 2.

To sum up, prison punishment does not solely rely on guilt but on other considerations including safety considerations. Pre-trial detention does not solely rely on safety considerations but also on other factors. There are strong reasons to suspect that a personal conviction that the defendant is guilty is a key factor in many pre-trial detentions, hence the difference between the two institutions is not as clear as one might think.

**The legal conditions to order a non-suspended prison sentence**

If punishment rests solely on guilt in theory, ordering a non-suspended prison sentence requires supplementary conditions, beyond guilt. Before guilt is established, one must look at the principle of legality: a prison sentence has to be allowed by law for this particular type of offence. In fact, the maximum statutory sentence for the type of offence considered will be the framework throughout this examination of post-trial and pre-trial detention. A judge’s order of a non-suspended prison sentence is, in some way, related to safety. The case must satisfy at least one of three conditions. First of all, the maximum statutory sentence is longer than ten years; secondly, the convict is a repeat offender; thirdly, subjective and objective considerations related to risk, the consequences of the offence and the insertion of the convict suggest a non-suspended prison sentence be ordered (see table 3 for legal references).

Firstly, the maximum statutory sentence is longer than ten years for what is called in France *crimes*, a category that encompasses the most heinous crimes such as murder and rape. In this case, there is no need for any supplementary condition to order a non-suspended prison sentence: guilt and legality are sufficient. What is fascinating is that until quite recently, this was also the legal regime of pre-trial detention: if the maximum statutory sentence was longer than ten years, there were no factual considerations of safety necessary to order pre-trial detention. Today, things are not radically different. In the case of *crimes* to order pre-trial detention, the judge only needs to state that the consequences of the offence are particularly serious; this is what is called “*trouble à l’ordre public,*” a vague French legal notion for which Bentham did not have kind
words (Bentham, 1843, art X.). One can imagine that in the case of crimes such as murder and rape, it is not very difficult to find “serious consequences”. The situation has not changed much: pre-trial detention can be ordered more or less automatically if the maximum statutory sentence is longer than ten years, just like a non-suspended prison sentence can be ordered by a court without further legal motivation.

Then, recidivism is mostly a safety consideration and has been used as an indicator of dangerousness and a predictor of future offences. The invention of the suspended prison sentence in France was built around political considerations for selective incapacitation in the late 19th century since the works of positivist criminologists. Recidivism, or more loosely a criminal record, is a key factor in both enforcing a prison sentence and in ordering pre-trial detention. In fact, when the maximum statutory sentence is ten years or less, the judge who orders pre-trial detention must specify what threat the suspect poses for society. Thus, recidivism is automatically used by judges to fulfill this condition. “It is not the first time the defendant is caught driving without a license, hence there is a great risk of reiteration if he is let free before the trial” is, for instance, a representative extract from a judgment ordering pre-trial detention (Decharron 2013, p. 22)

Lastly, subjective and objective considerations related to risk, the consequences of the offence and the insertion of the convict suggest a non-suspended prison sentence be ordered. This last condition, which provides for the ordering of a non-suspended prison sentence for convicts that are neither recidivists, nor guilty of the most serious offences is completely safety-oriented. The only difference between these conditions and the general conditions of pre-trial detention is that the consequences of the offence can justify a non-suspended prison sentence even though the maximum sentence is ten years or less. This used to be the case for pre-trial detention before Outreau reform in 2007. Considerations of integration—Is the convict well-integrated in society?—replace considerations of representation—Can we trust the suspect to appear to court when summoned to do so? Both questions are answered using the exact same criteria: employment, marital and housing situation, etc.

However, when a non-suspended prison sentence is ordered, it does not mean the convict will actually go to jail. The non-suspended prison sentence must then be enforced, a stage that also requires supplementary conditions which highlight an ever-growing overlap between pre-trial and post-trial detention.

The legal conditions to enforce a non-suspended prison sentence

First of all, a non-suspended prison sentence is automatically enforced if the convict is placed in pre-trial detention for another case, which is a
particular, but not uncommon, situation that further blurs the frontier between the two institutions.

In the simplest cases, when the convict is only tried for one offence, the legal conditions to enforce a non-suspended prison sentence depend on the length of the sentence. For a sentence of up to six months, the prison sentence is normally transformed into an alternative punishment such as community service or a fine, and without any factual motivation from the judge. This six-month threshold is the same that provides for pre-trial detention (in the case of rapid summoning) in the first place.

If the sentence is up to two years, one year in case of recidivism, transforming the prison punishment into an alternative punishment is possible, and is generally practiced depending on subjective considerations that are exactly symmetrical to the safety considerations providing for a prison sentence or pre-trial detention. The result of this rule is that the key moment of most criminal trials where a prison sentence is considered is when the question to know whether the convict will be detained is asked while waiting for a second judge to enforce his sentence. Of course, this is a judgment of pre-trial detention although this second trial is only an “enforcement of sentences” trial. This moment is “mixed” with the assessment of guilt and sentencing, and all three responses are given at the same time, by the same judges and based on the same facts.

Finally, if the non-suspended prison sentence is of more than two years, the sentence is enforced with no alternative punishment considered. This two-year threshold is close to the one that provides for a long period pre-trial detention of three years.

**Structural similarities**

Table 3 sums up the structural similarities between an enforced, non-suspended prison sentence and pre-trial detention. The parallelism is mind-boggling, since a conscious effort to bring the two institutions that close—or even to draw such a parallel in the legal doctrine—does not seem to exist. To draw this structural parallel one had to look for the legal conditions of mechanisms that are generally taught as very separate subject matters (general theory of punishment, theory of sentencing, enforcement of sentences, rapid summoning, instruction and pre-trial detention *stricto sensu*).

Obviously, a last technical similarity between pre-trial and post-trial detention is the correlation between the theoretical and factual length of both forms of detention. Not only is the legal maximum length of pre-trial detention mostly (although not only) tied to the maximum sentence, but there is also the automatic fungibility of the time served in pre-trial detention, a period of time that is subtracted from the post-trial detention duration so that pre-trial detention becomes *de jure* retrospectively a part of punishment. Nevertheless, the main reason why it is here argued that
pre-trial detention as it is used in France is mostly a punitive practice is not because of how the law is written, but due to the way the law is implemented.

**Ambiguous functions of pre-trial detention in practice: an exploration**

In 2013, a three man team composed of Professor Gaëtan Di Marino, law student David Decharron and myself started an exploratory empirical research of pre-trial detention in Aix-en-Provence and Marseilles, collecting through our contacts among judges and attorneys, a small sample of 118 pre-trial detention judgments. Thorough analysis of this sample shows evidence of all three ambiguous social functions of pre-trial detention mentioned above: governing social marginality, punishing guilt and bargaining with the defendant.

**Social marginality and pre-trial detention**

Studies of the French criminal justice system as well as the experience of practitioners all point to a simple conclusion: the same factors aggravate the situation of the suspect/convict from police custody to the enforcement of sentences (Aubusson de Cavarlay et al. 1995; Jobard, F. and Nevanen, S. 2005; Weltzer-Lang, D. and Castex, P. 2012; Danet, J. 2013). Many of those factors are indicators of social marginality: a criminal record, a poor professional, housing and marital, situation and a foreigner’s status are all aggravating factors.

This fact is well known by statisticians and social scientists. What we found is that these factors are sometimes used expressly as a reason to order pre-trial detention. Apart for the criminal record for which we mentioned examples above, we found some decisions solely referring to the foreigner’s or housing status as a reason to expect flight risk and thus to detain, even with severe doubts on guilt (Decharron 2013 p. 47).

**Guilt and pre-trial detention**

Given the strong similarities between punishment and pre-trial detention, the only parameter that seems to differentiate one from the other is that pre-trial detention does not theoretically rely on an assessment of guilt, except in the rare (but nevertheless revealing) case of the criminal caught in the act for the least serious offences. However, in practice, one can strongly suspect that a personal conviction that the defendant is guilty is a leading factor in ordering many pre-trial detentions.

First of all, the law allows and even encourages the judge in charge of ordering pre-trial detention to review the evidence so that he can assess the risk and the advancement of the investigation. The judge ordering pre-trial
detention has access to the exact same case file as the trial judge (Art 144 Code of Criminal Procedure CCP); thus nothing can legally prevent the pre-trial detention judge to act factually as if he were the trial judge.

Second of all, the judge will often imply orally or even in writing that the suspect is guilty of the offence for which he is investigated as the most compelling evidence of risk. No rule forbids this practice, even though the press is forbidden to do the same (Art 9-1 Civil Code). It should be noted that the legal conditions of pre-trial detention are notoriously easy to meet once it is suggested that the defendant will probably be convicted and sentenced to jail at the end of the investigation; risk for the investigation, risk of recidivism, risk for others, consequences of the crime are all boxes than can easily be ticked.

Our sample shows a strong proportion of decisions that are more or less overtly motivated by guilt. For instance, a type of motivation that is routinely found in pre-trial detention judgments is “the flight risk is heavy since there is large evidence of guilt and that this particular crime could be heavily punished” (Decharron 2013, annex n°56). Projecting into the future, and contemplating the sentence that will eventually be ordered against the suspect, the judge deduces the flight risk. Hence, the root of pre-trial detention is the almost certain prison punishment looming at the horizon, and the flight risk is a way to materialize in the present this future sentence.

As explained before, both mechanisms that allow pre-trial detention require a form of legal suspicion (but not guilt) to be believable against the suspect. However, in practice, suspicion and guilt seem often confused as if they were one and the same thing. For instance, here is an extract from a pre-trial detention judgment stating that “Suspicion that Mr. X. committed the crime is heavy and results from countless clues despite his denial” (p. 41). The phrasing does not make a lot of logical sense, since one does not expect the concept of “suspicion” to be affected by the denial of the defendant, while of course denial will be taken into account for a definitive judgment of guilt. The phrasing “Mr. X.'s guilt results from countless clues despite his denial” makes more sense, and is probably what the judge meant in this case. Other decisions seem to equate punishment and pre-trial detention. One is particularly telling: a young man caught for aggravated theft and placed in pre-trial detention by the judge who states that “going free immediately after being caught for such a serious act could lead this young impressionable mind to believe that his crime is going to be unpunished” (Annex n°96). In other words, the difference between pre-trial detention and punishment is too subtle for a teenager to understand, so a judge should detain a teenager who expects to be punished. A self-fulfilling prophecy of sorts….

These slips of the tongue mirror the “slips of the pen” we can find in the legal conditions of pre-trial detention. Even though the code of criminal procedure ensures that the suspect is presumed innocent (Preliminary art. CCP), the legal conditions of pre-trial detention (Article
144 CCP) refer to “the defendant's accomplices” instead of “co-suspects” and to “the victim” instead of “the plaintiff” or “the civil party.” Another condition refers to the “risk of reiteration” which implies a first iteration. Of course, any consideration related to the safety of other persons cannot logically treat the suspect as if he were innocent. Moreover, what the French legal system calls an “unjustified” pre-trial detention, which has opened a right to state compensation since 2000, is not the pre-trial detention of a person that posed no threat retrospectively. Of course, there would be no way of knowing that since a prognosis of dangerousness cannot be falsified if it is acted upon; but the pre-trial detention of an innocent *a contrario* seems to imply that the pre-trial detention of a guilty person is always justified.

Apart from these qualitative considerations, there are also strong statistical correlations between the decision “to detain” made by the pre-trial detention judge and the decision “to punish” made by the trial judge. It has been estimated by statistician and pre-trial detention specialist Aubusson de Cavarlay that people who are released before trial have a whopping 22% chance of avoiding conviction, a rate that is extremely high in France where the average acquittal rate was around 5% (2006 p. 4). Drawing on professional experience, freed suspects that are convicted represent very few cases of prison reentry. The same study reveals that the length of the sentence “decided” by the trial judge is in 95% of the cases at least equal (more or less two weeks) to the time served in pre-trial detention (p.4). Of course, this cannot be and is not a coincidence. Judges are aware of the time served and do not want the sentence ordered to be lower. What is interesting is that this strong confirmation rate between two seemingly unrelated issues (safety detention and punishment detention) is much higher that the correlation between first instance and appeal even though they are supposed to address the same question. A 2006 report of the Aix-en-Provence Court of Appeal showed that 30% of the cases in appeal were either (rarely) an acquittal or (more commonly) a sentence lower than in first instance.

**Bargaining and pre-trial detention**

While plea-bargaining does not really exist in France – a loose equivalent called *comparution sur reconnaissance de culpabilité* is in place but its use is minimal –, rumors that the threat of pre-trial detention was being used in a process similar to *Ancient Régime* torture to obtain a confession or informations on co-suspects have always been strong among practitioners. In 1995, a respected law professor somewhat candidly titled a three-page paper “Is pre-trial detention based on the silence of the accused legal?” (Bouloc, 1995). In this paper, professor Bouloc explains that pre-trial detention as a bargaining tool has always been a problem in France, and that detainees even have a slang term for it: “doing sheep” (*faire mouton*) – I presume because it means the suspects obeys, like every
other sheep, the judge’s pressure. Professor Bouloc gives a recent example of a pre-trial detention that was expressly ordered on the only account of the silence of the defendant, and that was annulled for contravening ECtHR ruling on torture. In the end, what the criminal justice system calls “denial,” that is to say the refusal to confess in spite of evidence, is widely perceived as an aggravating factor at all stages of the procedure, although it can be illegal in some cases to refer explicitly to denial to justify either pre-trial or post-trial detention.

Our empirical exploration showed that the same ambiguity existed with bargaining that with guilt. While few decisions to detain expressly and solely rested on the defendant’s “denial”, many motivations were ambiguous about it. The most obvious use of the defendant’s denial as a motivation for pre-trial detention is for sex crimes. For defendants accused of sexual abuses, denial is psychologically interpreted as a sign of clinical dangerousness. This motivation – supported by criminology manuals but not by the most recent meta-analyses of recidivism studies (Hanson and Morton-Bourgon, 2009, p.1) – is recurring in practice, and we found several local decisions referring to “dangerousness as indicated by the defendant’s denial” is our sample.

For other crimes, we found “denial” used by the judges as the sole sign that there might collusion between the co-suspects (Decharron, 2013, p. 49) – even in case files where thousands of pages of incriminating phone wiretapping evidence made the testimonies useless – or to indicate “an obvious risk of witness intimidation” (p. 50) . What this all means is that while written law does not state that pre-trial detention might be based on “denial” but only on a particular danger posed by the suspect, but in practice this danger is deduced from “denial”.

Discomfort arises as soon as we understand that these motivations imply that would the defendant wholly confess his crimes, he might then be freed or bailed. This ambiguity in the text seems very close if not identical to classical inquisitorial torture, and we know from practice that what is found here in the texts is reinforced orally. Some policemen will, during interrogations, repeat that confessing is good for the “image-management” of the defendant when the pre-trial detention judge will see his file. Some defense attorneys will also advise this to their client. A pre-trial detention judge once asked a defendant if he was sure he did not want to confess just before taking his decision. This question was reportedly perceived as pressure by the defendant who filed an appeal in before the Cour de cassation, but the appeal that was rejected (p. 39). In our small sample, we even had a case of a defendant being freed in the weeks following his confession, the court stating in writing that “after his confession and the precisions that were given on the minor role the defendant played, it is no longer needed to keep him on remand”. (p. 24)

Conclusion
Prison punishment is not solely based on guilt but also on considerations of risk and consequences of the offence. Pre-trial detention is not merely based on risk and consequences of the offence but there are strong reasons to believe that the personal conviction of the defendant's guilt plays a major part in whether detention should be ordered or not. Thus it is safe to assume that a substantial part of pre-trial detentions are in fact more similar to a “summary/ emergency judgment” that has to be revised ex post as it may be called a “référé-punition” as there is in tort law, than to police custody where most of the time spent in custody is useful for the investigation. If we see pre-trial detention as an emergency judgment, then we admit it may have the same multi-functional ambiguity of the main trial, and that it is reductionist to assume pre-trial detention only has the function that was officially assigned to it.

Works cited


Appendices

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<thead>
<tr>
<th>Punishment</th>
<th>Pre-trial detention</th>
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<tr>
<td><strong>Guilt</strong></td>
<td><strong>Necessary and sufficient</strong></td>
</tr>
<tr>
<td><strong>Safety</strong></td>
<td><strong>Irrelevant</strong></td>
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Table 1. An oversimplified but clear distinction between punishment and pre-trial detention

<table>
<thead>
<tr>
<th>Post-trial detention</th>
<th>Pre-trial detention</th>
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<tbody>
<tr>
<td><strong>Guilt</strong></td>
<td><strong>Necessary but not sufficient</strong></td>
</tr>
<tr>
<td><strong>Safety</strong></td>
<td><strong>Not irrelevant</strong></td>
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Table 2. Compiling all the legal conditions that allow for a detention, pre and post trial shows a growing overlap between the two institutions
<table>
<thead>
<tr>
<th>Threshold</th>
<th>Enforced, non-suspended prison sentence</th>
<th>Pre-trial detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; 6 months</td>
<td>Alternative punishment possible with no motivation [132-57 CPP; for all sentences &lt;= 6 months]</td>
<td>Illegal</td>
</tr>
<tr>
<td>&lt; 1 year</td>
<td>Alternative punishment, except if the convict is already in detention or lacks any subjective mitigating factor (professional, familial, medical, efforts) [132-25 to 29 for all sentences &lt;= 1 year]</td>
<td>The criminal must be caught in the act [For max. sentence &lt;= 2 years, 395 CPP]. Pre-trial detention can only be for a short period [For max. sentence &lt;= 3 years, 395 CPP; procedure of rapid summoning].</td>
</tr>
<tr>
<td>&lt; 2 years</td>
<td>Same as above, except in the case of recidivism [For all sentences &lt;= 2 years]</td>
<td>The judge needs to motivate pre-trial detention with the risk, in practice recidivism is a commonly used factual evidence of such risk.</td>
</tr>
<tr>
<td>&lt;=10 years</td>
<td>The judge needs to motivate the non-suspended sentence with the risk and the consequences of the crime [Art 132-24 CP], except in the case of recidivism.</td>
<td>There is no need to motivate pre-trial detention. Risk can be deduced only from the consequences of the crime.</td>
</tr>
<tr>
<td>&gt;10 years</td>
<td>There is no need to motivate a non-suspended sentence.</td>
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**Table 3. Summary of the structural similarities between the legal conditions of pre-trial and post-trial detention**