PRIVATIZATION OF CORRECTIONS: PRIVATE PRISON CONTROVERSY AND THE PRIVATIZATION CONTINUUM

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I. Introduction

Imprisonment calls into question the institutionalized violence of State and its organs. It touches on the very core of the meaning of State sovereignty and concerns for one of the most disempowered groups of society, i.e., 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. It will be suggested through this paper, that the democratic functioning, unlike the market, is an arena for explicitly articulating, criticizing, and conforming preferences and the same needs to be preserved through constitutional means. Privatization weakens this public space—the space for information, deliberation, and most importantly accountability. These are elements of democracy whose value is not reducible to efficiency.

Imprisonment also reflects a justified institutional violence of the State. When the framers wrote our Constitution, the nation's market places were largely local, personal, simple and as a result significantly accountable to the people directly affected.[1] Modern facilities of technological advancement were relatively benign. They had no means to foresee, and consequently did not provide for, marketplaces that would become national or even international—impersonal and complex. They had no premonition of technologies—too arcane to be understood by all but narrow specialties, and so volatile that each one has the capacity to menace a vast population if not all human life sometimes with little public awareness of peril.[2] In modern times, with the changing aspirations, the very Constitution, which was a *potpourri* of future, looking aspirations for transformation, has been picturesquely re-written.[3] How one would assist self,

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1 G. Austin, The Indian Constitution: Cornerstone of a Nation (Clarendon Press, Berkeley, 1966) p. 28. Austin states "The Constitution makers, therefore made themselves clear, that the constitution must be democratic, there was no return to the Indian precedent of a despot with his durbar, nor would the Assembly have Europe's tota litarianisms or the Soviet system."

2 *See* Morton Mintz and Jerry S. Cohen, Power, Inc.: Public and Private Rulers and how to make them Accountable (The Viking Press, New York, 1976).

for any understanding of original (founding framers) constitutional choices and subsequent constitutional developments in the language of economic rationality is what this paper explores. The article argues as to why State, as a constitutional entity must retain the power to enforce criminal law.

II. The Privatization Continuum

The traditional starting-point for discussing any challenges posed by privatization used to be that the decision to privatize is a matter of policy, not of law. Further, the perception of privatization has promoted an underlying assumption of constitutional neutrality regarding any decision to privatize. Since roman republic to modern democracy the dichotomy between private and public property has remained an issue for controversy, for long, and yet to be clarified. Romans have both private as well as public properties, where the later plays an important part in Roman economic system.[4] In India, the public domain comprises of very large area of land, resources and much of it after the introduction of new economic policy has been transferred to private players (on lease as well as on complete transfer) for exploitation of such natural resources.[5] Likewise, today in almost all other countries some considerable amounts of resources are devoted for governmental use, and it is thorough which government of the day generates income. Initial acquisition of resources was done through conquest and accordingly declared such conquered resource to be the public property of the new or existing sovereign. Such a method on one side increases resources (land, money etc.) for the sovereign on the other side decreases few resources too (men, money etc.). Later on new methods of acquisition were developed, and the most effective one was with the introduction of legal procedures for transfer of private/individual property into the hands of government, only later to be transferred back to selective private organizations/individual.[6] It was this legal device/devices, adopted for such taking of property by the state, to be known as expropriation, eminent domain, confiscation, nationalization and socialization.

Confiscation of property/goods by the public authorities has since past been used extensively as a mode of punishment for crime. Today, what we see in this field of law related to expropriation of common public property, that the

3 Prakash Sharma, Prison Privatization: Exploring the Possibilities in India (Mohan Law House, Delhi, 2017) p. 153.

4 F.A. Mann, "Outlines of a History of Expropriation", 75 Law Quarterly Review 188-219 (1959). Justice as a principle for regulating society was propounded by Rawls, *see* John Rawls, A theory of Justice (Harvard University Press, Cambridge, 1971).

5 *See,* Fritz Schulz, Principles of Roman Law (Clarendon Press, Oxford, 1936) p. 161.

6 Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America (Hindustan Law Book Company, Calcutta, 1994) pp. 380-82.

use of public property is transferred on market. Justification for such a step raises some serious issues of justice in both domestic as well international policy making processes. The initial process of taking property for public use was never been questioned as such, which since its true realization caused massive uproar and challenge to the authority of State in taking private individual property for larger common good. Grotius remarked "for the common good the king has right of property over the possessions of individuals greater than that of the individual owner."[7] Expropriation was a method of solving the problem of harmonizing the interests of society with those of the owner, since it's the very idea of property to make peace with the society. Ever since, no law was formed as to deny, governmental power to expropriate, though specific provisions in the Constitution were encrypted for adequate/reasonable (though both appears misnomer in present scenario, but this was the basic idea) compensation by the government while taking any private property under the guise of public purpose.[8] Any taking of property should have been limited to the extent that it should provide general benefit to the public.

In India large scale of expropriations of agricultural, industrial, and business properties have occurred in connection with social revolutions (a false claim, since it didn't reap the desired result, but in fact benefited the ones against whom such revolution took place) which backfired the socialist thinking of benefitting all, since it benefitted neither all nor the ones whose property was taken in the name of public purpose, as such confiscations of property took place without payment of any indemnity. In the course of such social transformation, the rights, in theory though granted to the citizens, which was told that they did not posses prior to such revolution, the citizens were later compensated for the loss of property rights in a limited way only.[9] In this regard, even the United Nations General Assembly adopted a resolution in 1962 entitled *Permanent Sovereignty over Natural Resources*, it reads:[10]

> Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.

[7] *See,* Iain Hampsher-Monk, The History of Modern Political Thought (Blackwell, Oxford, 1992). Also *see,* US Supreme Court decision in *Kohl* v. *United States*, 91 US 367 (1875), which declares right of eminent domain as the offspring of political necessity and is inseparable from sovereignty, unless denied to it by its fundamental law.

[8] James Delong, Property Matters (Simon and Schuster, New York, 1997).

[9] To countries like India, such a situation caused massive problem for the State, in a sense that, the wealth appropriated by the State belonged to relatively small segment of the huge population, and the financial resources available for compensation were seriously restricted. *See*, Amartya Sen, Identity and Violence: The Illusion of Destiny (Penguin Books Co., London, 2006).

[10] The General Assembly adopted resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources"on 14 December 1962.

There appears a common consensus across the world which indicates clearly that the standards of expropriation enunciated by developed market economies, for acquiring public property (indirectly and legally) has a backing of States.[11] These principles are allegedly, in accordance with the fundamental notions of Justice and fair dealing and it is this fair dealing principle which was given much more importance, in a sense that it secures no severe loss for business enterprises, due to any social events, for whose occurrence they were not directly responsible (may be indirectly).[12] India continues to face situations: (a) where conditions and wages of workers, taking into account the general social and economic situation, substandard and indefensible, while corporations derive exorbitant profits from such practices; (b) Multinationals continuously exercise improper pressures on the government resulting in measures greatly detrimental to the interest of people (the supposed sovereign). Does such a situation bring justice for the one who had/will/does suffer(s/ed)?[13] The experiences connected with the problem of justice are of non-sensory character, since they are not perceptions of data given by five senses of human beings. Justice therefore, is a phenomenon of intellectual, intuitive, or emotive nature, but nevertheless real and describable.

III. Constitutional Limits to Privatization

In 2010, Israeli Apex court struck down legislation pertaining to privatization of prison administration.[14] Chief Justice Aharon Barak of Israeli Apex court staged a *constitutional revolution*, declaring that basic laws would

[11] Constitution of India, Article 31A, 31C and 39 (b) (c). In this regard Law Commission Report on Land Acquisition Act would be interesting, which says "The power of the Sovereign to take private property for public use and the consequent right of the owner for compensation are well established" which however is debatable as to the say for compensation is concerned it remains doubtful as what would constitute a just, fair and reasonable *compensation*.Further, the reports says "A critical examination of the various stages of evolution of this power will serve no useful purpose as the power has become firmly established in all civilised countries."See 10th Law Commission Report (Ministry of Law, New Delhi, 1958) p. 1.

[12] *See* Upendra Baxi, Liberty and Corruption: The antulay Case and Beyond (Eastern Book Company, Lucknow, 1999).

[13] Hans Kelsen, What is Justice (University of California Press, Berkeley, 1958).

[14] *The Academic Centre for Law and Business* v. *Minister of Finance* (November 19, 2009 HCJ 2605/05), The Human Rights Division). An English translation is *available at*: http://eIyonl.court.gov.il. files_eng/05/050/026/n39/05026050.n39.pdf. (Last accessed on 16 May, 2017). The Court's decision to invalidate this legislation is interesting, as it stipulates that

function as a Constitution and be supreme over ordinary legislation.[15] This historic decision, which is equivalent of the United States famous case *Marbury* v. *Madison*[16] puts basic laws on the top and established the practice of judicial review of statutes. What this meant was that the Israeli Apex court which over the years has declared the eleven basic laws drafted over some 45 years a Constitution, has granted itself the power to strike down new legislation which contradicted any basic law. Furthermore, this case goes beyond the general argument, raised by many academicians as to the constraints against delegating essential governmental powers to private entities and developed more logical and practical answer as to the issue concerning transfer of essential State's functions into the hands of private players. The Israeli Apex court ruled that executing governmental powers by a prison staff employed by a for-profit setup, will violate prisoner's basic rights to liberty and human dignity, rather than dwelling into the argument of prohibiting the privatization of core governmental powers.

A. Argument of abuse of power

Among many arguments produced through justices, the use of unjustified force by a private body employing governmental powers which poses an unavoidable risk, in short *risk of abuse of power*, sounds more justifiable. Indeed, such use of force is subject to a constraint, which relies on the fact that power holders aim as an institution is to promote the social interest rather than the private interest, the democratic legitimacy for the use of force, which relies on the fact that organized force exercised by and on behalf of the state is what causes the violation of basic rights. Where such force is not exercised by the competent organs of the state, in accordance with the powers given to them and in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy, and it would constitute an

despite the popularity of this practice in the democratic world, privatization is unconstitutional per se, irrespective of its specific characteristics or expected outcome. The eight to one decision is based on two main factors. The first, presented by two of the justices, is that a private entity employing governmental powers poses an unavoidable risk of an unjustified use of force. According to this view, the very "culture"of for-profit organizations would create a risk of an abuse of power. This risk is sufficiently high to classify the privatization as an infringement of prisoners rights not to be subject to an unjustified use of force or otherwise humiliating treatment by the prison shards. While this is a consequentialist approach, as it points to the privatization expected outcome, the Court's analysis is profoundly non-empirical, but rather one that is based on axiomatic assumptions about the outcomes of privatization. The second reason, supported by all eight Justices of the majority, stipulates that an inmate is entitled not to be subject to the use of coercive measures by employees of a private, for Profit Corporation. According to this view, the very act of implementing incarceration powers by employees of a private entity infringes upon the inmates rights to liberty and human dignity. This recognition of "right against privatization"is the central novelty of the Israeli Supreme Court's decision.

[15] *Academic Centre of law and Business, Human Rights Division* v. *Minister of Finance* 2009.

[16] 5 US 137 (1803).

improper and arbitrary use of violence.[17] There is a drawback of such argument; the use of force (even by the State) if not done within the parameters of constitutional norms also renders the whole power as unconstitutional.[18] It does happen on a continuous basis in India, especially by State, and judiciary often has been the last saviour in this regard. But, here the constitutional guarantee of fundamental rights are available to such infringement of basic rights, caused by State or agencies authorized by State; in a similar situation the act if done by a private entity, would not call for the enforcement of writs, since any infringement of basic rights by a private entity would not cover prerequisites mentioned under Article 13 of the Indian Constitution,[19] and therefore would not hold private entity constitutionally accountable to higher courts, although a measure of civil or criminal petition is available, which will take years to settle. Therefore, the risk remains high on transferring governmental powers to private entities (though formed on the basis of axiomatic assumptions about the outcomes of privatization). The simple reason is that corporations in order to cut costs, or labour expenses or social securities for its personnel, which will leave inmates at the mercy of unscreened, untrained, understaffed and unpaid employees (much of the points hold good in Indian prison and police conditions, though public in nature). Any liberal democracy considers only a legitimate form of punishment, where inmates are entitled to enjoy some minimal living conditions with justified use of force by prison personnel. It is but obvious that any contractors purpose for attaining operation of government function would be to obtain maximum profits, hence this would likely result in an abuse of prisoner's rights to human dignity.

B. Inmates right to liberty and human dignity

The second argument raised by the Israeli Apex court, stipulates that an inmate is entitled not to be subject to the use of coercive measures by the employees of private corporations. This argument generates wider outcomes and covers issues concerning fields other than just law. The view held by the judges was that the very fact of implementation of incarceration powers by the

[17] In the words of President Beinisch, "The Court stated that a person's right to liberty is infringed not only by the criminal court's decision to imprison that person, but also by the execution of this decision. Justice Procaccia states, "The exercise of coercive authority by a party that is not the state which violates core human rights, necessarily does not enjoy the confidence and acceptance and lacks social, moral and constitutional legitimacy", *see,supra* n. 15,para 25.

[18] Any betterment if can be done should not be tested on the popular legitimacy basis, rather it should be seen from the point of view of the person whom it would be ultimately tested upon. Inhuman condition, with degrading state of living behind bars calls for better argument then to raise an argument of popular legitimacy. *See,* Alexander Volokh, *The Tale of Two Systems-Cost, Quality, and Accountability in Private Prisons*, 115(7) Harv. L. Rev. 1841,1872 (2002).

[19] Article 13, Constitution of India, 1950.

employees of a private agency would infringe upon the inmates rights to liberty and human dignity. Legally speaking, both governments in India and in Israel are well within the powers of their respective executive branch to implement any policies with respect to privatization.[20] Provided, procedural requirements to prevent corruption and ensure efficiency has to be taken care of by the private entity, which in a way does not impose limitations on the government's power to privatize State-owned corporations. The same holds true for the delegation of powers to the private individuals. Both Indian as well as Israeli Constitution doesn't include any explicit provision on limiting the powers of Parliament. Many a times in India, executive branch of government has delegated governmental powers to private entities even without explicit legislative authorization.[21] The legitimacy of such privatization was subject only to the process based requirements like setting of sufficient guidelines by a relevant public authority, steps taken to prevent conflicts of interests in the specific context and implementation of supervisory powers.[22] Similar is the position of United States which does not define specific functions as either properly or exclusively those of the government, rather employs the due process clause, for protection against uncontrolled discretionary power, and requires the private body to be guided by rules promulgated by governmental agencies which is subject to review by a public body.

In Israel privatization is supplemented by *quasi-public* entities doctrine, under which any body authorized to employ governmental powers is subject to the norms of public laws, important among them are human rights laws and Israeli administrative courts, including the high Court of Justice.[23] In U.S however, the question as to the subjection of private exercise of the governmental power, was discussed in *Pischke* v. *Litscher*[24] which held, "We cannot think of any…provision in Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than

[20] There is explicitly mentioning of certain limitations to the power so been exercised, which is government has to publicly fund certain services like education, health care, insurance etc. as well as some social rights, that are implicit to right to human dignity. In Israel these rights are exclusively within the domain of government and cannot be exclusively transferred to private players. In India, government has opened up market for private players in these core social sectors and the same has received judicial permission too, since court says under Indian constitutional structure executive policies cannot be challenged in the court. *See generally,* Prakash Sharma, *Does Privatization serves the Public Interest? An Assessment of the Risks and Benefits of Prison Privatization*, 3 Lexigentia 80-97 (2016).

[21] *See* Gautam Gupta & Prakash Sharma, *Pretentious Privatization: Public Law Limitation of Government Functions*, 5(2) Bharti L. Rev. 100-112 (2016).

[22] *See* FHCJ 5361/00 *Falk* v. *Attorney General* [2005] Isr. S.C. 59(5) 145; HCJ 2505/90.

[23] See HCJ 294/91 *Jerusalem Burial Society* v. *Kastenbaum* [1991] Ist. S.C. 46(2) 464.

[24] 178 F.3d 497, 500 (7th Cir. 1999).

by a government...private exercises of government power are largely immune from constitutional scrutiny....expanding privatization poses a serious threat to the principle of constitutionally accountable government."[25] In Israel, the constitutional setup is so framed that the private exercise of government power is subject not only to effective supervision by the Executive Branch, but also to the judiciary (as they act as a guardian to the Constitution). Hence, the delegation of governmental powers to private persons hardly changes the formal norms to which the power holder is subject.[26] In India, executive do not have much control over them, to the extent it is subject to judicial scrutiny on the grounds of corruption or issues related with environmental law or consumer law. In the United States, private prisons assumed to meet the non-delegation challenge as long as a public body provides sufficiently detailed guidelines for running the prison, with an effective application of supervisory powers. This thereby leads to a situation of ambiguity,[27] raising justified doubts on the constitutionality of privatization, much in line with Indian situation.

The case rests entirely upon the concept of liberty, which is fair enough a justification but there is an angle of human rights too. The commodification of prison and use of force by private prisons to its inmates raises issues as to the rights of the inmates under private control. Court states "Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison...turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit, it should be noted 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]

[25] *Ibid*.

[26] The position is similar in the Israeli law. *See*, Barak Medina, *Constitutional Limits to Privatization: the Israeli Supreme Court decision to invalidate Prison Privatization*, 8(4) ICON 693 (2010).

[27] In *Richardson* v. *Mc Knight*, 521 U.S. 399 (1997), the U.S. Supreme Court held that private prisons guards cannot claim qualified immunity on the other hand in *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61 (2001), court held that private entities are not subject to civil rights suits; *United States* v. *Butler*, 297 U.S. 1,71 (1936), court held conditional benefit can be unconstitutionally coercive. *See* also Kathleen M. Sullivan, *Unconstitutional Conditions*, 102(7) Harv. L. Rev. 1413-1506 (1989).

[28] *Supra* n.15, para 51 says, "Imprisonment that is based on a private economic purpose turns the inmates simply by imprisoning them in a private prison, into a means whereby the ... operator of the prison can make a profit: thereby, not only is the liberty of the inmate violated, but also his human dignity."

Here the apprehension raised by the court though totally ignored the benefits of operating private prisons was justified in doing so. Benefits so arisen must not act as an outweighing factor, especially when the act itself is not within the effective control of both judiciary and executive as mentioned (in the case of India and US). It's not just about commodification but also about betterment of condition, can we expect a private player to invest all its earnings on betterment of condition rather than to concentrate on profit? Effective control by state over private entities will serve better, but does market allow it? Inmates can be treated as a mere means for profit making, but for this reason, State can be justified in having control over a function which it claims as a sovereign, and yet does its best to enhance the condition, even when no capital is available. Innovative ideas should never have rigid oppositions; a balanced and neutral way has to be carved out, without compromising on the rights available to the inmates as well as of the personnel (who will be under private entity).

The model opposed by the Israeli Apex Court was based much on the lines with United Kingdom model of public private partnership, which holds private entity accountable to public laws with high prescriptive contracts, multiple level of monitoring and output based evaluations. Further, it rejected the very proposal of allowing even a single pilot prison even before deciding to expand this policy to other incarceration facilities, and this was for the first time in the Israel's judicial review history instead of provisions, an entire Act was held invalid on the ground it violates basic laws of the State.[29] This was brave, appreciable step taken by Israel's Apex Court, more so on the basis it was held. No matter how much amount of intensive regulations and supervision is done (as happens in UK) and even on the application of heightened judicial scrutiny it will be insufficient in its all probability to mitigate risk of abuse. The argument of providing prisoners with improved living conditions was outweighed by the risk of violating the core of prisoners right to human dignity. Justice Procaccia

[29] A brief history of basic laws as formed under Israel's system needs a worth mentioning here. Following the failure to create a complete Constitution at the time of Israel's foundation in 1948, the Knesset (Israel's Parliament), serving both as legislative branch as well constituent assembly, decided to create a constitution in a piece meal process. Each Part is titled *Basic Law with a vision that when all chapters are enacted, they will be combined to form the Constitution.* Over the years Knesset enacted some eleven Basic-Laws, including in 1992, *the Basic Law of Human Dignity and Liberty*. However, Knesset left some ambiguity as to the legal status of these Basic Laws, before they are combined to form a Constitution. It neither includes an explicit supremacy clause nor enforcement mechanisms of their provision over legislation. It was in Civil Appeal 6892/93 *United Mizrahi Bank* v. *Migdal Cooperative Village* [1995] Isr. S.C. 49(4) 221, 416, case the Supreme court explained even through the Basic Law: Human Dignity and Liberty does not include an entrenchment clause, its provisions binds the legislature. The court held that all the basic Laws are the supreme law of the land, based on the view that the Knesset enjoys the powers of the Constitutional assembly, and every piece of legislation that is titled Basic Law is the product of employing constitutive powers.

explains it rightly:[30]

> The potential harm that is inherent in the privatisation of a sovereign authority in integral to it and of such a degree that it does not allow for a process of experimentation and arriving at conclusions in consequence thereof.

Besides the argument of improvement of living conditions, when rate of incarceration is on high due to various reasons and with serious limited budget looks disturbing. No doubt present conditions didn't meet the conditions as prescribed by law and would fall beyond the requirements set by human rights law, but this concern cannot justify privatization of prison, since at present at least State prisons are under strict scrutiny of judiciary who will access the private prison and given the current state of corruption in India, can we rely of private players for such a measure?

IV. Outsourcing of Public Services and Its Limits

Moving further with the argument of democratic legitimacy of imposition of sanctions and the symbolic effect it causes as to the status of States authority cannot be achieved once it is transferred to a private corporation. No doubt the *popular legitimacy* is subject to the constraints, with an aim to promote social interests rather than some private interest. It is therefore, argued that the imprisonment function is, or should be, non-delegable and the use of force must be democratically legitimate, thus becoming socially, morally and constitutionally legitimate. As privatization got under way, Radzinowicz states"In a democracy grounded on the rule of law and public accountability, the enforcement of penal legislation...should be the undiluted responsibility of the state."[31]

Christie epitomizes a quintessentially European approach to the role of the state, one where "in the continental culture the state is seen as much more than a service institution."[32] It is no surprise that the European state that has come nearest to implementing privatization, France, has adopted a model of prisons *semi privies* where the custodial functions remain in the exclusive domain of State authorities and only the hotel, health, welfare, and program activities have been privatized. It is an awkward model but conforms in the letter if not

[30] *Supra* n. 15, para 50.

[31] In a letter to the London Times dated 22 Sept., 1988 as quoted in S. Shaw, "The Short History of Prison Privatization", 87 Prison Service Journal 30-32 (1992).

[32] *See* U. Rosenthal and B. Hoogenboom, *Some Fundamental Questions on Privatisation and Commercialization of Crime Control,* in H. Jung (ed.), Privatization of Crime Control (Collected Studies in Criminological Research, vol. 27. Strasbourg: Council of Europe 1990) 20-21.

the spirit with the strict European approach.[33] We have seen the significant role of private even in the traditional public functions. Besides, private prisons possess substantially greater market accountability (arguably in some countries)[34] as they have to survive for their existence by winning new contracts and renewing old ones, they cannot afford to have adverse publicity as it would be hampering on to their stocks/capital etc. In U.S. decisions like *Richardson* v. *Mc Knight*[35] and *Correctional Services Corp*. v. *Malesko*,[36] Supreme court held that private prisons are as accountable if not more, then the public ones, and have set up high standards in that regards.

Various scholars endorse the non-delegable core function approach on the ground that on the basis of *social contract*, State has an obligation to maintain *exclusive control over prison*.[37] This means in order to remain legitimate and morally significant, the authority to govern behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. In this regard President Beinisch in *Academic Centre for law and Business* v. *Minister of Finance*, states:[38]

> Although, naturally, many changes and developments have occurred since the seventeenth century in the way in which the nature and functions of the state are regarded, it would appear that the basic political principle that the state …is responsible for public security and the enforcement of the criminal law has remained unchanged …, and it is a part of the social contract on which the modern democratic state is also based.

Any transfer of these sovereign functions would therefore undermine the justification that underlies the exercise of power by the State. Imprisonment

[33] It is not unique, however. The Mansfield Community Corrections Facility in Texas (which despite its name is a place of incarceration) operates with the same division of functions. For technical legal reasons rather than administrative choice, a somewhat similar model exists in South Australia. *See,* Prakash Sharma (2017), *supra* n. 3, p 217.

[34] B. Western, Punishment and Inequality in America (Russell Sage Foundation, New York, 2006).

[35] 521 U.S. 399 (1997).

[36] 122 S. Ct. 515 (2001).

[37] *See*. *supra* n. 15 at para 36, (President Beinisch states "Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison…turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit, 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.").

[38] *Supra* n. 15, para 23.

through privately managed prison would further blurry and dilute prevailing conditions in existing prisons besides ethical and morally holds wrong, since private corporation's operation of prison would be for economic purpose alone which is for making financial profit. It would turn the prisoners into means through which the corporation manages and operates prison for profits. Regardless of which penological theory is in vogue, DiIulio's writes "the message that those who abuse liberty shall live without it is the brick and mortar of every correctional facility, a message which ought to be conveyed by the offended community as a law abiding citizens through its public agents to the incarcerated individual."[39] Is it a convincing argument? I think yes because, of the principle that it is the state that should decide not only on the sanction but also execute it, to ensure that it *discharges its basic responsibility as sovereign* for enforcing the criminal law and furthering the general public interest.[40] In *Tanada* v. *Angara*[41] Apex court of Philippines states:[42]

> While sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. Unquestionably, the constitution did not envision a hermit type isolation of the country from the rest of the world. By their inherent nature, treaties really limit or restrict the absoluteness of sovereignty. By their voluntary act, nation may surrender some aspects of their state power in exchange for greater benefits granted by or derived from a convention or pact. After all, states, like individuals, live with coequal, and in pursuit of mutually covenanted objectives and benefits, they also commonly agree to limit the exercise of their otherwise absolute rights.

There is a distinction between the allocation and administration of punishment. The first function is irrevocably non-delegable; in the sovereign state, private criminal justice systems are a contradiction in terms.[43] Commenting

[39] J. J. DiIulio, Governing Prisons: A Comparative Study of Correctional Management (Free Press, New York, 1987) p. 197. For discussions as to cost benefit analysis of prison privatisation, *see* Charles H. Logan, Private Prisons: Cons and Pros (Oxford University Press, New York, 1990) pp. 76-118. Georg Rusche and Otto Kirchheimer, Punishment and Social Structure (Transaction Publishers, London, 2003).

[40] 272 SCRA 18, May 2, 1997.

[41] *Ibid*.

[42] Further reading of the case *available at:* pretty-jaja.blogspot.in/2008/06/tanada-vs-angara-272-scra-18.html (Last accessed on April 30, 2017).

[43] In *Flagg Brothers, Inc*. v. *Brooks*, 436 U.S. 149 (1978), court have held that government can seek to avoid its constitutional obligation and pass it on to private delegation, here no standards as to how much of delegation can be allowed is explained. Further in *Shelley* v. *Kraemer*, 334 U.S. 1, 20 (1948), court held that states court's enforcement of racially restrictive covenant

towards the attitude of disrespect caused by transfer of States's power to private entity, President Beinisch states:[44]

> When the state transfers the power to imprison someone, with the invasive powers that go with it, to a private corporation that operates on a profit-making basis, this action—both in practice and on an ethical and symbolic level—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 conduct of the state violates the human dignity of the inmates of a privately managed prison, since the public purposes that underlie their imprisonment and give it legitimacy are undermined, and …their imprisonment becomes a means for a private corporation to make a profit. This symbolic significance derives, therefore, from the very existence of a private corporation that has been given powers to keep human beings behind bars while making a financial profit from their imprisonment.

Going with argument of prisoner's basic rights the very idea of transfer of sovereign power in the hands of private entity, no matter how much benefits it would generate (since this is debatable)—even in this market world, the basic rights should always outweigh the expected benefit of operating private correctional services. Therefore, even the administration is also not delegable, even with appropriate safeguards. Though it does not involve the imposition of additional State authorized punishment but, rather, a technical and morally neutral process to ensure that the allocated punishment is carried out according to law and due process, the question lies here as to the condition and status of personnel's deployed through private corporations.[45] The argument of allowing private players to take part in administrative functioning of prisons, looks suspecious because it serves rhetorically to insulate the two areas (the legitimacy of imprisonment and how to carry it out) from one another.[46] In Sparks's view, fundamental issues as to the proper scope and utilization of imprisonment and questions which are never to be put aside by society, are inextricably linked with questions of delivery (as it is bound to happen in a market economy); therefore, any arrangement should be opposed which permits them to be discussed and implemented as if they were discrete issues. There does not seem to be any insuperable intellectual or practical difficulty about challenging the depth and

constituted state action and violated Equal protection clause of Fourteenth Amendment. In *West* v. *Atkins*, 487 U.S. 42, 54 (1988), court held that delivery of medical treatment to state prisoner by physician employed under contract by state to be a state action.

44 *Supra* n. 15, para 39.

45 R. Sparks, *Can Prisons Be Legitimate? Penal Politics, Privatization and the Timeliness of an Old Idea*, in R. King and M. Maguire (eds.), Prisons in Context (Clarendon Press, Oxford, 1994) p. 23.

46 *Ibid.*

the scope of imprisonment and pursuing vigorously the question of prison conditions, regimes, and reform, but all that has to be done carefully. A more productive line of analysis is whether some of the tasks delegated to the private operators, while purporting to be merely the administration of punishment, are in reality its allocation. The empirical evidence is consistent with economic theory, which predicts that with privatization, costs falls and quality rises, but this happens in States where cost of inmates is high besides reasonable measures are taken.[47] The costs falls due to competition, will there be competition in India, where number of market players are available and ready to enter this less lucrative field, secondly, the quality rises with privatization measures is always debatable.[48] In U.S. studies do show that the concept of private prison does works,[49] idea is that private prisons can discipline public prisons into becoming more efficient and flexible, through a healthy competition.[50] But question still remains the same will there be an healthy competition, especially given the state of affairs we are in.

The distinction between public-private debates in the market economy has been blurred to the extent that many of the public functions, which were meant specifically for the public entities, are now been taken care by the private corporations. Market has actually dissolved this distinction, and even theorists and lawyers many a times face notorious difficulties in their efforts to draw the line between private and public.[51] The prevailing approach believes that there is no clear division, rather a mere continuum, between private and public body.

47 Arizona Rev. Stat., 41-1609.01 (G) (2001) (requiring the contractor to offer cost savings); (H) (requiring the contractor to offer services of at least equal quality). The Florida statute requires evaluation of both cost and quality, though only cost savings and the statute requires no quality improvements.

48 Expenditure of Israel, US, UK on Criminal Justice System: Privatization in Israel would have expected to bring about saving which would be estimated at approximately 20-25% of the cost of operating prison, the saving over the whole period of the concession is estimated at approximately 350 million NIS (close to 100 million US dollars), *see* Eyal Zamir & Barak Medina, Law, Economics and Morality (Oxford University Press, New York, 2010). In US the amount is $260 billion and it increases yearly, *see* Larry J. Siegel and John L. Worrall, Introduction to Criminal Justice (Wadsworth Publishing, Belmont, 2015) p. 9. UK spends £31.5 billion on public order and safety in 2012/13, see Richard Garside, Arianna Silvestri and Helen Mills, UK Justice Policy Review III (Centre for Crime and Justice Studies, London, 2014). Australia spends $14 billion, information *available at* http://www.aic.gov.au/publications/current%20series/facts/1-20/2013/7_resources.html (last accessed on 12 May, 2017).

49 *See,* Adrian T. Moore, Private Prisons: Quality Corrections at a Lower Cost (Reason Public Policy Institute, Policy Study No. 240, 1998) pp. 33-44.

50 Innovative approach to personnel management adopted by private prisons will be adopted by the remaining public prisons, thereby providing indirect benefits, *see* Prakash Sharma (2017), *supra* n. 3, p. 239.

51 Many a times the argument taken is with regard to the efficiency, *see* Prakash Sharma (2017), supra n. 3, p. 199 (Author while analyzing politics of government ownership and privatization notes that political considerations not only strengthen case for privatization, but in fact drive decision to privatize). *See* also John D. Donahue, The Privatization Decision (Basic Books, New York, 1989) p. 6.

The same distinction, which has no normative basis, is used merely for the purpose of descriptive in nature. In the simpler words, it is only when the State has to show its presence or claim or acquire something the issue of public private creeps in and nothing more. For the proponents of market it seems easy to classify the difference and accordingly jump to the conclusion that the decision whether an activity should be subject to some limitations or not is based on substantial reasoning rather than to any systematic, explained analysis on the distinction between private and public, and therefore this substantive consideration holds no justification since it does not have any source. Thereupon, they find no distinction in the setup established by them and the one by the State.

Further with the concept of *publicization of privatization*, wherein no distinction is made in the functioning of public or private functioning, which is also a means for incorporating public norms into private realm, explains otherwise.[52] Having said this one would be in no confusion over the authority of law over the acts and duties of private employee and a public employee but on liability and obligation the latter is in a better position to compensate for any infringement of rights on his/her part rather than the former one. As indicated already there appears a considerable amount of social and economic difference between a personal owned by a private entity and of the public. Proponents of market would hold that both public and private employees work to earn a living, and are interested in fulfilling their professional goals and developing their career, thus interested in the success of their institution. The test for any Constitution would therefore be to come with a solution which would claim privatization of public function unjustified not merely on the basis of principles like sovereign or core functions and laws like human and constitutional rights, but also on the basis of some settled decisions, not in piece-meal or abstract form but a common and uniform practice.

V. Conclusion

Privatization will continue to be a central phenomenon in the functioning of many governments around the world. However, the impact of privatization, especially with respect to essential core functions would definitely pose some serious repercussions on society. Any elimination altogether of institutions owned and run through State would not be in tune with the general principles and spirit of democratic Constitution. It is a two way process, where all must conform to the Constitution, and the Constitution must respect the sovereign will and welfare

[52] Jody Freeman (2003), *supra* n. 3, p. 1285. Jody suggests "privatization can be a means of '*publicization*,'through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state."

of the people. Just like Israeli Apex court our courts must also come ahead and save the country from any policy that may well be wrong for long run, they need to show courage, and not bow to demands of market but to the needs of people of this country, on whose name the Constitution withholds its authority and the decisions are pronounced. The preference for market ordering and market values has now become part of broader cultural society, thanks to the political shift and faith in markets.