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Review of the “Privatization” of French Prisons

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Rule of Law, The Managerial State Review of the “Privatization” of French Prisons

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ABSTRACT. – This article reviews the controversial process of privatizing one part of the French carceral system during the 1980s. It returns to the origins of the project, then to the resulting parliamentary battle. The ambition to produce a complete privatization is seen to relent to a partial concession, apparently superficial, correlated to a programmed expansion of the prison system’s capacity. This episode is a major milestone in the diffusion of economic thinking through the penal system. Beyond a legal redefinition, the argument is that this event primed the actualization of a political rationality that adapted the rule of law to managerial thought processes.

KEY WORDS. – prison, prison policies, privatization, State, rule of law, neoliberalism

RÉSUMÉ. – Cet article retrace le processus controversé de privatisation d’une partie du système carcéral français au milieu des années 1980. Il revient sur l’origine du projet, puis sur la bataille parlementaire à laquelle il a donné lieu. L’ambition d’une privatisation intégrale a laissé place à une concession partielle, apparemment superficielle, corrélative d’une expansion programmée du parc pénitentiaire. Cet épisode est un jalon majeur de la diffusion du raisonnement économique dans le système pénal. Par-delà un recodage juridique, l’argument est que cette épreuve a amorcé l’actualisation d’une rationalité politique réglant l’État de droit sur le raisonnement gestionnaire.

MOTS-CLÉS. – prison, politique carcérale, privatisation, État, État de droit, néolibéralisme

Introduction

It is the 19th of November, 1986, we are in the heart of the Senate. The location is not famous for uproars and furious confrontations; yet the parliamentary debate occurs with a significant intensity-disagreements, accusations, defensive parries and rhetorical counter attacks. From among those who oppose the legislation, a senator denounces the project as “liberal, carceral, immoral”, designed to “create a business” out of public safety, completely betraying the meaning of social indicators: “For you, the swelling of prisons and the rate of recidivism have a new meaning. Formerly seen as symptoms of a certain failure of society, with this project, these indicators will now mean success.”¹ For another senator, this legal project is a “grave menace to the future of our society and republican values”, indeed for human dignity: “Certainly, nothing will escape this infernal machine, from this inhuman logic”. “Liberalism”, that is to say the primacy of money over man in all domains, is truly a calamity for our society and our country; it is very much a step backwards for our civilization! (...) By legalizing commercial speculation within a marketplace of crime, the Senate would be embracing a heavy responsibility in the face of History...”². Whether or not we can suspect some of this to be bombast, the stakes here would not seem to be insignificant. Several months later, in the Assembly, one can confirm the strength of the hostility towards a project judged by its opponents to be “unconstitutional, costly, immoral, harmful, insane”³.

This legislation, which contains so much danger and arouses so much passion, presages a “privatization” of the French carceral system. The interference of private entities within the world of detention immediately after the change of government in 1986 quickly came to be seen, among the protagonists, for or against, as “revolutionary” within the prison system. A former technical advisor to the minister of justice in the proceeding government, reticent with regard to the project before ratifying it, thus characterized the event: “A first in France and in the world. Never before had a program of such scope, audaciousness and innovation undertaken the management of a public service moreover, with the blessing of the state. It is the result of an extraordinary political and industrial battle (...) For the first time in its existence, the prison administration had to question itself” (Thibault, 1995, 10 and 205). Fifteen years later, a former assistant manager in the central administration speaks of a “Copernican revolution”⁴. Yet, if there is an institution that one might not suspect of being subject to revolutions, one that relentlessly returns to its points of origin, it is surely the prison. The issue thus merits study.

The quotation marks surrounding the idea indicate that the definition of “privatization” is itself a fundamental stake in the political confrontation. This engages actors in a struggle for the legitimate qualification of the event, while at

1 Jean-Luc Mélenchon, in Sénat, « Débats parlementaires », Compte rendu intégral de la séance du 19 décembre 1986, Journal Officiel de la République française, 6425 et 6459. To avoid a boring system of notes (and expensive in characters), only those citations relating to parliamentary debates will be referenced. After the first occurrence, the document will be abbreviated as SE (Senate) or AN (National Assembly), followed by the page number. We will focus on the session of the first reading in the Senate, over the course of which the whole of the argument is mobilized in the the struggle, before the bill will be definitively reshaped; the first reading in the Assembly in the Spring of 1987 is thus reduced to the minimum. The names of the principal protagonist will be indicated once, without necessarily being specified after.

2 Hélène Luc, SE, 6440.

3 Philippe Marchand, in Assemblée Nationale, « Débats parlementaires », Complete report of the session of May 5, 1987, *Journal Officiel* of the French Republic, 874.

4 Interview with Isabelle Gorce, 18.11.2003. I thank her here for her availability.

the same time, they try to have their interpretation of the causes and foreseeable consequences prevail, as well as the importance, and valuation⁵. The “delegated management” of prisons is recognized after the change in 1988, at the cost of a modest restriction in the size of the project, eventually becoming the “13,000 program”. The breach will never close again. In 2001, the renewal of contracts with privatized establishments did not arouse any public backlash, as though an irreversible effect had been imposed, locking in place the relations of power.

A part of the story had been shown by the socio-technical organizations attached to the program (Callon, Akrich, 2004). From another point of view, we will consider the controversy that preceded it, particularly in the parliamentary context, before outlining several of its repercussions. In spite of the constant decline of Parliament during our regimes, above all in the penal domain, where it has basically been reduced to a “ratification phase “ (Robert, 2005, 52), the parliamentary arena merits double the attention. On the one hand, it remains a place that is clearly decisive in the handling of public affairs; on the other, the event took place 15 years before deputies and senators, through two overwhelming reports of inquiry, made public their indignation and qualified the prison situation as a “shame for the Republic” (Senate, 2000)⁶.

It is not a question here of adopting a diachronic perspective extending until the present, that might greatly exceed a chosen format; neither to identify a gap between the prescriptions of the program and the modalities of its application—since the gap is presumed to be sociologically irreducible (Lascoumes, 1990); nor to conduct an evaluation, which is the business of administrators – we can refer to the conclusions of a report of the Revenue Court from 2006⁷. The goal is rather to revisit a controversial episode from recent French prison history, and through it to outline the political rationale of which it is an expression. The face of rule of law today constitutes the inescapable horizon of the prison condition; but if we take note that its definition does not derive from any essence, that it is interdependent with the mutations of the exercise of power, it remains to search out the evolution of its assumptions and its meaning.

The push in favor of privatization shows itself to be problematic in relation to the prerogatives of sovereignty. The state actively renounces certain responsibilities, which it transfers to private agents. They may appear negligible in the sense that they only concern *intra-muros* logistics and supervision, not affecting the fundamentals of the power to punish. But, the limitation of this field of application is the result of a phase of uncertainty, not of its point of departure. From then on, after an eclipse over the course of a twentieth century marked by the takeover of prison functions by the state, the return of private actors to the

5 To highlight this symbolic struggle in the description, we will sometimes speak of “private” or “semi-private” prisons, sometimes of “prisons of mixed management” or of “delegated management”. The two last designations have more or less imposed themselves; nevertheless, the first remains (with quotation marks) a common shortcut, including in the bureaucratic literature.

6 If these two parliamentary reports have merit, it is that in officially agreeing to recognize the situation as intolerable, they draw a minimal critical threshold, a denial of which is no longer credible.

7 Revenue Cour des Comptes, *Garde et réinsertion : la gestion dans les prisons*, janvier 2006. These conclusions are, to say the least, dubious. The Revenue Court deplors the shortcomings in the supervision of mixed management, as well as the absence of a rigorous comparison to public management. Furthermore, it doubts the validity of the economic arguments. The assessment of this experience is obviously itself the object of disagreement. For the central administration, mixed management is thus “considered a positive datum” (Administration pénitentiaire, 2002, 158). The parliamentary reports of 2000 also assess this experience with a critical eye. For an outline of different points of view, see Lafarge, 1997; Delagarde, 1997.

heart of the carceral function can be read as a *test of the State* (Linhardt, Moreau de Bellaing, 2005).

In this test, the contours and functions of political authority which pretend to the quality of a rule of law are momentarily destabilized and discussed. This uncertainty is expressed by the presenter of the first version of the project of the bill: “The professional training that we can provide within a penal establishment, the treatment we can dispense or what comes with it, do they derive from the authority of the state? Is the guard who accompanies a prisoner to the clinic really exercising part of the authority of the state? It is not certain! (Mutterings among the socialists)”⁸. The result of the test involves an adjustment of the conditions of conformity of the prison to the State of Laws⁹, while the latter, devoid of essence, is itself re-defined as a result of the test. In this case, the rule of law aligns itself with the “spirit of managerialism” (Ogien, 1995).

1. The Ambition To Achieve Full Privatization

The ideal of the new Minister of Justice, Albin Chalandon is the complete privatization of a part of the prison complex. The justification for this design rests on the formulation of a characterization of the situation, the harms suffered and the remedies requested, which he tries hard to publicly accept. He presents it as a dead end while promoting himself as knowing the unique manner of exiting from this situation.

1.1 *Formulating Fate*

“I implement a reactionary and repressive policy”¹⁰. The explicit orientation of the minister is embodied in the toughened penal approach of his government. The Right claims to remedy the laxness it imputes to its predecessors, especially on the penal front. The period of maximum preventive detention is brought to 30 years, the possibilities for reducing sentences have diminished, a directive encourages more zeal from the prosecutors. Chalandon was quickly seized by a “prison question” which he perceived and described in classical terms according to the following dilemma: how to reconcile the repressive inclination of the government he was a part of, that he held as being indispensable to the well-being of the social body; the primary objective of secure management of prison facilities, where above all it is important to be certain of an absence of disturbances; with a minimal respect for the principles promoted by the “State of Laws” which is contradicted by everyday carceral reality, creating the potential for crisis? Indeed, the situation in the remand prisons (*maisons d’arrêt*) is unanimously seen as dramatic. There are 48,000 people crammed into 32,500 places, being a rate of occupation of 150%; at Lyon and Marseilles it has reached 400%. The derogation from minimal norms

⁸ Marcel Rudloff, SE, 6426. The controversy is both about the obligations towards what the State should be and about the type of carceral structure that can be put into place. There thus exist two opposing constraints in relation to new establishments: some fear that a pure security logic would prevail to the detriment of prisoners’ rights while others believe that infrastructures that are too “permissive” would result and vitiate the necessary containment.

⁹ Naturally, these conditions have no ontological constancy and vary based on the relations of sociopolitical forces. Furthermore, as is, everyone knows that the prison does not answer them at all; the testimonies are sufficiently numerous and solid to demonstrate that. Therefore, we do not speak here of the gap between norms and the reality of practices; we try to understand the political rationality at work.

¹⁰ “I implement a policy that is reactionary and repressive. Reactionary because it is a rupture from the dominant mentality of the past 20 years. Repressive because prevention, care, reintegration, only have chances of success if penal sanction is effective, if the rules of the game are clearly defined, which is not the case anymore” (cited by Thibault, 1995, 17).

regarding the treatment of prisoners is flagrant, and this is just from the juridico-humanitarian perspective.

Yet, according to the minister himself, the penal orientation of the government allows us to predict a continuing, an increased rise and even an acceleration in detentions. This increase would signify the generalization of unacceptable conditions of crowding and thus the confirmation of the fictitiousness of re-integration and the creation of a potential explosion in prisons. The administrative literature attests to the fact that the political and administrative decisional actors share the idea that “the penitentiary system is in a state of prolonged crisis”¹¹. They fear the repetition of the revolts of the 1970s: in May of 1985 revolts occurred in many remand prisons, particularly in Fleury-Mérogis and in Montpellier. The chronic discontent of prison personnel was another element of worry for the management. The momentum for reform is thus motivated by the recognition of an extremely perilous situation, in the worst case, or, an unfortunate institutional dysfunctionality at the minimum, based on the claimed “inevitability” of an ineluctable increase in the use of imprisonment.

The Minister of Justice is hostile to pardons and collective amnesties, decompression techniques that he despises for their artificiality (as opposed to a penal policy presumed to be “authentic”) and their effect in weakening the intimidation exercised by the justice apparatus. More generally, repudiating the “anti-carceral policy” attributed to his predecessor Robert Badinter, he intends to profoundly transform a penitentiary system known for its fundamental inertia, in other words, to at last create a rupture which the socialist governments never achieved. Indeed, just looking at the quantitative aspect, the carceral overpopulation has not diminished in spite of many waves of releases¹². Moreover, the Minister of Justice has a positive view of the privatization of penitentiaries in the U.S.A., where many representatives had been sent. While he was Minister of public works, in the early 1970s, he was involved in the privatization of the roads and highway sector, which serves as a reference for him. He gives the private sector a presumption of rapidity, economy and reliability, and bets on emulation – in other words, comparison/competition with a public administration that he considers sclerotic. Chalandon consequently chooses the extension and privatization of the prison capacity.

1.2 *The Project for “Total Concession”*

If his way of posing the problem created consensus in his camp, it didn’t go that way for his ambitious project. The minister clashed with *the general skepticism of his cabinet* (Thibault, 1995, 83) when he informed it of his intentions in April 1986. His collaborators did not see how to reconcile the economic/managerial approach with the juridico/institutional one. At the end of the month, the Minister of Justice organized a press conference, and charged the administration to work on a legal project authorizing an appeal to the use of private enterprises. The uncertainty of the situation then created doubts and anxieties: until what point would the minister cede the state monopoly of a public power, one within a domain as morally charged as the imprisonment of people?

The outcome of the partisan battle makes us forget that at the start, the objective was the creation of entirely private prisons, including the functions of management, offices and surveillance. A history of the program states: “it was then

11 Ministère de la Justice/Délégation pour la réalisation d’établissements pénitentiaires, *Nouvelles prisons – le programme 13 000*, juin 1991.

12 The number of entries into prison is on average as high between 1981 and 1985 as in the periods before and after, to which is added the extension of the average duration of detention (Tournier, 1996, 42).

envisaged as entrusting private operators with the responsibility of financing, conceiving, constructing and managing from 25,000 to 30,000 new places, constituting prisons in which all the management, including the administration and the surveillance, would be entrusted to the a private enterprise (...) Thus, the idea was based on completely conceding a public service mission to the private sector. It was new and shocking for the services of the Chancellory, and especially for the prison administration”¹³.

An essential component of the creation of a market society is in the making and, allows us to recall with Polanyi the futility of plans for the freeing and the autonomization of a natural marketplace. On the contrary, it is historically *the consequence of a conscious and often violent intervention of the State, which imposes market organization upon society for non-economic ends* (Polanyi, 1944, 321). The initial trajectory is thwarted. Commenting on this matter in 2000, Chalandon repeated his regret at not having been able to achieve a “complete privatization”¹⁴.

2. The Stabilization of Power Relations: a “delegated management”

A political battle emerges, in the course of which the legal project is substantially modified. Without aiming at the exhaustive review of the nuances of the rival arguments, we can take note of the principal criticisms and justifications, as well as several of the normative concepts and rhetorical tactics of the protagonists. For this, we place the accent upon the spaces between the definition, that is to say, the operations of (dis) qualification to which they devote themselves, as well as the concurrent definitions of the situation they express.

2.1 Repetition

The controversy surrounding “private prisons” did not develop from a protest of the opposition in the parliament, it was initiated in September 1986 by the publicization of the issue in the press. On the left, the opposition of the Union of Judges was expressed by its president. According to her, the Chalandon project ignored the structural determinants relating to the increase in the number of prisoners, an increase which pecuniary business logic would reinforce. Deploring the silence of elected politicians, she refused a program that amounted to a “simple application of liberal management logic”¹⁵. The criticism thus went beyond not just the issue of legal feasibility, but also that of sovereignty. In reply, Chalandon regretted the “absence of reserve” and the “politicization” of the magistrature¹⁶. For their part, the prison staff unions opposed the project, with the exception of the FO, whose corporatist connections with the administration were notorious. The CGT refused any form of privatization, including those of management functions¹⁷.

Among the supports counted were most of the high administration personnel of the penitentiary administration. They repeated the main justifications of the program: the need to slow prison overcrowding without the limit imposed by the absence of public funds¹⁸. The professional association of judges, on the Right, strongly supported the initiative: it would support a version of the project that

13 DAP, *Programme 13 000*, October, 1990.

14 National Assembly, 2000, I, 432.

15 « Prisons : non à la logique de marché », *Le Monde*, 26.09.1986.

16 On this proven technique, cf. Roussel, 2002.

17 « Sept syndicats pénitentiaires refusent de discuter », *Le Monde*, 26-27.10.1986.

18 « Les cadres de l'administration pénitentiaire sont favorables au projet Chalandon », *Le Monde*, 25.10.1986.

moved even faster and farther¹⁹. According to the association, the bill provided all necessary guarantees, especially since the minister affirmed that “the use of force and disciplinary functions would in all cases remain an exclusive prerogative of the State”. The declaration contradicted the initial intentions: indeed, the project for complete privatization set forth at the Senate on November 19, 1986, was appreciably changed by the commission of laws. For this commission, the clerk’s branch and enactment of disciplinary measures would not be conferred upon private actors. The text debated at the Senate exactly one month later was thus already the result of a compromise, in the sense of a temporary state of power relations.

The Senate discussion promised to be stormy, given the position taken by the socialists two days earlier in the media. Gilbert Bonnemaïson, assigned by the PS to security issues, wrote and printed 10,000 copies of a *Manifesto Against the Privatization of Prisons*, symbolically subtitled *The Walls of Money*. He protested a legally and morally reprehensible “business of freedoms” as well as a “market of financial dupes” who would overestimate possible savings. Reaffirming the priority of prevention over repression, Bonnemaïson condemned a “paranoia of detention” connected to the “freezing of penal policy”²⁰. In short, as the counsellor deplored, the text was “controversial before being known”²¹.

2.2 The Parliamentary Confrontation

Prison, although irreplaceable, did not reintegrate and punished poorly, claimed Chalandon before the senators on November 19, 1986. The remand centres and short term holding prisons were overpopulated and justice disordered, continued the minister, occasionally quoting Tocqueville. The rate of detention in France was claimed to be lower than that of its neighbours, in order to render “logical”, a phenomenon of “catching up”. The Minister of Justice added that despite the “clearly displayed anti-carceral policy” of his predecessor, the number of imprisonments did not stop increasing, from which arose the reversal of the accusation of a “paranoia of detention” towards his adversaries.

The discourse of the Minister of Justice attempted to both suggest the boldness of his commitment and to portray his interpretation of the situation as being the obvious one, recognizable to any reasonable person. Anything that could evoke discord, conflict and choice- in short, politics-was repudiated: “It is not an ideological problem, as some say today, but rather a situation of fact”²². To “necessity” answers the repeated motif of “pragmatism” and a shared common sense. “This reform belongs neither to the left nor to the right; it belongs to France and only to France”, thunders a senator from the right²³; “this bill characterized by what we call pragmatism and common sense, simply because it answers practical questions”²⁴, said another in a self-congratulatory tone. We find here the process of “depoliticized political discourse” that naturalizes the social order, “the denial of political struggle as struggle” based on the promotion of weighting, which is

19 « "Chalandon, tiens bon, la justice retrouve la raison" », *Le Monde*, 9.12.1986.

20 « Les socialistes contre le "commerce des libertés" », *Le Monde*, 17.12.1986.

21 SE, 6424.

22 SE, 6422. Further on: “I want to emphasize to you, that in light of everything we have heard on this subject: the prison with clinical support which I propose for that purpose is neither the result of some intellectual fantasy on my part, nor of I don’t what kind of ideological choice, as certain newspapers do not hesitate to pretend. It is simply the effect of a necessity for which I sought a pragmatic response, all while preserving a permanent interest in reconciling effectiveness while strictly maintaining the sovereignty of the State over the prison system” (6423).

23 SE, 6454.

24 SE, 6458.

confused with neutrality (Bourdieu, 2001, 192-193). The political problem is willingly retranslated into terms of deprivation, retardation, and archaism.

The minister made explicit a central assumption: the expectation of an increase in crime, “thus” an extension of the prison infrastructure. According to him, it was necessary to create 40,000 new spaces, of which 25,000 were described as having delegated management. As a means of assuring this construction, he deemed the recourse to the public sector “unrealistic”: too expensive, too long. The French, according to this spokesperson, are by no means ready to accord the necessary priority to prisons. The appeal to the private sector had thus become “the only means”. A fact created from scratch served here again as a justification: “We all know that the private sector manages better than the state”²⁵ A binary distinction supported the assertion: on the one hand “adaptation”, “flexibility” and “imagination” for the private sphere, on the other hand, the “well known” sclerosis of the state. What is more, the minister painted in glowing colors the creation of potential employment. Mostly, he did not conceal that the entry of private actors had intended to put pressure upon the prison administration and to introduce a dynamic of concurrence in the execution of punishment. The ambition displayed was not restrained (carried out in half-measures), and attempted to immediately deflect criticism relating to security: “beyond the discourses and hollow declarations of intent that one hears daily (...) thanks to prisons with delegated management, we will achieve a veritable revolution in the way of life in the penitentiary: we will create prisons of a new type, which will be much more favorable towards the re-integration of prisoners”²⁶. “Rigor, imagination, generosity” this triad forms the foundation of this discourse. Among the types of justification mobilized, that of categorization is pre-eminent: it is emphasized that the area concerned is a public service rather than the use of the sovereign power to punish. The minister thus did his best to prevent discord: the administration is not the responsibility of the State, “no one tries to dispute it”- yet that is precisely the situation. The senators of the opposition would, to different degrees, attempt to cast doubt upon these obvious facts.

If the senators are united in lamenting the disastrous state of prisons, the opponents of the project were rapidly being heard. Their critics simultaneously presented themselves as legal, economic, social, moral, while if need be, exhausting themselves trying to unify these aspects. The legal discord emerged around the principle of equality before the law, threatened by the institutional dualism of the administration of punishment. The Declaration of the Rights of Man and the jurisprudence of the constitutional council were enlisted in the two camps. For those opposed to the bill, it was necessary to “safeguard essential principles of the State of Law”²⁷. Dividing the carceral system, the stimulus of profitability demolished the values upon which rest public service, menacing the respect for rules and procedures²⁸. In the same perspective, the entry into prison of private, non governmental agents, submitting to divergent professional logics and loyalties, again risks creating a greater gap between written norms and their effectiveness, to the detriment of the slim resources allocated to resocialization.

Aside from a doubtful legality, the opposition railed against the immorality of a bill that reflected the promotion of the mercantile spirit in all areas. “The business class is salivating” frets a senator²⁹. Another, angry, connected the legal and

25 SE, 6423.

26 SE, 6424.

27 SE, 6437.

28 “It is not possible then to create two categories of prisoners without breaking a fundamental principle of our law” (Jacques Pelletier, SE, 6444).

29 SE, 6428-6429.

economic dimensions and shouted at the minister: “in reality, it’s because your bill serves the bulimia and financial hunger of capital that, Mister Minister of Justice, you have allowed yourself to neglect the rules of law that I recall and the prerogatives of public service”³⁰. The critique is double: not only is the introduction of money into public punishment unacceptable, but on top of that, the government was accused of grossly exaggerating the savings achieved for the taxpayer, if not to fool public opinion. Charles Lederman mocked the minister, telling him to take back his words and characterized him as a “manager”, he liked to question his marketing sense³¹. According to another parliamentarian, to adopt this bill that is “contrary to the fundamental principles of our Republic” would have been equivalent to ratifying one of these “retreats of civilization” to which liberalism is supposed to possess the secret³². Inversely, the supporters of the bill referred to the same imprecise federative concepts, such as “human value”³³.

Moreover, the opponents of the bill applied themselves to bring to light the contradiction contained in the strange admission of the government: by postulating the irresistible growth of both crime and incarceration, it discredited itself. It revealed in advance the ineffectiveness of its economic and social policy, as well as its criminogenic potential. It was not only its repressive myopia that was questioned, but there was also a recognition that the government was creating insecurity. According to this argument, the government had already admitted its failure and that its appetite was for repression only; its speculation, which wagered on the degradation of the social situation” appeared to be “humanly and morally inadmissible”³⁴. The dangers of “the carceral solution” were singled out, it was the case, at least, of the inflationist logic that drove the bill. An opposition senator observed that mercantile logic presupposed that the interests of the warden of a semi-private prison would see to it that his facility was always full, even having a slight overpopulation³⁵. In short, the privatization of prison would not solve the problem but rather would nourish it. To dramatize the claim, diverse historical analogies were mobilized: “Your 15,000...30,000 extra places in prison are the Munich of security!” exclaimed Bonnemaïson at the Assembly in the Spring of 1987³⁶.

Moreover, the opposition blamed the government for directing a hasty parliamentary procedure, in order to easily pass a contentious bill without a public debate. It insisted on the lack of will of the counsellor to suggest a reworking of the bill, as well as his silence on the questions raised by the preparatory hearings, he conducted with the observers from the U.S. system, among others. Such maneuvers would betray the “government’s fear of democratic debate”³⁷. Even more, these methods would prove that the Senate “does not hesitate to comply and salute the government when the political situation and class interests of the

30 SE, 6437.

31 SE, 6434.

32 SE, 6438.

33 “Trying to hide behind the Constitution in order to preserve stagnant and archaic institutions, is to reject progress and to underestimate the greatest value: human value” (6453). The same senator later puts forward “the star that is humanity” (6454).

34 Mélenchon, SE, 6459 and Lederman, 6434.

35 The more full the prison, the better it is for the shareholders” (SE, 6459). The senator adds that it is not even a good application of economic liberalism principles, because the Chalandon project ends in the creation of a captive market that is falsely competitive while instituting a prison lobby.

36 AN, 848.

37 This accusation cannot be separated from a contextualization made by the protagonists. They entangle the carceral debate in the student mobilizations on the one hand, and in the risk of terrorism on the other (a wave of attempts), both in the news of 1986.

bourgeoisie demand it”, thus showing contempt for democratic mechanisms³⁸. The prison debate was thus enlarged and linked to the whole of governmental activity. The opposition pointed out a double interest- financial and political: “Financial for the few groups that will share this pie of misery and unhappiness; political for the supporters of liberalism who here engage in an arm wrestle with the social interest (...) Everything is thus conceived so that the State, because its asserted policy of security, but also by interest, plays the propagandist for the private prison service and becomes, in fact, the most important instrument of accumulation, by private interests, of profits made on the backs of the prisoners”³⁹. If the bill passed, it would be a victory not for a simple law, but rather for a general law: “the law of the strongest, of the richest!”⁴⁰. For Jean-Luc Mélenchon, this project was the equivalent, like the policies of the government are, of a “cultural revolution”⁴¹.

Other types of arguments were presented at the stand. A member of parliament recalled that repressive action by the State does not operate in an egalitarian fashion, instead aiming particularly at certain populations, firstly at foreigners and drug addicts. She attempted to simultaneously connect the penal situation with the economic crisis, to the employment situation, to social inequalities⁴². As well, the idea asserted itself that it would not be about an outcome, but about a decisive stage of inversion calling forth other state resignations. From this premise stemmed the fear of the return to private police. The left wing senators then pleaded for a penal policy that would be “true and just”, that is, a thinning of the prison population, (for example, by limiting entry into provisional detention, the number of defendants reaching only half of the number of prisoners), to limit the recourse to imprisonment, to actively support alternative sentences, to focus upon prevention, etc. Since government had a significant majority at the Assembly, the attempts at procedural opposition (motion of inadmissibility, previous question, motion of dismissal at the law commission) made by the socialists and communists groups were widely rejected.

What were the tactics of counter attack adopted by the minister, the counsellor, and the senators of the majority, aside from challenging the use of the terms “privatization” and “private prisons”? One of them consisted of accusing the bill’s opponents of resistance to progress, even complicity with the current troubles, based on the idea that “anything, anything, anything would be better than the current situation!”⁴³. Rapprochements between opposing positions were effected to show a partial consensus: thus, the SM and the APM had a “common belief”, that there was an intolerable situation that had to be changed by all possible means. For Chalandon, the alternative “consists either in adopting these dispositions, or in doing nothing...”⁴⁴; there was therefore no alternative. The opposition was accused of being biased and dismissed as proponents of empty speech, against which the minister contrasted the action which he carried out; above all, the opposition was denigrated for maintaining a disastrous state of affairs due to a fecklessness with regard to progress. The refusal of the bill was juxtaposed against the acceptance of the then current calamity and condemned in its own right as shameful and

38 SE, 6439.

39 SE, 6440.

40 SE, 6440.

41 “As a liberal, it deregulates and creates the social disorder that results in the free exercise of the rights of the strongest. In his carceral function, it imprisons all those whom the cruel disorder has expelled from the social world. Being immoral, it organizes the continuity of commerce in every place and circumstance. It makes financial result the measure of good and evil” (SE, 6459).

42 SE, 6456.

43 SE, 6425.

44 SE, 6432.

regressive: “Your approach, gentleman of the opposition, is to refuse to adapt”⁴⁵. Moreover, the partisans of the bill rejected the idea according to which the State surrendered one of its most essential missions, from which derived various distinctions: we must not “confuse the role of the State, the action of the State, with the narrow dogma and sectarianism of statism”, even the “frenzy of statism”⁴⁶. As such, the idea of opening up of the “total institution” to the private actors who then played the role of third parties between the administration and the prisoners served as a legitimizing argument.

Another symbolic maneuver was to divide up the problems that the opponents of the bill linked together. The counsellor Rudloff tried hard to cleanly isolate the legal and economic problems, something which the senators Lorident and Lederman contested⁴⁷. Chalandon wanted to promote the idea that the sole obstacle, a surmountable one, was of a constitutional nature and not a socioeconomic one. The minister also accused his opponents of lying when they claimed that he neglected alternative sentences. He also denied, therefore suggesting a certain degree of amnesia, any notion of sovereignty being delegated: “There was never a question of delegating, even the smallest amount, the sovereignty of the State in this domain (...) The State is the master of its prisons...”⁴⁸. Contrary to the project re-written by the commission of laws in the Senate, the State preserves the functions of surveillance, clerk’s branch and enactment of disciplinary measures. In short, no “violation of the republican tradition”, nor “breach of the sovereign power of the State”; the minister even recalled the role of private actors in prisons during the 19th century⁴⁹. At the same time, the singularity of the program in Europe was mentioned, as much for its partisans (who insisted on its innovation) as for its detractors (who emphasized French isolation)⁵⁰. Depending on necessity, then, the arguments were reversible and the size of the project expanded or contracted accordingly. The novelty of the bill was affirmed, and then in relation to the accusation of archaism even under the cover of modernity, it was presented as not so innovative, a simple measure of common sense of which there was no reason to be afraid.

3. From Legal Framing to Managerial Logic

The guiding intentions relating to the “inevitable revolution in the world of prisons”⁵¹ were thus largely reassessed downwards, quantitatively and above all, qualitatively. To such a point that during the debate at the Assembly in May 1987, the deputies from the opposition reversed the basis of their criticism. Rather than a danger to be averted, they attacked the “emptiness” of a project that had become pointless. Regarding the number of places, it had fallen from 40,000 to 15,000,

45 SE, 6454.

46 SE, 6457 et 6458.

47 SE, 6427.

48 SE, 6424.

49 Historians have shown the influence of the business model upon the prisons of the 19th century. The remand centers functioned like labour barracks, where the State “did its best to pay the least amount possible to the speculators in charge of the daily management of the prisoners” (Petit, 1990, 376), the life of the prisoners being partially adapted to the quest for profit by the local entrepreneurs.

50 In the UK, which is the current bridge-head in Europe for carceral privatization, the idea really only appears after the Woolf report of 1991 (Sparks, 1994). “No where in Europe do private prisons exist”, declares a deputy favorable to the initiative (SE, 6442).

51 AN, 841. The minister often declares: “the prison revolution is being accomplished, thanks to an effort that France, champion of human rights, could not postpone any longer” (*Nouvelles prisons – le programme 13 000*).

before stabilizing at 13,000 in 1988. Meanwhile, the law regarding the “prison public service” was adopted on June 22, 1987. It legalized concessions granted to six private actors: lodging, restoration, transport, health, work and training; this involved twenty-one of twenty-five of the prison built institutions⁵². Moreover, it became a point of reference, a basis for a prison law whose failures were notorious. Through this law, which transformed political discord into a legal problem, a sort of “publicization” that seemed like an alibi became connected to the process of “privatization”.

The prison public service law was firstly a technical maneuver designed, by virtue of constitutional benediction, to remedy to the non conformity of the bill in relation to the code of public markets. It proceeded simultaneously through two concomitant symbolic transactions. Firstly, a requalification of a quintessentially sovereign institution as “public service”. What we can denote, stretching Goffman’s idea, as a reversal of an institutional stigma, can be understood as a sign of the statutory banalization of prison within the core of the State’s panoply of instruments of social control, with reference to the creation of fear attached to the punitive function. The law claims to create the end of a system of exception. At least symbolically, prison was back into line; it joined an administrative category that was recognized as positive alongside institutions deemed most welcoming. Secondly, the bill was presented as a significant milestone in the integration of the carceral system within the values and norms of the rule of law. However, it remained vague and timid, speaking only of “favoring reintegration”, after the participation of the prison in the maintenance of public order⁵³. Furthermore, this framing was of little consequence, in the sense that there were no sanctions foreseen in case of any breaches of the law (especially on the principle of resocialization), those not being defined.

One could add that even on the only level of the written norm, and to the difference of the German prison law adopted ten years earlier⁵⁴, in relation to which it remains in retreat, the definition of the rule of law here remained restrictive. The problem of the level of socially tolerable incarceration, like that of the effects of penal incarceration upon outgoing prisoners, has been cleared evacuated. Certainly, the law still spoke of social reintegration; the parliamentary debate was however, made explicit as an objective fact of the administration of the undefined growth of the population in jail. From which stemmed an explicitly managerial perspective on incarceration, articulated to the programmed expansion of the carceral system. If the political authority intended to legally reinforce its status of proponent of the rule of law, in the form as well as the content of normative texts, at the same time the effects of a change in the meaning of this rule of law were felt. Rather than the associate of a socially inclusive state decisively intervening in the social order, it was more and more thought of as a service provider incapable of guiding the socioeconomic game. It was more about adjusting to it-better: to facilitate its deployment-while accentuating its penal functions in order to contain its detrimental social effects (Wacquant, 1999).

Furthermore, the sociological interest of the 13000 program and of the delegated management went well beyond the construction of new buildings and the enactment of a new legal norm. The minister and his team had not tried to hide one of their ambitions, which was clarified in response to the criticism of

52 For the legal details, see Beauquier, 1996.

53 This caution is found in the decision of the Constitutional Council of Jan. 20, 1994, which plans for the goal of imprisonment to be an “eventual reintegration” of the prisoner.

54 The prison law promulgated in the FRG in 1976 was based on the legal recognition of the harmfulness of imprisonment: it intended on the one hand, to reduce the place of imprisonment among penal options, and on the other, to redefine imprisonment as an institution dedicated to reintegration.

inegalitarian dualization of the system: it was not the job of the mixed prisons to create a parallel norm, but rather to create a standard to which all the prisons would have had to adjust. The intention was to establish a competitive relationship which placed the “public” prisons under a pressure that encouraged adaptation:

“the legislator (...) authorizes the opening of a public service, until then very focused upon itself, towards the modes of management of the competitive sector, represented by the private service providers (...) The shock of the 13,000 program will shake the whole of the prison system and will compel it, at risk of having to manage “two tier prisons”, to undertake a complete modernization of its structures and its modes of operation”⁵⁵.

“The construction program will have introduced a modernization dynamic which will continue long after the completion of the last complex”⁵⁶.

The program thus amounted to the introduction of a competitive logic, willingly translated under the peaceful term of emulation, a springboard towards the comparison of prisons among themselves. By equating competition, innovation and progress, this logic would have, from the next decade forward, develop and succeed in establishing criteria for statistical comparison. The new pressure to measure “performance” required an increase in the use of *quantification*, the wielder of power whose strength stemmed from its apparent neutrality. On this issue, mixed management represented only the avant-garde of a phenomenon that was more profound as well as more diffuse: the fundamental influence of administrative rationale by managerial discipline and its expert practices. Politics, in placing itself under the dependence of a double “necessity” of law and economics, a necessity which it helped to develop, affirmed the equivalence of the rule of law, Managerial State and a State based on expertise (Rancière, 1995, 149-156).

The compliance with trade standard and the assimilation to the business model hardly resulted in the accumulation of profit since privatization, and finally, did not profit the “business class”⁵⁷. Profits revealed themselves more clearly through the activation of a principle of competition, as well as in the importation of managerial techniques deriving from the industrial firm. As in the other branches of the State, a new vocabulary imposed itself little by little, a vocabulary that was very far from the sovereign era: monies paid, services, performances, quantitative comparisons, etc. It was articulated with new practices, such as the control of management. A document evoked even “the satisfaction of inmates’ expectations”⁵⁸: if it is easy to identify the gap between the discourse and its realization, such a reshaping of the thinkable and the speakable is not insignificant in the coercive universe where, if the prisoners were supposed to retain some rights, it was never a question of their “expectations” and still less of their “satisfaction”. The representation of the prisoner as a client surfaced alongside the representation of the prisoner as subjected to the public power. The condition of the prisoner was shaped a bit more by the liberal anthropology of the “autonomous and responsible” subject. This was the source of the valorization of contractual relationships and work seen as indispensable vectors of socialization; this way, enterprise became the “natural extension” of the prison (Callon, Akrich, 2004, 311). This resulted in the passage from “correctionalism to managerialism” (Gallo, 1995),

55 *Nouvelles prisons – le programme 13 000, op. cit.*

56 *Programme 13.000, op. cit.*

57 In 2001, the renewal of contracts was indeed laborious. Few enterprises showed interest, the final arrangement having diminished the possibilities for profit.

58 Minister of Justice/DAP, s.d. [1997], Rapport annuel sur le fonctionnement des établissements du programme 13.000 – Année 1996, 6.

entailing a renewal of the forms of control and subjugation in detention⁵⁹, notably via the paradoxical injunction towards responsabilization within an institution designed to regulate all the activities of the prisoners.

Conclusion

In relation to the USA and the UK, Garland (2001) describes a “reinvention of prison”. From an institution largely discredited in the years 1960-1970---at best, the *ultima ratio* of punishment; at the worst, an example of structural toxicity---it has, in a quarter of a century, returned as a pillar of the social order. The exhaustion of the prison utopias has been accompanied by the decline of the rehabilitative ideal, causing a regression to incapacitating detention. This rebirth is but one element of a complex reconfiguration of the punitive economy, in which there is also a commercialization of social control as well as the importation of managerial thinking into the penal machine. A frozen model does not replace another, we assist with the uprooting of compromises that are the basis of *penal welfarism*, to the benefit of neoliberalism⁶⁰. Certainly, the French situation is not amenable to the diagnostic established by Garland. The statement is not surprising, given the heterogeneity of forms and the sense of state construction in these countries. The discursive theme of resocialization remains vibrant in France, while carceral “privatization” appears quite limited, everything occurring as though a point of equilibrium had provisionally been found for the last two decades. The principle concretized by the 13,000 program is no longer contested, it is even the object of a quantitative expansion⁶¹. Inversely, the logic of privatization of prisons, in a strict sense, has not seen any qualitative progression. The result has differed substantially from the model adopted by the Americans, who do not recognize the French experience as real “privatization” (Harding, 1998, 650)⁶². According to the privileged point of view, we can highlight a peculiarity, even an effect of resistance, or else emphasize that if the scale of the privatization remains limited, a taboo has still been lifted. We can draw attention to processes, both discreet and decisive, namely the expansion of intellectual and practical categories of the “managerial spirit” (Ogien, 1995), to the administration of penalties.

Indeed, beyond the immediate observation of the relatively narrow application of carceral privatization in France, the shift created was nonetheless a key moment for the penetration of economic motives into the activities of government. The adoption of the program 13,000 was only a first step; since then, public action has always been moulded more by the management techniques ordered by public management, from the use of “consultants” from private companies to new dispositions created by the LOLF, by way of the growing importance of “management of human resources”. The valuation of quantification as a support for the action of a knowledge reputed to be objective is the best indicator. Mixed management thus represents as much a symptom as a trigger for a more radical transformation: the imposition of rhetorical categories and practices derived from economic thought, under the auspices of public management; the advent of a way of thinking and an administrative practice based upon those of a business.

59 According to Gallo (1995, 88), the new prisons transform the prisoners into “cybernetic prisoners”, “biological appendages to the machinery that controls them”.

60 Garland identifies a dozen indicators of the contemporary transformation of discourses, doctrines and punitive practices (Garland, 2001, 6-20). The author, however, insists on the absence of a unified paradigm, and on the degree of uncertainty and contradiction within the processes that he describes.

61 In 1995, a “program 4000” was launched, according to the same principle.

62 On “the advent of American “Big Prison Government”, see Wacquant, 2004, 167-221.

Accompanying the neo-liberal rationality, the business tends to become the unified basis of the social world, the informational power of the society (Foucault, 2004). Slowly but surely, the effects of this logic (which excludes neither resistances, nor ambivalences, nor counter logics) have made themselves felt and included in the penal and prison system. Two concise formulas set the tone for an epochal change: *The system has gone from expressive ritualism to efficient management* (Christie, 2003, 182); *we have progressed from the reform of prisoners in favor of a humane management* (Faugeron, 1998, 12).

We have seen that the push in favor of privatization derived from an anticipated rise in criminality and therefore, according to the causality used, in imprisonment as well. There was there, a break with the history of penal thought since the time of the reformers of the 18th century. It relied upon a bet in favor of the extinction, as much as is possible, of the phenomenon of crime. Governmental fatalism assigned to itself (and to incarceration) a mission that was above all, reactive, while admitting a certain functional ineffectiveness in the struggle against social deviance. From that point on, the 13,000 program itself and its supporting premises created the extension in (de) finite of the carceral form, pure or derivative (“closed educational centres”). This extension profited from the valuation of the rule of law, a powerful legitimizing resource for the carceral institution (Chantraine, 2004). The force of the combination of legal and management rationales resides in the presumption that they are deployed beyond the sphere of political conflict. The existence of the prison is hardly questioned, while the legitimacy of the rule of law always seems stronger⁶³. That is because it focuses on the individual provided with rights and not on concrete social relationships.

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63 See Brossat, 2001, for a double critique.

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