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Managing Correctional Market: Constitutional Limitations on Privatization of Government Functions

Prakash Sharma[1]

ABSTRACT

This article explores constitutional limitations on blatant Privatization drive functioning across the world—including India. A concern is raised as to the effect of diminishing governmental control, particularly with respect to the dichotomy between private and public property. It is suggested that in a 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. The article explains how State as a constitutional entity must retain the power to enforce the law.

Keywords: Administration, Democracy, Expropriation, Imprisonment, Privatization, Punishment.

Upravljanje prevzgojnega trga: ustavne omejitve pri privatizaciji državnih funkcij

POVZETEK

Pričujoči članek preučuje ustavne omejitve pri privatizaciji državnih funkcij po svetu, pri čemer se posveča predvsem indi-

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jskem pravnem redu. Zasebno upravljanje tradicionalno državnih funkcij, kot so denimo zapori, lahko oslabi njihovo učinkovitost, transparentnost in izključi nadzor in odgovornost. Članek argumentira, da mora država kot primarni subjekt vsakokratnega obdržati pooblastila za izvrševanje temeljnih državnih funkcij.

Ključne besede: uprava, demokracija, razlastitev, zapor, privatizacija, kaznovanje.

1. Introduction

When framers of our (and many other countries) wrote Constitution, the nation's market-places were largely local, personal, simple and as a result significantly accountable to the people directly affected.[2] Modern facilities of technological advancement were relatively benign then and state was considered indispensable because of its role in protecting and developing the *res-publica*. 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 specialities, 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.[3] In modern times, with the changing aspirations, the very Constitution, which was a bricolage of future, looking aspirations for transformation—has been picturesquely re-written.[4] This function of state as *respublica* has shifted—from public to private sector—a phenomena felt across the globe.

The aim of this paper would be a modest yet precise—to remedy the lack of work initiated that accounts the problem which, doubtlessly, reflects unaccountable forces gaining fundamental positioning in the day to day exercise of democratic governments, across the globe. Existing situations would call for test for the Con-

[2] Morton Mintz and Jerry S. Cohen, Power, Inc.: Public and Private Rulers and How to make them Accountable, New York, The Viking Press, 1976, p. 34. See also G. Austin, The Indian Constitution: Cornerstone of a Nation, Berkeley, Clarendon Press, 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 totalitarianisms or the Soviet system."

[3] See Amartya Sen, On Economic Inequality, Oxford, Clarendon Press, 1973, p. 39, emphasising much on impartial rules of distribution, Sen compares it with the Rawls formula for impartial attention. See also Alan Ryan (ed.), Justice, Oxford, Clarendon Press, 1993, pp. 159-63. See also Nancy Folbre, The Invisible Heart: Economics and Family Values, New York, New Press, 2001, p. 106.

[4] Prakash Sharma, Prison Privatization: Exploring the Possibilities in India (forthcoming).

stitution, to come up with a common and uniform practice of flexible yet accountable use of power unlike what governments of the day have assumed.[5] Contracting out has become a fundamental norm and it has rather diminished the established principles of accountability, due process, and fairness in states actions. How one would assist self, for any understanding of original (founding framers) constitutional choices and subsequent constitutional developments in the languages of economic rationality is what this paper explores.

2. The Concept of Expropriation

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.[6] In India, the public domain comprises of very large area of land, resources and much of it after the introduction of NEP much has been transferred to private players (on lease as well as on complete transfer) for exploitation of such natural resources.[7] Likewise, today in almost all other

[5] Giandomenico Majone, Paradoxes of Privatization and Deregulation, Journal of European Public Policy, Vol. 1, No.1, 1994, pp. 53-69; Alfred C. Aman, The Democracy Deficit. Taming Globalization Through Law Reform, New York, New York University Press, 2004, pp. 129-182, (discussing the implications of the globalized state for law reform). Ronald A. Cass, Privatization: Politics, Law, and Theory, Marquette Law Review, Vol. 71, No. 3, 1988, pp. 449-523, Ronald notes that while every State function or service, like housing, education, health care, policing, welfare, transportation, postal service, and dispute resolution—has a private counterpart, the law subjects only State actors to constitutional limits. The traditional justification for such a differential treatment is that government power is uniquely coercive. See also Jody Freeman, Extending Private Law Norms Through Privatization, Harvard Law Review, Vol. 116, No. 5, 2003, pp. 1285-1352, (instead of seeing Privatization as a means of shrinking government, its can be seen as a mechanism for government to reach into realms traditionally through private). See also John D. Donahue, The Privatization Decision, New York, Basic Books, 1989, p. 6; Clifford J. Rosky, Force Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, Connecticut Law Review, Vol. 36, No. 3, 2004, pp. 879-1032; Paul R. Verkuil, Public Law Limitations on Privatization of Governmental Functions, North Carolina Law Review, Vol. 84, 2006, 397-433; Alexander Volokh, A Tale of Two Systems—Cost, Quality, and Accountability in Private Prisons, Harvard Law Review, Vol. 115, No. 7, 2002, p. 1841; Manuel Tirard, Privatization and Public Law Values: A View from France, Indiana Journal of Global Legal Studies, Vol. 15, No. 1, 2008, pp. 285-304, (emphasising on protection of public values); David F. Pozen, Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom, Journal of Law and Politics, Vol. 19, No. 3, 2003, pp. 253-284.

[6] F.A. Mann, Outlines of a History of Expropriation, Law Quarterly Review Vol. 75, 1959, pp. 188-219. For further corroboration of the statement formed see, Ralph Linton, "Universal Ethical Principle", in R.N. Antenna, Moral Principles of Action, New York, Columbia University Press, 1952, p. 655. Justice as a principle for regulating a society was propounded by Rawls, see John Rawls, A Theory of Justice, Cambridge, Harvard University Press, 1971, pp. 3, 11-22.

[7] See Fritz Schulz, Principles of Roman Law, Oxford, Clarendon Press, 1936, p. 161.

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 organisations/individual.[8] It was this legal device/devices, adopted for such taking of property by the state, to be known as expropriation, eminent domain, confiscation, nationalisation and socialisation.

Confiscation of property (goods) by the public authorities has since past, 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 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 process. The initial process of taking property for public use, was never been questioned as such, which since its true realisation caused massive uproar and challenge to the authority of State in taking private individual property for larger common good. As Grotius remarked "for the common good the king has right of property over the possessions of individuals greater than that of the individual owner."[9] Expropriation was thought it as a method of solving the problem of harmonising the interests of society with those of the owner, since its 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

[8] Also see Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America, Calcutta, Hindustan Law Book Company, 1994, pp 380-382.

[9] Richard Tuck, The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant, Oxford, Oxford University Press, 2001. See Iain Hampsher-Monk, The History of Modern Political Thought, Oxford, Blackwell, 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.

the basic idea) compensation by the government while taking any private property under the guise of public purpose.[10] Any taking of property should have been limited to the extend 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 reaped the desired result, but in fact benefited the one's against whom such revolution took place) which backfired the socialist thinking of benefitted all, since it benefitted neither all nor the one's who 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 extent only.[11] Generally the social upheaval resulting in such acts of expropriation, done with the aim of improving the social and economic conditions of people, must bring overall benefits, and accordingly must have balanced hardships and burdens accompanying such acquisitions, but this was not the case.[12] In this regard, even the United Nations General Assembly adopted a resolution in 1962 entitled *Permanent Sovereignty over Natural Resources*, it reads:[13]

[10] James Delong, Property Matters, New York, Simon and Schuster Inc., 1997, p. 24.

[11] 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, London, Penguin Books Co., 2006, p. 20. See also John Rawls, The Law of Peoples, Cambridge, Harvard University Press, 1999; Erin Kelly (ed.), Justice as Fairness, Cambridge, Harvard University Press, 2001.

[12] There appears no secret, rather it appears clearly that, State acquisition of private or common public property in the national interest is merely a slogan for, inevitably, whenever such acquisition takes place the interest of some particular group, industry, corporations or even individuals are served; not the common public. Earlier, it used to be done secretly just to avoid public outcry but nowadays political parties are winning election, by openly claiming such a procedure in public. See Karl Polanyi, "The Self-Regulating Market and the Fictitious Commodities: Labor, Land, and Money", in Karl Polanyi, Great Transformation: The Political and Economic Origins of Our Time, Boston, Beacon Press, 1944, p. 71.

[13] The General Assembly adopted resolution 1803 (XVII) on the "Permanent Sovereignty over Natural Resources" on 14 December 1962. See also UN General Assembly, Permanent sovereignty over natural resources, 17 December 1973, A/RES/3171, available at: http://www.refworld.org/docid/3b00f1c64.html (last accessed on 22 July, 2016). See also S.M. Schwebel, The story of the U,N,'s Declaration on Permanent Sovereignty over Natural Resources, American Bar Association Journal, Vol. 49, 1963, p. 463.

> 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.

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 (at the cost of their sovereignty).[14] These principles are allegedly, in accordance with the fundamental notions of Justice (presumably) 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).[15] India continues to face situations, namely: (a) where conditions and wages of workers, taking into account the general social and economic situation, as substandard and indefensible, while corporations derives exorbitant profits from such practices; (b) Multinationals continuously exercise improper pressures on the government resulting in measures greatly in 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)?[16] The experiences con-

[14] Under Indian Constitution 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. See agitation report of farmers here .....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 generally Law Commission of India, Law of Acquisition and Requisitioning of Land, New Delhi, Ministry of Law, 1958, p. 1.

[15] Situations, where conditions and wages of workers, are substandard and indefensible, are quiet common in India, see Randhir v. Union of India, AIR 1982 SC 879. Corporations deriving exorbitant profits from such practices. Multinationals continuously exercise improper pressures on the government resulting in measures greatly in detrimental to the interest of people (the supposed sovereign), see also Upendra Baxi, Liberty and Corruption: The Antulay Case and Beyond, Lucknow, Eastern Book Company, 1989; Amartya Sen, Development as Freedom, Oxford, Clarendon Press, 1999.

[16] Hans Kelsen, What is Justice, Berkeley, University of California Press, 1958. See also Upendra Baxi (ed.), K.K. Mathew on Democracy, Equality and Freedom, Lucknow, Eastern Book Co., 1978. On capability approach and its impact on distributive justice, see Martha Nussbaum, Women and Human Development: The Capabilities Approach, New York, Cambridge University Press, 2000, pp. 70-110;

nected 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 an phenomena of intellectual, intuitive, or emotive nature, but nevertheless real and describable. Generally, a matter concerning justice or injustice is something, which takes place in the realm of values, involving a mental empire district from the domain of physical occurrences. Here in context of present debate, justice may be identified as a value of an ethical significance, distinct from an aesthetic or economic value, since justice in such a context is concerned with the norms of right policy, which each sovereign observes towards each other in a righteous society.

3. Constitutional Limits to Privatization: The Israeli Supreme Court Decision

The decision of Israeli Supreme Court in 2010, to strike down legislation on establishing a privately operated prison, needs some special mentioning in order to acknowledge the constitutional limitation on state for unthoughtful and blatant privatization.[17] Chief Justice Aharon Barak of Israel Supreme Court staged a *constitutional revolution*, declaring that basic laws would function as a constitution and be supreme over ordinary legislation.[18]

Amartya Sen, "Capabilities and Well-Being", in Martha Nussbaum and Amartya Sen (eds.), The Quality of Life, Oxford, Clarendon Press, 1993, pp. 30-53.

[17] 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 August, 2016). The Court's decision to invalidate this legislation is interesting, as it stipulates that despite the popularity of this practice in the democratic world, privatization is unconstitutional per say, 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.

[18] Mizrahi Bank v. Migdal 1995 IsrPD 49 (4) 221; Academic Centre of law and Business, Human Rights Division v. Minister of Finance 2009. See Alexander Volokh, Philosophical Objections to prison Privatization, 2013, available at: reason.org/news/show/Israel-private-prison-ruling (last accessed on 17 August, 2016).

This historic decision which is equivalent of the United States famous case *Marbury* v. *Madison*[19] puts basic laws on the top and established the practice of judicial review of statutes. What this meant was that the Israeli Supreme 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 Supreme 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.

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 *de facto* an improper and arbitrary use of violence.[20] There is a

[19] 5 U.S. 137 (1803).

[20] 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 a person, but also by the execution of this decision. Id. at Para 25. President Beinisch further states "Indeed from a normative viewpoint, the decision of the competent courts of the state to sentence a particular person to imprisonment is the source of the power to violate the constitutional right of that individual to personal liberty. But the actual violation of the right to personal liberty takes place on a daily basis as long as he remains an inmate of the prison. This violation of the right to personal liberty is inflict party that manages and operates the prison where the inmate is held in custody, and by the employees of that party, whose

drawback of such argument, the use of force (even by the State) if not done within the parameters of constitutional norms also does renders the whole power as unconstitutional.[21] It does happens 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 authorised 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,[22] 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 personnels, which will leave inmates on the mercy of unscreened, untrained, understaffed and unpaid employees (much of the points holds 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 right to enjoy some minimal living conditions with justified use of force by prison personnels. It is but an obvious that any contractors's

main purpose is to ensure that the inmate duly serves the term of imprisonment which he has been sentenced... and complies with the rules of conduct in the prison, which his personal liberty." See also at para 20 where 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 o lacks social, moral and constitutional legitimacy." Id. at para 25. The Doctrine which generally empowers State to empower, improve, secure, protect and claim justice for its citizens. See similar view adopted in Upendra Baxi and Amita Dhanda, Valiant Victims and Lethal Litigation: The Bhopal Case, New Delhi, Indian Law Institute, 1990; Upendra Baxi and Thomas Paul, Mass Disasters and Multinational Liability: The Bhopal Case, New Delhi, Indian Law Institute, 1985.

[21] 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 (2002), supra note 4 at 1872, suggests overcrowding which is a bigger problem must needs to be tackled and for that Volokh suggests use of private entities to ease out burden from the State in the handling of prison inmates. See also Susanna Y. Chung, Prison Overcrowding: Standards in Determining Eighth Amendment Violations, Fordham Law Review, Vol. 68, No.6, 2000, pp. 2351, 2362-66, (arguing overcrowding leads to unconstitutional conditions). For Discussion see Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, University of Pennsylvania Law Review, Vol. 138, No. 3, 1990, pp. 805-912, (making a case for Privatization, Susan argues that even when legislature does responds to abuse like riot, violence, public exposure to brutal conditions, with legislations, there is little accountability).

[22] Article 13, Indian Constitution, 1950.

purpose for attaining operation of government function would be to obtain maximum profits, hence this would likely results in an abuse of prisoner's rights to human dignity.

Inmates right to liberty and human dignity

The second argument raised by the Israeli Supreme 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 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.[23] 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 privatise 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, limiting the powers of Parliament. In many occasions, Indian executive have delegated governmental powers to private entities even without explicit legislative authorisation. 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.[24] Similar is the position of United States which do not de-

[23] 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 judiciaries permission too, since court says under Indian constitutional structure executive policies cannot be challenged in the court.

[24] Similar is the state of functioning in Israel. See Aharon Barak, Israel Economic Constitution, Law and Governance, Vol. 4, 2008, p. 357; Barak Medina, "Economic Constitution", in Yoav Dotan and Ariel Bendor (eds.), Privatization and Public Funding: A framework of Judicial Review of Economic Policy, Jerusalem, Sacher Institute, Hebrew University, 2005, pp. 583, 648-652. See also FHCJ 5361/00 Falk v. Attorney General [2005] Isr. S.C. 59(5) 145; HCJ 2505/90 Travel Agents Association v. Minister of Transportation [1990] Isr. S.C. 46(1) 543; HCJ 39/82 Henfling v. Mayor of Ashdod [1982] Isr. S.C. 36(2) 537; Haifa Chemicals Limited v. Attorney General [2003] Isr. S.C. 57(3) 652.

fine 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 a review by a public body.

In Israel Privatization is supplemented by *quasi-public* entities doctrine, under which any body authorised 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.[25] In U.S, as far the question of subjection of private exercise of the governmental power, the initial practise was to test it through constitutional scrutiny, which however got diluted with the blatant measures of privatization.[26] The current terms of debate have shifted from whether one should allow private entities or not (in the functioning of essential sovereign function)—but how to best manage them.[27] 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 judicially (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.[28] 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 United States prison Privatization's 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

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

[26] See Pischke v. Litscher 178 F.3d 497, 500 (7th Cir. 1999), wherein at one place it is acknowledged that "..private exercises of government power are largely immune from constitutional scrutiny", but also the fact that "...expanding privatization poses a serious threat to the principle of constitutionally accountable government". See also Montez v. McKinna, 208 F.3d 862, 866 10th Cir. 2000; White v. Lambert, 370 F.3d 1002. 3013 (9th Cir. 2004).

[27] For understanding the effect of transfer of accountability for a private prison and its staff to public law norms, see Gillian E. Metzger, Privatization as Delegation, Columbia Law Review Vol. 103, No. 6, 2003, pp. 1367- 1373; Ira P. Robbins, The Impact of the Delegation Doctrine on Prison Privatization, UCLA Law Review, Vol. 35, No. 5, 1988, pp. 911-915, (author is of view that the constitutionality of prison privatization under the delegation doctrine is an extremely close one, and it would not be surprising if a court were to rule against constitutionality.)

[28] The position is similar in the Israeli law. See Barak Medina, Constitutional Limits to Privatization: the Israeli Supreme Court decision to invalidate Prison Privatization, International Journal of Constitutional Law, Vol. 8, No. 4, 2010, p. 693; Aharon Barak, Unconstitutional Constitutional Amendments, Israel Law Review, Vol. 44, 2011, p. 434. Under Israeli law, the delegation of governmental powers to private persons hardly changes the formal norms to which the power holder is subjected to. Also see David N. Wecht, Breaking the Code of Deference: Judicial Review of Private Prisons, Yale Law Journal, Vol. 96, No. 4, 1987, p. 815.

powers. This thereby leads to a situation of ambiguity,[29] 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 angel 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. From legal perspective, imprisoning persons in a privately managed prison leads to a situation which would either become blurred or diluted, thus making the very purpose of the imprisonment—irrelevant. Further, considerations that do arise from a private economic purpose, especially the desire of the private corporation operating the prison to make a financial profit, should invoke intense constitutional and ideological debates. There is an inherent and natural concern that imprisoning inmates in a privately managed prisons, that 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.[30] Similarly, according to president Beinisch:[31]

> 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 destiny of its inmates; exposing them to a private profit making enterprise (violation of inmates right; not to be sub-

[29] In Richardson v. McKnight, 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 Kathleen M. Sullivan, Unconstitutional Conditions, Harvard Law Review, Vol. 102, No. 7, 1989, pp. 1413-1506. (Discussing challenges to conditions on federal spending and taxing powers on the ground that they infringe state autonomy).

[30] The Academic Centre for Law and Business v. Minister of Finance, Supra note 16 at 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."

[31] Id. at para 39.

> jected to any private entity). This conduct of the state violates the human dignity of the in mates 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.

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 of profit? Effective control by state over private entities will serve better, but does market allows 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 must have to be carved out, without compromising on the rights available to the inmates as well as of the personnels (who will be under private entity).

The model opposed by the Supreme Court was based much on the lines with UK 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.[32]

[32] 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-mill 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

This was brave, appreciable step taken by Israel's Supreme 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 explains it beautifully:[33]

The potential harm that is inherent in the Privatization 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, especially 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 atlas 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?

4. Private Incarceration vis-a-vis Essential State Function

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

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 through the Basic Laws, and held that 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.

[33] Supra note 16 at para 50.

the use of force must be democratically legitimate, thus becoming socially, morally and constitutionally legitimate. As privatization got under way, it must be within the grounded norms of public laws—for any democracy grounded on the rule of law and public accountability, especially for the enforcement of penal legislation, it should be the undiluted responsibility of the state.[34] According to Christie, who sees this issue as one of communitarian responsibility and democratic participation, states:[35]

> The prison officer is my man. I would hold a hand on his key....He could be a bad officer. And I could be bad. Together we made for a bad system, so well known from the history of punishments. But I would have known I was a responsible part of the arrangement. Chances would also be great that some people in the system were not only bad. They would more easily be....mobilized. The guard was their guard, their responsibility, not an employee of a branch of General Motors, or Volvo for that matter. The communal character of punishments evaporates in the proposals for private prisons.

Interestingly Christie epitomises 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.[36] 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 the spirit with the strict European approach.[37] We have seen the significant role of private even

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

[35] N. Christie, Crime Control as Industry: Towards GULAGS Western Style?, London, Routledge Publications, 1993, p. 102. M. Tonry, "Punishment Policies and Patterns in Western Countries", in M. Tonry & R.S. Fraser (eds.), Sentencing and Sanctions in Western Countries, Oxford, Oxford University Press, 2001, pp. 3-28.

[36] N. Christie (1993), id. at 103. See also U. Rosenthal and B. Hoogenboom, "Some Fundamental Questions on Privatization and Commercialisation of Crime Control", in H. Jung (ed.), Privatization of Crime Control, Strasbourg, Collected Studies in Criminological Research, vol. 27, Council of Europe 1990, pp. 20-21.

[37] 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 Richard W. Harding, Private Prisons and Public Accountability, Buckingham, Open University Press,

in the traditional public functions. Besides, private prisons possess substantially greater market accountability (arguably in some countries)[38] 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. *McKnight*[39] and *Correctional Services Corp*. v. *Malesko*,[40] 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*.[41] 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:[42]

> 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

1997, p. 2, defining private prisons as "arrangements whereby adult prisoners are held in institutions which in a day-to-day sense are managed by private sector operators whose commercial objective is to make a profit from such activities; Richard L. Lippke, Thinking about Private Prisons, 16 Criminal Justice Ethics, Vol. 16, 1997, p. 35. Also see Oliver Hart, Andrei Shleifer and Robert W. Vishnu, The Proper Scope of Government: Theory and an application to Prisons, Quarterly Journal of Economics, Vol. 112, No. 4, 1997, pp. 1127-1161.

[38] See Alexander Volokh (2002), supra note 4 at 1874-75 (arguing cheaper prisons do not guarantee greater capacity and greater capacity does not guarantee decreased crowding; still it is reasonable to expect that private will not exacerbate crowding); Peter J. Duitsman (1998), Supra note 97 at 2209. For arguments see B. Useem and P. Kimball, States of Siege: U.S. Prison Riots 1971-1986, New York, Oxford University Press, 1989; B. Western, Punishment and inequality in America, New York, Russell Sage Foundation, 2006.

[39] 521 U.S. 399 (1997).

[40] 122 S. Ct. 515 (2001).

[41] See Michael Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, IOWA Law Review, Vol. 70, 1985, pp. 769, 866-67. See also supra note 119 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"). See also W. Young & M. Brown, "The Use of Imprisonment: Trends and Cross-national Comparisons", in M. Tonry (ed), Crime and Justice: An Annual Review, Chicago, University of Chicago Press, 1993, pp. 1-49.

[42] Supra note 16 at para 23.

> 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 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."[43] 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.[44] Therefore any task entrusted on private actors demands certain public values to remain intact—the core legal principles—both substantive and procedural in nature. The existing functioning of ad-

[43] J. J. DiIulio, Governing Prisons: A Comparative Study of Correctional Management, New York, Free Press, 1987, p. 197. For discussions as to cost benefit analysis of prison Privatization, see Charles H. Logan, Private Prisons: Cons and Pros, New York, Oxford University Press, 1990, pp. 76-118. Georg Rusche and Otto Kirchheimer, Punishment and Social Structure, London, Transaction Publishers, 2003, pp. ix–xlv. Rusche and Kirchheimer draws on materialistic framework a social history of western penal system and state "Every system of production tends to discover punishments which correspond to its productive relationships...the use or avoidance of specific the use or avoidance of specific punishments and the intensity of penal practices as they are determined by social forces, above all by economic and then fiscal forces." See also P. Carlen, "Imaginary Penalties and Risk-Crazed Governance", in P. Carlen (ed.), Imaginary Penalties, Cullompton, Willan Publications, 2008, pp. 1-25. ("Although the existence of social inequality cannot be allowed to licence crime–(even though in some circumstances it might both explain and justify it)–strategies to decrease crime must be made subservient to integrated policies to reduce economic inequality and increase participatory citizenship.")

[44] Supra note 506. Also see Travis C. Pratt and Jeff Maahs, Are Private Prison more Cost Effective than Public Prisons? A Meta Analysis of of Evaluation Research Studies, Crime and Delinquency, Vol. 45, No. 3, 1999, pp. 358-371, however the empirical evidence regarding whether private prisons are more cost effective than public institutions is inconclusive. See also V. Ruggiero, Crime and Markets: Essays in Anti-Criminology, Oxford, Oxford University Press, 2000; Georg Rusche, Labor Market and Penal Sanction: Thoughts on the Sociology of punishment, Social Justice, Vol. 10, 1978, pp. 2-8.

ministration shifts core principles and removes public supervision with that of the market.[45] The Constitution of the land grants sovereignty on state actions provided it would justify its actions.[46] 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.[47] Commenting towards the attitude of disrespect caused by transfer of States's power to private entity, President Beinisch states:[48]

> 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.

[45] Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, University of Pennsylvania Law Review, Vol. 130, No. 6, 1982, pp. 1349-1357.

[46] Tanada v. Angara 272 SCRA 18, May 2, 1997, the Supreme Court of Philippines states: 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. Also see B. S. Chimni et al., Asian Yearbook of International Law, Vol. 8, Boston, Martinus Nijhoff Publishers, 2003, p. 158; Norman Dorsen et al., Comparative Constitutionalism: Caes and Materials, St. Paul, West Publishing, 2010, p. 896.

[47] 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 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 for a state prisoner by physician employed under contract by state to be a state action.

[48] Supra note 16 at para 39.

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 safe-guards. 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 personnels deployed through private corporation.[49] The argument of allowing private players to take part in administrative functioning of prison, looks specious because it serves rhetorically to insulate the two areas (the legitimacy of imprisonment and how to carry it out) from one another.[50] 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 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.[51] 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,

[49] 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, Oxford, Clarendon Press, 1994, p. 23.
[50] R. Sparks (1994), Ibid.
[51] Arizona Rev. Stat., 41-1609.01 (G) (2001) (requiring the contractor to offer cost savings); (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 not quality improvements are required by the statute.

secondly, the quality rises with Privatization measures is always debatable.[52] In U.S. studies do show that the concept of private prison does works,[53] idea is that private prisons can discipline public prisons into becoming more efficient and flexible, through a healthy competition.[54] But question still remains the same, will there be a healthy competition, especially given the state of affairs we are in.

The distinction between public and private

The distinction between a public-private debate 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.[55] The prevailing approach believes that there is no clear division, rather a mere continuum, between private and public body. The same distinction, which has no normative basis, is used merely for the purpose of descriptive in na-

[52] 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 Barak Medina (2010), Supra note 135 at 695. In US the amount is $260 billion and its increases yearly, see Larry J. Siegel and John L. Worrall, Introduction to Criminal Justice, Belmont, Wadsworth Publishing, 2015, p. 9. In 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, London, Centre for Crime and Justice Studies, 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 September, 2015).

[53] See Adrian T. Moore, Private Prisons: Quality Corrections at a lower cost, Los Angeles, Reason Public Policy Institute, Policy Study No. 240, 1998, pp. 33-34. Studies do also show total control of corporations and thus having unfair advantages, see J. Robert Lilly and Paul Knepper, The Corrections-Commercial Complex, Crime and Delinquency, Vol. 39, No. 2, 1993, pp. 150, 151-66, where it is said that a line between the public good and private interest becomes so blurred and the distinction between governmental and non-governmental institutions is hard to find.

[54] Stephen McFarland, Chris McGowan, & Tom O'Toole, Prisons, Privatization, and Public Values, 2002, available at: http://government.cce.cornell.edu/doc/html/PrisonsPrivatization.htm (last accessed 18 September, 2016). Innovative approach to personnel management adopted by private prisons will be adopted by the remaining public prisons, thereby providing indirect benefits. Also see Alain Supiot, The Public-Private relation in the context of today's refeudalization, International Journal of Constitutional Law, Vol.11, No. 21 2013, pp.129-145. Prakash Sharma, Does Privatization Serve the Public Interest? An Assessment of the Risks and Benefits of Prison Privatization, Lexigentia, Vol. 3 (forthcoming).

[55] See Clifford J. Rosky (2004), supra note 4 at 967-68; Paul R. Verkuil (2006), supra note 4 at 402-06. Many a times the argument taken is with regards to the efficiency, see Andrei Shleifer, State Versus Private Ownership, 12(4) Journal of Economic Perspectives, Vol. 12, No. 4, 1998, pp. 133-150, Andrei while analysing politics of government ownership and Privatization notes that political considerations not only strengthen case for Privatization, but in fact drive decision to privatise.

ture. In simpler words, the moment 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.

While assuming no distinction between the two (public and private) the concept of *publicization of Privatization* which is a means for incorporating public norms into private realm, explains that there appears a clear distinction between the two.[56] Having said his 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.[57] 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 piecemill or abstract form but a common and uniform practice.

[56] Jody Freeman (2003), supra note 4 at 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." For further readings favouring such a step see also Clifford J. Rosky (2004), supra note 4 at 969; Paul R. Verkuil (2006), supra note 4 at 406; Richard L. Lippke (1997), supra note 36 at 34. Also see Jody Freeman, The Private Role in Public Governance, New York University Law Review, Vol. 75, No. 3, 2000, pp. 543-675.

[57] See Richard L. Lippke (1997), supra note 36 at 34-35, Richard favouring market ideology holds that "Prisoners in private facilities may wonder whether what they are compelled to do is for their own good or is calculated to promote the bottom line of the corporations that own the facilities. In fairness, similar questions may arise within public prisons, since state-employed prison administrators and guards have interests of their own to protect."

5. Conclusion

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. Its not that the document is bad or lacks something in it, it is all our willingness to go forward in the right direction, on the lines of social justness as enshrined in the Constitution. It is a two way process, where all must conform to the Constitution, and the Constitution must respect the sovereign will and welfare of the people. Just like Israeli Supreme Court, our Apex Court must also come ahead and save the country from any policy that may well be wrong for long run. Indian Judiciary needs to show courage, and make sure that they don't bow to the demands of market but to the needs of people, 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. For all others who feel equal in their value as citizen in market economy must feel satisfied; and the aggrieved must find hope in the influential poem by Seamus Heaney:[58]

History says don't hope
On this side of the grave,
But then, once in a lifetime
The longed-for -tidal wave
Of justice can rise up,
And hope and history rhyme.

[58] Seamus Heaney, The Cure at Troy, London, Faber and Faber, London, pp. 77-78.