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The Private Prison Controversy and the Privatization Continuum

Daphne Barak-Erez*

*Tel Aviv University, barakerz@post.tau.ac.il

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Abstract

Imprisonment calls into question the institutionalized violence of the state and its organs. It touches on the very core of the meaning of state sovereignty and concerns one of the most disempowered groups of society: indicted criminals. Therefore, privatization of prisons signals the willingness to apply privatization policies almost with no limitations. Private prisons have become a known phenomenon in many countries. After the debate on this issue seemed to lose its pragmatic value—in contrast to its importance on the theoretical level—privatization of prisons reemerged as an issue of legal debate due to the Israeli Supreme Court decision that declared a law authorizing the establishment of a private prison unconstitutional.

The following analysis evaluates this decision using it as a microcosm for studying the role of law in regulating privatization policies. The Article starts by studying the full range of privatization policies, in order to offer an analysis that would be relevant also to other cases along the privatization spectrum. It then challenges the traditional premise of public law that the move to privatization is merely a matter of policy and not of law. More concretely, the Article offers an analysis based upon distinguishing among three distinct spheres of discussion: the boundaries of privatization, the privatization process, and the regulation of privatized actions. This model of analysis is then applied to the case-study of prison privatization as decided by the Israeli Supreme Court.

KEYWORDS: Israeli Supreme Court decision, private prisons, privatization policies, boundaries of privatization, privatization process, regulation of privatized functions

*Daphne Barak-Erez, Professor of Law and Stewart and Judy Colton Chair of Law and Security, Faculty of Law, Tel-Aviv University. The Article draws on earlier writings in this area that did not specifically discuss the example of prison privatization, see Daphne Barak-Erez, *The Privatization Continuum*, in *PRIVATE SECURITY, PUBLIC ORDER* 71 (Simon Chesterman & Angelina Fisher eds., 2009); Daphne Barak-Erez, *Three Questions of Privatization*, in *COMPARATIVE ADMINISTRATIVE LAW* 493 (Susan Rose-Ackerman & Peter Lindseth eds., 2010). I thank Moshe Cohen-Eliya for his comments and Naomi Scheinerman for her assistance.

INTRODUCTION

Imprisonment calls into question the institutionalized violence of the state and its organs. It touches on the very core of the meaning of state sovereignty and concerns one of the most disempowered groups of society: indicted criminals. Therefore, privatization of prisons signals the willingness to apply privatization policies almost with no limitations. Indeed, at this stage, private prisons have become a known phenomenon in many countries. However, this fact alone does not prove that they are not controversial. After the debate on this issue seemed to lose its pragmatic value (in contrast to its important theoretical level) privatization of prisons re-emerged as an issue of legal debate due to the new decision of the Israeli Supreme Court that declared a law authorizing the establishment of a private prison unconstitutional.¹

The following analysis evaluates this decision using it as a microcosm for studying the role of law in regulating privatization policies. Although it is important to acknowledge the special traits of the privatization of prisons, it should be examined against the background of privatization policies at large. The focus on the special concerns raised by the privatization of prisons should not obscure the broader questions regarding privatization initiatives: What are the appropriate limits of privatization in general and which forms of regulation should accompany privatization initiatives? Accordingly, this Article seeks to address the complete privatization spectrum and not merely its extreme end. An understanding of the legal regulation of the privatization spectrum will enable us to better address extreme cases of privatization such as the privatization of prisons. The Article hence offers an analysis of the prison privatization case-study, as decided by the Israeli Supreme Court, in light of this broader perspective.

The traditional starting-point for discussing challenges posed by privatization used to be that the decision to privatize is a matter of policy, not of law. More concretely, this perception of privatization has promoted an underlying assumption of “constitutional neutrality” regarding any decision to privatize.

Against this background of constitutional indifference, privatization policies in many countries have even encroached upon areas of traditional government action, such as the operation of prisons and policing (by guards hired by private

¹ HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. The Minister of Finance [Nov. 19, 2009] (unpublished), an English translation is available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf [hereinafter *Private Prison case or the Decision*].

contractors). An even newer phenomenon is the trend of privatization in the area of military actions.²

The framework used here for thinking about the phenomenon of privatization is based upon studying the legal implications of decisions to privatize in three phases, each questioning this decision from another angle. The first question considers the boundaries of privatization: Does privatization have limitations based upon the type of the activities or powers being privatized? The second question relates to the administrative process of privatization: What are the constraints on the implementation of privatization decisions (for example, is there a duty to set a privatization policy before proceeding with a concrete privatization initiative, or is there a duty to disclose information regarding privatization initiatives)? The third question refers to the outcomes of privatization and its regulation: Which legal regime should apply to privatized activities, and will privatized activities be subject to special regulation or special duties?

More concretely, the Article presents the manner in which the three questions of privatization are relevant for understanding the questionable aspects of the private prison initiative. Formally speaking, the *Private Prison* case focused on the first question which addresses the boundaries of privatization, and stopped there. However, in fact, the initiative failed to also satisfy the other two questions in a manner that probably had bearing on the final result.

Following the Introduction, Part I sets the background for discussion by locating the privatization of prisons within the broader context of privatization policies. Parts II, III, and IV analyze the initiative to establish a private prison in a manner that dedicates each part for one of the three questions described: Part II looks into the boundaries of privatization; Part III discusses the decision-making process that superseded the privatization initiative; Part IV discusses the problems associated with regulating a private prison. The Conclusion evaluates the implications of the decision in this case for the future of other privatization initiatives.

I. THE PRIVATIZATION CONTINUUM

In order to fully evaluate the meaning and implications of the privatization of prisons, it is important to start by examining the spectrum of privatization policies. In general, privatization as a legal phenomenon should be understood as encompassing any policy that reduces governmental involvement in economic and social life.³ This broad definition includes different forms of government policy

² See PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS (Simon Chesterman & Angelina Fisher eds., 2009).

³ See also Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 6 (1988).

and government action or lack thereof. In some cases, privatization policies entail the complete withdrawal of government from activities in areas in which market forces are considered more efficient than centralized intervention. In other cases, privatization is manifested only in the contracting out of operational aspects of governmental activity, while government retains public responsibility privatized activity. In yet additional cases, privatization is the shift from the universal, free provision of public services to a more market-oriented provision of services, a government service that entails price tags. Awareness and understanding of the different manifestations of the phenomenon of privatization is crucial for addressing it properly. The central features of privatization are usually the following: an increased role of private entities in the operation of social and economic activities; intensive collaboration between public authorities and private entities; and the application of private-market logic to the authorities' activities.

Drawing upon the experience of several systems, it is possible to identify at least ten basic types of privatization:

(1) *Companies established by the government for the promotion of business activities*: Government-established companies that conduct businesslike activity and operate autonomously from government bureaucracy should be considered a type of privatization.⁴ In these cases, the government is still highly involved in economic life, but its involvement is limited to the use of private law mechanisms.

(2) *Sale of government assets*: The policy of selling government assets, especially state-owned companies, is one of the better-known manifestations of privatization.⁵

(3) *Long-term lease of public lands*: This type exists only in countries, such as Israel, that retain public ownership of land.⁶

(4) *Outsourcing of government activities to private contractors*: Privatization through outsourcing is currently a major feature of privatization. This type of privatization began with the transfer of technical activities to private contractors in such areas as construction, garbage collection, school bussing, and computer services. In time, contracting with external entities gradually expanded to matters

⁴ In Israel, for example, a government company has to be guided by economic considerations (unless it is specifically directed otherwise by the government). See Government Companies Law 1975, SH No. 5735, p. 132, s. 4 (Isr.).

⁵ See, e.g., Dawn Raines, *Privatization of Telecommunications in Latin America*, 48 ADMIN. L. REV. 479 (1996).

⁶ In Israel 93% of the land are owned by either the state or other public bodies and leased to private parties. In practice, lands are leased for very long periods in a manner that gives the public lessees "de-facto" ownership. Accordingly, even when land is not owned by private parties, it is used also for commercial purposes in manners similar to the use of private land.

while technical by definition have also discretionary elements, such as collection services. The next stage featured the transference of governmental functions that included a significant amount of discretion private entities, such as in the cases of the operation of welfare-to-work programs and the establishment of privately owned and operated prisons. This type of privatization has the potential to indirectly influence public service, as in the case of privatizing the training of public service professionals.

(5) *Construction of public infrastructures by private investors*: A unique form of contracting with private entities centres on constructing new infrastructures by private entrepreneurs, who undertake not only to execute the construction work, but also to invest in and operate them through the appointment of special concessions once they have been constructed. In this context, government collaboration with private entrepreneurs stems mainly from a desire to secure private funding for constructing the infrastructures at the initial stage. Concession-owners, who bear the costs of the project, ensure a profitable return on their investment through the long-term administration of the project during which they charge a fee for its use. In the framework of this model, known as Build-Operate-Transfer (BOT), the private investor builds the infrastructure at his own expense; operates it over an extended period of time, as agreed with him in advance; and, in the end, transfers ownership or control of the infrastructure to the state.⁷

(6) *Licensing and concessions*: The expansion of private activity at the expense of government actions has also been enabled by government policies that advocate the granting of licenses to private service providers. Accordingly, in the area of education, for example, privatization is manifested in the licensing of new private schools and universities (thus partially avoiding the need to establish more public schools and public universities). In the area of telecommunications, privatization is promoted when the governments refrain from taking upon themselves to provide new services such as cellular telephones, but rather grant licenses to operate them.

(7) *Privatization through omission: constricted governmental activity*: The state's contribution to the privatization of certain activities may be the result of government—and other public authorities'—failure to act effectively in that area, thereby making room for and perhaps necessitating private initiatives. Education and health initiatives illustrate this particular process. Thus, for example, when the education system provides less hours or lowers the quality of teaching services more parents opt for private education.⁸ Similarly, when a public health service is

⁷ See, e.g., Laura A Malinsky, *Rebuilding with Broken Tools: Build-Operate-Transfer Law in Vietnam*, 14 BERKELEY J. INT'L L. 438 (1996).

⁸ For a discussion of the opting-out problem, see Clayton P Gillette, *Opting out of Public Provision*, 73 DENVER U. L. REV. 1185 (1996).

inadequate or requires waiting for extended periods of time, opting for a private health service becomes more desirable.

(8) *Services for a fee*: Privatization of government activities also occurs when the relevant agency continues to provide the same activities but begins to charge a fee for services it previously supplied gratis (a growing phenomenon in various public venues such as museums and parks). As noted above, sometimes this phenomenon is combined with the transfer of an area of activity from government to a company the government controls and operates as a closed budgetary unit based on business profit considerations. However, privatization of this type can also be effected through direct fees collected by the agencies themselves.

(9) *Voucher systems*: Government may choose to provide services by subsidizing the purchase of these services from public suppliers (such as private schools or private health care providers).⁹

(10) *Cooperation with third-sector bodies*: Another type of privatization is the institutionalized collaboration between the state and third-sector non-governmental organizations (NGOs) for the purpose of performing various functions in areas such as welfare and education.¹⁰

Recognizing this variety of privatization policies is highly relevant for the analysis of the *Private Prison* case. First, the privatized prison controversy necessitates distinguishing between some of the privatization types mentioned. Typically, private prisons do not originate from public prisons that were sold to private investors, but rather from a BOT initiative (as was the case in Israel) or from some other licensing regime that allows for the operation of a private prison (licensed and regulated). More specifically, the prison initiative, which was at the focus of the analysis, did not concern a public prison designed to merely outsource specific services (such as prisoners' food supply), but rather a fully private enterprise (regulated and supervised by the state). Second, it is important to distinguish between privatization policies which directly affect only those who decide to use the new options they allow (by choosing to use the toll road or attend a private school using a voucher) and other privatization types that impose private services, even on non-interested individuals and thus raise additional questions regarding the protection of the rights of the recipients of these services. The private prison initiative was clearly included in the latter group of privatization policies.

⁹ Michael J Trebilcock, Ronald J Daniels, & Malcolm Thorburn, *Government by Voucher*, 80 BOSTON U. L. REV. 205 (2000); Klint Alexander & Kern Alexander, *Vouchers and the Privatization of American Education: Justifying Racial Resegregation from Brown to Zelman*, U. ILL. L. REV. 1131 (2004).

¹⁰ See Martha Minow, *Partners, Not Rivals?: Redrawing the Lines between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 BOSTON U. L. REV. 1061 (2000).

II. BOUNDARIES OF PRIVATIZATION

As noted earlier, the traditional premise of public law has been that the choice of activities proposed for privatization is a matter of policy and not of law. This premise was directly attacked in the *Private Prison* case. Indeed, it is indisputable that privatization decisions are an expression of policy and, typically, should not be transferred from the political arena to the legal sphere. However, it is necessary to challenge this assumption and acknowledge that it, too, has limits.

The question of the boundaries of privatization should be addressed using two levels of analyses: institution-based and rights-based. The institution-based analysis asks whether there are certain activities that cannot be privatized because they are an integral part of the state. The rights-based analysis asks whether operation of the privatized function infringes upon fundamental rights of individuals who receive the privatized services or are subject to them.

A. INSTITUTIONAL ANALYSIS

Establishing the boundaries of privatization from the institution-based perspective is a difficult task because there is no universally recognized definition of the core activities of the state. There is a wide range of views and interpretations of this matter, beginning with the “night-watchman” conception of the state—primarily a protector of personal safety¹¹—to rich notions of a developed welfare state. Within this wide spectrum exists a plethora of approaches: identification of the state with the use of violent force, with activities that signify sovereignty, or with the supply of public goods, to mention only a few options.

Difficulty in formulating a relevant legal stance also stems from the different understandings of the function that are being privatized. For example, in the area of education, advocates of privatization insist that instruction and educational services can, and should, be supplied by private entities under state supervision because they perceive education as a product that should be available in, and hence improved by, the free market.¹² In contrast, those opposing privatization emphasize the spirit

¹¹ See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1992).

¹² Milton Friedman, who espoused the application of free-market principles in education as well, proposed an action outline for running private education as follows:

Governments could require a minimum level of schooling financed by giving parents vouchers redeemable for a specified maximum sum per child per year if spent on ‘approved’ educational services. Parents would then be free to spend this sum and any additional sum they themselves provided on purchasing educational services from an ‘approved’ institution of their own choice. The educational services could be rendered by private enterprises

of education, asserting that the values of equal and democratic civil education can only be cultivated by public schools, and are as such likely to be eroded when supplied by private entities, even under state supervision.¹³ Accordingly, given the relatively diverse traditions regarding state functions, that are only carried out by the state, the definition of core government functions that cannot be privatized (in the sense of being performed by private contractors) under any conditions would be relatively narrow (and hence the majority of privatization initiatives will not be constitutionally precluded).

Even constitutional provisions that seem to preclude privatization of certain government activities may in fact allow their partial privatization. For example, Section 87a of the German Basic Law states that “[t]he Federation shall establish Armed Forces for purposes of defence. Their numerical strength and general organizational structure must be shown in the budget.”¹⁴ This provision may fairly be interpreted as barring the possibility of privatizing the army as such,¹⁵ but it does not imply anything concrete about the army contracting with private actors for

operated for profit, or by non-profit institutions. The role of the government would be limited to insuring that the schools met certain minimum standards, such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to insure that they maintain minimum sanitary standards.

MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 89 (1962).

¹³ Realization of the civic-democratic objectives of education is contingent on the way in which schools are run. This includes the way in which integration is achieved in schools, not only in its formal aspect of accepting students into the school, but also at the ongoing administrative level, for example, the distribution of students into different classes and learning groups. See AMY GUTMANN, *DEMOCRATIC EDUCATION* 66 (1987). Under this approach, education is in itself a social objective, and therefore state intervention cannot be limited to the prevention of harm or fraud with regard to the quality of the service provided, in contrast to Friedman’s example of state regulation of restaurants. As Gutmann explains:

[t]he analogy implies that our common educational standards consist only of preventing schools from physically harming children or fraudulently claiming to educate them. Were our public interest in regulating schools as analogous to our interest in regulating restaurants as Friedman suggests, it would be hard to explain why we should subsidize schooling for every child. A necessary condition for justifying public subsidy of schools—but not of restaurants—is the fact that citizens have an important and common interest in educating future citizens.

Id. at 67.

¹⁴ GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGB (Ger.).

¹⁵ In a similar manner, under Israeli law, “[n]o armed force other than the Defence Army of Israel shall be established or maintained except under Law.” Israeli Basic Law: The Army, SH No. 806 p. 154, s.6 (Isr.).

specific purposes, such as: training, purchasing services and goods, and more. It is a common feature of constitutional texts that they include provisions defining the main branches of government—the executive, the legislature and the judiciary—and these provisions may be interpreted as implying that it would not be possible to allow a complete privatization of these functions (for example, the American Constitution probably implies that Article III courts cannot be privatized,¹⁶ and that the power to legislate cannot be delegated to private professionals).¹⁷ At the same time, these general provisions do not define the scope of the executive functions (for example, should government guarantee the provision of education through a public education system, or can it also rely upon this provision by private schools).

It is clear that such an argument may be made only with regard to some “core” activities and not with regard to many other matters that are at the centre of current privatization initiatives, e.g., education, health, and welfare. Moreover, defining the “core” of executive actions poses the risk of indirectly legitimizing the privatization of all remaining functions that do not fall within the definition’s scope. At any rate, in Israel, it was not too late to raise the institutional argument against the proposal to establish a private prison, due to the lack of prior examples of private prisons operating in the country.¹⁸

More specifically, the petitioners argued that Section 1 of Basic Law: The Government—which states that “[t]he Government is the executive authority of the State”¹⁹—should be interpreted as mandating government to operate itself functions considered “core” executive powers. The petitioners went on and argued that this core includes the operation of prisons, a matter directly connected to the enforcement of criminal law, one of the most significant traits of sovereignty. Eventually, however, the Supreme Court refrained from formally deciding this argument, since most justices were of the opinion that the private prison initiative

¹⁶ It is interesting to note that despite Milton Friedman’s capitalistic approach, which espouses minimal state intervention in social and economic life, under his view one of the prominent functions of the state is to define and interpret property rights. He claims that coordinating economic activity through a free exchange is based on the premise that we have ensured, through the government, “maintenance of law and order to prevent coercion of one individual by another, the enforcement of contracts voluntarily entered into, the definition of the meaning of property rights, the interpretation and enforcement of such rights, and the provision of a monetary framework.” FRIEDMAN, *supra* note 12, at 27. This view implies that there should be limitations on the possibility of privatizing judicial functions.

¹⁷ It is possible that the non-delegation doctrine would apply here.

¹⁸ For an overview of the history of the privatization of prisons in the United States, see Martin E. Gold, *The Privatization of Prisons*, 28 URBAN LAWYER 359 (1996). The privatization of prisons is based on the distinction between the allocation of punishment (in the judicial process), which is not privatized, and its administration, which may be privatized.

¹⁹ Basic Law: The Government, SH No. 1396, p. 214, s. 1 (Isr.).

would infringe upon fundamental rights of the prisoners (and preferred to base their judgment on this alternative argumentation).

President Beinisch, who wrote the main majority opinion, stated that Section 1 of Basic Law: The Government “is essentially a declarative section that is intended to establish in principle the role of the government in the Israeli constitutional system. There is therefore a difficulty in using it as a basis for arguments against the constitutionality of the privatization of various government services.”²⁰ Nevertheless, she added that

we are inclined to interpret the provision of section 1 of the Basic Law: The Government in a manner that enshrines on a constitutional level the existence of a ‘hard core’ of sovereign powers that the government as the executive branch is liable to exercise itself and that it may not transfer or delegate to private enterprises,

and even commented that “the powers involved in the imprisonment of offenders and in the use of organized force on behalf of the state are indeed included within this ‘hard core’.”²¹

Justice Hayut agreed that it was difficult to base the prohibition against privatization of prisons upon such a general and abstract provision as Section 1 of Basic Law: The Government and made reference to another principle of Israeli constitutional law that recognizes the possibility of invalidating laws (in rare cases) based upon the “basic principles” of the legal system. She also preferred, however, to avoid deciding this matter explaining that this additional route of judicial review (based on basic principles) should be only used, even according to its supporters, “when the law in question shakes the basic foundations of the whole constitutional and democratic system and threatens to destroy it.”²² The institutional question was not addressed by the other majority justices.

Justice Levy—who authored the minority opinion and opposed judicial intervention at this early stage—when the private prison was not yet operating, criticized the majority decision for accepting the petition without ruling on its institutional aspects.²³ He then opined that both Section 1 of Basic Law: The Government and the basic principles of the legal system could not serve as a basis for invalidating the private prison initiative.²⁴

²⁰ *Private Prison* case, *supra* note 1, opinion of President Beinisch, para. 63.

²¹ *Id.*

²² *Id.* opinion of Justice Hayut, para. 3.

²³ *Id.* opinion of Justice Levy, para 11.

²⁴ *Id.* opinion of Justice Levy, para 17.

This decision exemplifies both the potential ingrained in institutional constitutional review of privatization initiatives and its limitations. First, drawing the line and defining “core” government functions is a difficult task that necessitates adoption of a firm view in political philosophy. In the context of Israeli constitutional law, it would not have been enough to state that a privatization initiative violated the constitutional duty of government to act as the “executive authority” with regard to “core” government functions. If this case, the Court would be expected to assess whether this violation met the constitutional standard for doing so—if it were done for a “worthy cause” and followed the proportionality test.²⁵ Second, a decision on “core” functions that cannot be privatized would imply that most functions at the center of privatization policies—in welfare, education and medical services—would not be included in this core.

However, from a realist perspective, as I explain below, the Israeli Supreme Court in fact accepted the view that the operation of prisons is part of the core functions of the state that cannot be privatized. Justifications offered by most majority justices implied this conclusion.

B. RIGHTS-BASED ANALYSIS

From the perspective of rights-based analysis, the question should be whether the privatization initiative is liable to cause infringements upon the fundamental rights of recipients of privatized services or those subjected to privatized functions. This question was very much the focus of the litigation since the privatization of enforcement and punishment powers has clear potential to infringe upon rights of prospective prisoners.

Indeed, the arguments focusing on the rights of prisoners—the right to liberty and the right to human dignity—served as the main basis of the decision in the *Private Prison* case.²⁶ However, these rights were analyzed from a relatively

²⁵ These criteria, that were set by Section 8 of Basic Law: Human Dignity and Liberty, also were applied to other basic laws that do not specifically refer to them. *See* E.A. 92/03 Mofaz v. The Chair of the Central Elections Committee, 57(3) PD 793 [2003] (Isr.).

²⁶ It is worth adding that in other contexts, privatization may have an effect on the realization of social rights. For example, privatization that entails charging fees for certain social services is likely to have ramifications for social rights in systems that recognize such rights. Thus, it will be necessary to examine whether the privatization of services in the area of health or education is conducted in a way that guarantees universal access to those services and prevents discrimination. At the same time, it is clear that not every privatization of a social service will necessarily result in a constitutional violation (as in circumstances in which the service is supplied by a private entity but through state funding or subsidization). There are also “mixed” examples in which the potential for infringement of rights involves both a civil rights aspect and a social rights aspect. This is the case

surprising angle. Whereas the traditional concern regarding prisoners' rights vis-à-vis privatized prisons is that they would suffer harm due to the franchiser's tendency to be led by his pecuniary interests coupled with the lack of satisfactory inspection by the state, the leading opinion focused upon the symbolic implications of imprisonment by one's fellow men, rather than by the state. With regard to the right of liberty, Beinisch, explained, that

[a]ccording to the basic principles of modern political philosophy, the violation of the right to personal liberty resulting from giving a private enterprise the power to deny liberty within the context of the enforcement of criminal law derives *ipso facto* from the fact that the state is giving that party one of its most basic and invasive powers, and by doing so the exercise of that power loses a significant part of its legitimacy.²⁷

Following that, with regard to the right to human dignity, President Beinisch stated that

the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls.²⁸

In other words, the basis for the decision, to which most of the justices agreed, was not the probability of de-facto infringement of prisoners' rights, as expressed in their daily lives, but rather the Court's negative normative judgment regarding the meaning of transferring powers that limit liberty to private actors operating to promote their economic interests.²⁹ According to this argumentation, the development of supervision mechanisms for the operation of private prisons could not suffice as an appropriate answer to the problem.

when the police wish to charge demonstrators for the expenses of policing their demonstration. *See* HCJ 2557/05 Majority Headquarters v. The Israeli Police [Dec. 12. 2006] (unpublished).

²⁷ *Private Prison* case, *supra* note 1, opinion of President Beinisch, para. 22.

²⁸ *Id.* para. 36.

²⁹ The opinion by President Beinisch earned the full concurrence of Justices Arbel, Rivlin, Naor, Hayut, and Joubran who all chose to author opinions but fully accepted the main holdings of the President. Justice Grunis concurred, but preferred to base his judgment only on the argument regarding the infringement of the right to liberty. In contrast, Justice Procaccia based her decision on the probability of de facto infringement of the rights of prisoners, when the power of imprisonment is operated by private actors who are motivated by profit, as explained later. Interestingly, Justice Levy, in the minority, was willing to admit that transferring the function of imprisonment to private actors infringes upon the liberty and human dignity of the prisoners, but resisted in deciding at this preliminary stage that this infringement is disproportionate.

It is fair to note that although the justices refrained from directly deciding the question of ‘core’ executive functions, their view that the very idea of operating imprisonment functions by private actors infringes rights implies that they considered these functions to be part of this core.

Among the majority justices, only Justice Procaccia held a different view. For her, the issue was not the symbolic meaning of the operation of the private prison by private contractors. She based her decision to accept the petition upon the estimated high probability of infringements of prisoners’ rights once subjected to a contractor who is motivated to increase his revenues. According to Justice Procaccia

[w]hen sovereign coercive authority is exercised in a manner that violates core human rights—including the rights to liberty and dignity—a real concern arises that transferring it to a private enterprise will result in disproportionate harm to the individual, which may make such a transfer illegitimate.³⁰

The other majority justices were reluctant to base their judgment on this reasoning. They stated that the concern regarding the effect of private interests on prisoners’ actual conditions was speculative at that point, before the private prison started to operate. This reluctance may be questioned, taking into consideration that legal decisions are often based on likelihood and probabilities (especially in the context of legal rules on conflicts of interest). At any rate, Justice Procaccia’s reasoning is important for future cases discussing areas not subject to *a-priori* reservation regarding the decision to privatize.

As noted, Justice Levy in the minority opinion, rejected judicial intervention at that preliminary stage, before the operation of the prison has started. He was willing to agree that symbolically the operation of a private prison entails an infringement of the rights to liberty and human dignity but argued that these infringements are outweighed by the potential for improving current conditions in prisons. As for the possibility of grave infringements on the ground, he concurred that these should be confronted, when necessary, by criticism (and petitions) if materialized.³¹

III. THE DECISION-MAKING PROCESS ON PRIVATIZATION

The *Private Prison* case was decided on the preliminary, and quite rare, basis of the constitutional boundaries of privatization. As such, it did not address secondary

³⁰ *Private Prison* case, *supra* note 1, opinion of Justice Procaccia, para. 20.

³¹ According to Justice Levy: “time will tell,” see *Private Prison* case, *supra* note 1, opinion of Justice Levy, para. 11.

issues that only arise when the privatization initiative is deemed constitutionally legitimate. However, in order to offer a complete picture of the legal challenges of privatization it is also important to formulate, in general terms, the additional steps that would become relevant in other cases and which may shed additional light even on the case at hand.

The process by which the decision to privatize is made is of great importance—for achieving transparency and public discourse in these matters. Therefore, it is vital to develop legal doctrines that aim to guarantee broad participation and public access to relevant information about privatization initiatives.³² In other words, it is necessary to consider whether the decision-making process that led to the decision to privatize took into account ramifications regarding the quality of services provided to the public as well as enabled public scrutiny in general.

Traditionally, the discussion around decisions to privatize often focused on the competition facet, i.e., decisions were not aimed to benefit government cronies. From this perspective, rules of bidding and contracting proved to be important. In contrast, the current discussion calls for scrutiny of the process that led to the preliminary decision to privatize as opposed to only evaluating the implementation of the decision to privatize in a fair and equal manner vis-à-vis other potential competitors for the privatization deal. The procedural concerns that should be addressed include the requirement to ground privatization decisions in a pre-formulated policy, public participation, and freedom of information (regarding the details of the privatization initiative).

First, it is necessary to recognize an administrative duty to formulate its privatization policy before promoting a specific privatization initiative. Thus, for example, government must create a policy regarding the transfer of public schools to private management before entering into contract with a private education network for the privatization of a specific school. The duty to formulate a policy on privatization shifts the focus from the question of the state's "minimum" functions, to a duty to justify the change (even when the state continues to provide the required minimum).

Second, it is important to ensure public participation in the decision-making process that leads to privatization. This additional requirement is consistent with the general trend toward reinforcing the democratic dimensions of the administrative process. In order to guarantee meaningful participation, privatization initiatives should be publicized well in advance of their execution in order to enable the

³² For public participation in administrative decision-making, see, e.g. Stewart Richard B., *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975); William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADM. L. REV. 171 (2009).

submission of comments and objections. It is important to stress that public participation in the formal stage of rule-making does not suffice when privatization is conducted by contracting out. In this context, many significant details are not set within the framework of a statute or regulations, but rather in the contract with the private entity (and perhaps even in the tender that preceded it). Therefore, in addition to guaranteeing meaningful participation, the tender and proposed contract must also be publicized properly, because at least some terms are likely to include matters of public significance (for example, the terms that define the living conditions of the inmates and the quality of experience and professional background of their guards). Participation in the substantive sense must be based on information. Thus, democratization of privatization initiatives must entail full disclosure of the details of the contractual relationship with the private contractor (both the terms of the proposed contract and the terms of the contract as finalized), or at least guaranteed access to them (through freedom of information legislation). Revealing the details of the contract to the public is vital also to allow the assessment of the consideration offered in exchange for the public assets as well as to monitor the execution of the contract by the private party (for example, whether the contractor meets the standards set in the contract regarding the services it supplies to the public).

Providing the public with information regarding privatization must be conducted both actively—through publications initiated by government—and passively—in response to specific requests for the disclosure of information. In practice, government may be reluctant to disclose the details of their contracts with private entities, principally in order to protect the trade secrets of their contracting party or confidential public information (for example, the details of the security system in a private prison the disclosure of which could threaten public safety and human rights). In the majority of cases, however, the details of the contract with the private entity must be open to public scrutiny in order to facilitate public debate and supervision over the privatization initiative. The presumption should always favor disclosing the contracting details, and therefore, when government seeks to prevent disclosure it should be required to provide detailed reasoning supporting its position. Indeed, transparency is also the accepted norm in the commercial world with respect to transactions involving a broad public interest, such as those in the stock market. Thus, in a similar vein, transparency should also prevail in the context of privatization.

It is interesting to point out that the issue of participation and information rights is one of the hidden aspects of the *Private Prison* case. First, when the government initiated the tender for the private prison it failed to disclose the terms of this tender to the public and even actively resisted their disclosure. When the Association for Civil Rights in Israel (ACRI) requested their disclosure it was asked to purchase the tender documents for a substantial price (the price demanded from

potential bidders). It only received permission to read part of the documents. ACRI had to petition the courts and only after lengthy litigation was its request accepted in essence.³³ Second, the law that authorized the private prison initiative was hastily enacted without any due public discourse. Only after the petition against this initiative was filed did public discourse ensue; the respondents even requested that the Court refrain from deciding it for a while in order to allow further public deliberation on the matter.³⁴

IV. THE REGULATION OF PRIVATIZED FUNCTIONS AND ACTIVITIES

Finally, the regulation and supervision of privatized bodies and functions is of paramount importance because it addresses the ongoing operation of activities that have undergone privatization. Assuming that notwithstanding the privatization controversy considerable areas of public activity will eventually be privatized, their long-term regulation is crucial.³⁵ This regulation should set the standards for the operation of the privatized activities. The potential for criminal sanctions³⁶ and tort actions³⁷ in cases of grave infringements of rights is important but does not suffice. The regulation of privatized activities should take various forms, such as direct application of constitutional duties, statutory regulation, and regulation through conditions included in privatization tenders and privatization contracts.

When private actors function as de-facto substitutes of government in the fulfilment of important public functions, they should be subject to duties similar to those that would apply to government had it conducted the same activities. The doctrinal way to achieve this goal may vary among legal systems in accordance with their views with respect to the application of constitutional principles to private actors.

³³ See A.P. (Tel Aviv) 2898/04 Association for Civil Rights in Israel v. The Ministry of Finance [Mar. 24, 2005] (unpublished) and A.A. 3637/05 Association for Civil Rights in Israel v. The Ministry of Finance [Dec. 19, 2005] (unpublished).

³⁴ The Supreme Court was indeed willing to give the parties additional time in order to facilitate public discourse. See HCJ 2605/05 Academic Center for Law and Business, Human Rights Division v. The Minister of Finance [Aug. 31, 2006] (unpublished).

³⁵ For an argument in favor of focusing on the supervision over privatized bodies in the American context, see Minow, *supra* note 10.

³⁶ An interesting question in the context of criminal law is whether employees of private corporations who execute public functions should be considered subject to the special offenses that have traditionally applied only to public officials (such as bribery).

³⁷ For an action for infringement of rights in the context of a privatized prison, see Richardson v. McKnight, 521 U.S. 399 (1997). In this case, the U.S. Supreme Court declined to apply to employees of a private prison the qualified immunity that would have been applicable in similar circumstances in the context of a government prison.

In the U.S. context, the way to achieve this goal would be to use the state action doctrine that also applies to private actors performing traditional government functions or working in close connection with it.³⁸ The problem with using this specific doctrine is its relatively narrow interpretation in case law that enables its application only regarding a relatively small core of government activities. This narrow interpretation would not pose a barrier to the application of constitutional standards to private actors performing traditional military functions, but unfortunately this would not be the case (in the U.S.) with regard to many other privatization endeavours.

In contrast, in Israel, the conclusion that a private prison should be subject to duties similar to those applying to government would be easy to arrive at based upon the doctrine of “hybrid” bodies.³⁹ The boundaries of this doctrine, as developed in case law, are also far from clear, but existing precedents allow determining that a private prison would be considered a “hybrid” body, and thus, subject to public law duties. At the same time, applying this principle to an active private prison would not fully guarantee prisoners’ rights in an effective manner since case law mainly focuses only on broad concepts such as the duty to act fairly and without discrimination. Therefore, as is explained below, legislation must regulate contracting details with the private service provider and the specific contract must also detail specific service conditions.

The regulation of privatized initiatives has to address the following issues:

First, it should apply also to decision-making processes within the privatized bodies regarding such matters as granting the right to a hearing (to those dependent on the decisions of the privatized body), and the right to receive information (in order to enable public debate on the operations of the privatized body).⁴⁰ An important factor to consider here is that privatized activities may be operated by large corporations not subject to domestic control. It is likely that such corporations will not be mindful of public criticism (which does not affect their revenues) unless obliged to conduct decision-making processes based upon disclosure and participation rights (or exposed to effective competition).

³⁸ Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

³⁹ Daphne Barak-Erez, *Civil Rights in the Privatized State: A Comparative View*, 28 ANGLO-AM. L. REV. 503 (1999).

⁴⁰ In other contexts, such as the privatization of utilities, the content of the regulation may have other focuses, for example an emphasis on equal access and universal provision. See Toni Prosser, *Public Service Law: Privatization's Unexpected Offspring*, 63 L. & CONT. PROB. 63 (2000).

Second, the privatization contract should play a role in the regulation of the privatized activity. It is important to define the duties of the private entity (especially with regard to the protection of human rights) in the privatization contract. For example, the privatization contract should include provisions regulating equal access to the privatized services as well as the due process rights of the service recipients. In some cases, the privatization contract should also create a supervision mechanism for prices charged by the private entity.⁴¹

Third, the efforts invested in the preparation of the regulation scheme may expose the difficulties in guaranteeing effective supervision, and can even lead to a reconsideration of the preliminary decision to privatize.

Fourth, it is highly important to regulate the compensation that would be paid to the private contractor if and when government decides to terminate the contract. This aspect of the contract is crucial since the prospect of paying significant compensation in the event of withdrawal from the privatization initiative may prevent government from taking this action, even once it has established that the initiative did not achieve its policy goals or has led to other unwanted consequences.⁴²

The regulation aspects of privatization initiatives shed additional light on the deliberations in the *Private Prison* case surrounding concerns whether the conditions of a prison enable effective external supervision.⁴³ It is difficult to conceive effective modes of control with regard to actions that are conducted on a daily basis vis-à-vis other individuals and which involve a high degree of discretion and immediacy (such as policing or the administration of imprisonment).⁴⁴ In fact, this was Justice Procaccia's reason for basing her opinion on the likelihood of actual infringements upon prisoners' rights. Justice Procaccia added in this regard that

⁴¹ Indeed, in many instances, the privatization endeavour is intended to release the government from the need to operate in the area of price setting, and to transfer this process to the market. However, there are privatized activities that relate to areas in which there is no market (or at least not a sophisticated market). Furthermore, it is important to guarantee the supply of vital services even for those who cannot afford to pay.

⁴² In principle, privatization contracts in this area provide for a step-in right for the state. However, the government may be deterred from relying on this provision if the expected scope of compensation to the private concession holder is excessive.

⁴³ On the aspect of supervision as a condition of the constitutionality of a privatization initiative, see Gillian E Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

⁴⁴ A noteworthy example in this context is the failure of the American authorities to supervise the administration of the Abu Ghraib prison facility in Iraq, which was operated by a private contractor. See Steven L Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549 (2005).

[t]he existence of state supervision over the manner in which the coercive authority is exercised by the private enterprise may to some extent diminish the potential for harming the individual, but it cannot materially reduce the extent of the violation inherent therein. Such supervision is mainly an umbrella supervision, which extends over the whole system and has difficulty in encompassing, before the event, the whole scope of the routine actions of the party exercising the power, which are carried out continually. A supervisory mechanism, by its very nature, reacts only after the occurrence of an unconstitutional violation of human rights and focuses on the general normative aspect of the activity, as distinct from ordinary everyday activity, which presents the great danger of harm to the individual. By privatizing the exercise of sovereign coercive authority, the discretion to exercise this authority is given to the private enterprise, even if the general guidelines and policy guidelines are laid down by the sovereign supervisory body. State supervision does not provide a proper solution to the dilemma involved in privatizing a power to exercise sovereign coercive authority, nor does it materially reduce the potential for harm to the individual that is likely to result from such a privatization.⁴⁵

As explained earlier, this was not the rationale that guided most of the majority justices who instead, emphasized broader normative reservations regarding the idea of a private prison. However, this position is expected to be highly important for future cases.

Indeed, occasionally, market mechanisms also contribute to monitoring the quality of privatized services. For example, the ability to choose between private health service providers may serve as a barrier against the deterioration of their quality. However, in many cases, market failures may limit the effectiveness of competition (e.g., when recipients are not well-informed). At any rate, the lack of choice is certainly a source for concern, and in this context, it is important to remember that a privatized prison is, by definition, a privatized project that does not allow the right to exit, in all possible senses.

V. CONCLUSION

Privatization will continue to be a central phenomenon in the functioning of many governments around the world. This reality necessitates rethinking constitutional and administrative law beyond the mere adjustment of specific rules and doctrines. The *Private Prison* case of the Israeli Supreme Court is an invitation to do that.

⁴⁵ *Private Prison* case, *supra* note 1, opinion of Justice Procaccia, para 21.

The approach proposed here for this endeavour is based upon posing three questions, and thus distinguishing among three distinct spheres of discussion: the boundaries of privatization, the privatization process, and the regulation of privatized actions. The importance of distinguishing between these spheres is exemplified by the Israeli Supreme Court decision which ruled that the decision to establish a private prison was unconstitutional. Formally speaking, the decision touched only on the first of these questions: the boundaries question. However, the development of the private prison initiative, as well as previous legal questions it involved, reveal the significance of all three. Moreover, the concerns this initiative gave rise to form the other two perspectives—the process perspective and the regulation perspective—that may serve as additional justification for the result.

In fact, the *Private Prison* case represents the layer of analysis that will probably be less common in future jurisprudence. The Court's decision makes clear that it does not change the basic premise that drawing the boundaries of privatization will usually remain a policy question and, accordingly, that constitutional review in this area will be secured only for the most extreme cases. Therefore, the importance of the decision lies mainly in establishing the principle that privatization initiatives should be subjected to legal regulation—also from a public law perspective (and not only from a business perspective). It does not derive from the practical impact of the decision on most future privatizations. It is even possible to argue that those supporting privatization policies can be now reassured that the Court will not intervene in most cases. In a similar manner, those opposing these policies cannot assume that the decision will serve as a safeguard against most privatizations. Privatization in areas such as education and health, for example, will not satisfy the criteria for intervention posed by the court. Against this background, the two other layers of analysis emerge as even more important from a pragmatic perspective—most privatization initiatives will be deemed constitutional but they still must be the result of open decision-making processes and should be subject to regulation that will safeguard service recipients' rights.