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Privatization as bureaucratization: Contracts, accountability, and uses of law in the privatization of French prisons

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Abstract

Contemporary prison privatization has been the focus of many studies. While most research mainly looks at political factors and practical results, few have explored the organizational impact of outsourcing. Despite privatization being often seen as a sign of liberalization and deregulation, this article uses the French prison privatization example to highlight the connection between privatization and bureaucratization. Based on observation and interviews, this study makes three claims. First, it argues that prison privatization is a changing relationship between public and private sectors, leading to controversy over private accountability. Second, it suggests that outsourcing contracts create a new layer of law with public compliance officers becoming a new form of legal oversight. Third, it shows how these controllers enforce contract terms in their own interest, resulting in an adversarial legal culture between public and private services. The article concludes by suggesting a fresh approach to studying privatization using qualitative methods.

Key words

Monitoring; outsourcing; public-private partnerships; neoliberal bureaucracy

Resumen

La privatización penitenciaria contemporánea ha sido objeto de numerosos estudios. Mientras que la mayoría de las investigaciones se centran principalmente en los factores políticos y los resultados prácticos, pocas han explorado el impacto

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organizativo de la externalización. A pesar de que la privatización suele considerarse un signo de liberalización y desregulación, este artículo utiliza el ejemplo de la privatización de las prisiones francesas para poner de relieve la conexión entre privatización y burocratización. Basándose en la observación y en entrevistas, este estudio hace tres afirmaciones. En primer lugar, sostiene que la privatización de las prisiones supone un cambio en la relación entre los sectores público y privado, lo que da lugar a controversias sobre la responsabilidad privada. En segundo lugar, sugiere que los contratos de externalización crean un nuevo estrato jurídico en el que los interventores públicos se convierten en una nueva forma de supervisión legal. En tercer lugar, muestra cómo estos controladores hacen cumplir las cláusulas contractuales en su propio interés, lo que da lugar a una cultura jurídica de confrontación entre los servicios públicos y privados. El artículo concluye sugiriendo un nuevo enfoque para estudiar la privatización utilizando métodos cualitativos.

Palabras clave

Supervisión; externalización; colaboración público-privada; burocracia neoliberal

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1. Introduction

As Michel Foucault emphasized, the prison is the emblematic institution of the direction taken by modern penal practices (Foucault 1975/1978). Since its inception, it has relentlessly gained importance, becoming the punishment paradigm in numerous Western societies. Quantitatively, the twentieth century witnessed a dramatic rise in the number of incarcerated individuals around the globe. The phenomenon of prison inflation, propelled by countries such as the United States, Russia, and several others including Brazil, China, and various European nations, has led to the mushrooming of numerous prisons, attesting to its hegemonic position within many penal systems. But Foucault did not only question the increasing prominence of prisons in contemporary times; he also characterized their transformation as inherently tied to authorities' pretense to reform society and the state:

> One should also recall that the movement for reforming the prisons, for controlling their functioning is not a recent phenomenon. It does not even seem to have originated in a recognition of failure. Prison 'reform' is virtually contemporary with the prison itself: it constitutes, as it were, its programme. From the outset, the prison was caught up in a series of accompanying mechanisms, whose purpose was apparently to correct it, but which seem to form part of its very functioning, so closely have they been bound up with its existence throughout its long history. There was, at once, a prolix technology of the prison. (Foucault 1975/1978, 234)

Structured by calls and reform initiatives, the prison appears to resist these changes. Rather than transforming itself, it would incorporate these changes to perpetuate its action. While it is undeniable that the principle of the institution itself has not evolved significantly over the decades, its concrete organizational modalities evolve according to legal, administrative, and political contexts that structure reforms of varying novelty (Durand *et al.* 2022). Among others, the privatization of prisons in several countries has sparked considerable debate and controversy from media, academic, and activist perspectives alike. Often analyzed through the lens of the neoliberal shift in Western economies, privatization has been primarily characterized, albeit elliptically, as indicative of a prison receptive to neo-managerial reforms. However, few studies have directly tackled the question of the tangible transformations induced by these reforms: how does privatization modify the organization of carceral institutions either wholly or partly privatized? This article attempts to renew the perspective on prison privatization by focusing on the outcomes of private actors' interference in the carceral organization. It aims to add a layer to the analysis of contemporary prison reforms by starting from a paradox: while privatization is often discussed and advocated as evidence of liberalization and deregulation, how does it interact concretely with an organization conceived as a tool that conversely serves an ideal of surveillance and control?

1.1. Privatizing prisons: an overview

The privatization of prisons, understood as the transfer of activities from the public to the private sector, particularly to for-profit firms, has sparked academic interest. The studies commonly interrogate the political, economic, and social rationales underlying privatization as well as its instrumental mechanisms. They tend, however, to overlook the transformation of the institution itself and more on the consequences of privatization on deprivation of liberty. Three main strands of research can be pointed out.

The first and most prolific strand consists of studies examining the historical causes of prison privatization. The privatization movement is situated within a centuries-old history of the relationship between states and private sectors in implementing custodial sentences, with its emergence dating back to the 19th century in the United States and Western Europe (Feeley 1991, Harding *et al.* 2019). After a period of public management of detention facilities in the late 19th and early 20th centuries, the private sector reemerged in the management of coercive infrastructures, first in the United States in the late 1970s and early 1980s, initially in 1976 for the management of juvenile delinquent centers and then in 1979 for undocumented migrants (McDonald 1992). The first private prison in the state of Tennessee opened in 1985 (Schneider 1999, Wood 2007). This model spread to other countries such as Australia in 1990 (Harding 1997, Andrew *et al.* 2016), the United Kingdom in 1991 (Pozen 2003), and later South Africa in 2005 (Coyle 2008) as security models circulate between national systems (Jones and Newburn 2006). These various privatizations share similar causes. Harding *et al.* (2019) identify six "catalysts" for the resort to the private sector for prison management internationally: (1) the increase in the incarcerated population, (2) legal and/or political constraints on public investment expenditures in the construction of new prisons, (3) prison overcrowding or poor detention conditions, (4) growing concerns about the rising operating costs of the penitentiary system, (5) the desire to improve the prison regime while ensuring value for money, and (6) government impatience with what it perceives as union obstructionism. If economic beliefs are a common ground for several examples (Andrew 2010, Rivet 2023), these privatization causes vary depending on national and penal contexts, nuancing the importance often given to the "prison-industrial complex" already criticized by Loïc Wacquant (2009). For example, in the United Kingdom, the influence of conservative lobbies in building an ideological framework favorable to public administration reform and private management played a significant role (James *et al.* 1997, Nathan 2003), notably serving as an instrument for weakening the Prison Officers' Association, which was denounced at the time by many politicians as omnipotent (Pozen 2003, 270). Overcrowding and repressive policies towards delinquency and crime also explain the recourse to the private sector in South Africa (Coyle 2008). In the United States, more or less recent research highlights the significant importance of prisoners' ethnicity (Price *et al.* 2009), inmates' lawsuits against states in their decision to privatize (Gunderson 2022), and the vital link between politics and privatization (Burkhardt 2019). In some cases and although we know little about public's perception of correctional privatization (Frost *et al.* 2019), attempts to involve the private sector in prison operations have not occurred without political disputes and constitutional controversies, as is the case in the United States (Robbins 1987, Schartmueller 2014, Jacovetti 2016) in the 1980s in France (Salle 2006, 2016) or in the 2000s in Israel (Timor 2006, Feeley 2014, Simmons and Hammer 2015). This heterogeneity of contexts leads to a diversity of forms of privatization. Prisons can be entirely or partially privatized. Their infrastructure can be state-owned or privately owned (Henneguelle and Rivet 2023). This diversity is also a question of proportion. In England and Australia, there were respectively 17.2% and 18.4% of prisoners in private prisons in 2018 (Harding *et al.* 2019). In the United States, where this figure is more difficult to obtain due to differences between states and the federal level, it can be estimated at around 10% in 2015 (Mukherjee 2015); Anna Gunderson (2022) estimates this number at 9% for state level prison and 18% for federal level one. In New Zealand, the proportion of prisoners

incarcerated under this management model has never exceeded 20% of the total prison population (Nossal and Wood 2004). In France, over 70% of prisoners are incarcerated in partially privatized prisons (Henneguelle and Rivet 2023). Moreover, in all these countries, the recourse to private providers for the management of a correctional facility may be a short-term solution, without being renewed after that: the privatization movement is hence neither inexorable nor linear.

A second strand of research has focused on the instrumental aspects of prison privatization. Beyond moral (Dolovich 2005, Reynaers and Paanakker 2016) or legal (Eisen 2019) debates, some studies have sought to examine the costs of these prisons (Hart *et al.* 1997) by testing for more effective and efficient prison models (Morris 2007, Rogge *et al.* 2015). Existing evaluation studies point to ambiguous results (Pratt 2019). Empirically, it is challenging to compare the costs of different prison management models, both because reliable data are scarce and because comparison between different structures remains difficult (Cabral and Saussier 2013, Wooldredge and Cochran 2019). If most contributions identify economic savings driven by privatization, some meta-analyses call for caution and point to inconclusive or ambiguous results (Lundahl *et al.* 2009, Kish and Lipton 2013). Other studies, often more qualitative (Kim 2022), tried to compare both systems (Montes and Morgan 2020) and have explored the interaction between privatization and more traditional subjects of carceral research on inmates or staff (Rynne *et al.* 2008). Beyond studies on human rights compliance in privatization regarding inmate workers' rights (Aman and Greenhouse 2014), healthcare or gender (Coyle *et al.* 2003), some authors have compared relationships between inmates and guards (Shefer and Liebling 2008) as well as inmate well-being between public and private prisons (Hulley *et al.* 2012): while a few studies highlight a more peaceful management within private prisons, most insist on similarities between various management modes. Some attempt to look at differences in terms of rehabilitation results (Gaes 2005, Duwe and Clark 2013, Mukherjee 2015, Galinato and Rohla 2020). While some studies looked at the correlations between prison privatization and employment growth in rural areas (Genter *et al.* 2013), others have questioned the professional transformations at work, both in terms of the relationship maintained by guards in private prisons with their work and regarding their training and employment conditions, highlighting a lack of professional training in several prisons (Crewe *et al.* 2015), working conditions made difficult by chronic understaffing (Taylor and Cooper 2008), and oppositions, in public-private prisons, between carceral and economic rationalities (Guilbaud 2011).

A final, more limited strand of research has focused on studying the organizational transformations of privatized infrastructures. Its entry point through the regulation of private actors is crucial. In the United States, the contracts signed with private companies give significant importance to self-monitoring and incentive mechanisms: companies themselves develop quality control services with private compliance officers in charge of ensuring compliance with standards comparable to those of prisons directly managed by the administration. Evaluation reports produced by companies are communicated to the Federal Bureau of Prisons (BOP), which grants an overall rating. If sufficiently high, this rating can lead to the allocation of additional credits (Gran and Henry 2007, 184). In France, contracts organizing privatization are equipped with hundreds of performance indicators for all aspects of outsourced functions (Henneguelle and Rivet 2023, Rivet

2023). The British case presents a specificity. As the entire operation of the establishment is privatized, broader indicators (related to security, rehabilitation, or the health of inmates) and fewer in number (around thirty) synthesize into a score from 1 to 5 the "quality" of the operation of privatized facilities (Taylor and Cooper 2008, 96, Mennicken 2013, 216, Cooper *et al.* 2019). The use of performance indicators involves another organizational change. In several countries, each private prison includes a public controller, as in England (Boin *et al.* 2006, Padfield 2018, Hargreaves and Ludlow 2020), Scotland (Taylor and Cooper 2008), Canada (Gran and Henry 2007), South Africa (Berg 2001), or France (Rivet 2022). These controllers are isolated figures within a private organization where state representatives are rare. In return, they may benefit in some cases from expanded powers that allow them to represent public authority within prison walls. In South Africa, they have access to all financial data and operating documents of the service provider company, as well as decide on actions related to the security of the establishment, such as conducting searches or authorizing the use of force, positioning them as essential actors in the organization (Berg 2001). In the UK, there are two controllers per prison who can, for example, decide on the implementation of curfews or the temporary release of certain inmates (Hargreaves and Ludlow 2020). However, according to existing research, the majority of the work of these controllers consists of verifying the compliance of services with the contract and the operating standards it stipulates (Padfield 2018, Hargreaves and Ludlow 2020). In France, they can impose financial penalties (Rigamonti and Leroux 2014). In these different countries, controllers are added to the safeguards applied to other public prisons (General Controller of Places of Deprivation of Liberty in France, HM Inspectorate of Prisons in the UK, etc.). Moreover, the prison administration (Federal Bureau of Prisons in the United States, His Majesty's Prison and Probation Service in the UK) can always, while paying penalties, terminate contracts and take the management of its correctional facilities back.

1.2. Bureaucracy and the mundane control of privatization

In this vast literature, two main shortcomings ought to be noted. Firstly, prison privatization appears to be relatively non-interactive. Once the private sector is integrated into the correctional system, current research provides a fixed and crystallized view of the links between the public and private sectors. However, one could question the evolution of the relationship between the administration and businesses in the context of tensions induced by the mundane activity of depriving people of liberty. How does the state attempt, or not, to retain control of the prisons? How are controllers, or not, a tool in the search for companies' accountability, and how does their work change over time? Secondly, there is a lack of research on the contractual activity of workers in privatizing or privatized prisons. Precisely, while several studies address the emergence of a new category of public agents – the controllers; none systematically capture their concrete activity. This partial view reflects a static approach to law and its uses within organizations. Controllers base their activities on the contract through which the state leases the management of certain prisons: how do they mobilize and appropriate, and hence change these contractual rules over time?

This article attempts to address these gaps by making two arguments. Firstly, it highlights the importance of privatization in the bureaucratization of prisons over decades. Bureaucracy corresponds for Max Weber to the surge of a rational-legal mode

of government, exerting its power through a complex body of public officials who resort to standardized rules to manage people and entities (Weber 2019). This article argues that by privatizing and simultaneously attempting to retain control over its service providers, the state generates a new layer of law, specifically contractual law, within the carceral institution. This process bureaucratizes the institution in two ways. On the one hand, it integrates a new set of rules and indicators intended to govern the functioning of many daily tasks of private providers. On the other hand, to ensure its effectiveness, the administration has built control bodies, thereby increasing the role of administrative services within the prison. Secondly, this article shows how this new law, used by these controllers, is subject to constant arbitrations, highlighting once again how law is produced in its application and remains constitutive of social practices. The results support the idea of a strategic appropriation of the law by controllers. These legal intermediaries (Edelman 2016, Pélisse 2019) adjust contractual rules according to the needs of the administration. They also play with the rules according to their own social dispositions and their vision of privatization. By following these two paths, this article draws on previous attempts to look at organizational cultures through the prism of their history to explore, more broadly, the effects of privatization on public administrations.

2. Methods and data

To address these questions, this article draws on the French case that has been described as a privatization *à la française*, a "French model" (Harding *et al.* 2019) due to the implementation of a "semi-privatized" (Coyle 2008), or "intermediate" model (Henneguelle and Rivet 2023).

2.1. The French privatization background

In 1986, the French government projected to build over 25,000 prison places to address prison overcrowding and prepare for an increase in incarceration. To finance this construction program, it initially aimed to privatize the prisons to be constructed, drawing inspiration from the experimental privatizations conducted in the United States since the 1980s. The project for entirely private prisons faced numerous oppositions. Ultimately, the government opted for a hybrid model. The scheme, called "*gestion mixte*" or "*gestion déléguée*" (hybrid or outsourced management) marked an institutionalized return of companies in the management of French prisons, akin to what existed in the 19th century with the system of the "*entreprise générale*". State authorities used to pay private companies a daily rate multiplied by the number of incarcerated individuals. In return, these companies provided all the necessary services for the operation of the prison except for surveillance: food, laundry, heating, and the management of convict labor. Companies used to profit mainly from this peculiar workforce, remunerated at around 20% of the cost of conventional labor (Seyler 1989).

Today's French privatization model differs from the American for two main reasons. Firstly, the prison administration keeps what are known as the "sovereign" tasks, such as security/surveillance, the prison's registry, and the prison's board, while the remaining functions are outsourced to contracted companies. Some of these functions include infrastructure maintenance or cleaning. Others involve personal services, such as catering, laundry services, transportation, and the canteen – which is the prisoners' grocery store where they can purchase various food, hygiene products, and tobacco. It

can include as well as family reception, or penitentiary work. Secondly, its implementation was not gradual. This partial privatization, through the various construction programs that followed, gradually gained momentum within the French prison system, to become the reference model for the operation of French prisons. In 2023, more than 70% of French prisoners were jailed in a public-private prison.

The contracts organizing the involvement of private companies are issued at the national level and encompass all outsourced tasks (maintenance, catering, transportation, etc.). Signed by the DAP (the *Direction de l'administration pénitentiaire*), they cover several prisons within the same "batch" dedicated to an identified group of companies. As the North American case, the market for facility management of prisons is oligopolistic. In addition to the leading three historical players (Gepsa, Idex, and Sodexo), other companies operate in the sector, such as Bouygues and Eiffage for investment and construction, or Elior, Eurest, or Onet for services like catering or cleaning. The intermediate nature of French privatization thus brings together public guards and private technicians within the same organization, who must collaborate daily to carry out their duties. To ensure cooperation between these two sectors, administrative civil servants are trusted in each prison to oversee the activities of private personnel. Placed under the authority of the establishment's director, they ensure that the company respects contractual standards and assist it in its operation proceedings despite the obstacles posed by the security measures implemented by the wardens.

2.2. Data

This article builds on a study conducted between 2019 and 2023 on the privatization of prisons in France. Over several years, various types of materials were collected.

Firstly, I carried out an ethnographic inquiry of the work of public and private agents within five prisons, four semi-privatized and one public establishments. These observations totaled three months of on-site presence, five full days per week. Most of them took the form of shadowing and involved following various professionals such as controllers, administrative staff, guards, private technicians and managers. Additionally, two weeks of observation were conducted in a regional control service. The objective of these observations was to understand how the work of public and private agents is organized and to grasp their interactions, relationships, conflicts, but also their collaborations beyond the discourses they might articulate.

Secondly, during and outside of this on-site presence, over 110 interviews were conducted with a wide variety of actors: guards, public controllers, private agents, as well as national public and private executives, policy-makers, and union representatives. The aim was to capture the actors of privatization from a multi-level (local, regional, national) and temporal perspective: most interviewees were still employed, but some had changed organizations or retired, facilitating liberty of tone in an administration often suspicious of social science inquiries. The interviews covered the agents' career paths and their views on their work, but mainly served to revisit particular cases, situations, and events concerning privatization. They shed light on the difficulties but also on the representations that actors develop on their activity.

Finally, most of the contracts organizing French outsourcing were collected. These contracts reflect several generations of contractual arrangements between the DAP and

private companies. These contracts date from the years 1990, 2001, 2008, 2015, and 2017. Their comparative analysis reveals the evolution of the role of law in the relationship between the public and private sectors over the years.

Informed by all these materials, this article particularly relies on interviews and observations of the daily work of local and national controllers. It also uses the study and comparison of contracts from successive generations.

3. Results

The systematic outsourcing of a major part of prison activities very quickly raised the question of its control by the administration itself. The study of the development of prison services specializing in the monitoring of this outsourcing shows how the prison was transformed, involving new professionals specialized in subcontracting issues. These actors were in charge of implementing equally evolving and increasing contractual obligations for private entities. The relationship between the public and private sectors changed over the decades, with the former strengthening its control over the latter.

3.1. A privatization-bureaucratization nexus

The bureaucratization resulting from the privatization of French prisons is made of three periods that illustrate both the development of controller positions and contracts and the adjustments in the conceived relationship with private contractors.

(1) The first semi-privatized prisons opened in 1990. These establishments operated in a new form where both the public and private sectors coexisted. These prisons, described at the time of their opening as state-of-the-art facilities, included new administrative roles in their organizational structure. These actors were not explicitly termed "controllers" at this stage. Instead, they combined responsibility for various administrative services with the additional task of monitoring the activities of the contractor and their compliance with the signed contract. According to the accounts of interviewees, these initial years were characterized by rather informal relations between the administration and the company, over which public executives had little to no authority. For one of them, a retired controller who worked in semi-private prisons for almost thirty years, the reason for this state of affairs lay in the lack of contractual coercive powers. Building on his memories, he compares the situation he left when he retired with the beginning of public-private partnerships in prisons. He describes this first period:

> There were no means of coercion... Everything was done with the goodwill of the contractor! So, the contractor complied with the specifications that fit its interests. There was no coercion, so we gave up. (...) It brought about a kind of laxist monitoring culture. There was no means of coercion, so why bother applying all of that? 'Look, it's working, more or less!' they said.

For this administrative officer, *laissez-faire* was omnipresent mainly due to the absence of means to sanction and compel the contractor to adhere to certain contractual provisions. According to him, the reason is also to be found in the contract writing, which was unclear regarding certain objectives and thus subject to numerous disputes of interpretation. This situation led some administrative officials to completely disregard

their monitoring duties. For a controller who also occupied this position in the 1990s, control was absent. She explains that she "had never heard of it", that control "completely passed her by", and that she did not consider it as something structuring her routine job at that time. These agents operating at the level of a particular prison establishment express their frustration with an activity that "did not serve anything". National managers of the DAP have also acknowledged this situation, describing an "helpless" administration and contracts that were "quite profitable" for the companies involved. One of them, who worked at regional and national levels between 2007 and 2018, recalls the first generations of contracts still in operation when he arrived in office:

> Indeed, you could conduct inspections: you would visit the facility, observe that they were not adhering to the quantities specified in the contracts, for instance, it was supposed to be 310 grams of pasta but they were only putting 280. You would then say to them: 'You are not complying with the contract here,' and the manager would respond: 'Oh, it's not a big deal anyway, they don't eat them, they don't like it!' and there you go, you had no means of leverage. You could threaten to terminate the contract, but no one terminates contracts covering multiple facilities worth millions of euros over a 30-gram difference in pasta trays...

This first period illustrates then how the first outsourcing contracts were relatively unformalized and thus allowed for "laxity" in terms of compliance from the suppliers, causing frustration among public staff in the facilities.

(2) Starting from the mid-2000s, the situation evolves, marking the beginning of a second period. The number of facilities under public-private management continued to increase, representing almost half of the prison system. Additionally, new contracts emerged, including public-private partnerships (PPP) inspired by British models, such as the Private Finance Initiative (PFI). The growing prevalence of privatization, contract renewals, and the accumulation of experience by the DAP led to a strategic shift. On one hand, a new team of executives was formed at the national level. A former national executive who worked in central administration for almost fifteen years in the early 2000s explains:

> The idea was to recruit someone from the private sector who had specific expertise in the facility management market. He would have experience in the field; the idea was to import methods from the private sector to the public one.

The arrival of executives from the private sector aims to improve the knowledge of the DAP in outsourcing management issues and contract drafting. This change allowed for a rewriting of contracts, leaving less room for interpretation and legal uncertainty: starting in 2008, these contracts included numerous performance indicators associated with financial penalties. This enabled controllers to penalize identified breaches. One national executive was hired in 2006. Coming from the private sector, where he spent his entire career, his arrival illustrated the shift in the relationship between the administration and private companies as follows:

> My initial roadmap was very simple; it can be summed up in a few words: it was about taking, regaining the initiative—I will not say power—in the relationship with private providers. My philosophy was to establish a client-supplier relationship. At that time, it was about 'Grouping, partnering, and doing things together.' So, my job was to reverse... to change the situation to express a need, set an expected service level, and therefore introduce performance and penalties to follow up.

When describing his arrival, he emphasizes speaking another language, that of "the private sector," which causes tensions with some colleagues. This shift in the commercial relationship had significant consequences in public-private prisons. In these facilities, controllers began to use indicators and penalties. The financial penalties distributed were swiftly multiplied by 5, increasing from less than one million euros in 2010 to over five million three years later. This new system was not welcomed by private agents in the affected prisons, who denounced the introduction of "penalty markets" that controllers term "performance markets." A private agent, who has spent the past thirty years working in public and private facilities as a chef, feels betrayed by the recent changes. He criticizes the situation, expressing dissatisfaction with the surveillance he is under and the formalization caused by the rewriting of contracts: "For us, it's like being constantly watched over, it's really surveillance. It's no longer possible. We have zero room for maneuver. We are no longer free at all." This period of formalization of outsourced management and the reversal of power between administration and business took place from 2006 to 2015. Its end coincided with the beginning of a third phase in public-private relations, during which several contradictions arose.

(3) This third period begins in 2010. It includes two main dimensions. On the one hand, financial penalties have become a topic of controversy and have led to some adjustments. For some controllers, the prison administration would have gone too far: the contracts would be too demanding and restrictive. They would then undermine their initial objective: control the contractors. The first retired controller previously quoted explains:

> The penalty at the beginning was so significant that it became counterproductive. Sometimes, certain penalties would consume ten years of their margin, so it's impractical. Economically impractical. We reduced it. It's better to have a small stone that hinders the walk – and hinders well! – rather than a big block that blocks the road.

Beyond merely "blocking the road", the issue was not solely about effective cooperation between public and private actors. It also concerns, from a national perspective, the sustainability of private companies' interest in the market for prison management in France. Indeed, as contracts become associated with financial penalties, they become less economically appealing for industry players. Therefore, the DAP sees in the reduction of penalty amounts not only an opportunity to better equip controllers but also to make their market attractive to encourage competition. A former executive, during an interview after he left the national unit which he helped to lead for several years, describes this contradiction:

> We have implemented a penalty cap mechanism to mitigate the risk for industrial players. (...) It's also a way to ensure that the industrial players will respond to the market. (...) Today, the levels of penalties are incompatible with market standards. You can't state in a contract 'I will apply a 5% penalty to you.' If the companies realize that they will be penalized consistently over a four-year contract period at a rate of 5 or 6%, it directly impacts their profit margins. So, they are much more hesitant to enter this type of market.

On the other hand, and despite this focus on maintaining a market that is sufficiently liberal to remain competitive, the prison administration continues to enhance its surveillance and control capabilities over the activities of its service providers. Initially a single administrative manager within each facility, the controllers are now assigned one or two technicians to assist them in their monitoring duties. Two decades have

therefore been required for the development of services entirely aimed at monitoring private activities. Since 2015, the administration has moreover implemented its own software for monitoring and penalizing private activities, formalizing its expertise in privatization management and hoping to streamline the activities of local controllers.

3.2. Controllers playing with the law

The development of specialized units responsible for the oversight of private companies characterizes the French privatization model: based on regulation, it shows a significant involvement of administrative agents in the daily operations of correctional facilities. While there is a gradual formalization of the relationships between the public and private sectors through the various transformations of the contracts framing their exchanges, the study of the work of controllers reveals a more complex reality in their use of rules and the implementation of these regulatory mechanisms. Their utilization of contracts unveils practices shaped by organizational interests (1) as well as social dispositions towards law and privatization (2). Taken together, these practices illustrate how the prison internalizes this new layer of law to serve its functioning (3).

(1) The use of contracts varies, depending on the prisons studied and the controls implemented therein. In some prisons, the approach is stringent, and practices are claimed to comply as strictly as possible with written standards. In a detention center, performance indicators are employed to sanction numerous shortcomings, such as food served below the contractual temperature or delayed repairs of locks or replacements of light bulbs. However, in certain cases, they are used to penalize elements that may seem, at first glance, more anecdotal. This is the case, for example, of a change in the shape of pasta served to prisoners, transitioning from twists to tagliatelle. An indicator is utilized to penalize what is interpreted as a menu disruption and incurs a penalty of 750 euros. One of the controllers at this detention center admits in an interview, chuckling, that her job consists of "making her provider suffer." In another correctional facility, a controller counts every dysfunctional neon light to then impose a hefty penalty. Some public decision-makers, more actually, express concern about this situation: "We need to move away from this mentality. Really, in certain facilities, [penitentiary staff] treat the provider's personnel as slaves." In contrast, in other prisons, penalties are used sparingly, as explained by one controller, in charge of the monitoring of the private activities for the last ten years in a specific prison: "We're not here to penalize them at every turn; we're here to make them more efficient, they need to improve." Another, who claims to "be stuck to the contract," expresses discomfort with the very idea of penalization:

> 'Penalty,' one should say 'non-performance.' 'Penalty' implies punishment, so perhaps we shouldn't go that far. 'Non-performance' I think that would be a good term. Or 'failure to meet performance'?

For another, the relationship between the administration and the company is comparable to that of a romantic couple: "It's like in a couple, you have to know how to make concessions. If it's always the same person making concessions, there comes a time when the other says no. There is a divorce." This stance leads to the existence of certain prisons where few penalties are applied and where several are ultimately exempted by

the controllers and the establishment managers who consider the amounts involved to be excessive.

(2) These differentiated practices in the use of law and contracts are partly explained by the social dispositions of the controllers. Their career paths seem to condition their use of the contract and, more generally, their relationship with private companies operating in prisons. Some of them explain in interviews that they have an issue with the profit-driven nature of private firms. One, close to retirement, explains his opinion after eight years as chief of a local control unit during which he seemed to be in a constant tension with the local private executives:

> I don't want an American system, an English system where they give up on every principle unfortunately. In the American system, prisons are about money, they have to make money. It's a bit like what [large French multiservice company] does, that's why I'm against the PPP. I think the 1.5 million euros that I pay every month, we could save that money and use it differently.

Referring to American private prisons, he ethically denounces the recourse to private companies and has no qualms about inflicting heavy penalties. This ethics is reminiscent of the diverse controversies surrounding privatization. The use of private actors directly addresses the morally questionable commodification: some research showed how certain things, when assigned a price or bought and sold, raise ethical issues (Radin 1996). This former controller mentions "principles" which refer to the moral considerations involved in privatizing the deprivation of liberty. This point is in the vein of a broader reflection applied to the legitimacy of the state and its agents. When the latter becomes privatized, the legitimacy of the former is called into question (Cordelli 2020). The position of this controller is notably explained by his trajectory: he has worked his entire career in public administrations and insists that he comes from a "family of civil servants." His clear opposition to private companies is echoed in other discourses, albeit less vehemently. For example, a former controller explains that there will always be opposition between the administration and businesses, the former embracing the values of "public service" while the latter prioritizes their economic interests. Other controllers, often younger, do not directly reflect this opposition. Some consider the presence of private actors necessary to perform tasks that the state either "could not" or no longer does. For some of them, privatization does not pose any threat to their activity. Rather, it is a professional resource that allows them to advance in their career in monitoring the activities of private contractors or in interpreting complex contracts.

(3) Yet, the existence of tensions within the group of controllers should not only be viewed through the lens of their respective social backgrounds or political opinions. Each controller may hesitate in the use and interpretation of the contract. This doubt raises the contradiction that can exist between two sets of ethics, materializing in two different ways of enforcing the law: should one scrupulously enforce the rules or interpret what one views as the spirit of the law? For example, a local controller previously quoted and chief of a control unit for the last ten years recalls the pressures he encountered from prison guards who accused him of being lenient towards private contractors:

> Behind this, there is a general discontent, and we try to say, 'Yes, we understand that you may be dissatisfied, but they have their difficulties,' and then people say, 'You are

> defending them.' 'No, I'm not defending them, I'm just explaining a situation,' but when I explain, they say, 'Yes, you are covering up for them or you are excusing...' No, we are not excusing, but at some point, we are in a situation of total deadlock, 'Here, you are not meeting the deadlines, you haven't done...' but the problem still won't be solved. Often we come to provide support to resolve certain difficulties or to overcome them.

For many controllers, the possibility of sanctioning or not sanctioning the private company is a matter of judgment: is their work aimed at strictly enforcing the contract, or rather ensuring that the prison operates as effectively as possible? Some refer to the "spirit of the contract," which is not all the rules it contains but rather the rationale with which it was written. It is common for them to waive penalties to tolerate certain shortcomings, provided that the contractor assists in other dimensions of carceral activity. Thus, in one of the prisons studied, controllers accept that general repair works (light bulbs, painting, water leaks, etc.) in a detention building get to be delayed and that, instead, the company turns its efforts on another building where many cells are unusable, leading to overcrowding. Controllers hence classify and prioritize some set of rules over the others, demonstrating their autonomy in the interpretation of the contracts that administer the privatization of French prisons.

4. Discussion

This article, grounded on extensive fieldwork, identifies three main claims regarding prison privatization and organizational transformations.

(a) Prison privatization must be studied not as an *ad hoc* decision but as a mundane process and as a relationship between the public and private sectors. Instead of studying the proportion of privatized facilities in the national landscape, a more specific focus on recent decades characterizes the role private consortia play in carceral policy and illuminates the conflicts driven by this delegation (Gunderson 2022) in a new search for accountability as in other sectors (Benish 2014). Privatization, indeed, is not solely about the introduction of a new set of private actors that may transform this total institution by further increasing the number of circulations between inside and outside (Goffman 1961): it culminates in a transformation of public administration itself in an attempt to regain control on the disruption that such a devolution engendered in the first place. In the French context, the three outlined periods describe the subsequent evolution of the penitentiary administration. Rather than viewing privatization as a single event, these periods demonstrate how the relationship between the public and private sectors changed over time. The initial relative *laissez-faire* attitude is indicative of the trust placed in private actors due to the penitentiary administration's lack of expertise in controlling its providers. Nevertheless, this relationship gradually becomes more regulated over time. This turn is partly due to the influx of new profiles within the administration, specialized in public procurement, with some previous experience in the private sector. However, increased control jeopardized competition and the market attractiveness for private enterprises. As a result, from the 2010s onwards, the DAP reformed its contracts to ensure a minimal profit for companies and convince them to remain in the prison management market. This analytical framework could be helpful in explaining changes in regulatory attempts in other countries. The example of the British government taking over the management of Birmingham Prison is illustrative. Initially privatized, the

facility was eventually returned to public management in the wake of a situation deemed critical by the authorities. Even in governments perceived as more inclined to privatize, privatization is then neither a constant nor unidirectional process.

(b) This observation leads to a second consideration. Loïc Wacquant has already shown how privatization is contributing to the extension of the penal system, and therefore of the role of repressive policies in the contemporary state (2009). With the study of the transformation of the administration, this article proposes to go further on how privatization is a driving force of state formation. Instead of observing a retreat of the state (Strange 1996), there may be, on the contrary, a bureaucratization of the state itself in the process of privatization. As Béatrice Hibou conceptualized it (2015), this bureaucratization can be described as neoliberal: the hybridization of public organizations through the introduction of private actors, the structured standardization by the use of outsourcing contracts, and the construction and appropriation of performance indicators are all hints of the renewal of bureaucratic forms through the lens of new public management. The increasing role of private firms leads, in the French case, to the development of new public actors and a new kind of state activity. Gradually, new professionals emerged to monitor private enterprises, challenging the assumption of a deregulating privatization. These professionals, developing as a new layer within the custodial bureaucracy of prisons—which combines an element of physical violence with routinized bureaucratic tasks (Sykes 1958/2007)— must be understood as legal intermediaries: while not entirely jurists, they serve the continuous compliance objective within the institution (Pélisse 2019). In so doing, we are witnessing an extension of the juridical field into the penitentiary sphere with a new dialectic between custodial and operators (Bourdieu 1986). Legal issues are no longer confined to deprivation of liberty, sentencing, and the direct management of prisoners. Rather, this juridical field now includes new professionals and news reflections on what would be a “good” management of the institutionalized outsourcing of many services. The appearance of a new contractual legal layer further standardizes and formalizes the operation of penitentiary establishments, overlaying existing legal regulations and standards. Apart from indicating that privatization does not simplify or dismiss the implication of state agents in the institution, this evolution leads to a proliferation of indicators whose objectives vary depending on the agents and the interests of the carceral institution. In the UK, these indicators contributed to the emergence of new objectives related to budgetary considerations and penal outcomes such as prisoner rehabilitation. In France, over a hundred indicators classify various facets of the prison, revealing how the administration conceptualizes its own incarceration standards. These indicators, describing parameters like food temperature and quantity as well as the number of activities offered to prisoners, serve to standardize carceral experience nationwide. They also bring a new facet of carceral study: the analysis of a new form of disputes (Felstiner *et al.* 1981) and an adversary culture (Miller and Sarat 1980) within prison organizations, between public and private services.

(c) The third assertion of this article is related to privatization as a new layer of law. The sociology of the prison has already studied the role of law in the daily practices of local officers and wardens, demonstrating how prison workers continuously navigate contradictions inherent in prisoner management and regulatory injunctions, which tend to rigidify and dehumanize carceral life. Specifically, this sociology has shown how

guards manage daily contradictions inherent in prisoner management and regulatory injunctions that tend to rigidify and dehumanize carceral life. The study of privatization reveals a new layer of law bearing its own set of injunctions and norms, formalizing the internal functioning of penitentiary establishments (Durand 2018, Durand *et al.* 2022). By taking this new legal dimension of penitentiary establishments seriously and examining it in action, this article highlighted two realities of contemporary prisons. Firstly, studying how prison workers appropriate contracts makes visible the conflicted rationales at play in prisons and how they are hierarchized among workers. Secondly, analyzing the work of controllers reveals their constant endogenization of law in a constitutive environment (Edelman and Suchman 1997, Edelman 2016). While regulated by law, privatized prisons constitute a social space of legal production. Controllers appropriate and apply rules according to their needs and interests. Contracts thus do not only represent a new "layer" of law superimposed onto others and imposed on practices. Moreover, they integrate into professional practices and become a new dimension thereof.

Although the route of privatization differs according to country, a common component must be noted: the state develops new control services to maintain its presence in (semi-)privatized establishments. The figure of an internal controller constantly on-site—previously uncommon in prisons— emerged in countries that privatized their prisons. Privatization is, therefore, not an evidence of the state's disappearance (Hibou 1999/2004); rather, it signifies a reconfiguration and a redeployment of state resources towards monitoring and control activities. Prison, indeed, is part of the larger rise of audit and management control services within public organizations (Power 1997). This article demonstrates how the organization integrates and adopts certain contractual norms to perpetuate its own functioning. Building on Foucault's theory, it can now be asserted that privatization constitutes yet another reform that modifies without transforming carceral institutions, hence equipped to perpetuate their function of collective imprisonment.

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