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Philosophical Objections to Prison Privatization

Israeli Supreme Court strikes down privatization statute on "liberty" and "dignity" grounds

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November 26, 2013

This month is the fourth anniversary of an important date in privatization history. On November 19, 2009, in *Academic Center of Law and Business, Human Rights Division v. Minister of Finance*, the Israeli Supreme Court struck down a statute passed by the Knesset (the Israeli parliament) allowing for private prisons.

This opinion is interesting for Americans for a number of reasons. First, it held private prisons unconstitutional based on the most general of constitutional provisions, the rights to "liberty" and "dignity," and based on very high-level political theory—rather than predictions about how the different sectors might violate inmates' rights, which one would expect in the U.S. constitutional tradition. Second, the decision is part of an emerging series of recent rulings by foreign courts on private delegations of coercive power (see my October 2013 post about a decision by the German constitutional court). Third, the Israeli Supreme Court enjoys substantial respect in comparative constitutional law circles worldwide, so there's a possibility that similar reasoning will spread to other countries.

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In 2004, the Knesset adopted the Prisons Ordinance Amendment Law ("Amendment 28"), which would have established a single prison operated and managed by a private corporation. Amendment 28 gave the private operator mostly the same powers that are held by the Israel Prison Service—with various exceptions, such as (among others) the authority to make transfer orders, extend an isolation period, and confiscate possessions. It also gave prison security guards the same powers as those of prison officers of the Israel Prison Service, also with some exceptions. The private operator and its employees were made subject to the same legal norms that apply to the officers of the Israel Prison Service, including the general body of administrative law. And the statute also provided for various monitoring mechanisms, which the Israeli Supreme Court characterized as "apparently more comprehensive than the supervisory mechanisms that exist in other countries where private prisons operate in a similar format."

Amendment 28 was challenged as violating the Israeli constitution.

First, a word about the Israeli constitution. Israel, which had been governed under a British mandate since right after World War I, declared its independence in 1948. A constituent assembly convened in 1949 but failed to reach agreement on a constitution. Instead, the constituent assembly became a parliament (the Knesset) and adopted a plan to draft a number of piecemeal "Basic Laws" dealing with separate subjects. Thus, a number of Basic Laws were adopted between 1958 and 2001, dealing with the functioning of the Knesset, the economy, the military, the status of Jerusalem, the judiciary, and the like. At first, Basic Laws

could be overridden by ordinary legislation, but in the 1990s, Chief Justice Aharon Barak staged a "constitutional revolution," declaring that Basic Laws would function as a constitution and be supreme over ordinary legislation. This has been the constitutional regime in Israel for almost 20 years.

The Israeli Supreme Court ruled that Amendment 28 violated "the constitutional rights to personal liberty and human dignity of inmates who are supposed to serve their sentence in that prison." These rights derive from the "Basic Law: Human Dignity and Liberty," adopted in 1992. The Basic Law: Human Dignity and Liberty is extremely short; it fits on a single page. The main constitutional texts relevant to this case are the following: "One may not harm the life, body or dignity of a person," and "A person's liberty shall not be denied or restricted by imprisonment, arrest, extradition, or in any other way." These rights aren't absolute: the Basic Law also provides (in a "limitations clause") that "[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." (A terminological note: in Israeli constitutional law, one speaks of a rights violation that is nonetheless justified, whereas in U.S. constitutional law, one would instead say that a justified rights violation is no violation at all. Thus, incarceration itself is called a justified violation of liberty rights in Israeli but not in U.S. terminology. But this is just a difference in labeling.)

Before proceeding to examine the liberty and dignity claims, the Court clarified that it wasn't going to strike down the law based on the concern that there would be more rights violations in the private sector. While these concerns were "not unfounded," the Court stated that there was "no certainty that [the violations would] occur" and (citing me, among others) that "the comparative figures [derived from the experience of privatization in other countries, including the United States, were] not unambiguous." Because these concerns related to future violations, they probably weren't a sufficient reason for striking down a law before implementation. The Court therefore proceeded on the assumption that the protection of inmates' rights would be identical in the two sectors.

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First, the Court analyzed the liberty right. In the Court's view, "the question whether the party denying the liberty is acting first and foremost in order to further the public interest . . . or whether that party is mainly motivated by a private interest is a critical question." Making inmates "subservient to a private enterprise that is motivated by economic considerations . . . is an independent violation [of the right to personal liberty] that is additional to the violation caused by the actual imprisonment under lock and key." In fact:

> the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right . . . when the entity . . . is a government authority that is not motivated by those considerations, even if the term of imprisonment . . . is identical and even if the violation of . . . human rights that actually takes place . . . is identical.

Throughout the opinion, the Court drew a strong distinction between the Israel Prison Service and the prison firm. The Israel Prison Service is a "bod[y] that answer[s] to," "receives its orders from," "is subordinate to," "acts through" and "by and on behalf of," and is a "competent organ[] of" the state or the government or the executive branch—which, in turn, is "the representative of the public." The prison firm, on the other hand, is "an interested capitalist" and "a private interest," "a party that is motivated first and foremost by economic considerations—considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes." Justice Arbel, in a separate opinion, similarly wrote that the private firm is "an outsider that is not a party to the social contract . . . and does not necessarily seek to realize its goals" and that its "main purpose is *by definition* the pursuit of profit."

But the Court's analysis suffers from at least two weaknesses. First, why can't a private firm receive its orders from, be subordinate to, act through, and be a competent organ of the state? And second, all employees, even public employees, "profit" from their employment, in that they don't work for free and presumably they're earning more than the bare minimum that was required to get them to accept the job. Why is a contractor's profit any different? In other words, why are a corporation's purposes necessarily private while public employees' purposes aren't?

The Court's opinion does note a few tangible, non-question-begging differences between the Israel Prison Service and private firms, but these differences are hardly central to the argument. Nor do they succeed in distinguishing public and private prisons as a philosophical matter.

First, the opinion says, the head of the public agency is appointed by the government. But the private prison firm is also chosen by someone in the government. And most public employees, like private employees, aren't politically appointed or democratically elected. In any event, it's not clear what difference these various selection mechanisms make apart from the empirical question of how people behave in the different sectors.

Second, the public agency is "subject to the laws and norms that apply to anyone who acts through the organs of the state and also to the civil service ethos in the broad sense of this term," which "significantly reduc[es] the danger that the considerable power given to those bodies will be abused." Perhaps Justice Arbel was getting at something similar when she alluded to the private firm's not being "bound by the norms inherent" in the social contract, though it's hard to say. Certainly she stressed practical concerns like directness of supervision, though she didn't rely on them.

But this is an argument against unaccountability, not against privatization as such. One can imagine private prisons that are subject to the norms of state actors; certainly, the private prison in this case was subject to a lot of state-actor norms. Moreover, that the "civil service ethos" is a stronger force against abuse in the public sector than possible competitive or other market or contractual forces in the private sector is a contested empirical question, which is in tension with the majority's stated intention to not rest its decision on possible future violations.

Third, Justice Arbel notes that the private firm "is chosen and operates on the basis of its ability to maximize income and minimize expenditure." But prison firms needn't be chosen on a low-bid basis. And efficient management, at least in the sense of not spending more than one's budget, is valued in the public sector as well.

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The Court's alternative holding was that private prisons violate the separate constitutional right to human dignity. The idea of private purposes again made an appearance there, but the flavor was slightly different:

> There is . . . an inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose *de facto* turns the prisoners into a means whereby the corporation . . . makes a financial profit. . . . [T]he 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.

The Court noted that this claim did not depend on the inmate's "subjective feelings"; being a means to a private firm's profit-making is "an objective violation of [one's] constitutional right to human dignity."

But the Court went further than a mere private purposes argument. Private prisons, it said, also violate human

dignity because of "the social and symbolic significance of imprisonment in a privately managed prison." Because there is a "social consensus" that private prisons "express disrespect," the practice violates human dignity—"irrespective of the empirical data . . . (which may be the source of the symbolic significance), and irrespective of the specific intention of the party carrying out an act of that type in specific circumstances." Private imprisonment "expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise."

This aspect of the Court's analysis can also be questioned. On the one hand, the idea of social consensus isn't totally irrelevant as such. To take a hypothetical: Suppose public and private provision are not only indistinguishable as to their tangible consequences (such as the extent of rights violations) but also also indistinguishable morally under a proper philosophical analysis. But suppose that a large majority in society wrongly considers public provision to be legitimate and private provision to be illegitimate. The existence of this social consensus (though without foundation) may be a sufficient argument for public provision, since institutions believed to be legitimate might make members of society (in or out of prison) happier, which is a valid concern under a number of political-philosophy frameworks (utilitarianism, among others).

Still, this supposed social consensus shouldn't count for everything. In the first place, the existence of such a consensus was merely asserted, not proved. In the second place, the idea that privatization necessarily expresses a divestment of the state's responsibility is belied by the government's own view, which was that privatization could simultaneously improve conditions (for instance by relieving overcrowding) and reduce costs—a view that (whether or not it's correct) is espoused by many prison privatization advocates, including the Reason Foundation. In the third place, the Court's holding implies a strong view that, in this area, *prison conditions don't matter*: regardless how well inmates will be treated under privatization relative to public provision, a social consensus otherwise is enough to establish a violation of the inmates' dignity. One wonders who—the government or the Court—is taking its "responsibility for the fate of the inmates" more seriously.

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Recall that a law could still authorize a violation of constitutional rights if it were "befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." Under the last clause, the Court applied a proportionality test and concluded that—taking the government's claims of quality improvement and cost savings at face value—the claimed benefits couldn't justify the damage to liberty and dignity (which are "in the 'hard core' of human rights") resulting from the very existence of a for-profit prison.

The Court wasn't impressed by the various accountability mechanisms, reasoning that these were introduced not to improve the lot of prisoners as such, but rather to mitigate the profit-motivated abuses that would be introduced by privatization. On the other hand, the Court did stress that its conclusion was heavily influenced by the character of Israeli society and the social consensus regarding the role of the state and the social meaning of privatization; it noted that the same analysis might not apply in the U.S. and UK, which have a long history of private operation of prisons.

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The Israeli opinion is interesting both for what it might portend in other countries and as an example of the sort of high-level political-theory reasoning about privatization that seems foreign to the U.S. constitutional tradition.

Prison litigation is important in the U.S., but always in terms of instrumental concerns like the constitutional rights of prisoners and the accountability of prison authorities. Private prisons are considered state actors in the U.S., so public and private prisoners have all the same constitutional rights. (Which isn't to say they

always have the same remedies: see my May 2013 *Annual Privatization Report* piece on the tort liability of federal private prisons.) Thus, one can always claim that prisoners are suffering cruel and unusual punishment as a result of bad prison conditions, or aren't being afforded due process, or are being denied their First Amendment rights to freedom of speech or free exercise of religion; if conditions are worse at private prisons, then presumably private prisons will lose cases more often, but the public or private status of the prison typically doesn't enter into the argument directly.

How different our approach is from that of the Israeli court, which explicitly held, based on the most brief and general text, that private purposes and social meaning made prison privatization invalid, *regardless of the effect on inmates*. Though a philosophical discussion of the legitimacy of the privatization of force is always welcome, the Israeli court's approach relies heavily on conclusory assertions about public and private motives and purposes. The court doesn't seriously consider the deep similarity between public and private employees, who after all are just people under a contract of some sort with the government, both agreeing to do the state's bidding for money and neither necessarily sharing the public purposes that justify incarceration as a philosophical matter. The type of contract matters, but because different contracts have different incentives and lead to different actions, not because one kind is "the state acting" and the other kind isn't. (I discuss the issue further here.) As a result, the court's approach is interesting but ultimately disappointing.

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