

## Madmen in Prison?

Laurence GUIGNARD and Hervé GUILLEMAIN

**There was a time when a criminal judged to be ‘insane at the time of committing an offence’ were neither to be punished nor imprisoned. Since the 1980’s, the number of those judged to be criminally insane has been on the increase in French prisons. Is this because prison exacerbates pre-existing pathologies? Or perhaps that psychiatry is increasingly struggling to deal with difficult patients.**

In January 2007, Nicolas Cocaigne was charged for premeditated voluntary manslaughter. He had just killed his fellow prison cellmate and consumed part of his lungs. Quickly renamed ‘the cannibal of Rouen’ by the press, he was transferred to the Unit for Difficult patients at Villejuif after already having served 4 years since 2006 for sexual assault. Diagnosed as schizophrenic, he had been treated in psychiatric hospitals several times before starting this sentence.

Aside from the gory nature of events, the case draws our attention to the high rates of mentally ill serving sentences in our prisons. Insanity is obviously not caused by imprisonment alone,<sup>1</sup> but there is a tendency for it to worsen, and this phenomenon is supported by the findings from several studies. According to a survey carried out in 2004, between a fifth and a quarter of all prisoners could be diagnosed as psychotic,<sup>2</sup> and

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<sup>1</sup> F. Chauvaud, *Les Experts du crime. La médecine légale en France au XIXe siècle*, (Criminal Experts. Criminal medical law in France in the 19<sup>th</sup> century) Paris, Aubier, 2000, p. 162; M. Renneville, *Crime et folie. Deux siècles d’enquêtes médicales et judiciaires*, (Crime and insanity. Two centuries of medical and legal study) Paris, Fayard, 2003.

<sup>2</sup> These findings are from a 2004 epidemiological study carried out by a scientific committee from the Health and Justice Ministries, and in cooperation with professionals from the health and prison services,

such figures are even higher among inmates serving longer sentences. 10% of the 60,000 prison population suffer in varying degrees from schizophrenia, as did Nicolas Cocaigne, and medical observations of newly arrived prisoners appear to confirm that this figure is on the increase with every passing year, particularly in France. Certain different legal and medical factors have a part to play in this phenomenon.

### **The Effects of Prison and Hospital**

Is prison pathogenic? The high suicide rates for prisoners suggest it may well be. Results from the same 2004 study show how many detainees (more than two thirds) suffer from psychological stress. It is easy to see how imprisonment, worsening relations with family members and society, promiscuity and violence could cause anxiety and depression, which in turn often encourage suicidal tendencies, but we less frequently look at the ways in which imprisonment and isolation from real life and society can cause and aggravate actual psychosis. However, as awful and damaging as prison conditions might be for the individual, they often simply aggravate pathological problems which existed before imprisonment. 20% of the prison population have already been either examined or hospitalised for psychiatric problems even before being sentenced. It is only once they are held in isolation that certain illnesses then become chronic.

To understand why there are such high numbers of prisoners suffering from mental illness, perhaps we should examine the changes that mental health institutions are subjected to. The asylum, which was the main form of treatment for the mentally ill for more than a century and a half, no longer exists. What remains of it is little more than an open care system functioning within a network of reduced facilities, and spread out across the country. The policy of rationalisation of the hospital system introduced in the 1980's and accelerated today has led to a significant reduction in the number of beds available in psychiatric facilities – down from 83,000 to 40,000 between 1987 and 2000. This is despite the fact that numbers of patients needing such care has skyrocketed to

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which looked at mental health problems among prisoners from twenty prisons (F. Rouillon *et alii*, *Étude épidémiologique des troubles psychiatriques chez les personnes détenues en prison*, 2004).

over a million during this same period.<sup>3</sup> The average time a patient spends in a specialised mental health care facility has been reduced significantly; patients spend less than a month, compared to the year which was customary 30 years ago. As a result, psychotropic drugs are more widely resorted to. Overcrowding of facilities leads to increasing numbers of mentally ill being left on the streets. They are often vulnerable and homeless, may resort to petty crime, and then almost always end up in prison. The psychiatric profession, which has seen a drop in staff numbers and treatment facilities, is no longer able to take on so many difficult patients, particularly those who have come out the other end of the criminal justice system. What was once a modern policy of locking away the mentally ill no longer exists, and the ‘great opening up’ of the mental care system has put an end, for most patients, to the traditional purpose of the hospital – to be a refuge from the outside world.

Conversely, bed spaces across French prisons have increased. In conjunction with the new 1985 law, which supported the policy of sectorisation introduced in the 1960’s, the decree passed on the 14<sup>th</sup> of March 1986 introduced psychiatry to the prison system. There were two possible outcomes to be had from such a policy; either the medical establishment was to start taking on prisoners, or a system of regional medical and psychological services (known in France as SMPR) were to be established within the criminal justice system itself. Five such units for difficult patients now exist, in Villejuif, Cadillac, Sarreguemines, Montdevergues and Plouguernevforel. As their name implies, these facilities take in prisoners who are mostly psychotic, and who pose a threat to other prisoners and so need to be kept under close surveillance. Operating from within these specialised hospital facilities (CHS), and thus outside prison, they help to deal with the issue of dangerous prisoners. However, these facilities have also seen bed numbers reduced. Prisoner rights to access mental health care, which is upheld by the new legislation, has led to certain public mental health services being transferred to prisons, but this has had some perverse effects, caused both by the introduction of mental health services within prisons, however inefficient and substandard they might be, and by an obvious difference in costs – a day of medical care in prison is three times less expensive

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<sup>3</sup> C. Prieur, « La psychiatrie française va de plus en plus mal », (‘French psychiatry going from bad to

than a day in hospital. These social, institutional and medical changes are occurring at a time when the definition of criminal responsibility for the mentally ill is under review. The history of the notion of responsibility thus needs to be examined.

### **Article 64 of the Penal Code, and the Evolution of Medicine**

The distinction made between prison and psychiatric hospital is based upon the principle that those suffering from psychiatric problems have diminished criminal responsibility, and it is set out in the Penal Code of 1810 in its famous Article 64 – ‘There can be no crime or offence committed if the accused was demented at the time of action.’ This article, which was enforced until 1994, differentiates very firmly between the insane and the criminal. But defining the difference between the two is quickly becoming problematic. The principle of diminished responsibility for the criminally insane draws from ancient sources, already existing under Roman law, canon law, and in ancient theology of responsibility and moral philosophy. It is so old as to be almost archaic, if only for its use of the term ‘demented’ (*démence*), already obsolete in medical terminology. The medical and legal evolution which occurred over the course of the 19<sup>th</sup> century, challenged this principle by confronting Article 64 with the modern problem of the definition of responsibility.

In order to understand the importance of these changes, it is necessary to evaluate the principles of the 1810 Penal Code and its intellectual context. The Code introduced a penal system based heavily on a notion of retribution, which defined sentencing as punishment proportionate to the crime committed. Sentencing thus focussed on the criminal’s past rather than on his possible future rehabilitation. If those judged to be criminally insane were not punished, it was because they were believed to be incapable of intent and could therefore not be held accountable for their actions. They could be locked away (which was permitted by both the law of the 16<sup>th</sup> – 25<sup>th</sup> of August 1790 which allowed automatic restraint of those deemed to be berserk, and the 1838 law on the insane) but not punished in the moral sense of the term.<sup>4</sup> Establishing responsibility

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worse’) *Le Monde*, 21st November 2008.

<sup>4</sup> Law of the 16<sup>th</sup> - 25<sup>th</sup> August 1790, article 3, title 11: “Administrative authorities are invested with the responsibility to take precautions against or to remedy unwelcome events brought about by insane or

thus became a prerequisite for all legal proceedings, as noted by the great neoclassical prosecutor Ortolan in 1855 in his remarkable attempt at a conceptual definition of the term, using language which has by now become very anachronistic:

The first condition of accountability is freedom. (...) Responsibility, and thus accountability, requires an awareness of what is right or wrong, or just or unjust in one's actions. (...) Finally, there must have been wrong-doing or guilt.<sup>5</sup>

The Code, which was secularised in its definition of crime and, for the most part, in its sentencing of offenders, is founded on a concept of spiritual anthropology, which took hold at the beginning of the 19<sup>th</sup> century, and which held serious consequences for the definition of responsibility. Its spiritualist principles allowed for the definition of a 'moral responsibility', which stems from the spiritualist definition of man. The 'freedom' of which Ortolan writes is thus conceived to be a faculty of the original divine soul, which, as such, cannot be altered. It is either entirely complete or entirely destroyed. It is from this belief that the essence of the 19<sup>th</sup> century notion of criminal responsibility was developed, as something which could not be measured.

This theory started to crack at the beginning of the 1880's, when the Third Republic, rethinking the justice system along more secular lines, and freed from its religious and moral foundations, swung from a system based on retribution towards prioritising the protection of society, as seen in the works of Gabriel Tarde and Raymond Saleilles.<sup>6</sup> Psychiatry came to play an important role, especially regarding the development of the individualisation of punishment and in measuring the extent to which criminals were dangerous. It was the moral element of crime and the psyche of the criminal which became the focus of attention and which imposed new terms according to which

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raving persons that have been left unrestrained or by dangerous and wild animals." (*"L'autorité administrative est investie du soin d'obvier ou de remédier aux événements fâcheux qui pourraient être occasionnés par les insensés et les furieux laissés en liberté ou par des animaux malfaisants et féroces"*). Article 491 of the Civil Code of 1804: "In cases of madness where neither spouse nor parents are able to intervene, or where no spouse or parents exist, the responsibility to act is transferred to the government commissioner" (*"Dans le cas de fureur, si l'interdiction n'est provoquée ni par l'époux ni par les parents, elle doit l'être par le commissaire du gouvernement, qui, dans les cas d'imbécillité ou de démence, peut aussi la provoquer contre un individu qui n'a ni époux, ni épouse, ni parent connus."*)

<sup>5</sup> J.-E.-L. Ortolan, *Éléments de droit pénal*, (Elements of Penal Law) Paris, 1855, p. 99.

<sup>6</sup> Raymond Saleilles, *L'Individualisation de la peine*, (The individualism of punishment) Paris, 1898;

sentencing was to be passed.

This change introduced new terms according to which the extent of criminal responsibility was to be measured. The policy of punishment based on individual circumstances began with the recognition of attenuating circumstances in 1824, which was brought into general use by law in 1832. First and foremost, this allowed the degree of culpability to be adjusted according to the character of the accused. Secondly, and more problematically, the level of responsibility itself was individualised. Responsibility which could be measured was quietly introduced within legal practice in the last quarter of the century. A ruling in 1885 by the French Supreme Court described what it believed to be a “certain lack of balance which, although it does not annul responsibility entirely, nevertheless allows for it to be judged as being *limited*.”<sup>7</sup> More widely known, the Chaumié circular confirmed in 1905 the notion of ‘attenuating responsibility,’ by inviting experts in psychiatry to research the extent to which the accused could show “physical, psychic or mental anomalies”<sup>8</sup> without drawing from the concept of mental alienation that exists in Article 64. This new ‘psychological’ definition of responsibility, considered in Chaumié’s circular as a source of “moderation in sentencing of offenders”, and which is applied mostly to those who are considered to be ‘degenerate’, seems difficult to reconcile with the previous notion of moral responsibility which made up Article 64. However, almost a century later, it rules alongside Article 122-2 of the Penal Code of 1994.

It stems from the evolution in mental health medicine which confirmed the possibility of varying degrees of responsibility. By developing and refining the classification of disease, and particularly by confirming the possibility for partial madness in time and object, psychiatrists have, since the work of Pinel, begun a process of blurring of the lines between reason and madness, which would later be confirmed by the discovery of

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Gabriel Tarde, *La Philosophie pénale*, (Penal Philosophy) Paris, 1890.

<sup>7</sup> *Bulletin des arrêts de la Cour de Cassation rendus en matière criminelle*, (Report on French Supreme Court interventions in criminal matters) tome 90, n° 170, 1885, 1887, p. 285. It refers to the rejection of an appeal by Emilie Picollet against an arrest by the Court of Appeal of Chambéry on the 30<sup>th</sup> of April 1885.

<sup>8</sup> Circular of the Chaumié Minister of Justice of the 12<sup>th</sup> of December 1905.

Freud's unconscious.<sup>9</sup> The emergence of a psychological 'I' contradicted the legal principles of the 19<sup>th</sup> century, by introducing a notion of responsibility which was both psychological and measured. Hence the extreme difficulty which arises from trying to apply the principle of lack of criminal responsibility for the insane, when the distinction between the mad and the criminal is no longer so clear-cut, and of separating the hospital from prison, when an individual can be both a little sick and a little criminal.

### **Recent proponents of criminal responsibility**

The repercussions of this subtle theoretical distinction between madness and criminality, which persisted into the 20<sup>th</sup> century, can be seen in the numerous changes over the last fifteen years that have brought the issue of mental health into the prison environment. Article 122-1, which replaced Article 64 in the new Penal Code of 1994, has made the dismissal of cases on mental health grounds less prevalent. It states that "An individual who is affected, at the time of his actions, by psychological or neuropsychological problems that alter his judgement or impede control over his actions, is still punishable." It did not take long for the effects to be seen across the legal system. Cases where a lack of criminal responsibility was found have been decreasing since the 1990's, with 611 such cases in 1989 compared to 203 in 2004.<sup>10</sup>

And yet this change in the notion of criminal responsibility holds sway, while the role and the fundamentals of psychiatry are cast under doubt. Medical experts turn to the notion of impaired judgement not only because of a strong social pressure to do so,

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<sup>9</sup> These new medical 'propositions' lead very early on to intense medical and legal debate which began in the 1820's and which focussed on the question of homicidal monomania. Renowned doctors rejected what they saw as legal error, and confirmed that homicidal acts committed by such criminals as Léger (1824), Papavoine (1825), Cornier (1826) and a little later, Pierre Rivière (1835), were the result of partial mental illness, of which committing crime was the only symptom. The justice system thus retained these more traditional notions and sentenced them all to death. Doubts in the system nevertheless remained, and Henriette Cornier and Pierre Rivière were to see their sentencing commuted. See Michel Foucault (dir.), *Moi, Pierre Rivière, ayant égorgé ma mère, ma sœur et mon frère... Un cas de parricide au XIXe siècle*, (I, Pierre Rivière, did cut the throats of my mother, sister and brother...A case of parricide in the 19<sup>th</sup> century) Paris, Gallimard, 1973.

<sup>10</sup> Public hearing, psychiatric penal expertise, report by the hearing committee, May 2007, table 1, p. 17. Based on yearly criminal justice statistics, the following are figures for cases where lack of criminal responsibility was found: 528 in 1985, 518 in 1986, 444 in 1987, 518 in 1988, 611 in 1989, 424 in 1990, 372 in 1991, 493 in 1992, 370 in 1993, 350 in 1994, 340 in 1995, 309 in 1996, 190 in 1997, 211 in 1998 and 286 in 1999.

which stems from an over-hasty association between danger and mental illness, but also due to their reliance on arguments in favour of therapy. For example, Michel Bénézech showed how certain psychiatrists contributed to reinforcing the idea of the curative effects of punishment.<sup>11</sup> The psychiatrisation of prisons has also had some perverse effects. Once sentenced and imprisoned, the ‘ill’ who would once have been judged criminally not responsible, are now held in prison, with some unable to benefit from probationary periods or day release due to their illness. What’s more, the use of drugs to stabilise mentally ill prisoners during their time in prison often leads to psychosis being re-diagnosed as borderline, which can further alter perceived levels of criminal responsibility.

This phenomenon extends to lesser jurisdictions. While mental health experts are present in court, they are not required to be present in cases that involve neither acts of murder nor sexual assault. And yet almost half of detainees suffering from psychosis arrive in prison after being sentenced in a magistrate’s court. The system of immediate summons, aimed at facilitating rapid legal procedures, essentially represents a trap for those suffering from mental illness; even if mental health experts can be summoned, this does not mean that they can authorise the suspension of a prison sentence.<sup>12</sup> Those accused of minor offences and given shorter sentencing are sent to prison instead of being hospitalised. Prison psychiatrists have to take on mentally ill prisoners who have never seen a doctor before<sup>13</sup>. Are these “distressing trials for the mentally ill,” which amount to a depressing spectacle of those suffering from mental illnesses being impeded by their medical treatment and unable to defend themselves, going to become the norm?<sup>14</sup> If justice does indeed have a function, could it be to provide catharsis? Not only is mental illness no longer synonymous with a lack of criminal responsibility, it

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<sup>11</sup> M. Bénézech, « Nous sommes responsables de la criminalisation abusive des passages à l’acte pathologiques » (We are responsible for the abusive criminalisation of pathological acts), *Journal français de psychiatrie*, n° 13, p. 23.

<sup>12</sup> B. Brahmy, « Psychiatrie et prison » (Psychiatry and Prison), *Études*, 2005, n° 6, pp. 751-760.

<sup>13</sup> V. Jourdan, « Moins cher que l’hôpital, la prison » (Prison is cheaper than hospital), *Le Monde diplomatique*, July 2006.

<sup>14</sup> M. Peyrot, « Les consternants procès des malades mentaux » (The disturbing trials of the mentally ill), *Journal français de psychiatrie*, n° 13, p. 18; See the example given by A. Salles in « Prostré et comateux, un fou devant la cour d’assises » (Prostrate and comatose, a mentally ill patient before the Crown Court),



sometimes even leads to harsher sentencing if the individual is diagnosed as dangerous and believed to pose a threat to the public. The focus of the new Article 122-1 of the Penal Code is thus to defend society, as shown in the Hearing Report published by psychiatric experts in 2007.<sup>15</sup>

An acceleration in legislative reforms and announcements following news stories and crime statistics, where political acts come as a response to pathological ones<sup>16</sup> (from the Pau case in 2004 to the one in Grenoble in 2008), are surely set to increase in a society that marginalises, in a system of psychiatry that is open but unable to replace the gap left by the asylum, and within a context underlined by a political agenda that favours victims. The latest story, in 2008, has brought back to the forefront issues that have been under discussion since 2005, along with the controversial adoption of a principle of fixed minimum imprisonment.<sup>17</sup> These issues include care orders, compulsory hospitalisation files, and new facilities. The idea of civil responsibility for the mentally ill was thrown out by the *Conseil d'État* in 2008, but it is the last issue under discussion that is in its most advanced stages of being implemented. What are we to make of the nineteen special hospital units (UHSA) planned in 2002 by the Justice reform act, known as the Perben Law? These specialised units, expected to be opened in 2009-2010 and located within the hospitals, are operated by the prison mental health services and their security is maintained by the prison services.<sup>18</sup> Are the mentally ill going back to hospital or have hospitals merely become more like prison?

It is not difficult to see why a lesser tolerance of marginalisation in urban areas, the deinstitutionalisation of psychiatric hospitals and a policy that prioritises the needs of the victim should all favour imprisonment of the mentally ill. But the road to hell is paved with good intentions, as this final example illustrates; the 1990 reform on hospitalisation

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*Le Monde*, 15<sup>th</sup> of November 2008.

<sup>15</sup> Public hearing, psychiatric penal expertise, report by the hearing committee, May 2007, p. 20.

<sup>16</sup> « Une réforme de la psychiatrie: pour quoi faire ? » (Reforming psychiatry: Why?), *Le Quotidien du médecin*, 17<sup>th</sup> of November 2008.

<sup>17</sup> The Law of the 25<sup>th</sup> of February 2008 relating to secure detention and criminal irresponsibility for those suffering from mental health problems.

<sup>18</sup> DHOS/O2/F2/E4 circular, no 2007-284 of the 16<sup>th</sup> of July 2007 relating to investment funding for special hospital units (UHSA).

methods, which concluded that hospitalisation should ‘generally’ not be carried out against the will of the individual, made forced hospitalisation more difficult, and in turn delayed the hospitalisation of difficult mentally ill individuals, increasing their chances of ending up in prison. These policies are certainly less discriminatory for the ill individual, since they aim to keep the patient in his familiar social environment by blending psychiatric institutions into the city landscape. However, they operate on the assumption that there will be permanent monitoring and an expensive system of urban integration, which lets some patients slip through the cracks unprotected. Is it not counter-productive for democracy to try to make an average citizen of a madman?

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