Studies and Comments

Human dignity in the context of prison privatization

Ph.D. student **Ivica PAVIĆ**[1]

Abstract

This paper discusses the legal nature of human dignity as well as whether and in what manner it merits consideration in the prison privatization decision-making process. The first chapter grasps the complexity of the legal concept of human dignity by analyzing how it is approached - its status, roles and content - in notable international and domestic regulations, soft law, sociological and legal theories. The second chapter discusses the qualitative characteristics of the decision to privatize prisons and argues that it is primarily legal (constitutional) in nature, the importance of agent identity and its effect on conceptual permissibility of prison privatization based on the rationale theory of conceptual limitation to privatizing prisons by Dorfman and Harel, and finally, presents the institutional and human rights aspects of prison privatization as discussed by Barak-Erez and Feeley following the 2009 constitutional review decision of the Supreme Court of the State of Israel which held prison privatization to be unconstitutional. The conclusion attempts to formulate an acceptable legal definition of human dignity, gives a summary of author's opinions, and assesses the influence of presented argumentation on recommendation of prison privatization as long-term or short-term solution for addressing human rights violations with overcrowding as underlying cause.

Keywords: *prison, privatization, human dignity, identity, core.*

JEL Classification: K14, K15, K23, K38

1. Introduction

Prison sentence execution (imprisonment) is one of the most controversial state prerogatives since it involves specific limitations to human rights, and can also include various forms of (actual) coercion.

This paper will try to focus specifically on if and how human dignity of prisoners (or perhaps the society as a whole) is affected by prison privatization analyzed from the perspective of the decision whether to privatize prisons.

In order to attempt to answer this question, the paper will first give an overview of the most likely answers to the following two further questions:

1. What is human dignity, what are its status, possible roles and content?, and

[1] Ivica Pavić - Faculty of Law, Osijek, Croatia, ipavic@pravos.hr

2. Is the decision to privatize prisons a political or a legal decision, or perhaps a combination of the two, and what would be the consequences of each of those points of view?

Why did I point out exactly these two further questions?

The first further question is a direct consequence of the topic of this paper - it would not be prudent discussing possible violations to human dignity without at least roughly grasping just what it is - is it a value, a right, a standard, or something else? The paper attempts to answer this question by analyzing human dignity through: a) examples of significant international and national acts and *soft law* documents mentioning human dignity, b) the way it is described in the Croatian Legal Lexicon as the starting point for further theoretical analysis, and c) sociological and legal theories on human dignity.

As for the importance and necessity of the second further question - should we negate the legal aspect of the decision to privatize, we negate the possiblity that private imprisonment could pose a violation of human dignity because we would also negate the possibility of judicial review of the decision to privatize. Thus, the first part of the chapter of this paper dedicated to answering this question will begin with an introduction to the importance of characterizing the decision to privatize prisons. The second part of the chapter will focus on the importance of identity of prison sentence executioner (agent identity) in the context of the aims of prison sentence. In the following part, I will discuss the differences in mindsets of a public versus a private prison employee when approaching prison sentence exeuction and whether or not one mindset can be applied to the other sector (public vs private), largely based on the theoretical discussion by Dorfman and Harel. Finally, the last part of the chapter will present an overview of Barak-Erez's two complementary aspects of prison sentencing - institutional aspect and human rights aspect - as well as Feeley's criticism that followed, all in the context of the Israeli Supreme Court (sitting as High Court of Justice) case decision of 2009 in which prison privatization in Israel was held unconstitutional.

2. In search of the definition, status and content of human dignity

2.1 Legal documents and human dignity

International acts and *soft law* documents give little to no contribution in determining what human dignity is, its content or its status (roles). Vast majority, if not all of them, only briefly mention it or refer to it either in preambles (more often the case) or in normative sections of those acts, without describing what it is or what other source to use as an interpretational guide. In those documents, human dignity is either mentioned as something to which specific relations regulated by the act should always stride, or it is expressly guaranteed, but in a similar sense.

Examples of such practice would be: a) the Preamble and Articles 1 and 22 of the 1948 Universal Declaration of Human Rights, b) the Preamble of the 1966 International Covenant on Civil and Political Rights, c) the Preamble and Article 1

of the 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, or, short, the Convention on Human Rights and Biomedicine, d) the Preamble of the Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, e) the Preamble and Articles 1 and 31.1 of the Charter of Fundamental Rights of the European Union, and f) the Introduction and Rules 49 and 54.3 of the Committee of Ministers of the Council of Europe Recommendation Rec (2006)2 to member states of the European Prison Rules, also known as *European Prison Rules (2006)*.

Examples of acts on the national level (in Croatia) share almost identical approach to human dignity: a) the Constitution of the Republic of Croatia (Narodne novine, 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14) in Articles 25 and 35, b) the Penal Code (Narodne novine, 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17) in Articles 7.1, 43.1, 136.1, 241.1 and 556.1, c) the Media Act (Narodne novine, 59/04, 84/11, 81/13) in Articles 3.2, 7.1 and 16.1, d) the Civil Obligations Act (Narodne novine, 35/05, 41/08, 125/11, 78/15) in Article 19.2, e) the Criminal Code (Narodne novine, 125/11, 144/12, 56/15, 61/15, 101/17) in Articles 63.1, 156.2 and Articles 88-109, f) the Execution Act (Narodne novine, 112/12, 25/13, 93/14, 55/16, 73/17) in Articles 6 and 16.6, and g) the Code of Ethics of the Croatian Bar Association (Narodne novine, 64/07, 72/08) in Rules 1, 6, 7, 8, 11 and 95.[2]

Considering the abstract nature of human dignity in all those acts, it is often not clear whether it is considered only a value (which seems more likely), or a right/guarantee as well. As I will demonstrate in the following parts of the chapter, the understanding of the status of human dignity in a particular legal system is crucial to its interpretation by the courts.

2.2 The starting point of the human dignity analysis

To help mitigate the described shortcomings of human dignity in acts, and in order to prepare the reader for rather complex human dignity theories that follow, I have searched for a solid starting point for the human dignity discussion, and I believe I have found it in the Croatian Legal Lexicon's explanation of human dignity.[3] Obviously, lexicons are not a recognized source of law, nor they should be. Regardless of that fact, they can prove very useful when acts and practice fail to provide us with a definitive meaning.

Roughly translated, the Lexicon defines human dignity as *personal good which, being the highest value pertaining to every human being, gives an individual*

[2] All official versions of the mentioned national acts are available in Croatian on the official Croatian regulations website or in the corresponding journal - Narodne novine (e-versions available at: https://www.narodne-novine.nn.hr/) - in listed editions. The Constitutional Court of Croatia case law also shows a level of uncertainty towards the content and role of human dignity, but it appears that is it interpreted by the Constitutional Court either as a foundation for other rights (dignity as a value) - Article 25 - or as a derogable right on its own (dignity as a right) - Article 35.

[3] Pravni leksikon,, Leksikografski zavod Miroslava Krleže, Zagreb, 2007, p. 686.

the right to be treated as a human being, and not as a good, regardless of person's physical, psychological, moral or other qualities/characteristics, and cannot be waived.

Let us now examine the definition element by element.

First of all, human dignity is said to be *the highest value*, or *one of* the highest values. It means that - in the hierarchy of human rights and values, which undoubtedly exists, at least in the sense of giving certain values or rights more weight when conducting proportionality test, or in the sense of pronouncing certain rights as eternal, absolute or non-derogable - human dignity sits at the very top (or very close to the top) of the constitutional hierarchy of protected values. This element proves to be only partially correct, since there are examples of countries and cases in which human dignity is also a human right, and not only a constitutional value.

The second element of the definition is the element of *pertaining to every human being*. This is important, but also very problematic, because it opens many more questions than it answers, especially in the modern era of everyday breakthroughs in science. For example - How do we define a human being? At which point do we attribute a certain set of biological characteristics the status of human being? Does the human being need to be alive to be granted human dignity protection? If so, when does life begin and end? What aspects of life warrant human dignity protection? Are clones human beings? Unfortunately, these questions reach far beyond the scope of this paper and will serve as no more than an encouragement to conduct further research on the topic of human dignity.

It was a long-lasting understanding that there are certain social groups which do not merit all the rights enjoyed by the rest of the society. During that long period in the history of human civilization, and all the way up to the beginning of the 20th century, one group, apart from slaves, stood out in particular - prisoners. Since prisoners were deemed second-class citizens, they were considered unworthy of an equally human treatment. Today's penal law recognizes the equal status of free citizens and prisoners and negates the view by which prisoner status inherently presents limitations on other human rights as well, and not only on personal liberty. It does, however, remain questionable to this day whether human dignity specifically pertains to every human being *equally*, i.e., whether there is only one type (generalized content) of human dignity, or whether the content of human dignity depends on the characteristics of an individual. It is a question upon which not even the most prominent scholars can agree, and it even appears impossible to answer, given there are more different possible variations of human dignity.

After accepting that human dignity pertains to every human being and cannot be *alienated* (at least in its narrower content) was widely recognized, another question presented itself: is it possible for the bearer of human dignity to *waive their own human dignity* in order to realize another (e.g. economic) interest/right? It is an important one to answer since human dignity can and, in fact, does sometimes collide with other human rights or values. The answer is not so clear-cut, and will largely depend on a) the status of human dignity in a particular legal system, and b) the understanding of human dignity - whether it be a narrow or a broad understanding.

Several constitutional courts have approached and discussed this dilemma in the past twenty or so years.[4] Perhaps the most publicized case was the so-called *dwarf-tossing case* from France in which *Conseil d' Etat* held that dwarf-tossing as an economic activity is a violation of human dignity, but not only of the dignity of the dwarves involved in the tossing activity, but of the society as a whole. By that view, every person carries within them the same essence of human dignity shared by the continuity of the human race (the past, the present and the future generations), the essence being the very thing that differs humans from any other life form on this planet. Since human dignity pertains to humanity as a whole, a person cannot waive their dignity because it is not solely their own to begin with.[5] In other words, *Conseil d' Etat* adopted the negative, objective approach of human dignity, and concluded that, by allowing himself to be paid to be tossed, the dwarf in question conducted activities or actions that were not only harmful to himself, but also to the society as a whole. This form of actions was extensively researched and discussed by John Stuart Mill, who refers to them as *other-regarding actions* (as opposed to *self-regarding actions*, that affect only the individual conducting or performing them).[6]

2.3 Divergence and absence of content in human dignity theories

The situation regarding human dignity is no less unclear among scholars. Some often cited authors, such as Waldron, Hennette-Vauchez or Barak, even go as far as explicity stating that precise definition of human dignity is not even possible due to irreconcilible cultural, religious and legal disparities between countries, resulting in human dignity being interpreted differently in every country so as to adapt to those specific conditions.[7] Therefore, they are doing their best to direct the human dignity discussion towards its *content* and, particularly, its *roles*.

Waldron states that the understanding of the concept of human dignity can only be done on a self-intuitive level, but that it, in general, implies the specific status of human beings and the claim to protect that status. He then continues discussing the two possible roles of human dignity: 1) as foundation for other rights, which is basically human dignity as value, and 2) as a right on its own - human dignity as a right, something that Barak accepts in the legal concept as well. According to Waldron, the human dignity of today is a continuation of the historical concept of dignity as *rank* or *nobility*, which served only to protect and grant privileges to

[4] For examples see Hennette-Vauchez, Stephanie, *A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence*, International Journal of Constitutional Law, 2011/1, pp. 36-38.

[5] See Ibid., pp. 36-37; also discussed in Beyleveld, Deryck, *Human Dignity in Bioethics and Biolaw*, Oxford University Press, New York, 1993, pp. 26-27.

[6] Ten, Chin Liew, *Mill on Self-regarding Actions*, Philosophy, 1968/163, p. 29.

[7] It is worth mentioning that human dignity is often not even mentioned in constitutions, and even when it is, there is a lack of elaboration on what it is and its scope. That does not, however, mean that these shortcoming cannot be made up for through extensive case law.

certain people with higher status (e.g. the king or a noble).[8] Unlike dignity as rank or nobility, the modern human dignity is enjoyed by *every* human being. The second difference he points to is that it is enjoyed *in the same manner* by everyone (dignity as rank was different for the king, for a noble, for a minister, etc.). Naturally, there are different social and political roles today as well (*condition status*). However, they do not affect how human dignity is interpreted or protected as the historical dignity as rank did (*sortal status*). Waldron summarizes his work with the statement that dignity as rank (nobility) was gradually, with advancement of society, given to us all. He refers to this new, unique and uniform dignity as *legal citizenship*. Hennette-Vauchez acknowledges it as *humanity rank*,[9] and Berger in the form of *humanity as the new institution*.[10]

Beyleveld believes that the importance of human dignity has peaked nowadays in discussions of bioethics, where it can take the shape of a right (*empowerment*) or a limitation (*constraint*), e.g. in the question of informed consent, where it can be interpreted as the ultimate realization of the autonomy of will (empowerment) or be ignored/suspended having in sight the interests of society as a whole (constraint).[11]

Hennette-Vauchez, in similar fashion to Waldron, argues the so-far described *paternalistic dignitarian* approach to human dignity, according to which every individual carries the essence of humanity as a race that cannot be alienated or waived, and that most constitutional courts follow, to be somewhat double-edged. The reason for that, she writes, lies in the fact that human dignity more and more often serves as the basis for restricting rights rather than guaranteeing them, what she claims to have been its primary purpose that is today becoming twisted.[12]

Waldron agrees with Hennette-Vauchez that, but only in certain situations, the paternalistic dignitarian approach to human dignity has not produced satisfying results, and that it would have instead been more benefitial to use the approach of *dignity as autonomy*, which accentuates individual differences and focuses on autonomy of an individual, the freedom of choice of how to live one's life as a whole. Mind you, I specifically wrote *only in certain situations* for a reason. Namely, Waldron thinks that the paternalistic dignitarian approach is still necessary in areas such as prisoner treatment, otherwise there would even be an opening for the argumentation about how a certain level of treatment or specific action taken against

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[8] Waldron, Jeremy, *Dignity, Rank and Rights*, The Tanner Lectures on Human Values, Delivered at University of California, Berkeley, April 21-23 2009, [Online] Available: https://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf, (Sep 17, 2017), pp. 215-216.

[9] Hennette-Vauchez, *op. cit.*, p. 36.

[10] cf. Berger, Peter, *On the Obsolence of the Concept of Honor*, European Journal of Sociology, 1970/2, pp. 339-347.

[11] Beyleveld, *op. cit.*, p. 11.

[12] In the already mentioned "Dwarf-tossing case" the restricted human rights were the right to earn a living and the autonomy of one's physical aspects (body), see Hennette-Vauchez, Stephanie, *A human dignitas? The Contemporary Principle of Human Dignity as a Mere Reappraisal of an Ancient Legal Concept*, EUI Working Paper LAW, No. 2008/18, pp. 21-23, cf. Waldron, Jeremy, *Dignity, Rights and Responsibilities*, Arizona State Law Journal, 2011/4, p. 1131.

a prisoner was justified by their consent or behaviour, that it was „their choice“ that merited further sanctioning.

It is quite clear that both Waldon and Hennette-Vauchez approach the matter of dignitarian paternalistic status of human dignity in the sense that it represents an evolutionary stage of the ancient and medieval concept of *dignitas*. Other than by its negative role (imposing obligations, or limiting other rights), today's dignitarian paternalistic human dignity concept shares another trait with the medieval *dignitas* concept - in both cases the obligation exists to oneself. Considering this fact, it could even be questioned whether human dignity can even be a human right at all since, in the case of all other human rights, the obligation to protect the right exists for the government and other legal subjects performing delegated government functions, and not for the individual or group to whom it is granted. However, the courts have, so far, rightly held that this is not the case.

Applying this interpretation we can infer that the obligation that arises with the application of the dignitarian paternalistic principle is an obligation arising from status. Therefore, it is an obligation towards oneself as much as towards a status. If we accept the earlier constatation that humanity is the new status, we come to the conclusion that human dignity is actually an obligation to oneself and towards the entire humanity not to give up what makes us humans and sets us apart from any other living form, protected by law.

Thus, much like *dignitas*, human dignity is, at least according to the dignitarian paternalistic concept, also inalienable and cannot be waived. It is eternal and timeless at the same time because it focuses primarily on the human race as a never-ending sequence of generation upon generation of people.

Another fine example confirming the application of this concept is yet another case from France in which the court decided upon the request filed by civil associations of the parents of HIV-positive persons after a Benetton commercial aired on national television. In the commercial there were people posing with the text “HIV-positive“ printed on their body parts. The court found Benetton to have crossed the freedom of expression protection threshold and to have violated the human dignity of all HIV-positive persons. Perhaps even more important than the decision itself was the fact that the court even agreed to proceed upon this request because, should the court have applied the precise civil procedure rule, the associations would have lacked active legitimation to file the request in the first place. The court allowed the request because it had found that active legitimation arises from the status of human beings, which is, as we by now know, consistent with the dignitarian paternalistic human dignity concept.[13]

Still, even though the modern dignitarian paternalistic concept of human dignity and the medieval *dignitas* concept share some very important traits, as presented in this section of the paper, there is still one crucial and clear difference between the two, and that is the fact that the modern human dignity is the basis for

[13] Hennette-Vauchez, *op. cit.*, pp. 52-53.

equality, while *dignitas* was the basis for *social distinction*. We know this because *dignitas* was neither eternal/timeless nor inalienable.[14]

As a long time constitutional lawyer, and even Supreme Court Justice in Israel for many years, Barak approaches the problematic of human dignity from a different, purely legal (constitutional) perspective. In his monograph titled *Human Dignity: The Constitutional Value and the Constitutional Right*, he classifies possible approaches to human dignity in two basic categories - subjective and objective.

Subjective approaches view human dignity as, before everything else, a set of traits through which *an individual* thinks of oneself as a human being, and back it up by focusing on the right to self-actualization, which is based on the autonomy of will concept (*freedom to write one's life story*). The basis of these approaches lies in the observation that constitutions do not create or refer to an ideal person to which, then, all the rights and freedoms are granted and guaranteed, while, at the same time, individuals more distant from that human being model would enjoy less of those rights and guarantees. On the contrary - the society (through its government) is obliged to provide every individual with an equal chance of self-actualization, regardless of person's characteristics. Every person carries *their own unique* humanity essence which shall be protected through individual approach. The mentioned autonomy of will does not necessarily involve decisions only about one's own mind and body, and can also span to other choices (e.g. choosing how to raise one's children).

Objective approaches give critical importance to the fact of belonging to the human race, to the society of humans. The human race is regarded as the most perfect life form in this world. Humanity is one the highest, if not the highest value on its own. Because of that, no person can be treated or allow themselves to be treated as an object in order to realize other rights and liberties, or rights and liberties of other people. Since every person carries only the *shared* essence of the universal human dignity, violation to human dignity of one person also affects human dignity of the whole society. When it comes to imprisonment, this approach to human dignity is regularly dedicated to protecting the bare minimum of standards of treatment.[15]

Barak continues his analysis by presenting constitutional case law of the United States, Canada, Spain, Germany, Republic of South Africa and Germany. The reason he chose those countries specifically was because the status and roles of human dignity are different in each of them. In some of those examples human dignity is a constitutional value, while in others it is a constitutional right as well. The other differentiating factor for the selection was the existence or absense of a bill of rights in the respective countries' constitutions. Without going too much in detail, it is, for the scope of this paper, enough to state that, based on his findings - which concur with my own understanding - there are three possible statuses of human dignity in modern constitutional law: a) human dignity as a constitutional

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[14] Ibid, pp. 51-52.

[15] See Pavić, Ivica, *Review: Barak, Aharon, Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge University Press, 2015, in Pravni vjesnik, 2017/1, pp. 125-133.

value, b) human dignity as a constitutional value and a derogable constitutional right, and c) human dignity as a constitutional value and a non-derogable constitutional right. Where human dignity is an absolute, non-derogable right, the proportionality test does not apply to it, so it is necessary to interpret it much narrower than if it were a relative, derogable right, in which case the proportionality principle applies, but is also interpreted in a much broader sense.

Why is the status of human dignity so important?

I will try to demonstrate this by presenting Dworkin's differentation between legal principles and rules. He believes the difference to be of logical nature, meaning - both principles and rules (provisions) direct the interpreter on how to proceed in a specific case, but they differ in the character of the given direction. Unlike principles, rules do not have the „weight" dimension. They are either relevant, in which case they are to be applied, or irrelevant, in which case they cannot be applied. If two rules conflict with one another, one cannot be relevant, and the decision about what rule to apply in a specific case lies within reasons outside of the rules themselves (usually other rules or basic legal principles, most common being *lex posteriori*, *lex specialis* and *lex superior*). The „weight" dimension is important in specific cases in which the law specifies application of opposing or mutualy exclusive principles, and the interpreter must decide whether to fully apply one of them, denying the other one application or to find a way to at least partially apply/respect both or all involved principles.[16]

Based on what Dworkin stated, should we accept the premise that the provision guaranteeing human right is a rule, we need to either grant full protection or exclude its application entirely because of another rule or general principle stating not to apply the human right provision (which is very rare and presents a carefully enumerated set of exceptional circumstances in practice). Should we, on the other hand, accept the premise that the provision guaranteeing a human right is a principle, we must put that principle in relation to other principles, weigh them and, as a result, *possibly limit or suspend it altogether due to another competing interest of application of another principle*. So, apart from being only partially applicable as well, principles are also suspended for different reasons than rules - not because of existance of a second rule excluding the first rule, but because of the need to perform *normative balancing* (or *value balancing*).

Due to its specific attributes, constitutional values - I would add human rights here as well - should be considered neither rules nor principles. They are, however, as Vrban rightly admits,[17] closer to principles than to classic rules. What sets them apart from principles as well, in my opinion, is that principles usually serve as interpretation *criteria*, while values (and rights - gurantees) are *objects* of interpretation, the objects of normative or value balancing process.

[16] Dworkin, Ronald, *Shvaćanje prava ozbiljno*, Kruzak, Zagreb, 2003, pp. 36-39.
[17] Vrban, Duško, *Država i pravo*, Golden marketing, Zagreb, 2003, p. 405.

3. Contemplating the decision to privatize prisons

3.1 The legal-political character of prison privatization decision. Introduction

After trying to wrap our minds around the concept of human dignity, it is time to devote our attention to why it was discussed in the first place - the context of prison privatization.[18] More specifically, the moment (or the period, if understood as a deliberative process) of making the decision to privatize (or not privatize) prisons.

I begin my analysis with something we already know, and that is - if the answer to the question about the character of prison privatization is that it is political-only, it would render any legal discussion about prison privatization moot and, according to Barak-Erez,[19] impose a certain level of legal and *constitutional neutrality* towards any form of privatization.

Why towards *any* form of privatization? Because imprisonment or prison sentence execution is the most serious form of intervention in human rights and freedoms. So, if we allow the privatization of prisons without raising any serious legal (constitutional) issue, we can easily justify privatizing almost any other delegable power[20] of the state simply by applying *argumentum a maiori ad minus*. For, if the more intrusive form of privatization does not merit legal argumentation and review, why should privatization of less instrusive powers be any different?

The legal-only character of prison privatization standpoint is hardly worth examining and is obviously not correct due to an inseparable connection existing between politics and law.

Should we, however, at least in the opening stages of the privatization process (even though just reaching that early discussion stage would require some level of political will/interest), approach prison privatization issue from a purely legalistic perspective - not that politics is separable from law, but it is possible to limit the influence of politics by shifting the early phase of the prison privatization discussion process towards the scope of constitutional law - there is a possibility of evaluating it as unconstitutional. The consequence of that would be immediate unconstitutionality of any possibly existing private imprisonment, as well as

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[18] Prison privatization is a form of public-private parternship in which the state delegates imprisonment to a private subject (usually a corporation) by paying it a contractually set prison management fee (the fee ammount can be set in many ways; one popular variant is the one in which the fee is paid *per capita*). The prison itself can be private property or remain public property; on prison privatization variants/models see Robbins, Ira P., *Privatization of Corrections: A Violation of US Domestic Law, International Human Rights, and Good Sense*, Human Rights Brief, 2006/3, p. 43, also Genders, Elaine, Player, Elaine, *The commercial context of criminal justice: prison privatisation and the perversion of purpose*, Criminal Law Review, 2007/July, p. 515.

[19] Barak-Erez, Daphne, *The Private Prison Controversy and the Privatization Continuum, Private Power and Human Rights*, Law & Ethics of Human Rights, 2011/1, p. 139.

[20] Of course, not all powers are delegable. Good examples would be legislation and foreign affairs.

completely rejecting the possibility of future prison privatization until such opinion has been altered, which is unlikely to occur in constitutional practice.

What is the connection between legal discussion about prison privatization and human dignity?

Unlike imprisonment or prison sentence execution within the public sector, which is, without question, constitutional, legal and under direct control and supervision by the state so long as the state enjoys legitimacy, should we infer that prison privatization is unconstitutional, it would mean that prisoners in private prisons would be held captive by private persons without constitutional or legal authority, and coercion imposed by a private person is illegal and punishable. Limitations to personal liberty outside of legally mandated cases (e.g. arrest, imprisonment) that do not even respect the minimal constitutional guarantees of the arrestee or the prisoner are unconstitutional and in violation of Article 3 of the Convention, and therefore in violation of human dignity as well, since it was shown that the ECHR embeds human dignity when interpreting Article 3 of the Convention.

3.2 Identity of the executioner (agent identity) as the critical characteristic of imprisonment

Dorfman and Harel also believe the exclusively political character of prison privatization decision to be wrong. They do not think that the most important question to answer when discussing prison privatization is who can perform prison sentence execution better. Instead, they argue that, despite the fact that private prison employees can act *in accordance* with the demands set by state regulations and the privatization agreement (which they refer to as *compliance* or *mere performing*), the problem is not *how* they can perform the tasks put before them, but in an entirely different rationale with which they approach prison sentence execution compared to public servants (*on behalf of the state*),[21] which they find unconstitutional and in violation of human dignity (*dignity-based reasons*).[22]

Thus, the main question for Dorfman and Harel is not who can execute prison sentence *better*, but *who may* execute prison sentence to begin with. They believe that only after we've eliminated any doubt of its constitutionality can we begin discussing economical aspects of prison privatization. So, the legal (constitutional) evaluation must *precede* the *how* discussion.

Their theory rests on the postulate of the state not being allowed to delegate imprisonment to private sector subjects at all. Any delegation of imprisonment limits the scope of state powers, and any action or act within the privatized prison becomes a private action or an act. The values because of which penal law even exists, those it serves to protect and promote, are diminished because they manifest themselves in the very fact that execution is performed within the public sector, meaning - the

[21] More on the difference between *on behalf of* and *mere performing infra*.

[22] Dorfman, Avihay, Harel, Alon, *Dignity and Privatization: The Dignity-based Case against Outsourcing Violence*, [Online] Available: https://www.law.upenn.edu/live/files/327-hareldignity andagencypdf (pdf) (Oct 18, 2016), p. 2.

identity of those who execute the prison sentence is what gives *public character* to imprisonment. Imprisonment cannot even exist outside of the public sector, they continue - it's *conceptually* implausible.[23]

Their joint view on the importance of identity of the executioner is based on Harel's earlier classification of the three possible explanations or justifications of why only the state may inflict criminal sanctions, specifically - prison sentence.

The first possible justification is called *instrumental*, and is based on the argument that state institutions are the ones most likely to make quality assessment of the set of conditions regarding specific prison sentence execution in question and apply law in practice in a just and efficient way, because they eliminate the elements of friendship, camaraderie and vengefulness from prison sentence execution.[24] Harel finds such explanation unacceptable and rejects it completely because the decision not to privatize in this case is predicated on the assumption of the state being the better performer.

The second, *normative precondition* justification, is based around the construction that, in principle, even private sector subjects could execute prison sentence because it's necessary to consider not only the results, but also the aims of punishment. However, according to this justification, even though private sector subjects could, hypothetically, fulfill those aims, it is not allowed due to constitutional or subconstitutional (normative) limitations that only allow this power to be executed by the state. The constitutional part of this argumentation is very similar to Barak-Erez's *core state functions* discussion in that it negates the sufficiency of cost-benefit analyses as the basis for prison privatization, and relies on social contract theory in the sense that the right to sanction belongs only to whomever the people have transferred (delegated) it (from which legitimacy is derived) - the state.[25] The procedural aspect of this justification is the fact that there are certain procedular shortcomings of private prison sentence execution, and that those shortcomings complicate or prevent just treatment of prisoners. Also, it is questionable whether it is possible to make sure private prisons follow the same standards of treatment, as well as to ensure adequate monitoring of private prison activities on everyday basis. This justification was also rejected because it still relies on an *ex post* (and not a conceptual, constitutional) comparison (of results), and can be possibly worked around by simply removing those limitations when there is enough political support.

The third and final possible justification is called *state-centered*, is constitutional in nature and has to do with the questions of legitimacy and identity, as developed and discussed by Dorfman and Harel together later on. It is based on the fact that the state is the one that regulates behaviours that merit criminal

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[23] This theoretical concept is similar to Beyleveld's discussion on human dignity in which he states that, regardless of how individual slave owners handled their slaves, slaves were still to be perceived as property of the slave owner and as such, the entire concept of slavery violated human dignity, see Beyleveld, *op. cit.*, pp. 18-19.

[24] Harel, Alon, *Why only the state may inflict criminal sanctions: the case against privately inflicted sanctions*, Legal Theory, 2008/2, p. 118.

[25] Ibid, pp. 118-120.

sanctions, so it should also be responsible for executing those sanctions. If the state delegates its execution power, the sanctions lose their legitimacy *regardless of the quality of execution*. This justification shares its view with what Feinberg describes in *The expressive Function of Punishment*, in which he states that only the state, as the official and organized representative of the people, may condemn the act of an individual and find it to be a punishable offence with legal effects.[26]

3.3 Rationale behind prison sentence execution - can private prison employees act in the public interest?

Criminal sanctions can, according to Dorfman and Harel, be executed based on two different rationales: 1) fidelity of reason and 2) fidelity of deference. The questions we must answer is whether both rationales can result in public interest actions as perceived by the state (through its legislature and criminal justice) and whether one fidelity can be transferred to the other sector or should be applied to both public and private imprisonment (which will be discussed in the following section).

Fidelity of reason signifies the behaviour of an employee who acts unbias and in accordance with demands of public welfare (regardless of whether the incentive is of economical or other nature),[27] but *from the perspective of the agent executioner himself* of what public interest is (*value judgement*). That judgement may or may not coincide with the actual public interest, as construed by the state itself. Even if the two do coincide, it may only be an accidental overlap, and does not have to necessarily mean that value judgement is something we can regularly rely on. In other words, there are two ways of looking at public interest - extrinsical (the state view, the only legally acceptable point of view in application) and intrinsical (as constructed according to values nurtured by the agent himself), the latter being in use here.

Fidelity of deference represents the state in which an employee adopts the perspective of the state, when he basically acts as the state itself (*perspective of the state* or acting *on behalf of the state*). Acting from the perspective of the state requires ridding oneself of urges to conduct one's own reasoning (*supressing your own judgement*)[28] and forming one's own opinion on what the public interest is in any particular case, accepting the will of the state simply because it is the will of the state through faith in the system and the values that system seeks to protect and promote, and all that even if one might act differently applying one's own reasoning.[29] The reason why the will of the state is accepted without question is because it is the will of the sovereign. Acting based on this form of fidelity does not involve value judgement, i.e. represents the very lack of it or, if it does occur, overpowering it

[26] Feinberg, Joel, *The Expressive Function of Punishment*, The Monist, Philosophy of Law, 1965/3, pp. 401-408.
[27] Dorfman, Harel, *op. cit.*, p. 7.
[28] Ibid., p. 8.
[29] Ibid., pp. 21-22.

without questioning the validity of a given public interest action directive. Dorfman and Harel argue that this type of execution is much less stressful for the executioner because it does not requires of him to recognize public interest on their own in every single situation, which could, if it were the case, potentially lead to discrepancies between the two points of view of what public interest is.

Admittedly, fidelity of deference seems rather far-fetched at first because reasoning is inherent to human nature. The authors partly admit this to be the case. However, they add that fidelity of deference is also hard-coded in human nature for as long as people have lived in organized communities, even more so since the beginning of organizing in the form of states. There is a well-recognized order there, starting with legislation, continuing with prosecution, court procedures and judgments, and ending with sentencing and sanction execution, that inspires confidence and provides extrinsic and acceptable justification to what a prison employee is about to do - and that involves limitations to another person's rights and freedoms.

There remains, however, the question of the extent to which the actions and acts of public servants would need to be formalized in order for nothing to be left unspecified, i.e. require any form or value judgement in application of regulations and judgments. What also remains questionable is the level of identification of prison employees with the system of which they are parts and the values that system represents. My opinion is that this identification is, in practice, severely lacking, and that the inability of private prison employees to act through fidelity of deference argued here is, on its own, not enough to explicitly exclude the possibility of prison privatization.

Dorfman and Harel continue their identity discussion by describing this barrier or inability when it comes to private prison employees not as psychological, but as conceptual. Were private prison employees to act with fidelity of deference, they would be void of any liability for their actions, which would be unacceptable. When a public servant's actions result in deviations from public interest or violations of human rights of prisoners, the state steps in to take responsibility for his action. In the case of private imprisonment, should we apply fidelity of deference, there are none to take that responsibility. Considering what was just stated, the only ones who could possibly be held responsible would be the private prison employees themselves. But if that's the case, if their own well-being in on the line , how could we ask of them to act without performing their own value judgement?

Therefore, they find that private prison employees cannot act in fidelity of deference and that the state may not support such actions by accepting them as execution of its judgements (state execution of sanctions). That would, as stated earlier by Harel in his invidividual paper on this topic, break the necessary bond between norms by which the state prohibits certain behaviours and the sanctions for those behaviours, and diminish the overall legitimacy of criminal sanctions. So, even if the private prison were to act exactly as a public sector prison would, private imprisonment may still not be regarded as public (interest) prison sentence execution.

But, aren't the results all that matters, and haven't we already established them to possibly even be identical? Does *agent identity* truly matter? In the attempt to completely clarify the answer to this question, Dorfman and Harel further explain the two earlier mentioned types of executing the will of the state. One is, as previously said, called *execution on behalf of the state* and is characterized by a sort of automatism or mechanical action, while the other is called *mere performing* and is characterized by situation-to-situation individual assessment (rationalization). The most important difference is that the latter requires of the employee to reach their own conclusion on how to proceed, where there is a possibilty of deviation from the state perception of public interest.[30] The existance of such responsibility, they claim, would undoubtedly represent a moral defeat and violate human dignity of the person on the receiving end.[31]

There is also an opposite view, mostly acknowledged by privatization supporters, which suggests that the permissibility of delegation of agent executioner status exists regardless of whether the agent has adopted fidelity of deference, and every action taken in accordance with the public interest (even if equal result is only a coincidental match as a product of fidelity of reason) is lawful. In order words, the legal evaluation of prison privatization is not the key perspective, and even if it were - there is a presumption of legal permissibility.[32]

This perspective is also flawed, because it would also legalize regular private punishment, which is unacceptable. I also agree with Dorfman and Harel finding this presumed permissibility to be highly questionable because it clearly depends on a series of legal, social and cultural specificities, so its evaluation may not be excluded or assumed even with the help of extended social contract theory interpretation. Also, if we try focusing solely on economic criteria, we shortly realize that we find ourselves in front of a wall, since the economic effects of prison privatization have not been definitively answered even after over thirty years from the beginning of the modern wave of prison privatization, because they, too, depend on legal, social and cultural specificities of a country.[33]

The fact that, with fidelity of reason, there is a risk of deviation from public interest does not yet mean it is unacceptable. It could easily also mean that all we need to do is ensure that the people entrusted with sanction execution share the same values as the state (a sort of an *ex ante* public interest overlapping test). Would that not solve the earlier described issue of fidelity of reason?

As it turns out, it is here that the question of protection of human dignity stands out the most. Dorfman and Harel point out that, in a situation in which fidelity of reason is applied, the personal (private) aspect of the decision to execute the

[30] Dorfman, Harel, *op. cit.*, p. 23.

[31] Ibid.; If we apply the dignitarian paternalistic understanding of human dignity as described in the previous chapter, we could say that it violates human dignity of the whole society, not just of the prisoners involved in that specific execution.

[32] Ibid., p. 19.

[33] For more on economic effects of prison privatization see Pavić, Ivica, *Perspectives of Prison Privatization as a Solution to the Prison System Crisis in Croatia*, European Journal of Multidisciplinary Studies, 2016/1, pp. 190-193, 195-196.

sanction overshadows the public aspect of criminal sanction and can be characterized as private execution, which, according to this theory, is a *per se* violation of human dignity. If the person is to conclude that the procedure leading to the judgment was unjust, or that the sanction itself is unjust, would morale not require to act outside of what the execution of sanction legally mandates, even as far as denying execution entirely? So, by that logic, even if we do not categorically state that everyone in a similar position would act as described (*praeter legem* or *contra legem*), the very existance of such possibility brings the ethical and legal justification of prison privatization into question, since it would always, at least partially, be *the act of personal will of agent executioner as well*. On on the other hand, when the execution is carried out by a civil or public servant, he acts as though he himself is the state (the extension of the state), without the need for fidelity of reason - of course, under the assumption that there is a sufficient level of state legitimacy. The acts of private prison employees would, by this argumentation, lack legitimacy that can only be attributed to the state.

3.4 The possibility of fidelity of reason application on public sector imprisonment

However, even if everything stated in the previous section was correct, should we not apply the same chain of thought on acts within the public sector as well? Doesn't fidelity of reason affect every human being, and not just private sector employees? What is it that sets public servants apart from private sector employees, or is there even anything setting them apart? In other words, should we or should we not view state execution and individual execution within the public sector as one and the same?

If we were to extend the argument of the need for fidelity of reason to public servants, it would mean that there is state as an abstract sovereign with nobody left to carry out its will, which in turn would mean that the state cannot carry out its will at all.

Dorfman and Harel discuss this as well and reject this possibility. They admit that prison sentence execution is hardly the type of person-to-person behaviour an average agent executioner would find to be an attractive or enjoyable activity in any way. Because of that, one should not expect everyone to comply to legal mandates of such manner without personal objections. Imprisonment is and should, instead, be analysed as the necessary evil which a certain group of citizens has vowed to uphold to promote state welfare and, consequently, everyone's benefit (including their own in a broader sense).[34] They find this argumentation is in line with Weber's statements about bureaucracy containing a certain *moral core* (the sense of duty) that overpowers personal gain and personal choices, resulting in accepting mandates without the involvement of fidelity of reason, or even acting against it should it meddle in.[35]

[34] They argue this by quoting Montaigne, see Dorfman, Harel, *op. cit.*, pp. 27-28.
[35] Ibid., pp. 28-29.

Of course, even fidelity of deference should have its limits. An obvious example would be civil service in the Nazi regime. So, even fidelity of deference can result in violation of human dignity.

What sort of attributes, then, must a public service have for the actions of public servants not to be considered as conflicting with human dignity?

Apart from the basic attribute - the existance of a constitutional legal system that appropriately addresses, secures and protects human rights and in which public officials and public policy enjoy legitimacy - Dorfman and Harel name two other that also give a mostly (but not entirely) acceptable answer to why private prison employees cannot act upon fidelity of deference:

1. a person *cannot choose* to act on behalf of the state, because the perspective of the state only exists within the public sector, within the practice of public sector organs which represent the extensions ("limbs") of the abstract concept of the state; the existing practice of application of law together with the law itself can only be properly and systemically formulated and articulated within the public sector; in order words, only public servants can truly know the practice of imprisonment and use it as a guide for every individual action and act,[36] and
2. since it is possible to mitigate the lack of the first additional attribute by hiring employees or who were once, not long ago, members of that very public sector prison system, or otherwise, over a longer span of time, by developing their own positive practice, there must be something more to it; and, in fact, they argue there is one more important attribute that prevents fidelity of deference to prevail in private imprisonement - the fact that state or higher ranked public officials can, within the public sector, and unlike in the private sector, directly influence prison sentence execution practice outside of the mere normative requests by further steering them in the same direction (or a different direction when needed), so long as that behaviour remains within the legal scope, of course; they refer to this attribute as *integrative practice*; this is because even the best of regulations can never predict or cover every possible situation requiring application and can, therefore, be interpreted opposite to the protection of human rights; Dorfman and Harel argue that this desirable, unspoiled by corruption type of influence stops on the crossing line of transition to the private sector, increasing the danger of „wrongful interpretation" significantly; this happens due to the fact that public interest is not entirely an abstract concept - it is reshaped and articulated through every-day judgments, decisions, instructions, recommendations and treatment of prisoners, and private prison employees are not in constant contact with those authorized to articulate it; that lack of contact will likely result in seeking other criteria on which to base their everyday decisions, whether it be fidelity of reason, or even worse, the reasoning of their employers (who are usually driven only by the motive of profit), which will likely result in conflict with public interest.

[36] Ibid., p. 30.

Although this explanation seems appealing, I would not rush to accept it without critic. It is possible to object the need for integrative practice development within the public sector because it is easy to picture a scenario in which the very reason for prison privatization would be the negative effects of that practice and the aim of altering/ending it. In such cases, it is usually not the aims of the policy to blame, but the methods of accomplishing those aims. Perhaps, then, it would be enough to simply lay down the framework, and let the agent executioner choose the appropriate individual action (method) by which to accompish set aims.

What does argue in favor of this argumentation is that the authority to punish and imprison may not be analyzed separately from other prerogatives of the state, something that Harel depicts on the example of parental care. According to that example, it is, in fact, possible to „delegate" certain elements of parenting authority (such as the choices on the specifics of child's education) to another. However, the very reason why those inherently belong to parents as well is because of their integral role in children's overall development and the enhanced sense for the child's welfare that (nearly) all parents carry inside them (parental care as moral core). Should these elements be „delegated", the integrity of the whole structure of family would weaken, and perhaps family as the fundamental social unit would crumble altogether.[37]

Applying this analogy to the state, the effect of functioning of the whole criminal justice system is brought to question with private imprisonment. We can look to other countries' experiences as a possible guess to what would happen, but it would remain just that - an educated guess. Should we really risk so much to possibly gain little to nothing (according to most newer research on the effects of prison privatization, the financial gain is minimal at best, and the human rights aspect is still not nearly analyzed enough to be judged).

3.5 The character of imprisonment from institutional and human rights aspects

Barak-Erez approaches the subject of the second big question asked in the paper by examining two aspects of imprisonment - the institutional aspect (similar to Harel's normative justification - see *supra*) and the human rights aspect.

The institutional aspect is described as one attempting to give an answer to the question about whether there is a core of fundamental government functions (*core government functions*), and the human rights aspect focuses on answering the question about whether privatization of those functions - even in the hypothetical way described by Dorfman and Harel as acting *on behalf of the state*, which they argue is not even possible outside of the public sector - violates human rights of the prisoners (in the prisons involved in privatization).

Setting institutional boundaries of privatization is no easy task, mainly because there is no one accepted definition of what constitutes core government

[37] Harel, *op. cit.*, pp. 123-125.

functions. Most modern constitutional systems contain constitutional elements by which separation of powers is either expressly stated or indicated and interpreted. Constitutional acts mention, at least on a rudimentary level, the three branches of government - the legislative, the executive and the judiciary. And, while the powers of the legislative and the judiciary are fairly clear (enumerated), the individual powers of the executive are far too many to be enumerated in the constitutional act. Therefore, by studying the act itself it remains inconclusive which of those powers can be delegated outside of the public sector. The risk of precisely defining and expressing core government functions in a constitutional act is, according to Barak-Erez, in the danger of implicitly allowing privatization of all other functions outside of that narrow scope of powers simply by applying *argumentum a contrario*[38] (similarly to how *argumentum a maiori ad minus* was applied in an earlier discussion) in the sense that anything not belonging to that core may be privatized.

In Israel, a state in which there had previously been no private prisons, there was a case before the Supreme Court several years back which revolved around the question of whether the Israeli government's decision to privatize a prison violated provisions of Article 1 of the 2001 Basic Law: The Government, as well as provisions of the 1992 Basic Law: Human Dignity and Liberty. The mentioned Article 1 provision states that „*The Government is the executive authority of the State*", and a similar provision is present in most countries constitutions or constitutional laws. The applicants suggested that the correct interpretation of the provision would presume the existance of core government functions, powers that may not be delegated, and that managing prisons and imprisonment is among them due to being an integral part of criminal law in general and, therefore, a part of one of the most important prerogatives of the state.

Interestingly, the Supreme Court, formally sitting as the High Court of Justice in the case, decided to base its 2009 decision to set aside Amendment 28 of the Prison Ordonance in its entirety[39] almost exclusively on the human rights aspect, while neglecting - apart from mentions in opinions - the institutional aspect.[40] The decision was reached around four years after constitutional review petition was submitted.[41]

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[38] Barak-Erez, *op. cit.*, p. 146.

[39] Academic Center of Law and Business v. Minister of Finance, Israeli High Court of Justice, Case No. HCJ 2605/05 [Online] Available: http://versa.cardozo.yu.edu/opinions/academic-center-law-and-business-v-minister-finance, (Sep 19, 2017).

[40] It should be noted that the explanatory part of the decision also suggests condemnation of the lack of transparency in the tendering process that followed enactment of the Amendment, see Barak-Erez, *op. cit.*, pp. 152-153.

[41] The petition was submitted in 2005, the year after the Knesset (Israeli Parliament) enacted Amendment 28 of the Prisons Ordonance, authorizing the construction and operation of an 800-bed private prison. In 2005, an academic institution, a retired senior officer in the Israel Prison Service, (IPS) and an IPS prisoner challenged Amendment 28. Feeley, who published his overview of the decision as a reply to Harel's theory (described *supra*) in 2014, argued that the Supreme Court deliberately delayed reaching a decision in order to give the government enough time to reassume control of the set-to-privatize prison as well as to acknowledge how sensitive the subject of human rights and prison privatization is based on comparative law examples, mainly from the United States.,

President Beinisch, the author of majority opinion, expressed her reserve towards constitutive[42] character of Article 1 of the 2001 Basic Law, and stated that it is, therefore, not possible to establish arguments against constitutionality of the decision to privatize on its basis (Justice Hayut agreed with this opinion). However, she continued by stating that it does not mean there isn't a *core of sovereign powers of the executive*. She argued that imprisonment may not be separated from punishment and invoked Hobbes' social contract theory by which only the state, as the sovereign to which the people have entrusted the care for safety and security, may execute that power. According to Beinisch, Hobbes suggested that the extension of sovereignty of the state on safety and security is one of the foundations of modern society and added that a) without the penal element the state legitimacy diminishes significantly, and b) imprisonment involves organized coercion with many opportunities for abuses, which can be better controlled if the sentence is executed within the public sector.

In other words, as interpreted by Feeley,[43] it means that, if the social contract lacks the expressed authority of the state to delegate a power, it may only be exercised by the state itself, and any such delegation would present an *ultra vires* delegation of power, which cannot be accepted, as shown in practice, for example, in the cases of states sending prisoners to serve their sentence to another states or countries to protect the integrity of the family and the prisoner's dignity whenever possible.[44]

Justice Levy, on the other hand, as a representative of the minority, found that it was not yet time to discuss the human rights aspect of prison privatization since it was only in the process of realization, much less without first discussing and assuming a firm standpoint on the institutional aspect. He also expressed his opinion according to which Article 1 cannot challenge the constitutionality of the decision to privatize prisons on its own, without also conducting proportionality test. Finally, he suggested that prison privatization may not be equal to privatization of, say, the legislative power, i.e., that imprisonment does not fall within the scope of the core of government functions.

As for the dominantly present human rights aspect in the 2009 decision, the analysis and conclusions headed in an unexpected direction. Instead of the usual critical overview on the dangers of human rights violations due to conflicts with the motive of profit of the private sector subject combined with insufficient and legally flawed state supervision (which was still mentioned, but was far from being in the focus of the argumentation), justices of the majority focused on the symbolic meaning of private prisons as institutions where state punishment ends, and a place

see Feeley, Malcolm M., *The unconvincing case against private prisons*, Indiana Law Journal, 2014/4, p. 1402.

[42] As opposed to declaratory.

[43] Feeley, *op. cit.*, pp. 1415-1416; Feeley used the opportunity to interpret President Beinisch's opinion to point out that such interpretation of the social contract theory is only applicable on the legislative, not on executive as well.

[44] Ibid., pp. 1433-1434.

in which humans punishing humans begins (this mostly matches what Dorfman and Harel argued, see *supra*).

In the context of the human rights aspect, President Beinisch did reckon that, according to the basic principles of political philosophy, the violation of the right to personal liberty in the case of prison privatization derives from the very fact that the state is delegating one of its fundamental and most-invasive prerogatives to a private sector subject, which hurts the legitimacy of the state. The very existence of private prisons which function on economic principles reflects disrespect towards prisoners as human beings (i.e. negatively affects their human dignity). Therefore, the violation to human dignity exists on a *conceptual* level, regardless of *de facto* violations once the private prison starts to operate, which may or may not occur. Feeley finds this argumentation false considering the fact that the unitary model of the state, by which the state can and does exercise all its powers, is practically impossible in the 21st century.[45]

Feeley also opposes the logic by which private prison companies cannot place the interests of prisoners ahead of the motive for profit because it would mean that the level of human rights protection of prisoners depends on the identity of the executioner, and not on the actual quality of treatment, programmes and overall prison conditions.[46] He opposes the argument of the historic character of state imprisonment by discussing examples of United Kingdom and the Netherlands where not only were prisoners housed in private property, but where other punitive elements, such as probation, were or are also handled by private sector subjects. In order for his argument not to be rebutted as looking for exceptions that prove the rule, he states that even the highly cited Jeremy Bentham himself constructed his idea of *Panopticon* around not only advancements in security and treatment programmes, but also around the interest of profit by using the great potential of the prison working community on the market, thus demonstrating that positive advancement in treatment of prisoners and proft can go hand in hand with one another. That very idea lived to see the light of day - admittedly, in a slightly toned down form - in the modern American and Australian prison systems in which, especially in the United States, prison privatization was encouraged by the very motive of raising the standards of imprisonment (after a number of court decisions fining the states with high figure fines for confining prisoners in overcrowded prisons).[47]

Instituting new supervisory mechanisms would, according to Beinisch, not pose a sufficient response to the problem of prison privatization.[48]

A somewhat different approach, one that was expected from more justices, was adopted by Justice Proccaccia, according to whom there is a high probability of *de facto* human rights violations when the prison is governed by someone with the motive of profit in mind. Other justices found this to be overly speculative

[45] Ibid., pp. 1405-1406, 1418.
[46] Ibid., pp. 1408-1409.
[47] Ibid., pp. 1418-1421.
[48] Barak-Erez, *op. cit.*, p. 149.

considering the timing of the constitutional review (preparations for opening of the first private prison in Israel).

Justice Levy, in his minority opinion, rejected this argument and pointed out that there is currently a much more pressing, prevailing interest that merits protection than potential, speculative and future *de facto* violations (this is likely where he saw the earlier mentioned need to conduct proportionality test) - the interest of improving the overall standards of imprisonment, which would certainly and with immediate effect eliminate some of the current and existing violations to human rights that are happening on a daily basis. He believes that human rights violations in the context of the yet unreleased private prison should be judged on an individual (*in concreto*, per case) basis and from an *ex post* perspective.[49]

Finally, Barak-Erez agrees with Justice Beinisch's statement of how any effective supervisory model would be hardly imaginable, as it would require an overview of activities with a certain level of discretion that require immediate action and are performed on a daily basis. She continues on Justice Procaccia's and Justice Beinisch's argument about how the state supervision would be too generic and not detailed enough, i.e. could not grasp everyday prison activities affecting prisoners' human rights (*umbrella supervision*). In practice, state supervisory mechanics focus mostly on what the reports made by the very subject the state is to supervise, and the supervision itself would most likely end up being conducted only in the form of periodical prison inspections with minimal contacts with prisoners.

4. Conclusion

Through this paper I attempted to point to the direction of defining the legal concept of human dignity, and demonstrated it can be approached from various perspectives - normative, theoretical and practical. And, even though it proved to be a difficult task, certain characteristics were noticeably shared, regardless of the approach.

Considering what was said, and in accordance with the selected starting point, I believe there to be two possible meanings of human dignity.

The first meaning of human dignity encompasses the personal good belonging to every human being equally, the human dignity that gives us *at least* the right to be treated as human beings, regardless of our individual characteristics, and in that sense it cannot be alienated or waived. All other noticed possible characteristics of human dignity depend on the status and roles (interpretation) of human dignity in a particular legal system, and therefore belong to the second, broader meaning of human dignity.

In the context of the two possible meanings of human dignity we also notice that human dignity can have the status of a constitutional value, or the status of both a constitutional value and a constitutional right (derogable or non-derogable).

[49] Ibid., p. 150.

Should the content of human dignity be limited only to the narrower meaning, which is negative and objective in quality, it truly cannot be alienated or waived. However, should it also include the broader meaning, which is positive and subjective in quality (e.g. autonomy of will, the right to self-actualization), then that broader segment of human dignity is subject to the proportionality principle and the proportionality test and can be limited, or even suspended altogether, depending on the result of normative (value) balancing.

As for the character of the decision to privatize prisons, on the one hand, I find it necessary to reject the view of exclusively political character of privatization in general (not only in the prison system) because all constitutions contain, explicitly or implicitly, the core of fundamental government functions that cannot be delegated. Any delegation of such functions is unconstitutional. Apart from that, constitutions guarantee human rights regardless of social status and lay before the legislator strict requirements of when those rights can be limited or suspended on subconstitutional level. On the other hand, we must also be aware of the ever-present influence of politics in the modern society and that the fundamental institutions of the government are actually political institutions. I believe that an open-to-public and expert legal discussion (e.g. round tables, conferences, forums), then an economic and social discussion, followed by a comprehensive multidisciplinary review should precede any type of political debate involving potential private sector partners/investors as well, that could result in a formal political (and also normative) decision, not diminishing the importance of latter in the possible realization of the prison privatization project.

Whether imprisonment or sentence execution is a part of the mentioned core is an entirely different issue that cannot be answered in a general manner, as it depends on the characteristics of a particular constitutional structure - particularly, on the specifics of the manner of the separation of powers as expressed and interpreted by constitutional courts.

I do not find the argument of agent executioner's identity, as the key element without which the penal aspects of prison sentence diminish and cannot fulfill the set aims, convincing enough to *a priori* reject the concept of prison privatization. It is also the opinion I share towards the impossibility of public servants to act according to fidelity of reason, as well as towards the impossibility of private prison employees to act on behalf of the state, i.e. according to fidelity of deference.

So, to bring the two chapter subjects together - does the decision to privatize prisons violate human dignity of the involved prisoners? Not necessarily. Any potential violation should be judged individually and *ex post*. I believe that some level of negative effects on human dignity of prisoners exists in every prison society, state or private, as it is inherent to the social status of prisoners. According to my personal belief, and considering what research has so far demonstrated, it appears that there are far more important factors shaping the treatment of prisoners in a given prison than the management structure or the ownership of the person (if it even merits any meaning at all), such as the economy of scales, prison facility age or security conditions of a prison facility. The remainder of those negative effects usually are,

indeed, the result of not meeting the minimal standards of treatment or other actions or acts directed against those standards, but they, once again, need to be dealt with through an individual approach.

To conclude, due to several undefinitely answered questions regarding prison privatization (e.g. economic benefits, potential human rights issues, the question of possibly diminishing state legitimacy), I would surely not recommend it as a regular means of direct positive influence of treatment standards and prison conditions, but I would also not exclude it *a priori* and completely from the discussion about possible solutions, usually to overcrowding causing decline in treatment standards, indirectly leading to human rights violations. I would, however, due to the mentioned risks, only resort to it as a short-term solution, and only when the overcrowding levels become dramatic - for example, the population of twice the capacity of a prison when other prisons face serious overcrowding as well, and there is nowhere to move the excess number of prisoners without violationg either their rights or other prisons' prisoners' rights, and release of such a large number of excess prisonsers is out of question. But, doing so will require a preceding constitutional interpretation and then a careful consideration of methods, control mechanisms and partners in possible future public-private partnership endeavours.

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