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UNIVERSITY OF SOUTHAMPTON

FACULTY OF BUSINESS, LAW AND ARTS

Southampton Law School

The Assembly of an Integrated Theoretical Framework to Assess the Legitimacy of Prison Privatisation Policies in England and Wales: an Interdisciplinary Multidimensional Meta-model to Evaluate the Implications of Contracting out Imprisonment in Mexico

by

Hector Olivas Maldonado

Thesis for the degree of Doctor of Philosophy

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UNIVERSITY OF SOUTHAMPTON

ABSTRACT

FACULTY OF BUSINESS, LAW AND ARTS

Law

Thesis for the degree of Doctor of Philosophy

THE ASSEMBLY OF AN INTEGRATED THEORETICAL FRAMEWORK TO ASSESS THE LEGITIMACY OF PRISON PRIVATISATION POLICIES IN ENGLAND AND WALES: AN INTERDISCIPLINARY MULTIDIMENSIONAL META-MODEL TO EVALUATE THE IMPLICATIONS OF CONTRACTING OUT IMPRISONMENT IN MEXICO

Hector Olivas Maldonado

Prison privatisation was recommended to enhance efficiency, economy and innovation as mean to tackle penal crises. Private sector involvement in the prison system was authorized in Mexico without consultation process which would have informed legislators about the wider implications of this penal policy that affect its legitimation.

This research examines key questions: the multidisciplinary of legitimacy; the extent to which legitimacy of private prisons has been examined; the need for a multidimensional evaluative method of legitimacy; and the legitimating factors to be acknowledged and essential in the prison privatisation debate.

Considering that policymakers, politicians and practitioners ought to be aware of the implications of prison privatisation and that the legitimisation of this penal policy is utmost, the goal of this thesis is to develop a new methodology to assess the legitimacy of private prisons, based on principles extrapolated from various disciplines and related to particular issues.

Private operation of prisons in England and Wales has provided literature that, in addition to a much wider scholarly canon, will be examined to draw lessons for the Mexican case, and to establish principles underpinning particular categories of legitimacy, related to three disciplines: Philosophy, Sociology and Management. Each of these areas is linked to the participants in this phenomenon: governments, society and corporations. The purpose of this research is to add to the debate, which should enter a new stage, since recent developments in the operation of private prisons question their legitimacy. Through the construction of a new evaluative methodology in the form of a meta-model, it contributes to theory and policy about legitimacy and prison privatisation, by providing a guideline to acknowledge the implications and factors of its legitimation, in order to evaluate, re-evaluate or reform this penal policy.

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Academic Thesis: Declaration of Authorship

I, Hector Olivas Maldonado declare that this thesis and the work presented in it are my own and has been generated by me as the result of my own original research.

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I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission

Signed:

Date: 7 June 2018

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Abbreviations

<i>FMI</i>	Financial Management Initiative
<i>HMIP</i>	Her Majesty's Inspectorate of Prisons
<i>IMB</i>	Independent Monitoring Boards
<i>IMM</i>	Interdisciplinary Multidimensional Meta-model
<i>NOMS</i>	National Offender Managements Service
<i>NPM</i>	New Public Management
<i>PbR</i>	Payment by results
<i>PFI</i>	Private Finance Initiative
<i>PPO</i>	Prison and Probation Ombudsman
<i>PPPs</i>	Public Private Partnerships

Chapter 1: Introduction

This thesis examines the challenges brought by private sector involvement in the prison system in various areas of concern, and the significance legitimacy has in this penal policy, for it is key in the authorization, recognition and operation of private prisons, and should be acknowledged as crucial by all those involved in this policy.

The purpose of this research is the study of the implications of this policy recently implemented in Mexico as the hoped-for solution to reduce the alarming levels of overcrowding, tackle penal crises affecting safety and well-being of inmates, enhance security to prevent escapes and disturbances, and modernize the prison system. This work focuses on the experience in England and Wales, since the justification, operation and performance of prisons managed by private corporations has been thoroughly analysed.

It has been suggested that “a punitive political and legal culture [...] gives rise to mass incarceration” (Garland, 1996: 461), endorsing a “*new and thriving industry, private incarceration*” (Wacquant, 2005: 9, emphasis in original). Through the examination of approaches in various disciplines, this work offers a new insight about the connection between political, sociological and managerial concerns and prison privatisation, recommending a framework to assess its legitimacy.

1.1 Background of this work

Within a period of four years, Mexican parliament and the federal government authorized private corporations involvement in the prison system, which before a constitutional reform, was organised and delivered by governments.

As the outcome of internal and external factors, Mexico witnessed in the early 1990s the expansion of drug cartels and new forms of organized crime that increased violent offences in the 2000s. Using populist rhetoric, politicians from across the spectrum recommended a multi-strategic criminal policy to reduce crime, which included major constitutional and statutory reforms, the adoption of punitive policies towards criminal organizations, the implementation of tougher measures for members of organized crime, and most importantly, using armed forces to fight crime.

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These circumstances generated an alarming growth of remand and sentenced offenders, contributing to further deteriorate the prison system. Bosworth (2010) noted that the declaration of a 'war' against drugs threatens the implementation of more principled policies aimed to solve social problems, but most importantly, has an unavoidable effect on prison numbers, especially "the impact of drug legislation on the prison population [is] dramatic and immediate" (p.135).

Academics and experts have been advocating for a wider use of restorative justice mechanisms and successive governments have acknowledged the need to reduce prison population, but in reality criminal policymaking has driven tougher legislation and mass incarceration with all the implications that this entails. The National Ombudsman (Comisión Nacional de los Derechos Humanos, 2016c) recommended a significant reduction in the use of imprisonment and a limit to the use of life and long-term sentences.

Against such background, this work studies the consequences of punitive policies and mass incarceration, providing an examination of the implications of private sector involvement in the prison system. To contribute to a more informed penal policymaking, this thesis focuses on the assessment of wider concerns about private prisons; but most importantly, its connection to a key element of all organisations -public or private-, legitimacy. This research endeavours to highlight the need to evaluate the legitimacy of this policy.

The motivation of this research lies in generating an assessing tool of privatizing policies, in order to ensure that legitimacy of prison privatisation is acknowledged, evaluating to what extent this policy pursues the public goals of imprisonment, is ideologically informed, improves the prison system, innovates rehabilitative regimes and guarantees humane conditions and treatment, amongst other issues. This work aims to raise awareness amongst all those involved in this phenomenon about the effects of expanding penal capacity through private contractors' investment.

Having experience- as academic and practitioner in the criminal justice system-, this research is inspired by the opinion that penal policymaking in Mexico requires an informed approach to prison privatisation and its implications. It is important to determine to what extent privatisation is a principled policy through an assessment of its legitimacy by means of a new methodology.

1.2 Rationale and significance of the study

The Mexican prison system is characterized by overcrowding, corruption practices, internal self-governing regimes, security breaches, violent incidents, lack of trained staff, and inhumane conditions and degrading treatment (Carbonell, 2012), amongst other administrative and operative failures. Under these circumstances, the delivery of imprisonment in Mexico requires a transformation, for its ideology and practice are out-dated.

Following practices in countries and based on the official assumption that prison privatisation could not just solve penal crises, but also improve the operation of the system, this policy was authorized aiming to fulfil what public sector prisons could not achieve, the constitutional provision about imprisonment: ‘social reinsertion’ –rehabilitation or reform- of offenders. As it will be presented, in a relatively short period of time the constitutional and legal locks were opened for corporations to manage prisons in Mexico.

However, the legitimacy of such policy requires a comprehensive analysis. A far-reaching study to evaluate the legitimacy of private prisons is needed in any country planning or operating them- and such research could be of interest to policymakers, politicians, legislatures, practitioners, academics, even directors of private prisons and shareholders of corporations, as a guideline to pursue the legitimization of this policy.

Since legitimacy is a central concept related to the foundation, function and recognition of authorities (Beetham, 1991; 2013), this research examines the legitimization of force, recognition and operation of private prisons. Therefore, it is relevant to analyse the effects of delegating such functions into private entities.

The rationale for this work is the importance of creating a new theoretical insight and evaluative framework of the legitimacy of private prisons, initially provided by its justifications. Nevertheless, it is essential to examine the original drivers under the light of recent findings, results and developments; but most importantly, such examination must be performed taking a multidisciplinary approach, since there are several issues involved in this phenomenon requiring further understanding and reassessment. This research is justified by its contribution to studies about the legitimacy of privately run prisons.

Since the 1980s, the debate in England and Wales about privatisation has produced extensive literature, both from supporting and opposing stances. This

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is the reason why this analysis is based, primarily, on the British experience, in order to draw lessons for the Mexican case.

This research then, develops an interdisciplinary multifactorial theoretical framework to examine the legitimacy of prison privatisation from different perspectives, with the purpose of assessing the drivers and conditions behind this measure.

1.3 Research questions

To provide a new insight to the legitimacy of prison privatisation, as the basis for an innovative evaluative tool, some questions directed this study.

- Is it possible to examine the concept of legitimacy from a multidisciplinary approach?
- Has the existing literature about prison privatisation comprehensively examined the legitimacy of its implications?
- How can a multidisciplinary perception of legitimacy be integrated in a framework to analyse private sector involvement in the prison system?
- Is it possible to develop an interdisciplinary framework to assess the legitimacy of prison privatisation in various areas of concern?

To address these queries it is essential to acknowledge that prison privatisation is a topic requiring a holistic approach and its implications in a wide array of areas - from its authorization to its operation through its recognition- can be evaluated in terms of legitimacy.

To this purpose, it is crucial to employ a methodology that integrates approaches to particular concerns of prison privatisation, incorporating theoretical contributions and empirical research into a new multidisciplinary framework. For a broader assessment of the legitimacy of private prisons, a new system has to be developed: one that expands the scope of analysis to facilitate theoretical and practical evaluations.

To contribute to the debate, this thesis provides a multi-perspective analysis that connects approaches from diverse disciplines to the study of prison privatisation and its legitimization. This, in order to allow all parties involved in the discussion to be aware of the interconnected legitimating principles and factors. The contribution of this work is the recommendation of a new integrated system that, from a multidisciplinary perspective examines legitimacy and its importance in

private prisons authorization, recognition and operation. However, since this research is not empirical, the framework is constructed considering a wide array of existing works, both theoretical and empirical, examining their findings and extrapolating them as principles supporting each component of this work.

1.4 Selection of sources

Since this research is not empirical, it is constructed by the examination of a wide array of existing theories and results, extrapolating findings to support this study. Notwithstanding the theories examined throughout this research were produced considering certain political, economic and cultural circumstances, results are still relevant for a wider study, since they address issues existing in other countries and their findings may be well applied in other jurisdictions.

In certain areas, particularly concerning issues not previously examined thoroughly, this work had to embark in a process of reviewing the major theoretical and empirical contributions in specific disciplines, in order to establish the connection between principles and the legitimation of privately managed prisons.

The selection of particular commentators responds to specific criteria, since - needless to say- the inclusion of all perspectives and research on the topic is beyond the limits of this thesis.

Given that the main objective of this thesis is to inform those involved in the privatisation debate in Mexico, the first criterion is justified by the fact that many of the selected authors are recognised as leading thinkers in their disciplines. To support their claims, both opponents and advocates of prison privatisation have reviewed the contributions of particular scholars perceived as key in the discussion. This is the reason why, as a second criterion, this thesis reviews such works. The third criterion is the recognition that some findings of authors have recently contributed to the discussion about the operation of private prisons worldwide, particularly those who stressed the legitimacy of this policy. The final criterion is that, since this research is based on the English experience, it includes literature and official documents specifically related to England and Wales.

1.5 Structure of the thesis

Chapter 2 overviews the authorization process of private sector involvement in the prison system in Mexico and in England and Wales, highlighting the reasons for focusing on specific jurisdictions and recent circumstances that suggests a need to re-evaluate the legitimacy of this penal policy.

Acknowledging the importance legitimacy, Chapter 3 presents a review of studies about the concept and the importance of multidisciplinary. Likewise, examinations of the legitimacy of prison privatisation are briefly reviewed.

Chapter 4 highlights the value of developing multidisciplinary methodology to assess the legitimacy of prison privatisation, through the design and construction of an evaluative framework in the form of a multidimensional meta-model.

Assembling this evaluative framework, Chapter 5 develops the first core model: the Philosophical domain. This domain takes into account theoretical contributions from Political Philosophy, Jurisprudence and Moral theory, to recommend a set of principles extrapolated from these disciplines to assess the legitimacy of private prisons.

Chapter 6 develops the second area to assess the legitimacy of prison privatisation in three main approaches to legitimacy: Social psychology, Procedural justice theory, Criminology and Penology.

The final component of the legitimacy assessment is assembled in Chapter 7 consisting of disciplines such as Organizational theory, corporate governance corporate finance, and performance management.

The discussion about the challenges and implications of prison privatisation and the pertinence to assess its legitimacy through a new multidimensional framework is presented in Chapter 8. The practical application of this thesis is briefly demonstrated in three indicative examples; and a definition of legitimacy is recommended as the contribution of this thesis to the theory of legitimacy and the discussion about privately managed prisons.

Chapter 9 provides an overview of the background, rationale and relevance of the research, and a summary of the main findings and limitations of this study as well. It also emphasises the contribution to the debate and the practical and theory value of the thesis, recommending future studies. Finally, a personal reflection about the process of this research is presented.

Chapter 2: Primary legitimation of private prisons: towards an assessment of policy transfer

2.1 Introduction

Between 1995 to 2004 prison population in Mexico doubled (México Evalúa, 2013) and according to the National Ombudsman (Comisión Nacional de los Derechos Humanos, 2016b) the period 2006-2016 witness overcrowding levels of 23 per cent. Under such circumstances, in 2010 the federal government proposed the construction of 12 new prisons required to provide 32,500 additional spaces.¹

In England and Wales between 1979 and 1988, and prior to the privatisation of the first remand prison, prison population grew by 76 per cent (James *et al*, 1997: 5). Therefore, the British government planned 26 new prisons to “provide 22,000” new places by the mid-1990s (Home Office, 1988: 3).

This chapter presents an overview of the historical background of contract out of prisons in Mexico and England and Wales. Additionally, the current situation of private prisons in both countries will be commented, and in particular some events will be pointed out, as the reasons behind focusing this research in both jurisdictions.

2.2 Mexican crusades on crime and incarceration oversupply: American policymaking replication

In 2006, the conservative administration commanded an unprecedented joint operation of federal forces with the aim of regaining regions under the control of criminal organisations.² This strategy involved the deployment of a task force of

¹ Fourth Annual State of the Union. Presidencia de la República. ‘Cuarto Informe de Gobierno. Procuración e Impartición de Justicia’ Available at: http://calderon.presidencia.gob.mx/informe/cuarto/pdf/Informe_de_Gobierno/1_2.pdf [Accessed December 11 2016].

² Public announcement ‘Michoacan joint operation Presidencia de la República. ‘Anuncio sobre la Operación Conjunta Michoacán’. Available at: <http://calderon.presidencia.gob.mx/2006/12/anuncio-sobre-la-operacion-conjunta-michoacan/>. [Accessed December 13 2016].

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7,000 members of armed forces, federal police and intelligence agencies. It was the declaration of a war organized crime. Distrust in local law enforcement agencies was the driver behind the expansion of military operations and the implementation of criminal policies. However, the use of belligerent rhetoric to justify strategies to tackle drug and organized crime started years earlier.

Emulating American policies, the 1994-2000 federal administration launched in 1998 a 'National crusade against crime and criminality'.³ Later, the 2000-2006 administration highlighted the results of "the great crusade against drug trafficking and organized crime", through the presidential statement of endorsing a "war giving no quarter to pernicious criminal gangs".⁴ Nevertheless, both strategies did not involve the use of military forces, focusing exclusively on legislation and reform of criminal justice agencies.

One crucial step taken by the 2006-2012 administration was the publication of the white paper 'The fight for public safety' that pointed out the aims of such strategy. This proposal had three core objectives: "reclaim safety for Mexican families; endorse Mexico as a country where the rule of law and institutions prevail; and ensure a well-ordered and peaceful co-existence" (Presidencia de la República, 2010: 1). The extensive use of imprisonment for drug related offences and harsher sentencing of violent offenders, including, for the first time in Mexican legislation, life imprisonment, were some manifestations of this criminal policy.

Along with the war on organized crime, in an attempt to improve the operation of criminal justice agencies and through the adoption of adversarial principles, the system underwent a major transformation through an unprecedented constitutional reform passed in 2008. For the purposes of this thesis, one particular modification deserves special attention.

³ Presentation of the National Crusade against Crime and Criminality. Presidencia de la República. 'Versión Estenográfica de las Palabras del Presidente Ernesto Zedillo, durante la Presentación de la Cruzada Nacional contra el Crimen y la Delincuencia, que encabezó en el Museo Nacional de Antropología, de esta ciudad'. Available on line <http://zedillo.presidencia.gob.mx/pages/disc/ago98/26ago98.html> [Accessed 22 October 2016].

⁴ Briefing about the results of the Permanent Campaign against Crime and Drug Trafficking. Presidencia de la República. 'Informe de Resultados de la Campaña Permanente Contra la Delincuencia y el Narcotráfico'. Available on line <http://fox.presidencia.gob.mx/actividades/?contenido=373> [Accessed 24 October 2016].

Since 1965, the Constitutional provision about imprisonment -Article 18- stated that the prison system was to be organised by federal and local governments. However, the 2008 reform, removed the explicit text of ‘federal and state governments’. The legislative Hansard (Congreso de la Unión, 2008: 283) does not provide strong arguments as to why this reform was needed and approved.

The Mexican war on organized crime had serious consequences, including an alarming growth of prison population. By 2015, the total prison population was 254,704 (Comisión Nacional de los Derechos Humanos, 2016b: 15). This phenomenon contributed to the deterioration of the already deficient conditions and inappropriate regimes.

This expansion of the penal system through the construction of new prisons was recommended by the federal government as the mean to reduce overcrowding. In the fourth State of the Union, the administration recognized that new prisons built with the participation of private companies were needed, to contribute to the renovation of the penal system.⁵

In order to authorize long-term agreements between public agencies and corporations to deliver public services using infrastructure and facilities built with private investment, the unprecedented ‘Public-Private Association Federal Act’ was passed in 2012. (Cámara de Diputados, 2012). Later that year -two months before leaving office- during the inauguration of the first federal prison built under public-private investment association scheme, the undergoing programme to expand the system was announced, while stating that “perhaps this might, by the way, be the largest [prison], obviously in Mexico, and in the world, and we will seek the Guinness World record for it”.⁶

Under the legal provision of “delivery of integral services for penal capacity” (Secretaría de Gobernación, 2012), the Mexican federal prison service allowed companies to design and construct facilities and deliver most services, excluding security and control, which should always be performed by state staff.

⁵ See note 1

⁶ Speech given by the Former Mexican President Felipe Calderón Hinojosa, during the inauguration of a Federal Prison for minimum and medium risk offenders. 2nd October 2012. Available on “Presidencia de la República” on line <http://calderon.presidencia.gob.mx/2012/10/el-presidente-calderon-en-la-inauguracion-del-centro-federal-de-reinsercion-social-para-internos-de-minimo-y-mediano-riesgo-procesados/> [Accessed 24 October 2016].

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In 2014, the administration published the 'Public Safety National Programme' which included as one of its objectives the reorganization and strengthening of the penal system to be accomplished, amongst others goals, thorough the "[r]egulation of service delivering models, which private corporations can provide for the construction and operation of penal centres" (Presidencia de la República, 2014: 47).

According to the legislation and due national security and public safety, only Mexican corporations can participate in bidding processes and be awarded contracts to construct and manage prisons, excluding companies, which may have more experience in managing prisons in other countries, which could provide at least a certain degree of expertise. This being the case, Espejel and Diaz (2015) have noted that when privatisation was announced, companies which had already been previously and extensively awarded contracts for the construction of housing, hospitals, motorways, amongst other areas, expressed their interest to build and manage prisons; however they lacked experience in the design, construction and delivery of services related to imprisonment.

By 2017, Mexico has six federal prisons constructed and managed by private corporations, with two more in construction. Two state prisons also operate under such scheme.

2.3 The American way to imprison: experimenting privatisation in England and Wales

Justified on economic liberty ideology, private investment in "core public utilities" (Riddell, 1985: 174), was endorsed by conservative administrations in England and Wales. Contracting out imprisonment was included as a component of the broad privatisation programme. Privatisation was aimed to reduce state participation in decision making by "pushing back the frontiers of the state" (Vickers and Yarrow, 1988: 158). It was a formula offered to increase efficiency as "[t]he government's preferred strategy in relation to public expenditure" (Gamble, 1994: 229); and through the "liberalisation [...] of statutory monopoly powers" (Heald and Steel, 1986: 59) privatisation remained "a central component" (Jackson and Saunders, 2012: 7) of conservative administrations and the contribution to the world of politics. (Wilding, 1990).

The privatisation movement had an impact in the prison system when a right-wing think-tank, through two documents, highlighted the advantages of private

prisons in the USA. Documenting case studies in the USA, it was claimed “Britain has led the world in [...] privatization, yet in the prison field there is a danger that she will fall behind” (Young, 1987: 39). It was also suggested that “[I]f we want to have prisons which do justice and follow due process [...] we should shop around [...] [w]here can we get the most, or the best, of these values for our money? [i]t may turn out to be the state prison bureaucracy [...] or it may turn out to be provider competing on the open market” (Logan, 1987a: 8).

Ryan and Ward (1989a; 1989b) examined the process of privatisation, focusing on the role of the Home Affairs Select Committee. Overviews of the process are provided by McDonald (1994) and Bottomley and James (1997), while James *et al* (1997) offer a detailed description of the political and penal context under which privatisation was discussed. Ryan (2003) gives an interesting review, highlighting the political drivers behind the debate and authorization. A further account of the process was presented by Windlesham (1993).

A crucial moment in the process of authorizing private prisons was the visit by members the Home Affairs Select Committee to privately managed prisons in the USA. The outcome was the recommendation that “the Home Office should, as an ‘experiment’, enable private sector companies to tender for the construction and management of custodial institutions” (House of Commons, 1987b: viii).

The official ground to allow privately run prisons was “the failure of the present state-orientated system to overcome the problems of out of date and overcrowded prisons” (House of Commons, 1987b: vi) and the need to “increase the provision of prison places to meet demand [...], further private sector involvement could make a speedier and more cost-effective contribution” (Home Office, 1988: 3).

During the Parliamentary debate, the Howard League for Penal Reform argued that “[p]rivatisation of prisons is a diversion from the critical policy choices as to who should go to prisons and for what offence” (House of Commons, 1987a: 94) and the Prison Officer’s Association acknowledged that “[i]t would create an inherent conflict of interest between a [...] desire to maintain the profits by keeping prisons operating in full capacity and the efforts [...] towards reducing the prison population” (House of Commons, 1987a: 101). In a speech presented to the Parliamentary All-Party Penal Affairs Group, Andrew Rutherford stated. “[p]risons were a public trust to be administered on behalf of the community in the name of justice. To open the way for the private sector into the administration

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of prisons would undermine the very essence of a liberal democratic state”
(quoted by Ryan and Ward, 1989b: 69).

To tackle the problems of the prison system, contracting out was a strategy suggested to give “potential benefits to both prisons and the whole criminal justice system” (Home Office, 1988: 15). Private sector involvement in the prison system, as an experiment, was enacted in the Criminal Justice Act 1991.⁷

By 2017, after 25 years of its authorization, there are fourteen privately run prisons in England and Wales.

2.4 Policy transfer and privatisation in Mexico and England and Wales: legitimacy in the eye of the lawmaker

Since the mid-90s Mexican politicians, policymakers and practitioners have supported transformations in governmental administration, which have driven major constitutional and legal reforms. It is widely agreed that such changes in areas such as oil production, taxation, communications, and criminal justice, attempt to replicate the experience in other jurisdictions, specially the USA, in a constant case of policy transfer.

According to Jones and Newburn (2007), the USA provided the background for privatisation in England and Wales; and timing and the role of key players suggest that “in terms of basic policy ideas and principles, [...] this convergence reflects a degree of deliberate policy transfer from the USA” (Jones and Newburn, 2007: 71).

Dolowitz (2000) considers that the reproduction of policies is frequent for “all governments are using ‘foreign’ models in the development of national programmes, policies, institutions, structures, etc.” (p. 9); and in this process, policy makers must determine the real conditions and establish the public purpose of policy transfer.

In his assessment of governmental rules, Baldwin (1995) notes that the legitimacy of legislation and regulation is determined by, amongst others, the same legislative activity through democratic legitimacy, however, “assessing the

⁷ “(1) The Secretary of State may enter into a contract with another person for the provision or running (or the provision and running) by him, or (if the contract so provides) for the running by sub-contractors of his, of any prison or part of a prison”.

legitimacy of governmental processes involves asking whether they further certain identifiable values” (p. 17).

Public policies adopted from other countries can be legitimized, even before their implementation, since legislative or parliamentary activity can be a source of legitimacy. It can be suggested that in the UK and in Mexico, parliamentary authorization and governmental regulation provided prison privatisation, through policy transfer, with ‘primary legitimation’. Primary legitimation serves as a governmental strategy to provide legitimacy to policies and their underpinning rules, exclusively via lawmaking. However, this strategy does not suffice since there are some concerns that require analysis, discussion and evaluation of the legitimacy of this policy.

The fact that this policy was authorized by the Mexican parliament without a consultation process makes the assessment of the legitimacy of this policy a crucial matter. Policymakers, practitioners, and NGOs -even from jurisdictions with private prisons- could have presented evidence and expertise for a wider discussion about the implications of this policy. There are other concerns that question the legitimacy of this policy, which would be highlighted in the next chapters.

Regarding England and Wales, the legitimation of privatisation requires an evaluation as well, particularly after recent official findings, independent reports, empirical research and the documentation of incidents inside some private prisons; facts seem to support the suggestion made by Rutherford (1984) that further investment in prisons “makes little impact on the conditions of imprisonment” (p.90).

When this research began, according to the 2013/2014 Prison Annual Performance Ratings (National Offender Management Service, 2014), two privately run prisons, Oakwood managed by G4S and Thameside contracted-out to Serco, were amongst the lowest rated prisons, both graded 2, meaning that the “Overall Performance is of concern” and of all fourteen contracted out prisons, only G4S operated HMP Parc was graded 4 regarded as “Exceptional Performance”. In contrast, fifteen statel run prisons received this same 4 rating (pp 2-3).

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Notwithstanding such alarming results, in its Annual Report and Accounts 2013⁸, G4S informed that its Care and Justice services had revenues of £653 million compared to £553 million in 2012 (p. 11) and in the United Kingdom and Ireland alone, the total revenue was £1,652 million compared to £1,625 million in the previous year, representing a growth of 1.7% (p. 29). In the same way, Serco maintains that its strategy is “to be a superb provider of public services, by being the best managed business in our sector”.⁹ The company states that “we don't believe that the private sector is automatically better than the state sector at delivering services, but we do believe that competition helps out the most innovative approaches”.¹⁰ In Serco's Annual Report and accounts 2013¹¹, the group highlighted as a notable contract award the construction, operation and capacity expansion of HMP Thameside, with an approximate total value of £120 million over 22 years (p.20). In the United Kingdom and Europe the group's activities “grew by 3% to £2,514m (2012: £2,436m)” (p. 26).

Despite corporations' statements and healthy finances, the current status of prison privatisation, particularly the operative results and current conditions question the original drivers and weakens ‘primary legitimization’.

Considering how privatisation was approved and looking at the current results in England and Wales, it can be implied that it is an instrumental strategy to tackle penal crises by expanding the penal system, as a manifestation of what was dubbed as the “new gaol fever” (Rutherford, 1984: 3). By October 2016, the total UK prison population was 85,108 (National Offender Management Service, 2016a) and early November 2016, the British government planned the construction of new prisons to provide 10,000 places (Ministry of Justice, 2016).

Responding to such plan, the Chief Executive of the Howard League for Penal Reform (2016) stated that “[w]hat we desperately need is a real commitment to trying to lower prison numbers and reduce overcrowding [...] [i]nstead, the government seems set on repeating the mistakes of previous administrations in seeking to build its way out of the problem. It has never worked before and will

⁸ Information available at <http://www.g4s.com/~media/files/annual%20reports/g4s%20annual%20report%202013.pdf> [Accessed July 7 2015].

⁹ Information available at <http://www.serco.com/about/index.asp> [Accessed July 7 2015].

¹⁰ Information available at <http://www.serco.com/about/publicservicemarkets/index.asp> [Accessed July 7 2015].

¹¹ Information available at http://www.serco.com/Images/Serco_AR2013_tcm3-44453.pdf [Accessed July 7 2015].

not work today". Furthermore, years earlier, Rutherford (1991) stressed that transferring "much of the enhanced capital expenditure into new prison building often has the effect of draining the prison of vital resources" (p. 6).

Within this context, it was noted that "[t]he paramount question in the debate over the privatization of corrections is not whether private firms can succeed [...] but whether privatization movement can last" (Dilulio, 1988: 67). At this moment, the privatisation movement has not only lasted but further more so, expanded to other countries. Under these circumstances, the topic remains controversial and requires further analysis; the privatisation debate is ongoing and still dynamic, especially after the contracting out of other public functions, such as probation, when a market was opened for 'new rehabilitation providers' (Ministry of Justice, 2013: 6).

Scholars have pointed out the main drivers of privatisation. For Flynn (1998) four were the motivations of privatisation: conservative lobbying; controlling the influence of the prison officers union; innovation of the system; and economic savings (pp 61-2). According to Bottomley et al (1997), privatisation was grounded in two main issues: increase economic effectiveness and tackle rising prison populations.

It can be concluded that some of the initial drivers behind privatisation require a re-evaluation, and the 'primary legitimacy' is questioned. As a result, is possible to offer a new and wider methodology to assess the legitimacy of prison privatisation, encompassing various concerns, particularly the delegation of the state's power to imprison, the approval of this policy by the public and the actual performance of privately managed prisons. The legitimization of these main issues -among others- can be assessed and questioned under the light of theoretical approaches, empirical findings and official results.

Furthermore, considering the lack of a consultation process and expert debate in Mexico, raising awareness about the consequences in other countries, the parliamentary approval was not fully informed about challenges and implications of private prisons. Hence, the need to provide a guideline, in the form an innovative evaluative framework of the legitimacy of this policy, as a contribution in a new phase in the prison privatisation debate. Despite private prisons are already -as suggested by politicians and policy makers- an key component of the Mexican prison system as providers of penal capacity, research and studies in

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Mexico are scarce; hence the importance of engaging in a broader study is evident.

Moreover, since this phenomenon is recent, theoretical and empirical studies on privatisation are limited, let alone about the legitimacy of this policy. Few relevant works (Espejel and Diaz, 2015; Documenta/Análisis y Acción para la Justicia Social A.C. et al, 2016) have based their analysis on journal articles and general research studies available online regarding the American experience. This research contributes then to the study and evaluation of private prisons in Mexico, for it provides a more extensive assessment from a broader perspective, one that includes more specialized theoretical and empirical research available to the academics, as well as official documents and reports from independent bodies in other countries.

Additionally, this thesis is relevant for it presents a different approach to the study of prison privatisation, mainly drawn from the English, not the American-experience. One of the reasons behind this is to provide a new insight of this phenomenon, because it can be deemed that prison privatisation in England and Wales has been constrained and the growth of privatisation has been kept to a minimum. As it will be analysed throughout this thesis, the inclusion of independent auditing, monitoring, inspecting mechanisms implemented in the UK to control and make corporations accountable can be regarded as legitimating factors, is an additional reason to focus this research in England and Wales.

The final motivation lies in the fact that if prison privatisation is a case of policy transfer to Mexico from the USA as suggested earlier, its legitimacy evaluation must find its principles in a different jurisdiction from which it firstly replicated. Therefore, the experience in England and Wales operating private prisons could be the source of a new policy transfer to the Mexican debate and to influence members of parliament to commission a review of the current situation of privatisation in Mexico based on this research.

2.5 Conclusion

This chapter presented a brief review of the authorization process of private prisons in Mexico and in England and Wales. Despite the differences, particularly regarding the extent to which the issue was debated, the motives in both countries were similar, specifically the need to expand the prison system and provide additional capacity, in order to solve overcrowding problems. It can be

suggested that in both cases, it was a case of policy transfer from the USA and that, through legislation and regulation, primary legitimisation was provided to this penal policy.

After more than two decades of private prisons management and considering official results that regularly rate their performance, which have uncovered that their operation has not been in accordance with the arguments initially supporting this policy, their legitimacy has been weakened and must be questioned, while reassessing a wider array of legitimating factors.

Since legitimacy of prison privatisation has been placed in a controversial position it is essential for policymakers, politicians and practitioners to be aware of the implications of such policy and the importance of legitimisation by questioning and assessing it through a new evaluative framework. In the case of Mexico, this assessing methodology could serve to guide all those involved in the regulation and operation of private prisons to be informed of the wider consequences and the role legitimacy has in this phenomenon.

However, the initial justifications presented in this chapter to support prison privatisation and the grant of primary legitimisation can be challenged. Further factors can be questioned in Mexico through a new evaluative tool drawn from the British experience, which will be a matter of the following chapters. In order to develop an original assessing system, it is required to firstly examine the concept of legitimacy, its extent and its relation to prison privatisation. The following chapter will be devoted to that task.

Chapter 3: A taxonomic approach to legitimacy: a new stage in the privatisation debate

3.1 Introduction

Having established the need for an assessment of the legitimacy of private sector involvement in the Mexican and British prison system, it is essential to review the available literature about prison privatisation and its legitimacy.

The departing point in this chapter is the acknowledgement that legitimacy in this topic is utmost and requires further analysis, since as it has been indicated, legitimacy is of “great theoretical and practical importance within the field of criminal justice, but it remains under-studied by criminologists and socio-legal scholars” (Bottoms and Tankebe, 2012: 120).

Hence, the importance of providing a new approach to the legitimacy of prison privatisation as the starting point for the recommendation of a new evaluative framework to assess the different premises involved in this policy. The following sections will address both the concept of legitimacy and its application to private prisons.

3.2 Legitimacy and imprisonment (by private means)

Taking into account the importance of legitimacy in power and authority relations as an essential feature of any organisation –including prisons–, academics and researchers have acknowledged such relevance and included the examination of legitimacy in the penal setting, therefore, legitimacy must be addressed as a central topic in the prison privatisation debate; particularly since as Loader and Sparks (2013) noted, the democratic delivery of punishment relates directly to “problems of legitimacy” (p. 123).

Walker and Telford (2000) highlighted the significance of the concept of legitimacy to the broad criminal justice system within a wider political context. In particular, imprisonment “raises questions about the authority and legitimacy of the state and morality of punishment” (Shichor, 1995: 45). Therefore, it is necessary to review the concept within the prison privatisation context, since a more profound study on legitimacy and its relation to private prisons will be

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performed in the following chapters, regarding specific concerns of the phenomenon.

Legitimacy cannot be left out of prison studies –including privatisation- because coercive power and the use of authority are central part of prison (Liebling, 2004). Sparks (1994) has pointed out the importance of addressing legitimacy in any penal discussion, regardless minor attention received by criminologists and penologists, for “legitimacy is not an abstruse concern [...] it is intimately and practically implicated in every aspect of penal relations” (p. 16). Liebling (2004) maintains that the discussion about legitimacy in imprisonment started after the enquiry into the riots and disturbances across various prisons in the early 1990s in England and Wales highlighted in the Woolf Report (Woolf and Tumin, 1991). Different works have analysed the importance of legitimacy within prisons in the matter of order and performance (Sparks and Bottoms, 1995; Sparks *et al*, 1996; Liebling, 2004; Crewe, 2009).

In the case of prison privatisation, the concept was considered by Logan (1987b) amidst the debate in England and Wales, who suggested that legitimacy of private prisons was the result of fair and just treatment, for “legitimation is generally granted in exchange for the fair exercise of power, a profit-seeking prison has a vested interest in being perceived by inmates as just and impartial in the application of rules” (p. 37). However, Garland (2001b) acknowledged that derived from an important legislation process in the 18th and 19th Centuries, punishment returned to public hands in order to provide uniformity and, to a certain extent, legitimize imprisonment through the process of ‘statization’ “as the main features of the ‘modernization’ of criminal justice” (p. 30).

Sparks (1994) has noted the difficulty to analyse all the arguments presented in the privatisation debate, therefore he highlighted “some of the ways in which the advocates of private sector initiatives pose (or avoid) legitimation problems” (p. 22).

Regarding the legitimacy of delegating the power to punish, Reisig and Pratt (2000) noted that the discussion about the legitimacy of prison privatisation “is worthy of attention given that potential misinterpretations of liberal theory and libertarian thought may inhibit policy makers from arriving at sound, well-informed positions” (p. 211). Field (1987) highlighted that only the government - not private companies- is allowed to exercise such power because of the concepts of the social contract and the legitimacy of government. In the same view, for

Weiss (1989) the administration of justice is a core occupation of the state and, from a legal perspective, only the state can deliver punishment because it implies the use of coercive violence, and is not morally acceptable to privatize prisons as such privatisation would contribute to expand and extend imprisonment to obtain higher profits.

Particular mention deserves one of the first studies performed by James *et al* (1997) to address the concept of legitimacy from a comparative approach about performance in public and private prisons operation.

Now, concerning policy implications, Beyens and Snacken (1996) question the legitimacy of private sector involvement in the prison system, for privatisation is a penal policy that expands the penal system leaving aside other alternatives. Genders (2002) has also questioned the legitimacy of privately managed prisons.

Without making any direct reference to the notion, some studies (Logan, 1990; Harding, 1997) have focused in the legitimization of privatisation based on its economic and practical advantages, because as acknowledged by Borna (1986) "the main justification for the commercialization of prisons is economic" (p. 328).

In relation to the profit motive in the delivery of public imprisonment, Ryan and Ward (1989b) stressed, "it is morally repugnant to punish people [...] for the sake of profit" (p. 70). In this sense, Shichor (1995) considered that "the contractor also may benefit financially from the denial of certain services and privileges to inmates because these measures may reduce the operating cost for the corporation" (p. 82). For Cervin (2000), the profit motive is a crucial issue in legitimization of prison privatisation for "private companies do not have an incentive to rehabilitate inmates [...] [leading] to the early release of prisoners, equating to an economic loss for the prison operator" (p. 74). Similarly, Dorfman and Harel (2013) perceive that "[p]rivatizing the execution of government functions poses a serious challenge even with respect to private entities seeking to take on the role of public bureaucracy faithfully" (p. 83).

After all the arguments presented in previous paragraphs, it can be mentioned few attempts have been made to provide a multi-perspective analysis in order to determine the connections between the various approaches to the legitimacy of private prisons in diverse disciplines, as an effort to discover the features that bind such different perceptions together.

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Most of the existing studies about private prisons legitimacy have focused on specific areas such as economic outcomes, criminological implications or legal accountability, just to mention a few. However, as suggested, a wide-ranging research of the legitimacy of prison privatisation is required, one that includes different categories of legitimacy. Therefore, an examination of the legitimacy of prison privatisation from a variety of perspectives is not only possible, but necessary, in order to determine the connections between various approaches in diverse disciplines.

3.3 A taxonomy of legitimacy: an introductory multidisciplinary review

The concept of legitimacy has been thoroughly examined. There is a vast number of approaches that range from a wide array of perspectives, since it has been addressed by philosophers, political thinkers, legal scholars, sociologists, organisational theorists, empirical researchers and -more recently- criminologists.

The first observation is that the concept of legitimacy has various meanings depending on the discipline of study: Sociology (Weber, 1968; Habermas, 1973); Political philosophy (Merquior, 1980; Beetham, 1991; Dworkin, 1998; Beetham, 2013;); Management (McNulty, 1975; Deephouse and Carter, 2005; Suchman, 1995); Procedural justice (Tyler, 1990; 2001); Criminal justice (Bottoms and Tankebe, 2012; Tyler and Jackson, 2013); Legal theory (Bonthuys and du Plessis, 1996; Fagan, 2008; Raz, 2009); Organisational theory (Aldrich and Fiol, 1994; Deephouse, 1996; Hybels, 1995); Psychology (Tyler, 2006; Tyler and Jackson, 2014; Tyler *et al*, 2008); Criminology (Loader and Sparks, 2013); and Penology (Sparks, 1994; Sparks and Bottoms, 1995; Cavadino and Dignan, 1997; Liebling, 2004; Pratt, 2008c; Crewe, 2009).

Equally, there is a considerable number of definitions and descriptions, therefore, this review is limited and not intended to provide a comprehensive examination of the concept. The purpose of the following paragraphs is only to provide an overview of some relevant perspectives in particular disciplines, mainly those connected to authority, compliance and the use of force, as some features of imprisonment. The following chapter will engage in a deeper analysis and discussion of the concept as the basis for an innovative evaluation of prison privatisation.

With regard to Political philosophy, Simmons (1979) pointed out that legitimacy is an essential feature of governments to have the right to command and “the exclusive moral right of an institution to impose [...] binding duties, to be obeyed [...], and to enforce those duties coercively” (Simmons, 2001: 155). Similarly, MacCormick (2007) has noted one basic element of authority, the claim to legitimacy as the mean to exercise “effective control” (p. 39). Connolly (1984) suggests that legitimacy is essential for any society willing to live in a political order that requires public allegiance. For Sadurski (2008), legitimacy is “intimately connected with the idea of public reason” (p. 29).

In a legal context, Schaar (1980) suggests that most explanations “attempt to justify power by reference to its ends” (p. 23). Fagan (2008) considers that legitimacy determines the extent a legal system and its norms are obeyed when its functions are performed with fairness and proportionality; Dworkin (1998) links legitimacy with the use of coercive power by the state, considering that an authority is legitimate if it is grounded on the perception that it must be obeyed and people accept their obligations. Raz (2009) asserts that a condition for the recognition of an authority as legitimate is that its rules are consented by citizens through reason and knowledge as foundations of legitimacy.

In sociological terms, Smith (2008) recognizes that legitimacy derives from popular beliefs and values within different historical moments and different societies. Parsons (1960) explains the concept of legitimation as the connection between “values as an internalized component of the personality of the individual, and the institutionalized patterns which define the structure of social relationships” (p. 175).

Now, taking an organisational stance, legitimacy regulates the behaviour of organisations (Dowling and Pfeffer, 1975) and is a valued resource for any institution (Ashforth and Gibbs, 1990). In this sense, legitimacy must be pursued by any institution (Wodahl *et al*, 2011), due its importance for the organisation’s image, structure and processes, but also variable, depending on historical, temporal and local conditions (Clegg and Gordon, 2012).

However, some key perspectives have set the foundations of current perceptions of legitimacy and thus, have been studied further by researchers and scholars. Four particular approaches will be considered in the following chapters, but briefly mentioned in the next paragraphs as part of the review of the literature about legitimacy.

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Weber's contribution to the theory of legitimacy is paramount. According to his approach, there are two categories: convention and law (Weber, 1968); and any manifestation of political authority, like coercive force, ought to be legitimized by the law as part of the broader legitimate order. Weber grounds his concept of legitimacy on a set of beliefs resulting from a previously determined legal procedure (Weber, 1964).

Criticizing Weber, Habermas (1979) conceives legitimacy as "the worthiness of a political order to be recognized" (p. 182) and points out the existence of a legitimation system, which is essential also for any social and economic structure, and its legitimacy must be identified and recognized by its subjects; otherwise, it faces a legitimation crisis (Habermas, 1976). To solve such crises, legitimation is pursued by those on power positions, through the communication of affirmations in the form of norms, social institutions and public policies. However, these claims and the eventual solution of the crisis should be grounded on public acceptance and rationality (Habermas, 1976).

In the same critic line, Beetham (1991) is recognized for his study of legitimacy within the context of authority and power. He objects Weber's concept of legitimacy, arguing that power relations are legitimate to the extent that they are in accordance with values, standards and normative expectations; but most importantly when the political institution pursues "proper ends or purposes of power and standards in its exercise" (Beetham 2013: 20). Beetham (1991) has suggested three elements; the lack of one of them affects the legitimacy of any particular power relation; therefore "legitimacy of power must be understood as multidimensional, comprising legality or rule-conforming, the justifiability of rules, and confirmation through expressed consent" (p. 205).

Departing from the traditional political, legal or sociological contexts, the institutional approach to legitimacy has attracted much attention, particularly the stance taken by Suchman, who regards legitimacy as the aim of institutional, for it maintains and strengthens their stability and persistence. In organisational terms, legitimacy is conceived as the "*perception [...] [about] the actions of an entity [...] within some socially constructed system*" (Suchman, 1995: 574, emphasis in original).

Finally, the approach taken in recent years by Tyler addressing the concept on empirical terms (Tyler, 1990; 2001; 2006; Tyler et al, 2008) has highlighted its procedural aspect. This view is underpinned by the argument that people are

more likely to comply with the law and obey authorities if their performance is perceived as legitimate, resulting from “beliefs about what are fair or ethical procedures for exercising authority” (Tyler, 2006: 394). Tyler observed that legitimacy implies “a conception to obey any commands an authority issues so long as authority is acting within appropriate limits” (Tyler, 1990: 26), and is considered as valued-based “linked to personal feelings of obligation” (Tyler, 2006: 390).

Considering such conceptions, it is possible to suggest that legitimacy is related to specific disciplines and thus, it has a multidisciplinary nature; therefore, the examination about the legitimacy of institutions should take a multidimensional approach; and if particular disciplines are not part of the expertise of the researcher, the suggestion is they should be studied at least to a basic level, and avoid leaving gaps, and thus, providing a broader interpretation.

Acknowledging a multidimensional approach, researchers like Aldrich and Fiol (1994) and Díez-Martín *et al* (2013) have classified and integrated different types of legitimacy. Suchman (1995) developed a typology of legitimacy in three main categories: pragmatic, moral and cognitive (p. 584); each category with specific aims and values. In this sense, it has been recognized the need for further studies of the sources of legitimacy particularly from a multi-level study, since “legitimacy and its dimensions are analytic concepts, not fully separable empirical phenomena” (Deephouse and Suchman, 2008: 67).

Regardless the wide array of disciplines to which legitimacy has been applied, for the purposes of this research, it is possible to establish the three main fields of knowledge to which legitimacy relates, namely Philosophy, Sociology and Management. These disciplines will be the main source of the assembly of a new methodology throughout this thesis.

3.4 Legitimacy and multidisciplinary: a new stage in the privatisation debate

According to Pozen (2003), the prison privatisation debate had gone through two phases: when initially suggested in the 1980s and 1990s; and when, after becoming a component of penal policy and private prisons part of the system, it was required to “evaluate the successes and failures” (p. 256) of policymakers approaches. Nearly two decades after privatisation was enacted in England and

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Wales, it was noted that “[t]he private sector is clearly not best suited to bear all the risks in all forms of private finance project” (House of Lords, 2010: 32)

Moreover, under the light of recent events regarding the operation of private prisons –some already presented in the previous chapter, whilst others will be examined in the following chapters-, the debate about prison privatisation should enter a new phase, in which the alleged advantages and contribution of private prisons can be tested against current results and developments. This, in order to examine and question the justifications originally presented to support this policy, and thus, assess the legitimacy of private prisons.

Notwithstanding the huge amount of works from both sides of the arena, most of the existing studies about prison privatisation have focused on specific areas such as the economic outcomes, the criminological implications or legal accountability -to mention a few-. This is reasonable; but a research focusing on the legitimacy of privatisation can consider broader issues related to a particular category of legitimacy. Prison privatisation is a topic that has to be approached in an all-inclusive manner.

Black (2008) has suggested that legitimacy is a concept that varies according to values, interests and expectations of those accepting a particular regime or institution, and thus, “legitimacy can differ significantly across time and space, and between actors, systems, and contexts” (p. 145). Considering this view, focusing on one single approach to legitimacy risks overlooking other questions, particularly when assessing the legitimisation of significant institutions as a mean to reshape and reform them through upgrading the legitimisation standards in the politics of privatisation.

The study of legitimacy cannot be constraint to one discipline, particularly when the institution whose legitimacy is evaluated has multiple concerns and areas related to specific disciplines. In contrast to a mono-disciplinary, a poly-disciplinary method that assembles various disciplines, new research, and new knowledge through the amalgamation of principles strengthens the assessment of legitimacy. Disciplines act as the roots of legitimacy from which various principles can be derived, and the basis for this integrative research resides in synthesising diverse perspectives into a new instrument to assess the legitimacy of institutions by interconnecting concerns and issues. The study of one discipline carries the risks of weakening an integrative evaluation. Here lies one

of the theoretical advantages of this research regardless the utmost contribution of the approaches and theories mentioned in the previous section of this chapter.

Moreover, the grounds of legitimacy for institutions pursuing a public interest must stem from various contributing perspectives. It is therefore paramount to understand the interconnecting factors in the legitimation of public institutions and a link between philosophical, sociological and managerial approaches can be suggested. However, there is also a need to separate concerns regarding prison privatisation according to specific disciplines. To secure and guarantee legitimacy, organisations should build it taking into account its multidisciplinary nature.

As it was presented, there are various sources of legitimacy, and as a key topic, legitimacy as an interdisciplinary concept provides the background for a new evaluative methodology of the legitimation of private sector involvement in the prison system in Mexico, based on the experience in England and Wales; but also acknowledging the utmost contribution of the key approaches to legitimacy and without any intention to lessen the importance of a 'unidisciplinary study' of the legitimacy of private prisons.

An integrated assessment of the legitimacy of prison privatisation has to draw knowledge from all the disciplines related to the institution whose legitimacy is been assessed, for there is a close relation between concerns, and thus, a direct connection between disciplines. Although the issues regarding this policy can be separated, they are integrated into a single phenomenon and analysed taking a multidisciplinary approach.

Drawing from theoretical perspectives and empirical studies, this research embarks in a process of examination of previous scholarly approaches from various disciplines to offer a new understanding of the legitimacy of organisations and institutions, specifically penal policymaking and the privatisation of the delivery of imprisonment. This study creates an innovative framework and an analytical method to evaluate the legitimation of prison privatisation from a multidisciplinary approach, advancing the theory of legitimacy.

An assessment of the legitimation of prison privatisation has to be regarded as an urgent matter and be recognised as part of penal policy and practice. The theoretical and empirical literature about prison privatisation and its implications in various disciplines requires new approaches and new developments, especially

A taxonomic approach to legitimacy

after three decades of operation, without conclusive evidence about its claimed advantages and results, and therefore, the initial justifications and processes that provided primary legitimacy require a new assessment to determine -or question- its legitimacy.

The aim in this new stage of the debate is to transform imprisonment by private means; but the study of prison privatisation from sole separated disciplines is not sufficient to understand and address the questions about its legitimacy, an inter - multidisciplinary study is utmost to understand the interconnections of issues in the prison privatisation phenomenon. In this case, an interdisciplinary approach is not only convenient, but also needed.

Nissani (1997) has highlighted the importance of interdisciplinary knowledge and research, considering that “[i]nterdisciplinarity is best seen as bringing together distinctive components of two or more disciplines [...] [and] applies to four realms: knowledge, research, education, and theory” (p. 203, emphasis in original). For him interdisciplinarity endorses and contributes to the production of new knowledge.

Therefore, for a comprehensive evaluation of the legitimacy of private prisons, a new system has to be proposed; one that broadens the scope of analysis and provides theoretical or practical support to assess legitimacy in significant matters; it must comprise different perspectives focusing on particular issues; in other words, an integrated multidisciplinary study is required.

A far-reaching evaluation of private sector involvement in the prison system requires a different methodology, considering that legitimacy is a multidisciplinary concept. This task will be performed in the subsequent chapters and since this research proposes and achieves an interdisciplinary approach, it contributes to the existing literature and moves forward from typical and traditional studies of legitimacy.

3.5 Conclusion

After reviewing the existing approaches to ‘legitimacy’, it can be concluded that, although most definitions share the same components: source, use and function of authority to fulfil a specific aim, the concept is still possible to be examined from different angles -different disciplines-. Legitimacy is then an integrated

multidisciplinary concept, which for the purpose of this research, will be studied from Philosophy, Sociology and Management.

When this concept has been linked to the prison privatisation phenomenon, it has been regarded mainly in terms of the concerns raised by the delegation of the power to punish into private hands and the performance of private prisons, particularly in relation to issues of order, control and security. However, taking into account the multiple approaches to legitimacy, it is necessary to perform a study of the legitimacy of private prisons considering a multidisciplinary approach as a contribution to the current stage of the debate, a re-evaluation of the factors that provided primary legitimisation.

A deontological holistic approach to legitimacy is required, one that considers mutually supporting elements and principles to perform a more comprehensive assessment of the privatisation phenomenon. The next chapter will determine the appropriate method to perform the reassessment of the legitimacy of prison privatisation.

Chapter 4: Meta-modelling legitimacy: a multidisciplinary assessment

4.1 Introduction

As suggested, legitimacy is a multidimensional concept that can be examined from a variety of disciplines, but as an integrated notion. Each category of legitimacy is related to specific purposes and functions of an organisation that pursues it as an essential feature in its operation.

The majority of studies about the legitimacy of private prisons have mainly focused in terms of the delegation of the power to punish, the use of force inside prisons to secure order by prison staff, and the profit-making motive. It is appropriate then, to recommend an examination of prison privatisation and assess its legitimacy from a broader perspective, one that includes various concerns and take into account all participants in the phenomenon as providers of legitimacy.

In this sense, a new methodology for the assessment of the legitimacy of private prisons is required to examine the various aspects related to this policy. This chapter focuses on the design of a holistic framework comprised of various dimensions, each of them addressing a particular issue raised in the prison privatisation phenomenon that requires legitimisation.

4.2 Designing an interdisciplinary model

Acknowledging the existence of different notions of legitimacy and that the debate about the legitimacy of contracted out prisons has centred in specific issues, an approach that concentrates such areas in a multidisciplinary manner is recommended. In order to evaluate the legitimating factors of prison privatisation an integrated system is needed, one based on three main disciplines that encompasses other disciplines and provide a wider understanding of the phenomenon. This work proposes Philosophy, Sociology and Management as the core disciplines of the evaluative framework.

An appropriate method to evaluate the legitimacy of prisons operated by private entities is through the construction of a model. Model building in criminal justice

Meta-modelling legitimacy

topics has been done before (Packer, 1964; King, 1981; Ashworth 1998; Roach, 1999; Walker and Telford, 2000; Macdonald, 2004), since the construction of frameworks is an appropriate instrument to recognize, analyse and provide solutions to criminal justice issues.

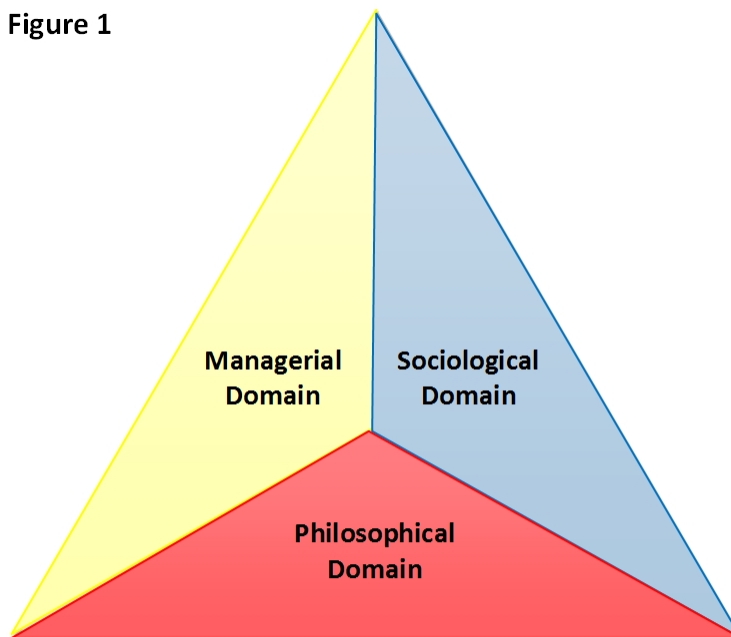
The practicality of model is acknowledged, since similar to what happens in physical and social disciplines, in criminal justice concerns a model is applied “to denote a hypothetical but coherent scheme for testing the evidence” (King, 1981: 12). Models offer a parameter “to judge the actual or positive operation of the criminal justice system [...] [and] can also describe the ideologies and discourses which surround criminal justice” (Roach, 1999: 672). It has been suggested that ‘modelling criminal justice’ improves the “understanding of how such a system operates and to informing our attempts to redesign such a system” (Walker and Telford, 2000: 3).

According to the previous paragraphs, a model-based approach to criminal justice topics provides a mechanism to generate theories, address controversial matters, evaluate, re-evaluate and even reform critical or contentious features of the criminal justice system and its underpinning rationales and values. Here lies the significance of the proposed evaluative framework in the form of an integrated model to assess the legitimating factors of private prisons.

In the construction of models as methods for the examination of actual events, Weisberg (2006) acknowledges three main phases: first, the description of the model; second, the analysis to determine its characteristics; and, third, the application of the model by linking it to the object of study (p. 624). Following this modelling process, this chapter focuses on the design and description of the proposed model. The construction and inclusion of its features and its application is performed in the following chapters.

The model-based method in this thesis represents a broader and cohesive process that unites various issues and actors involved in prisons privatisation, which require legitimization. This ‘Integrated Three-domain Model’ shown in Figure 1 is assembled from three disciplines: Philosophy, Sociology and Management. Each one of these areas of knowledge represents a ‘domain’ directly linked to one of the participants in the prison privatisation phenomenon: the government, society –as a whole and the prison society-, and corporations.

Figure 1



Integrated Three-domain Model

Figure 1 Integrated Three-domain Model

However, and as the result of the analysis in previous chapters, legitimacy is a multidisciplinary concept that can be studied as a whole. To conduct a comprehensive evaluation of the legitimacy of prison privatisation, in relation to the various challenges involved in its practice, this basic model, would not suffice; therefore, a more sophisticated method of assessment is required.

4.3 The importance of an ‘Interdisciplinary Multidimensional Meta-model’

As it has been suggested the legitimization of private delivery of punishment, which is a public relevant institution, requires the amalgamation of several perspectives, a multidisciplinary approach, since legitimacy has different sources according to the particular concern to be evaluated, and one perspective would not suffice to legitimate private prisons. Moreover, as it has been suggested, penal policymaking is connected to “relevant criminological, legal and political literature” (Annison, 2015: 181).

An assessment method based on the taxonomy of legitimacy, that considers the variety of issues associated with the private operation of prisons, can be performed by separating the contentious topics on the basis of the subject or matter to which they are linked. This can be achieved by the design and assembly

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of an enhanced model constructed on three core models, this is, a model of models: a meta-model.

Walker and Telford (2000) emphasize the relevance of meta-modelling as “an attempt to construct a framework against which any existing type of criminal justice system might be assessed and in terms of which any new blueprint for criminal justice might be designed” (p. 7). The utility and practical worth of meta-models has been also highlighted by Bézivin (2005) asserting that “it facilitates the separation of concerns” (p. 178).

This meta-model prototype is assembled by the three core domains, each incorporating three specific fields of study, comprising nine dimensions, each associated to a particular conception of legitimacy, but interconnected and complementing each other. This meta-model is thus an integrated holistic framework addressing issues related to main identifiable concerns, which question the legitimacy of this privatisation, both from a general perspective and in particular cases.

To that effect, the ‘Interdisciplinary Multidimensional Meta-model’ (IMM) as described in Figure 2, is structured as follows: the ‘Philosophical domain’ comprises the ‘Political dimension’, the ‘Jurisprudential dimension’ and the ‘Ethical dimension’. The ‘Sociological domain’ incorporates the ‘Ideological dimension’, the ‘Procedural dimension’ and the ‘Criminological dimension’. The ‘Managerial domain’ includes the ‘Organisational dimension’, the ‘Contractual dimension’ and the ‘Operational dimension’.

Figure 2

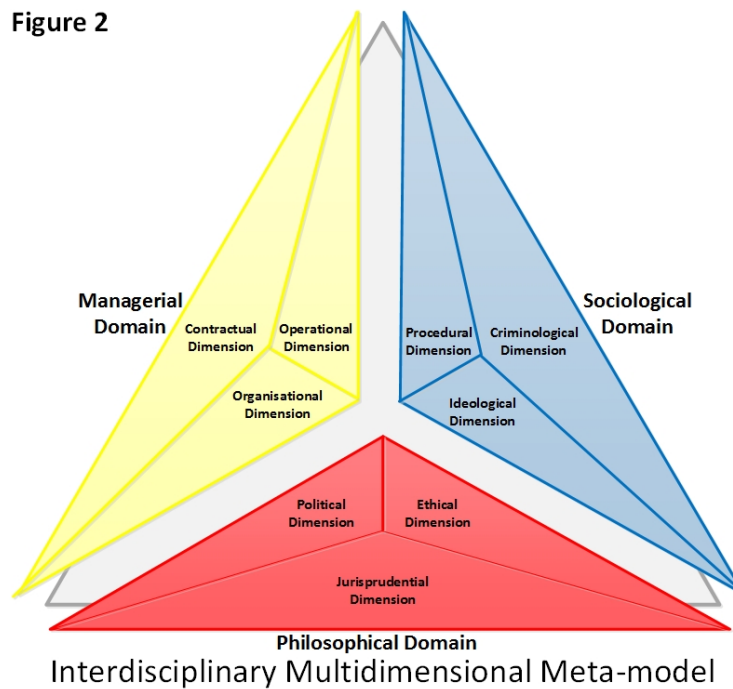


Figure 2 Interdisciplinary Multidimensional Meta-model (IMM)

The ultimate objective of this innovative IMM is to assign each dimension with a specific sort of legitimacy. Recollecting Suchman's definition mentioned in Chapter 2, each form of legitimacy has to be supported by sets of principles to which actions and decisions are to be referred to evaluate the legitimacy of an organisation. Therefore, each dimension of the IMM is supported by criteria that determines the substance and extent of particular categories of legitimacy.

The methodology for the production of the IMM is through the analysis of existing theoretical perspectives and previous empirical research studies in the appropriate disciplines, extrapolating basic principles to set a criteria later applied to assess the legitimating factors of the contracting out of prisons. As stated in the introduction, there are precise reasons for the selection of the sources examined in this thesis.

As one of the aims of this research, the assembly of this IMM is intended to contribute with a new and alternative method for the evaluation or re-evaluation of prison privatisation, through the examination of its broader implications, by assessing the same time, the legitimacy of this policy and its concerns, through the lens of an multidisciplinary interdimensional framework underpinned by specific principles and values drawn from existing knowledge.

In countries where private prisons have been recently authorized or have been operating for some time, this framework can offer a guide to consider some

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further legitimating elements, filling the gaps where legitimation has not been provided but is required. Similarly, it offers an evaluative system to determine if private prisons should be reformed, reconsidered or even ceased. In countries where privatisation is currently being discussed, it would raise awareness about the various implications and the need of legitimacy

Here lies the practicality of this IMM: that it can be used by proponents and equally by opponents of prison privatisation, either to develop strategies to secure that private prisons operate to their best legitimation in accordance to principles; or to contest their operation for the lack of legitimacy, and thus advocate for alternative approaches to imprisonment. This IMM can also contribute to ensure that properly operated and legitimated on the grounds of this thesis, private prisons can improve and enhance a prison system.

One additional advantage of this IMM is it can be applied in any jurisdiction to assess the legitimacy of any form of privatisation of public services. This can be done by substituting specific dimensions with the inclusion of other fields of study quite significant to the case. For example, the Criminological dimension could be substituted by a medical dimension in an analysis of privatisation of health and care services; or by an energetic dimension in the case of the privatisation of energy production, just to mention a two examples.

It is important to note that, despite the different methodological purposes between a model and a theoretical framework, this evaluative system takes the form of a theoretical meta-model. In order to assess the legitimacy of a particular concern about prison privatisation, in this IMM, data -in the form of facts, official documents, investigative journalism reports, statistics, empirical findings and other sort of results- is input into the specific dimension. The underpinning principles in each dimension act as the formulae, and the output is the evaluation of legitimacy in the relevant issue and in a specific case, resulting and determined by the legitimating principles. In other words, it is not a numerical or quantitative model, but a theoretical meta-model which produces a result in the form of the extent to which the legitimacy of prison privatisation can be acknowledged or challenged in that specific area.

4.4 A nine-dimensional evaluative system

4.4.1 The 'Philosophical domain'

The 'Philosophical domain' is directly related to issues such as the legitimacy of the delegation of the power to punish, the legitimacy of parliamentary processes to legislate and authorize the operation of private prisons, and the legitimacy about the moral appropriateness to pursue particular interests instead of public goals of imprisonment. As a brief introduction, the main participant in this domain is the state, that through government, holds the authority and power to punish and determines the philosophy of prison privatisation. The fact that the state is delegating this power to corporations determines the legitimacy from this perspective. Chapter 5 explores this domain including the 'Political dimension', 'Jurisprudential dimension' and 'Ethical dimension'.

4.4.2 The 'Sociological domain'

This domain raises questions about the social recognition and ideology of prison privatisation. Private prisons require social validation and approval, because their operation responds to public goals of punishment and society's values, beliefs and expectations. The public would acknowledge them as legitimate to the extent to which there are grounds for their creation according to truthful information about their operation and they achieve the official goals of imprisonment. The main actor determining the legitimacy in this domain is the public and prison society - inmates and their families, inmates and staff-. The assembly of this domain within the model is explained in Chapter 6. The constituents are the 'Ideological dimension', the 'Procedural dimension' and the 'Criminological dimension'.

4.4.3 The 'Managerial domain'

This component is also integrated by three dimensions: the 'Organisational dimension', the 'Contractual dimension' and the 'Operational dimension'. Chapter 7 addresses this domain, which relates to the fact that private prisons are managed by enterprises that have to adhere to corporate governance practices. But since they are performing a public function on behalf of the state for the common good, they should be legitimated through the way they are structured, comply with contractual provisions and are accountable for their

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performance, achieving the agreed results. The crucial player in this domain are the corporations managing prisons, including its shareholders, and those directly in charge of its operation, directors and staff.

4.5 Conclusion

Once the importance of a multidisciplinary approach to the legitimacy of privately managed prisons has been established, this chapter discussed the need of an appropriate evaluative system. Since models have been considered useful in criminal justice topics, the suggested framework takes the form of a model supported by three main components. However, as legitimacy of prison privatisation requires the examination from the various concerns, what is convenient is to develop a meta-model.

The proposed Interdisciplinary Multidimensional Meta-model, is integrated by nine interconnected dimensions grouped in three main disciplines, as the basis for the assessment of the legitimacy of private prisons in this research.

The next three chapters focus on the construction of each core model by the study of particular theoretical and empirical perspectives that will provide the grounding legitimating principles.

Chapter 5: The Philosophical domain

5.1 Introduction

Having established the significance of an assessment about the legitimacy of prison privatisation through the IMM, this chapter develops the Philosophical domain.

The rationale of this domain is the importance of broader philosophical analysis on issues regarding the delegation of one substantive governmental function: the power to punish, that on behalf of society pursues public goods. The player in this domain is the state, holder of the right and the power to deliver public imprisonment as the consequence of a crime or an offence.

The delegation into private hands of that public function has implications in three areas: political, legal and moral. In this sense, as shown in Figure 3, the Political, Jurisprudential and Ethical dimensions comprise this domain.

Figure 3

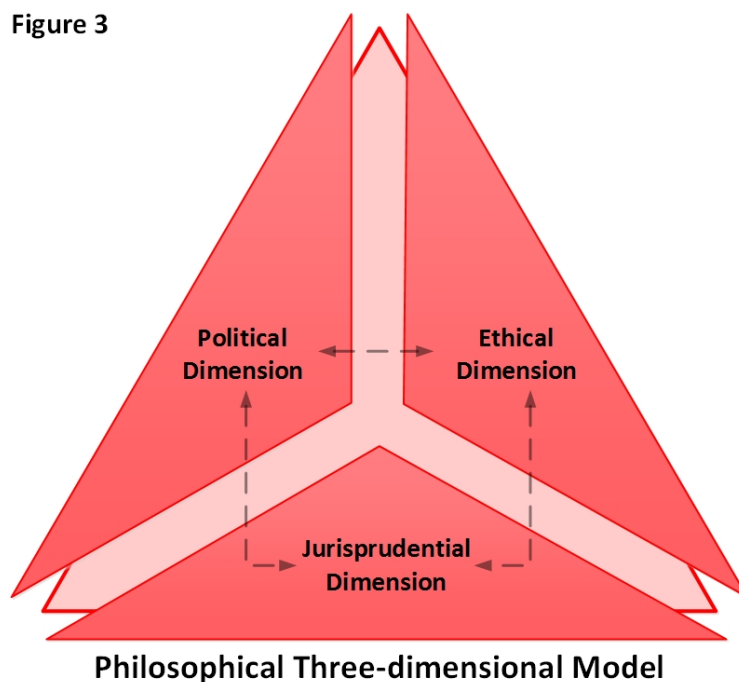


Figure 3 Philosophical Three-dimensional Model

The Political dimension assesses if the delegating of the power to imprison offenders, which implies the use of coercive force, generally agreed as a core and exclusive function of the state, is legitimate. The Jurisprudential dimension evaluates to what extent the authorization of private entities to deliver

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imprisonment is the result of valid legislation, created in accordance with legal principles and procedures. Finally, the Ethical dimension ponders whether imprisonment of individuals by corporations is morally appropriate, considering the interests pursued on this activity or if this policy represents a moral dilemma for the state.

The analysis in this domain starts from the recognition that the philosophy of punishment identifies specific goals according to historical, cultural and economic circumstances, that must be pursued, but within certain limitations, for the bodies delivering any form of public punishment in modern democracies must comply with guiding principles.

Therefore, this chapter presents some principles determining the political legitimacy, the jurisprudential legitimacy and the ethical legitimacy of prison privatisation. To this purpose, the assessment of the delegation of the power to punish in philosophical terms requires the inclusion of three disciplines: Political philosophy, Philosophy of law, and Moral philosophy.

5.2 The Political dimension: permission or authority

In a political context, studies about legitimacy have focused mainly on the role of the state, the right to rule and the use of power to use force and punish. In this sense, Shichor (1995) suggests that any analysis on the delivery of punishment, whether by a public authority or a private corporation, must relate to the concept of state and its supporting theories. Similarly, for Brettschneider (2007) a “political theory of punishment is concerned [...] also with the question of who is administering a punishment” (p. 175).

Weiss (1989) recognizes the importance of evaluating the political suitability of “privatizing an activity that would seem to be a core function, indeed the *raison d’être* of government” (p. 34) and Jing (2010) notes that “the unilateral role of the state in areas like [...] punishing constitutes a basic justification of the state’s legitimacy” (p. 266).

To support arguments, either advocating or opposing such delegation through the privatisation of prisons, the contributions of particular scholars have been widely studied. A comprehensive examination of such political theories on authority and the use of power escapes the scope of this thesis; however, in order to draw specific principles to assess the political legitimacy of private prison,

some particular approaches are included in this dimension: Hobbesian classical contractualism; Locke's classical liberalism; Weberian political sociology and Nozick's libertarianism.

Since the main purpose of political philosophy is to establish the limits of the authority of the state (Ripstein, 2004), this dimension examines to what extent the state is the exclusive holder of the right and power to punish offenders through public imprisonment -as the mean to rehabilitate or reform offenders-, function that implies the use of coercive force. This, in order to assess if the delegation of this function is legitimate on political grounds.

5.2.1 Authority and state punishment

There are two crucial questions in the prison privatisation political debate: who is the legitimate authority to punish offenders on behalf of society? Is it legitimate to delegate or sub delegate imprisonment as a form of punishment? These issues have been explored by advocates and opponents alike (Field, 1987; Logan, 1987a; Logan, 1987b; Logan, 1990; Ryan and Ward, 1989a; Sparks 1994; Shichor, 1995; Reisig and Pratt, 2000; Metzger, 2003). McDonald (1992) questions whether imprisonment, as a topic of political philosophy "should be exclusively, or predominantly, delivered by government" (p. 407).

Given the close relation between authority and legitimacy, both as components of power (Friedrich, 1972) and as the foundation of the right to rule (Ladenson, 1980), it is essential to review, from a political context, the features of a legitimate authority.

Recognizing that political legitimacy and the right to rule are interconnected notions, for Buchanan (2002) a political body is legitimate to the extent there are moral reasons in the use power and its monopoly is aimed to make, apply, and enforce rules. In Barnard's (2001) opinion, legality in the exercise of the right to rule and lawfulness of its goals are features of a legitimate authority. According to Shapiro (2002), a legitimate authority has "the right to rule [...], the right to be obeyed [...] [and] to coerce others to conform to their demands" (p. 394).

Simmons (1979) identified legitimacy as "the exclusive moral right of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively" (p. 155). Legitimacy is crucial in setting the "limits on the nature and exercise of power" (Coicaud, 2013:

The Philosophical domain

40) and to ensure the capacity of a political system to sustain that “existing political institutions are most appropriate ones for society” (Lipset, 1984: 88).

Noting that the use of power is a key attribute of authorities in modern societies, Beetham (1991) suggested that, to be legitimate, must be acquired and performed in accordance with law and with some indication of approval from the citizens. Therefore, power is justified when it meets the needs of the subordinates, who transferred power and resources to the authority in order to achieve social aims.

Considering that political legitimacy and the use of coercive force resulting from the right to rule are closely linked, now it is essential to determine to what extent the delivery of public punishment -as one manifestation of political authority- is legitimate, particularly since imprisonment entails precisely the use of such coercive force, this in order to assess if punishment by private means can be legitimized.

Coicaud (2002) provides an important interpretation about the relevance of the power to punish and its implications in this realm, since for him “[t]o render justice [...] [is] typically political [activity]” (p. 12); in the same way, for Zimring (2001) “punishment of criminals is at root an exercise of governmental power” (p. 164).

Decades before the resurgence of private prisons, scholars examined the features of punishment as a public institution. Benn (1958) for example, noted that in its modern context, punishment had distinctive elements, aims and justifications, especially that “it must be sought in terms of the net advantages gained or mischiefs avoided” (p.341). Rawls (1955) defined punishment as the action where an individual is “legally deprived of some of the normal rights of a citizen [...] provided that the deprivation is carried out by the recognized legal authorities of the state” (p. 10). Hart (1968) suggested that punishment should be “imposed and administered by an authority constituted by a legal system against which the offence is committed” (p. 5); and similarly, according to Flew (1954) any form of punishment delivered by an unauthorized institution should be considered “a non-standard case of punishment” or “pretending [...] to punish” (p. 294).

Punishment as a manifestation of power is then a right derived from the will of the society, acquired in accordance with the rules, and pursuing social aims, since these are features of a public authority. Consequently, to be legitimate, the power

to punish offenders should be exercised by authorities holding the right to rule, limited in its use, and justified by recognized principles.

However, it is key to further examine the primal source of this right to punish and the extent to which it can be delegated to other non-public bodies while maintaining its legitimacy. These topics are crucially at the centre of the debate regarding the political legitimacy of prison privatisation. The following sections will address such concerns, from theoretical approaches presented by advocates and challengers alike, to support their respective claims.

5.2.2 Hobbesian commonwealth's 'right to punish'

In the prison privatisation debate, contractualist theory is significant to assess the political legitimacy of punishment and its delivering bodies, as Brettschneider (2007) has suggested, "political legitimacy requires asking how a polity reasonably can balance societal and individual interests, with an aim to make laws and institutions justifiable to all" (p. 177). For Carlen (1992), any examination about the right of the state to punish offenders has to be performed under Hobbesian and Lockean contractual theories. Hobbesian works have been examined either to validate or to question the private delivery of punishment; hence, the importance of Hobbes contribution for this dimension.

Hobbes (1994) considers that the notion of authority implies "the right of doing any act" (p. 102), including those performed by commission or license from the owner of the right. However, some rights must remain in the hands of the owner, which, in origin, cannot be renounced or transferred, for they protect the holder. One of these non-transferable rights is the use of force. Nevertheless, in order to ensure peace, the right to use force can be transferred to a different entity by "the mutual transferring of right [...] which men call contract" (Hobbes, 1994: 82).

Under these circumstances, and since the ultimate goal of living in a community is the preservation of security and lives, this is the purpose of warning of punishment. To do this, and as the result of the sum of wills through a covenant, a common power with authorization is created. This 'Commonwealth' holds -as the basis of sovereignty- certain rights and faculties conferred by the people but with authorization to use "power and strength conferred on him that, by terror thereof, he is enabled to form the wills of them all, to peace at home" (p. 109).

One of those powers is the right to punish, which cannot be transferred to others, since it is aimed to protect people as "the sovereign is committed the power [...]"

The Philosophical domain

of punishing” (Hobbes, 1994:115). In Hobbesian terms, punishment is an evil inflicted by public ministers that -representing the Commonwealth and through legislation-, have the authority “to [...] imprison malefactors” (Hobbes, 1994: 158).

Having established the rationale for the authority’s right to punish, which should remain in the same hands of the body which has the right to judge, Hobbes (1994) questions how the right to punish was obtained by the public authority, admitting that it “is not grounded on any concession or gift of the subjects” (p. 204). He considered that the reason lies in the necessity to prevent situations like the disproportionate punishment existent before the Commonwealth.

Even conceding that subjects did not meaningfully transfer this right, but they merely renounce it, it was done to reinforce the sovereign’s right “to use his own as he should think fit for the preservation of them all: so that it was not given, but left to him, and to him only” (Hobbes, 1994: 204).

Hobbes (1998) further suggests that to achieve security, men had to unite and yield their will, granting a person or assembly with the power to establish penalties and punish. It is appropriate to transfer this power to the assembly that holds the authority given by the subjects- the Hobbesian ‘sword of justice’. This right cannot be transferred to other person or group, for “if power to judge were in one’s man hands and power of execution in another’s, nothing would be done, his judgments would have no effect, because he would not be able to have his commands carried out” (Hobbes, 1998: 79).

Hobbes’ theory of punishment and the right of the public authority to punish is according to Yates (2014), the result of complications in the hypothetical state before formation of government, and thus, “the right to punish must be both exclusive and universal; that is to say, only the sovereign can possess the right to punish” (p. 250).

From Hobbes’ political approach to punishment, the delegation of the power to punish by imprisonment into a private entity is not justified and legitimated, for this function has been granted to the commonwealth -governments- to protect peace and security, as the primal source of the sovereign’s authority. In other words, the delivery of imprisonment is a function that, to have legitimacy and to achieve the actual goals for which societies are formed, ought to remain in public hands.

5.2.3 Punishment and public good: Locke's 'natural right'

Tuckness (2010) has suggested that the state's power to punish is a core feature in Locke's perception of political power. The political liberal approach taken by Locke about a limited state has been considered key in the justification of prison privatisation; it has been regarded as liberal theory of punishment that allows any individual to punish violations of natural rights (Logan, 1990). Taking into account such perceptions, Locke's political theory must be analysed in this dimension.

Locke (1988) develops his theory describing the state of nature as the "right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws [...] only for the public good" (p. 268).

Addressing the question of who must enforce laws, Locke (1988) acknowledges the exclusive natural right of an individual to punish others, for "every man hath a right to punish the offender, and be executioner of the law of nature" (p. 272). However, in this hypothetical condition prior to the political society, the exercise of this right should in accordance to rational limits. To prevent any excess in punishing others, he provides one solution, the establishment of civil government "to restrain the partiality and violence of men" (Hobbes, 1988: 276).

An essential function of a political society in Lockean theory is the power to protect citizens through punishment. This power is the result of the merging of natural rights yielded by every member, conceding that the political community should hold such power in order to "have a common establish'd law and judicature to appeal to, with authority to decide controversies between them and punish offenders" (Locke, 1988: 324). Locke goes further by pointing out that derived from the abdication of this right, the political society has the power to create laws and use punishment.

Locke (1988) recognizes the protection of property as a core function of the commonwealth, through the establishment of laws, courts, and power to execute sentences to secure "no other end, but the Peace, Safety and [public] good of the People" (p. 353). Locke (1968) explains the delegation of the power to punish into a body representing all members of society in terms of such preservation of property and the fact that "the magistrate is armed with the force, namely, with all the strength of his subjects, in order to the punishment of those who violate any other man's rights" (p. 67).

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Taking a Lockean stand, Grant (1987) noted that to ensure limits on punishment by individuals, those private powers had to be delegated to a public authority in order to provide and guarantee security to all. Similarly, Alm (2013) considers that the governments' right to punish offenders derives from "an individual right to retaliate, present in the state of nature" (p. 93). These arguments support the justification and legitimation of state punishment as a consequence of the transfer of rights from citizens to the state, however, the "Lockean consent may be necessary for legitimate legal punishment, but not sufficiently in evidence in real political societies to justify our actual practices" (Simmons 1992: 165-6).

From an analysis of Locke's theory, legitimate punishment by the political governing body results from the sum of individual rights to punish. Such power is delegated to the government in order to protect property, but also to ensure safety and public good. In this context, a sub-delegation of the power to punish into private hands could be legitimized not in terms of the rightful holder, but in its rational limitations and in the aims such punishment should pursue, particularly impartiality and the public good.

5.2.4 Weberian 'monopoly of legitimate violence'

Weber's (1964; 1968) examination of legitimacy is fundamental, but this section focuses particularly on his approach to the legitimate use of force, since opposition to prison privatisation can be justified by the conception of a state's exclusive right to use legitimate force. Weber's work is a beacon to understand the extent of this claim since it represents the ground for legitimation of the state's right to punish (Reisig and Pratt, 2000).

Analysing the legitimation of the role of the state, Weber (1968) suggests that any political action -including the use of physical force to secure compliance- is to be performed within a previous legitimate order such as law, which comprises the existence of enforcement and the legitimate possibility to use coercion.

In Weberian context, an essential element providing legitimacy to the state is ownership of the use of legal violence as "[a] compulsory political organization with continuous operations [...] will be called a 'state' insofar as its administrative staff successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order" (Weber, 1968: 54).

Noting that the state has acquired some forms of coercion previously owned by individuals, Weber (1968) observes that the "conflict between the means of

coercion of various organizations is as old as the law itself” (p. 318). Nonetheless, the state is not always successful in the prohibition of some forms of disciplinary coercion -particularly within private associations- and, at the same time, it has to tolerate -to a certain extent- the use of this sort of administrative and organizational coercion, which does not relate to public punishment.

For Weber (2004), the use of violence by a wide range of organizations was something acceptable in the past, however currently “the state [...] lays claim to the monopoly of legitimate physical violence [...] regarded as the sole source of the ‘right’ to use violence.” (p. 33). Other forms, such as private groups disciplinary sanctions, can be “regarded as legitimate only so far as it is either permitted by the state or prescribed by it” (Weber, 1964: 156).

This monopoly, as perceived by Weber (1968), is an essential element of modern states, which resulted from developments of previous forms of political organizations in which the right to use violence -even to punish offenders- belonged to individuals. However, the exercise of this individual right led to misuses and abuses, hence the need to monopolize and restrict the use of violence.

Weber’s concept of monopoly of legitimate physical force is regarded as “twofold in that the state provides for public enforcement and it limits private enforcement” (Grechenig and Kolmar 2014: 5). Following this line of argumentation, for Reisig and Pratt (2000) the use of coercive force by private corporations in corrections opposes liberal conceptions of the state, since “the state’s monopoly over coercive authority, compared with other domains of authority [...] is necessary” (p. 218).

In Weberian theory, modern states hold the monopoly of legitimate physical force as a manifestation of the right to rule, to prevent the excess in the use of this right as shown in previous periods of political history. This means that the use of physical coercion exclusively by the state represents an important evolution in the legitimation of the right to punish, for it is historically justified. In the case of privately run prisons, in which the use of coercive force is a feature of their operation, there is no more a monopoly of legitimate force by the state. Consequently, the private use of force during imprisonment requires political legitimation.

5.2.5 Nozick's 'right of all to punish'

Logan (1990) recognized the importance of classical liberal and libertarian views to support private prisons, for "[t]he state is artificial and has no authority, legitimate power, or rights of its own other than those transferred to it by individuals" (p. 52). Since Libertarianism promotes "individual freedom of action, and asks why state power should be permitted" (Nagel, 1982:192), Nozickian theory is presented to oppose the state's monopoly of coercion and thus, to support prison privatisation and provide political legitimacy to this policy; hence the need this review its main ideas.

Underpinning Nozick's (1974) theory is the idea that only a 'minimal state' is politically and morally justified, any other form of state alters basic entitlements, for "[i]ndividuals have rights, and there are things no person or group may do to them without violating their rights" (p. IX).

The function of Nozickian 'mutual protection association'-just as Locke's state of nature- is to protect its members through enforcement of the individual's right to punish (Nozick 1974: 12). However, such assembly is not highly recommended for it might generate arbitrary processes, therefore, it is a requirement to create other associations aiming to protect individuals in a more extensive way.

According to Nozick (1974), some groups would rather be regulated and protected by the state's apparatus, particularly since such individuals would perceive the states' system of justice as the sole law enforcer, since "the state does not *allow* anyone else to enforce another system's judgement" (p. 14, emphasis in original). He also claims the services offered by protective agencies can be considered as a form of market, hence the importance of creating a 'dominant protective association'.

This scholar questions the Weberian 'monopoly of the use of force', arguing that this notion refers only to the state's ability to determine who, how and when is allowed to make use of coercion while the state is keeping the right to transfer this activity legitimating it "via some general regulation or authorization" (Nozick 1974: 24). In this respect, any use of force by a person without permission would be a threat to this monopoly.

He points out that -from an anarchist position- the fact that a state monopolizes the use of force is immoral in itself, as the state violates the same right that would be violated if one person would punish others by his own means. An

anarchist could then raise the question: “[b]y what right, then, can the state and its officials claim a unique right (a privilege) with regard to force and enforce this monopoly?” (1974: .52). For him, any monopoly on the use of force claimed by the state -or in Nozick’s words, the “dominant protective association”- (1974: 108) is a *de facto* monopoly and neither the right to use force nor the prohibition that others would exercise that right, were transferred by individuals.

Nozick goes on pondering the difference between a state’s enforcement of justice and private means. In his theory, the main difference is that according to the same state, its procedures are the ones regarded as correct. Therefore, in the minimal state, the dominant protective association is the proper legitimate entity to punish, for it has been authorized by the majority of members acting on their behalf. However, this does not give a group or anyone else the prerogative to be the dominant protective agency since “[w]hen only one agency actually exercises the right to prohibit others from using their unreliable procedures for enforcing justice, that makes it the *de facto* state” (1974:141). In this minimal state it is not acceptable for the protective agency to remove or have the monopoly to punish.

One additional argument presented to support delegation of punishment, is that retributive punishment is different from revenge. For Nozick (1981), punishment has two main features, namely the punishment in itself, and compensation to the victims. He adopts a retributive perspective on punishment; therefore, such punishment allows everyone to perform the execution of punishment, for “the agent of retribution need no special or personal tie to the victim of the wrong for which he exacts retribution” (Nozick, 1981: 367).

In sum, Nozick acknowledges that the right to punish does not belong exclusively to the victim, and can be substituted by anyone; therefore, any person or entity can deliver punishment, since this right is not limited to the state. Moreover, it is possible to delegate it in a different protective agency under certain circumstances and through previous legal authorization, thus legitimating the private delivery of punishment.

5.2.6 The power to punish and the legitimation of its delegation

At the start of the debate about privatisation, Field (1987) considered that transferring the management of prisons to corporations represented the abdication of an essential function of the state, since it implied the use force and coercion by private individuals. The delegation of this crucial element of

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authority, as a manifestation of the right to rule, would represent -as Shichor (1995) expressed- the abandonment of the state's authority. Here lies the importance of reviewing the approaches addressed in the prison privatisation debate, to establish if the legitimating factors of public punishment of offenders can also be applied to the private delivery of imprisonment, therefore performing an assessment about its political legitimacy.

As a constituent of this IMM, the evaluation of political legitimacy in this dimension is supported by specific principles extrapolated from political philosophy perspectives, which will be summarized at the end of this section. It is important to mention it is not the purpose of this work to perform a comprehensive examination of the philosophy of punishment, its goals and justifications. Such topic, despite its utmost importance, is beyond the scope of this thesis.

According to Logan (1990) and taking into consideration Lockean and Nozickian theories, the right of individuals to punish in the 'state of nature' was transferred to the political society, but the source of the authority to punish does not lie in the state, but in the group of citizens who, under certain conditions, renounced it, therefore "[c]itizens reserve the right to revoke any of the powers of the state, or indeed, the entire charter of the state, if necessary" (p. 53). Logan (1987a) also highlights that, as a result of this situation, the power to punish through imprisonment, just as any other form of authority, is the result of the subjects' agreement, and that is the reason why "with similar consent, [can] be delegated further" (p. 2); this being the case, the state is not the owner of the right to punish, it only has the duty -under specific legal conditions- to administer it on behalf of the society as the holder of that right, which can be transferred even to private bodies.

Regarding Weber's monopoly of violence, Ryan and Ward (1989b) consider it is a misleading notion, for it exclusively relates to the power in one particular jurisdiction to enact laws and allocate punishment through sentencing, power that "does not necessarily depend on the state [...] owning the means of force or employing the individuals who use it" (p. 69). Likewise, Logan (1990) questions it on the grounds that there is no obstacle in contracting out the delivery of punishment, as it "does not deny government's responsibility to provide or arrange for a particular public service; it only rejects a government monopoly over the immediate production of that service" (p. 238). In this same line, Harding (1997) considers that, as long as the allocation of punishment is performed by a

judicial authority as part of the state, “the administration or delivery of punishment is a second level aspect of state authority, delegable in a day-to-day sense” (p. 22), thus, the operation of private prisons does not contravene the exclusive use of force, for inmates remain under the supervision of the state and not as prisoners of a private entity.

However, from Hobbesian and Lockean approaches, if this core public function is delegated into private entities, offenders would be punished under conditions like those existing in the hypothetical ‘state of nature’ which were precisely those meant to be avoided, such as excess and partiality. Taking this into account, punishment through public agencies is legitimated in terms of it being transferred from individuals to public authority and aimed to pursue specific aims. Any other form of punishment, even considering that individuals have the natural right to punish, is politically questionable, even from a Lockean perspective.

From a Hobbesian approach, the right to punish was conferred to the state as a mean to prevent partiality and excess in punishment; this delegation into political authorities represents the separation of public organized imprisonment from private instrumental retribution. This is supported by Dorfman and Harel’s (2013), since “[p]unishment is distinguished from mere violence by the fact that the state is a legitimate authority [...] also for inflicting the punishment” (p. 93).

5.2.7 The principles of political legitimacy

By acknowledging the opinions regarding the delegation of the delivery of imprisonment from a political perspective, it is possible to establish the set of principles underpinning this dimension of the meta-model, which define the political legitimacy of delegating into private corporations the authority and function to imprison offenders, and thus, assessing the legitimacy of private prisons.

The first principle that provides legitimacy to punishment is that the authority, with both the right to rule and the right to use of coercive force, must deliver imprisonment.

As examined in the first section of this dimension, an authority is legitimate if it holds the right to rule; consequently, to be legitimate, the power to punish offenders should be exercised by an authority holding the right to rule. In Beetham’s (1991) theory of legitimacy, this right to imprison should result from

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legal procedures, in accordance with existing laws and rules and with approval from the citizens. These issues will be examined in other dimensions of this IMM.

Hobbes and Locke highlighted the features of legitimate punishment, including that it should originate from the holder of the right to punish, this is, the rightful source of authority to punish offenders through imprisonment. In Hobbes' opinion, the right to punish was rightfully granted to the state by its citizens, and the state became the legitimate authority to use that power. Moreover, legitimate punishment should be delivered by the authority with the right to determine punishment through legislation; therefore, in political terms, the legitimate authority to deliver imprisonment should be the same that enacts and administers it.

Despite the fact that -in Locke's perspective- the right to punish was transferred by individual to the state, its sub-delegation or licensing to private corporations – different to the society as a whole-, would affect the legitimacy, since after the original delegation, the state holds this right to use force and deliver punishment, on behalf of society.

If one considers the enforcement of laws in modern democratic states as a manifestation of the right to rule which belongs exclusively to public authorities as previously discussed, Nozick's approach might justify limitations of the state's role and private involvement, but not in regard to such relevant function as imprisonment of offenders.

Additionally, the Weberian concept of monopoly of the legitimate use of physical force is essential to ponder. This notion could be regarded as a key component of modern states and crucial in the debate of prison privatisation, since it represents an important component in the argument against this policy. Imprisonment in itself requires the constant use of coercive force, especially to maintain security and order. Thus, the body in charge of delivering imprisonment should have the right to use coercive force.

The second principle relates to the proper aims of punishment through imprisonment. Punishment, as a manifestation of the state's power and as a political institution, in order to be legitimate must meet certain conditions, highlighted by Beetham (2013) mentioned previously, this is, an appropriate and principled use and exercise of power.

From a Lockean perspective, the right to punish was transferred from citizens to the state as a mean to prevent partiality and excess existent in the hypothetical state of nature, separating public punishment from private revenge. This is an important political element for the legitimate delivery of punishment.

Nozick's libertarian approach accepts the possibility of authorizing a group to use force only if it is duly allowed under certain circumstances. His arguments might support some forms of privatisation but they do not suffice to justify and grant political legitimacy to the delegation of the right to imprison offenders, for it necessarily implies the use of physical coercive force. His view of about the possibility of a 'minimal state', where the power to punish can be delegated into private protective agents and become part of the free market, is a concern discussed in a different dimension.

Acknowledging that in modern democratic states, punishment fulfils specific goals and is delivered on behalf of the society, it is possible to sustain that it is a manifestation of the state's power and as a political institution in Beethamian terms has to exercise such power according to principles and standards, and only then the state is the "legitimate authority [...] for inflicting the punishment for the right reasons" (Dorfman and Harel, 2013: 93).

To conclude, the principles mentioned serve as political legitimating factors of punishment by private means, and they serve to both assess and challenge this policy. The use of coercive force to punish offenders and to maintain order inside prisons is a concern of the utmost relevance in the legitimation of prison privatisation. The delivery of imprisonment on behalf of the society is a political activity performed to pursue the official purposes of punishment -whichever the state considers most pertinent in accordance to its ideology-. The delegation of this function to a private corporation requires legitimation in the suggested terms.

However, this political analysis does not provide a complete philosophical assessment of the legitimacy of privately run prisons. That is the reason why it is necessary to continue with the next dimensions of this first core model.

5.3 The Jurisprudential dimension: procedure or validity

A fundamental concern in the prison privatisation debate refers to the constitutionality -or legality- of both, the delegation of the authority to punish,

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and the validity of legislation authorizing private prisons (Field, 1987; Shichor 1995, Reisig and Pratt, 2000; Shichor and Sechrest, 2002; Mezger, 2003; Israeli High Court of Justice, 2009; Harding, 2012). The evaluation of such legal issues is fundamental within the IMM to determine the principles underpinning the jurisprudential legitimacy of delegating the faculty to imprison, and establish to what extent such authorization must be in accordance with the legal system.

Shichor (1995) has addressed the legal issues related to prison privatisation, including the question about the constitutionality of delegating governmental powers -including imprisonment- in the USA, conceding that, apparently, there are no constitutional problems regarding private prisons, however, other legal concerns remain like legal liability and the protection of inmates' rights.

To assess this particular category of legitimacy it is fundamental to point out that the validity of laws authorizing private prisons is crucial, for this legal concern "has important implications for practice" (Shapiro 2011: 28). The purpose is then to evaluate the legal validity and lawful origin of legislation authorizing the delegation of the state's power to imprison offenders. This dimension takes into consideration specific contributions to Jurisprudence to extract the legitimating principles of private prison, particularly from two schools of legal thought: natural law and legal positivism. Both theories provide valuable features to this jurisprudential dimension.

Since Mexican policymakers, politicians and academics are more familiar with Aquinas, Finnis, Kelsen and Hart works, such perspectives will be examined to establish what features provide legal validity -and thus legitimacy- to the legislative processes and legislation allowing the delivery of public imprisonment by private corporations.

Therefore, it is important to analyse briefly the relevant features of natural law and legal positivism as two of the main streams in legal philosophy that have shaped discussions in Jurisprudence regarding the source and substance of law.

The contention between these two systems of jurisprudential knowledge has significantly contributed to the construction and development of legal thought, regardless jurisdiction or legal tradition, since many of the claims presented by supporters from both systems have justified the operation of legal structures. Despite fundamental differences and conflicts between these schools of thought, Waldron (1990) perceives a common feature in both theories, since norms are

enacted by the human legislator and, thus, can be “judged morally good or morally bad” (p. 35).

According to Bix (2002) natural law is “a mode of thinking systematically about the connections between the cosmic order, morality, and law, in one form or another, that has been around for thousands of years” (p. 61). Fuller (1969) considers natural law as a system of thought related to various human principles that shape law and represent the “internal morality of the law” (p. 96). McInerny (1993) considers it as a theory that acknowledges “certain non-gainsayable truths about what we ought and ought not to do. These truths are described as principles known *per se*” (p. 212, emphasis in original).

Legal positivism identifies itself as a challenge to natural law theories (Finnis 1999: 1606) and has been presented by its legal scholars as one system opposing natural law. Waldron (2005) accepts positivism may “have offered more complex and equivocal accounts of the role of legislation in a well-ordered legal system” (239).

5.3.1 Legal legitimacy and legitimate law-making

The legal legitimacy of prison privatisation is a topic that deserves attention, especially through an analysis on existing legal theoretical perspectives. Legal legitimacy has been defined as “a property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system” (Thomas, 2014: 735); and as “a combination of state power acting through institutions that are [...] open to public input” (Fenrick, 2007: 179). However, for the purpose of this particular dimension, a more appropriate conception is that of ‘jurisprudential legitimacy’, since theoretical principles, rather than legal provisions, support it.

The first step in the analysis of the jurisprudential legitimacy of prison privatisation laws is to establish the broad legitimating factors of laws. However, it is worth noting that laws regarding criminal and penal law concerns are particularly sensitive, since such rules have specific interests to pursue, both protecting and restricting the most fundamental values of society. Hence the relevance of legislation defining punishment and establishing the lawful agencies to impose and deliver it.

Legislation is a political and social object that guarantees social interaction and protects human values. Laws are complex institutions and are considered valid

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only if they are created accordingly to legitimate standards (Raz, 2009), since they are regarded as “the most articulated form of human coordination” (Finnis, 1983: 254).

The validity of legislation derives from its primal source and its ultimate purpose. Laws regulate human behaviour by setting normative guidelines, making individuals to perceive law as the result of “a sustained purposive effort” (Fuller, 1969: 106). In this sense, legislation is the activity by which “laws are made [...] by formal processes” (Waldron, 2005: 236).

For Loewenberg and Patterson (1979) lawmaking is aimed to prevent and solve conflicts, therefore, the legislative process should include “relevant facts and opinion, the assessment of the positions of influential groups and of public opinion, the formulation of alternative solutions, and the articulation of the rationale of each alternative” (p. 196). These are then, essential components of a legitimate legislative process.

In constitutional democracies legislation is carried out by an exclusive institution, the legislative branch, but it can be proposed by other governmental bodies. Legislation is ultimately the result of the legislative branch that makes the appropriate and needed modifications of the proposals made by other branches of the state (Rosenthal, 1996). Parliaments can also seek the contribution of the public through public consultation or debate and the legislative process is an important occasion to allow this participation. (Docherty, 2004).

However, since the 19th Century von Savigny (1975) warned of the possibility that legislators could be “influenced by high reasons of state” (p. 32). Legislatures are political institutions and, thus lawmaking might be the place where political affairs and party interests drive legislation (Waldron, 2005); and in this process a subjective element might affect laws which “may well be corrupted by false beliefs, passion, ineptitude” (Finnis, 2011: 43). In this regard, according to Norton (2005), the influence of groups, organizations and even companies, might lobby on the legislature attempting to influence public policies.

Loewenberg and Patterson (1979) classified the legislatures according to their influence and involvement in the law making process: one extreme form is the “legitimizing legislature” (p. 198) which has the sole role of approving legislation created outside this body, normally presented by the executive branch or even lobbied by other groups. According to Lagona and Padovano (2008), members of parliaments might produce laws to groups “that are politically more rewarding to

benefit at the expense of groups that are politically less costly to damage” (p. 201). Levy and Razin (2013) also point out the possibility that in the legislative process some groups may lobby to secure their participation in the proposed and approved policy (p. 1866).

For Barnett (1996) a law is legitimate only if it is just in its substance; even a valid law can be regarded as illegitimate when it was enacted using the formal procedures but it results in injustices. In this sense, it was essential to review the legislative process of authorizing privatisation in Mexico and in England and Wales in Chapter 2, highlighting the justifications presented to legitimate legislation approving this policy.

5.3.2 Thomist notion of ‘*bonum commune*’

Aquinas is considered “the most influential writer within the traditional approach to natural law” (Bix 1999a: 63), and his approach to law is “teleological or goal-oriented” (Sigmund, 1993: 222).

Aquinas developed a naturalistic theory of legal philosophy describing law as an “ordinance of reason for the common good made by the authority that has care of the community and promulgated” (Aquinas, 1966: 17). This definition has particular features relevant for this dimension, especially since it considers reason as the foundation of law pursuing a specific aim: common good –“*bonum commune*” (Aquinas, 1966: 10) and lawmakers have the duty to preserve it. A Thomist approach to law encompasses then, the common good as the justification, purpose and concern of every law.

This notion of common good has been further examined. According to Murphy (2006), it refers to justice and peace intended to accomplish the proper operation of the community, and thus “must be something that there are very strong reasons to promote and protect” (p. 168). For Finnis (1998) common good has to be considered as a political –public- category, which must be ensured by the ruler. Finally, Sigmund (1993) suggests the relevance of the concept is such that it can determine the correct operation of governments in their legislative activity, because legislation must be created to preserve public goods rather than private goods.

For Aquinas (1966), natural law is aimed to “maintain and defend the elementary requirements of human life” (p. 81); this implies a close relation between natural law and law in general. Following this link, Finnis (1998) notes that human law

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represents positive law and “human positive law is derived from natural law and natural right” (p. 266). Natural law entails a set of unalterable principles for and common to every human being and human written law serves as a mean to complement or correct some of these principles but never to cancel them; such principles are integrated into one precept: ‘reason’ (Aquinas, 1966 p. 83).

Despite enacted laws should result from reason, they can be imperfect when principles are neglected and Aquinas’s solution to this problem is that law can be modified and corrected by human, positive law. Such modifications must be for logical and practical purposes and always pursuing common good, since “human law should never be altered, unless the gain to the common well-being on one head makes up for what has been lost on another” (Aquinas, 1966: 147).

According to Aquinas (1966) all rules ordering an action are just as long as they are created according to natural law’s rule of reason and its principles; therefore, legislation created in this way has force of law, not because they are posited, but because they derive directly from natural law. Laws created for instrumental purposes without including basic principles, have only force in human law terms. Aquinas claims that human laws can be just or unjust depending on three factors: their purpose, source and form. In this view, laws are just if they are enacted for the sake of common good, if in the law making process the creator has not exceeded in his powers, and if they equally distribute obligations. Unjust laws are regarded so in the absence of these principles.

From a Thomist perspective, legislatures must guarantee the general well-being and, in lawmaking, the common good must be the guiding motive and most significant principle. It follows that only rules and norms that pursue the common good could be regarded as legitimate. Prison privatisation legislation should always consider as its main purpose ensuring common good above any other motive.

5.3.3 ‘Die Grundnorm’: Kelsen’s ‘validity’ of law

In civil law jurisdictions -including Mexico-, Kelsen is regarded as one of the most relevant thinkers in legal positivism, and as a leading legal scholar who has made “a more illuminating analysis of the legal process” (Freeman, 2008: 305), for his work “has attracted most attention and captured the imagination” (Raz, 1999: 47).

As one of the first legal philosophers to examine, from a positivistic approach, the concept of the legitimacy of norms as a basic principle, Kelsen (1967) considered that a norm belonging to a certain normative order is enforceable until its validity is voided or replaced by a new norm with its own validity, created according to constitutional criteria and by an established legal procedure. Legitimacy then, refers to the temporal validity of a legal norm, created according to specific processes; and they must be obeyed -accepted or not- just because they are part of the legal order.

Kelsen (1957) affirms a legal norm is the manifestation by the legislator of the 'collective will' on behalf of the people and the state, and such norm is valid since it has been enacted by the authorized body. This feature provides the validity of norms, since "[a] legal norm empowers certain individuals to create legal norms or to apply legal norms [...]. Only individuals on whom the legal order confers this power can create or apply norms" (Kelsen, 1991: 26).

According to Kelsen (1991), the principles of "morality, politics and manners" (p. 116) are key in the creation of legal norms. These principles are regarded as 'legal' only to the extent they influence authorized lawmaking bodies. He acknowledges the possibility that party-interests can influence legislation, but this cannot be regarded as legal.

Kelsen (1967) points out that the validity of a norm -not its content- is what provides legitimacy to the legal system, for "[a] norm is part of a legal order only because it has been created according to the provision of another norm of this order" (p. 233), and a norm to be valid "must be posited" (Kelsen, 1991: 171). In sum, for Kelsen (1992), a "law is valid only as positive law" (p. 56).

However, in Kelsenian terms, one particular norm is valid by its mere existence (Kelsen, 1992); this norm is the source of validity -legitimacy- for any other norms derived from it. This first and ultimate validity-giver rule is the "Grundnorm" (Kelsen, 1991; 1992), -the basic norm-; as "[t]here must exist one ultimate reason [...] which is the source of the validity of all norms" (Kelsen, 1957: 219).

This basic -hypothetical- norm has full validity only if it has been acknowledged by the legislature (Kelsen, 1967; 1991). Any legal order constructed on this basic norm allows governments to legislate norms to be in accordance with it. Therefore, the validity of any legislation derives from the validity of the basic norm (Kelsen, 1992). This norm-creating norm of a positive legal system can be

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found in a country's first constitution or in the principles supporting it. However, Kelsen (1957) recognizes a non-written basic norm previous to the first constitution: a 'hypothetical basic norm' (p. 221) that provides validity to the first historical constitution and the legal system that derived from it.

Finally, and related to this research, it is important to note that Kelsen (1992) addresses the validity of the right to use coercive force, which must be authorized and established by the legislature or the authorities that held and delegated such power. For him, the use of force "was centralized" (Kelsen, 1957: 251) in one specific body with the power to do so; particularly the delivery of punishment must be performed by the legal entity "authorized to punish the guilty individual" (Kelsen 1957: 253).

Kelsen's works are seminal in the analysis of new legislation in Mexico, given the relevance he has amongst scholars and policy makers. Therefore the consideration of the legal principles suggested by him are essential in an assessment about the jurisprudential legitimacy of Mexican public institutions, which is the ultimate objective of the IMM. In that sense, according to Kelsen's perspective prison privatisation legislation to be legitimate, must be provided with validity, either from the Constitution or the basic norm, and the authorization to use force -in our case during imprisonment- should be performed by the legal entity with the authority and validity to exercise the right to use physical force.

5.3.4 Hartian 'system of laws' and 'rule of recognition'

Hart has been recognized as an important legal positivist (Bix, 1999b) and his contribution to British legal theory has also been acknowledged in countries with different legal traditions (Dworkin, 1998). Hart's most relevant work is regarded as "a landmark monograph and remains a beacon for all who pursue scholarship in [jurisprudence]" (Freeman, 2008: 371).

The most relevant contribution to this research, from Hart's theory is the grounding and structure of a normative order. For Hart (1997), the legal validity of a system must be evaluated on a test that any norm has to pass to be regarded as valid, these are "the foundations of a legal system" (p. 100).

According to Hart (1997) in any original society exist particular social governing rules: "primary rules" (p. 81), which impose duties and restrictions, but with the possibility to lack certainty, progress and efficiency. To solve these defects

“secondary rules” (p. 97) serve to correct, modify or remove any defective rule of the first group, by three possible ways: allowing authorities to solve conflicts (rule of adjudication), permitting authorities to create rules (rule of change), and providing a tool to assess and give validity to all norms. This conjunction of rules is the ground of a normative order and when the manifestations of secondary rules determine the content of laws, then it is appropriate to refer to such order as a legal system.

However, Hart (1997) suggests that a particular manifestation of secondary rules - the validity assessment- is a method aimed to resolve concerns about the uncertainty of norms, by recognizing the existence of the “rule of recognition” (p. 94). This rule underpins any legal system and is the origin of the legal validity - legitimacy- of the norms included in the system. It also represents a framework to evaluate the validity of other rules since “a given rule is valid as to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system” (p. 103). The rule of recognition is then “an ultimate rule” (Hart, 1997: 105), and a supreme criterion of validity.

Furthermore, Hart (1997) suggests that there are two basic preconditions for the validity of a legal order. First, general compliance with the norms which are valid according to the rule of recognition and second, that the rule of recognition and the rules to modify norms are accepted, by those in charge of creating and enforcing laws, as patterns of conduct.

Hart (1958) also specifies that for a norm created by the legislature to be considered as law, it is essential that legislators take into account the recognized rules regulating lawmaking.

Finally, in relation with the topic of this thesis, Hart (1997) considers that members of the society have an essential role in achieving compliance with the law by the use of coercive force since “coercive power of law presupposes its accepted authority” (p. 203).

5.3.5 ‘Lex injusta non est lex’: Finnis’ natural approach

The work of Finnis has been considered as “[t]he most authoritative modern statement of natural law (Freeman, 2008: 126) and he has been acknowledged as one of the most important supporters of natural law in the last decades, providing an “an explanation and application of Aquinas’s views” (Bix 1999a: 68). Despite Westerman’s (1998) disagreement with Finnis’ theory, she recognises his

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contribution as a modern approach to rights and law to ensure common good (p. 234).

The aim of Finnis (1980) is to contribute to natural law theory while being a guide for those making political and legal decisions, since his purpose is to “identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct” (p. 18).

This naturalistic legal approach is constructed on the recognition of “basic human goods” (Finnis, 2011: 206) that every individual would pursue including practical reasonableness. The recognition of these goods determines the rationality of any decision (Finnis, 1983).

In order to explain the main features of the practical reasonableness, a new set of principles is suggested: the “basic requirements of practical reasonableness” (Finnis, 1980: 100) which serve as guidelines for any reasonable decision, including ‘the common good’ in relation to justice, rights, authority and especially for the aim of this dimension, to legislation. The concept of common good is connected to other notions such as “general welfare” or “public interest” (Finnis, 1980: 156). According to Finnis (1980), common good is “a set of conditions which enables the members of a community to attain for themselves reasonable objectives” (p. 155).

Finnis (1980) argues that a legal order and the rules regulating the enactment of norms have a particular feature: that the validity of norms created by the legislature is provided by the same rules creating them. A legal system is effective as long as its rules are promulgated and coherent with other rules belonging to the order. These are relevant features of Finnis’s definition of law, but most importantly is that all the rules belonging to a particular system must be reasonably created.

In this context, for Finnis (1980) positive law must originate from natural law and the “requirements of practical reasonableness” are key in the legislative process. The common goods must be the source of both legislatures and legislation for “a ruler’s use of authority is defective if he exploits his opportunities by making stipulations intended [...] not for the common good” (Finnis 1980: 352). Finnis’ (1980) maxim “*lex injusta non est lex*” (p. 351) refers to the fact that, a norm created by unfair and partial procedures is regarded as unjust since it does not comply with the practical requirement of reasonableness, including the common good, and thus, its obedience is not justified.

Finnis' (1980) asserts the function of contemporary criminal law and its enforcement is supported by procedures and principles and it can be defined "as a certain form or quality of communal life, in which the demands of the common good indeed are unambiguously and insistently preferred to selfish indifference or individualistic demands" (p. 261).

It can be suggested that, from a Finnian perspective the concepts of reason and common good can be considered as the justification of criminal law -including punishment, its delivery and the rules regulating it-, and "sanctions are part of the enterprise of legally ordering society, an enterprise rationally required only by that complex good of individuals which we name the common good" (Finnis 1980: 264). Prison privatisation should, in Finnian terms, pursue the common good, and its supporting legislation should be created in accordance with the principle of reasonableness.

5.3.6 Public good and the legitimization of privatizing laws

After reviewing key theories in jurisprudential thinking, it is possible to say that for natural law and legal positivism the concept of validity and common good are a mutual feature and should be principles underpinning any modern legal system. These concepts are linked to legitimacy since they are legitimating factors not only of the legal system but particularly of legislators, lawmaking and laws, in our case, those authorizing the delivery of imprisonment by private corporations.

From a naturalistic perspective, it is possible to suggest that the legitimacy of norms derives from a teleological process in lawmaking; it should not be a blind process or purely formal function, since it has to be orientated to legislate towards the promotion of values, the common good and human rights. In the light of natural law, the legitimacy of laws depends on their goal and on the motives of the legislator. If legislation pursues and ensures the common -public- good and legislature is directed by this motive then it has full validity, this is legal legitimacy. Lawmaking must be guided by reason in order to create legitimate laws.

Moreover, if private interests are pursued instead of the common good, the legitimacy of legislation could be questioned, just as Finnis (1998) suggests that "if the lawmakers are motivated [...] by greed or vanity, or act outside the authority granted to them [...] in the forum of reasonable conscience [...] are not so much laws" (p. 272-273). This is because legislation, particularly related to

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criminal law and punishment of offenders has to be supported by reasonable decisions based on principles, including the common good.

A further concern in the privatisation debate from a jurisprudential approach is the extent to which legislatures comply, with not only the regulating rules but also acknowledging a broader set of principles underpinning lawmaking according to legal theory.

For Loewenberg and Patterson (1979) legislators influence on lawmaking can be determined by their connection to other groups, despite Hayek's (1993) claim that the "task of a true legislator ought to be to say 'no' to all claims for special privileges" (p. 29).

As it was presented in Chapter 2, the legislative authorization of private prisons in Mexico and in England and Wales had some particularities that raise questions about their legitimacy. In Mexico, there was no consultation process and expert debate to raise awareness of the implications of prison privatisation and in a period of four years, the operation of private prison was recommended, discussed, authorized and implemented. In England and Wales, despite having a consultation process with the opportunity to present evidence, so Members of Parliament would be well informed, this policy was recommended by a right wing think tank that highlighted the importance of continuing with the process of privatizing public services as part of the conservative administration at that time.

It is also possible that initiatives regarding the privatisation of prisons might be introduced to the legislature backed or lobbied by groups that, on behalf of companies, are interested in privatisation policies. In this respect, Roberts and Saeed (2012) have pointed out that in privatisation processes political determinants are present and they "hypothesize that a right-wing orientation of government makes privatizations more likely" (p. 52).

It can be argued that legislation authorizing private prisons might be created taking into account interests different from those guiding an impartial and objective lawmaking process, in order to benefit particular groups and sectors. The motives of the legislator might be influenced by party interests or even by external private drives. Therefore, legislation created under these circumstances can be questioned in its jurisprudential legitimacy, since it privileges certain groups over society, and the legislator exceeds its power to secure common good. External influence on legislatures is a difficult topic to prove, however,

further research might serve to determine to what extent specific groups influence lawmaking aimed to approve privatisation policies.

Taking a positivist stance, legislation and rules allowing private prisons would be valid if they are created by an authorized body in accordance with constitutional and legal enacting procedures, regardless of their content or goal, because, as Kelsen (1957) points out “[t]he reason for the validity of a norm is always another norm, never a fact” (p. 219). In Kelsen’s and Hart’s opinion, the validity - legitimacy- of a rule that permits the operation of private corrections, derives from the recognition of such rule within the whole set of norms that conforms a legal system.

Privatizing legislation has validity and jurisprudential legitimacy if created by existing legal procedures emanating from previous fundamental norms: the basic norm or the rule of recognition. From this positivistic perspective, a particular rule or law, including those authorizing private prisons, to be legitimate has to be traced to the basic norm, created by existing procedures according to this norm and not having been voided by other valid norms. Nevertheless, it has to be commented even constitutional legislatures acting under legal procedures “may enact statutes that profoundly affect the law-making procedure [...] within the frame of the constitution and yet undermine the institutions it was intended to establish” (Fuller, 1958: 642).

When private prisons are authorized by legislation created by an uninformed or biased legislature, for instrumental goals as part of a pragmatic penal policy, their jurisprudential legitimacy can be questioned, despite having full validity after been authorized by a lawful procedure and even pursuing -at least in the rhetoric- the public good. This legislation questioned in its legitimacy can be challenged by the legislature -a review commission- and the judiciary -a constitutional court- by a process of legal reasoning.

5.3.7 The principles of jurisprudential legitimacy

To assess the jurisprudential legitimacy of privately run prisons in this meta-model it is essential to establish the principles that must be taken into account in this dimension, thus it was necessary to review some theories in order to extrapolate principles that provide legitimation to private prisons.

Considering that prison privatisation has to be examined from legal theory, in order to determine whether legislation authorizing private delivery of

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imprisonment are legitimate because they have taken into account into account specific values, or are only by the fact that they have been approved by authorized bodies and in accordance with previously established law-making procedures.

The first principle providing jurisprudential legitimacy is that privatisation legislation must be the result of a legislative procedure not only with strict compliance to the rules regulating this procedure, but also must be the result of a well-informed legislature that allows a public space –as part of a consultation process- where opinions from all those with interest in the policy, are allowed to present evidence. This since legislatures ought to be a ground for debate and argument from a wide range of views and thoughts and the law created in this forum has to be the result of contending perspectives about the relevant issues in society (Waldron 2005: 242).

Moreover, legislature in charge of enacting legislation to support prison privatisation must have two essential features: impartiality and independence of their members to reach a decision and support legislation. This is, any parliamentary discussion about prison privatisation must be free from any external pressure either by lobbying groups or corporations seeking particular interests. To avoid any influence in lawmaking that may influence and determine particular legislation, lawmakers must adhere in their activity to guiding principles and every decision ought to be directed towards the public interest as the ultimate goal of legislation. A lawmaking process and its result have jurisprudential legitimacy when society, rather than particular groups, is considered.

The second principle providing jurisprudential legitimacy is that privatisation laws must have legal validity, as part of the broad legal system. In this sense, it has been emphasized that every legal system must have an essential rule, origin and source of the complete normative system (Fuller, 1958).

Hartian and Kelsenian approaches are essential to support this principle, for they provide a tool to trace back the legitimacy of a particular rule to the rule of origin. Even when privatisation laws are the result of a lawful legislative process, their jurisprudential legitimacy depends on further factors. The rule might be considered as valid, and therefore legitimate, if it complies with the principles of the Constitution as a ‘basic norm of recognition’ or, in the absence of a fundamental law, with the principles that underpin a legal system and are

recognized by both the State and the society, including the common good. As Davies (1996) points out “[t]he rule of recognition [...] provides not only an internal criterion [...] of legitimacy but also an external ‘objective’ definition of law” (p. 26). It has also been noted the importance of the rule of recognition by setting a validity criteria of legal rules that must be observed and applied by officials “and the rule of recognition sets out the content of this duty” (Shapiro 2011: 85).

In other words, privatisation laws must be in accordance with a nation’s constitution and its grounding norms. The constitutionality of prison privatisation has been primarily addressed in the USA, Robins (1989) provided a valuable examination, since for him, a legal approach to this policy has three different elements: constitutional, contractual and statutory. Regarding the constitutionality of the delegation of power, he considers that, despite it might not be unconstitutional, if a conflict between private interest and public goods exist “courts may invalidate the delegations” (p. 576).

The pursuit of basic principles, in particular the common good is the third and final principle supporting this dimension. The common good, according to both Aquinas and Finnis should be the ultimate purpose of legislation.

This has an utmost importance for the purposes of assessing the jurisprudential legitimacy of legislation permitting the operation of privately run prisons as, in Finnian terms, they must aspire to the common good, value that is directly connected to the legislative task.

Despite the ambiguity and debate around the concept of the common good, particularly in penal terms, it can be said it refers to the public aims of punishment according to its philosophical and ideological grounds. However, a deeper examination of the concept of the common good is not a purpose of this research.

As with the previous dimension, for a complete trial of the philosophical legitimacy of prison privatisation, a further dimension is required, one that provides a moral assessment of the motives pursued by both, governments and private corporations, in the delivery of punishment.

5.4 The Ethical dimension: motive or duty

This final dimension is of the greatest relevance in the prison privatisation debate since the authorization to imprison offenders in private facilities involves ethical issues and it can even be considered as a moral dilemma.

It has been suggested that the moral question lies in the very essence of punishment, since “[t]he use of force by any human being against another, constitutes an ethical problem” (Kleinig, 1995: 215). It has also been conceded by Bottomley *et al* (1997) that, despite its lack of conclusive arguments, the morality of private prisons can be evaluated through a philosophical debate.

Advocates of prison privatisation have claimed that this moral debate is irrelevant due its abstract nature (Harding, 1997); or as Young (1987) suggested there is no moral conundrum in the phenomenon, since profit making within the criminal justice system has been a common practice by lawyers or crime reporters. These sort of arguments have been presented to set aside the moral component, without making any further analysis on the ethicality of this policy.

However, for opponents it represents a fundamental issue, because, as they have pointed out private delivery of punishment is morally inappropriate, and it has been questioned “whether it is proper that private parties will make a profit [...] from the infliction of pain on others” (Shichor, 1995: 67). A further ethical concern refers to the possibility of recruiting persons involved in the debate or legislative process in key positions in companies managing prisons for they might have “benefited either that particular contractor or private prison operators in general” (Cavadino and Dignan, 1997: 174). The Howard League for Penal Reform (2014) has asserted that “[i]t is morally reprehensible to profit from people’s misery and a system to reform individuals and promote the public good is counter-intuitive to one set up to derive profit” (p. 5).

Notwithstanding its prominence in the debate, the question about the morality of public imprisonment by private corporations requires further examination, but particularly through the contributions of moral philosophy, to assess the ethical legitimacy of the delegation of imprison offenders and the pursuit of private interests, like profit-making from taxpayer’s money. This is the purpose of this section.

This dimension will establish the principles that determine the ethical legitimacy of prison privatisation, by acknowledging the contributions of moral theory and

assessing to what extent it is morally acceptable for the state to allow individuals -the private sector- to deliver punishment and imprison other individuals - inmates- while gaining economic profit. The starting point of this dimension is to analyse the morality of state punishment and the justifications provided to delegate this function. To do this, is imperative to review how morality is regarded in normative theories. Then, as in the previous dimensions, some theoretical perspectives will be briefly examined; in this case, Bentham's classical utilitarianism, Kantian deontological ethics and Rawls' contractarianism, since these theories are directly connected to punishment in general and their theoretical postulates are useful to draw the principles underpinning the ethical legitimacy and assess the appropriateness of privately run prisons.

5.4.1 Normative ethics and the morality of state punishment

The starting premise in the ethical debate about private prisons is that all actions and functions of the state, as a legal entity and acting body on behalf of its citizens, must be guided by a set of principles derived from constitutions, agreements or customary law that define what it might be considered as the 'morality of the state'; this is, what is right and wrong for the state to do, regardless the implications and the political and legal legitimacy of that particular action.

Governments should be morally neutral concerning citizens' morality and should not determine its contents, but its actions should necessary have a determined morality that underpins and justifies its policies, practices and functions. The state is thus a moral agent to itself, and just as any individual, it has to make decisions according to its own morality at a certain place at a certain moment. This set of moral values must be considered in any policy making process and in its practical application. Morality can be regarded as "a public system that applies to all rational persons, governing behaviour that affects others, and includes what are commonly known as the moral rules, ideals, and virtues and has the lessening of evil or harm as its goal" (Gert, 2005: 14).

Each state has a normative-ethics constructed morality, which sets the limits to the state's activity and government's functions, including punishing offenders, since the state has not only a public and legal duty, but a moral duty as well to use imprisonment in an ethical way; otherwise, punishment and prisons could be regarded as immoral and ethically questionable, situation which would contribute to the perception by the public of a penal crisis.

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State punishment as one response to crime is alone a moral concern and through the centuries has been justified in terms of its aims, for “social control and punishment are central to any discussion of morality and ethics” (Pollock-Byrne, 1989: 135). A comprehensive analysis on the rationale of punishment escapes the scope of this work; however, within the prison privatisation debate, there are issues directly linked to the purpose of state punishment. When an offender is punished –sentenced to imprisonment, in our case-, the state acts on behalf of society and has a duty to perform such function in accordance to institutional goals, whichever they are: retribution, incapacitation, deterrence, rehabilitation or reparation; but always within certain moral limits. Therefore, punishment is morally justified only when it guarantees public goals; when external, instrumental aims are pursued, punishment is morally questionable.

The main question in the punishment by private means discussion is to what extent this practice is guided by the same principles, values and aims of imprisonment by public agencies. At first, it could be implied that they are the same; but this might not be the case since particular private interests come into play when imprisonment is delivered by corporations.

In modern democracies, the rule of law, institutional goals, public common good and human rights should be the guiding principles of public punishment and its supporting penal policies; well-being, safety and dignity of inmates have to be considered as the drivers behind imprisonment and values in the morality of the state. If privatisation policies are implemented, the state has to clearly determine its purposes and ensure, through various mechanisms, that private prisons align with the recognized rationales of imprisonment. However, if the drivers behind public and private imprisonment differ, then allowing the private management of prisons would constitute a moral dilemma for the state, which will have to be solved through an assessment of the ethical legitimacy of such policy, and taking appropriate measures to ensure that imprisonment by private means conforms to the state’s morality about public punishment.

Hence the importance of moral philosophy in this IMM, since ethics are of practical application, not just a theoretical methodology (Gert, 2005: 8) and “[m]oral philosophy [...] reflects the debates and disagreements of the culture” (MacIntyre, 1985: 252)

5.4.2 Bentham: maximization of 'utility'

Utilitarianism, as a form of consequentialism, has been considered very influential in moral theory (Schofield, 2013). As a theory of the right, Moore (2009) regards consequentialism as the position where good is maximized by actions or institutions. For him, this is a principle of morality; however, it is acknowledged that in certain situations it would be prohibited to perform a particular action even when it maximizes good (p. 37). Consequentialism supposes "[t]here is one and only one factor that has any intrinsic moral significance in determining the status of an act: the goodness of that act's consequences" (Kagan, 1998: 70).

Utilitarianism determines the right or wrong of actions on moral basis, and thus their moral relevance is assessed according to the fulfilment of well-being, happiness or good. It is an useful device to determine "which acts are good, which are right, which are just, and which are obligatory" (Narveson, 1967: 19); and it has two distinctive features, according to Shaw (1999): that actions are regarded as moral in terms of their results and that those same results must be judged in terms of the happiness or unhappiness they achieve (p. 2). It is regarded as "a theory about how decisions should be made, not about how decisions are in fact made" (Lyons, 1984: 113) and decisions must take into account the well-being of others.

Despite Mill coined the term utilitarianism first (Schneewind, 1969), Bentham's contribution to the utilitarian philosophy is paramount, as he was the first to fully develop a systematic theory to explain it (Shaw, 1999: 7). It has been noted that the role of Bentham as a moral philosopher is limited (Plamenatz, 1966); however, his theory about the principle of happiness or utility is useful for the purpose of this research.

Having its origin on the axiom "the greatest happiness of the greatest number that is the measure of right and wrong" (Bentham, 1983: 3), "the principle of utility' is a valuable contribution to moral theory. Happiness is the common end of all actions, in so far they comply with this end: "the principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or [...] to promote or to oppose that happiness" (Bentham, 1970: 12).

For Bentham (1970), utility is a characteristic of goods that generate other goods or avoid negative goods. Governmental actions –public policies and laws-, are in

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accordance to utility only if they maximize the happiness –well-being- of its subjects rather than reducing it and therefore the principle of utility determines the moral rightfulness or wrongness of those actions. In this sense, it has been pointed out that the principle of utility is the rule by which any action can be morally assessed (Milo, 1974).

The meaning of general utility is that evil must be avoided for the promotion of good (Bentham, 1871: 2). Bentham considers that if, and only if, governmental actions increase the community's 'happiness', they can be regarded as aligned to the mentioned principle (Bentham, 1970: 13). Bentham also uses the term well-being to refer to the "highest and most general end" (Bentham, 1983: 125).

In a later work, Bentham acknowledged that the notion of 'greatest happiness principle' was more appropriate; hence, Bentham's classical utilitarianism is regarded as hedonistic tending to be an egocentric theory (Shaw, 1999). However, in the light of modernity, it is possible not to take the term 'happiness' literally, but as a mean to seek well-being or welfare, particularly since Bentham (1983) further considered the concept of "summum bonum" (p. 134) as the most relevant good. This utilitarian principle is adequate to evaluate the morality of public policies and governmental actions as they might be justified "if the total net benefit of their adoption, direct or indirect, is greater than the total net benefit of adoption of any other possible policy" (Brandt, 1992: 366). Here lies the importance of Bentham's theory as to provide support to the assessment of ethical legitimacy of allowing private prisons to imprison offenders, based on the utility principle.

Classical utilitarianism has been the guiding principle for public institutions and functions that exist nowadays, such as punishment, and has influenced its reform and transformation (Wiggins, 2006: 145). For Sandel (2010) the utility principle was the basis for Bentham's panopticon, originally proposed to be operated by private individuals, maximizing the humanity of imprisonment and, at the same time, the economic gain of the contractors.

5.4.3 The 'categorical imperative' in Kant's Deontology

Although Kant's approach is not directly related to state decisions, his propositions have certain repercussions in the field of law and politics (Acton, 1970: 43). The moral philosophy of Kant is considered as a leading moral theory (Höffe, 2013: 465) and has also been regarded as one of the most important

perspectives in normative systematic theory about morality, being its most enduring legacy “his commitment to rational justification” (Gurnham, 2003: 21). Kant’s approach is built on the recognition of morality as universal, based in reason in a manner that “moral principles present requirements on action that are valid for any rational agent regardless of their desires and ends” (Reath, 2013: 443).

The “supreme principle of morality” (Kant, 1983: 5) begins with the proposition that there is a principle regarded as absolutely good and thus, a moral law, through the formulation of his categorical imperative: “[a]ct only according to that maxim whereby you can at the same time will that it should become a universal law” (Kant, 1983: 30). This maxim is rational, absolute and obligatory, is imperative and implies the recognition in an act or decision of an objective condition, always in accordance to practical reason for “the summum bonum may be the whole object of a pure practical reason” (Kant, 1948: 204). It is not derived from desires or other motives, and is categorical since “an action is objectively necessary in itself, without reference to another end [...] [and] [t]his imperative may be called that of morality” (Kant, 1983: 24-26).

The categorical imperative has been regarded as a manifestation of an “ultimate moral norm” (Sullivan, 1994: 28) since it requires all subjects to align their acts to this general unconditional principle compelling to act always in accordance to such universal law for “[t]here is [...] only one categorical imperative; and we may call it ‘the categorical imperative’” (Paton, 1967: 133).

If one considers Kant’s proposition, all acts must be performed according to one universal reason and not upon particular interests. It has been suggested this first formulation of the categorical imperative has the benefit of providing clear guidelines to assess the morality of rules and actions (Acton, 1970), and it represents a process to establish moral principles (Reath, 2013). In this sense, the principle of universality as a categorical imperative becomes a valuable tool to determine the moral content of public policies and governmental actions, establishing what are the duties for the state to fulfil. In Kant’s words “[a] categorical imperative, because it asserts an obligation with respect to certain actions, is a morally practical law” (Kant, 1996: 15).

A second expression of Kant’s categorical imperative is known as practical imperative, meaning to “[a]ct in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end

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and never simply as a means [...] ‘the principle of humanity’” (Kant, 1983, 36-37). Sandel (2010) comments this principle, by highlighting that “respecting human dignity means treating persons as ends in themselves” (p. 110).

Sullivan (1994) concedes that -from a Kantian perspective- the state and all its acts, including laws, ought to be underpinned by the universal principle of justice, meaning they should be universal and impersonal “avoiding partiality toward special interest” (p. 152). Gurnham (2003) also acknowledges that “for Kant, “reason”, “moral”, “universal” and “objective” are mutually dependent and defining concepts.” (p. 23).

Kant’s (1996) retributivist approach to punishment is not matter of this thesis, however it is important to note that, in his theory “[t]he right to punish is the right a ruler has against a subject to inflict pain upon him because of his having committed a crime” (p. 104). The law of punishment is perceived as a categorical imperative, particularly in its second manifestation, the principle of humanity, since “a human being can never be treated merely as a means to the purposes of another” (Kant, 1996: 105). Considering this, the categorical imperative means imprisonment must serve specific purposes and not a mean to achieve other motives. This point is particularly relevant for the purposes of this dimension for, as it was stated, private prisons should pursue the official aims of imprisonment.

5.4.4 Rawls’s social contract: justice and morality

Rawls’s contractarianism has been acknowledged as a variant in moral philosophy (Scanlon, 1982: 103), for the construction of morality is based on social agreements and contracts amongst the people. Rawls (1973) suggests all social and state institutions must consider justice as their first virtue; otherwise, unjust institutions must be abolished; this since the justice of a social policy is based on the delivery of fundamental rights and obligations (Rawls, 1973). This principle can also be applied to political actions as well, including policy making within any social structure, as they can be regarded as just or unjust depending on how they are aimed to include basic rights.

In Rawlsian theory, any social structure has to decide -by means of a rational process-, which are the ruling principles, and thus support any common decision; the source of these principles of justice are rationality and universality. Since these principles are obligatory, all institutions and public decisions derive from these previously agreed standards. This is the basis of Rawls’s deontological

approach in moral theory, for “a theory of justice is [...] a theory of the moral sentiments [...] setting out the principles governing our moral powers [...], our sense of justice” (Rawls, 1973: 50-51).

For Rawls (1973) each social institution should be guided by existing rules but particularly by the two principles of justice, which drive the institution to fulfil previously determined goals through strategies led by rationality. The penal system is such an institution with particular aims and defined means and cannot depart from the guiding principles of its functions. In Rawls’s theory, the duty of justice is fundamental and all governmental institutions are required to pursue justice in Rawlsian terms: as fairness and as equality. (Rawls, 1973: 115).

According to Rawls society agrees –in the hypothetical original position- the goals of institutions and the good that is to be pursued.

In Rawls’s (1955) approach to punishment, it means the legal removal of rights “carried out by the recognized legal authorities of the state” (p. 9). This is one of the components of a morally legitimized punishment. From this view only authorities might deprive rights, such as liberty; other bodies -even legally authorized by the state- that restrain freedom and use coercion to secure this constraint, are performing an immoral form of punishment. He questions the possibility of justifying from a utilitarian perspective other forms of punishment apart from the one he proposes. However, by setting an example of authoritative manifestations of deprivation of rights in a penal system, he asserts that a “utilitarian justification for this institution is most unlikely [...] as one drops off the defining features of punishment” (Rawls, 1955: 12).

Rawls (1955) proposes two conceptions of rules: summary, that admit no exception and those rules of practice that consider particular cases on utilitarian ground, and can still be morally justified.

Finally, Rawls (1973) asserts that, although the principles of justice do not derive directly from respect for individuals, such principles “will be effective only if men have a sense of justice and do therefore respect one another” (p. 586). In the case of punishment by private means, Rawlsian principles are relevant to assess moral appropriateness of allowing corporations to make profit from public imprisonment of offenders.

5.4.5 Applied ethics and private imprisonment dilemma

The state's morality should be the basis of all decisions and policies since all governmental actions should be taken on behalf of all citizens, and not on individual choice. This morality must reflect the principles recognized by its subjects and manifested by democratic procedures. The state has duties and obligations and all its actions and decisions –including penal policies and their supporting legislation- should be morally justified, in order to be ethically legitimate. The construction of an ethical framework is essential to develop moral policies and, in consequence, perform the necessary actions to implement them through appropriate guidelines, principles, or standards “to identify the morally relevant features of [the state] actions” (LaFollette, 1997: 6).

Such is the role of normative ethics, not as a theoretical system, but as the application of both theory and practice: “the application of ethics or morality” (Singer, 2011:1). Jamieson (2013) considers “[p]ractical ethics is concerned with the evaluation of particular things as good and bad, and of various acts, practices, or institutions as right or wrong” (p. 844). Almond (1995) recognizes the importance of applied ethics in public policies debate and asserts that “[c]urrent interest in applied ethics, then, can be seen as a return to what have always been proper preoccupations of philosophers, questions about ends or ideals as opposed to means or techniques” (p. 1).

Applied ethics aimed to solve moral conflict or dilemmas, which are understood as “[situations] in which we seem to have conflicting duties” (Hare, 1981: 26) or as “situations in which an agent morally ought to (and can) do one thing, and morally ought to (and can) do another, but cannot do both” (Gowans 1996: 202). Sandel (2010) acknowledges that moral dilemmas might originate when there is a clash between moral principles. Considering this, it is possible to suggest that private management of prisons can be perceived as a moral dilemma since there are principles of punishment apparently colliding with each other: utility and duty of public interest and private motives.

Examples about the revenues of private companies running prisons that were presented on Chapter 2 might suggest such conflict of interest, as companies are growing and their revenues increasing, but in their management, some areas have not been operating according to the expected results and to the justifications originally presented to support this policy. This issue affects the

ethical legitimacy of privatisation since it provides an argument to question the moral appropriateness to allow private enterprises to imprisonment.

The morality of modern states compels them to secure the aims of imprisonment -either utilitarian or retributive- with the duty to guarantee humane treatment of inmates. The authorization of private prisons puts the state in a situation where a conflict of interest and a collision of values is highly likely in the form of the duties of the state and the motives of private corporations. This is a case of practical ethics, a moral dilemma: the state deciding to apply instrumental policies, leaving aside humane and principled measures. From Sandel's (2010) analysis of ethical dilemmas, it is possible to draw certain values that should be considered in any action or decision taken by the state in a moral debate: the status of the person involved, the purpose of the controversial action and the good it protects.

The first conflict affecting the legitimacy of private prisons refers to the goals pursued by imprisonment. On utilitarian grounds, one argument for the permission to private corporations to deliver public services can be that is justified in terms of the ultimate goal of prison -rehabilitation or reform-, as companies have the necessary resources to provide better conditions and regimes to achieve such aim. However, Sandel (2010) considers that utilitarianism does not take into account individual rights and the utility of an action cannot be the only guiding principle of a policy. This is the case of public punishment since from a utilitarian view it can be regarded as moral only to the extent it seeks general, common and greater good.

From a Kantian approach, the features of punishment already stated need to be considered in order to determine its deontological principles and apply such postulates to the case of making profit from punishment and to determine if using a human being merely to attain other ends- such as profit- is morally acceptable. Proponents of privatisation might argue that to achieve rehabilitation or reform, the state needs to partly delegate this function, as corporations are perceived to perform better, being merely helpers to the state, turning that argument into a utilitarian one. The other deontological perspective in this conflict refers to the present situation in which the state with its available resources is not able to attain the aims of imprisonment. Nonetheless, it makes a deontological decision to keep its monopoly over imprisonment to maintain the morality of punishment protecting Kant's universality and humanity principles.

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From a contractarian perspective, the ethicality of allowing private operation of prisons results from the fact that society agreed to allow the state to take any necessary measures, formulate, and apply appropriate policies to secure its functions. In this case, reducing reoffending and ensuring public safety through rehabilitation or reform thru imprisonment, even if this implies the use of private means to achieve it. However, from an opposite perspective it could be argued that a social group acknowledged that making profit from human pain is immoral and thus, not accepted as part of the original agreement, as nobody would like to be treated as a commodity and source of profit.

Such opposing perspectives lead us to a second dilemma: the authorization from the state for private companies to economically benefit from delivering punishment, a function quite sensitive to be regulated by market rules. If imprisonment is delivered by private corporations in exchange of profit, then punishment is at risk of losing its public, general, institutional purposes. This is what Sandel (2012) perceives as the corruption objection, this is “the degrading effect of market valuation and exchange on certain goods and practices [...] certain moral and civic goods are diminished or corrupted if bought and sold” (p. 111)

The third and final moral conflict relates to the duty to ensure, not just appropriate conditions and regimes within prisons, but most importantly, to protect the dignity –humanity- of inmates. Rhetorically private punishment might be regarded as humane if it provides better conditions; nevertheless, from an ethical approach, delivering punishment in exchange of money affects the human condition –humanity- of inmates, as they become a marketable commodity, becoming profitable goods. These economic issues will be examined later.

There is a risk then that punishment might become an economic good; however, by its nature and the good pursued, it cannot be part of the market for obtaining economic benefits from the deprivation of liberty and the use of coercive force by private individual might be perceived as morally questionable.

This section raised three particular concerns derived from the state’s authorization for private corporations to deliver imprisonment and has highlighted the importance of applied ethics in an attempt to resolve the potential moral conflicts that this policy causes.

5.4.6 The principles of ethical legitimacy

To provide a comprehensive methodology to solve the moral dilemmas that might be generated by prison privatisation and thus, assess the ethical legitimacy of private prisons, the principles drawn from the moral philosophy and normative theories analysed in this dimension of the IMM are key.

The first legitimating principle refers to the utility of imprisonment according to the state's penal ideology. As previously stated, a study regarding the philosophy of punishment is not a purpose of this research, but suffice to say that in modern democracies, punishment ought be allocated and delivered in accordance with guiding principles and aiming to achieve particular goals considered in the state's penal ideology, this is, punishment must secure its utility according to humane liberal standards and private prisons must follow this; since "every unprofitable punishment is ipso facto morally unjustified" (Primoratz, 1989: 41).

For private delivery of punishment to have ethical legitimacy, it must be goal-orientated and have a public utility in accordance with international and local guidelines, and not only a private utility in the form of profit-making. The state has to safeguard this obligation for punishment by private means to be morally justified; and according to Sandel (2010), is not appropriate to turn a "duty into a marketable good" (p. 87).

Taking a utilitarian approach, any punishment pursuing private ends with consequences disapproved by society can be regarded as morally questionable. The marketization of punishment through prison privatisation is perceived by its opponents as morally questionable due the economic motive of corporations, because economic profit-making might be incompatible with the public goals of imprisonment and the protection of the human condition of inmates. This leads us to the second principle.

The pursuit of the common -public- good of imprisonment as an agreed goal instead of mere economic profit is a principle supporting this dimension. This since, as examined, the role of the state and its use of the power to punish - despite its delegation-, to be ethically legitimate and justified must ensure the goals of punishment -namely rehabilitation, resocialization or reform of inmates- as a mean to reduce reoffending and provide public safety.

According to Sandel (2012), public policies should consider morality very seriously and certain activities or services should not be handed to the market

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due the good that is pursued; this, since “markets and market-oriented thinking have reached into spheres of life traditionally governed by nonmarket norms [...] putting a price on noneconomic goods” (p. 48). Moreover, Shichor (1995) acknowledged the danger of the profit motive, as this might become the driver of the private sector prisons agenda and guiding purpose at the expense of the formal aims of imprisonment, for “private corporations were not established for serving the public good; they were established to generate profit for their owners and stockholders” (p. 67).

The final principle that provides ethical legitimacy to prison privatisation is the duty –a categorical imperative- of the state to secure universality –fair treatment- and humanity –decency- to all inmates in the delivery of imprisonment. If the state allows operation of private prisons, it must ensure that corporations delivering imprisonment perform this function in accordance with standards that secure humane and impartial treatment of offenders, through appropriate accountability mechanisms –topic that will be addressed elsewhere.

In Kant’s (1996) approach, it is an obligation to act under a categorical imperative of reason; therefore, modern governments have the obligation to pursue punishment through fairness and decency standards, pursuing its utility and common interest, rather than private goods. Even Logan (1987a) a strong advocate of private corrections, concedes that “for punishment to be a moral enterprise, it is important that it be done for the right reasons” (p. 7).

It is possible to suggest that the delivery of punishment by private means might breach the first principle of justice in Rawlsian theory as well: equality, since some inmates could be treated differently –either better or worse-, depending on the prison and the area- by an alternative and parallel penal system driven by particular motives, but that at the same time, has to achieve the public good of imprisonment. However, Rawls’s second principle, - the arrangement of inequalities- could be used by private prisons proponents, to legitimize these institutions by establishing procedures to guarantee equality of opportunities to inmates.

5.5 Conclusion

The delegation by governments for private corporations to imprison individuals as the public consequence of committing an offence or crime requires an assessment of its philosophical legitimacy, especially in three particular areas:

political, jurisprudential and ethical. The purpose of this domain was to determine and depict a set of principles required to evaluate the legitimacy of privately run prisons. The examination of one single dimension is inconclusive, but when all three dimensions are connected, it is possible to claim that they complement each other and allow us to take a wider approach and evaluation of the concerns in this discipline.

From the analysis and connection of the concepts of legitimacy and state punishment, imprisonment can be regarded as a function that must be accomplished by the precise entities with particular features and pursuing specific goals. Political legitimacy of prison privatisation is determined by principles extrapolated from Political Philosophy. In the Jurisprudential dimension, it was presented that privatisation legislation to be legitimate must be created in accordance with previously established procedures and have validity as component of the legal system by conforming to the basic principles. In the final dimension, ethical legitimacy referred to prison privatisation as a moral dilemma for the state, since there might be an apparent collision between the public good of imprisonment and the profit-making motive of corporations; normative and applied ethics proved to be useful in addressing this issue.

Chapter 6: The Sociological domain

6.1 Introduction

This second component of the IMM includes society as a key player in the privatisation phenomenon. Imprisonment by private means requires to be examined from a sociological approach, as a contribution to the debate.

The rationale of this domain lies in the importance of recognition, compliance and approval of privatisation by the public and the prison society as essential legitimating features. The evaluation of the legitimacy of private prisons is based on principles drawn from Social Psychology, Procedural justice theory, Criminology and Penology. The constituents of this Sociological domain portrayed in Figure 4 are: the Ideological, Procedural and Criminological dimensions.

Figure 4

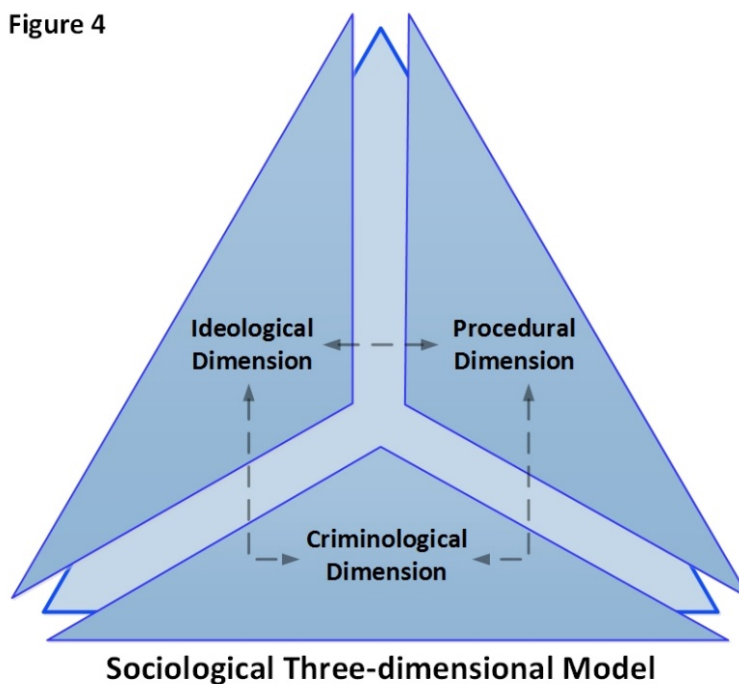


Figure 4 Sociological Three-dimensional Model

The problems raised in this dimension refer to the social recognition, public approval and penal expectations of privately managed prisons. To be legitimate, privatisation policies should be socially validated since their implementation should adhere to communal values, ensure fair treatment inside prisons and supported by criminological evidence about its pertinence. This chapter will

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assembly this core model to evaluate the sociological implications of prison privatisation.

Punishment as a social institution has been widely studied (Garland, 1990a; Garland, 1991a; Garland, 1991b; Garland and Young, 1992), for a sociological approach examines “the relations between punishment and society” (Garland, 1990b: 10).

The Ideological dimension evaluates the legitimacy of privately managed prisons in terms of their recognition, approval and attitudes by the public. The Procedural dimension examines to what private prisons are perceived as legitimate by inmates. The Criminological dimension analyses the supporting penal ideology behind prison privatisation and its relation to the aims of imprisonment.

To sum up, if private sector prisons are not perceived by the society as more appropriate, reliable and effective than their public counterparts are and if there are negative public attitudes towards them, their Ideological, Procedural and Criminological legitimacy is questioned according to the principles suggested in this domain.

6.2 The Ideological dimension: persuasion or rationality

Since punishment itself is considered as “seriously undermined” (Duff, 2001: 198), to be justified collective commitment and public support is required; this justification has to be done on “wider patterns of knowing, feeling, and acting, and it depends upon these social roots and supports for its continuing legitimacy” (Garland, 1990b: 21). This is significant for this research, for prison privatisation is a social concern, with consequences in communal life, endorsed through ideological discourses aimed to influence public perception, opinion and approval in an attempt to legitimize it, just as other pragmatic penal policies (Rutherford, 1997: 132).

The principles of this dimension drawn from Social psychology are the basis for the evaluation of the legitimacy of the social construction and public approval of prison privatisation. Values, beliefs and attitudes -as some of the components of a communal ideology- are key aspects to challenge, according to Annison (2014) the “shared assumptions regarding the legitimate activity held by policy makers” (p. 51). Communal values, public perception, communication processes, power

and media, ideological influence and persuasive techniques are some of the concepts to be explained in the following sections.

The legitimacy assessment in this dimension focuses on the social cognition of imprisonment by private means; this is, if the general perception is constructed through factual information or if it has been pragmatically persuaded. Such evaluation is paramount to understand how public attitudes can be adjusted to accept private delivery of punishment and, therefore, grant ideological legitimacy. An ideological legitimization of private corrections depends on the acceptance of society based on actual grounds.

As presented earlier, the expansion of the prison system through privatisation in England and Wales and Mexico, was driven by conservative ideologies based on the alleged efficiency of the private sector. Alcock and Sadava (2014) suggest amongst the characteristics of a conservative ideology, the idea of limited government. Billig (1991) notes that modern conservatism differs from its old counterpart since it praises to liberate the market from limits and “move the money markets in profitable directions” (p. 203). According to Habermas (1989), neoconservatism allowed state organizations and activities to return to the market, in order to reduce the need to legitimize its policies, as “[t]he more the state withdraws from the economic process [...] by privatizing public services, the better it can escape the legitimization demands” (p. 26).

According to a 2015 poll, a low public acceptance of privatisation in England was suggested, showing that only 9% was in favour of prisons to be run by the private sector, in contrast to 62% thinking that should be run by the public sector and 22% admitting that the sector is not the issue as long as the function is performed according to standards.¹² Therefore, it is essential to examine to what extent public perception of private prisons adheres to communal values and if cognition responds to facts and actual results, or whether opinion and attitudes are induced by rhetorical persuasion.

¹²“Nationalisation debate: it's not about 'whatever works”, *YouGov UK*<https://yougov.co.uk/news/2015/03/12/nationalisation-ideology-beats-pragmatism/> [Accessed 24 May 2016].

6.2.1 Legitimacy and cognitive construction: communal ideology

Constructionism, as a branch of Social psychology perceives institutions, such as punishment as “social artifacts, products of historically situated interchanges among people” (Gergen, 2003: 15). As a social institution, punishment requires the acknowledgment of “the nature of its social support” (Garland, 1991b: 160), and legitimate public support for punishment must stem from the perception that it answers specific needs in accordance with communal values since “[a] society’s penal ideology and culture [is] greatly shaped by [...] the more general ideology and culture of the society” (Cavadino and Dignan, 2006: 13). Therefore, to have legitimacy, penal policies should be developed in accordance with cultural beliefs and they must be analysed from a cognitive approach.

Various connotations of legitimacy are significant for this dimension. It has been associated to shared opinions and general consent (Beetham, 1991); social acceptance of norms (Deephouse and Carter, 2005); and the recognition of a system whose rules are considered proper and justified (Held, 1984).

An association between legitimacy and ideology is possible because “legitimation is one of the main social functions of ideology [...] [and] a prominent function of language and discourse” (Van Dijk, 1998: 255); therefore, the delivery of imprisonment by private corporations requires legitimation and it should not be explored exclusively from political or economic ideologies but from its socio-ideological implications, topic that remains less explored.

Values, as the basis of social identity are a determining factor in the assessment of public policies to approve- or disapprove- them and establish whether their implementation collides or conforms to them, since they are “conceptions of the desirable that guide the way social actors [...] select actions[...] and explain their actions and evaluations” (Schwartz, 1999: 24-5).

Alcock and Sadava (2014) regard values as universal principles that determine specific attitudes or responses towards particular issues. However, values and beliefs can be shaped by organizations seeking legitimacy, using knowledge as a social cognitive technique that, through the dissemination of specific ideological information, generates an expected opinion.

Berger and Luckmann (1967) noted that knowledge serves to legitimize an order by providing cognitive validity to institutions “[maintaining] the reality of the socially constructed universe” (p. 132), but knowledge creation can be influenced

by other processes that as “social backgrounds [...] emerge and become recognizable as the invisible forces underlying knowledge” (Mannheim, 1964: 241), such as market competition and economic activity. Dant (1991) agrees that knowledge is an essential component of societies linking -or separating- groups as the basis of shared beliefs and values in accordance with the characteristics of a particular group to have a common perspective on specific concerns, in contrast to ‘ideology’, this is, “knowledge of those with whom we disagree [...] not knowledge in the sense of something consistent with our lived reality” (p. 1).

Ideology has been regarded as: “value priority-based arguments [...] for self-justification purposes [...] [making] people [...] feel they are making the best decision and will be able to convince themselves and others that they are good, moral, or ethical” (Rohan, 2000: 268). Jost *et al* (2009) perceive ideology as the “assertions or assumptions [...] specifying acceptable means of attaining social, economic, and political ideals”. For Charteris-Black (2005) ideology is a “belief system thorough which a particular social group creates the meanings that justify its existence to itself, it is therefore an exercise of self-legitimation” (p. 21).

Ideology is also a manifestation of the use of power to create perceptions about specific issues, it is “a doctrine of apprenticeship [...] and the regulated formation of the social body” (Foucault, 1998: 140). Blommaert (2005) acknowledges that is the result of the combination of power and discourse manifested through “ideas produced by particular material conditions or instruments and performed [...] [by] social formations, instruments of power, and institutional frames within which particular set of ideas are promulgated” (p. 161). In this same line, Billig *et al* (1988) differentiate a system of thought created by thinkers -intellectual ideology-, from a society’s real way of life -lived ideology - (p. 27), which for the purpose of this research can be labelled as communal ideology.

Once knowledge and ideology are constructed, they must be conveyed to attain concrete effects through processes of communication such as discourse and rhetoric, which are effective conducts to shape opinions and attitudes. Eco (1976) defined communicative process as transmissions from a source to a receiver with a message to create specific reactions, with “signification” (p. 8).

However, communication can also deliver biased knowledge about crises and institutions. Discourses are held as “material content of utterances exchanged in social contexts that are imbued with meaning by the intention of utterers and treated as meaningful by others participants” (Dant, 1991: 7) and as a mean to

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“dominate knowledge, attitudes, ideologies, norms [...] [and] values” (Van Dijk, 2008: 9). Rhetoric as an element of social construction is also “the art of persuasion” (Gergen, 2002: 73).

Given the connection between values and ideology, a sociological analysis about the legitimacy of contracted out prisons is essential, not purely of its political or penological ideologies, but in terms of a communal ideology. The next sections are not intended to perform a deep exploration on sociological theories, but to briefly consider some relevant approaches about these concepts to draw the principles supporting this dimension.

6.2.2 Belief formation: Rokeach's Value Survey

Punishment should be created and exercised according to values and policy aims (Garland (1990a). Notwithstanding its variability, values and beliefs are the substance of an ideology behind institutions aimed to respond to public interests. Examining such link, “Rokeach's Value Survey” (Johnston, 1995: 583) is relevant to understand public perception is shaped by values and beliefs.

In his first study, Rokeach (1968b) classified values, which included peace, tranquillity and security as what he called “terminal values”, while forgiveness, logic, helpfulness were “behavioural values” (p. 554). The importance of values in public opinion research as a manner to change attitudes is relevant, for the public is aware of the actual values that support groups beliefs, by being conscious of the possible contradictions between values and behaviours, and thus, creating a more informed public opinion. In later works, Rokeach (1973) admitted the need of additional research to establish subsets of the values more likely to be promoted by institutions, the likely collision of values, and “the effectiveness of different social institutions and organizations as value-socializing agents” (p. 327).

Social attitudes are enduring sets of beliefs and opinions regarding a situation (Rokeach, 1951) that shape specific reactions to it (Rokeach, 1966) and embodied in “standards or criterion [...] that tells us how to act or what to want [...] [and] which values, attitudes, and actions of others are worth or not worth trying to influence” (Rokeach 1968b). Social institutions are in charge of enhancing and creating values systems (Rokeach, 1973).

In a re-classification, Rokeach (1973) regarded values as the basis of behaviour patterns or life objective achievements, such as those concerning aims in social

life, what he identified as “terminal social values” (p. 5) which included equality, freedom and security. Equality and freedom were values constructing political ideologies, a “two-value model of politics” (p. 171).

Rokeach explored changes in attitudes and their causes, such as social pressure and changes in social climate. Such changes create modifications in value systems or even dilemmas, since “[o]ften a person is confronted with a situation in which he cannot behave in a manner congruent with all of his values” (Rokeach, 1968a: 161).

Acknowledging Rokeach’s study as a relevant evaluation tool, Rohan (2000) provided an insight into different value theories. Values are still cognitive structures but with an ideological additional element, for “when descriptions of the value priorities endorsed or promoted by groups are discussed they should be identified as ideological value systems” (p. 267). In such cases, an individual must decide on the priority of the value system, either social or personal and “behave in line with others’ expectations -consistent with social value priorities- or in line with their own value priorities” (Rohan, 2000: 266).

Further studies about changing values and attitudes suggested some additional features. Schwartz (1999, 2011) considered that cultural values in society represent the ground for subsequent rules that define behaviour and activities of societal institutions. Cultural values underpin and justify social institutions, shaping “individual and group beliefs, actions, and goals [...] and policies” (Schwartz, 2006: 139). As societies change, they must adapt to different circumstances (Schwartz, 2014) and in this context, Featherstone (2011) noted the possibility of promoting specific values among the public in globalization and market economies by particular agents, supporting the perception that “the consumer culture is antipathetic to values” (p. 121). This is worth noting for this dimension, since attitudes towards private prisons might change derived from the influence of various factors.

6.2.3 Foucault’s ‘bio-power’ and knowledge

Notwithstanding the criticism of Foucault’s analysis (Garland, 1990b), his approach to punishment and the use of imprisonment is an essential reference in any penological study (Garland and Young, 1992; Smart, 1992). Foucault is one of the most recognized sociologists in Mexico, and his work is widely regarded as leading in the study of crime and punishment, thus the importance of considering

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his approach in this research about prison privatisation and the different legitimating factors that can be applied to Mexico's situation. Particularly, the genealogy of the use of power over persons is relevant for the purpose of this dimension, as it is provided with certain principles that could be extrapolated to the IMM.

For Foucault (1980) the rise of new forms of scientific wisdom in previous centuries was the source of changes to power relations and to "the rules of formation of statements which are accepted as scientifically truth" (p. 112). One of the consequences of such scientific developments was the birth of a power technique over the body that, through discipline and control institutions -like prisons-, is a manifestation of the "anatomo-politics of the human body" (Foucault, 1998: 139).

The Foucauldian concept of 'bio-power' can be manifested in a variety of dominating executive methods -including the power to punish. One specific expression of these techniques is the production of new knowledge as an essential component of social relations. Both concepts -power and knowledge- are closely interconnected in a cycle of creation and reception of each other, for power cannot be exercised without previous knowledge over the object or subject. Knowledge supports discursive systems that create, develop and coordinate "statements in which concepts appear, and are defined, applied and transformed" (Foucault, 1980: 201).

In this power/knowledge system of domination, Foucault (1980) suggests an adjacent element: truth, implanted within a specific society that accepts it as a discourse system. In Foucauldian terms, truth becomes a broad form of making politics within society as a set of standards that separate what is accurate from what is untrue, providing the former with special power implications as the result of discourses and statements created by institutions, influenced by political and economic factors, and widely spread by systems of power.

Foucault (1991) suggests that power not only creates knowledge, but also discourses, since controlling ideas are the most effective system of exercising power. Furthermore, knowledge outlines criminal justice functions including punishment, prison becomes then, an essential component of a system of power domination. This system creates relations sustaining and justifying the state as the ultimate power originator (Foucault, 1980). The prison system according to Foucault (1991) "combines in a single figure discourses and architectures,

coercive regulations and scientific propositions, [...] [and] programmes for correcting delinquents and mechanisms that reinforce delinquency” (p. 271). This is the basis of ‘bio-punishment’, as a control mechanism supported by law and the penal system.

Foucault (1991) acknowledged that, despite such “ideological techniques” (p. 299) brought some humanity, reform and changes to prison in the last two centuries, the penal system is currently supported and justified by its infrastructure, which serves to legitimize the power to punish, but at the same time, prevents excess and misuse. Imprisonment creates and supports an interaction between the power to punish and the law. However, Foucault (1991) further considers that prison should be questioned in terms of its expansion and increase on its use, losing the aims and discourse of imprisonment.

It can be suggested that in Foucauldian context, imprisonment by private means is a further manifestation of power and knowledge, for it entails discourses produced by supporters to justify this policy as a mean to exercise private control over inmates, and how knowledge can affect the delivery of imprisonment for instrumental purposes, including situations when such delivery is contracted out to private entities.

6.2.4 Habermasian cognitive legitimacy and rational communication

Public communication is essential to be aware of the extent of criminal justice concerns (Becket, 2000). In the case of this research, this claim is vital, for the underlying justifications of privatizing policies ought to be communicated to the public in order to gain legitimate approval. Furthermore, given that societal values and changes in attitudes can be shaped, the legitimacy of private prisons needs to be reassessed in terms of its public recognition. Given that Habermas’ legitimacy theory is pertinent to analyse social institutions and governmental functions that involve the use of power (Outhwaite, 1994), his analysis on particularly on communicative action represents a valuable approach in this dimension.

For Habermas (1976) a system is legitimate if it produces general motivations and is recognized by its subjects, for legitimacy and rational recognition are interconnected. The legitimation of the system is operated by those with power to communicate “validity claims” (Habermas, 1979: 2), this is, assertions in the form of norms, social institutions and public policies. Acceptance of these claims

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should be based on reasonable perception and agreements, this is, a “rationally motivated recognition” (Habermas, 1976: 107), otherwise, systems face legitimation crisis.

To solve such crisis, a new form of legitimacy is recommended: “reconstructive” (Habermas, 1979: 204), which is built by the restoration of previously available justifications to demonstrate that a validity claim has general interest and thus, be accepted by the public. Habermas (1972) points out the importance of the sociology of knowledge, the connection between interests and knowledge, and knowledge as information used to increase the power to control.

According to Habermas (1976), liberal governments justify their actions on ideological terms to elude any challenge to their assertions. Their legitimizing technique is based on “interpretations, [...] narrative presentations or [...] systematized explanations and chains of argument” (p. 112). Legitimation serves one specific objective: demonstrate the justification of institutions that hold power to be perceived as necessary to fulfil society’s aims.

Habermas (1992) maintains that power holders seek recognition and acceptance through argumentation and discourse expected to reach pragmatic consensus. In this process he acknowledges a “mass media-dominated public sphere” (p. 216), where “the sender of the message hides his business intentions in the role of someone interested in the public welfare” (p. 193) and the publicity of governmental actions or products is promoted by groups with certain interest on the action to influence the consumer using political pressure to manipulate the public.

In contrast, societal public spheres serve to challenge and control the power of the state; here lies the importance of an independent public sphere as a space where individuals unite as public to reach agreements about common interests as a method of “democratic will-formation” (Habermas, 1976: 111), influencing governmental decisions through the construction of a “public opinion” (Habermas, 1992: 89) that includes the participation of private organizations, balancing strictly personal opinions with formally authorized opinions, like non-partisan, independent or experts groups.

According to Habermas (1992), agreements regarding public and social concerns are possible through rational communication; only then, governments should implement policies. To succeed on this, Habermas (1984) suggests that, in contrast to communication aimed to achieve practical ends in the pursuit of

specific goals, social understandings can be reached through language exchange between participants who are confronted with previous cultural beliefs. This assertion is the basis of a “communicative action” (Habermas, 1984: 99), comprised by explicit validity claims presented by one of the participants – government’s officials, politicians and policy makers- that can be either recognized or challenged by the counterpart –the general public- and to be rationally acknowledged such validity claims have sine qua non attributes: to be realistic, lawful and genuine, -“truth, rightness, truthfulness” (Habermas, 1979: 118). The result of such debate is communicative action.

With the formulation of his theory, Habermas notes these essential features of any communication are crucial to build rational perception and reach public consensus about issues, including privatisation of imprisonment. Therefore, the Habermasian approach is regarded as rationalist, for a “better society is the more rational society” (Pusey, 1987: 14).

6.2.5 ‘Ideological persuasive agents’ and public perception

Lash (2000) notes that independent, free formation of opinion should be based on credibility and not on the power to influence. However, value formation and knowledge generation can be controlled by groups with specific agendas seeking to generate perceptions in the public- or even in other groups in power- about strategies presented to solve social concerns -factual or created-. It is common for privatisation policies to be preceded by campaigns drawing attention to failures about the public service to be considered to contract out.

Turner and Oakes (1997) distinguish two categories of persuasion: normative, which derives from pressure reflecting only in external behavior and informational which changes cognitional perception and attitudes. In this persuasion process, Cialdini (2009) recognized some “weapons of automatic influence” (p. 11) used by those who want to impose their will, being one of these persuasive techniques the dissemination of the perception of a lack of resources to solve concerns. Aronson and Aronson (2012) ponder three crucial influencing elements: the reliability and appeal of the source, the way in which content is communicated and the acknowledgement of the particularities of the receiver.

To shape opinions through controlled communication, the role of ‘ideological persuasive agents’ is crucial to pursue approval of policies and decisions presented as adequate responses to social concerns In this sense, two main

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'ideological persuasive agents' form opinions –either to support privatisation or to back public sector prisons- and change attitudes towards imprisonment: mass media and think tanks. Influence and persuasion might then be used by these agents to create impressions, particularly about the alleged benefits of contracting out public services.

First, due its extensive capacity to reach the public, media plays a pivotal role as originator of “commercial knowledge” (Chibnall, 1981: 75) and a factor that “fundamentally changes policymaking” (Annison, 2016: 5). For this reason, media has to be accountable and align with values such as freedom, equality and order (McQuail, 1981), but in fact, mass media contributes as a communicative machine of the power holders to control cognitive freedom and rational choices through constant “constructions of reality” (Luhmann, 2000: 86).

Altheide (1985) sees a connection between mass media and those in political and economic positions, who share the same views and interests and media might even “strategically promote dominant ideological interests” (p. 59). Media can be a communicative channel of rulers' ideologies, providing at the same time a legitimizing method of governmental actions “[reproducing] the definitions of the powerful” (Hall *et al*, 1978: 57). In this influencing process, for Schoenbach and Becker (1995) media make use of techniques, suggestions of opinions and assertions on behalf of the society about social concerns (p: 326). Chomsky (1989) maintains that media transmit views and interests of the powerful dominating public opinion and mass media thus has the function to “inculcate individuals with the values, beliefs, and codes of behaviour” (Herman and Chomsky, 1994: 1).

Secondly, pressure groups, mainly think tanks, are instruments that modify public opinion about a particular issue. Rivers (1974) affirms that pressure groups have a close relation with politicians and policy makers who support their interests, mostly those related to economic activities (p. 12). Think tanks are more influencing at policymaking and legislative stages, as highlighted previously; however, their persuasive ability on the public should not be ignored.

Grant (2000) considers that despite the lack of power to make commanding resolutions, pressure groups do influence political institutions to include them in policymaking processes. According to Smith (2000) companies' interests are included in public policies and they financially support think tanks, since these groups “shift public opinion toward the preferences of business” (p. 169). In this

sense, Rich (2004) maintains that “[m]arketing has become a feature of the efforts of many think tanks, ideological and not” (p. 31). Denham and Garnett (1998) suggest that think tanks “anticipate the future priorities of government, and either through the media, informal contacts or its own publications provide blueprint for reform which can be readily translated into legislation” (p. 163).

6.2.6 Rational public opinion and informed ideology of privatisation

Notwithstanding that actual values and public attitudes towards prison privatisation and the role of ‘ideological persuasive agents’, can only be confirmed through empirical research -bearing in mind methodological limitations-, these theoretical findings do affect the legitimacy of private involvement in imprisonment according to what has been stated in this dimension.

For Becket (2000), specific values underpin ideologies behind penal policies and public opinion is shaped to ensure support, revealing then a close connection between discourses and their effect in popular attitudes about punishment. In this sense, the aim of ideological discourses is to legitimize specific policies. To secure public support of privatisation, discourses are delivered in accordance with identifiable needs, for penal ideologies are regularly aimed to solve penal crises. Since the task of this dimension is to establish some essential features of a legitimizing communal ideology, penal ideologies backing privatisation will be addressed in another dimension.

Media can also influence politicians and policymakers, for it presents itself as the channel of public opinion by means of two techniques relevant in the creation and implementation of penal policies: “misinformation provided to the public and misreading of public opinion by politicians” (Roberts *et al*, 2003: 67). This form of transmitting and receiving information through the amplification of criminal justice concerns to secure public’s attention, promotes populist policies in contrast to “the opinion of elite experts” (Pratt, 2007: 78). If there is a crisis, in an attempt to legitimize a policy, the ‘ideological persuasive agents’ highlight the alleged advantages of such policy over others; but this sort of “[l]egitimation has in turn become opportunistic: what ‘goes’ in the media and with the voters” (Rutherford, 1996: 133).

An example of influence on public perception of private prisons in England and Wales are news reports, such as one that highlighted the alleged better regimes

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inside one privately managed prison, stating that “private jails are here to stay and the state sector could learn a lot from this impressive prison”.¹³ This statement contrast with the results in the 2013/14 Prison Annual Performance Ratings of that particular prison, rated 2 on a scale of 4, meaning that “[o]verall performance is of concern” (National Offender Management Service, 2014). In 2014/15 the same prison was graded 3 “[m]eeting the majority of targets” (National Offender Management Service, 2015).

Politicians also use rhetoric to justify their policies (Charteris-Black, 2005); in the case of penal policymaking, their views are very influential (Annison, 2014); however, one detail must be emphasized, that “[p]oliticians typically do not deliver a speech at the headquarters of a think tank [...] unless they respect their positions and advocate similar positions themselves” (Smith, 2000: 182-183). The 2016 announcement about reforming the penal system in England and Wales by creating new ‘reform prisons’ and giving governors more autonomy, was delivered in the headquarters of a think tank¹⁴, associated to the conservative government proposing such reform, a group founded by the Minister in charge of implementing it, who was also a trustee and served as chairman¹⁵ Two issues preceded the announcement: months earlier a show advocating for such reform based on the experience in Texas was broadcasted on a major network¹⁶, and in 2013 that same lobby group published a document recommending the creation of prisons as “semi-autonomous units [...] [providing operational flexibility to respond to changes in the size and profile of the prison population [...] [financed] through public sector borrowing, private finance” (Lockyer and Chambers, 2013:

¹³ “There’s more than one way to run a prison”. Available at The Guardian on line <http://www.theguardian.com/society/2015/dec/15/thameside-prison-privately-run-state-sector> [Accessed 25 May 2016].

¹⁴ Speech given by the Prime Minister David Cameron at the Policy Exchange in London on 8 February 2016. Available at “GOV.UK” on line <https://www.gov.uk/government/speeches/prison-reform-prime-ministers-speech> [Accessed 24 May 2016].

¹⁵ “Brains for hire: the thinktank”. Available at The Guardian online <http://www.theguardian.com/politics/2010/oct/27/thinktanks-brains-for-hire> Accessed [24 May 2016]; “Policy Exchange”. Available at Powerbase on line http://www.powerbase.info/index.php/Policy_Exchange#Former_directors Accessed 24 May 2016; About Michael. Available at Michael Gove on line <http://www.michaelgove.com/about-michael> [Accessed 24 May 2016].

¹⁶ “Michael Gove took inspiration from Texas rehabilitation programmes for prison reform plans”. Available at Independent online <http://www.independent.co.uk/news/uk/crime/michael-gove-took-inspiration-from-texas-rehabilitation-programmes-for-prison-reform-plans-a6689926.html> [Accessed 26 May 2016].

6). It is worth mentioning that in such document, the authors acknowledged the information provided by a corporation managing prisons.

To counterbalance the influence of these agents, ideological legitimacy of prison reform is crucial; genuine knowledge should be generated by independent and qualified representatives of society. In the debate is essential the formation of consultation groups, non-partisan collaborative panels with the participation of all those involved -in the case of this research in prison privatisation- and the creation of alternative groups. Media can even be used by these independent groups to “institutionalize critical standards and professional consensus” (Luhmann, 2000: 106). One particular element that ideologically legitimates prison privatisation is its public acceptance and approval via the participation of “intraorganizational public spheres” (Habermas, 1992: 248), as a mean to counter existing ideologies (Mathiesen, 2000). Featherstone (2011) suggests that non-governmental organizations and universities can respond to the vast scope of media about news and information that motive market values within a society (p. 129).

Moreover, it has been suggested by Almond (2015), that “[t]he policy-making process is pluralistic, with different interest groups having input via (for example) the submission of evidence or participation in a discussion forum” (p. 212). In this sense, collaborative spaces where academics, practitioners and policymakers gathered to discuss contemporary penal concerns are essential, since “[d]eliberation upon, and debate between, differing perspectives [...] is a crucial means of fostering effective and appropriate penal policymaking (Annison, 2016: 2). Famous efforts are the meetings highlighted by Christie (2000) which were aimed to “establish some kind of informal minimum standard for what is considered decent in the name of punishment” (p. 43). Rutherford (1996) pointed out the establishment -in 1980s England - of connections between the Prison Department and the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders to “[serve] as a crucial counter-weight to [...] the dominating role of the mass media [...] [that congregate] criminal justice practitioners, politicians, the liberal ‘opposition’, journalists and prisoners” (pp. 130-131). Ryan (1983) even performed an analysis on the contribution of groups that counteract influential lobby groups by challenging the penal policies they promote.

6.2.7 The principles of ideological legitimacy

Despite the need of further empirical research to support each of the issues raised in this dimension, some principles drawn from particular sociological perspectives, will be recommended to assess the ideological legitimacy of the public approval of prison privatisation. Regardless the conflicts between some theories, this dimension highlights useful elements: value formation, changing social attitudes, influence and persuasion, knowledge and power, and rational communication, are all key elements of ideological legitimacy.

Given that specific values and beliefs underpin ideologies, a communal ideology supporting particular forms of punishment must respond to shared values at a particular time and in a particular place. It is important to determine to what extent society would approve corporations making profit from punishment, or reject this, despite the apparent social benefits. Yet, public opinion can be shaped through discourse and rhetoric to change attitudes modifying cognitive perceptions (Alcock and Sadava, 2014). However, according to Habermas (1992) an opinion is a public when “it emerges from the intraorganizational public sphere” (p. 248).

In Foucauldian terms, those interested in privatisation might generate knowledge to secure their actions and control perceptions, but knowledge should be free from any underlying hidden political and economic interests. Considering this, the first principle granting ideological legitimacy to prison privatisation is the delivery of and access to impartial and objective knowledge about this policy.

Ideological legitimacy is questioned when values and opinion are changed using rhetorical discourses stressing the advantages of a particular policy to solve, for example, current crises of the prison system, despite the opinion that “[t]he public has the right to expect [...] news in an impartial manner” (Brembeck and Howell, 1976: 41).

Thus, opinion formation through communication about prison privatisation must consider Habermasian features. The second principle underpinning this dimension is the delivery of truthful communication about actual situations of the prison system, required to gain public acceptance for private involvement, as an option for improving its operation.

Crises in the delivery of a public service are usually highlighted before the government’s recommendation to privatise such function. In the process of

presenting arguments to support privatising policies, the participation of 'ideological persuasive agents' is decisive, for many privatizing policies require a modification of societal values, in our case, about punishment and rehabilitation. These 'ideological persuasive agents', might influence the public through two methods: campaigns and reports from the private sector assembled by transnational corporations, media and think tanks; and statements, white papers, enquiries and reports from the public sector, joint by politicians, policymakers and government officials.

To counter the influence of those agents supporting privatisation and the communication of alleged benefits exclusively, without any reference to actual results, the participation of other lobby groups is necessary to provide a broader perception of prison privatisation, for the public have the right to know the consequences of such policy, including the expansion of prison capacity as one of the main justifications behind it.

The final principle providing ideological legitimation is the rational and accurate perception of the extent and implications of private sector involvement in the prison system, based on information free from any particular ideology. Here lies the relevance of a society truly informed about the consequences of contracting out prisons.

Reforming groups like the Prison Reform Trust (2005) and the Howard League for Penal Reform (2014) have published reports providing information challenging the supposed effectiveness of privately managed prisons. Other sources of information are printed and on-line official research findings about the performance of privately run prisons such as reports issued by HM Inspectorate of Prisons (HMIP), the Prisons and Probation Ombudsman (PPO) and the Prison Annual Performance Ratings. Academic research published in journals or other medium about the implications of privatisation and the importance of other more principled reforms is valuable as well. Parliamentary television channels that broadcast debates about law and reform proceedings serve to create a more informed opinion. Investigative journalism is also significant.

Furthermore, reasonable and rational discussions about penal privatisation policies should be the result of democratic participation through consultation processes, conferences, debates and independent symposia. Such forums, which provide a space to argument, assess evidence, ponder opinions and even present alternatives, could congregate inmates and their families; associations of ex-

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offenders; penal reforming organisations and pressure groups; academics and researchers; politicians and policymakers; practitioners and government officials; and even directors and CEOs of private corporations. Media participation is also key, so the results of such meetings are made public and distributed.

Public opinion about the authorization to imprison offenders in exchange of economic benefits will remain divided in contesting views; but what is important, is that any opinion is rationally informed and supported, to the most possible extent, by a principled communal ideology. However, the opinion and perception of those directly affected by this policy must also be acknowledged: inmates and staff, for their validation of privatisation is essential on the legitimization of this policy. This is the matter of the next dimension.

6.3 The Procedural dimension: order or decency

Acknowledging the inexcusable levels of violent behaviour amongst inmates, the Prison and Probation Ombudsman (2016a; 2016c) in England and Wales highlighted the considerable number of inmates' complaints derived from physical abuse of prisoners by staff. Under these circumstances, the importance of safety and fairness was emphasised as an essential element of any penal reform proposal, the right "to ventilate grievances legitimately" (Prison and Probation Ombudsman, 2016b: 11) must be ensured through effective complaints mechanisms.

It is possible that the particular setting of prisons makes them more likely to tolerate unfair disciplinary decisions and unjust treatment, that might generate non-compliance and resistance, *let alone* violence, putting at risk the physical and psychological integrity of all those inside prisons. Private prisons are not exempt of such incidents, quite the contrary, as privatizing policies intended to improve the operation of the prison system in England and Wales, according to Sim (2009) have "failed to challenge the power of the prison with regard to what happened in the everyday world of the institution" (p. 65).

For Bryans (2011) violent incidents have a variety of sources such as "ambiguous and conflicting information; shifting goals; time pressure; dynamic conditions; complex operational structures and poor communication" (p. 127). Any explanation regarding the sources of violence is difficult, but according to Cavadino and Dignan (1997), prisoners' sense of injustice contributes to penal

crises, specifically a crisis of legitimacy and a “crucial factor in the genesis of prison riots and of the system’s other problems” (p. 21).

Following from the previous dimension and considering that, according to this domain, for privatisation to be legitimate it requires recognition and approval, is crucial to consider that prisoners might not be concerned about philosophical, ideological or managerial legitimisation of private sector investment in the prison system. However, inmates expect the provision of suitable conditions, regimes and treatment, particularly lawful performance, impartial application of prison rules and respectful behaviour by staff. Procedural legitimacy derives from inmates’ perception of how imprisonment is delivered in private prisons, having direct consequences for compliance with prison rules as one foundation of safety and order.

Further research is convenient to evaluate if privatisation is in fact legitimated by the perceptions and experiences of inmates, but there is also a need for further studies to analyse to what extent private prisons’ directors and staff are aware of the consequences of providing appropriate conditions, humane treatment and fair procedures, and if these are actually provided. This work does not intend to examine the actual performance of private prisons, but to determine the principles that, derived from examinations of relevant Procedural justice theory perspectives, and historical inspections of the state of prisons in England and Wales, underpin the procedural legitimacy in this IMM. The justification for this dimension lies in the need for an examination of the connection between fairness, respect, humanity and monitoring as the requisites for inmates’ compliance with rules, including those within privately managed prisons.

6.3.1 Procedural justice: punishment and legitimacy

Regardless the body delivering imprisonment as punishment, this function -for which the state is the ultimate responsible-, must be performed with “fair treatment and respect” (Beetham, 2013: 27) to have legitimacy. Logan (1987b) even suggested that, regardless the philosophical implications and concerns of privatisation, “to the extent that [prisoners] are treated with fairness and justice, [...] will be more inclined to legitimate their keepers’ authority and to cooperate with them” (p. 36). Therefore, all those involved in this phenomenon, specially practitioners, should be aware of the significance of fairness and decency as basic requirements of imprisonment but closely related to the duty to ensure security

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and order (Mathiesen, 1965), despite the opinion that control and order endorses the “inherently authoritarian structure of the prison” (Rutherford, 1991: 2).

Given that legitimacy of imprisonment is weakened by the fact that prisoners do not generally accept it (Sparks and Bottoms, 2008), the concept becomes crucial to understand and address socio-penal concerns (Sparks and Bottoms, 1995), for in penal affairs it is “intimately and practically implicated” (Sparks, 1994: 16). Imprisonment then to be perceived as legitimate by those directly involved, requires that prison staff officers -starting with governors and directors- perform their respective tasks with impartiality, safety, respect and humanity to meet inmates’ basic expectations and legal requirements. Otherwise, imprisonment suffer a crisis of legitimacy, contributing to the increasing public demand for legitimization of the criminal justice system (Coicaud, 2013).

In this sense, legitimacy has been related to fairness and the prevailing communal values in specific historical moments and places (Smith, 2008), beliefs in the right of an institution to enforce certain behaviour and to respond to that claim (Tyler and Jackson (2013), public obedience to the law (Tyler *et al*, 2008) and authorities’ performance (Tyler, 1990). Similarly, it has been linked to relations between inmates and prison staff (Liebling, 2004), normative compliance within prisons (Crewe, 2009), fair treatment and prison regimes (James *et al*, 1997), imprisonment conditions (Sparks *et al*, 1996) and the use of coercive force to maintain order and discipline (Sparks and Bottoms, 1995).

Notwithstanding these notions, the majority of recent studies about procedural legitimacy derive from social psychology and focus on its behavioural aspect, but procedural justice has its origins in legal theory. Hence the pertinence of briefly reviewing some jurisprudential perspectives on procedural fairness as a legitimating method.

This relation between legitimacy and procedural justice was analysed by Thibaut and Walker’s (1975, 1978) in a study about how law practitioners perceive it, concluding that features of the adversarial system provide legitimacy, namely the limited control of the decision maker and the distribution of control to disputants. Both elements ensure procedural justice within a system. Solum (2004) considered that equal participation of all those involved in a conflict to reach a decision is essential in legitimate law systems; however, to be fully legitimate, procedure requires a legally correct outcome, for “[p]rocedure without justice sacrifices legitimacy [...] [and] [p]rocedure without participation may

command obedience, but it cannot win principled allegiance” (p. 321). Finally, for Fagan’s (2008), legal systems are perceived as legitimate if obedience to norms is effectively ensured and functions are performed in accordance with principles of fairness and proportionality; thus, “both procedure and outcome are components of legitimacy, and deficits in either area can weaken popular legitimacy” (p. 136).

6.3.2 Tyler’s exploration of procedural fairness

The jurisprudential principles of participation, legality and proportionality mentioned above are valuable notions in the assessment of legitimacy; nonetheless, sociological approaches to fairness provide additional support for the purposes of this dimension, as legitimacy requires a subjective element: approval and obedience resulting from fair outcomes, particularly inside prisons, both public and private; as suggested by Bottoms and Tankebe (2012) in terms that “prison-based research [...] has [...] open up some aspects of legitimacy [...] that go beyond [...] procedural justice” (p. 123). Hence, the importance of first reviewing legitimacy from a procedural justice perspective.

As noted in Chapter 3, Tyler’s work and approach to legitimacy was groundbreaking, since he directly linked the concept to procedural justice within the criminal justice setting. The ‘Chicago Study’ (Tyler, 1990) was the first to establish a link between procedural justice, legitimacy and compliance, by analysing people’s previous experiences with authorities, in order to demonstrate that “[l]egitimacy is a particularly important normative factor [...] [and] the key to the success of legal authorities [...] if they lack it, is difficult and perhaps impossible for them to regulate public behaviour” (Tyler, 1990: 57).

To ensure compliance from citizens, three specific institutions require legitimization through fairness in their procedures: authorities, regimes and communities (Tyler, 1990). Fairness in turn, has two main preconditions: treatment received by authorities, and perception about the impartiality of a resolution (Tyler, 2001). For this reason, legitimization is pursued particularly by authorities and bodies with coercive power, as a strategy to accomplish, not only acceptance and attitudes to avoid the threat of punishment, but also actual obedience (Tyler, 2006).

For Tyler *et al* (2008), security and order are achieved as the result of the belief that “authorities ‘deserve’ to rule [...] [and] that some decision made or rule [...] is ‘entitled’ to be obeyed” (p. 10). According to this perspective, inmates would

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accept their imprisonment –even in privately run prisons- only if they perceived the prison system and prison staff as legitimate to rule and, thus, obeyed them by means of the justice and fairness in procedural decisions during their imprisonment.

However, Tyler (2010) acknowledged other factors related to procedural justice affecting inmates' perception of the legitimacy of their imprisonment: participation in decision making; impartiality in the application of norms; humane treatment by prison officers; and confidence in prison authorities. Moreover, justifications and drivers of punishment influence inmates' behaviour; therefore, penal policies should focus on their legitimating grounds and in the promotion of procedural fairness mechanisms, as a mean to “minimize violence and misconduct within prisons and subsequent reoffending” (p. 132).

Taking into account Tyler's approach and the suggestion that “failures of procedural justice have the most decisive role in eroding [legitimacy]” (Smith, 2008: 56), this dimension aims to indicate that unfair procedures and unjust outcomes inside private prisons affect inmates' perception about their imprisonment by corporations. This situation generates “prisoners' feelings of powerlessness and illegitimacy” (Crewe, 2009: 452); and at the same time puts at risk compliance with rules, acceptance of disciplinary decisions, and the whole setting of order, making violent incidents more likely by questioning the procedural legitimacy of prison privatisation.

6.3.3 The Woolf Report: the foundations of 'justice'

Fairness legitimates imprisonment, but further factors are the bases for inmates' perception of their imprisonment: decent conditions, constructive regimes and respectful treatment. These concerns have been widely addressed through research, inspections, and inquiries, as a mean to prevent crises of safety and control, and thus, of legitimacy.

The lack of “vision and purpose” (Rutherford, 1993: 34) of the prison service before the 1990s, contributed to the inadequate management of prisoners, eventually detonating the most serious prison riots in British history.

Paradoxically, these violent incidents were the foundation of important reforms resulting from an enquiry established to find the causes of the penal crisis and, through a series of recommendations, aimed to improve the prison system and legitimize imprisonment.

The Woolf Report is regarded as a “standard liberal account of what is wrong with English prisons” (Cavadino and Dignan, 1997: 24); as “[o]ne of the great penal documents of all time” (Ramsbotham, 2005: 73); and “an authoritative statement on [...] what must be done to civilise [prisons]” (Prison Reform Trust, 1991: i). Its findings are still relevant and must be reconsidered, for it is also “increasingly prescient as a warning to our own time” (Day *et al*, 2015: 5). Notwithstanding its importance, this report has also received criticism, particularly about its limited influence and scope, since at the time of its publication, harsher strategies to control riots were proposed (Sim, 2009); none of its recommendations suggested a reduction in the use of coercive control (Sim, 1994); and essential problems about the purpose of imprisonment were not included (Player and Jenkins, 1994).

Woolf and Tumim (1991) did not perform their investigation merely on procedural justice terms, since it was considered not enough to prevent violence. Based on the evidence collected throughout the inquiry, it was established that “respect and responsibility” (Woolf and Tumim, 1991: 18) guide all relations within the prison system, for these are pivotal in achieving a balance between interconnected components delivered by the prison service: “security, control and justice” (Woolf and Tumim, 1991: 17). An imbalance of these elements hinders its achievement, making incidents more likely to occur.

The Report’s 12 main recommendations (Woolf and Tumin, 1991) are essential for the stability and improvement of the prison system; however, for the purpose of this dimension, the recommendations directly related to ‘justice’ deserve special analysis, since “[j]ustice’ refers to the obligation of the Prison Service to treat prisoners with humanity and fairness” (p. 226). To perceive imprisonment as more ‘just’, it was recommended (Woolf and Tumin, 1991) the right to access an ‘Independent Complaints Adjudicator’, “a grievance procedure which has at its final stage the necessary degree of independence” (p. 26); and the provision and compliance with a set of ‘Accredited Standards’ “required standards of conditions and regime within prisons” (p. 23). Recognizing the expected involvement of private sector, it was noted that these standards should also be accomplished in contracted out facilities because “[t]here is no reason why the standards required of the private sector [...] should be any different from those required of the [p]rison [s]ervice” (Woolf and Tumin, 1991: 301).

The report (Woolf and Tumin, 1991) stressed the obligation of the prison service to treat inmates with justice enhancing fairness and a suitable service for everyone; otherwise, imprisonment under inhumane conditions leads inmates to

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perceive their imprisonment as unjust, despite being justly imposed by the judiciary, Therefore, the prison service was expected and required to treat prisoners with “humanity [...] and justice” (p. 241). It was also observed “improvements in the physical conditions [...] should help to improve staff morale” (Woolf and Tumin, 1991: 356).

The concepts of ‘humanity’ and ‘justice’ are not synonymous, but incorporated in the notion of ‘justice’, since even humane imprisonment with unjust treatment could lead to perceptions of injustice and resentment of inmates, especially due the absence of an independent body to complaint. Therefore, the access to a clear, prompt, confidential and effective ‘Complaints Adjudicator’ –different from a Prisons Ombudsman-, was recommended, without executive powers to revoke verdicts but able to make recommendations and with a particular feature: its independence, for “[a] system without an independent element is not a system which accords with proper standards of justice” (Woolf and Tumin, 1991: 419).

According to this notion -relevant for this dimension-, perceptions of justice are determined by the appropriateness of conditions and regimes; the facility to access procedures and fair outcomes; and the quality of prison staff performance. Injustices, including “the allegedly arbitrary and oppressive way in which power is exercised” (Cavadino and Dignan, 1997: 139) lead to a legitimacy crisis; hence the importance of examining the Woolf Report as a source of principles guiding penal policies. Due the significance of this enquiry, its recommendations are a valuable source of factors shaping inmates’ perception about their imprisonment; and for the purpose of this research, from those incarcerated in private facilities, about the procedural legitimacy of privatisation.

6.3.4 Prison inspection as Howard’s humanitarian legacy

Despite their significance, fairness and decency remain empty of meaning unless appropriate tools are included to ensure their implementation. Prison inspection is one of such mechanisms, urging “for improvement, both at the level of the individual institution and the service as a whole” (Owers, 2009b:16), motivating “big changes” (Hardwick, 2016: 652) in specific areas of concern. Inspection is also legitimized by prison officers in terms of its methodology and the humanistic underpinnings pursuing improvements through impartial inspection according to international human rights standards, engaging “those inside and outside the criminal justice system” (Bennett, 2014: 464).

Prison inspection was firstly advocated in the 18th century by prison reformer John Howard, whose work is held as an “astonishing monument” (Whitefield, 1991: 188), a “lasting stimulus” (Grünhut, 1948: 31) for reform, and with long-term influence to make prisons more humane (Rutherford, 1991). Both, Howard’s appointed position and humanitarian vision allowed him to pursue “better physical conditions for the inmates and more sympathetic treatment of them” (Howard, 1958: 15). Howard’s legacy is crucial for this dimension as it defines guidelines for humane treatment and decent conditions that are essential features in the assessment of the legitimacy of imprisonment, let alone its delivery by corporations.

Howards’ motivation was grounded on the facts that there were “still remaining many disorders that ought to be rectified: prisoners suffer great hardships from which I am desirous to set them free” (Howard, 1977: 4) and there were prisons “that there is some great error in the management of them” (Howard, 1977: 7). Moreover, there are two key concerns for Howard (1977): the persistent and pervasive “*gaol-fever*” (p. 4, emphasis in original), and whether “the sources of misery, disease and wickedness, [would] endured in a nation celebrated for good sense and humanity” (p. 21).

Any change in the treatment of prisoners and their conditions should be in the way that prison “may cease to be destructive to health and morals” (Howard, 1977: 77). To achieve this, prison officers required specific qualities: to be honest, active and humane. To ensure officers’ proper work Howard (1977) recommended the appointment of a prison inspector; this is Howard’s greatest contribution, enacted in England and Wales two centuries later.

HM Inspectorate of Prisons is an independent body with the responsibility to monitor prisons and report to “*ensure independent inspection of places of detention, report on conditions and treatment and promote positive outcomes for those detained and the public*” (Her Majesty’s Inspectorate of Prisons, 2016a: 5, emphasis in original). HMIP evaluates the performance of a particular facility in terms of its own ‘Expectations’ -guidelines derived from international regulations-, against four key notions. A full description of the inspection process escapes the scope of this work, but two notions are particularly relevant for this dimension: safety and respect.

Safety assesses to what extent imprisonment guarantees the security of inmates, dealing with topics such as bullying and violence reduction, self-harm and suicide

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prevention, protection of adults at risk, and disciplinary procedures. Respect examines whether prisoners are treated with respect of their human dignity and includes staff-prisoner relationships, complaints and legal rights amongst other (HM Inspectorate of Prisons, 2012).

Howard's determination has been kept up, particularly by critic of the system Sir David Ramsbotham (now Lord) (Hardwick, 2016) who during his office produced a vast number of inspection and thematic reports. Additionally, a personal text presents his views and concerns about the current state prisons. Lord Ramsbotham (2005) perceived his role as a mandate "[t]o monitor and influence the treatment and conditions" (p. 50) and to expose the appalling treatment of prisoners in manner that society would not "tolerate such treatment of fellow citizens [...] in their name" (p. 25).

For Ramsbotham (2005) some issues in prison management obstruct effective improvements, and at the same time, undermine decency in their operation, such as the lack of experience of prison staff to run complex prisons; bureaucratic barriers preventing proper inspection and monitoring; and the establishment of targets and performance indicators, which contribute to an impersonal approach to management. These are some manifestations of a more serious concern: that the Inspectorate focuses on treatment and conditions, whereas the Prison Service puts its attention on following administrative managerial rules (Ramsbotham, 2005). Ramsbotham accepted some progress in treatment and conditions, noting good practices in contracted out prisons, even regarding one as "far and away the best-run local prison in the country" (Ramsbotham, 2005: 94).

Despite not having enforceable influence, prison inspection is still "a key component of the protection of prisoners' rights" (Owers, 2009a: 1538). However, it has been argued that, both prison reform and any developments in inmates' treatment and conditions, are at risk of remaining in the same inexcusable situation even after "critical report after critical report [and] [having] occasional improvement but no fundamental change" (Hardwick, 2014: 23).

For the purposes of this research and the IMM, independent inspection is essential to determine the procedural legitimacy of privately managed prisons, for it provides a source of information of actual performance and the state of private prisons. This is particularly relevant for this research for, as Vagg (1994) noted, privatisation is a policy that will continue and extend its scope.

6.3.5 Relations inside prisons, order and security.

In 2016, the Chief Inspector of Prisons emphasized that prisons “have become unacceptably violent and dangerous places.” (HM Inspectorate of Prisons, 2016b: 8). 25 years earlier, The Woolf Report (Woolf and Tumim, 1991) acknowledged that relations between managers and officers and between staff and inmates are paramount to prevent violent incidents. Sparks *et al* (1996) noted that “[a]ny prison can enter a crisis of order if its resources of legitimacy are sufficiently thin, its social relations sufficiently stressed or provocative, and its practices of risk management sufficiently unreflexive” (p. 325).

A critical function of prison officers is maintaining internal order, but this duty faces a significant obstacle: inmates’ lack of compliance with prison rules (Sykes, 2007); however, order is acknowledged by inmates as important in their daily lives (Bottoms, 1999). Order is a complex function needing the interaction of factors and implementation of different mechanisms (Matthews, 2009); but according to Vagg (1994) two elements put it at risk: “[great] levels of unpredictability in staff behaviour [...] and [...] higher level of perceived arbitrary decision-making” (p. 85).

Order is normally secured using power and force, and inmates’ perception of this defines their compliance or resistance to prison rules (Crewe, 2009). Given this, inmates would resist acknowledging and accepting the legitimacy of a prison system which is built on the use of them (Sim, 2009). Sparks *et al* (1996) have recognized that this “dialectic of control” (p. 84) is a concern that should be considered in any assessment about the legitimacy of imprisonment, for legitimacy is closely connected to compliance with prison rules and maintenance of order. Therefore, inmates perceptions about the legitimacy of imprisonment is seriously damaged when order and control are neglected, since these two concerns “are not just *out-comes* of legitimacy but are themselves *aspects* of legitimacy” (Crewe *et al*, 2014: 392, emphasis in original).

Given that security and control are influential factors in the provision of humane imprisonment, King and McDermott (1995) noted how inmates’ opinions regarding legitimate order and discipline are determined by “fairness of the procedure, the justice of the verdicts, or the proportionality of the punishment” (p. 104). Sparks and Bottoms (1995) added two elements: basic prison regimes, but more importantly for this section, the “quality of behaviour of officials” (p. 55). Prisoners-staff relationships are crucial to the quality of regimes (Liebling *et*

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al, 2012), paramount in maintaining order (Bottoms, 1999), and “a key element in the generation and escalation of conflict” (Scruton *et al*, 1991: 59).

Since social relations between inmates and relations with officers are relevant to prisoners’ experience of punishment (Sparks, 1971), studies on the legitimacy of imprisonment have examined daily life and relations inside prisons, focusing on inmates’ perceptions of staff treatment to ensure order. Staff attitudes, behaviour and treatment towards inmates have a strong influence on the legitimacy perception of the overall imprisonment. For Bryans (2011), to operate prisons orderly, interactions between staff and prisoners should be determined by prison administrators who ought always to consider “the importance of achieving and maintaining legitimacy” (p. 139).

Liebling *et al* (2012) observed that satisfactory relationships between staff and prisoners provide not only order and security, but most importantly, provide legitimacy and the acceptance of imprisonment by inmates, as a mean to achieve further goals. For Crew *et al* (2011) “[p]risoners experiences are also shaped by factors [...], but these are less significant than staff behaviour in determining the quality of prison life for prisoners” (p. 111).

Furthermore, in a study about the extent to which prisons operate in accordance with specific values that determine the legitimacy of prison’s inner life, Liebling (2004) developed a framework for the assessment of the “prison quality” (p. 50), classifying the relevant factors that shape inmates’ and staff perception about internal legitimacy: humanity, fairness, order, well-being, decency and most importantly, respect. These concepts, along with “the perceived fairness of staff, the perceived fairness of the regime, and procedural justice” (Liebling, 2004: 473) are influential on inmates’ experience and perception about legitimacy, as a set of standards and requirements to be accomplished in prisons.

For the purposes of this research, it is possible to assert that any assessment about the procedural legitimacy of prisons has to consider their ability to prevent violent incidents and secure order without the overuse of force, but most importantly through constructive relationships between inmates and staff.

6.3.6 ‘The state of the private prisons’: values and legitimation

In the privatisation debate, it is suggested that, resulting from the profit motive, “humane operation of private prisons will not be ensured even with adequate standards in place” (Dunham, 1986: 1494). Similarly, the operation of private

prisons is questioned in terms of an inadequate understanding of order, since the managerial penal agenda established how prison officers ought to accomplish it, to the detriment of humane, respectful and fair treatment (Sparks *et al*, 1996). Furthermore, it has been recently considered that contracting out prisons contributed to the “more complex configuration of the prison-society relationship [...] [and] privatization could be seen as a de-coupling of the prison from the state” (Crewe, 2016: 83).

To contest these opinions, private prisons should constantly pursue improvements on performance, by accepting recommendations made by official and independent bodies, in order to be perceived as legitimate by inmates. A full analysis about the performance of private prisons is not an aim of this work; however, some empirical studies, independent reports and official sources will be briefly reviewed to provide information about the state of private prisons in England and Wales.

The first evaluative comparison performed by James *et al* (1997) highlighted some achievements of private prisons such as the delivery of positive regimes and the conditions and facilities were regarded as some of the best. These situations were acknowledged by prisoners, who rated staff higher than in public prisons. The study noticed that inmates’ perception about the legitimacy of the privately run correction in charge of their imprisonment was based on “the quality of staff-prisoner relationships, fairness in the application of rules, and the successful maintenance of order” (James *et al*, 1997: 139).

The National Audit Office (2003), found that prisoners allocated in contracted out prisons perceived “greater respect and were treated better than prisoners in public prisons” (p. 11). More recently, Hulley *et al* (2011) discovered some evidence that staff in private prisons treated prisoners with more respect, being this a strength of private sector establishments. Such finding was also noted by Crewe *et al* (2014) in their comparative analysis about private and public sector facilities of staff practices, custodial attitudes and inmates’ opinion about them. This, despite the fact that staff in private prisons might not have the physical presence and experience of their public counterparts, but prisoners in contracted out prisons believed staff were less oppressive and showed more respect creating a sense of “‘lightness’ of experience” (p. 395). Liebling *et al* (2015) performed a three-year study of the perceptions of both staff and inmates concerning the quality of life in one establishment transferred to the private sector, pointing out a decline in the quality of life after the corporation took the facility, but during

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the study various areas were considerably enhanced: “‘respect/courtesy’; ‘humanity’; ‘decency’ [...] [and] ‘fairness’” (p. 4).

However, it was also established by Crewe *et al* (2011; 2015) that prisoners in private prisons were concerned about the inexperience of staff, revealed in the inappropriate and ingenuous use of authority, for “[p]risoners wanted staff to deploy their power to protect them from themselves as well as from other prisoners” (2011:105), but “complained about both the underuse and overuse of power” (2015: 326). In this sense, Liebling *et al* (2012) noted that “[c]learly there are overuses of power and uses of discretion (including discrimination) which are *against* legitimacy” (p. 115, emphasis in original).

Staff cultural differences in private prisons and public counterparts have been examined by Liebling (2008), who observed private sector staff showed more positive opinions about the corporation running the prison, than public officers towards the Prison Service; and that staff culture in some private prisons is characterized both by more respectful attitudes towards inmates, but at the same time by a process of moving to an “over-use of authority or the under-use of formal procedures” (p. 120). Regarding staff perceptions of their own activities and attitudes towards prisoners in private and public establishments, McLean and Liebling (2012) stressed some contrasts, especially in terms of discipline, control and discretion, as private sector staff are not confident with the use of force.

Regarding the current operation of private prisons, an influencing think tank published the results of analysis on governmental data and new research findings, highlighting the advantages and better performance of private prisons, claiming that “[p]rivate contractors outperform comparable public sector prisons on both cost and quality” (Tanner, 2013: 21). This study emphasised that in 2011-2012, in the domain of ‘Decency’ -which relates to this dimension-, 7 out of 12 privately run prisons performed better than the public sector average; and that in the general performance “[h]alf of the privately managed prisons are delivering “exceptional performance”” (Tanner, 2013: 8).

Despite these results, the Prison Performance Annual Ratings 2015/2016 (National Offender Management Service, 2016b) informed that none of the 14 private prisons in England were graded 4 (Exceptional performance); 11 were rated 3 (Meeting the Majority of Targets); while two prisons operated by different companies were rated 2 (Overall Performance is of Concern). Nevertheless, one prison was rated 1 (Overall Performance is of Serious Concern). Moreover, since

this research started in 2013, the average rating of private prisons has been 3 and out of the 14 prisons only 3 have been rated 4 at any time. In the most recent publication, the majority of private sector prisons were rated 3, two were rated 2, and one facility rated 1 (HM Prison and Probation Service, 2017). In those same periods, the average of most public sector prisons was 3, following by an important number rated 2, whilst some rated 4 and a few were rated 1.

6.3.7 The principles of procedural legitimacy

After the examination of concepts and approaches related to procedural justice and legitimacy, it is possible to propose the principles underpinning this dimension of the IMM. As stated previously, further research is required to examine each of the issues raised in this dimension; nevertheless, the sources examined are useful for the theoretical assessment of procedural legitimacy.

This particular category of legitimacy acknowledges Rutherford's (1993) "Credo Three" (p. 18), an approach that incorporates compassion to offenders, restrictions on the use of power, and openness in procedures, as features of a humanitarian ethos in the delivery of imprisonment. Similarly, it takes into account the view that protection of prisoners' rights "transcend the boundaries of the public and private sectors" (Easton, 2011: 7).

At the beginning of the debate in England and Wales, Logan (1987b) suggested that legitimacy to private prisons was provided "in exchange for the fair exercise of power [...] being perceived by inmates as just and impartial in the application of rules" (p. 37). Cavadino *et al* (2013) later noted that the crisis of legitimacy can be addressed by "[treating] prisoners justly, respecting their dignity and their rights" (p. 228).

The first principle providing procedural legitimacy to private prisons is fairness in disciplinary procedures and in the application of rules. This principle has one key implication, as it must be ensured through access to an impartial and independent mechanism to resolve grievances, for "the ability to complain effectively is integral to a civilised prison system" (Prisons and Probation Ombudsman, 2015: 9).

This relation between fairness and legitimacy, was recognized by Mathiesen (1965) as a mean to limit "the pains of imprisonment" (p. 69), for "*there appears to be a correlation between [...] personal power and [...] the feeling of illegitimacy*" (p. 99, emphasis in original). Privately managed prisons then -as

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public sector prisons- must respect prisoners' rights and ensure procedural justice, as a mean to achieve inmates' compliance to internal rules, for, as according to Tyler (2006) "only legitimacy shapes behavior" (p. 390).

A further principle derives from inmates' experiences about justice with regard to their imprisonment and how it is delivered, particularly through prison staff performance.

Since legitimacy "can be acquired [...] changing procedures and practices of current officials" (Meares, 2000: 401), for inmates to perceive the operation of private prisons as legitimate, constructive and positive relationships with staff and directors must be ensured, and treatment should be based on respect and professionalism. It is also important for private prison staff to adhere to guidelines and contract terms, particularly regarding the use coercive force to achieve the goals of safety, order and security, and prevent any form of violence, otherwise, the legitimacy of a particular private prison or the corporation managing it, is seriously undermined.

Given that privatisation was recommended and justified by its alleged ability to improve the delivery of imprisonment and prevent violent incidents, the provision of decent -humane- conditions by prisons under private corporations' management is another principle.

Some degree of legitimization of privatisation was provided by the Woolf Report (Woolf and Tumin, 1991), since it supported the government's agenda, suggesting that contracted out prisons would deliver higher standards of imprisonment. According to King and McDermott (1995), privatisation certainly changed the prison system. However, fairness, decency and humanity of conditions and regimes in prisons require supervision, particularly through effective inspection.

The final principle suggested to assess procedural legitimacy of private prisons, is compliance with recommendations made by independent bodies. The intention and capability to fulfil such recommendations, particularly from HMIP is essential in the legitimization of prison privatisation.

For Vagg (1994) monitoring is an instrument to maintain the legitimacy of privatisation; and according to Day *et al* (2015), Lord Woolf's recommendations about monitoring conditions, regimes and treatment are being implemented nowadays through one external mechanism, -the HMIP-, and one internal, -

‘Prison Annual Performance Ratings’ and its supporting statistics. Nevertheless, the role of Independent Monitoring Boards (IMB), assembled by members of the local communities that supervise the delivery of “humane and just treatment” (Independent Monitoring Boards, 2016b: 1), is also vital.

If privately run prisons take into account the principles suggested and order is ensured, then inmates would be “more likely to acknowledge the legitimacy of the regime” (Sparks and Bottoms, 1995: 59) and thus, their imprisonment in private prisons. Therefore, inmates’ perception and approval of private prisons are crucial in the overall assessment of the legitimacy of prison privatisation, for they not only improve the imprisonment of individual offenders, but can also contribute to the enhancement of the whole prison system by ensuring the principles presented in this dimension.

However, prison privatisation also requires legitimation in terms of its penal implications of this policy, particularly since, as presented in Chapter 2, privatisation was recommended in England and Wales and in Mexico, as a strategy to expand the prison system by providing more penal capacity to solve overcrowding, instead of suggesting a reduction in the use of imprisonment. Moreover, prison privatisation has been regarded as one contributing factor to more punitive policies. These issues, among others, will be discussed in the next section.

6.4 The Criminological dimension: expansion or decrease

Given that imprisonment is a manifestation of state power (Garland, 2013), and that any authority to be legitimate must exercise that power to attain proper aims (Beetham, 2013), the legitimacy of imprisonment must be examined in terms of its official goals and aims (Cavadino and Dignan, 1997). To be legitimate, the delivery of imprisonment ought to respect prisoners’ rights and develop an ethos amongst corporation’s staff to ensure this protection (Cavadino *et al*, 2013).

To be perceived as legitimate by the public and inmates, imprisonment should pursue particular objectives –a topic not a matter of this research- depending on a country’s ideology and be supported by policies in accordance with that ideology. However, privatisation requires legitimation also on criminological grounds this is, if this policy is in accordance with the aims pursued by the penal ideology of one particular jurisdiction.

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Legitimacy of imprisonment is questioned when its supporting policies are “insecurely and eclectically defined” (Sparks *et al*, 1996: 307), or if it is delivered in the pursuit of private aims. Hence the importance of an assessment of the criminological legitimacy of privatisation and its penal implications. Within the setting of this dimension, legitimacy has been linked to crime control (Loader and Sparks, 2013), as the basis of penal policy making (Sparks, 1994), and to ideological discourses supporting punishment (Pratt, 2008c).

Despite the fact that this dimension focuses mainly on penological approaches, its denomination responds to the significance of Criminology as a broader discipline, and also to open the scope to examine other issues not addressed by penologists but by criminologists.

As a collection of academic, cultural, and official studies about “crime, criminals and crime control” (Garland and Sparks, 2000: 192) Criminology produces theoretical approaches pondered by Penology in the study of punishment and penal control in an effort to legitimize it (Garland, 1997). To theoretical and empirical studies about penal institutions, legitimacy is “the basis for grounded but experimental theorizing about what a better politics of crime and justice might look like” (Loader and Sparks, 2013: 123).

Privatising policies are usually recommended as a mean to reduce “the scope of government activities” (Feeley, 2002: 322). However, based on the failure of public prisons to rehabilitate -or reform- inmates and reduce reoffending, this policy is designed and implemented as an attempt to improve prison system operation solving the “crisis of resources” (Cavadino *et al*, 2013), securing larger capacity and to reduce overcrowding.

Such expansionist penal policy was recently endorsed in England and Wales in 2016, for despite admitting the colossal costs of imprisonment and that “prisons are not working” (Ministry of Justice, 2016: 3) it was proposed to “invest £1.3 billion to build up to 10,000 new adult prison places” (Ministry of Justice, 2016: 58) as part of “a major overhaul of the [prison] system -the biggest for a generation-” (House of Commons, 2016b).

The most obvious implications of prison privatisation are related to criminological and penological matters and contracting out of prisons has been widely studied from both perspectives since firstly proposed in the 1980s; however, after nearly three decades of operation, a re-evaluation of its legitimacy is fundamental. This dimension provides the guiding principles to assess the criminological legitimacy

of privatisation and ponders the outcome of pursuing an “expansionary policy at the expense of other, arguably more constructive” (Cavadino *et al*, 1999: 138).

In order to establish the guiding principles to assess the criminological legitimacy of private prisons, this dimension provides an examination of some key perspectives; as the mean to evaluate to what extent prison privatisation responds to a penal ideology that, at the same time, is required to answer to communal values and beliefs, and pursue the official purposes of punishment. In particular, three criminological issues, namely populist punitiveness, mass incarceration and prison expansion will be studied to determine the connection and influence in privatising policies.

6.4.1 Beccaria’s rational approach to punishment

Despite historical objections like disapproval by contemporary legal scholars (Maestro, 1942) and the prohibition by the inquisition (Torío, 1971), and recent criticism in terms of its authorship (Newman and Marongiu, 1990), Beccaria’s work was a beacon for the first penal reformers in Continental Europe and the Americas.

Notwithstanding his limited influence in England (Draper, 2000), Beccaria’s principles and groundbreaking contribution to criminological thinking attracted attention from social and political thinkers. His approach “based on reason and opposed to unnecessary cruelty” (Maestro, 1973: 463) was influential in the process of humanization of criminal justice and pivotal in the rationalization of punishment; hence the significance of his legacy to liberal penal reform.

Beccaria (1872) perceives legislation in Hobbesian and Lockean terms; this is, as the sum of individual freedoms aimed to safeguard security and peace. To achieve such goals, laws should have clarity and certainty. In Beccarian criminology, laws should be clear, both in their meaning and their aims, and leniency of punishments should be enacted in criminal laws as “[c]lemency is a virtue which belongs to the legislator” (Beccaria, 1872: 158). The importance of knowledge and science and the negative effect of ignorance, particularly resulting from obscure laws, are important features in his approach.

Following Montesquieu, Beccaria acknowledged that punishment must originate from extreme necessity; otherwise, it is regarded as tyrannical. This is key in his penological analysis, since to be just, laws and punishment must pursue specific aims and functions, like the conservation of the social bond, for “punishments,

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which exceed the necessity of preserving this bond, are in their nature unjust” (Beccaria, 1872: 18). To be just then, punishment must be limited as to ensure public interest.

To avoid excessive punishment, it must be based exclusively on the damage to society, maintaining proportionality between crime and punishment at all time; hence Beccaria’s strong opposition to the atrocity of punishments, and his support for milder, rational and minimal use of criminal law.

For Beccaria (1872) to be just, punishment “should have only that degree of severity which is sufficient to deter others” (p. 101); therefore, an effective method to prevent crimes is through awareness of the inevitability of a lenient sentence rather than just the fear of harsher punishment. He also noted that cruel disproportionate punishments have negative effects and fails crime prevention, as “[t]he countries and times most notorious for severity of punishments, were always those in which the most bloody and inhuman actions and the most atrocious crimes were committed” (Beccaria, 1872: 94).

Regarded by Beccaria as different to other punishments, since it requires preceding conviction and sentencing, imprisonment should be determined exclusively by the law, and leniency should guide its use, for “[w]hen punishments become less severe, and prisons less horrible; when compassion and humanity shall penetrate the iron gates of dungeons [...] the laws may then be satisfied” (pp. 109-110). He perceived a danger in the use of imprisonment, both as punishment and as a provisional measure, and also rejected the practice of incarcerating indiscriminately in the same prison sentenced and remand offenders, for it supported the opinion that criminal law relates to power rather than to justice.

The final part of Beccaria’s work acknowledged the appropriateness of prevention rather than punishment, being education “the most certain method of preventing crimes” (Beccaria, 1872: 157). It concludes by declaring that “*a punishment may not be an act of violence [...], it should be public, immediate and necessary; [...] proportioned to the crime, and determined by the laws*” (Beccaria, 1872: pp. 160-161, emphasis in original).

Beccaria’s contribution to criminological thinking is still relevant and his principles applicable to question the practice of imprisonment. Compassion, rationality, proportionality and clarity in the use of imprisonment are essential to

provide legitimacy to imprisonment, let alone if it has been delegated into private corporations, hence the need to consider his approach in this dimension.

Since laws should be clear about the aims of imprisonment, taking a Beccarian approach penal policies should encourage rationality and proportionality in the use of prison, avoiding any excessive use as a mean to control crime. Countries with high prisons populations should consider Beccaria's principles in their policies, particularly that related with a rational use of imprisonment.

6.4.2 Norwegian exceptional approach to imprisonment: Christie and Mathiesen

Nordic countries are distinguished for their humanitarian approach to imprisonment (Pratt and Eriksson, 2011), known as "Scandinavian exceptionalism" (Pratt, 2008a: 119). In contrast to countries with punitive and expansionist penal policymaking, Scandinavian systems, based on welfare model, reduced prison population by having "a softening effect on criminal justice policy" (Bondeson, 2005: 197).

Notwithstanding the evident obstacles of replicating penal policies from other countries (Pratt, 2008b), Norwegian approaches are key in modern penology; hence the importance of including in this dimension some of this criminological perspectives. Particularly influencing in other countries, including Mexico -at least academically speaking, are the works of Christie and Mathiesen, regarded by Rutherford (1996) "an invaluable framework for assessing the competing strands which drive any transformation of criminal policy" (p. 129).

Taking a critical stance, these criminologists advocated for the humanization of punishment, through its limitation and eventual abolition. Their significant works have contributed to criminology by covering mainly the same issue: the importance of questioning the appropriateness of imprisonment as a form of social control.

In particular, Christie (2000) explored in his most renowned work the disparities on prison populations in various countries and the factors behind them; finding that high prison numbers are determined by political and social interests and are the result of crime control policies rather than crime. Crime control in modern democracies is highly influenced by market and economic drivers, and criminal policies have promoted and endorsed the emergence of the "crime control

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industry" (p. 13), with evident advantages over others, for offenders and inmates are the "raw-material for control" (p. 117), which this industry is supplied from.

Christie (2000) perceived a risk in the delegation of the delivery of punishment, for its public and communal nature "evaporates in the proposals for private prisons" (p. 145), highlighting two additional concerns. First, contracting out might enable a network in which inmates from overcrowded public prisons are relocated in private new facilities, having then space again to be filled with inmates; second, privatisation is the right strategy for governmental expansionist agendas, since it generally does not require public vote or parliamentary debate, remaining thus, a prerogative of the executive branch.

In contrast to Scandinavian countries, the use of imprisonment in the USA, England and Wales, and Mexico is encouraged by the private sector, for an oversupply of inmates is "an extraordinary strong incentive for the expansion of the system" (Christie, 2000: 121). Here lies the central issue and concern about privatisation, that "private prisons increase the capacity for incarceration" (Christie, 2000: 148). For Christie (2004), "[a] strong growth of penal institutions represents a serious threat to ideals of social cohesion and assimilation" (p. 105), hence the importance of policies encouraging the prison system contraction and prison populations reduction, for they are grounded on values such as compassion and integration.

In the same line of thinking, Mathiesen's (2000) major work focused on the effects of imprisonment, assessing prison from socio-legal, criminological and penological perspectives, questioning the arguments supporting it, and its alleged effectiveness; for this reason, it is relevant to analyse his work as to evaluate prison privatisation.

After evaluating the justifications behind prison to determine whether it has a defence, Mathiesen (2000) concludes that, in terms of rehabilitation, general prevention, incapacitation, social defence, and justice, prison "does not have a defence [...] is a fiasco in terms of its own purposes" (p. 141); prison is "a deeply irrational system in terms of its own goals" (Mathiesen, 1998: 13). However, after that conclusion, the question posed is then why do modern societies use prison despite its failure. The answer provided is that "there exists a pervasive and persistent ideology of prison in our society" (Mathiesen, 2000: 141). This ideology has two major elements: first, a supportive component in the sense that prison serves certain functions and is successful in achieving such aims; and

second, a negating component, this is, the denial about the failure prison. In both circumstances, mass media plays an essential role (Mathiesen, 2000), just as it was explained in the Ideological dimension.

Mathiesen (2001) suggested, that along with various factors behind high incarceration levels, television plays a very significant role since it “*facilitates prison growth*” (p. 31, emphasis in original), by contesting the defences against prison, which according to Mathiesen, are values that limit the use of imprisonment. Such values also serve to challenge the legitimacy of punitive policies, which are conceived as “purely opportunistic” (Mathiesen, 2001: 32) and not originating in principled argumentation.

Imprisonment -according to Mathiesen (2000) - has entered a new stage, characterized by alarming escalations of prison population, due four factors: political failure of reforming efforts to limit imprisonment; neutralisation of legislation intended to decrease imprisonment; growing prison population; and new prisons’ building programmes to tackle overcrowding. In this trend, “the market mechanism, with an emphasis on profit, is currently in the process of penetrating a prison system under pressure” (Mathiesen, 2000: 15).

Under these circumstances, prison expansionism has created new levels of repression. Mathiesen (2000) suggests that resistance to this policy is essential as “the expanding prison [...] represents a permanent challenge to those of us concerned, politically and/or scientifically, with the sociology of social control” (p. 197).

Despite the obvious criticism, particularly from right realism criminologists focusing on social control mechanisms, these approaches provided liberal examinations, mainly regarding the importance of limiting the use of prison, since it has failed to achieve its goals. Hence the need to review their opinions, for they represent a challenge to an extensive use of imprisonment that has generated penal crises, like overcrowding and deterioration of conditions and regimes, which require a solution, normally through private sector involvement in the prison system.

6.4.3 Punishment and privatisation in Garland’s ‘penal culture’

Despite Garland’s analysis focused on the USA and the UK, countries with circumstances different to others -such as Mexico-, his contribution to modern criminology and to the debate is significant, for Garland’s examination of

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punishment is well known. His arguments, valid also in other jurisdictions with similar penal problems, are functional to understand to a certain extent, the evolution and current practices of punishment, and even the origins of privatisation.

Examining the evolution of punishment, Garland (2001b) considered that penal strategies in the 1970s were legitimized through the involvement of experts and professionals; however, the collapse of the rehabilitative ideal, along with social, economic and political factors in the USA and the UK, challenged that legitimization of penal institutions. In that sense, new strategies were implemented in a particular period when “penal policy discussions increasingly evoked cynicism about rehabilitative treatment [...] distrust of penological experts, and a new righteousness about the [...] efficacy of punishment” (2001b: 102).

Regardless the inevitable evolution of punishment towards more civilized forms, Garland (2001b) recognised that the excessive use of imprisonment served two parallel goals: social demand for retribution, and incapacitation of particular individuals. Garland (1985) suggested that cultural values and social sensibilities shape punishment, creating a society’s “penal culture” (Garland, 1991a: 210). However, penal policies are in fact, influenced by political and economic interests, legitimized only to the extent that such influences conform to socially constructed values. Punishment is then, a ‘complex cultural artefact’ (Garland, 1991a).

The ascent of “pragmatic new strategies” (Garland, 1996: 449) and punitive policies was encouraged by political forces rather than penological knowledge. Therefore, punitive penal cultures are encouraged by the diversification of criminological thinking, giving raise to “the criminology of control” (Garland, 2001b: 182) as a reaction to the perceived failures of the criminal justice system. This category is shaped by two contrasting approaches: “the criminology of everyday life” and “the criminology of the dangerous others” (Garland, 2001b: 186-187). Important for this dimension is the latter, since it comprises extreme measures and perception towards offenders, motivating social exclusion and incapacitation.

Public perception of increasing crime is a key factor in the formation of the ‘crime complex’, which is a set of beliefs and attitudes characterized by the politicization of crime concerns and its focus on public anxieties. This results in the creation of strategies grounded on punitiveness, public protection, exclusion

of offenders and the collaboration between governmental agencies and private corporations, which together give rise to a particular penal culture, the “culture of crime control” (Garland, 2001b: 174). One particular expression of this culture is the “sovereign state strategy of punitive segregation” (p. 141), characterized amongst others, by a colossal use of imprisonment, situation that affects the “political and cultural significance of punishment” (Garland, 2001b: 168).

A further element of the culture of crime control is the managerial philosophy, displayed in matters such as target-driven and monitored performance and the focus on economic benefits, and in this context contracting out plays a significant role. Garland (2001b) acknowledges that both liberal and conservative ideologies have endorsed new markets offering services formerly delivered solely by the state. Particular mention deserves the notion of “commercialization of justice” (Garland, 2001b: 116), which despite the rejection of penal experts, is a common practice targeted to answer crisis of legitimacy. He suggests that “[w]hat were once state-monopolized powers have increasingly been devolved to private, ‘for-profit’ contractors, who are allowed to pursue their commercial interests so long as they remain within the constraints established by their contract [...] and submit to [...] monitoring and regulation” (Garland, 2001b: 116).

Garland’s genealogical account of punishment has received criticism from different angles. Daems (2000) criticised the methodology; Zedner (2002) questioned the content and extent of Garland’s concepts and the account “so apocalyptic” (p. 363); for Braithwaite (2003) some crucial historical events and developments were not considered, some statements being “wrong at worst, misleading at best” (p. 13). Similarly, Loader and Sparks (2004) noted his dramatic explanation which provided them with the opportunity to reflect and develop an alternative account “of criminology and crime policy as versions of an historical enquiry into politics” (p. 26).

Despite such critique, Garland’s theory provides a framework for the assessment of prison privatisation and its legitimacy on criminological and penological grounds, understanding the historical factors behind private sector involvement. According to this perspective, punishment delivered by private means can be regarded as an outcome of crime control policies and a component of a society’s penal culture.

6.4.4 'The penal triad': punitiveness-'imprisonment in excess'-expansionism

If punishment fails to accomplish the expected results, its legitimacy is undermined; and in an effort to recover it, governments implement particular policies considered as demanded by the public (Pratt, 2008c), sometimes derived from fears and concerns (Pratt, 2007). These policies are influenced by the "crime consciousness" (Garland and Sparks, 2000: 200), this is, cultural perceptions and beliefs about crime and punishment. Those beliefs, along with the symbolic use of imprisonment in public knowledge (Drake, 2012), sustain populist punitive policies. The drivers and effects of these policies have been widely examined, but an examination of such phenomenon is not part of this research.

Bottoms (1995) was the first to use the term populist punitiveness as the option of policy-makers and politicians to reduce crime through deterring and incapacitating offenders by addressing voters' demands. For Zimring (2001), public support for punitive policies is a manifestation of excess of confidence in authorities, but at the same time, a manifestation of distrust in them; assumption also suggested by Enns (2014), who considers that "less confidence in the [...] system will correspond with [...] greater support for being tough on crime" (p. 861). Additionally, Wacquant (2010) observes that punitive policies are rooted on neo-liberal strategies supported by politicians, indistinctly their political ideology.

Pratt (2008c) maintains that policies resulting from penal populism "are designed not only to control crime through more punitive sanctions but also to '[...] take penal power away from criminal justice elites and return it to the 'people' (p. 369). This "new punitiveness" (Pratt *et al*, 2005) considers public opinion as the influencing factor in penal policies, creating new forms of punishment that challenge principles and rationality, making prison a "container for human goods now endlessly recycled through what has become a transcarceral system of control" (p. xiii).

Bell (2011) acknowledged that the most significant effect of punitive measures is the "capacity of the penal arm of the state to penetrate deeper than ever before into civil society" (p. 118). Despite the terminological differences between penal populism, populist punitiveness, new penology and the new punitiveness (Brown, 2005), mass incarceration is a common feature, for punitive policies have instant changes on prison numbers (Garland, 1996). It can be suggested then, that

populist punitiveness, in any of its manifestations, gives rise to 'imprisonment in excess'.

Since the 1970s, the two major political parties in Britain motivated a punitive drift (Ryan, 2005). As a result, the country had the highest prison population in Europe in the 1980s. To address this, the government proposed some actions including the promotion of alternatives to prison for less serious offenders and the expansion of the prison system (Muncie and Sparks, 1991). Years later, grounded on the notorious statement that 'prison works', policies guided by that ideology were aimed to "toughen up the criminal justice system" (Cavadino and Dignan, 2006: 67) abandoning the objective of reducing the number of imprisoned offenders and engaging in a prison-building program instead.

Mexican policymaking has also been influenced by populist punitiveness, particularly with the enacting -in 1996- of punitive measures against members of criminal groups, and since then prison numbers have doubled. The number of imprisoned offenders "has risen in a vertiginous manner in recent years" (Carbonell, 2012: 115). By July 1997 prison population, both remand and sentenced, was 110,863, with an overcrowding level of 11.1% (Oficina del C. Presidente, 1997). By June 2007, one year after the war against organised crime initiated, 216,845 inmates were held in Mexican prisons with an overcrowding level of 32.3% (Presidencia de la República, 2007). Such alarming rise in the number of people imprisoned in Mexico was the outcome of the shift towards a more punitive position (Müller, 2016).

Mass incarceration has been perceived as the result of tougher sentencing, crime control, and even privatisation policies (Garland, 2001a); the consequence of neo-liberal decisions (Cavadino and Dignan, 2006); with overwhelming consequences and social, political and economic repercussions (Cohen, 2014); raising "fundamental concerns of human rights" (Mauer, 2001: 8); and the direct result wars on crime deriving in a "carceral hyperinflation" (Wacquant, 2009: 169).

'Imprisonment in excess' has further implications and consequences, particularly connected to the final component of the penal triad: prison expansionism. The expansion of the prison system as a strategy driven by legislatures based on political consensus (Jacobs, 1983) is the ultimate consequence of mass imprisonment (Gottschalk, 2013). In this sense, Lacey (2008) has observed that the public and politicians have supported prison expansion, despite the fact that

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“high rates of imprisonment offend against the value of autonomy and liberal principles of parsimony in punishment” (p. 17).

Rutherford (1984) suggested that prison expansion is, in part, the result of the government’s expectation of controlling crime, as one of the goals of criminal justice, and persistent growth in prison numbers, alarming levels of overcrowding, prison construction programmes and investment in security and control are some characteristics of expansionist programmes. For Mathiesen (1991), prison expansion is a political decision entailing, that once a prison has been built, it must be used and filled, then the construction of new prisons is required, for “[t]he longer the expansive policy is pursued, the more difficult it will be to turn the tide” (Mathiesen, 1991: 184). Garland (1999) emphasized that privatisation is one manifestation of the transformation of penal institutions and a new mode of penal policymaking advocated by private interests.

After reviewing some criminological and penological perspectives, it is possible to suggest that the influence of populism along with the involvement of non-experts in penal policymaking encourages punitive responses to crime, and the immediate consequence is mass imprisonment; and ‘imprisonment in excess’ makes the expansion of the prison system inevitable. However, this ‘penal triad’ has also further penal policy implications.

6.4.5 ‘Prisons for the masses’, commercial incarceration and legitimization crisis

Resulting from the extensive use of imprisonment, overcrowding is frequently tackled through investment by the private sector in the prison system, which seems to be an inevitable element of penal policy in countries with punitive policies. The ‘penal triad’ can be considered then as the cause and effect of penal crises, providing a fertile ground for the authorization of privatisation of prisons, which works as both its justification and legitimization by governments and corporations. According to Cavadino and Dignan (1997), despite the fact that privatisation does not contribute to solve overcrowding problems, even by means of expanding the prison system, privatisation is perceived by governments as a solution of the “*crisis of legitimacy*” (p. 29, emphasis in original). In that sense, according to Bosworth (2010) private sector participation is justified and legitimized in terms of its ability to reduce overcrowding.

Genders (2013) claims that the rise and growth of privatisation coincides with the implementation of tougher criminal policies along with an expansionist penal policy, and as these three concerns are linked, it can only be provided with “pragmatic legitimacy” (p. 27). Sparks (1994) questioned the legitimacy of privatisation in terms of its contribution to penal policy because private prisons are regarded as “*supplementary* to an existing system which has reached or exceeded even the most permissive estimation of its capacity” (p. 25, emphasis in original).

In Mexico, the excess of inmates, both remand and sentenced, is a phenomenon not previously seen and the solution recommended from the government was the expansion of the federal prison system through private sector involvement. According to the National Ombudsman, in a 20-year period –from 1995 to 2015–, the prison system grew by 135,460 new spaces (Comisión Nacional de los Derechos Humanos, 2016b: 69)

During the inauguration of the first privately operated centre, privatisation was regarded both as “a strategic development in the transformation of the federal prison system” and as a measure “to close gaps in penal policy through an extensive and urgent programme to build state-of-the-art infrastructure for an appropriate control of inmates and reduce overcrowding in federal and state prisons”. It was also stated: “what has to be done is to increase the number of penal facilities [...] the reasoning being that if the law establishes that there must be one, thousand, ten thousand or one hundred thousand inmates, the state has to deliver its duty to provide the spaces, so law can be enforced”.¹⁷

Considering this situation, Mexican penal policymaking, through privatisation, was set to provide ‘prisons for the masses’. It is possible to recognize what Drake (2016) has suggested, in terms that punitive policies provide opportunities for private corporations to invest in the delivery of punishment, and that companies can endeavour to maintain or increase prison populations (Fulcher, 2012).

To this respect, Sim (2009) acknowledged the impact of commercial interests in imprisonment. Similarly, Borna (1986) considered that higher rates of reoffending

¹⁷ ‘El Presidente Calderón en la inauguración del Centro Federal de Reinserción Social para internos de mínimo y mediano riesgo procesados’ Presidencia de la República. Available online <http://calderon.presidencia.gob.mx/2012/10/el-presidente-calderon-en-la-inauguracion-del-centro-federal-de-reinsercion-social-para-internos-de-minimo-y-mediano-riesgo-procesados/> [Accessed 13 November 2016].

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can be a source for profit for privately run prisons, as “the private sector does not have any real interest in reducing the number of prisoners” (p. 332), therefore, as Aviram (2014) pointed out, corporations managing prisons offered governments ““discounts” on the required occupancy rates in their institutions” (p. 447).

Lilly and Knepper (1993) questioned whether it could be possible to establish a link between harsher criminal policies and private corporation’s economic interests, but despite the difficulty to prove such connection, in fact corporations do influence penal policies promoting a “corrections-commercial complex” (p. 157). For Genders (2002), the fact that “[b]y providing rehabilitative regimes, [private] prisons would be in the business of putting themselves out of business” (p. 288), represents a conflict in the legitimization of privatisation.

Private prisons are perceived by opponents as a diversion and an obstacle to any principled reform of the prison system (Cavadino *et al* 1999), since “the privatization process is a damaging distraction from the need to embark on a programme on fundamental reform directed at the whole of the system” (Cavadino and Dignan, 1997: 177). Therefore, according to Gottschalk (2015), instead of endorsing privatising policies, a major reform is needed, one that lowers prison numbers and stops prison expansion. It is possible to suggest then, that the rise and development of prison privatisation can be seen as another manifestation of “dangerous politics” (Annison, 2015: 206) aimed to extend the use of imprisonment and expand penal control.

Prison privatisation, as manifestation of the new managerialism in penal expansion (Fionda, 2000) and neo-liberal strategy, can be seen as the result of the ‘penal triad’: populist punitiveness, “imprisonment in excess” and prison expansionism. Moreover, commercial punitiveness and penal entrepreneurship can be driving forces behind policies promoting ‘imprisonment in excess’, through spending resources and building programmes to provide ‘prisons for the masses’.

6.4.6 The principles of criminological legitimacy

Derived from criminological perspectives and considering the implications of prison privatisation in England and Wales and in Mexico, criminological legitimacy in this IMM is determined by some specific principles.

As seen, to manage high incarceration rates, privatisation has been one of the most recurred and implemented strategy; however, private sector involvement

has an additional effect, as it broadens the system at the expense of reforms aimed to reduce the use of prison as a reaction to crime. Additionally, it has been suggested that corporations wanted to invest in the prison system for “profit can be made in this growth industry” (Shichor, 1998: 87). If privatisation stimulates incarceration growth and thus, the expansion of the prison system, its legitimacy is undermined. Therefore, the criminological legitimacy of this penal policy has to be evaluated in terms of its penological goals and penal implications.

Considering a liberal approach to punishment, in particular from a Beccarian perspective, the first principle underpinning this dimension is the rational and rationing use of prison.

Legislation and its supporting policies should be clear about the aims of imprisonment, and the importance and need to limit the use of imprisonment, for any excess is the origin of further concerns like overcrowding, deterioration of conditions, lack of appropriate regimes, and ultimately, the failure to rehabilitate or reform inmates. Thus, prison privatisation should respond to the public interests and pursue the official enacted purposes of imprisonment, limiting its use.

In a comparative study of prison systems, Cavadino and Dignan (2006) highlighted that privatisation failed to progress in Scandinavian countries, for as Christie (2000) declares “[p]unishment can then be seen to reflect [...] values, and is therefore regulated by standards [...] for what is possible and what is not possible to do to others” (p. 201). Mathiesen’s (2000) assessment of prison is essential in this legitimacy test by reformulating his questions and asking: why do we have private prisons? Do private prisons have a legitimate defence?

The second principle derives then from Norwegian exceptionalism and refers to the importance of, not just limiting, but reducing the use of imprisonment, through the implementation of alternatives to prison.

Privatisation has been advocated on the grounds of the claimed ability of corporations to overcrowding, whilst contributing to fulfil the aims of imprisonment. However, as suggested, such legitimisation requires a re-evaluation, for there is the possibility that privatisation promotes punitive policies, mass incarceration and the expansion of the penal system. This particular principle underpinning this dimension, challenges penal policies that promote the ‘prisons for the masses’.

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Downes' (1998) comparative study about penal policies highlighted the contrasts of expansionist and contracting strategies, acknowledging the benefits and convenience of a reductionist policy and its effects on the quality of imprisonment.

Under these circumstances, the third principle determining criminological legitimacy is that it must not be the result of private interests or the 'penal triad', but the outcome of expert academic knowledge and evidence aimed to fulfil the goals of imprisonment.

Garland suggested that the public is not fully aware about the impact of privatisation in imprisonment rates (1991a) and on how "[c]ommercial interests have come to play a role in the development and delivery of penal policy" (2001b: 18). It appears to be a contradiction between the official arguments behind privatising policies and the actual participation of corporations. Private investment in the prison system is recommended as a mean to reduce overcrowding, without acknowledging the broader penal implications, particularly the expansion of the prison system.

Privatisation has been praised also on its alleged managerial advantages. It is a policy and strategic plan aimed to innovate the delivery of imprisonment, secure contractual accountability and perform better. These issues, amongst others, will be addressed in the next chapter.

6.5 Conclusion

The approval of private sector involvement in the prison system by society, both the public and prison society, requires legitimation on three grounds: ideological, procedural and criminological. This chapter aimed to establish the principles underpinning the assessment of the legitimacy of the delivery of imprisonment by private means from three different -but linked- disciplines related to a sociological approach to prison privatisation and its legitimation.

Analysing legitimacy from a social psychology, procedural justice and criminology has provided an evaluative structure to establish that imprisonment must be grounded on values and beliefs and according to a communal perception of what imprisonment should pursue. The categories of Ideological, Procedural and Criminological legitimacy must be acknowledged as paramount in the prison privatisation debate, since they refer to the legitimation from two of the key

players in the phenomenon: society and inmates. Legitimation of private prisons requires public rational approval according to factual knowledge about prison crises; improvement of procedural fairness and decent conditions through independent monitoring and inspection; and a rationing use of imprisonment, pursuing a contraction of the penal system according to principled penal ideologies, implemented along with a reduction in the use of imprisonment.

Chapter 7: The Managerial domain

7.1 Introduction

Prison building programmes are frequently planned to tackle overcrowding resulting from steadily growing prison numbers; however, this policy is not always accepted, because governments, politicians and even the public are reluctant to allocate resources to construct new facilities (Kish and Lipton, 2013). Private investment is validated since governmental budgets cause financial obstacles for building new prisons (Sechrest *et al*, 1987). Programmes such as Financial Management Initiative (FMI) allowed private involvement (Cavadino *et al*, 1999) and strategies like Private Finance Initiative (PFI) and Public Private Partnerships (PPPs), which stemmed from the New Public Management (NPM) approach, were planned by governments -regardless political ideology- as suitable mechanisms to fund new prisons (Ryan, 2003).

Additionally, proponents have repetitively emphasized the alleged advantages of private sector prisons, from an economic and performance perspectives; amongst such arguments is the claim that experience and expertise of corporations allow them to “locate, finance, design, and construct prisons more rapidly” (Logan, 1990: 79). Privatisation was also recommended to be “a comparative standard” (Logan and Raush, 1985: 317) by which performance of public sector prisons could be assessed against and thus, identify failures; and if appropriately managed, privatisation provided “a unique opportunity to raise standards” (Harding, 1997: 31).

For opponents, privatisation was introduced as a strategy to tackle problems within the prison system based on the alleged “efficiency, both in the form of cost effectiveness and operational flexibility” (Shichor and Sechrest, 2002: 402). In this sense, this phenomenon contributed to the creation of “a ‘penal market’ dominated by certain powerful private companies” (Maguire, 2012: 489). This by releasing “entrepreneurial energies” (Feeley, 2002:323) inside prison systems and influencing governmental programs and public policies as “a matter of administrative practice” (Metzger, 2003: 1369).

Such conflicting claims have nourished the debate about private prisons. Academics and researchers have addressed this managerial area more widely, for the vast majority of arguments to legitimate contracting out of prisons are

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budgetary-orientated. Hence, the importance of including this domain in the IMM, integrated by the Organizational, Operational and Contractual dimensions as Figure 5 displays.

Figure 5

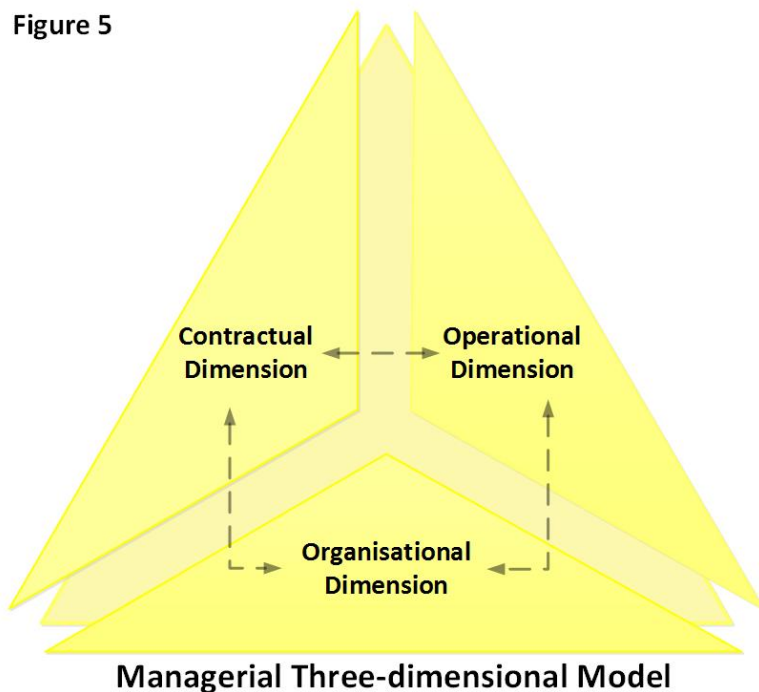


Figure 5 Managerial Three-dimensional Model

The Organizational dimension relates to the aims of private prison management since, like any other organisation, responds to expectations and values. Secondly, the Contractual dimension refers to the importance of accountability mechanisms to monitor private prisons' performance to secure contract compliance. Finally, the Operational dimension focuses on the effectiveness of private sector prisons at maintaining or improving the quality of imprisonment. Notions from fields of knowledge such as institutional theory, corporate governance, corporate finance, and performance management, underpin these dimensions to establish which principles determine legitimacy from these perspectives.

7.2 The organisational dimension: imitation or innovation

Corporations have extended their scope to the provision of complex governmental functions (Phillips, 2003), including sensitive areas of the criminal justice system, like policing, probation and imprisonment. According to Shefer and Liebling (2008) in England and Wales, this involvement was justified by the government on the "loss of faith in the public sector's ability to do anything efficiently or well" (p. 263). As seen in previous chapters, growing prison

population and the need to improve economy and efficiency were substantial drivers of contracting out (Bottomley *et al*, 1997), and thus, to “solve the major social problems of public-sector prison decline” (Young, 1987: 39).

Moreover, the provision of public services by private organizations is frequently validated on the ability to fill out “state-based gaps in service” (Hallet, 2004: 54), and by increasing efficiency and reducing failures in governmental functions through competition (Vickers and Yarrow, 1988). In addition, the “widespread and increasing distrust” (Scott, 2010: 42) on public institutions has also contributed to approve private sector involvement.

Notwithstanding privatisation has prospered due the convergence of mutually supporting factors, a major justification and legitimation argument is the perception that private sector involvement would stimulate innovation in the delivery of imprisonment, for the prison system was recognised to be “stagnant and slow to react to the constantly changing penal and political environments” (Bottomley *et al*, 1997: 41). Corporations recognize this fundamental driver. G4S states that “has been providing [...] innovation [...] since the first private sector prison in the country was opened in 1992 [s]ince then, expertise from around the business has been used to expand and improve our offering”.¹⁸ Sodexo, considers it will “constantly innovate to deliver better services and maximum value for money - to government, to taxpayers and to the 3,000 offenders we help rehabilitate everyday”.¹⁹ Finally, Serco acknowledges that it helps “governments deliver a more effective justice system, at a lower cost, by championing service innovations, [...] to produce the very best service offerings”.²⁰

In this regard, ‘primary legitimation’ to prison privatisation was provided on managerial grounds even before private prisons began operations and eventually constructed organisational legitimacy through their performance and results. Yet, given the actual performance and the possibility that the goals of imprisonment have not been achieved affect the claimed organisational legitimacy of private prisons, since as Scott and Davis (2007) suggest, the absence of well-defined

¹⁸ G4S United Kingdom. Custodial and Detention Services. Available at <http://www.g4s.uk.com/en/What-we-do/Care-and-Justice-Services/Custody-and-Detention-Services> [Accessed 13 May 2017].

¹⁹ Sodexo UK Website. Justice. Sodexo form strong and successful partnerships. Available at <http://uk.sodexo.com/home/services/on-site-services/justice/innovation-partnerships.html> [Accessed 13 May 2017].

²⁰ Serco UK and Europe. Justice. Available at <https://www.serco.com/uk/sector-expertise/justice> [Accessed 13 May 2017].

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goals or effective mechanisms to achieve them, are conditions that affect the creation and development of organizations and thus, their legitimacy.

Any corporation and its performance require legitimation (Van Dijk, 1998: 256). Legitimacy, as a fundamental concept in organisational theory (Deephouse and Suchman, 2008) is an essential resource for organizations to gain further resources and therefore, be able to grow and profit from their activity (Zimmerman and Zeitz, 2002); since legitimacy is “the endorsement of an organisation by social actors” (Deephouse, 1996: 1025). Regardless its nature, and despite economic shortages or unsatisfactory financial situations, Wodahl *et al* (2011) consider that any organisation has to make all possible efforts to acquire and maintain legitimacy, for “legitimacy in the institutional environment is paramount” (p. 211), despite that “legitimacy systems and legitimation agents vary by sector or field” (Scott, 2010: 41).

Taking into account the importance of legitimacy for private corporations, this topic is crucial in the IMM, for private prisons are organizations delivering imprisonment as a public institution, thus, the need to assess their legitimacy from institutional theory and organisational studies.

7.2.1 An organisational approach to imprisonment and private prisons

Since organisational theory examines “how organizations operate and how they affect and are affected by the people who work in them and by the society in which they operate” (Jones, 1995: 11), this discipline provides valuable concepts in the evaluation of the appropriateness of any organisation -including prisons managed by corporations. Institutional and organisational theory literature is a significant source to determine the principles that support this dimension of the IMM.

For organisational scholars like Scott (2010), institutions are “durable social structures, made up of symbolic elements, social activities, and material resources” (p. 57) that have identifiable properties, such as conduct regulation, and basic requirements like legitimacy. According to Parsons (1956), the pursuit of specific goals is key in organisational performance. In this sense, an organisation is perceived as a “system which, as the attainment of its goal, ‘produces’ an identifiable something which can be utilized in some way by another system” (Parsons, 1956: 65), and as a “tool whereby management can endeavour to shape collective effort” (Child, 2015: 7).

Furthermore, for Jones (1995) organizations might pursue various objectives according to specific requirements of stakeholders, whose contribution is essential for their effective operation; consequently, the effectiveness of an organization can be evaluated in terms on its ability to meet all the expected objectives. A concern for Jones (1995) is to what extent an organization achieves specific goals that are expected by some stakeholders rather than others, trying to maintain a careful balance between all interests at stake. In this process, the likelihood of a clash between competing goals affects how legitimacy is built; therefore, organisations are required to satisfy individual expectations “at least *minimally*” (Jones, 1995: 29, emphasis in original), otherwise, their organisational legitimacy is undermined.

Under such perspectives, imprisonment is a public institution aimed to achieve specific goals and influence behaviour through specific organized structures. Prisons in general are executive organizations that, on behalf of the state and the society, deliver the public institution of imprisonment; and private prisons are a branch in the organisational system of the penal apparatus, assisting in the rehabilitation of offenders to reduce reoffending. As such, prisons can be studied within the scope of Organisational theory, issue that remains an area not fully explored in the prison privatisation and legitimization debate.

According to Zimmerman and Zeitz (2002), legitimacy ensures the survival of organisations, since it represents “the *relationship* between the practices and utterances of the organization and those that are contained within, approved of, and enforced” (p. 416, emphasis in original). For Ruef and Scott (1998) “antecedents of legitimacy vary depending on the nature of the institutional environment as well as the organisational function that is being legitimated” (p. 899).

Henisz and Zelner (2005) have noted that a key feature of emergent institutions is the absence of public recognition; consequently, their legitimacy has to be constructed. Private prisons, in their contemporary context, are relatively new organisations required to build on cognitive basis. Prison privatisation is recommended and authorized on its justifications, and this represents the first challenge to their organisational legitimacy. However, legitimacy can be built thorough various techniques and strategies, some of which will be briefly examined in the next sections.

7.2.2 Meyer and Rowan, and DiMaggio and Powell: isomorphism as legitimation

Suchman (1995) has acknowledged the significance of the institutional approach to legitimacy, and in this context, for Deephouse (1996) organisational legitimacy is closely linked to one particular institutional concept: isomorphism.

Isomorphism is considered as an “argument that related systems tend over time to mirror or resemble one another” (Scott, 1975: 17), and a useful strategy to pursue legitimacy, particularly when the organization’s performance is not familiar to audiences and the expectations about the operation are not clearly recognized (Ashforth and Gibbs, 1990).

Meyer and Rowan, as founders of a neo-institutional approach, moved away from a political approach of institutions and offered a new perspective on legitimacy within an organisational setting (DiMaggio and Powell, 1991). Their contribution begins with the claim that organizations as “systems of coordinated and controlled activities” (Meyer and Rowan, 1977: 340), change according to particular requirements, and in doing so, stimulate the creation of new organizations.

To build legitimacy, organizations are compelled to integrate structures of effective practices and innovative procedures, implemented by interactive societal networks. Business ideologies and managerial programs are essential in the legitimation of organizations based on new societal necessities. However, powerful organizations might create specific demands for products or services, influencing public opinion and persuading customers to accept them, by “[building] their goals and procedures directly into society as institutional goals” (Meyer and Rowan, 1977: 348).

In this process of adopting societal structures to answer specific needs, Meyer and Rowan (1977) suggest that organizations can become “isomorphic” (p. 346) with other similar organisations to accomplish effective relations within the system. Hence, isomorphism is key for organisations, since it guarantees a higher degree of success by acquiring legitimacy, regardless their productive efficiency, because “[o]rganizations that incorporate socially legitimated rationalized elements in their formal structures maximize their legitimacy” (Meyer and Rowan, 1977: 352, emphasis in original).

In the same vein, DiMaggio and Powell (1983) noted that uniformity is a regular feature of organizations. Modern organisational theory studies the changes of

structures and performance of organisations, how competition and other forces motivate changes in goals, mission and practices of a particular organization, and how in this process of adapting, organizations tend to become more similar in their performance and culture aims to other organisations. These circumstances may limit innovation of structures and outcomes, through a “process of homogenization” (DiMaggio and Powell, 1983: 149). DiMaggio and Powell’s isomorphism can be considered both a state and a process (Deephouse, 1996).

According to DiMaggio and Powell (1983) there are two categories of isomorphism: competitive and institutional. They further recognise three mechanisms of institutional isomorphism “*coercive* [...], *mimetic* [...]; and *normative*” (p. 150, emphasis in original). Coercive isomorphism results from demands placed on a particular organization by other organizations, either governmental bodies, private corporations or the public, in order to meet certain expectations. Mimetic isomorphism relates to organizations “[modelling] themselves after similar organizations in their field that they perceive to be more legitimate” (DiMaggio and Powell, 1983: 152), particularly to address operational uncertainties and when goals are unclear. Finally, normative isomorphism is linked to professionalization as a source of legitimacy, resulting from knowledge produced by specialists and experts in a specific field or based on information exchange within networks.

Moreover, organisational isomorphism is relevant for this research, for this concept has “important implications for social policy in those fields in which the state works through private organizations” (DiMaggio and Powell, 1983: 157-8). For this dimension of the IMM, this concept serves to determine to what extent prisons managed by corporations seeking legitimacy in the first stages of their operation become isomorphic with their public counterparts, incorporating existing practices and ethos, according to public beliefs and expectations, to communicate consistency within the prison system and the official aims of imprisonment. Furthermore, it serves to assess if homogenization of the penal system through managerial practices secures the recognition of identical standards and results expected from prisons, regardless the organisation in charge, in order to evaluate if differentiations in the delivery of imprisonment affects organisational legitimacy.

7.2.3 Norms, beliefs and legitimate congruency: Dowling and Pfeffer, and Ashforth and Gibbs

Divergent from previous perspectives, strategic studies of legitimacy consider that to gain public support, an organization builds legitimacy through communicative techniques and through a “high level of managerial control over the legitimation process” (Suchman, 1995: 576).

First, for Dowling and Pfeffer (1975), legitimacy regulates the behaviour of organisations, but political and social support is also required for some organizations. This association between societal and organisational approaches to legitimacy seeks to develop a method to study as “the outcome of, on the one hand, the process of legitimation enacted by the focal organization, and on the other, the actions affecting relevant norms and values taken by other groups and organizations” (Dowling and Pfeffer, 1975: 125).

This legitimating method constrains an organisation to ensure its activities conform to two sets of rules: on the one hand, norms guiding its operation; and on the other, rules previously established about approved and permissible behaviour and performance. Equally, market rules determine competition amongst organisations, and how individuals choose one over another, for they fulfil expectations or adjust their operation to existing norms. Legitimacy is analysed from a teleological perspective, this is, regarding the expected and required aims of the organisation.

Secondly, Ashforth and Gibbs (1990) perceive legitimacy as a valued resource, achievable by two methods: substantive management, and symbolic management. The first category involves actual changes in organisational operation to respond to social expectations; while the second refers to apparent changes to conform to societal beliefs and attitudes.

Management of legitimation strategies depends on the aim pursued by the organisation; this is, to extend, maintain or defend it. Extension of legitimacy is particularly important for this dimension and essential for new organizations or existing organizations entering a new field, in order to win constituents’ support and positive assessment. This, especially in situations in which the organisation’s “means and ends are disputed by portions of society [...], lack the support of traditions and norms [...] [or] the organizational activity entails substantial risk” (Ashforth and Gibbs, 1990: 182).

Consequently, any adjustments in societal values affect organisational legitimacy, particularly when activities firstly regarded as unacceptable, later are approved, being in accordance with beliefs and attitudes. In such cases, Ashforth and Gibbs (1990) suggest that *“the less legitimate the constituents believe the organization to be, the greater the need to gain legitimacy and the greater the effort to gain legitimacy”* (p. 185, emphasis in original).

Taking into account this strategic approach, organisational legitimacy of corporations managing prisons, depends on the fulfilment of the aims and purposes expected, according to values and norms that regulate imprisonment, as a manifestation of public punishment. Legitimacy can be assessed in teleological terms and according to existing values.

7.2.4 Suchman’s dimensions of legitimacy

Legitimacy is key for organizations and studies have focused on institutional and strategic perspectives. Deephouse and Suchman (2008) further reviewed the primal analysis and the theoretical and empirical evolution of legitimacy. The categorization of legitimacy proposed by Suchman is central in organisational theory for it takes an intermediate position and his study set the basis for current approaches to legitimacy from an organisational perspective, thus its significance for the IMM.

Suchman envisioned his study as a method to support, maintain and strengthen the comprehensibility and stability of organizations, by building legitimacy. Extrapolating Weber’s claims to institutional theory, Suchman (1995) provides a broader comprehensive conception of legitimacy, defining it as *“a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”* (p. 574, emphasis in original).

After summarizing previous research and definitions from various perspectives, Suchman (1995) recommends a new approach to legitimacy, one that considers various dimensions, distinguishing three main categories: pragmatic, moral and cognitive, as the “primary [...] trichotomy” (Suchman, 1995: 583). Despite the differences, all three coexist in practice, and there is no hierarchy amongst them and frequently are mutually strengthening each other for they comprise the perception that an organisation performs according with norms and beliefs. However, occasionally they oppose each other, particularly “when larger social

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institutions are either poorly articulated with one another, or are undergoing historical transitions” (Suchman, 1995: 585).

Cognitive legitimacy implies public recognition and acceptance based on the appropriateness of an organization’s activity, issue discussed in the previous chapter. A deep exploration of Suchman’s classification is beyond this thesis, but for the purpose of this dimension, pragmatic and moral legitimacy are relevant. The first category ponders the interests of groups closer to the organization and its operation, the “most immediate audiences” (Suchman, 1995: 578), and pragmatic legitimacy is assessed in terms of the extent to which an organization shares those interests and includes them into account in its operation. Moral legitimacy refers to “judgments about whether the activity is ‘the right thing to do’” (Suchman, 1995: 579) and is determined by evaluations of the structures, procedures and outcomes of an organisation.

Suchman’s multidimensional method includes further subcategories; from a total of nine, three sub-types, one linked to moral legitimacy and two related to pragmatic legitimacy are of particular relevance for this research. Since moral legitimacy is granted through the assessment of the appropriateness of the activity performed, consequential legitimacy is assessed “by what [organizations] accomplish [and] consumers’ judgments of quality and value [...] [and] outcomes of production activity” (Suchman, 1995: 580). Connected to pragmatic legitimacy, exchange legitimacy implies validation granted to the organization’s operation and policy based on the fulfilment of the aims expected by the constituents; whereas influence legitimacy, is associated to the response from the constituents in terms of their perception that their interests are accepted and incorporated in the organization’s policies.

Suchman’s examination serves to challenge and assess how organizations manage legitimacy as well, particularly to gain, maintain and repair it through “a diverse arsenal of techniques” (Suchman, 1995: 586). From all the strategies, two particular legitimization techniques are linked to the previous sections: one, is conforming to the environment in which the organization operates, the demands in accordance with audiences’ beliefs, guidelines and expectations; or to models in order to gain legitimacy; the other, is restructuration to repair legitimacy affected by crises, including replacement of staff, revision of practices and creation of monitoring bodies.

Regardless legitimacy variations depending on the activity and the sector, “[i]f organizations gain pragmatic legitimacy by conforming to instrumental demands and moral legitimacy by conforming to altruistic ideals, they gain cognitive legitimacy primarily by conforming to established models or standards” (Suchman, 1995: 589).

Suchman’s concludes highlighting the need for future research aimed to examine the connections and clashes between all forms of legitimacy, since “researchers have come far enough to understand that legitimacy is not the unitary phenomenon that many previous investigators assumed it to be” (Suchman, 1995: 604). Therefore, this multidimensional categorization is important to assess to what extent contracted out corporations are still operating legitimately, according to techniques used by enterprises to gain, maintain, or repair legitimacy after crises and incidents.

7.2.5 Penal entrepreneurship: identification, conform and ‘value-creating innovative imprisonment’

Newly created corporations or inexperienced companies precisely lack that kind of legitimacy built on performance and results according to expectations and values, which is essential for all organisations. In this respect, Tornikoski and Newbert (2007) pointed out these corporations can achieve success to the extent to which they are “perceived as “legitimate” to those institutions and individuals with which they hope to engage in exchanges” (p. 312). Therefore, building, gaining and maintaining organisational legitimacy is particularly “crucial in the early years [...] [and] even before it begins to generate profit” (Zimmerman and Zeitz, 2002: 414).

Hitt *et al* (2001) have suggested that privatisation endorses the rise of new corporations providing “entrepreneurial opportunities” (p. 486); being entrepreneurship the ability to identify and exploit new opportunities through agents that produce services and goods (Hitt *et al*, 2002). It is an activity created or improved as part of a wider system by “individuals or groups of individuals, acting independently or as part of a corporate system” (Sharma and Chrisman, 1999:17). Navis and Glynn (2010) consider that a new market is present “when two or more products or services are perceived to be of the same type or close substitutes for each other in satisfying market demand” (p. 440).

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Public imprisonment has not been unaltered by such phenomenon, since contracting out this public function endorsed the creation and development of corporations providing prison services as a relatively new entrepreneurial endeavour. There are two specific areas present in this entrepreneurial activity: “expansion within existing markets and entry into completely new ones” (Harding, 1997: 150).

Given the relevance of legitimacy for new ventures and entrepreneurship, there is a considerable amount of theoretical studies and empirical research across disciplines such as management, entrepreneurship, and economic sociology. The next paragraphs will consider some approaches that provide significant resources for this section, in terms of some organisational strategies suggested to build legitimacy: identification, conform and innovation.

Examining the link between organisational legitimacy and new ventures, Aldrich and Fiol (1994) highlighted that legitimacy is evaluated in terms of the degree of acquaintance and attainable via developing knowledge through “encompassing symbolic language and behaviour” (p. 652), and trust by “communicating internally consistent stories regarding their new activity” (p. 653).

According to Lounsbury and Glynn (2001), for unknown entrepreneurs or whose activity is unrecognized by a specific audience, storytelling is a strategy aimed to make the organization identifiable by the public and approved by key stakeholders through credible, truthful, significant, and appropriate narratives to construct a legitimate identity. Similarly, Phillips *et al* (2004) have also pointed out how discourse -instead of actions- is a legitimation method, as “successful institutional entrepreneurs will be those who are skilled at producing convincing texts [...] [that] may work on increasing their legitimacy” (p. 648). Finally, Ruef and Scott (1998) considered that in this process, “[t]he mission of an organization [...] is particularly important for attracting managerial legitimacy” (p. 899).

As previously examined, prison privatisation in England and Wales was defended through the production and distribution of discourses, verbal and written, in the likes of speeches in parliaments, and written evidence and research as part of the debate -even by lobby groups-, in an attempt to provide initial legitimation. However, instrumental symbolic strategies do not provide organisational legitimacy, for it has to be constructed through meeting expectations, instead of relying on symbolic sources of temporary legitimacy (Tornikoski and Newbert, 2007). The legitimation of new markets is done through strategic and symbolic

actions, but particularly through the interaction between the organisation and its constituents who assess reliability and appropriateness (Navis and Glynn, 2010).

Now, according to Jones (1995), organizations exist for their ability to provide value and appropriate results for those groups that have either interests or claims in their operation and outcomes, namely the stakeholders, who can be inside stakeholders –closely linked to the organization-, and outside stakeholders –those with some interest in its operation. Hybels (1995) has argued that an assessment about the legitimacy of an organization requires “a comprehensive appraisal of relevant constituencies” (p. 243), including governments, the public, media, and obviously, financial groups; therefore, it is essential to understand the role of each of these constituents and the relations and connections created amongst them.

In Ruef and Scott’s (1988) multidimensional evaluation, legitimacy depends on the ability to conform to standards or models, since the success and legitimation of an organization is connected to its stakeholders and constituents. Likewise, Scott (2010) sees that to secure organisational legitimacy, entrepreneurs must conform, even at a minimum degree, to the standards established by the “institutional gatekeepers” (p. 34). For Zimmerman and Zeitz (2002), legitimacy, as a resource of the greatest relevance in the creation, development and survival of new ventures and equally important as other resources required for its operation, can be achieved by complying with rules through “strategic legitimation” (p. 421). Johnson and Van der Ven (2002) state that, as soon a business enters an industry and it seeks to conform to previously constructed norms and values, legitimacy must be pursued and achieved through entrepreneurial strategies.

For Child (2015) it is essential for companies to consider innovation, as customers demand more developed products and services and therefore companies must ensure mechanisms to constantly innovate their services. In the same vein, Stokes *et al* (2010) consider that entrepreneurs can significantly contribute to society through innovation. Innovation is attainable by creating new knowledge, even non-scientific and non-technological (Drucker, 2001). Innovation is then, one of the key components of entrepreneurship.

Enterprises managing prisons are legitimated through symbolic and strategic organisational techniques: initial justifications and actual performance complying with expectations and contractual terms –topics that will be analysed in the next

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dimensions-. Notwithstanding that, according to Logan (1990) “entrepreneurs are competitively motivated to provide maximum satisfaction at minimum cost” (p. 84), in the privatisation debate, one major driver of contracting out, besides the claimed economic benefits, was the alleged ability to innovate imprisonment.

It was stressed by the National Audit Office (2003) that staff recruitment and the extensive use of technology was “a small amount of innovation from the private sector” (p. 33). However, following Jones’s (1995) suggestion of value creation in organizations, innovation of imprisonment must be developed and delivered through a value creating process, achieving the official aims, ensuring inmates’ well-being –decency and integrity-, and also securing a balance between what all relevant stakeholders expect from the operation of private prisons. Penal entrepreneurs should generate ‘value-creating innovative imprisonment’ for the inmates in their custody: constructive and humane rehabilitative regimes.

7.2.6 The principles of organisational legitimacy

Given that legitimacy is essential for all organisations, companies endeavouring in the delivery of imprisonment might be able to accomplish organisational legitimacy through the techniques previously examined. From the perspectives in institutional theory is possible to draw the principles underpinning this dimension of the IMM. Further research in each of the examined subjects could provide empirical evidence in a particular topic of assessment.

To build initial organisational legitimacy, corporations managing prisons are expected and required, not only to produce narrative discourses, but to adopt existing basic structures of public sector prisons. Isomorphism then is the first principle determining organisational legitimacy of private prisons.

According to Deephouse (1996) organizations that conform to structures implemented by similar organizations are perceived as “more legitimate than those that deviate from normal behaviour” (p. 1033). Resemblance is a strategy aimed to seek acceptance, from both authorizing and regulating bodies, and the public. Under such circumstances, corporations must ensure that prisons under their management resemble -at least to the basics- their public counterparts, adopting recognized processes, and are incorporated into the prison system by aligning their structures to the general rules and standards.

As previously suggested, this strategy would not suffice to maintain organisational legitimacy, for other mechanisms are required. Conforming is the

second principle that determines the legitimation of organisations managing prisons.

To build and maintain organisational legitimacy, corporations and private prisons should align their performance to values and beliefs, attaining “organizational conformity to social expectations” (Dowling and Pfeffer, 1975: 131) and respond to expectations from audiences and stakeholders. If corporations do not conform to agreed rules and standards guiding the use of prisons, which should have already incorporated values and beliefs, in order to achieve the expected results of the organisation, their legitimacy is undermined.

Strategic plans of corporations managing prisons should take the most appropriate decisions to build and maintain legitimacy in terms of the ability to fulfil the stakeholders’ expectations by adding value to their operation, responding to all those with interest in the operation: the prison system, inmates and their families, the general public and tax payers, and obviously the company’s shareholders.

In this regard, a central feature of organisational legitimacy is the determination and ability to innovate. Hence, innovation, particularly ‘value-creating innovative imprisonment’, is the final assessing principle to be taken into account in this dimension.

As a major justification for privatisation, innovation is key to imprisonment entrepreneurship, since it questions whether the corporation’s objectives and actual performance are orientated towards potentially improve imprisonment, especially by evaluating levels of reoffending of inmates released from private sector prisons, and to what extent corporations develop and implement innovative regimes, and if there is a connection between both. If corporations just replicate practices in order to allow prisons to be merely isomorphic through “innovative imitation” (Levitt, 1966: 67), organisational legitimacy is damaged and corporations must build and seek other forms of legitimation considered in this research.

Given the participation of private prisons in the penal system, along with their public counterparts, they should be part of a network, under the supervision of competent bodies, encouraging the exchange of information about good and improving practices. This would entail private prisons’ directors to share information and experience within the prison service, but particularly when improvements have been achieved. Creating knowledge based on expert and

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scientific advice and empirical evidence to enhance imprisonment -and the whole prison system- is essential in the legitimization of prison privatisation. This was acknowledged by the House of Commons (2003) suggesting that “[t]he Home Office and the Prison Service should promote greater co-operation and exchange of good practice between publicly and privately managed prisons” (p. 4).

To conclude, it must be said that all three principles, isomorphism, conforming and innovation are verified in the actual performance of private prisons, which is the ultimate key feature providing organisational legitimacy (Deephouse, 1996), in an attempt to answer the question posed by Scott and Davis (2007) “why do some organizations perform better than others?” (p. 310).

It has been widely claimed that corporations have the resources and funds to improve and innovate imprisonment, provide value for money and comply with contractual terms. Organisationally legitimate corporations managing prisons are more likely to secure further contracts and continue their commercial expansion, particularly if such private prisons are provided with contractual and operational legitimacy derived from accountability, compliance and cost-effective performance, issues that will be examined in the following dimensions.

7.3 The contractual dimension: self-governance or accountability

For the benefit of society, governments can regulate -at least theoretically- the operation of private companies (Monks and Minow, 2011); nonetheless, in the case of this research, contracted out corporations managing prisons might not be under the government’s total control. Under these circumstances, privatisation creates additional concerns about the legitimacy of private prisons, in particular regarding accountability.

Prison privatisation is a strategy that delegates a complex governmental function “while still holding [...] corporations publicly *accountable*” (Gran and Henry, 2007: 173, emphasis in original). After privatisation was incorporated in penal policies of English-speaking countries, supporters suggested that, in order to assess properly the efficiency of privately managed prisons, performance had to be measured against contractual terms, for “[c]ontract compliance is a central element of accountability” (Harding, 1997: 67).

However, accountability in public and private prisons operates differently due the stakeholders they respond to: one sector answers to the government and taxpayers; the other, despite regulation and contractual provisions, responds to the corporations' shareholders (Chan, 2010). Hence the suggestion that the extent to which governments ensure the accountability of corporations managing prisons remains uncertain (Cervin, 2000).

It is widely argued by critics that privately managed prisons are less transparent and not under the same level of scrutiny than their public counterparts, in particular because "[t]he inherent conflict between external supervision and the autonomy of a private institution, particularly one driven by the pursuit of profit, tends to militate against systems of accountability that promote transparency and the public's "right to know"" (Genders and Player, 2007: 519). Proponents reject such views and perceive accountability as an opportunity for better quality in imprisonment performance and better performance of the whole prison system (Harding, 1997), because "[p]rivate facilities are currently subject to a great deal of publicity" (Logan, 1990: 203).

Accountability is "[a] principle of corporate governance which requires [...] those in charge of governance to take responsibility for actions with the obligation to report on the outcome of those actions"(Millichamp and Taylor, 2012: 483). This concept is integrated by specific identified components such as the rights of the corporation, the relevant shareholders and responsible agents (Slim, 2002). In this sense, corporations have to be "effectively accountable to some independent, competent, and motivated representative" (Monks and Minow, 2011: 16).

Companies managing prisons must adhere to governmental regulation in the pursuit of good corporate governance, incorporating accountability practices like transparency, audit and monitoring, whilst directors of private sector prisons must comply exactly with the contract provisions. Hence, the significance of effective accountability within private prisons as the factor that delivers "the conditions that enable the private provider, the state and citizens to scrutinise penal policy and operations" (Andrew, 2007: 900). Considering this, accountability is key in the legitimization of prison privatisation, therefore the importance of including this contractual dimension of the IMM.

Given that legitimacy is an essential component of corporations, crises or scandals faced by companies challenge the provided legitimacy. The legitimization of organisations is under careful and permanent scrutiny, due the considerable

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power and resources they hold to influence markets (Warren, 2000) and is questioned due “publicly visible scandals” (Power, 1996: 291). Recent scandals regarding abuses, disturbances, and failures to reduce reoffending are some factors undermining the legitimacy of corporations that deliver imprisonment on behalf of the state.

Audit and monitoring have been studied and regarded as crucial in the process of privatisation, emphasising the significance of including these obligations in the contract, through adopting effective and objective accountability measures in an attempt to legitimate this policy. Since accountability mechanisms in the UK have been praised to be “amount to the strongest statute-based accountability structure currently in existence” (Harding, 1997: 40), it is fundamental to examine some mechanisms that, along with other institutions previously analysed, safeguard accountability of private sector prisons in the UK.

The purpose of this dimension is not to perform a profound study of the concepts in question or an extensive evaluation of existing corporations’ policies, contractual terms, and auditing results, but to establish the link between some key components of effective corporate governance, as the source to suggest the principles underpinning contractual legitimacy of prison privatisation. Further research on contracts’ provisions, monitoring performance and audit results is recommended for the evaluation of a particular private sector prison.

7.3.1 Corporate governance in private prisons: transparency to stakeholders

Whilst providing market opportunities for the satisfaction of specific needs, corporations must be consistent with the public good, finding a balance between competing interests, particularly between power and accountability (Monks and Minow, 2011). As suggested in previous dimensions, private prisons are organisations that, as the executive branch of companies -normally transnational- provide specific public services: rehabilitation or reform of inmates. Therefore, in the delivery of imprisonment by private means, effective management of prisons is crucial to maintain or improve imprisonment quality (Logan, 1996).

Effective management of organisations can be the result of good practices and values derived from corporate governance rules that, through their implementation and evaluation by particular stakeholders interested in their successful operation, are strategically aimed to prevent risks or failures in the

organisations' activities. Corporations managing prisons are not the exception to this situation, for they have to perform in accordance with agreed provisions and terms about their operation.

Given that corporate governance is an effective instrument to ensure that corporations operate under regulations and rules to prevent failures, the following paragraphs will provide a brief overview of its importance in privately managed prisons and the relevance of some of its components as prerequisites of effective contractual accountable performance.

The production of corporate governance rules and guidelines by different bodies has been a priority in the UK (Mallin, 2013). Recognising corporate governance as fundamental for businesses, the influential Report with Code of Best Practice (Cadbury, 1992) defined it as a "system by which companies are directed and controlled" (p. 15); enabling "effective, entrepreneurial and prudent management that can deliver the long-term success of the company" (Financial Reporting Council, 2016: 1).

Considering various definitions presented by international organisations and national codes, Jørgensen and Sørensen (2012) noted that, notwithstanding evident variations, all definitions include some specific values, principally transparency and accountability. Particularly relevant for this dimension is the broader definition that conceives corporate governance as "*the system [...] which ensures that companies discharge their accountability to all their stakeholders*" (Solomon, 2013: 7, emphasis in original).

In this context, the identification of stakeholders is another pillar of corporate governance. Three main groups of stakeholders have been identified: shareholders, governing bodies and managers (Tricker, 2009); nevertheless, companies should not exclusively answer to those directly interested in profit maximization, but also to a broader group of stakeholders (Thomsen and Conyon, 2012), enhancing accountability to them (Solomon, 2013). Consequently, organisations implementing corporate governance practices should acknowledge all stakeholders, broadening the scope of identification and recognition, particularly including those primarily affected by their operation.

Under such circumstances, companies managing prisons should identify and recognize all stakeholders with interest, not only on the success of the firm, but also on the effective performance of private prisons. Corporate governance practices in companies running prisons must focus on two main groups:

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providers, category that includes shareholders, prison directors and staff; and customers, comprising governments, the public, and inmates –including their families-.

For Slim (2002) in the process of identifying stakeholders, transparency to all groups is a requirement, and thus, key in corporate governance. According to Solomon (2013), corporate governance developments and reforms have contributed to make transparency a central practice. Likewise, Millichamp and Taylor (2012) consider transparency is a pillar of good corporate governance understanding it as a set of “ideas of openness and willingness to communicate and as such encourages disclosures in excess of statutory minimum requirements” (p. 492). For Brennan and Solomon (2008) studies should highlight the importance of transparency and its forms as part of good corporate governance.

Therefore, the recognition and adoption of corporate governance practices, legitimates organisations by providing certainty and clear information about their performance, as a mean to avoid fraudulent operations, bankruptcy scandals and failure collapses putting at risk the services provided.

However, transparency in privately managed prisons has obstacles, one highlighted by Genders and Player (2007), in the sense that “commercial confidence may be used to suppress potentially damaging information and protect shareholders' interests, [allowing] low visibility to predominate over transparency and the public's right to know” (p. 530). Similarly, Raher (2009) noted that while private prisons operators claim to perform more efficiently, at the same time “they prevent public access to information which could substantiate or refute these claims.” (p. 248).

Since public scrutiny of prisons is limited and “even more so in the case of private prisons, whose operators have shown an unwillingness to divulge information” (Cervin, 2000: 76), transparency is an essential value of corporate governance to provide legitimation for companies managing prisons. Corporations should comply with regulations and rules that set values and policies, including transparency, to all stakeholders in the pursuit of rehabilitation or reform as the contracted out function of imprisonment.

Notwithstanding the significant developments resulting from reports, rules and legislation, corporate governance remains a complex field for it is shaped by legal, cultural, financial, managerial and structural factors (Mallin, 2013);

consequently it is problematic to develop a structure “completely free from the possibility of corporate governance failure” (Wearing, 2005p. 23). Against this background, to ensure corporate governance, companies -including those managing prisons-, should consider further mechanisms to secure effective performance in accordance with contractual terms to prevent failures in the delivery of the services or goods.

7.3.2 Monitoring and auditing contractual terms compliance

As argued in Chapter 6, effective inspection and supervision of treatment, conditions and regimes are factors that determine the legitimation of prison privatisation; nonetheless, monitoring about the extent to which corporations meet contractual terms is equally crucial to legitimize this policy; for monitoring instruments of contractual compliance to be accountable has been considered as fundamental (Harding, 1997). For these reasons, effective monitoring of performance is an essential element of accountability in private prisons.

According to Borna (1986), claims by opponents that quality of imprisonment and rehabilitation regimes would be at risk in private sector prisons were contested by the governments’ assertion that the contractual terms would be effectively accomplished due the obligation of corporations to comply with standards and guidelines. However, even advocates recognize that the operation of privately managed prisons requires effective monitoring about “compliance with contractual provisions” (Logan, 1990: 204), and to achieve this, the terms of the contract are essential mechanisms in enforcing and monitoring performance (Shichor, 1995).

Contractual provisions lead performance, but in practice, effective compliance with the terms of the contract requires monitoring through mechanisms such as independent audit and governmental control, which are crucial in the legitimation of privatisation. Auditing includes areas such as efficiency and effectiveness (Power, 1999) and the strict compliance with the agreed terms (Harding, 1997).

For Pollitt and Suma (1999) performance audit is a manifestation of NPM “practiced by powerful, independent institutions and is presented as a mode of investigation aimed at establishing whether, at what cost, and to what degree the policies, programmes, and projects of government are working” (p. 2). Likewise, according to Power (1996) the adoption of managerial accountability and NPM practices encourage corporate audit and the creation of governmental bodies

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assessing value for money and effectiveness of public institutions and services, which coincides with the creation of inspecting bodies. Amongst such bodies, it is possible to mention the Audit Commission established in 1982 and the National Audit Office formed in 1983, which in the case of imprisonment, their creation concurs with the establishment of the current prison inspectorate by the Criminal Justice Act 1982.

Auditing bodies in the UK have produced important documents concerning this research. One decade after the first prison was contracted out, the National Audit Office (2003) produced the report aimed to assess privately run prisons performance against the contract. Some of the results will be commented in the next dimension.

To assess the extent to which private sector prisons comply with contractual provisions, monitoring is also a vital instrument (Cervin, 2000), which implies “frequent, systematic and purposeful observation to determine how well objectives are met” (Independent Monitoring Boards, 2016b: 3). Andrew (2007) has considered that “[m]onitoring [...] is essential to ensure that the service that has been defined and paid for is actually being provided” (p. 893).

In England and Wales, there is one significant monitoring mechanism within private sector facilities, which should be replicated in other jurisdictions. Shichor (1995) acknowledged the importance of such monitoring device of private prisons performance, in the existence of a full-time contract supervisor with special faculties to access all areas and documents about the prison’s operation. James *et al* (1997) have observed that, when contracting out was discussed in the UK, monitoring was a key concern, for it was considered that “the mechanisms for ensuring accountability of private-sector prisons, through the contract and the role of the Home Office controller, needed to be effective in order to assuage any fears of a ‘cover up’” (p. 91-2). In that sense, the Criminal Justice Act 1991 established the provision of a regulatory mechanism of contracted out prisons through the inclusion of the figure of the controller, whose function was to ensure strict performance according to terms and provisions. The duties of the controller are essential to ensure monitoring and accountability of privately managed prisons (Genders, 2002).

Along with the controller, IMB serve as an additional monitoring body in the UK, despite the fact that their function focuses more on concerns like fair treatment and humane conditions. Nevertheless, their role includes checking “whether

stated performance standards are met [...] [monitoring] anything that affects those held in custody, whether it is [...] operational matters decided at the level of the establishment” (Independent Monitoring Boards, 2016b: 3).

For Shichor (1995), effectiveness in monitoring contract compliance is “an opportunity for the improvement of the correctional system by controlling private contractors” (p. 123); therefore, compliance must be ensured even by means of economic measures, particularly the use of fines for breaches in performance, or schemes like ‘Payment by Results’ (PbR), mechanism that will be examined in the following dimension.

Monitoring through governmental controllers and audit through independent bodies are aimed to ensure that corporations comply with contractual provisions and that prisons operating under their management are meeting rules and standards in their performance. The presence and effectiveness of mechanisms such as the ones mentioned above are essential in the legitimization of private prisons.

7.3.3 Accountability and the legitimization of contracted out imprisonment

Since legitimacy and corporate authority derive from accountability (Monks and Minow, 2011), this concept is a key principle of good governance (Cadbury, 1992) and perceived as a method to solve legitimization crises (Scharpf, 1999). In corporate context then, accountability provides “a fair, balanced and understandable assessment of the company’s position and prospects” (Financial Reporting Council, 2016: 16), aiming to secure that “[a]n accountable organization cannot obfuscate its mistakes to avoid scrutiny” (Koppell, 2010: 36).

It is believed that prison privatisation “failed to enhance the democratic accountability of a key institution of the criminal justice system” (Sim, 2009: 65), this, since the competing drives behind privatisation “affect the extent to which there is political willingness to hold private contractors to account” (Vagg, 1994: 310).

Considering that accountability -as a regulating and governing mechanism- guarantees “that private prisons meet acceptable state and community standards” (Harding, 2001: 341), such notion has fundamental meaning for this research and for the IMM; therefore, it is necessary to examine some issues raised by scholars and researchers in relation to this mechanism and its implementation in private sector prisons.

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Corporations managing prisons, as any other corporation, should observe corporate governance regulations and practices to avoid failures that could damage reputation and reliability, and eventually compromise the delivery of a public service, ultimately undermining their legitimacy. What is more, since private sector prisons are part of the prison system and contractual imprisonment entails the use of public resources in the delivery of imprisonment, accountability acquires particularly importance, for “[a]ccountability for the use of public money is the cornerstone of democratic government” (Ryan, 2003: 95).

In this respect, a connection between accountability and legitimacy of organisations has been identified by Slim (2002), who understands legitimacy as the “*particular status with which an organisation is imbued and perceived [...] [operating] with the general consent of peoples, governments, companies and non-state groups*” (p. 6, emphasis in original). Also acknowledging such link, Black (2009) perceives accountability as “a particular type of relationship between different actors, in which one gives account and accepts that the other has the authority to impose consequences as a result (p. 250).

Logan (1990) remarked that “if accountability and control are weak, there will be a risk of corruption” (p. 211). Such is the importance of these mechanisms it has been suggested that, if the state is to delegate its power to punish “proper safeguard must accompany the delegation to prevent any potential abuse” (Field, 1987: 657). Similarly it has been recognized that the importance of “meaningful supervision and monitoring of private correctional facilities require the establishment of an efficient mechanism” (Shichor, 1995: 119).

Given that the nature of prisons makes them places not open to public inspection, effective accountability is crucial in the legitimation of imprisonment; hence, a central objective for the prison service in England and Wales is to have “clear lines for accountability” (HM Prison and Probation Service, 2017: 5). What is more, if rehabilitation or reform of inmates has been delegated through a contract to private entities, accountability becomes imperative, with a special significance that both supporters and opponents have recognized. The legitimate delegation of the power to imprison offenders and use coercive force depends highly on the degree of accountability to “measure performance and take action in the event of non-compliance” (Genders and Player, 2007: 519).

Examining accountability and its implications for prison systems, Vagg (1994) considered it “about controlling and legitimating the ways that power and

authority are exercised” (p. 311). Likewise, regarding accountability as the legitimization of power inside prisons, Genders (2008) identified two different categories: democratic accountability, that involves the power to punish; and operational accountability, related to how punishment is delivered involving the responsibility to meet “standards and targets set regarding the quality and quantity of that work” (p. 2).

Accountability in private sector prisons is essential, yet a complex subject for there are different categories identified by Logan (1990): administrative, legal, economic, political, and community, amongst others. Similarly, for Harding (1997), accountability is supported by various principles or “tenets of accountability” (p. 27), such as transparency and accessibility about corporations’ performance, well-defined conditions expected to be met, independent research, and evaluation with subsequent publication, and financial accountability. In addition, some specific mechanisms to hold privately managed prisons accountable depending on the area subject to account have been proposed by Pozen (2003), namely “public and private monitoring, litigation, accreditation, and contractual stipulations such as mandatory disclosure requirements” (p. 276).

Within this context, contractual provisions and terms, along with the availability of reliable data and accurate information –topics matter of the next dimension-, are significant factors that allow corporations to build legitimacy. In the case of private sector prisons, accountability is determined by the contract, for “[a] loose contract will tend to have loose accountability; a tighter one should facilitate accountability” (Harding, 1997: 80). Consequently, contractual terms are “fundamental to public accountability and organizational structure” (Gran and Henry, 2007: 191) and the duration and termination of the contract is an essential provision gives certainty and security to both governments and private contractors (Shichor, 1995).

However, some obstacles undermine accountability in private sector prisons. For Vagg (1994), one particular difficulty to ensure contractual accountability in the UK relates to “the terms of contracts regarded as commercially privileged information and thus kept confidential” (p. 295).

Concerning further effects of accountability, it is necessary to suggest that liability as a component of accountability is key when assessing any failures to meet agreed standards and responsibilities (Gran and Henry, 2007), and in particular, legal accountability is essential to address as an element of any

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statute, act or contract authorizing to privatize prisons (Chan, 2010). In this respect, one particular outcome of a failure to meet contractual terms and a consequence of liability is the cancellation of the contract (Harding, 2001).

Notwithstanding the advantages of accountability as a legitimating factor of private sector involvement in the prison system, it represents some concerns. For example, Armstrong (2003) observes a danger in focusing exclusively on efficiency rather than normative goals, and thus private prisons would be pursuing “an amoral goal of compliance with technical terms, which are more readily specified as tangible benchmarks than are ultimate principles” (p. 296). Furthermore, Shichor (1995) suggests that corporations running prisons might attempt to ease the obligations and regulations established in the contract on the basis that certain regulatory clauses constrain effective performance and innovation. Logan (1990) noted that even though effective performance and contractual compliance are inter-reliant obligations, in fact are conflicting aims. Therefore, for Hart *et al* (1997) privatisation might be regarded as appropriate only “when quality-reducing cost reductions can be controlled through contract” (p. 1159). For these reasons, legitimacy is about getting the right balance between compliance and performance.

7.3.4 The principles of contractual legitimacy

It is claimed that a company is legitimate “if, and only if, the way it does business is consistent with the norms of the society it does business with” (Warren, 2000: 33); however, as suggested, legitimacy can be built by corporations also by adopting good corporate governance practices, like the ones highlighted in this dimension. Derived from corporate governance theory, it is possible to put forward the principles influencing contractual legitimacy of private sector prisons.

The issue of accountability is crucial in the privatisation debate (Armstrong, 2003), and despite the conflicting views, prison privatisation “brings new questions surrounding appropriate approaches to accountability” (Andrew, 2007: 877); therefore, accountability of private prisons is the first principle underpinning contractual legitimacy.

One of the main reasons why accountability is so crucial in the legitimization of prison privatisation is that, according to Dolovich (2005), without accountability mechanisms, conditions and regimes can be directly affected, as the result of cuts and reductions in the pursuit of economic gain. One particular manifestation

of accountability is legal liability, which ought to be clearly established in the contract, for it entails that “individuals and organizations must face consequences for performance, punishment for malfeasance and reward for success” (Koppell, 2010: 37).

Due their critical implications and consequences, contractual certainty and legal liability -as forms of accountability-must be considered and ensured before any decision to contract out prisons is made and taken into account in the assessment about the legitimacy of private prisons. However, despite its relevance, policymakers should also consider the other legitimating factors suggested in this thesis, for it has been warned by Pozen (2003) that “the accountability debate underlines the broader debate over whether private prisons can be more effective than public prisons and whether they can possess the same legitimacy” (p. 277).

Moreover, accountability requires its effective implementation for “[m]echanisms for accountability and the information they provide are of little value unless they are properly and effectively used” (Genders, 2002: 300). Hence the need of effective accountability, to provide contractual legitimacy as a principle. Monitoring and auditing are supplementary sources of contractual legitimacy and two strategies that go hand in hand and operate as one principle underpinning this dimension.

These mechanisms, either enacted or established in contracts, are essential to ensure effective compliance in private sector prisons to enhance legitimacy. As suggested, monitoring mechanisms in the UK are seen far stronger than in other countries (Pozen, 2003), therefore, should be replicated in jurisdictions where privatisation requires legitimation, particularly the inclusion of an on-site monitoring tool in privately run prisons.

Effective accountability requires clarity, both about the terms of the contract and the actual operation of private prisons, as it has been claimed that “corporate governance issues arise wherever contracts are incomplete” (Hart, 1995: 688). In this sense, it is possible to suggest that transparency is a legitimation principle of contracted-out prisons. Transparency, as an essential element of accountability (English, 2013), is also regarded as the source of the connection between two policy goals of an organisation: accountability and legitimacy (Auld and Gulbrandsen, 2010).

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Furthermore, as suggested earlier, one concern arises when assessing the extent to which corporations are accountable and transparent in their operation: the scope of stakeholders. As Solomon (2013) explained, transparency as part of corporate governance should acknowledge the relevance of incorporating “a more inclusive approach” (p. 261); of a similar opinion are Ntim *et al* (2017) who have also suggested that accountability should “be moved beyond private accountabilities [...] to traditional stakeholders [...] to broader public accountability to new and emerging equally powerful stakeholders” (p. 105).

Since accountability to a broader group of stakeholders is a key component of corporate governance and the legitimacy of companies (Thomsen and Conyon, 2012), transparency and accountability of private sector prisons should be secured, not exclusively to the corporation’s shareholders and auditors, but to a broader group of stakeholders including the public, inmates and their families. Transparency of both compliance and performance to a broader set of stakeholders is key in the contractual legitimization of privatisation. It is for the reasons stated above, that the final principle in the assessment of contractual legitimacy should be transparency to all stakeholders.

Aman (2005) considers essential in the process of privatisation the production of “information necessary to understand the issues for a real debate to ensue and for new ideas to be suggested” (p. 549). Here lies the importance of identifying and recognizing a broader group of stakeholders, widening the scope of transparency as a legitimating method. League tables, official statistics and publications in the form of enquiries and reports or other external and independent scrutiny mechanisms, are a source of information to all those with at least some degree of interest in the real performance of privately managed prisons. An additional source of transparency is the publication of annual reports that include a variety of non-financial issues (Ntim *et al*, 2017), in the case of this research, recidivism rates, incidents and abuses, employability of release inmates rates, etc.

Accountability has substantial connotations in the delivery of imprisonment, since it is related to critical contractual issues such as legal liability, clear provisions and terms, obligation of transparency, and effective monitoring and audit. These are preconditions of a legitimate performance, but more importantly, what provides legitimacy is the actual operation of private prisons, as the demonstration of the alleged effectiveness and efficiency of private sector prisons operation.

7.4 The operational dimension: economy or quality

To assess prison performance, managerial and actuarial instruments like statistics, targets and rates were set onto the penal system, as a mean to legitimize criminal and penal policies (Pratt, 2007). Such neoliberal policies endorsed a managerial approach embracing competition as a significant feature of the process of marketization, privatisation and profit-making (Teague, 2012).

Grounded principally on managerial rationales, prison privatisation was advocated in England and Wales as a solution to the crisis brought by the failure of public prisons (Young, 1987), particularly the crisis of resources in penal system (Cavadino and Dignan, 1997). James *et al* (1997) highlighted that the decision was based on the belief that the state would “save a significant amount of taxpayers’ money” (p. 23). In this sense, in addition to other motives, privatisation is the outcome of decisions based on the alleged cost-effectiveness in the delivery of imprisonment (Nicholson-Crotty, 2004). Economic drivers have been central in this policy and the debate about its pertinence, for privately run prisons allegedly perform more efficiently and deliver better value.

Amidst the privatisation debate and its authorization, entrepreneurs -some with previous experience in public prisons- were regarded as capable to manage prisons “at least as effectively, safely, and humanely as the state, but with greater efficiency” (Logan and Raush, 1985: 307). In this process, it was also recognized that privatisation offered a method to compare and evaluate the effectiveness and efficiency in the provision of governmental services (Logan, 1990); this, in order to make the public “less tolerant of facilities that are crowded, dirty, unsafe, inhumane, ineffective, and prone to riots and lawsuits” (Logan, 1987b: 39).

In this regard, opponents of privatisation have highlighted the strong influence of economic rules in penal policies that incorporate market principles “sufficiently powerful to undermine public policy ambitions that conflict with their purpose” (Genders and Player, 2007: 516). Consequently, imprisonment entered a process of commercialization and “the traditional client-provider or customer-seller relationship [was] altered and [became] more complex” (Shichor, 1995: 71), since governments became customers, inmates became recipients and corporations became providers. Under these circumstances, a new participant in the delivery of imprisonment was fully incorporated and private firms with economic interests became strategic operators in the prison system, having decision-making faculties and crucial responsibilities in punishment.

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Given the likely clash between the public aims of punishment and the for-profit private motives, this area has stood out from the rest in the privatisation debate, due its practical implications, and has received the most attention from a vast number of studies that -on evidence-based findings- attempt to substantiate their respective stance.

Although corporations could build organisational legitimacy through symbolic strategies analysed in previous dimensions, they are required to maintain it on their actual performance and expected outcomes. Grounded on what can be called as the 'trichotomy competition/cost/efficiency', privatisation was further legitimized on these areas, particularly through comparisons about the operational efficiency between public and private prisons. However, the legitimacy of private prisons should be assessed in terms of their actual operational outcomes as well; this is their possibility to achieve and enhance rehabilitation or reform as the utmost priorities and supreme objectives, particularly providing 'value-creating innovative imprisonment'.

Since private prisons are managed like commercial enterprises, with an intrinsic purpose to grow (Stern, 1998), there is the risk that rehabilitation programs could be conducted "at minimal cost [...] [with] no stake in the success or failure of such programs" (Kyle, 2013: 2098). However, contracted out corporations are required to pursue public goods over any other interest, and corporations, through prisons directors, are expected to achieve a balance between efficient operation in accordance with agreed standards, and economic interests of shareholders and other stakeholders. Here lies the significance of operational legitimacy of prison privatisation: the pursuit of customers', recipients' and providers' satisfaction.

The purpose of this research is neither to perform a comparative analysis nor to assess comprehensively the findings about cost-savings and better performance; but to draw some guidelines from empirical studies and official reports to recommend the principles shaping operational legitimacy of privatisation within the IMM. To that end, the following sections will briefly analyse the role that commercialisation has played in prison privatisation, particularly through competition, and how the private management of prisons has been legitimized in comparative terms.

7.4.1 Market-based imprisonment and the 'commercialisation-privatisation dualism'

Supporting privatisation, Logan (1990) indicated that "[a]mong claims made for the superiority of [private] prisons, the most frequent and most salient –but not necessarily the strongest– is that they would be less expensive" (p. 76). Such alleged cost-saving reasoning is regarded as the outcome of productive corporate forces influencing market competition (Blumstein *et al*, 2008). Moreover, as noted previously, the authorization to privatize prisons was significantly grounded on the lack of capability of public agencies to innovate their services in the prison system (Kyle, 2013).

Originating mainly from such justifications, privatisation contributed to the creation of commercial opportunities for entrepreneurs seeking to be entrusted with the rehabilitation or reform of offenders. Strategies such as PFI and PPPs allowed the design, construction and operation of prisons by private corporations in the English prison system, and these mechanisms, as components of NPM, created a "quasi-market" (Ryan, 2003: 94).

For Phillips (2003), corporations are powerful organizations and their influence in public policy has been increasing steadily, having a substantial participation in the delivery of services and goods that, in some cases, can be challenged on ethical bases. Logan and Raush (1985) considered that despite its public nature, imprisonment was not exempt from market rules, for "where demand for a service outstrips supply and where prices seem unreasonably high, conditions are ripe for competition and for the emergence of new sources of supply" (p. 303). Penal entrepreneurs can create demand for a wider use of imprisonment; this is why issues about efficiency and propriety should be addressed before any authorization is given (Feeley, 2002).

To gain reputation in a market that commodified inmates rather than ensured their welfare (Ryan and Ward, 1989a), corporations highlighted their ability to provide better service and thus, be perceived as legitimate. Acknowledging that market forces affect both social norms and the goods they regulate (Sandel, 2013), the commercialisation of imprisonment and inmates is considered as one of the most disturbing consequences of privatisation (Fleury-Steiner and Longazel, 2014), for it creates a "repugnant market" (Roth, 2007: 39). Hence, the imperative need to ponder to what extent the public nature of imprisonment has

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been altered by a commercialisation process that subsequently might commodify rehabilitation or reform of offenders.

The possibility of creating a market from imprisonment is a concern that has been constantly addressed. Genders and Player (2007) noted how the transformation of prison management by market rules and principles prioritize “competition and performance audits driven by close attention to financial targets and “value for money”” (p. 521). Maguire (2012) also warned about the risks of widening the delegation of criminal justice areas to the private or third sector since, [w]hile some companies operate totally ethically in terms of responding to client needs (even if this is logically against their best interests financially), others may be driven to a greater degree by the logic of the market” (p. 489). Commercialisation has also influenced the voluntary sector, by driving charities to engage in the penal market by bidding along private corporations to run prisons, resulting in part from “poorly-implemented market reforms in criminal justice” (Neilson, 2009: 408).

In a market-orientated imprisonment, where commercialisation and privatisation are interconnected forming a dual relationship, three additional issues make very likely the continuance or expansion of privatisation as a regular resort in countries with neoliberal policies. Firstly, policies restricting the use of imprisonment pursuing reductions of prison populations represent a substantial menace to corporations. Under these circumstances, transnational firms might offer their services to solve overcrowding, improve conditions and finance construction programmes in emerging economies and countries with punitive approaches to crime, where prison populations are increasing and eventually these countries, like Mexico, “will have tough choices to make in the coming years about how best to expand these systems before outright collapse.” (Oster, 2016: 33).

Secondly, private sector involvement in the prison system in non-central areas might open the possibility to further participation in key parts of the delivery of imprisonment. For Shichor and Sechrest (2002), the provision of specific services from private corporations required by the prison system “increases their opportunity to get more business, bolster their claims of effectiveness, raise their profits, and facilitate their expansion.” (p. 403).

Finally, in Cervin’s (2000) view, the existence of effective competitive market constrains is essential, for its absence allows private companies to increase

profits from any saving, and in countries where privatisation is recent, contracted out prisons will operate the first years with losses “to undercut the cost of public prisons” (p. 70).

Considering these three factors, in the marketization of imprisonment privatisation is frequently authorized along with reforms to the prison system as a whole, incorporating elements of market testing and corporatization to encourage competition in the delivery of imprisonment (Moyle, 1998). As Whitehead and Crawshaw (2012) noted, “[c]ompetition for the running of criminal and community justice services is an inevitable part of these processes of deregulation and wholesale marketisation” (p. 46).

Competition is then a key component to be examined in the legitimacy assessment of privatisation, for it is one of the main supporting arguments. One consequence of the marketization of imprisonment through privatisation is the identification of competition as the catalyst of improvements in the prison system. From market reasoning, it is widely agreed that competition improves efficiency and innovation, and the imprisonment market is not the exception.

7.4.2 Competition in the prison system: catalyst of efficiency

In their extensive analysis about the 1980s privatisation program in the UK, Vickers and Yarrow (1988) held that improving efficiency through competition was a fundamental aim. It was in this context that competition was introduced in the prison system in England and Wales. In addition to innovation and value for money, it was considered that “competition in [o]ffender services has been shown to be effective at encouraging the management and workforces of existing and future providers to improve outcomes, drive efficiency and deliver more innovative models of service delivery” (Ministry of Justice, 2011: 4).

After being operational, it was suggested that “[t]o date the performance of private sector has been encouraging” (Laming of Tewin, 2000: 19), and privatisation is perceived not as a substitute for public participation, but a “symbiotic partner for publicly managed services” (Blumstein *et al*, 2008: 451).

Competition, as a driver of efficiency, was an element supporting private sector involvement and, at the same time, a legitimating method. According to the Home Office (2004) “[t]he Government [...] [wants] the most cost effective custodial [...] sentences no matter who delivers them” (p. 14). The mean to achieve such efficiency and cost-effectiveness was through market testing, a

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strategy conceived as “commercial competition for the delivery of services where the current provider is invited to compete along with other potential suppliers” (Gillespie, 2007: 160).

In the UK, the recurring reference to the competitive capability of the private sector was backed by the first comparison between public and private prisons, study in which the researchers argued that effective administration of resources in the British prison system was motivated by the potential effects of market testing and private sector involvement (Bottomley *et al*, 1997). Market testing and privatisation were recognized as boosters of competition in the prison system, bringing improvement in costs, performance, management and conditions, since “[t]he competitive market has been beneficial to the Prison Service as it allows the performance of public prisons to be assessed against that of alternative providers” (National Audit Office, 2003 p. 32).

Additionally, in the well-known ‘Carter Report’ through which a restructuring of the prison service was recommended, it was recognized that “[s]ervice delivery can be further improved through greater use of competition” (Carter, 2003: 43). The Home Office accepted such recommendation and later stated that “[t]he new National Offender Management Service will also ensure greater value for money by encouraging the greater use of the private and ‘not-for-profit’ sectors in prisons” (Home Office, 2004: 10).

Market testing as a managerial strategy was replaced by a new method to encourage competition in the delivery of public services and goods: performance testing. This mechanism served to publicly identify “poorly performing prisons [...] and given six months in which to improve their performance and identify an action plan for the future” (National Audit Office, 2003: 32). Performance testing was later replaced by a different model of competition: ‘outcome-based payment scheme’.

Commonly known as ‘Payment by Results’ (PbR), this scheme is aimed “to deliver services where all or part of the payment depends on the provider achieving specific outcomes” (National Audit Office, 2015, 11). PbR was introduced in the delivery of prison services in England and Wales in 2010 to bring fundamental changes to the prison system, in an effort to improve rehabilitation programmes instead of focusing on meeting targets of prisons performance. This mechanism can “give providers the freedom to innovate to deliver results, paying them

according to the outcomes they achieve and opening up the market to diverse new players who bring fresh ideas” (Ministry of Justice, 2010: 38).

In 2011, the Ministry of Justice published ‘Competition Strategy for Offender Services’, document which presented reforms across the whole prison system as a mean to encourage “greater involvement of the private and voluntary sectors in the rehabilitation of offenders to cut re-offending to improve outcomes and efficiency” (Ministry of Justice, 2011: 4).

However, competition and market testing have a downside, particularly when implemented in public prisons aimed to be later transferred to the private sector. In two specific cases researchers acknowledged and highlighted the dangers, for competition could lead to disorders (Liebling *et al*, 2015) and market testing might contribute to riots (Rynne *et al*, 2008), thus affecting the legitimacy of private prisons, as it will be analysed later.

Despite the recognized value of competition and market testing, Crewe *et al* (2015) have considered that “[w]hether or not privatization and private-sector competition assist in the delivery of progressive public services remains an empirical question, linked to national and local contexts” (p. 335). For that reason, since the start of this phenomenon, empirical research through comparative studies has been widely regarded as the most appropriate method to assess the alleged performance improvements and economic advantages of private prisons.

7.4.3 Evaluative comparisons as strategic legitimization of private prisons

Notwithstanding the significance of comparative research, this section is not intended to review the vast number of studies or to examine the results; the aim is to highlighting some general salient points to determine crucial features to ponder the operational legitimacy of privatisation.

Either to justify or contest the operational effectiveness of contracting out, comparisons between public and private prisons have persisted as an important topic in the debate. Comparative studies have been performed and endorsed due their practicality, attracting considerable attention from researchers. To legitimize privatisation in the USA, the UK or Australia, comparisons have highlighted the economic efficiency and better performance of privately managed prisons; yet, comparisons can expose failures of privatisation as well.

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Two studies in the USA deserve particular attention. One of the first studies was performed by Logan (1992) who offered an evaluative model about quality of imprisonment, concluding that private prisons “outperformed [...] often by quite substantial margins” (p. 601) in eight dimensions: security, safety, order, care, activity, justice, conditions and management. These main areas of concern are “concrete concepts susceptible to operational dissection and empirical measurement” (Logan, 1992: 581). Two decades later, assessing and summarizing a considerable number of comparative studies, Kish and Lipton (2013) noted that private prisons “have a slight operating-cost advantage [...] on the labour side, because of reduced non-wage benefits and increased efficiency from technology” (p. 103).

There are interesting comparisons in the UK. Bottomley *et al* (1997) performed the first study of this nature. Later on, the National Audit Office (2003) compared performance in terms of private prisons contractual obligations against public sector prisons, concluding that “[a]lthough the PFI has brought an increase in capacity, the operational performance of the prisons has been mixed” (p. 9). That same report noted that “PFI prisons tend to be better than public prisons in areas related to decency and regimes (such as the purposeful activities available to prisoners). They perform less well in other areas, such as safety and security.” (National Audit Office, 2003: 7). Academic comparisons about staff-inmates relationships (Crewe *et al*, 2015; Crewe *et al*, 2011) have provided interesting findings discussed in the previous chapter.

Despite early studies showed private prisons outperformed their public counterparts in the UK, such results should be assessed carefully, for any slight changes in management might have consequences that could vary the initial favourable results (Shefer and Liebling, 2008). Hence, evaluative comparisons are regarded as complex and problematic to perform, especially due disparities and differences in assessing performance and target achievement (House of Commons, 2003). Furthermore, it was pointed out that “[t]here is little available information on how the operational performance of PFI prisons compares with other prisons or whether the use of the PFI has brought wider benefits to the Prison Service” (National Audit Office, 2003: 5). In this sense, despite the apparent advantages of comparisons as a legitimating strategy, some caveats must be pointed out, for supporters and opponents of privatisation alike have acknowledged difficulties in comparative research.

Firstly, there are methodological inconsistencies that question the results about performance. For example, Kish and Lipton (2013) suggest that “[i]ssues of measurement and comparability make evaluating the results of privatisation difficult” (p. 93). In this sense, for Shichor (1995), a major issue for objective and accurate comparison is that any comparison has to be performed on prisons with the same particularities, including design, type, location and population. The House of Commons (2003) also acknowledged such concerns, because “[c]omparing the performance of PFI prisons against publicly-managed prisons is difficult because of variations in their age, design and function and because of the different ways in which their performance is measured and targets are set” (p. 11).

Secondly, regarding financial matters, Logan (1990) pointed out the difficulties to assess cost-effectiveness, since there are several hidden costs in prisons which could affect the findings. He identified three spheres to be pondered in any comparative study, namely finance, construction and operation. McDonald (1989) listed and classified various costs in prisons that have to be taken into account to achieve accurate results, such as indirect costs, both governmental and social. Moreover, Kyle (2013) noted that “the disparate incentives facing private and public providers” (p. 2095) represent another area of concern. Such budgetary issues have also been recognized by governmental bodies in the UK, for “[t]he difference in capital financing between the PFI prisons and other prisons adds another level of complexity when seeking to compare costs” (National Audit Office, 2003: 7). In the enquiry to assess the efficiency and value for money on private prisons, the House of Lords posed a question to be answered: “[h]ow does the performance [...] of [...] prisons [...] operated under private finance compare to those which were traditionally procured?” (p. 40); the answer provided was: “[w]e recommend that, in order to make possible proper comparisons between privately financed and traditional procurement, the Government should collect on a whole-life basis cost data on some comparable traditionally procured projects” (House of Lords, 2010: 15).

Thirdly, the scope of comparisons must be taken into account, since for Avio (1998) “[e]conometric studies of the cost-effectiveness of prison industries should be undertaken [...] [and] [l]inking rehabilitation outcomes with current costs would enhance the value of the studies” (p. 154). The National Audit Office (2003) recognized that “[a]ssessing the performance of prisons using purely quantitative measures will usually be unreliable” (p. 28). Dolovich (2005) also warned about

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the risk of comparisons focusing exclusively on performance, what she called “comparative efficiency” (p. 441), since such method focuses on issues of efficiency as an operational standard, leaving aside other normative concerns, including legitimacy.

Finally, other sort of issues affect comparative findings. Raher (2009) considers that comparisons face the lack of reliable information, since -based on secrecy-, private corporations do not disclose it to support their claims and “policy-makers will never receive adequate information to determine the operational success or failure of [...] prison privatization” (p. 238). According to Harding (1997), since private and public prisons are components of the same system, in order to improve the delivery of imprisonment, an evaluation about performance should be made of the overall system, highlighting its “strong and weak aspects” (Harding, 1997: 111), and only then, assess the pertinence of privatisation.

In one recent comparative study focused on values, practices and quality of life in British prisons, it was emphasized that “the resonances between our findings and the international literature give us confidence that we have identified some meaningful strengths, weaknesses, and paradoxes of public -and private- sector imprisonment” (Crewe *et al*, 20015: 334).

However, Liebling (2004) suggested that, regardless the evidence of apparent advantages of private facilities, some practices do question if public service is the value driving punishment delivered by private corporations. This, since there are differences in the values that drive performance in public prisons and behind the operation of privately run prisons, being the goals of private corporations: “profit and expansion, efficiency, and quality” (Liebling, 2004: 123).

7.4.4 Commodification of rehabilitation and the pursuit of legitimacy

Economic drivers motivated the creation of a competitive market that allowed the participation of new private providers of public imprisonment, turning its official goals into services exposed and shaped by market rules. Due the influence of managerialism in the criminal justice system, economic efficiency was introduced into the prison system to encourage a swift growth in the delivery of imprisonment by private means.

For Crewe *et al* (2015) “[p]rofit is the sine qua non of private-sector involvement in punishment provision and is the primary discourse at very senior levels within the global corporations that compete to run prisons.” (p. 333); this is the reason

why the key issue in the commodification of rehabilitation is profit making from imprisonment. Economic interests are behind private prisons (Logan, 1987b), and as any other business, their economic success is based in the “maximization of profits and minimization of costs and losses” (Field, 1987: 662). Furthermore, it is suggested that “[p]rison officers in private [...] may be there only ‘to make business’ (‘or help their bosses make business’)” (Shefer and Liebling, 2008: 273). To gain and manage legitimacy in the imprisonment market, corporations claimed to have the aptitude to provide better value in the delivery of imprisonment, but increases of profit and reductions in costs cannot be considered as operational aims of a public institution like imprisonment (Avio, 1998).

In the pursuit of innovation, efficiency, quality and savings in the delivery of imprisonment, governments allowed the growth of a market, providing operational legitimation to privatisation through operational and commercial competitiveness. However, building and maintaining legitimacy requires an examination of the extent to which private sector involvement in prisons has influenced the commodification of imprisonment.

A significant question in this process is that, like in any other new market, ventures are required to demonstrate their ability to ensure the proper delivery of the service or good, to legitimize their involvement. Flynn (1998) described how to demonstrate the alleged capability of entrepreneurs to run prisons more efficiently and secure contracts, joint ventures and corporate groups were created. This sort of strategy reveals how imprisonment was turned into a demanded product, nourishing the creation of corporations seeking profit.

Another aspect that contributed to the marketization of imprisonment and the commodification of rehabilitation or reform is that, despite inconclusive evidence, advocates recognized pioneering practices of the private sector behind the claimed better performance of contracted out prisons. To support that perception another managerial strategy was introduced in the UK to measure performance and determine value for money: Key Performance Indicators (KPIs); mechanism projected to significantly improve to prison service (Ryan, 2003).

Both failures of public prisons and private sector preliminary contributions validated the creation of the penal market. The state, as a consumer, initially legitimated the process of commodification of rehabilitation by the provision of alleged better value in imprisonment, through comparisons and evaluations. Such

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mechanisms to assess the efficiency of privately run prisons in the UK have been praised, since “[o]f all countries to introduce private prisons, the UK is the most advanced in developing system-wide performance measures that provide accurate evaluations of prison quality” (Rynne and Harding, 2016: 158). However, comparisons should also address and assess private prisons efficiency in terms of the aims of imprisonment, this is, rehabilitation or reform as the means to reduce reoffending.

There is a further issue that determines the legitimization of privatizing the delivery of imprisonment and rehabilitation: the contention between quality, efficiency and profit. It has been suggested that any assessment about the pertinence of private sector involvement in prisons must include an essential factor: the quality of imprisonment (Camp *et al*: 2002); for quality covers every aspect of imprisonment, ranging from order, through conditions, to rehabilitation (Hart *et al*, 1997). In this sense, Genders and Player (2007) have pointed out that “[a]lthough the concept of ‘value for money’ links cost with quality [...] in reality it is bound by qualitative commercial constraints” (p. 525).

As shown, the decision to allow private sector involvement in prisons is also strengthened by its contribution to increase competition and thus, improve the overall operation of the prison system, by achieving a specific aim: economic efficiency. This goal is possible to reach through privatisation only if it “sharpens corporate incentives to cut costs and set prices in line with costs” (Vickers and Yarrow, 1988: 158). One example of such cost reduction is through the extensive use of technology, particularly to monitor and supervise inmates instead of using more trained custodial staff (Cavadino and Dignan, 1997). Likewise, Hart *et al* (1997) suggested that contracted out corporations do have the ability to cut expenses “in ways that may lead to a substantial deterioration of quality” (p. 1148). For McDonald (1994), an evident concern is “that prisoners' rights and welfare will be sacrificed if they conflict with the pursuit of private profit” (p. 42).

Additionally, the absence of procurement processes represents an advantage for corporations to have more flexibility and search for suppliers with best prices (Shichor, 1995); since they are not restricted by bureaucratic constraints “[p]rivate companies are neither restricted to following the usual bureaucratic channels, nor limited to government suppliers” (Cervin, 2000: 69).

In this sense, it was reported that “[t]he drive for greater efficiency had led to downward pressure on the price of recent contracts, leading to reductions in

staffing levels and concerns that prisons would not be able to meet their full obligations” (House of Lords, 2003: 9). Mehigan and Rowe (2007) noted that as source of profit, reductions can be made in areas such as purchasing and staffing “to a level below the sum charged to the state” (p. 367). This is a serious concern that needs to be addressed by all those involved in the authorization and monitoring of privatisation, for the quality of imprisonment is lessened when efficiency and cost-saving in prisons are targets to be met, consequently having an impact on the delivery of imprisonment as a whole.

Prison privatisation, through the marketization of imprisonment and the commodification of rehabilitation, has been regarded as a “threat to both overall allocative efficiency and to individual liberty” (Avio, 1998: 151); and institutional models controlling the activities of professionals and practitioners have been replaced by models focused on “utilitarian individualism, neoliberal and market oriented standards of social behaviour” (Scott, 2010: 43). Resulting from neoliberal policies that have incorporated penal policies into “the circuits of capitalist production and accumulation” (Whitehead and Crawshaw, 2012: 70), the authorization of private sector involvement allowed “private prison domination” (Fulcher, 2012: 610).

If private prisons focus exclusively on meeting performance targets, and cost savings are planned and implemented to increase profitability, the legitimacy of privatisation is seriously affected. Hence, the performance of directors and staff in private prisons should be aimed to improve imprisonment not by the threat of market competition or private interests, but from an actual commitment to the service they deliver and on the awareness about the role they play in public punishment and in the prison system.

Firms should safeguard the quality of imprisonment ‘balancing corporations’ stakeholders’ economic interests and the public good they are expected to achieve: reduction of reoffending. Considering the rapid and steady expansion of this phenomenon, it is necessary to evaluate yet again whether private prisons have achieved the pursued legitimacy, for they “actually live up to their expectations (cost and quality) or if the state and the inmates are being cheated out of quality care at an affordable cost” (Perrone and Pratt, 2003: 303). However, a few years after private prisons became operational in England and Wales, it was suggested that “[f]urther experience with private imprisonment services and systematic studies of those experiences will probably show that there is no

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inherent superiority of contracting, in terms of cost-effectiveness” (McDonald, 1994: 41).

7.4.5 The principles of operational legitimacy

After reviewing some theoretical perspectives, empirical research and official reports regarding the economic operation and actual performance of private prisons, it is pertinent to present the final set of principles included in this assessing IMM.

In the pursuit of legitimation, private corporations must perform efficiently; in this sense, efficient performance is the first principle supporting operational legitimacy. To be operationally legitimate, private prisons should be able to reduce reoffending by improving and enhancing rehabilitation or reform.

Privately managed prisons, through their directors representing corporations, must perform in accordance, not only with contractual provisions, but at the same time, as Harding (1997) suggested, contributing to the overall performance of the prison system.

It was noted that in England and Wales, the “overall experience with privatization seems more positive than negative” (Pozen, 2003: 274). However, as Fulcher (2012) more recently noted, “without clear evidence that prison privatization is demonstrably more cost efficient, government decisions to allocate funds to private prison companies must be reassessed” (p. 605).

One legitimation method used by policymakers, corporations and lobby groups is comparative empirical research about the alleged advantages of privately managed prisons compared to their public counterparts; however, official and academic comparative studies can be used to either legitimize or delegitimize privatisation. Nevertheless, results from this strategy must be taken cautiously due the issues discussed previously. Avio (1998) considered that in the first decade of privatisation “the empirical evidence comparing private and public management [...] has been scant and somewhat unsatisfactory” (p. 151).

Therefore, the second principle of operational legitimacy refers to availability of proper evaluative mechanisms, particularly comparative research that takes into account the concerns presented in this dimension, in order to have objective and accurate results to detect areas of opportunity for improvement.

According to the National Audit Office (2003), relying exclusively on quantitative methods to assess the performance of privately run prisons is unreliable, for “[p]risons are complex entities which suggest that any system which attempts to evaluate total performance needs to be sophisticated” (p. 28). Rynne and Harding (2016) have noted that “methodological problems associated with comparative studies have made it difficult, if not impossible, to compare the public and private sectors in terms of outcomes” (p. 155). For Perrone and Pratt (2003) “providing correctional policy makers with more conclusive and definitive empirical information may help to add a more rational component to discussions about prison privatization that may then contend with the legal, philosophical, and moral dimensions of the debate” (p. 319).

Any comparison about efficiency and cost-effectiveness between public and private prisons should include a broader set of standards to have more accurate results. Unbiased aims, broader data, stricter methodology and wider publicity could be some elements of a comprehensive comparative study aimed to provide evidence about the legitimate operation of private prisons.

However, and as Sandel (2013) pointed out, even efficiency in some markets cannot be justified when those markets disturb “nonmarket norms of moral importance” (p. 123). Moreover, according to Crewe *et al* (2015) “[e]mpirical data alone cannot settle debates about the ethics of private-sector involvement in incarceration” (p. 333).

For Dolovich (2005) any cost and budget reductions in private prisons aimed to secure profit-making affects essential components of humane imprisonment: inmate’s conditions and regimes, and professionalization and capability of prison staff. Quality, regimes and conditions must not be affected by cost-reductions, for it corroborates the commodification of imprisonment. Competition mechanisms should be directed not exclusively to cost-saving, but to encourage innovation.

Such claim supports the final principle determining legitimacy assessment on operational grounds, as corporations managing prisons must ensure responsibility towards rehabilitation and reduction of reoffending, and not exclusively to profit making.

Corporations -through private prisons directors- should be compelled and dedicated to reduce reoffending rates of inmates released from their prisons, above any private economic motive. Corporations should protect the integrity of

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inmates above economic expectations of stakeholders. In this sense, private corporations must manage and satisfy those receiving the service- customers and recipients. The delivery of imprisonment by private corporations for pure profit making and the pursuit of cost-cutting targets at the expense of the overall delivery of imprisonment, questions the operational legitimacy of privatisation.

In the first comparative study in the UK was commented that a “balance between reducing costs and maintaining regime standards has to be kept under constant review for both public and private sector prisons” (Bottomley *et al*, 1997: 7). In this sense, it can be considered that market forces and competition result in better accountability (Blumstein *et al*, 2008).

In sum, to be operationally legitimate, privately managed prisons should perform efficiently and better than their public counterparts in terms of reducing reoffending through innovative rehabilitative programs by using the means and resources provided by contracted out corporations and at the same time responding to the stakeholders expectations; and such operational performance should be supported by empirical evidence from comparative studies that consider the elements proposed earlier. A comparison on expenditure between public and private prisons can also be valid to determine operational legitimacy.

7.5 Conclusion

In this section of the research, legitimization of private sector involvement in the delivery of public imprisonment is grounded on three main areas: organisational, contractual and operational. This Managerial domain establishes the importance of assessing the legitimacy of prison privatisation considering some basic principles derived principally from institutional, organisational, corporate governance, financial, and performance management approaches.

The dimensions included in the final core model of the IMM permit the evaluation of the legitimate participation of corporations that -on behalf of society- deliver public imprisonment. Therefore, private prisons were justified, and thus, are legitimate to the extent that agreed expectations by all the stakeholders of this service are fulfilled. Legitimation depends on corporations being legally liable for failures to achieve contractual terms and accountable through effective governmental monitoring and independent audit mechanisms. Additionally, corporations should innovate, providing value to imprisonment, but ensuring that the delivery of imprisonment is not affected by expenditure reductions,

particularly in sensitive areas. The alleged cost-effectiveness and better performance of private prisons is to be demonstrated by appropriate comparative mechanisms. Finally, corporate responsibility and transparency are crucial in the legitimization of prisons managed by corporations.

Chapter 8: Transforming private prisons: discussion and assessment of its legitimization

8.1 Introduction

As presented throughout this work, private sector participation in the prison system could be perceived as causing a collision between principles underpinning imprisonment in the 21st century and pragmatic drivers of contracting out.

Against this background, this work suggested that a re-assessment of the legitimacy of prison privatisation was imperative. It was also argued that considering the results derived from the current operation of private prisons, specifically in England and Wales, the justifications originally presented to support their legitimate implementation had to be re-evaluated. Such re-evaluation could provide a guiding framework for politicians, policy makers and practitioners to have a more informed approach about the implications and the outmost significance of legitimization of contracting out imprisonment, particularly in Mexico, but also in other jurisdictions as well.

This thesis started with the examination of the concept of legitimacy, to determine legitimization of institutions or organisations. At the same time, this work focused on the existing approaches to the issue of prison privatisation, both theoretical and empirical. Although these approaches came from studies performed in different countries with experience in this phenomenon, this research concentrated in the debate, authorization and operation of contracted out prisons in England and Wales. This was the basis to create an innovative system to assess, question and enhance legitimacy, acknowledging that multidisciplinary is key in a broader analysis of this policy and its implications.

Given that legitimacy of imprisonment has recently attracted attention, this research acknowledged the importance of the nature and extent of legitimacy and its association to the private delivery of imprisonment. As a result of this work, it can be suggested that private sector involvement in the prison system has a broader drivers and implications, causes and effects, which either provide or weaken legitimacy.

8.2 The 'penal triad' and 'prisons for the masses': features of penal policymaking

In order to recommend an assessment about the legitimacy of private sector participation delivering imprisonment, it was essential to begin this study by analysing the phenomenon of prison privatisation in the light of different approaches, both theoretical and empirical. Since the literature in Mexico is scarce, this work focused on reviewing works related to the experience in English-speaking jurisdictions, particularly those with years of practice, namely the USA, Australia and England and Wales.

Notwithstanding the vast amount of literature regarding private prisons, and acknowledging the impossibility to review all perspectives, this research focused particularly on seminal works but also considering recent approaches and those directly addressing the issue of legitimacy.

The first finding is that perspectives about prison privatisation are polarized. Some scholars support this policy as a valid measure whilst others regard it as unacceptable. In this sense, advocates and supporters justify their stands on the claim that private prisons perform better at lower costs and improve conditions and regimes, helping the state to fulfil the aims of imprisonment, particularly by reducing levels of overcrowding through construction programmes. In contrast, opponents highlight the inappropriateness of delegating the power to punish, especially since it implies the use of force by private contractors, the profit motive of corporations and the lack of reliable evidence about the claimed efficiency of private prisons.

A second relevant finding in the privatisation of prisons' phenomenon is that it is generally considered as one solution to penal crises, particularly to reduce overcrowding levels, through the expansion of the prison system and the provision of 'prisons for the masses'. However, this research also shows that the 'penal triad' of punitiveness-'imprisonment in excess'-expansionism is one indirect reason behind prison privatisation. What is presented as the solution to the problem of prison overcrowding actually is the consequence of punitive policies that promote mass imprisonment and the need for more prisons in countries such as England and Wales and Mexico.

A third aspect made noticeable on this research is that delegating the power to punish to private contractors is normally justified in terms of their ability to

innovate and provide better conditions and regimes at a lower cost, permitting corporations to pursue profit and make business from imprisonment. Nevertheless, the conflicting opinions about the actual results of cost-effectiveness based on empirical evidence were also observed.

Considering these three main concerns, it can be said that prison privatisation is, indeed, a controversial policy and since there are relevant implications and serious consequences to it, which have been presented and discussed throughout this work, prison privatisation requires a more robust rationale, related to the fundamental supporting component of institutions and organisations: legitimacy.

Furthermore, the legitimization of prison privatisation in Mexico is an issue that cannot be postponed, given its authorization was justified to face the rise in prison population originated by the implementation of punitive policies and the war against organized crime; and considering that the full implications and consequences of allowing private sector involvement in the Mexican prison system were not wholly and carefully analysed.

The issues raised by privatisation are so fundamental for the future of imprisonment they make legitimacy key in the debate. In order to provide a solution to this dilemma a new integral assessment about the legitimacy of private sector involvement in the prison system is required. Therefore, legitimacy must be acknowledged by all those involved in the privatisation process, for it enhances the overall authorisation, recognition and operation of an organisation.

8.3 Contracting out imprisonment: a reassessment of its legitimacy

As suggested, organisations face legitimization crises at some point, but particularly after failures and scandals that question trust and their legitimacy. Building and repairing legitimacy becomes paramount for their continuity. In the second decade of the 21st Century there have been some circumstances that have affected the credibility of privately managed prisons, making clear the need to reassess the pertinence of private sector involvement in the prison system.

There have been significant events that questioned the legitimacy of private contractor's participation in the management of prisons in England and Wales and in the USA.

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The strongest arguments behind contracting out of prisons lose any legitimating validity after incidents and events such as the ones mentioned in this thesis, that have put safety and security at risk, let alone possible failures to achieve the aims of imprisonment.

For all these reasons, it is clear that the debate is not over, on the contrary, the reality shows that, in fact, it should be brought again to reevaluate this policy and, even more so, its legitimacy. The debate should focus on a new, contemporary examination about the legitimacy of private sector involvement in the prison system since it has entered a new stage in discussion after more than two decades of experience. Under these circumstances, this research engaged in a process aimed to contribute to such debate by producing a new methodology to reassess the link between legitimacy and privatisation. In the case of private prisons, legitimisation is still required.

8.4 The assemblage of a theoretical meta-model

Taking into account the legitimisation of prison privatisation should be evaluated by a new methodology, this research aimed to propose and develop a new assessing framework. As suggested, taking into account the advantages already highlighted of models in criminal justice, and the fact that models should not be limited to research that evaluates empirical results, the most appropriate method to evaluate a concept such as legitimacy- when related to private prisons- is through the design, assembly and application of an evaluative model.

Now, given the array of concerns regarding private sector involvement in the prison system, this framework is intended to raise awareness of all areas involved in the privatisation process that require legitimisation and have direct consequences on the authorization, approval and operation of private prison. However, a simple model does not suffice. To achieve the complex task of addressing the most relevant issues concerning prison privatisation identified throughout this study, the most suitable method to test its legitimacy, is through the assembly of an 'Interdisciplinary Multidimensional Meta-model'.

As a result of the research performed, there are three main themes that link legitimacy to prison privatisation, namely the delegation by the State of the authority to deliver imprisonment; the recognition and approval by society of imprisonment by private means; and the present and actual operation and results of prisons managed by corporations. Each of these themes is related to one

specific actor in the privatisation phenomenon: the State, society as a whole, and private corporations.

Considering the themes and actors mentioned in the previous paragraph, the IMM is constructed by three main disciplines that address the subjects described above, creating three core models: Philosophical, Sociological and Managerial. However, since there are several concerns in the prison privatisation phenomenon associated to these main disciplines, what is required is a meta-model, this is, a model constructed by three core models.

Taking into account the proposed multidimensional concept, the legitimacy of prison privatisation has to be assessed through a sophisticated interdisciplinary method, which is verified by the construction of a theoretical meta-model that conceives legitimacy as linked to various areas of knowledge, depending on a particular concern, but integrated into one single concept.

First, the Philosophical domain as one core model is integrated by three components that examine, from three different disciplines the privatisation phenomenon. The appropriateness of the delegation of power is addressed from a Political Philosophy perspective, the legal process of authorizing this policy is studied from a Jurisprudential point of view and the ethical questions regarding the private delivery of imprisonment are studied from a Moral Theory approach.

Second, three concerns constitute the Sociological model: the recognition of privatisation according to specific ideologies, the degree of fairness and impartiality in procedures inside private prisons, and the extent to which privatisation achieves the recognized goals of imprisonment. The fields of study considered in this core model are Social Psychology, Procedural Justice and Criminology.

Finally, the three disciplines considered in the Managerial domain are Organisational theory, corporate governance, performance management. The concerns addressed are to what extent private prisons emulate public prisons conforming to values and beliefs and innovate imprisonment; the extent to which private corporations managing prisons are accountable and comply with contractual terms; and to what extent -if at all- privately managed prisons outperform their public counterparts improving the prison system.

This multidisciplinary stance is then an integrated nine-disciplined meta-model, developed to examine and assess the legitimacy of private sector involvement in

the delivery of imprisonment. In order to generate the IMM, it was required to review theoretical approaches by classic and modern thinkers and scholars recognized in Mexico, and research performed in countries with experience in prison privatisation. The assembly of this IMM is the result of the examination of existing theoretical postulates and previous empirical findings directly addressing the concept of legitimacy and, in some cases, the legitimacy of prisons and privatisation, sometimes extrapolating notions from other disciplines to support legitimization in areas that did not address legitimacy and its application to prison privatisation.

Now, since this IMM was not created and supported through an empirical research, it is a theoretical meta-model that, as it was highlighted throughout this research can be later supported by empirical research.

Despite the difficulty of establishing these interwoven principles that determine the legitimacy of privately managed prisons, for- as commented- there are conflicting views about this phenomenon, this research produced a framework underpinned by findings in the form of legitimization principles supporting each dimension of the IMM, linked to each other, providing a holistic, sophisticated method to contribute to the theory of legitimacy from an interdisciplinary approach.

8.5 The legitimating factors of prison privatisation

After studying the contributions of the areas included in the Philosophical domain: Political Philosophy, Legal theory and Moral theory, as underpinning disciplines of the Political, Jurisprudential and Ethical dimensions; it can be argued that the legitimization of the delegation of the power to punish, the legal authorization to deliver public imprisonment and the morality of imprisonment by private entities, is granted by the principles suggested in this thesis. Political legitimacy is provided as long as the power to punish has a rightful source of authority, limiting the use of coercive public force by private entities and considering that it is delegated to pursue the public nature of imprisonment. Jurisprudential legitimacy is provided when the legal process of authorizing private sector involvement in the prison system is the result of a valid norm, conforming to constitutional requirements and the legislature in charge of the authorizing process acts independently, free from all external influence and legislation has validity in accordance with the legal system principles. Finally,

ethical legitimacy can be obtained when imprisonment has indeed a utility, according to the state's penal policy; the state secures a general and humane application of punishment through private means and it is delivered in the pursuit of the common good according to the official aims.

The principles supporting the Ideological, Procedural and Criminological dimensions as part of the Sociological domain related to the social recognition of this policy were drawn from disciplines such as Social Psychology, Procedural Justice and Criminology. Private sector involvement in public imprisonment is ideologically legitimate when it conforms to societal values regarding public imprisonment, and non-biased and objective knowledge has been provided to society about all the implications of privatisation; the actual and real situation and conditions of public prisons have been communicated in a truthful manner; and society has an accurate perception of the extent of the prison system operation. Procedural legitimacy is granted when private prisons secure impartial and fair internal disciplinary procedures; order, safety and security are effectively maintained; and independent monitoring and inspection are not just implemented but their recommendations are put fully into practice, ensuring humane conditions and regimes as part of the rehabilitation of offenders and protecting their human rights, in accordance with legal provisions. For prison privatisation to gain criminological legitimacy, the use of imprisonment must be limited, according to the prison system capacity, by a humane, rational and rationed use of prison; privatisation policies implemented along with prison reductionism, promoting the use of alternatives; and the decision to allow private corporations to rehabilitate or reform offenders supported by expert criminological evidence.

Finally, the Managerial domain, integrated by the Organisational, Contractual and Operational dimensions contains principles extrapolated from Organisational Theory, Corporate Governance and Marketing Management. Therefore, private corporations' management of prisons has organisational legitimacy when their facilities resemble, at least to the minimum, the structures and standards of their public counterparts; when they comply not only to social expectations but conforms to values and norms regulating public imprisonment; when they meet the official expectations and public goals in the use of imprisonment and, at the same time, deliver innovative rehabilitative regimes in order to reduce reoffending. Contractual legitimacy is determined by a high degree of accountability in the misuse and abuse of authority and coercive force; by legal

liability about the prisons' failures in their operations; and the implementation of independent bodies that audit and monitor that their performance complies with the contractual terms; and ensuring transparency, not only to the corporations' shareholders and primary stakeholders- like the state- but to a broader set including society but, most importantly, inmates and their families. Operational legitimacy is based on the cost-effectiveness performance of private prisons derived from competition; on effectiveness that can be verified by impartial and methodologically reliable comparative studies; and on the private corporation's commitment to rehabilitate and reform inmates, above – or at least with the same importance- of their profit-making motives, avoiding the commodification of imprisonment.

This comprehensive list of recommended principles that, according the multifactorial constitution of the IMM, provides specific sorts of legitimacy to prison privatisation confirms that legitimization of private prisons is a complex task for it requires the convergence of several circumstances. From this, private prisons, when meeting particular principles, might have legitimacy in some aspects but lack in others, which therefore, will have to be addressed by those in charge, for the private prison to be regarded as legitimate. Otherwise, its legitimacy could be challenged and questioned in one, some or –in the worst case- all the dimensions that integrate the IMM.

Here lies the main contribution of this research and its application to both theory and policy, as a method to assess, challenge or confirm the legitimacy of private sector involvement in the prison system, in order to ensure that this measure is presented, discussed, authorized and implemented according to principles and standards guiding penal policymaking in 21st Century democracies.

8.6 Practical application of the IMM: three case studies

A fundamental question that drives this research is to what extent the contracting out of imprisonment is legitimate and to what extent political, sociological and managerial issues influence policy making. As it has been suggested throughout this work, the quintessential legitimacy of prison privatisation derives from primary legitimacy provided by different public and private organisations. What is important now is to determine the inner legitimacy of these institutions based on a series of dimensions already recommended in this thesis, particularly with philosophical, sociological and managerial significance.

As suggested in Chapter 4, the IMM can be used for a general assessment of the legitimacy of prison privatisation, but also for particular cases and particular issues in an integrated manner, therefore reinforcing the link between theories and reality and offering value as an evaluative framework that can be applied to assess specific cases in specific circumstances.

To demonstrate the utility and value of the IMM to both theory and policy, and the relation between them, the following sections will present an outline of the application of the IMM in indicative case studies. The purpose is not to provide a comparative study, but to support the significance of this research and the possibilities of a practical application in specific developments in prison privatisation. This, by highlighting which principles from a particular dimension are more relevant to consider in a specific case and the inter-relations between dimensions, in an assessment of the legitimacy of particular concerns in the privatisation debate.

These case studies are based on recent developments in the jurisdictions from which this research is mainly drawn, namely USA, UK and Mexico, in an attempt to evaluate private prisons, but also to provide some suggestions to improve their legitimisation for the sake of inmates' dignity, humanity and wellbeing, since the opposite undermines the legitimacy of this penal policy.

8.6.1 Revival of private prisons: between prison population reduction and Trump's punitiveness

Punitiveness at the end of the 20th and early 21st Century made the USA the leading incarcerator in the world for prison population alarmingly soared. By 2015, the American prison population was 1,476,847 (The Sentencing Project, 2017). However, since 2010 prison numbers started to decline significantly²¹, and the population on privately managed prisons decreased by 8% since its peak in 2012²². This decline coincides with a 2016 audit that concluded that private

²¹ Prisoners in 2016 U.S. Department of Justice, Office of Justice Programs. Bureau of Justice Statistics <https://www.bjs.gov/content/pub/pdf/p16.pdf> E. Ann Carson, Ph.D., BJS Statistician January 9, 2018. NCJ 251149 [Accessed 24 April 2018].

²² U.S. private prison population has declined in recent year BY ABIGAIL GEIGER, APRIL 11, 2017, Pew Research Center <http://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/> [Accessed 24 April 2018].

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prisons were more likely to incur in safety and security issues than their public counterparts²³.

It was under these circumstances that the Deputy Attorney General in August 2016 issued a memorandum to the Director of the Federal Bureau of Prisons communicating the resolution to end the contracting out of federal prisons in the USA, stating that “for the first time in decades, the federal prison population has begun to decline”. This document highlighted that private companies helped the prison system in turbulent times, but stressed the decision to start “the process of reducing -and ultimately ending-” the use of private facilities justified on the claim that “time has shown that they [...] do not provide the same level of correctional services, programs, and resources; [and] they do not save substantially on costs”.²⁴ It is important to point out that when such decision was announced, stock exchange shares of private corporations involved dropped considerably.

Despite the importance of this decision to phase-out the process of contracting out federal prisons, in February 2017 the same Justice Department under a new presidential administration revoked the decision to stop the use of privately managed facilities. No criminological evidence, scientific backing or empirical research was presented to support the production of an eight-line single paragraph memorandum. The Attorney General (Sessions, 2017) stated that the 2016 memorandum “changed long-standing policy” of the bureau and impaired its “ability to meet the future needs of the federal correctional system [...] [t]herefore, I direct the Bureau to return to its previous approach”²⁵.

Days before the publication of this memorandum, specifically on February 9 2017, the newly sworn President of the USA signed three executive orders embodying a tougher stance to crime by focusing on the reduction of crime through the creation of a task force that will “identify deficiencies in existing laws that have made them less effective in reducing crime and propose new legislation

²³ Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons. Office of the Inspector General. U.S. Department of Justice <https://oig.justice.gov/reports/2016/e1606.pdf> [Accessed 15 March 2018].

²⁴ Memorandum for the Acting Director Federal Bureau of Prisons’ from the Deputy Attorney General.

²⁵ Memorandum for the Acting Director Federal Bureau of Prisons’ from the Attorney General.

that could be enacted to improve public safety and reduce crime”²⁶; fight criminal organizations by strengthening “enforcement of Federal law in order to thwart transnational criminal organizations and subsidiary organizations”²⁷; and commend harsher punishment for offenses against law enforcement officials through “appropriate legislation [...] that will define new Federal crimes, and increase penalties for existing Federal crimes”²⁸.

As suggested in Chapter 6, punitive responses to crime and subsequent mass incarceration undermine the legitimacy of private prisons, particularly when such policy endorses the prison expansionism. Moreover, there is a close connection between punitiveness and privatisation, and companies managing prisons are aware of this link. In its Annual Report submitted to the United States Securities and Exchange Commission in 2012, GEO Group -corporations managing several prisons in the USA- stated that “the demand for our correctional [...] facilities and services [...] could be adversely affected by changes in existing criminal [...] laws, [...] the relaxation of criminal [...] enforcement efforts, leniency in conviction, sentencing [...] and the decriminalization [...] [that] could lead to reductions in arrests, convictions and sentences requiring incarceration at correctional facilities” (p. 30). This seems to confirm the suggestion that to secure growth and profits, private corporations make use of strategies such as “lobbying, direct campaign contributions, and building relationships and network” (Cohen, 2015).

Revoking a decision ordering to limit and eventually stop the use of federal private facility, can be regarded as a momentum in a new surge of privatisation, motivating and endorsing corporations in the wider expansion of the American prison system, while seriously undermining the legitimacy of such policy, since this shift in criminal and penal policy that authorised the resurgence of private

²⁶ "Presidential Executive Order on a Task Force on Crime Reduction and Public Safety". Washington, D.C.: White House Office of the Press Secretary. February 9, 2017. <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-task-force-crime-reduction-public-safety/> [Accessed on 12 March 2018].

²⁷ "Presidential Executive Order on Enforcing Federal Law with Respect to Transnational Criminal Organizations and Preventing International Trafficking". Washington, D.C.: White House Office of the Press Secretary. February 9, 2017. <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-enforcing-federal-law-respect-transnational-criminal-organizations-preventing-international-trafficking/> [Accessed on 12 March 2018].

²⁸ "Presidential Executive Order on Preventing Violence Against Federal, State, Tribal, and Local Law Enforcement Officers". Washington, D.C.: Office of the Press Secretary. February 9, 2017. <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-preventing-violence-federal-state-tribal-local-law-enforcement-officers/> [Accessed on 12 March 2018].

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prisons seems to be the result of political circumstances more than deriving from an informed and founded debate.

The legitimacy of this decision can be assessed through the application of the IMM by recognising specific principles that should drive penal policymaking and legislation, which have been suggested throughout this thesis. Particularly, the lack of criminological evidence to support a new decision to invalidate a previous one which derived from an audit and to allow the continuation of privatisation of prisons through policy requires the application of the principles recommended to provide criminological legitimacy, such as the rational use of imprisonment and the fact that this policy should be implemented as a result of expert academic knowledge.

However, it is also possible to perform a crossover study including various principles from different dimensions that complement each other. Legislation through presidential executive orders without consultation and parliamentary debate affects the jurisprudential legitimacy of the prison privatisation in the USA. The presidential and administrative decision evaded discussion with expert evidence. The way in which privatisation regenerated in Trump's administration represents the input into the IMM and principles such as the principled use of punishment in the pursuit of the public good -suggested in the Political dimension-, independence of a parliament -proposed in the Jurisprudential dimension-and the duty to secure humanity of punishment through appropriate mechanisms -recommended in the Ethical and Procedural dimensions can be applied to assess such decision. In sum, principled policymaking should support privatisation rather than a punitive populist approach to imprisonment for instrumental reasons, since it is clear that higher imprisonment rates and soaring prison population require more prison spaces, and thus, a new surge in mass incarceration.

This section is not aimed to provide a broader interdimensional assessment of the legitimacy of recent privatising penal policies in the USA, for that will entail a deeper and more profound study that should include both empirical research and investigative journalism.

Suffice to say that the legitimacy of criminal -penal- policymaking based on instrumental, expansionist goals, and not in principled values, is seriously undermined, for it responds to specific interests and ideological agendas. To rebuild legitimacy, policymakers in the USA should acknowledge the principles

suggested in this research and plan a principled penal policy that promotes decarceration and the limitation of private prisons. Moreover, legitimacy could be supported in Managerial terms with an effective, efficient and accountable operation of private prisons in the USA.

8.6.2 Violence and riots in HMP Birmingham: delegitimation of competition and privatisation

Different penal reform groups have been warning about the current state of prisons in the UK, including private sector prisons. The Howard League for Penal Reform has warned constantly about the rising levels of violence in English prisons, “with safety deteriorating at a faster rate year after year” as his Director of Campaigns noted that “[p]risons are not only becoming more dangerous; they are becoming more dangerous more quickly” (Howard League for Penal Reform, 2016: 5). Recently, this reforming group emphasised “[violence] and self-injury in jails soared to record levels as overcrowding continues to put pressure on the prison system” (Howard League for Penal Reform, 2018: 6).

In early 2017, an undercover reporter from the British public service broadcaster spent some weeks as a newly recruited prison officer in HMP Northumberland run by Sodexo Justice Services.²⁹ This investigation revealed the appalling conditions faced by inmates and exposed the levels of violence in this privately managed prison due the availability of drugs. This, among recent incidents and violence in other privately managed prisons in England, along with inspecting reports exposed serious failures in their operation, questioning the legitimation of specific private prisons in particular areas, which can be assessed with the application of the IMM.

The perceived and forewarned crisis in the British prison system reached its peak at the end of 2016, when around 600 inmates were involved in serious disturbances which lasted for 12 hours³⁰, and dubbed by the Secretary of State for Justice as “a serious disturbance” (House of Commons, 2016a: col 1202) widely regarded as the worst since the 1990’s riots.

²⁹ Undercover Panorama report reveals prison chaos. BBC News, <http://www.bbc.co.uk/news/uk-38931580> [Accessed on 16 April 2018].

³⁰ “HMP Birmingham riot: 240 prisoners being moved after riot”, BBC News, 17 December 2016. [Accessed on 16 April 2018].

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The day of the incident, the Prison Governors Association pointed out “the private sector has now been infected with the same disease that has had such a debilitating impact on the running of public sector prisons – an erosion of respect and a disregard for authority which has emboldened prisoners across both the public and private sector”³¹. The Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers, formerly the Prison Officers' Association, noted the day after the incident that “[t]he current state of our prisons is down to the systematic failure of previous administration”³²

Days after the riots, when questioned by Members of Parliament about the link between the violence and low staff levels in private prisons, the Justice Secretary noted that: “[t]here is not a significant difference between performance in the private and public sector” (House of Commons, 2016a: col 1210) and that “the resources employed by the public sector, but we need to be honest that this is a problem across our prison estate—we have seen issues at our private sector prisons and our public sector prisons” (House of Commons, 2016a: col 1205).

However, a few months before the riots, the Independent Monitoring Boards (2016b) warned that this facility showed progress, but highlighted concerns in the operation, especially “the increasingly difficult behaviour of individual prisoners coupled with staff resource constraints” (p. 7). Such report was also emphasised by one Member of Parliament during the session of questions in Parliament after the incident. This particular –though serious- incident provides an opportunity for a practical application of the IMM in one facility, assessing HMP Birmingham’s legitimacy.

The recommendations from an unannounced inspection of HMP Birmingham on 2014 (HM Inspectorate of Prisons, 2014) stressed that “[s]ecurity was well managed and proportionate. Intelligence-based risk management systems were effective and sophisticated. Security committee meetings were well attended and links to other key areas, such as the safer custody and drug strategy teams, and local and regional police forces were good” (p. 25)

³¹ Prison Governors Association Disturbance at HMP Birmingham 16 December 2016 <http://prison-governors-association.org.uk/wp-content/uploads/2016/12/PGA-PRESS-RELEASE-Birmingham-Disturbance-161216.pdf> [Accessed on 16 April 2018].

³² POA Press Releases 140 17 DEC 2016 Update Birmingham http://www.poauk.org.uk/index.php?press-releases&newsdetail=20161217-10_update-birmingham-1 [Accessed on 16 April 2018].

As it has been already analysed in Chapter 6, riots and violent disturbances affect the legitimacy for security and well-being of inmates is paramount; therefore, when assessing the legitimacy of HMP Birmingham, the Sociological domain would be the most appropriate, specifically the Procedural dimension, for one of the principles guiding procedural legitimacy is safety through the fulfilment of recommendations made by independent monitoring and inspecting bodies, in order to prevent violence. Taking into account such principle, the legitimacy of HMP Birmingham must be reassessed, especially after the decision to transfer its management to the private sector. This significant variation has to be considered as an element on the evaluation of the legitimacy of this prison in a practical application of the IMM.

Resulting from these violent disturbances, the most recent Prison Annual Performance Ratings (HM Prison and Probation Service, 2017) graded HMP Birmingham 1, meaning that its operation is of serious concern. However, this particular facility was graded 3 -meeting majority of targets- for three consecutive years (National Offender Management Service, 2014; 2015; 2016b). This variation affects the operational legitimacy, since it might be showing that this facility has not been complying with the new contractual terms. Thus, the legitimacy of HMP Birmingham can also be evaluated on managerial terms, since its performance has not accomplished the contractual terms of safety and security, for serious incidents have happened. In this particular case, there is a crossover of dimensions, for staff and resources reductions are also source of violence within prisons.

As it was presented in Chapter 7, politicians and policymakers have praised competition as a factor than enhances prison conditions and regimes, and thus, legitimating private prisons. However, derived from competition, the management of HMP Birmingham was transferred to private corporation G4S in 2011. This process and outcome of the transfer were studied by Alison et al (2015), who perceived that “competition and staffing reductions lead to turbulence, but can bring about positive improvements after it was contacted out” (p. 5) and that this particular prison “was showing strong signs of stabilisation and positive progression” (p. 6).

Following such perception, competition indeed improved the operation of HMP Birmingham, but eventually led to failures, eventual deterioration of security, resulting in serious incidents. Therefore, in this particular case its legitimacy can also be evaluated with the principles related to the operational dimension.

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Finally, it has been suggested by a particular Member of Parliament that it needs to be considered “whether or not it is right that private companies such as G4S at Birmingham or Sodexo at Northumberland, where there are also big problems, should be making profit from prisons and from society’s ills” (House of Commons, 2016a: col 1204). Suggestions like this reinforce the importance of the inclusion of principles developed in the Ethical dimension -considered in Chapter 3- in the assessment about the legitimacy of HMP Birmingham.

8.6.3 Confidentiality and secrecy in Mexico: the legitimating role of independent inspections

As is was stated in Chapter 2, the Public-Private Association Federal Act passed in 2012 by the Federal Parliament allowed the federal government to contract-out the construction and later management of prisons. This Act, later changed in 2016, allowed agencies to resolve about the viability of a particular project through a decision made by the same agency, after a study and analysis of specific factors, a decision which should be made public and informed to Parliament. However, the agency is not required to make public its resolution when it can be regarded as “confidential” according to the relevant legislation, in particular when matters of national security and public safety can be compromised. This Act also allows governmental agencies to directly grant a specific project to a corporation, without a competitive bidding process if issues of national security and public safety are involved.

It has been pointed out by various NOGs (Documenta/Análisis y Acción para la Justicia Social A.C. et al, 2016) in one of the few assessments of the privatizing process and current situation in Mexico, that justified in the provisions mentioned on the paragraph above, in 2010 federal prison authorities approved and directly awarded eight contracts to build and operate prisons. These restrictions to a competitive bidding process and transparency have blocked access to the evaluation and selection criteria and to the terms of the contracts. This report also noted that the federal agency in charge of the prison system has denied in several occasions access to the contracts granted to private enterprises claiming security reasons, for such information is regarded as confidential, issue that “promotes obscurity in contracting-out whilst endorsing a vicious circle in which contractors might finance and promote politicians who favour them [...]” (Documenta/Análisis y Acción para la Justicia Social A.C. et al, 2016: 23-24).

Therefore, derived from security protocols, the files of the awarding process and the resultant contracts are considered restricted and the public has no access to them. This also means that there is limited and insufficient information about the current performance and contractual compliance of private sector prisons.

This significant lack of transparency was recently noted by the Inter-American Commission on Human Rights, as the main independent body of the Organization of American States aimed to guarantee and protect human rights in the Americas. This body published a report on the current situation of human rights in Mexico, after a visit by a special delegation (Inter-American Commission on Human Rights, 2015).

One of the areas assessed by the visiting delegation was the privatisation process, regarded as an area of interest within the Mexican prison system. This body highlighted its concerns about the availability of information on the contracts awarded to companies, issue already raised by NGOs. Moreover, the Commission confirmed its attempt to access information regarding contracts, a request “denied by the Decentralized Administrative Office for Prevention and Rehabilitation on the ground that is considered ‘reserved’” (Inter-American Commission on Human Rights, 2015: 150).

As commented, the absence of transparency in competitive bidding rules, along with the restricted availability of documentation about the contractual terms, are common features of the privatizing process in Mexico. This situation also results in an obstacle to evaluate through empirical research the performance of privately managed prisons, let alone the supporting motives and accountability mechanisms, thus affecting any evaluation about the legitimization of privately managed prisons.

In this particular case, the Managerial domain is the most appropriate for a legitimacy assessment that could take into account particularly the principles suggested in the Contractual dimension. Under these circumstances the rules and procedures of the current procurement legislation are the input in the application of the IMM, and the principles of transparency -as essential element of accountability- and monitoring -through independent bodies-, are legitimating factors of contracted-out imprisonment. The result is that the lack of these basic principles, present in other jurisdictions, weakens the contractual legitimacy of private prisons in Mexico. Further research could also consider others dimensions

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directly related, either within the same domain, specifically the Operational dimension, or from other domains, particularly the Jurisprudential dimension.

However, this assessment must also suggest measures to respond to this contractual legitimization crisis, and principles from other dimensions should be taken into account. In this sense, one of the principles for procedural legitimacy, namely the role of independent inspections is playing a relevant role in the privatisation process in Mexico. To this day, the only reliable information available to researches and NGOs to evaluate operation of private facilities has been provided by independent inspecting bodies.

The National Ombudsman has published a series of inspections and special reports regarding the operation of private prisons. A detailed analysis of the appalling results of these reports and the recommended measures escape this work, for it would require a more profound study; nevertheless, just to mention that in its annual review of the whole prison system in the country, the National Ombudsman rated six private prisons between 6.52 and 7.34 in a 1-10 scale, being 10 the highest. (Comisión Nacional de los Derechos Humanos, 2016a). The same year, derived from inspections, a report made a number of recommendations regarding treatment and conditions in five privately managed centres (Comisión Nacional de los Derechos Humanos, 2016d). Similarly, the National Ombudsman (Comisión Nacional de los Derechos Humanos, 2017) opened an enquiry into allegations of human rights violations, physical abuses, lack of basic conditions and discriminatory practices in a prison which started its operation in 2015.

In sum, after this application of the IMM, the legitimization on contractual terms is questioned, for there is no evidence and reliable information about the motives and background required to manage prisons; also because it has not been made public as to whether corporations managing private prisons have both the resources and expertise; and nothing is known about the evidence companies presented to prove that the management of prisons and the delivery of imprisonment is sound. However, the legitimacy of private prisons in Mexico could be improved by taking into account and meeting the recommendations derived from the independent monitoring and inspecting reports, as one of the main legitimating principles considered on the IMM.

8.7 An atomic conception of legitimacy

While acknowledging the application of the evaluative framework of the legitimacy of prison privatisation in the form of a meta-model, it was vital to examine previous conceptions of legitimacy. A considerable part of this research was dedicated to explore previous studies and definitions of legitimacy.

After reviewing various approaches to this relevant concept, the conclusion is that almost all definitions share common features, like the reference to the rightful and lawful use of power; its public recognition; and its requirement to fulfil specific aims, according to beliefs. However, the notion has been applied in many different ways, with different perspectives in various areas of knowledge and in some- like social theory, procedural justice, penology, and management- receiving more consideration than in others.

Considering this wide array of perceptions from specific disciplines, despite the unitary nature of its substance, legitimacy is a matter that can be fragmented and applied to specific concerns according to a particular domain. It can be said then, that it is a detachable concept which can be split into various components; in other words, it is an 'atomic conceptual approach' to legitimacy that can be studied as a whole when applied to one institution or organisation, thus, providing an integrated perspective of all the factors that legitimize it.

Such 'particles of legitimacy' that create an interconnected network represent different dimensions of the notion and determine the different meanings and applications depending on the issue involved. This was one of the hypothesis of this work, that legitimacy is not exclusive to one particular discipline.

Relevant for this study is the fact that legitimacy is a complex notion and paramount for any institution or organisation; thus, as the result of this research a re-definition of the concept of legitimacy is necessary; one that, for the purpose of assessing private prisons, incorporates different fields of knowledge, reconciling previous conceptions and applying them to this research.

Combining the knowledge produced in this thesis, legitimacy can be defined as '*a requirement for any organisation, particularly when using authority, force or control, in the pursuit of recognized goals, and determined by mutually contributing factors: political suitability, legal authorization, ethical aims, informed ideology, procedural fairness, evidence-based objectives, organisational structure, contractual accountability and operational effectiveness*'.

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This definition is the result of this research and represents its major contribution to the theory of legitimacy, by providing an analytical conception, summing up the main findings of this work, since it constitutes an integrated but divisible notion, which underpins the holistic framework to assess it.

The most relevant and conspicuous feature of this definition is that it represents a *conditio sine qua non* for all organisations but most importantly, for public organisations and even more so for private organisations delivering public services, as they are allowed to use power of any sort in order to fulfil specific legal, expected and agreed goals. Legitimacy is key in any private or public function, in its authorisation, recognition and operation.

Legitimacy is then, both a requisite comprised of various features and a process integrated by different stages that outline the origin, development, and operation of an organisation, which can be evaluated using the IMM resulting from this research. This means that the evaluative framework, along with the definition provided is also a contribution to the theory of legitimacy, particularly, to fill the gap in studies within criminal justice.

8.8 Prison privatisation and the quest for legitimacy: a principled approach

Pondering the contribution of this research aimed to analyse a contentious penal policy and engaged in the debate about prison privatisation, there are some personal observations derived from the outcome of this study.

The set of legitimating factors can be regarded as the source of a more principled approach to privatisation in order to provide a solution to the dilemma of imprisonment entrepreneurship, since from a liberal reforming standpoint, the principles are a blueprint for penal policymaking that pursues humanity, decency and empathy towards inmates.

According to available information –reports, statements and empirical findings–, the operation of private prisons has not met the projected goals, for which they were initially authorized, particularly the delivery of innovative rehabilitative regimes, cost-effectiveness and securing order and safety as means to reduce reoffending. Quite the contrary, violent incidents and disturbances are frequent in privately managed prisons.

The primary legitimization of privatisation requires a re-evaluation, for if they continue to operate without any principled steer, there is the risk they will further deteriorate, weakening its legitimacy in some areas. Meeting the suggested legitimating guidelines, private contractors could be operating fit to the purpose for which they were authorized, and thus achieving principled goals and ensuring the aims of imprisonment.

For private prisons to be perceived as legitimate, in accordance with the IMM, they should be delivering innovative imprisonment, particularly through strengthening family and community bonds. Private corporations have the resources to engage in empirical research to determine the most appropriate regimes, and invest in the rehabilitation or reform of offenders by reinforcing verified and effective programmes and even developing new schemes to secure the goals of imprisonment, and improving its delivery throughout the whole prison system. By doing this, corporations managing prisons could be securing a balance between the public goals of imprisonment and the private economic interest of their shareholders and would be revolutionizing and reforming the prison system.

Nevertheless, this research can be useful in other jurisdictions planning, or already operating privately managed prisons, as a mean to prevent or tackle more firmly failures whilst assessing other principled options to improve the delivery of imprisonment.

Allowing private sector involvement in the prison system should not imply the deregulation of imprisonment, on the contrary, as part of good governance, the regulation of its delivery must be kept in the hands of public governmental bodies that control its operation according to principles, rules and contractual terms, for there is a fundamental connection between corporations' capability to provide the service and the government's responsibility over inmates' welfare.

In the assessment about the legitimacy of private prisons, it is essential to make a distinction between pragmatic justifications and principled goals, since privatisation might achieve effective imprisonment –as the expectation-, but not humane rehabilitation or reform –as its duty-. Inmates' wellbeing should be the utmost legitimating factor of imprisonment, particularly through innovation in training, regimes and conditions, addressing the needs of offenders and society.

There is the danger that by promoting a wider use of imprisonment through the expansion of the prison system punitive populism turns into penal

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authoritarianism, limiting rationality and rationing in its use in modern democracies and a threat to the modern humane use of imprisonment.

This research has been driven to challenge prison privatisation in Mexico, in an attempt to advocate for a principled use of imprisonment, as a step towards the humanization of imprisonment in Mexico, raising awareness about the implications of private sector involvement in the prison system. Particularly, since private prisons contribution to the expansion of the prison system is one of the most significant issues that question its legitimacy.

Nevertheless, principled prison reforming movements might face equal and opposite instrumental government policies; hence the relevance of liberal criminological thinking to address the implications of prison privatisation and challenge claims about better performance of private sector prisons. Reforming groups play a key role in the transformation of private prisons, encouraging humanity and decency.

8.9 Conclusion

In order to propose a new assessing tool, the study started by analysing previous perceptions of legitimacy. To perform this evaluation about the legitimacy of privatisation, a new method is required: one that addresses various areas involved in the private delivery of imprisonment, not focusing in one specific issue, but one that entails a holistic perception of this phenomenon.

The lesson drawn from these straightforward examples of the application of the IMM is that penal policy makers, practitioners and researchers should acknowledge legitimization as utmost in the prison privatisation phenomenon, and thus guarantee that legitimating principles are considered to safeguard and ensure humanity and decency of inmates serving prison sentences in privately managed facilities. These principles, amongst other that could be proposed by further research are essential for a humane governing and operation of private prisons. It is also important to take into account to what extent privation endorses and legitimises penal punitiveness and what are the drives behind privatisation policies that are applied in specific jurisdictions.

This research has endeavoured to raise awareness of the implications of privatisation in different areas, and to help governments and corporations to address fully the issues raised throughout this thesis and even influence reluctant

groups opposing privatisation. It is a template not just to challenge prison privatisation, but also to provide a guideline for the delivery of a more principled penal privatisation policy.

Chapter 9: Conclusion

9.1 Introduction

This concluding chapter presents a brief overview of the contents of the thesis, summarises the findings of this study, and highlights the value of this research and its contribution to the debate through the application of the IMM, while noting the limitations of this work. Resulting from all the previous, prospects for further research are recommended. Finally, this chapter also presents some personal reflections as the outcome of this research.

9.2 Background, rationale and significance of the study

To solve crises in Mexican prisons: of security, of conditions, and of overcrowding resulting from punitive policies, the federal government recommended the expansion of the prison system through private investment, measure that can be considered as a policy transfer from the USA. Without previous significant parliamentary debate and expert consultation, at the time of conclusion of this research, six federal prisons and one state facility are managed by private corporations.

This current approach to imprisonment- and its implications- that entails an extensive and excessive use of prison by securing further capacity requires an urgent evaluation; hence, the motivation of this research, as a mean to raise awareness about the prominence of legitimacy in prison privatisation. To inform all those involved in the process, this research provides an innovative tool, not only to consider a broader set of implications and to re-evaluate the original justifications that supported this policy, but most importantly, to assess the legitimacy of privately managed prisons.

Legitimation is key in the delivery of imprisonment, let alone if it is performed by private contractors. Therefore, this research was justified on its contribution to the privatisation debate by offering a new insight into the legitimation of private prisons. Considering that Mexico does not have the experience to provide the elements to assess the legitimacy of privatisation, this research was mainly supported by literature produced in England and Wales and drawn from the British experience.

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The significance of the research derived from the fact that contracting out of imprisonment requires a multidisciplinary assessment, for there are several issues involved in this policy, both in the process of authorizing it and in the actual operation of private prisons. In this sense, this thesis addressed crucial questions about privatisation of prisons in order to provide a suitable method to evaluate its legitimating processes and, if necessary, to reconsider and re-orientate this policy as part of a principled penal reform.

9.3 Questions and aim of the research

This research was orientated by some core questions. First, it was important to determine if the existing literature has fully addressed the legitimacy of private prisons. Second, given the significance of legitimacy, if this concept can be studied taking a multidisciplinary perspective. Third, whether this multidisciplinary approach to legitimacy can be applied to the case of prison privatisation and fourth, if that multidisciplinary approach can underpin an evaluative framework of the legitimacy of private prisons.

In order to answer such questions, this work set out to: analyse the legitimisation of privatisation in Mexico and in England and Wales; review the existing literature both on legitimacy and on prison privatisation; and recommend and assemble an evaluative theoretical framework for the assessment of the legitimacy of private prisons, both in general as a policy, and in particular, with the application to individual cases.

The aim of this thesis was to offer an alternative for the assessment of the legitimisation of prison privatisation by providing a new theoretical approach to the concept of legitimacy. The ultimate objective was the construction of an Interdisciplinary Multidimensional Meta-model -IMM-, as a sophisticated mechanism to evaluate -by questioning and enhancing- the legitimacy of private prisons.

9.4 Summary of the main findings

Prison privatisation, suggested as a policy aimed to reduce overcrowding and prevent further deterioration and crises is a case of policy transfer from the USA, and policy makers and politicians provided “primary legitimisation” through legislation and regulation both in England and Wales and in Mexico. However, this

sort of legitimacy does not suffice for private prisons must built legitimacy as the result of their authorization, approval and operation.

The operation of privately managed prisons entails the confluence of various concerns related to various disciplines, and despite the vast amount of literature on prison privatisation, the majority of studies, either theoretical or empirical, have focused on one specific concern related to one particular discipline. It is against this background that any evaluation of the legitimacy of prison privatisation must take a holistic integrated approach.

The introductory chapter presented the background and rationale of this research, highlighting the personal motivation, the importance of the topic, the research questions and the criteria behind the selection of particular authors and theories as the source of this thesis. In sum, this section established the need to produce a new mechanism to evaluate the legitimacy of prison privatisation in the form of a theoretical multidisciplinary assessing method as the contribution to the debate and discussion about both legitimacy and private prisons.

In Chapter 2 the process of authorization of private sector involvement in the prison system, both in Mexico and in England and Wales was briefly reviewed. It was noted the lack of expert consultation and further debate in the Mexican case, where the federal government, in a matter of four years allowed the construction and management of two prisons by national corporations with no previous experience in the field. In contrast, contracting out imprisonment in England and Wales was discussed in Parliament after a consultation process, in which the claimed ability to provide better conditions and regimes at lower costs and innovate imprisonment, were the strongest drivers. Additionally, this chapter presented recent developments in the operation of private prisons that questioned the original justifications and, therefore, suggested the need for a re-evaluation of such policy as part of a new stage in the debate about the appropriateness of privatisation.

In Chapter 3, after reviewing various conceptions of legitimacy and examining works specifically applied to the case of prison privatisation, it was found that such concept could be analysed from different angles and different disciplines, despite sharing common features such as the use and recognition of authority to fulfil a specific aim. In other words, legitimacy is an integrated multidisciplinary concept. The relevance of this finding was that any evaluation about the legitimacy of an institution, either public or private, must be thus performed

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considering its multiple manifestations or, as called within this work, its multiple dimensions. For the purpose of this thesis, the relevant dimensions related to prison privatisation were grouped in three main disciplines: Philosophy, Sociology and Management.

Acknowledging the need of this interdisciplinary evaluation of the legitimacy of private sector involvement in the delivery of imprisonment, Chapter 4 highlighted the importance of model building as an appropriate method to assess criminal justice concerns. The modelling of an approach to the legitimacy of prison privatisation was proposed, resulting in the design of an interdisciplinary, multidimensional meta-model comprised of three core models: Philosophical, Sociological and Managerial domain. Three constituents equally comprise each of these three domains, integrating a nine-dimensional meta-model.

The intention of the following three chapters was to expose the concept of legitimacy from different perspectives, addressing theories and research available in the subject and relating them to the particular situation of private prisons, extrapolating principles to support each component.

Chapter 5 was dedicated to describe the contents of the Philosophical domain. The Political dimension, the Jurisprudential dimension and the Ethical dimension integrate this domain. The principles that either provide or question the legitimacy of delegating the delivery of imprisonment within this domain are as follows: the rightful source of authority; the public nature of coercive force; the pursuit of the public and common good; the validity of legislation authorizing this policy; securing justice and equality; the independence of legislature and impartiality of legislative processes; the utility of imprisonment; the duty to secure generality and humanity of punishment; and the public general aims of imprisonment.

The Sociological domain was developed in Chapter 6, assembling the Ideological dimension, the Procedural dimension and the Criminological dimension. Within this Chapter, the principles raised to provide legitimation to private prisons are: a non-biased and objective knowledge about them; truthful communication of the actual situation of the prison system; an accurate perception of the extent of their operation; impartiality and fairness of prison internal procedures; mechanisms to secure order and safety within prisons; the monitoring of humane conditions according to legal provisions; a rational and rationed use of prison; the protection of the humanity of inmates; the promotion of alternatives and the reduce of

imprisonment; and the delivery of expert criminological evidence to support this policy.

The Managerial domain, comprised of the Organisational, Contractual and Operational dimensions was developed as part of Chapter 7, in which the principles suggested to build legitimacy for private corporations managing prisons are: to resemble at least at the minimum the structure and processes of public facilities; to conform and comply to values, beliefs and rules; to fulfil expectations and the public goals of imprisonment; to innovate its delivery; to be accountable in the use of authority and force; to be legally liable in the operation and failures; to secure effective and independent monitoring and auditing; to ensure transparency to a broader set of stakeholders; to perform efficiently, complying with contractual terms; to be cost-effective, validated by appropriate comparative studies; and to be corporate responsible towards rehabilitation and reform and not exclusively to profit making.

Chapter 8 discussed the importance of the IMM arguing that the process of authorizing the delegation of the power to imprison by the State, the approval of private prisons by society -including inmates- and the actual operation of prisons by private corporations must adhere to the principles suggested throughout this thesis, otherwise their legitimacy can be challenged. In this sense, the chapter presented the dilemma of private prisons and the requirement to enter into a new stage on the legitimization debate. This chapter concluded by recommending a principled approach to the issue and its implications in an attempt to reform the prison system. The practical application of the IMM was demonstrated through three indicative examples. Finally, as a contribution to the theory of legitimacy, a definition of the concept was provided, one that comprises the findings and concerns analysed in this work.

9.5 Contribution and practical application of the thesis

From the review of the existing literature about legitimacy it was concluded that the concept required further examination but with a new insight, particularly when related to the assessment of privatisation. The new suggested approach recommended it to be studied from various disciplines that provide specific legitimating factors, amalgamating them into a single theoretical structure that comprises various elements - related to different areas of knowledge- that converge and interconnect with each other: a multidisciplinary approach.

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This thesis contributes to the ongoing debate about prison privatisation from a different approach, for it highlights the importance of a multidisciplinary perspective, which the existing literature has overlooked. Multidisciplinary in the study of the legitimacy of prison privatisation is essential for this policy entails a link between different disciplines, each related to a particular concern either in the process of authorization by the state, the approval by the society and general public or the management and operation by private companies.

In order to develop a multidisciplinary insight to assess the legitimacy of prison privatisation, this work recommended an innovative framework, based on existing theoretical and empirical studies, as a guideline for all those groups involved in this policy to assess, question and even enhance the legitimacy of private prisons. Such original structure was achieved through the assembly of theoretical and empirical scholarship, that based on specific criteria, were selected to extrapolate particular principles underpinning the legitimation of prison privatisation. With this outcome, a gap in existing literature about this policy has been filled.

This thesis advances the theory of legitimacy by exploring previous seminal approaches and suggesting a new perspective -and even a broader definition- of the concept. It also contributes to the literature regarding prison privatisation for it suggests a set of basic principles that must be taken into account in the legitimation of this policy. This research represents a step forward from the standard perspectives to legitimacy, which are indeed very valuable but in the case of prison privatisation were one-sided and a multi and interdisciplinary, more comprehensive study was required.

The value of the Interdisciplinary Multidimensional Model (IMM) resides on its theoretical and practical application in order to provide relevant and objective information which can be used to inform policymakers, academics, practitioners, and private firms about the factors that can either legitimize or weaken the legitimation of privately managed prisons, through a re-evaluation of its implications, in order to take the appropriate measures, so this policy is implemented according to the guiding principles.

The input of this research to a new stage of the debate about privatisation also lies in the fact that it provides a comprehensive analysis regarding the legitimation of private prisons based on the English experience, to draw lessons that can influence the decision making process and improve the current situation of the prison system in Mexico.

This research serves as a policymaking parameter to evaluate legitimacy of private prisons not only in theoretical terms but, as it was demonstrated, with a practical application both in general and also on individual cases.

As briefly demonstrated in Chapter 8, the IMM has numerous practical applications as an evaluative tool to address questions related to legitimacy, by applying the whole structure of the model or -if it is more appropriate- one particular domain in the assessment of this policy as such; or even one specific dimension or a combination of dimensions with one guiding dimension to evaluate the legitimacy of a specific concern.

Since it is highly unlikely that the process of privatising prisons will cease, this study serves as a guideline for policymakers, politicians and groups committed to a reforming humane agenda of imprisonment by raising awareness of the implications of contracting out prisons. In sum, this thesis provides a framework for strategic legitimation for: policymakers and legislatures with a guiding framework to pursue legitimacy; practitioners with a cluster of standards that legitimate their work within the prison system; corporations managing prisons with an inventory of operational benchmarks to enhance the legitimacy of their involvement; academics with a new theoretical perspective about the concept of legitimacy; the general public with an understanding about the meaning of legitimacy of private prisons; and finally, inmates and their families to be aware of the significance of securing compliance to guidelines and standards in the private delivery of imprisonment.

An additional contribution of this research and the IMM is that it serves to challenge any public or private institution with the principles that sustain legitimacy and provides a guideline for public enquiries or academic research. The development of this new theoretical approach to the concept of legitimacy, can function to examine not only privately managed prisons, but also any other institution or organisation, public or private, that entails the use of power and authority and requires legitimation. Even more so if it relates to a public service or good to be privatised. Here lies the policy value of this work, that provides policymakers, politicians and practitioners with an array of interconnected factors underpinning legitimacy.

Regardless the limitations of this research, this thesis does contribute to the debate, by setting the grounds for new stage. As shown, the authorization of contracting out imprisonment is regularly justified on the alleged ability of private

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corporations to innovate and improve the delivery of punishment and as an urgent measure to reduce overcrowding and provide better conditions and regimes. However, the lack of conclusive results about better performance, cost-savings and innovative regimes, but particularly, after the recent developments, incidents and disturbances within prisons managed by the private sector highlighted throughout this thesis, the grounds that supported privatisation have to be examined again to re-evaluate private sector involvement in the prison system in terms of actual performance and outcomes, and not only deriving from the primary legitimisation.

In sum, the value of this research lies in its contribution to both theory and policy about the legitimisation of privately managed prisons, for it offers an evaluative framework with practical applications to ponder legitimacy in order to take the appropriate steps to ensure the aims of imprisonment and re-shape the future of privatisation according to humane standards.

9.6 Limitations of the research

Notwithstanding the importance of the findings of this work and despite the practical applications of this research, as presented in the previous Chapter, there are limitations that must be acknowledged.

Firstly, in the construction of the IMM some choices were made in relation to the selection of authors, theories and perspectives. The sources are limited and other perspectives might challenge the principles supporting the framework. More authors and scholars have addressed the topic of legitimacy than those considered in this work; nevertheless, as has been previously stated, the selection of authors responded to specific criteria.

A second limitation is the fact that the IMM is theoretical in its nature, since no direct empirical research was performed to support the principles claimed as underpinning each dimension. This methodology is not a quantitative model but still can be used as the grounds for further empirical research and practical application. The application of models in all disciplines, including criminal justice topics, since models are regularly regarded as purely empirical- either qualitative or quantitative- data.

Considering how the IMM was assembled, its practical application might be limited by cultural, legal and economic differences in other jurisdictions and

operational variations between private prisons, since each corporation has its own ethos.

Finally, it must be acknowledged that there might be other areas related to legitimacy that were not included in the IMM.

9.7 Prospects for further research

Although this thesis contributes to the debate about private prisons and their legitimization, its limitations provide, at the same time, opportunities to pursue further research. Particularly since, as stated throughout the work, each dimension could be supported by empirical research and its results can strengthen and underpin with evidence some of claims presented in this work.

This research is an archetype for future works, specifically a blueprint of future approaches to legitimacy in order to continue with the development of each dimension and the study of prison privatisation, by acknowledging that legitimacy is an essential- and multidisciplinary- component.

In this sense, future works could also focus on determining new dimensions to be added to the IMM. Obviously, as a legitimization guiding framework, future research can relate to strengthen specific constituents of the model. For instance, by doing research about the legislative process of authorizing private prisons, the influence of lobbying groups, the role of the public in the decision-making process, costs comparison between prisons within the suggested terms; but most importantly, about the actual achievements and results of private sector prisons in rehabilitating or reforming inmates and the resulting reoffending rates.

Particularly after the incidents and disturbances within some private sector prisons in England and Wales, some other areas of further research could be implemented to study the current mechanisms that can provide legitimization in specific areas, particularly by protecting inmates from the misuse and abuse of coercive force. In addition, research could also be performed to propose instruments, both legal and economic, to ensure that public goals of imprisonment prevail over private profit interests or even to present innovative rehabilitation regimes as means to legitimate private prisons, ensuring compliance and enhancement.

Finally, a further area of research consist of a comparative study of one- or more- legitimating factors of private prisons in different countries.

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