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Institutional police, juridical activism, democratic struggles

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Introduction: Law/Rights and the Politics in Prison

Our contribution aims to describe the actual or expected changes in prison due to the relative promotion and recognition of prisoners’ rights, in order to comprehend their innovative potentials. Can one democratize an institution that is structurally anti-democratic? Why introduce rights into an environment where inhabitants are deprived of liberty? These somewhat persistent questions only reinforce a classic ambivalence in the criticism of prison, structure strategies of struggle, cement internal oppositions (actual or in principal) and stimulate its efforts at understanding. This ambivalence is therefore found at the core of the socio-historic status of prison reforms: do they help to reduce the indignity that is the essence of forced confinement or, under cover of and through this transformation, do they primarily help to consolidate the institution, in search of a new stability, obtained thanks to the neutralization of criticisms whose target is this irreducible indignity? The ambivalence attaches to a now classic « dilemma of prisons » which is clearly described by Y. Cartuyvels (2002, 130).

On the one hand, trying to make prison an environment that is subject to law ratifies the existence of a carceral environment that suffers from a serious lack of legitimacy; accepts the maintenance of a penal system that is based on the deprivation of liberty that one can deem contrary to human rights; accepts the violence of a rationale for discrimination that manages the exclusion (...). On the other hand, to refuse any prison reform is to refuse to consider the development of a regime of rights regarding the execution of punishments, a source of guarantees, of protection and genuine improvements for prisoners confronted in their daily lives with the arbitrariness and emptiness of the carceral world.

The governing concept behind this collective publication- innovation- is here used as an heuristic and tactical concept to objectivize what it is NOT, that is to say, the universe of observable transformations that are not necessarily « innovative ». Innovation is, in this case...
sense, another way of pursuing the analytic exploration of the historically powerful inertia affecting prisons. To put it another way, innovation is a « demanding » theorization of change, in the sense that it refuses to label as innovative a whole collection of simple transformations that another theoretical focus might possibly declare to be significant changes, changes of the first order. It is therefore necessary to understand innovation as a concept simultaneously heuristic and critical that allows us to empirically observe the body of social transformations of the institution while introducing an essential distinction in relation to the real changes brought by these transformations. This position is clarified by J.F. Cauchie, when he distinguishes a redundant reproduction (or reproduction to the « identical ») of the penal system (when a system’s adaptation to its environment strictly conforms to the dominant rationality which underlies it) from an innovative reproduction that « is characterized by the emergence of an unexpected and unpredictable element relative to the dominant modern penal rationality, or relative to the normal changes in the normative structure of the system » (Cauchie, 2005, 412).

Following this first distinction and anchored in the analysis of concrete socio-historic situations, it will become clear, however, that the critical issue is not to declare or reject something as an innovation. Indeed, with regard to the proposed definition, a fundamental statement, both theoretical and empirical, asserts that: the promulgation and granting of rights to prisoners in a total institution is a formal innovation.

« Rights of prisoners » creates a rhetoric and tends to establish practices that partially run counter to the dominant rationality of the system, the concept of prisoner-as-citizen clashes with the opposition between the « criminal » and « the honest man ». This last opposition is a divisive practice (Foucault, 2001 [1982], 1042) typical of a rationality « that certainly accepts the principles of the adversary’s dignity, but does not represent any less the transgressor caught up in the net as an « Object-Enemy » (Pires, 1998, 6).

But one has to admit (and that is where resides the whole ambiguity arising from the irreducible incompleteness of the question) that this discursive collision occurred within a defensive, warrior mentality, embodying the essence of this same rationality (Chantraine, 2006a). In other words, by introducing « rights of prisoners »... « prison » and the system of thoughts that underlie it are in some ways « enriched » by an internal sub-rationality that apprehends and partially reduces the « excesses » of its dominant rationality. The emergence of a divergent element from the system’s rationality thus creates a principle that limits the tyrannical and despotic character of the institution (see Chauvenet, 2006). It integrates, within its very own rationality, a form of thought both deriving from and in conflict with its own « excesses »: « to limit the adverse effects of imprisonment » in a suicide-generating institution; « to maintain family ties » in an institution that breaks them etc.

As a result, carceral innovation is a foundation for the analysis of the collision of unequal rationalities that, together, underlie the complex modalities for the regulation of behaviours in prison. The challenge therefore consists less of detecting the existence or non-existence of innovation than of examining the peripheral or central characteristics of a « novelty »; in other words, to examine the ways in which its confrontation with « traditional » practices galvanizes, decreases or destroys its scope, reducing it, in this last case, to a simple « innovative potential ». Although partially stabilized, innovation is still susceptible to being reduced to a state of « virtuality ». It is then necessary to
explore the concrete extent to which law can limit the intrinsically tyrannical nature of prison.

6 In this context, and with regard to the socio-political dilemma of prisons mentioned supra, we effect a first reversal in approaching the problem from the perspective of a sociology of criticism: the social criticism of prison will be comprehended as one of the essential engines of the institution’s transformations. It will therefore become necessary to examine the manner in which prison was transformed by integrating, bypassing, domesticating or defusing the polymorphic array of criticisms of which it was and is the target. The scandalizing of prison conditions emerges from different channels, ranging from the publication of a scathing book, such as that of Doctor Vasseur (2000), to movements of revolt; these latter, as rare as they are, disrupt prisons and inflame public opinion. Hence, these changes have now been framed for the most part in the language of law and the promotion of prisoners’ rights. This was the case in France in 2000 (a project to develop a prison law was abandoned under the decisive pressure of the insecurity « debate »), then in 2006-2007 during the « General Forum on Prison Conditions».

4 Indeed, a prolonged effort would be necessary to understand the conditions required for placing on the political agenda reform aimed at significantly promoting the rights of prisoners. Here, more modestly, we will borrow from the recent history of Western prisons (mostly in France, Belgium and Canada) to understand how different forms of political action have contributed to the reorganization of the economy of social relations in prison. This acknowledged fragmentation of our analysis implies that our article is an exploratory contribution that aims primarily at generating other research in the area of the socio-politics of prisoners’ rights that is both more focused and more polished.

7 Inspired by the philosophical works of J. Rancière, we will examine the regulating modes of conduct in prison using terms such as institutional police, the « police », designating the array of processes by which occur the aggregation and consent of communities, the organization of powers, the distribution of places and functions and the systems of legitimization of this distribution (Rancière, 1995).

8 There is an order of the visible and an order of the utterable that make some activities visible and not others, that make some words heard as discourse and others as noise. It is, for example, a law of police that traditionally makes the workplace a private space unregulated by ways of seeing and saying that are specific to what one would call the public space, where the role of the worker is strictly defined by the remuneration of his work. The police is not so much a « disciplinarization » of bodies as it is a rule of their display, a configuration of the properties of space and the way it is occupied when these occupations of space are distributed (Rancière, 1995, 52-53).

9 Freely inspired by the philosopher, the institutional police will designate here both the regimes of governance and the art of governance of a penal institution, rationalities and systems of legitimization that underlie that art and those regimes. The institutional police of prison, as an art of governance, characterizes the organization of the tangible in prison and the process of depoliticization that is intrinsic to it. “Depoliticization” because J. Rancière opposes the concept of police to those of the politics and democracy—the second constituting the essence of the first—understood not as a style of social life or a political regime, but as the subjectivization mode by which political subjects exist.

10 Referring to the Greek meaning of democracy, J. Rancière reminds us that the Greek demos, before referring to the whole of the community, was the name of one part of that community: the poor; not simply the economically disadvantaged, but those that were...
not counted-in the literal sense of the term-as having the right to speak. It’s that original anomaly that best defines the democratic process, when those without the right to speak, speak; when those who are on the sidelines arise onto the political scene.

I now propose to limit the term «the politics» to an activity that is specific and antagonistic to the first: that which breaks the tangible configuration where the parties and the parts or their absence are defined by a presupposition that by definition, has no place there: that of being a part of those that have no part. This rupture is manifested by a series of acts that reconfigure how the parties, the parts and the absences of parts were defined. Political activity is that which displaces a body from the place that it was assigned to or changes its destination; it shows that which should not have been seen, it makes heard a discourse where only noise was accepted, it makes heard as discourse that which was only heard as noise. (...) It might be one of those workers of the 19th century who put into a collective mindset work relationships that refer to an infinity of private individual relationships. Or again that of the demonstrators or barricaders who literalize in a «public space» urban channels of communication. Spectacular or not, political activity is always a mode of expression that unravels the tangible divisions of the police order by acting on a presupposition which, to it, is in principle, foreign-being a part of those that are without parts, which manifests itself, ultimately, the pure contingency of order, the equality of any speaking being with any other speaking being. The politics exists where there is a place and structures for the joining of two heterogeneous processes. The first is the police process in the sense that we tried to define. The second is the process of equality. Let us temporarily define this term, the infinite collection of practices guided by the supposed equality of any speaking being with any other speaking being and by the concern to verify this equality (Rancière, 1995, 52-53).

In this context, the primary hypothesis behind this contribution was that the intrusion into the prison system «of an unexpected and unpredictable element in relation to the dominant modern penal rationality» - that which constitutes, for Cauchie and Kaminski (2007), one of the theoretical issues in penal innovation-is firstly the product derived from a democratic activity defined as an enterprise of politicization of the prison context. Thus, this contribution, initially proposed to examine the role of the politics, understood, in Rancière’s terms, as the demand to be heard by prisoners themselves, in the reconfiguration of the modes of the institutional regulation of prisons.

In this regard, the petition, dated January 16, 2006, signed by prisoners condemned to long prison sentences incarcerated in the prison of Clairvaux, then smuggled out of the prison and greatly publicized afterwards, constituted a political event. Following Rancière’s terminology, it is the emergence of the politics in the police order, the order of the visible and the utterable. A «we» is formed and produces a discourse where previously there was only silence or noise. Through a unique subjectivization, the «living entombed» make visible the specific harm of which they are the subject-something clearly not allowed by the different monsters’ images associated with authors of serious crimes, neither allowed by the prison jargon that uses only duration to characterize the prisoner “long sentences”- and destabilize the assumptions at play when the abolition of death penalty is discussed. Let us here give, by way of illustration, a large excerpt from this petition:

We, the living entombed, held for life at the most secure prison in France (...), we appeal for the return of the death penalty for us. Enough hypocrisy! Since we are in reality doomed for life, without any realistic prospect of liberation at the end of our recommended minimum sentence, we would prefer to end it once and for all instead of slowly dying without any hope for the future after more than twenty
years of absolute misery. Unlike other European countries, behind the grey walls of its shameful prisons, «the Republic of Lights and of freedoms» of 2006, tortures and quietly destroys us with apparent legality, «in the name of the people of France» (...) What is the point of the recommended minimum sentences inflicted on us when once their duration has been duly served, there is no hope of regaining freedom? (...) After such periods in prison, any survivor leaves at best, senile and completely broken. In such a case, who can really re-integrate into society? In fact, as an alternative, as before 1981, is there anything better for us than to more quickly find our freedom through death? Moreover, to force us to submit to this fate of a living entombment, in recent years, there were added: walls, watchtowers, steel bars and many other constraints. (...) Also, because a society called «democratic» should not be allowed to toy in this way with penal policy, aiming at the indefinite lengthening of sentences, based on situation, individual or particular needs: we choose, in place of our slow programmed death, to demand of the French state, champion of human rights and freedoms, to immediately re-establish, for us all— the death penalty.

We would need then, to explore, through the history of Western prisons, the consequences or lack of consequences, of this type of political subjectivization. To emphasize: this form of subjectivization is here that much more interesting for us than the fact that collective speech remains to this day expressly forbidden in French prisons; also, when it is authorized, by, for example, prisoners’ committees (Canada, Sweden), the security questions (the very structure of the institution...) are formally removed from this area of freedom, while it explicitly motivates the denunciation of the petitioners'. Above all, in order to establish and build its legitimacy, this type of denunciation is explicitly based on the universal values of human rights.

However, we quickly had to deviate from our initial intuition. Indeed, certain forms of expression—i.e of politicization—may not be very well expressed in the strict language of rights, and yet find a police response in terms of law; in addition, some forms police reconfiguration can combine the granting of rights with institutional modalities of transformations that, in practice, eliminate them; lastly, and above all, the effectiveness of one particular form of political subjectivization often rests on the existence of intermediary mechanisms (militants who press for reform, journalists who reveal the intolerable, a tribunal that bends the jurisprudence etc.), mechanisms which for Rancière do not reach the status of «the politics», but are still part of the police. Our observations have thus led us to elaborate the initial project, and to consider the inherent ambiguity of the language relating to rights in prison, and, from a theoretical point of view, to question the alleged radical separateness and heterogeneity of the concepts the politics and police for Rancière.

In this revised context, we will first outline the two main forms of sociological criticism generally aimed at the promotion of rights in prison: that this promotion would be incapable of 1) destroying the primacy of security in the institutional on the one hand, 2) ending its disciplinary mission on the other. First, the criticism of the subjugation of law to the security order. Here, the Belgian prison law enacted in 2005 will be taken as a typical example of this subjugation: privileges are transformed into formal rights, but the exceptions to these rights then justified by security needs, reduce their scope. Second, the criticism according to which rights support the penological reconfiguration of the institution. Here, we will objectify the success of the prison in integrating the critique of discipline within its functioning (in «taking better account of the individual») while reinforcing its correctionalist mission and actualizing it for the neo-liberal age. These two
assertions, relevant in many ways, remind us of the formidable capacity of the institution to adapt to criticism. They emphasize that the movements of the institutional police by struggles pursued « in the name of rights », are movements that, when all is said and done, are secondary. They affect only peripherally the security imperative and the correctionalist vocation of the institution.

In the second part, we will hypothesize that despite their relative pertinence, these criticisms do not allow us to qualitatively understand the actual uses of rights in prison by all the actors in the prison field (prisoners, guards, activists, administration, control agencies, etc.). We will explore the sociological continuum that connects activist issues, political and academic commitments and concerns, the opening of windows of opportunity, political crises (see Vigour, 2004; Dobry 1992), triggering events or the discovery of scandals, condemnations by the European Court of Human Rights, etc. Let us emphasize, that showing this continuum will lead us to critique the concept of the politics as elaborated by Rancière. We will defend the idea that the transformation of the institutional police is the product of a complex dialectic between forms of political subjectivization of prisoners and a network that functions beneath this subjectivization, through appeals, case law, publicity, denunciation, sensitization, etc. We will support our exploration using a sociological interview with a militant jurist working within the International Observatory of Prisons (OIP), in order to illustrate certain aspects of cause lawyering in prison matters, that is, the way in which legal professionals can devote their expertise to a cause, thus transforming the law into a weapon of activism. Although this interview is isolated and would have benefited from being combined with other types of empirical data - let’s recall that this contribution is only exploratory - we gambled that this interview would illustrate « from the base » mechanisms by which supranational agencies of control, militant activity and prisoners’ resistance are interlinked, mutually supportive and structuring.

Finally, in the last section, we will state that this political activity is driven by a utopian objective which pertains to the functioning of the total institution: the rights of prisoners would constitute the immovable barrier to the security imperative of the institution. We will speculate about the implications of this utopia, in showing that it defines the boundaries of the struggles explored in our second section: while resisting them, the rights claim sheds light upon the discipline and security imperatives organizing the prison world and relentlessly and silently leads the prison to be more than the mere deprivation of liberty (Bérard, Chantraine, 2007, 50). Hence, from a socio-political point of view, the focus so adjusted is distinguished as much from philanthropic optimism for prison reform (that sees significant progress in all change), as from the radical critique that a priori sees all attempts at improving the institution as a project aimed at consolidating a barbaric system—thus conceding to the difficult view that « better is worse ». The goal is somehow to disentangle, in a conceptual way, our analysis from the dilemma of prisons in escaping from « the false opposition between cynical criticism and blissful celebration » (Linhart, Moreau de Bellaing, 2005, 298) by providing new concepts to analyse the situation. We will try to achieve this disentanglement in such a way that the dichotomy that created this dilemma appears too simple, finally offering not enough traction for either sociological observation or political action.
1. The new vitality of the institution: rights “instrumentalized” by prison inertia

Two groups of critiques denounce the inability of rights to transform prisons. The first group explains how the rights introduced into prison are undoubtedly perverted by the security apparatus of the institution, even where such introductions occur through the adoption of a formal prison law (such as it exists, for example, in Belgium, but not yet in France). The second group of critiques targets the manner in which the promotion of rights might hopefully have made prison into « a simple deprivation of the right to come and go ». Such a shift would revitalize its original vocation. This second group of critiques follows Foucault’s work on correctionalism and carceral discipline, The Canadian correctional system will be used as an ideal-type: the political promotion of prisoners’ rights reframes and intensifies the forms of subjective enrolment of prisoners, supplying the correctionalist vocation of the prison.

1.1. Prisoners’ Rights and Prison Police

Two fundamental reservations have, to this point, affected the actual recognition of prisoners’ rights: the drastic limitation of the practical implications of the rights and the depoliticization of the struggle since the rights are mainly concerned with issues of living conditions.

1.1.1. Limited Rights

The Belgian prison law, voted on January 12, 2005 but still only partially enacted (Beernaert, 2007), has two characteristics that lower the hopes for transformation that were attached to it: 1) it organizes a regime of rights that is the most often subordinated to security needs; 2) it creates a major strategic option for a contractualized form of the discipline of prisoners, under the terms detention and rehabilitation plans; the objective of these tools is, in exchange for the participation of the prisoner in their elaboration, to reconcile the execution of his sentence with his needs, broadly defined as educational, familial, social, sanitary. The armour of the reformist penological discourse, aside from its good intentions and its results, presents two major flaws that affect the range and effectiveness of its critique. The first—the subjugation of rights to the security imperative—will be discussed here. The second—the reformulation of the penological project—will be explored further on through the Canadian example.

The typical contemporary statement affirms that security is threatened by rights and rights limited by the security imperative: privileges are transformed into rights but the legal exceptions to their claim transform them into privileges. Rights are most often recognized in a space within the security imperative; in other words, this imperative is the basic norm to which all subjective right must defer. While this, indeed, represents the introduction of a new instrument of public policy, it nevertheless does not change the finality of the policy; using Hall’s terminology (1986, 1993, quoted in Lascoumes, 2006) it is a change of the second order. A conservative position supported in France, for example, by Boulouc (2005), does not even see the advantage in further recognizing the rights of
prisoners, rights already seen to be quite satisfactory, without running risks to the security imperative.

While this measure has been taken in Belgium, through the adoption of a prison law, Pierre Reynaert, former director of a Belgian prison, concluded pessimistically that the granting of rights does not reduce any of the supremacy of security over rights: «All that the law gives with one hand it takes away with the other. Each provision has its reservation, its exception. How can one not be shocked by this image of rights imprisoned? One certainly has to reverse the perspective: rather than granting rights to the prisoners, rights have to be granted to the prison administration to depart from them as soon as a superior motive demands it» (Reynaert, 2004, 241). In this regard, the alternation between or the substitution of a security for a rehabilitation project (Morgan, 1994, 109-110), vitiates and irremediably corrupts the logic of rights.

The procedural benefit—of granting a right of complaint and of recourse, of allowing access to tribunals—of the recognition of rights, is not negligible but it seems to already have been perverted. A prison director, interviewed at the time of a social conflict, declared, accurately, that the recognition of rights for prisoners consists of procedural progress, which will make decision taking more transparent and therefore more reliable, especially in matters of discipline. Other prison wardens in Belgium recently signed a document in which they refer to decisions of the state council which overturn disciplinary sanctions: «essentially, the practices do not change and that is (...) the problem: we have nevertheless gleaned some information in order to better formalize these decisions. And we give them an appearance of legality that only hides the practices, which fundamentally, have not changed and reflect the power of the prince, more than a balanced adversarial procedure» (de Thier et al., 2005).

Prisoners’ rights can also be interpreted as a victory or else as the ultimate benefit of a prison revolution. Indeed, during close to two centuries, reformist humanism was «silent about rights» (Pires, 1992, 81). But in terms of the police function of the institution, one can also conceive that it represents a necessary adaptation to the increasing demands of a principle of normalization that pervades the whole of society (this goes from the rights of children to those of homosexuals, touched-on incidentally, by debates on anti-discriminatory measures relating to foreigners or immigrants, if not actual positive discrimination towards them). Even if the stakes and conditions differ according to the domains of law and the various groups concerned, this normalization surge pressures the State to engage with human rights and insure their effectiveness. The recourse to subjective rights given to the prison minority might appear in this sense as the instrument of avoidance blame politics: (see Lascoumes, 2006, who adopts the term from Weaver, 1986).

In this regard, Hall’s terminology, already referred to, would no doubt attribute to the recognition of rights the status of a third-order or of paradigmatic change, since it is the finalities that are transformed by the introduction of new instruments. The following would be the cynical interpretation. Following Pires, it is in the context of institutional loss of legitimacy and of «disenchantment with prison reform» (Pires, 1992) that the discourse of rights appears, not just as a force in opposition to the discretionary normative model of prison, but also as a source of new legitimacy for the institution.

Reading the introduction of rights as a change of purpose (from promoting multiple and successive objectives of incarceration towards one of respect for the rights of prisoners), depends as well on the failure of the discourse on the objectives as on the positive
promotion of subjective rights. The legitimacy of the institution is then preserved by its narrowed aim to protect the public while respecting prisoners’ rights.

1.1.2. Recognition of rights and the depoliticization of living conditions

The need to analyze the changes that occurred in carceral normativity since the 1970s stems from the relative failure or the relative emergence of the critique: the revolts (like those of Louvain, for example; see Mary, 1988), militant actions (of the GIP, for example; see Artieres et al., 2003) have had their positive effects on the living conditions in prison, without, nevertheless, having achieved their full potential. In the prison upheavals of the 1970s it was not as a victim that the prisoner was represented, but as a subject and actor in a political story denied and rendered inaudible. Foucault (1994a [1979]) is explicit: it was necessary to bring prison into the public domain, not in the form of a moral problem or as a problem of general management, but because prison is a place where history is made: daily events, life, events of the same nature as a strike in a workshop, a movement of protest in a district, a protest in low income housing buildings.

Mary shows how after prison revolts and especially the one that occurred at Louvain in 1976, the issue of prisoners’ rights had blossomed but then contracted around questions of procedure and prison living conditions. These are certainly essential questions, but this concentration excluded from the area of reforms the rights that must logically be associated with the resocialisation of prisoners, namely the rights to participate in prison life, all rights that can be collected under the category of democratization of prison. The spectrum of rights promoted and acknowledged is often minimalist, because of the fact that the minimum necessary for life is often not attained in prison. Somehow, the primary requirements for life (survival) always outweigh the conditions of the constitution of the political subject (a negative luxury for the administration and a luxury—not a priority, even though demanded in the prison revolts— for the prisoner). Indeed, whatever the results, the revolt automatically transforms the prisoner into a subject and the prisoners into a collective subject: a social movement is produced, with its own organizational and activist dimensions. Making one’s voice heard is intrinsically political, therefore revolutionary with regard to the total institution. However, it results in the internalization of claims, meaning its re-integration into the perennial logic of the prison, or to the recycling of the revolt in a superficial change (the relative improvement of living conditions to the detriment of the recognition of a new political subject).

What Phillipe Mary calls « the contradiction of change in prison » refers both to the paradox of scandal (defined as a gap, publicly exposed, between norms and their reality) and to the heuristic implications of innovation. Paradox of scandal, seen as an ordeal, an event with an indeterminate result: « the moment of public revelation of the existence of a contradiction between the normative ideal and practices and also the moment where it again becomes possible to make this same contradiction disappear » (Comité éditorial, 2005, 4). The heuristic implications of innovation: this appears more in the processes of revolt and of struggle than in the results that can be attributable to it, reduced, discrete, discontinuous, disappointing. We should probably recognize here the common fate (and not specific to prison) of the relationship identified by J. Rancière, between the political function and the police function: the infinite capacity of the institution to absorb the effects of revolt as well as the infinite capacity of the politics (illustrated here by the revolt) to disturb the police and to compel it to re-organize—if only partially. Paradoxically, the absorption is proof that scandal « never allows things to remain the
However, the scandal of prison is always contained in a « circumscribed area » (De Blic, Lemieux, 2005, 36) that is, in the end, « re-inforced in its autonomy », particularly because the political status of the cause of the scandal is, in this area, disqualified by the master status (Hughes, 1975), that of the criminal.

Thus, it seems incontestable that the emergence of rights in prison and, above all, the opening of external channels of grievances and the re-enforcement of external agencies of control, are more and more a tool for protection against the abuse of power of an administration now less sovereign - and this is a real novelty. But this emergence did not so much, as hoped by the pragmatic abolitionists, initiate reforms that would, while improving the conditions of detention, force the institution to face its democratic shortfalls and therefore participate in its progressive dismantling, but rather remove from criticism one of its traditional targets and allow the institution to re-inforce the legitimacy of its apparatus (Chantraine, 2006a ; Kaminski, 2002).

1.2. Empowerment, rights and the penological project

The second obstacle affecting the innovative potential of the recognition of prisoners’ rights is the penological apparatus of the prison. In this regard, the Canadian correctional system represents an ideal type and we will here describe how the transformations of the correctionalist vocation of the Canadian penitentiaries « absorbed » the struggle for rights in a renewed project. We will first outline the mechanisms behind the emergence of a « positivist » and « scientific » correctionalism, supplied with risk-knowledge promoted as new penological religion, that took shape within the Canadian correctional services. Second, we will essentially focus on women’s prisons, and the manner in which feminist struggles, intellectually structured around the idea of empowerment, helped to reconfigure the police of the institution.

Within Canadian prisons, the emergence, then ubiquity, of the risk-tool, must be understood as an institutional response to a double crisis of legitimacy. First a crisis in the rehabilitation objective promoted by the penal system. In fact, the critique brought together arguments and ideologies that were fundamentally contradictory-marxists, foucauldians, conservatives and liberals (Cohen, 1985): rehabilitation is an illusion that masks the violence in class relationships; rehabilitation is a modern refinement of cruelty; rehabilitation deceives itself when it believes that it can replace the social virtues of real punishment; rehabilitation is too costly in relation to its meagre results, etc. Second, a crisis of the clinical therapeutic practice, both condemned for its laxness with regard to dangerous individuals and its inability to adopt an « effective scientific approach ». This double crisis constituted the negative support for a vast re-articulation led by the cognitive revolution, the multiplication of actuarial tools for clinical evaluation and the increasing responsibilization of the beneficiaries of therapeutic intervention (Quirion, 2006). During this double crisis, therapeutic practice searched for (and found) a new legitimacy in re-organizing its techniques of truth.

In this context, a formal process combining the evaluation of « recidivism risk factors » with an intervention plan to manage the correctional content of the sentence as well as to the modalities of parole, was put into place at the beginning of the 1980s. This system is based on the hybridization of an actuarial (statistical) « risks » management and of cognitive-behavioral therapeutic practices, structured around the identification of the prisoners’ « needs » or « criminogenic dynamic factors ». Following Hannah-Moffat...
(2005), we can observe how the alignment of « recidivism risks » with « prisoner's needs » contributes to the creation of the prisoner as a « transformative risk subject » amenable to targeted therapeutic interventions. This alignment re-affirms the necessity to re-integrate the delinquent in the community and to reduce the risks of recidivism. The inclusion of prisoners’ « needs » in the calculation of risk reconfigures intervention efforts and connects risk management strategies to rehabilitative strategies supported by a normative psychological theory of the criminal. In sum, the risk-need association and the hybrid conceptual framework (clinical-actuarial) on which it rests, now create the core of a neo-liberal correctionalist model (Chantraine, 2006b).

The report entitled The Creation of Choice (see Shaw, Hannah-Moffat, 2002; Frigon, 2002; Hannah-Moffat, 2005) deepened the spirit of protection and emancipation of female prisoners' rights in promoting key principles for the incarceration of women: the autonomization of incarcerated women by the dispensed programs; the offer, by these programs, of significant choices and realistic opportunities for the personal development of women, the treatment of incarcerated women with respect and dignity, the development of a supportive carceral environment, the development of shared responsibility.

It is interesting to note the way in which Sylvie Frigon evaluates the innovative character of the studies that led to The Creation of Choice report: « finally, a logic of reform and not of transformation will triumph during these processes and their implementation » (Frigon, 2002, 18-19). Kelly Hannah-Moffat uses the most blunt formula in considering the effects of the Report on « penal governance »: the women are nowadays incarcerated and incarcerated for longer, in order to empower them. Such conclusions are based on a limit inherent in the transformation of prisons through empowerment: indeed, the valorization of the needs of prisoners in the prison apparatus is combined with risk evaluation. In a way, the absorption of values by the correctional system creates an effect of increased individualization but « under the cover of empowerment » (Hannah-Moffat, 2005).

The subjugation of the prison regime to a penological objective is therefore a second obstacle to the innovative power of prisoners' rights. Neo-correctionalism is in some way the prison's answer to the carceral-centric criticism made of it. A « New Penological Spirit » helps to create a capable prisoner (rather than a culpable one), itself a product derived from a critique of the carceral system. Neo-correctionalism retains the objective of correctionalism but uses new subjective levers such as responsibilization and hypermotivation (subjective engagement) of the prisoner. It thus borrows the prevailing intuitions of modern management-ideologically-at least, in many professional contexts. The prisoner can also be « responsibilized » during his penal trajectory, and become a client, by contract, of an offer of services in which the subject of rights resembles a vassal more than a possessor of subjective rights against the institution (see Kaminski, 2006).

One of us has argued that recognition of prisoners' rights « which can be interpreted as a victory for categories of marginalized people, consists more fundamentally of an amplification of managerial cynicism, under which the State loosely distributes its responsibilities, expressed in terms of individual rights; in exchange, without loosening any of its repressive vigour, the State provides itself with the luxury of neglecting the essential normative question: the justification for the recourse to imprisonment » (Kaminski, 2002, 91). This neglect does not specifically signify the disappearance of public justifications for imprisonment but rather their inconsequential accumulation (from neutralization to compensation via retribution) or their purely rhetorical character, leaving neo-correctionalism as an item of obvious
methodological interest. One can affirm, following others (O’Malley, 1992; Hannah-Moffat, 2000), that rights are a resource in the neo-liberal strategy of instrumentalizing empowerment. This one consists of governing prisoners through their subjectivity, by their rights, rather than against them, through discipline. The apparent democratization of the juridical relationship can better ensure subjectivization than can its disciplinary, authoritarian, and vertical forms. Along with the advances of penal prudentialism, the institution allows increased prisoner access to specific rights. The recognition is far from constituting a political rupture and produces a more refined form of discrimination in governing methods aimed at powerable and unpowerable: the new subject of rights which does not grasp the occasion to become a prudent subject will thus be responsibilized; the other, who doesn’t reach the required level of prudence, will continue to be disciplined and will lose the benefits of the advantages previously gained. One can then doubt that in modifying its procedure and the judicial status of its clients, the prison also changes its structure and its program... It diversifies itself, operating a new regime of classification with the cooperation of the prisoners... The increased use of the motivational incentive in the management of correctional trajectories (detention and reclassification plans in Belgium) and the indexing of « motivation » to security dimensions of carceral order (see for example Chantraine, Vacheret, 2005) reorganize carceral constraints around the negotiated practices of engagement and collaboration.

One can also imagine that the options for complaints and grievances regarding particular rights will be less likely to produce innovation than the penological logic risks blocking the logic of rights. Dunkel (1997) explains the weak success rate of complaint rights in Germany by the indeterminacy of the texts. Being based on a treatment philosophy, they are favourable to the administration. The political indeterminacy (and the variability) of prison objectives allow for the reduction of the range and nature of the granted rights.

1.3. A night where “anything goes”?

These two critiques of prisoners’ rights have the definite advantage of forcing the analyst to be vigilant and appraise the whole specificity of rights in prison, weakened by its security structure and its disciplinary mission. A right granted is not necessarily a right guaranteed – a particular right can coexist with the exercise of a power that will uproot a different right.

But these critiques also risk making a major mistake: that of being incapable of clearly seeing the reconfiguration of social relationships in prison. These critiques can fall into an odd nihilism according to which every institutional transformation could only be perceived as a « mirage ». Power seems to moderate, but in fact, it advances more successfully when disguised—a certain sign of its growing perversion. And yet, nothing is more false or more counterproductive than to characterize every police power, whatever it is, as « A night where “anything goes” » (Rancière, 1995, 53). In prison as elsewhere, there are better and worse police.

Just because a right tends to inexorably meld into the functioning of the prison (producing its own measure of arbitrariness) does not mean that it is of no value. An administration with an objective of zero escapes and that represses all protest activities through force is not the same as an administration that allows room for dialogue and renounces a paranoid attitude according to which risk is permanent and ubiquitous. Detention centers managed by threat, if not pure and simple violence, are not the same as
detention centers granting broad opportunities for work, training, and family contacts. Being
condemned to indeterminate protective sentences, so that prisoners can, in the
eyes of the institution, only be kept in a state of permanent tension is not the same as
prisoners having access to leave, so that opportunities offered in prison can have true
meaning. An administration with total discretionary power is not the same as an
administration limited by independent agencies able to defend rights, even if this defence
remains imperfect. (Berard, Chantraine, 2007, 51-52).

Even if rights remain subjected to the security logic of the prison and sometimes seem to
be reduced to a simple lubricant for power relationships, at least the new prison
organisation offers a better leverage for the concrete struggles that aim to subvert the
newfound stasis. Prisoners’ rights transform the visibility system of the institution.
Closed in on itself, organized to hide from the outside world behind its high walls while
ensuring the complete visibility of the prisoners (panopticism, peep-hole), the institution
is now under the scrutiny of the media and civil society. One of us met a former Canadian
penitentiary warden who admitted: « we, the penitentiary administration, today, are like
fish in an aquarium».

2. Rights and politics: the heterogeneous connections of counter-power

For Rancière, subjectivization is the only true essence of politics. When everything is
organized to prevent their self-expression, yet prisoners speak up and make demands in
the name of a singular « we », a transformation of their condition has occurred. For
example, for the philosopher, the revolts of November 2005 in France were not in the
nature of « politics » because the revolts did not create a « common world »; in the same
way, the aliens’ claim to substitute « dignity » in favor of « equality » fails to constitute a
real « political » action 15. What would Rancière say then, of these militants in France who
demand the promulgation of a prison law? Faced with this conceptual segregation, which
turns a political idea into a quasi-metaphysical and radically anti-sociological one, we
would like to explore, on the contrary, the concrete interplay of the mechanisms of the
police and political functions. This, in order to describe the carceral reality produced in
part by the promotion of prisoners’ rights.

The exploration, as we have said, will be partial. We have chosen to base our analysis on
the discourse of a militant-expert of the OIP gathered through a research interview aimed
at illustrating the mutual support flowing from different levels of struggles. This mutual
support should later be the object of in-depth and systematic studies not limited to a
strictly juridical approach to prisoners’ rights...... but rather rooted in the sociology of
cause lawyering, a sociology of activist politics for prisoners’ rights.

2.1 Of a juridical guerilla conflict

For our interlocutor, the promotion of rights is not so much an end in itself as a means
towards two general objectives: « to protect the prisoners » and « to make detention less
arbitrary». The activist use of rights also marks a turning point in the history of the OIP:
from a simple denunciation of the arbitrary, during a time in which the association was
defined by a certain mistrust towards law (« the law can only be an instrument of
power ») to concrete action that uses the law as an instrument for the revitalization of counter-powers. Other associations, namely the defence of aliens (like the Gitsi for example) constitute models in such matters: for many years, legal professionals (academics especially) used their expertise to defend aliens’ rights, and, in their own fields, advanced the state of legal doctrine. The legal weapon is thus not at all a mere idol, it is used primarily because it facilitates an attack on the institution where it is most vulnerable.

Its vulnerability to law is one of several points of attack on the institution, since it fundamentally negates individual rights and constantly attempts to dominate a person. Thus, inevitably, it has consequences: it translates into a legal characterization, and so the critique of the institution is also a legal one.

Underlying this militancy is a general philosophy of the « guerilla type »: the struggle is seen as fragmented, taking place on many fronts at the same time (body searches, arbitrary transfers, etc.) and taking many forms that are mutually reinforcing. This struggle has abandoned two of its utopias. First, an abolitionist utopia: the total and definitive eradication of prison is not perceived as possible in the near future. Second, the utopia of a well managed prison, the « good prison »: in its essence, prison will always mean more than just deprivation of freedom; rights violations will always exist. Better, the evolutionist and progressivist visions are themselves rejected: if rights progress in some areas, they can easily regress in others.

One should have not a static representation of the situation. The administration constantly looks for a new way to control, subordinate, etc. One can see it in what happened after 2002, the ERIS intervention, etc. In putting forward a claim, we try to underline the danger in such an apparatus...Then, there are some safety regimes that were developed since 2002 that are more and more constraining, mainly those associated with L... who was the penitentiary administration warden. There are some times... we find ourselves in some sort of containment and in some sort of advancement of arbitrary powers. Rights progress on different levels, but there are also temptations for the penitentiary administration to go with other things, things that are far more harsh [as the maximum security prisons] that are meant in the first place for a specific category of prisoners, but they are very harsh...

It consists then, in an always renewed struggle, to limit the space for arbitrary power where it is the least tolerable and/or according to the strengths and juridical « attackability » of the issue, all those aspects changing with each new gain. To the question: « what would you consider to be a penal innovation ? », our interlocutor, after pausing and mentioning a future penitentiary bill, states three elements that well describe the multiplicity of scales in the struggles: the abolition of bodily searches, the institution of an independent and external control agency, a massive help in the use of rights for prisoners who can’t activate them on their own. This vision is compatible with the claims made by three Belgian prison wardens, for whom the recognition of prisoners’ rights must possess some efficiency indicators: rights issues in prison should be swiftly resolved (if not, rights would quickly become useless: the action aims at preventing the lock down... before the lock down happens...), accessible (understandable by everybody) and allowing mobility (rights « representatives » have to travel through the prison to meet the inmates) (de Thier et al., 2005).

Despite being fragmented, these struggles nevertheless emphasize some area of arbitrariness in prison that needs to be focused on, among others, we find arbitrary transfers and isolation. The work then, is to put together a grievance and bring it to the administrative tribunals in the names of specific prisoners. The objective is to « take the
47 Fundamental to our analysis is the relationship that exists between prisoners' subjectivization and the legal struggle. The prisoners who take their case to the tribunals are also those who « make their voice heard » (political subjectivization according to Rancière) and who lead an array of infra-political resistance actions (rebellion, behind-bars protests, negotiation, pressure, etc.). Among the Clairvaux petitioners, for example – see the introduction- we also find a list of law professionals. Our interlocutor insists: it is very often « the same prisoners » who use the law that make legal advances in the jurisprudence. Part of the work then, is to support prisoners who don’t have a lawyer, but also to support on a regular basis those prisoners who are serious activists.

There are some prisoners, who live for that, who survive their sentence because of that. If they are not completely squashed by the prison administration, it is because those guys are fighting in the tribunals. You have a certain group which is like that. Usually, we know who they are, those guys are in DPS [specially labelled prisoners] whom the penitentiary administration subjects to all kind of things, and the way for them to fight back ... Well, some accumulate many escape attempts, etc. that prevent them from fighting in tribunals though... but there are some who manage to stand up to the prison administration, who manage to stand on an equal footing with it, I would say, because someone who resists the arbitrary powers, the constraints, through legal fights will... He will feel equipped in a way, even if he goes through good and bad times... But we see that, for them, it is important.

2.2. A heterogeneous network that feeds and supports itself

48 The activity of a cause lawyer needs to be supported by the action of a broad range of actors and institutions that make the claims credible, the legal arguments solid and legitimating his action. Thus, the Human Rights Commissioner or the work of the National Consultative Commission of Human Rights (NCCHR) provides many valuable recommendations upon which to base a claim. The supra-national agencies play a crucial role as well. Thus, the Committee for the Prevention of Torture (CPT), the European Court of Human Rights (ECtHR) and the Council of Europe are an institutional trio producing declarations, the mere existence of which partially transform the substance of the public debate. Despite the structural weaknesses of the European Penitentiary Rules created by the Council of Europe, they do constitute a new tool for anyone who wants to denounce, on the basis of a document legitimated by a unanimous vote of the 46 member states, the detention system and detention conditions in penitentiaries found in any of those member states. It consists of a specifically normative weapon (as opposed to a distinctly judicial one), in the sense that it gives some material – legitimate, European, institutional material –to any moral entrepreneur who wants to change prison laws and practices deemed unworthy of a democratic state. For example, the statement by the reformist Norman Bishop, according to whom « it is the responsibility of member states to follow up on propositions of the Recommendation » becomes, thanks to the Rules themselves, effective, and it is with this logic that the texts are used. In brief, the existence of those recommendations increases the possibilities of testing the governmental discourse, decisions, involvements and practices governing penitentiary matters by the activists who use rights as a weapon.

49 Possibly more important, because they are part of a powerful institutional network, those Rules are a bit more than mere recommendations. Thus, Françoise Tulkens, judge at the
European Court of Human Rights, explains: «The Court increasingly takes into consideration what is accepted in the European Penitentiary Rules. They are important since they represent a European consensus. This consensus is decisive since, if the Court goes forward alone and blind, the states resist and nothing progresses. The Court increasingly uses the reports of the Committee on the Prevention of Torture (CPT), that can help to document a complaint» (Tulkens, 2006). Thus, even if the Court progresses slowly, step by step, in order to guarantee the legal security («weakness» that is the condition of its force, of its legal strength), and even if the functioning modes of each of the related institutions are not identical, there are indeed some “gateways” able to establish a legal dynamic favourable to the defence of fundamental rights, a dynamic that the Rules have, even modestly, been involved in. In the same way, CPT reports at the tribunal can be used as components in a proof to denounce practices, or be used as leverage to make jurisprudential change.

The support of the media is also deemed essential; it publicizes intolerable situations, even if going to a tribunal is a lost cause. Thus, OIP can take advantage of a legal action to suggest a press article denouncing an intolerable situation. In turn, this condemnation will have so much more strength and legitimacy that it will be legally «bullet-proofed».

I think that those combine quite easily... Those times when we write a press release, it works quite well. Public denunciation, normally, should combine in each case. Because you can fail but it doesn't prevent you from... You opened your mouth a first time, it didn't work, but if you continue to open it, and you still have the possibility to denounce, this will give you a good media opportunity to do it; also, it shocks many more people's minds. Despite everything, we are in a society where we think the administration has to bend to legal rule.

More generally, we find those elements present in cause lawyers movements that are older and more established. For example, in the United States, Anthony Romero, executive director of the ACLU (American Civil Liberties Union) identifies three necessarily joint strategies: the legal action per se and the action in the tribunals to protest rights violations, the legislative action that aims at promoting fairer laws, and a «communication and public education program». Anthony Romero thus explains «you can win at the Congress or at the state level, you can win at the tribunal level, but if you don't win over the hearts and minds of people, you might well win two out of three battles but, in the long run, you will lose the war. This is, to my opinion, what often happened to the Civil Rights defence movement in the United States» (Romero, 2006). Our interlocutor follows in the path of this three part strategy by showing how the collective sensitivities influence the decisions of the State Council.

For example, on the mattresses issue, we used litigation, the toxic mattresses that release fumes. We also used the media, regularly, talking about the highly toxic mattresses that the penitentiary administration is completely aware of, etc. We are forced to use complementary methods for we know very well that the internal judge, at the State Council, moves only when he can feel pressure, the gap between his position and society's expectations concerning the way an institution functions etc. becomes too wide to accept the status quo. Hence, we need the press. It also often plays a role, in part... As long as it holds together, as long as an arbitrary position holds, it does; when it becomes too hard, when there is a criticism in the press, in the doctrine and when there are risks of reprimand by the ECHR, then, they anticipate and change their position.

This educational work aims at legal professionals themselves, especially the lawyers who experience their first contacts with the carceral milieu and the academics. Thus, for
example, when a lawyer trained in criminal law, but not prison law, has to defend a client in court, it happens that he asks advice from the OIP. Also, efforts are made to develop a dialogue with many academics to impact directly on juridical knowledge.

Well, it is true that we always have the possibility to influence, through commentaries in the doctrine, a decision, a complaint about a state of fact that will allow the legislative power to realize the problems related to such and such an issue... Then, we try to have an approach of... We can call it pedagogical lobbying, I don't know, depending on where we stand, but anyways, trying to supply some law professors with court decisions, etc. and share our appraisal, etc. and that our appraisal be eventually incorporated in the comments... All of this creates a body of doctrine that influences the way the PA (penitentiary administration) sees itself perceived by the outside world and, especially, by law professionals and this can really be useful.

Finally, some legislative changes can also create secondary effects. For example, a prisoner's right to be represented by a lawyer at the disciplinary tribunal didn't really transform those practices. But the presence of the lawyers, in fact, intensified the exterior scrutiny of the prison, which in turn can sustain the juridical actions.

It even happens that we have lawyers on the phone for a case, and the lawyer takes this opportunity to say: « I am just out of a disciplinary hearing, I saw this today, it is really fishy, etc. ». It happened, even if few of them spontaneously share these problems with us.

This brief look at how carceral cause lawyering is structured, shows the intellectual challenges at stake: it is impossible to limit the analysis of the evolution of rights and practices in prison to an exclusively juridical approach. What is needed here is a sociology of the uses of rights in prison. It is also impossible to limit oneself to criticising the inertia of the institution. A glimpse of those practices is enough to hint at the emergence of a new institutional police whose function is to be put to the test by the law. This legal test is sustained by other kinds of actions: denunciation, mediatization and political subjectification.

In reality, the police and the political spheres as conceptually seen by Rancière are not impermeable. From a theoretical point of view, the networks of counter-power described earlier, disturb the « purity » of the political sphere as presented by Rancière. This is consistent with Nordmann’s criticism: can’t the political also have as its goal, and maybe as its essential goal, the creation of new forms of police? « Relinquishing this aim, we risk being trapped in an action mode that is exclusively symbolic, compromising the demonstration of equality that we want to provide (...) There are no other means to insure a less « bad » police than to demand, through political actions, its reform (...) If one of the major effects of the politics is to transform and inform the police, it is then problematic to claim that the politics is fundamentally different from the police » (Nordmann, 2006, 139-140).

2.3. Innovation as a continual becoming

Innovation represents less the product of a specific transformation than a « becoming », a wish against the intolerable that can serve to organize concrete struggles. Let’s explain here in more detail the utopian perspective that structures the concrete struggles just explored. We will do this by altering the perspective on what is the received wisdom in carceral thinking. How shall we think about the development of a prison police structure that transforms the order of priorities? The belligerent and defensive organisation of the
institution would no longer represent an obstacle to the progress of rights; on the contrary, the rights of incarcerated people would become the immovable obstacle to the security logic in prison. We must then think, with Baratta and Chauvenet, of deepening the concept of security, not so much to make life in prison more fragile, but rather to reinforce an essential type of security; a security defined as the result of a conflict-driven logic (replacing violence) in prison life.

Rather than being kept below the horizon of security, it seems pertinent to think of rights as an instrument of a policy of « global » security, a policy of « rights security » (Baratta, 1999). Baratta suggests this path in the field of criminal policies. It appears possible to transfer his intuitions to the carceral domain. Barratta indeed suggests an epistemo-political transformation of the concept of criminal policies in order to avoid its transfer to social policy in the contemporary context marked by its « efficientiveness » (the depoliticization of criminal and penal issues for the benefits of an efficiency calculus). Security is a concept that should be redefined as « use (…) and effective protection of fundamental rights against all attack or inappropriate treatment from people in any position of power, in fact or in law, in a territory » (Baratta, 1999, 241). Security, the author also writes, refers to the need to be and feel safe in using all one’s rights. This new definition makes security of rights the primary object of the politics, especially in spaces and territories where this security is far from realized. Thus, insecurity in prison depends much more on the action or inaction of the « power in place » than on the bare action of the prisoners. From this point of view, the suspension of rights, justified on the basis of disciplinary sanction or security imperatives, logically means the suspension of security itself (as defined by Baratta). If we can see in these developments a program that weakens the prison, this same perspective apprehends in a dialectical fashion the seeming paradox of its definition and its fragilization effect, since a « policy of social justice and equality can only have positive consequences on [prison life’s] control » (Baratta, 1999, 251). Said otherwise, the protection of rights doesn’t oppose security; it is the main component of the latter.

Chauvenet explains that a prison is fragile and that it isn’t an institution in the sense that it doesn’t institute anything. This fragility is a condition of the violence found within it. On the contrary, the weakening of the prison by a global security policy, the security of rights, is paradoxically the condition of the institutionalization of prison, of its transformation into a space of law and rights. « Prison, as a tyrannical society, is a labile, unstable and unpredictable structure. This fact represents the main cause of violence happening inside prison. One of the characteristics of its tyranny is its fragility » (Chauvenet, 2006). Paradoxically, it is in this deficiency and the radical inconsistencies of the administration that one can see more clearly and cruelly the social and political powers of the prisoners themselves. An article published in the Courrier International (November 2005) on a Malawi prison shows how, in a state of extreme deprivation and overpopulation, the prisoners take charge themselves, in a « civil » way, of their security, of the resolution of their conflicts, of their health. The unpredictability, when it is not pertaining to survival, pertains to the rules. Introducing more predictable rules, the application of which can be objects of complaint by inmates, represents an intensified way to weaken the prison, a way that institutionalizes it and that makes political subjects out of prisoners. The lability of the rules serves the tyranny, even when tempered; the rigidification of prisoners’ rights brings the uncertainty of actions taken and their results both upon the prison and the prisoners. The innovation is more a matter of this
transformation potential than a matter of the recognition of the rights as such. Two concepts are intimately associated with this innovative representation of rights: the production of an uncertain situation (a rights milieu leads to an uncertain milieu) and the construction of the prisoner as a political subject likely to challenge the institution. Paraphrasing Linhart and Moreau de Bellaing, 2005, 279, this happens when the prisoner provokes a situation creating uncertainty about the characteristics of the protagonists, apparatus and the regimes of the prison until their identity stabilizes or characteristics are questioned. In this perspective, what is at stake in the promotion of prisoners' rights is the constitution of prisoners as political subjects, capable of organizing life in detention. The legal interaction is thus normalized – meaning isolated from the penological and security constraints that limit the legal aspects. This in turn responsibilizes prisoners as political subjects (and not as the subjugated) and weakens the prison by making uncertain its despotic working conditions (said otherwise, in increasing, through the law, the demands to justify of its functioning). Ordeals suffered by the prison become, from this perspective, a real political test because uncertainty burdens the prison as much as the prisoner. The legal interaction is indeed a modern conflict-driven relationship. Such a conflict-driven relationship is impossible in prison today, and this impossibility creates violence (Chauvenet, 2006).

One can see, in Baratta’s «positive guaranteeism» theory, the essential and innovative consequence of the concept of dynamic security, meaning a security based on dialogue and conflict rather than authoritarian power, static security and violence. If its instrumentalization is forseeable, Baratta’s proposition forms the basis of a governmental innovation. Somehow, the instrumentalization of rights as a process of subjectivization constitutes the main stake in the next struggle in the infinite dialectic between the political and police powers. This issue was well understood in the campaign for the «General Forum on Prison Conditions» since the goal was to identify, based on prisoners’ own complaints (generated by a questionnaire that inmates enthusiastically completed), the most pressing reforms. This issue – returning to the prisoner his status of political subject- alerts all prison reformists to the contemporary relevance of this old Touareg saying: «Everything that is done for us, without us, is against us».

Conclusion : the policy of rights, a living and uncertain struggle

The weakening of prison, through the creation of a positive guaranteeism, makes thinkable the transformation of violence into conflict and of insecurity into uncertainty. Beyond this speculative suggestion for a radically innovative prison policy and consequently, a less reprehensible one, we have to recall the ultimate legitimacy of a democratic emergence in a given policing logic. This prevents us from limiting thoughts on innovation to the necessity of another configuration, even if it is the basis of a reversal that respects «human rights».

The era of militant democracy generated different polemical versions of the saying: «Men [are] born free and equal in rights». Some «we» took different subjects’ names to test the contestable power of human’s rights, to test the commitment to equality, to ask if human rights are universally applied: if human rights are also the rights of women, proletarians, blacks, etc.

They thus gave human rights all possible power: the power to increasingly ensure equality by arguing on its basis and using it in the construction of litigation cases.
The «humanitarian reign» starts, on the contrary, when universalized human rights are prevented, in a polemical way, from being singularized; when equality stops being interpreted in the argumentation about a prejudice and loses its effectiveness to challenge.

The human quality is not attributed in a polemical way to women and proletarians, to blacks and the damned of the world. Human rights are not experienced as a political capacity. The human «attribute» and «human rights» are simply given to their lawful owner, the «human» subject, without specifics, without mediation. The lawful owner, pure and simple, is then nobody other than the generic victim, final incarnation of the person excluded from the logos, armed only with his voice to express his dull grievance, the complaint of a naked suffering, that saturation masks and renders inaudible (Rancière, 1995, 171-172).

The carceralo-centrism aims to achieve what, with Rancière, we can see as the paradox of the political suppression of the politics. This void has a name: consensus, understood here as the disappearance of conflict, the subjugation of the politics to the police powers. According to Rancière, consensus tends to mask the foundation of the politics: the emergence of political subjects voicing their disagreements with others, in the form of a conflict showing – even in a biased way – its universal breadth. According to us, it is this dynamic and this «universality», beyond its contemporary domestication, that make the prisoners’ rights issue, a living struggle. The critical dynamic of democratic ideas does not require stability. It is partially «usable» as it can facilitate penal innovation, understood here as the emergence of a new prison and penal police; it is also «unusable» in the sense that its essence is conflict, the struggle leading to a dialectic of the politics and the police powers.

The real innovation does not refer to the improbable discovery of the «good prison government» but, to the creation, through the politicization of its operating mode, of the conditions for an uncertain form of government. The prison rationality and mechanisms, like the democratic state, surrender to this demand for legitimate weakening, rather than putting forward a re-legitimization program. The weakening of the prison rests on both the emancipation of the political subject that is the prisoner and on the opening of the prison (or its increasing porousness) (Kaminski, 2002). This ultimate legitimacy of the democratic emergence in a given policing logic prevents us from identifying as an innovation the suggestion of another configuration. And this is so, even if this one brings a reversal in the tendency. For in a democratic logic, the concept definitely remains infused with the necessity for indeterminacy. Such a stake, if we understand it well, makes antithetical the affirmation: «prisoners have to constitute themselves as political subjects» because such a creation is, by nature, indeterminate. Democratic indeterminacy is the condition of the existence of a political subject and of the continuation of the police/political dialectic. In this conceptual framework, the emergence of democracy in prison must be understood as a politicization enterprise. This aims to break the structural domination of the prisoners by shaking, through this politicization, the police logic that underlies, stabilizes and legitimates the prison structure. The struggle is specific, but it arms itself with a universal weapon. It brings together, in a polemical way, the universal – historic – and the specific. The truth of human rights is not associated here with universal and a-temporal characteristics but rather with the historicity of the political structures. The truth of human rights is rather associated with their embodied representatives such as penalty and, in particular, the prison; such as human rights and, in particular, prisoners’ rights.
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NOTES

1. Translated by Uri Ben-Gal
2. The authors wish to thank Hugues de Suremain for shedding light on many aspects of legal militancy in prison.
3. Rights as innovation are then a reversal (or a simultaneous process occurring while the contrary process takes place) well described in his contribution in this Champ Penal/Penal Field dossier by Richard Dubé: human rights have had, at first, the perverse effect of reinforcing the modern penal rationality from the outside; now, human rights change, at least partially, the modern penal rationality from the inside. From the inside of the components of this rationality, there is a struggle, against it, in the name of human rights. On the other hand, Tulkens and van de Kerchove (2005) show how the jurisprudence of the European Court of Human Rights instrumentalizes the convention to serve penal action and its reinforcement. To be respected, the reinforcement of human rights “demands” an increasing penalization.
4. The General Forum on Prison Conditions, held on the 7th of March 2006, aimed at initiating an in-depth reform of the prison system, and more generally, at starting a wide discussion in France on the role and functioning of prison. Directed by Robert Badinter, a former Keeper of the seals, it brought together many agencies: the General Confederation of Workers (CGT in prison), the National Council of the Bars (CNB), Emmaüs France, the National Federation of Social Support and Reintegration Associations (FNARS), the National Federation of the Young Lawyers’ Unions (FNUJA), the Human Rights League (LDH), the International Observatory on Prisons (OIP), the France Lawyers’ Union (SAF), the Judges’ Union (USM) and the National Union of Prison Personnel (SNEPAPFSU). The General Forum also surveyed 15,000 prisoners, almost a quarter of the carceral population.
5. Our notion of police is similar to those used by 17th and 18th century thinkers in referring to anything pertaining to «men» and their «happiness». See Foucault, 1994b.
6. We base our analysis on the work of Bérard and Chantraine (2006), who examine in more detail the specific living conditions (giving rise to this petition) of long-term prisoners.
7. Bishop, 2006. In the same way, rule 50 of the European prison rules suggests that «With reserve to good order, safety and security imperatives, prisoners must be authorized to discuss issues relative to their general conditions of detention and must be encouraged to communicate with the prison authorities on these issues».
8. In this sense, our reflections on penal innovation are not based on systems theory but rather on a “political” reflection. It must be emphasized that this political posture in our contribution is not incompatible with a systems theory approach. It only displaces the focus of the observation in order, in turn, to support it. The goal is to give the stage to social movements and democratic analysis, for they temper the “coldness” of systemic transformations. Therefore, following this hypothesis, there is no mystery regarding the origins of an unpredictable element that would modify the governmental carceral rationality. This element is the incorporated product of a political struggle in the governmental reconfiguration. This democratic process is itself intrinsically unpredictable since the process that characterizes it is itself a reconfiguration of the material world and not just the objective of its functionally optimal organization.
9. For example, a secular project aimed at transforming deviant behaviours through imprisonment; a project whose failure would equal its repetitive reproduction.

10. We base our analysis on Chantraine, Vacheret, 2005, and Chantraine, 2006a and b.

11. Contrary to the confused idea that the possible coexistence of a prison respecting human rights and a prison that imposes its will to correct, there is a primary contradiction between discipline and rights. The goal of transforming people, in a constraining context, generates an unavoidable power imbalance (...) This power negotiation can be full of complexities and deceptions but it can’t avoid its initial configuration: the patient is placed in an artificial context where everything must bring him, whether he wants it or not, to transform his will. [For example], the tension between discipline and the right to intimacy and family life is blatant.

When prison reformists consider the level of isolation likely to induce a reflection on his behaviours by a remorseful prisoner, they clearly determine, in one way or another, the necessary frequency of visits the prisoner will get. If isolation is deemed profitable to the reflection, and the contact with the loved ones a source of corruption, it is logical that the people in charge of correction will adjust contacts with the family according to their logic, and not according to the prisoner’s right to see his family (Bérard, Chantraine, 2007, 51).


14. We won’t see police order defined in this way as a night where “anything goes”. The way Scythians blinded their slaves and the way that modern information and communication strategies, on the contrary, make visible without limits, both refer to police powers. We won’t conclude, in a nihilistic way, that both are equal. There is better and worse police power; the better is not necessarily the one which follows the supposedly natural order of societies or the science used by legislators. The better police is rather the one most often driven off-course from its “natural” logic by the fractures of the equality logic (Rancière, 1995, 53-54).

15. On the topic of November 2005’s revolts, see the article published by J. Rancière, in Libération, on the 18th of January 2006; on illegal aliens, see J. Rancière, in Mouvements, in March-April 1999, 134-135. For a criticism of those positions, see, Nordmann, 2006.

16. We won’t see police order defined in this way as a night where “anything goes”. The way Scythians blinded their slaves and the way that modern information and communication strategies, on the contrary, make visible without limits, both refer to police powers. We won’t conclude, in a nihilistic way, that both are equal. There is better and worse police power; the better is not necessarily the one which follows the supposedly natural order of societies or the science used by legislators. The better police is rather the one most often driven off-course from its “natural” logic by the fractures of the equality logic (Rancière, 1995, 53-54).


18. Even if Howard Becker’s conceptualization is ironic and critical in the first place, its heuristic power nevertheless allows us to use it in a neutral sense. Let’s recall here Becker’s simplest definition: “Norms are the products of some people’s initiative, and we can consider the people who take such initiative as moral entrepreneurs.” (Becker, 1985 [1963], 171).

19. “The CPT is in charge of preventing [torture], producing general reports, making recommendations and engaging in discussions with states. We [at the ECHR] have a judicial and repressive function. The demands are different because the court must make, in specific cases, decisions entirely based in law and fact” (Tulkens, 2006, 25).

20. On this general dynamic, let us quote F. Tulkens one last time, about the ECHR: «In Semoulin against France, 28th of July 1999, the tribunal qualified as torture, for the first time, events that happened in a police station. The decision specifies that the increasing demands regarding fundamental rights brings acts described in the past as inhuman and degrading treatment to now be described as torture. Acts that would not in the past be covered by article 3 are now covered by it. This decision is often used to justify the fact that we have to progress in protecting human rights» F. Tulkens, 2006, 25.

21. For OIP, it is the case, for example, that when the «General Forums of prison conditions» were taking place, the event culminated with the demand to promulgate a real prison law, capable of protecting the fundamental rights of prisoners.

Regarding this, Mathiesen suggests that we carefully understand the «victories» of the historical abolitions: the abolition of slavery (for example) constituted an innovation; it displaced and renewed the manifestations of racial discrimination: each innovation is part of an
historical process, and for this same reason, a stake in the infinite and always renewed political struggle (Mathiesen, 1990, 159).

RÉSUMÉS

Contemporary prison sociology remains largely skeptical regarding the true impact of the development of prisoners’ rights on the management of carceral institutions. On the one hand, the relative consolidation of prisoners’ rights is unable to undermine the security imperative of the institution: privileges are transformed into formal rights, but exceptions justified by the security imperative retransform those rights into privileges. On the other hand, this consolidation does not put an end to the disciplinary mission of the institution but is, on the contrary, a source of its revitalization. This dual critique, whose general framework will be further detailed, allows one to understand the strong inertia of the institution. However, it does not offer a relevant framework to observe the actual uses of the law during detention. Pioneering a sociology of cause lawyering inside the prison, the present contribution explores the ways in which different juridical resources are mobilized to hone the political struggle against arbitrary actions in prison while simultaneously reinforcing its social legitimacy. Within this framework, “penal innovation”, that is to say, a prison that would respect all human rights, constitutes less the result of a specific transformation than a becoming, an aspiration against the intolerable by which concrete struggles can be organized. The empirical observation of the ratchet effect between various types of action (political subjectivization, administrative appeal, media denunciation) sustains an appropriate theoretical discussion. This discussion demonstrates that the mutual exclusiveness of the concepts of “police” and “politique”, (“the politics”) as Jacques Rancière philosophically puts it, does not permit one to fully grasp the complex dynamics of contemporary democratic struggles.

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