

The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State

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This Article examines what form the public/private distinction takes in contemporary legal consciousness. It proposes that while the public/private distinction is still an important component of contemporary legal consciousness, the content of each sphere, their stability as distinct spheres, and their interaction with each other have significantly changed. This transformation occurred primarily due to the rise of the regulatory state and the increased visibility of the interconnectedness of the spheres due to public ordering of private activity in an age of widespread privatization. The current state of the distinction challenges courts, when these are asked by petitioners to define the proper scope of the spheres and decide on their boundaries. The Article critically examines the Israeli High Court of Justice decision in a prison privatization case, as a case that reflects the mismatch between the traditional understanding of the public/private distinction and a much messier reality in which the private and public spheres keep changing, and intermingling in new ways.

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INTRODUCTION

Possibly too much has been written about the public/private distinction. The distinction has been described, explained, critiqued and defended.¹ It is seen as an institutional structure that may facilitate individual liberty by some,² and as the dark, violent side of liberalism by others;³ it appears in the literature as

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- 1 For a small sample of the vast array of literature on the topic see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); Symposium, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1213 (1994); Symposium, *The Boundaries of Public Law*, 11 INT'L J. CONST. L. 125 (2013); and of course this volume: Symposium, *Public/Private Beyond Distinctions?*, 15 THEORETICAL INQUIRIES L. 1 (2013); see also countless individual books and articles, such as PAUL FAIRFIELD, *PUBLIC/PRIVATE* (2005); MARTHA MINOW, *PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY* (Jeff Weintraub & Krishan Kumar eds., 1997); *PUBLIC AND PRIVATE IN SOCIAL LIFE* (S.I. Benn & G.F. Gaus eds., 1983); Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387 (1999); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635; and *Development in the Law — State Action and Public/Private Distinction*, 123 HARV. L. REV. 1248 (2009-2010).
- 2 See, e.g., Maxine Eichner, *The Family and the Market — Redux*, 13 THEORETICAL INQUIRIES L. 97 (2012); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 861-66 (2000) (arguing that much feminist theorizing has been about “reform and not elimination of the distinction” and that in fact there is great utility in aspects of the distinction for women’s sexual self-determination and liberty); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 315 (1989) (carefully suggesting that public power should be preferred over private power:

A confirmed optimist about the deliberative character of popular political action would tend to see the regulatory alternative to private or market oppression as at least somewhat more likely to be considerate of all the interests involved, not least including people’s interest in preventing the accretion of totalitarian, citizen-shaping power by any social agency—the government among others).

- 3 CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 184-94 (1989); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 119 (1994) (“[I]f patriarchal control of women’s choices and patriarchal domination of women’s inner and public lives occur in the very private realm of home life then the Constitution, above all else, protects the very

an ideological construct — a mere invention — while at the same time as a very real power that explains and arranges our lives, our laws and our legal systems.⁴ In this Article I attempt not to rehash what is by now known about the public/private distinction in the Western world, but rather to hypothesize where this distinction stands and how it functions at this moment in legal consciousness.⁵ I do so through an analysis of a narrow slice of this fundamental and structural distinction: the public/private interaction in the provision of social services, as it is challenged by the institutional variety of the regulatory state. I use as a test case the telling story of prison privatization in Israel.

This Article focuses on the survival and perhaps revival of the distinction in the regulatory state of the twenty-first century, and sketches what form it may take today. It proposes that while the public/private distinction is still an important component of contemporary legal consciousness, the content of each sphere, their stability as distinct spheres, and their interaction with each other have significantly changed. This transformation occurred primarily due to the rise of regulatory state and the increased visibility of the interconnectedness of the spheres due to public ordering of private activity in an age of widespread privatization. The current state of the distinction challenges courts, when

system of power and control that constrains us”); Ruth E. Gavison, *Feminism and the Private-Public Distinction*, 45 STAN. L. REV. 1, 3 (1992-1993) (“[T]he distinction itself plays a part in creating or perpetuating injustice”); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) (stating that “the law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability”); CAROLE PATEMAN, *Feminist Critiques of the Public/Private Dichotomy*, in THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY 118, 118 (1989).

- 4 Yishai Blank & Issi Rosen-Zvi, *The Persistence of the Public/Private Divide in Environmental Regulation*, 15 THEORETICAL INQUIRIES L. 199 (2014); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1353 (“The distinction is dead, but it rules us from the grave”); Karl E. Klare, *Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1358 (1982) (“The public/private distinction recurs not just as a background motif but very often as an essential ingredient of the grounds of decision. Indeed, courts and commentators often speak as though resolution of labor law problems would be impossible, without a conceptual apparatus for distinguishing between public and private.”); Frances Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497, 1527 (1983) (“[T]he dichotomy . . . remains and plays a vital justificatory role in maintaining the status quo”).
- 5 For an up to the contemporary moment periodization of legal thought, see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David M. Trubek & Alvaro Santos eds., 2006).

these are asked by petitioners to define the proper scope of the spheres and decide on their boundaries.

One judicial response to this challenge can be found in an Israeli prison privatization case, in which the privatization of a prison was declared unconstitutional due to the harm to prisoners' dignity caused by being imprisoned in an institution motivated by economic interests. The case provides an example both of the changing nature of the public and the private and the particular challenge courts face in its wake. The changing realities of public service provision led the justices to look for the core of each sphere and clearly identify the differences between public and private and, in this case, insist on preserving the imagined dichotomy — despite the rapidly changing nature of both private and public — in the name of protecting human rights. The Article argues that the Israeli prison privatization case manifests the danger that lies in fetishizing a static understanding of the public/private distinction.

Part I offers a brief history of the public/private distinction, using Duncan Kennedy's *Three Globalizations of Law* periodization as its starting point.⁶ Part II then turns to discussing the public/private distinction in contemporary legal thought, detailing three main challenges the current moment presents to traditional understandings of the public/private distinction. The challenges are exemplified through an exploration of the changing character of the distinction in light of the rise of the regulatory state. Part III then looks into one case in point: the attempted privatization of prisons in Israel.

I. A VERY BRIEF HISTORY OF THE PUBLIC/PRIVATE DISTINCTION

What is the public/private distinction in legal thought? Briefly defined, the public/private distinction in Western legal thought refers to notions that legitimize or delegitimize legal regulative “intervention” in different spheres of human activity.⁷ Legal thought in different eras developed different images of the relationship between the private and the public. Roughly speaking, the liberal idea that has haunted legal consciousness since the late nineteenth century, or since “markets became central legitimating institutions,”⁸ is that legal intervention in the private sphere (namely, the family and the economic market) is unjustified and should be limited (in the market) or nonexistent (in the family), while in the public sphere (state) legal intervention is welcome

6 *Id.*

7 Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1982).

8 Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982).

and necessary.⁹ This understanding of the public/private distinction became a dominant characteristic of the formalist thinking known as classical legal thought (CLT).¹⁰ The era of CLT — the cradle of legal liberalism and, with it, of the public/private distinction — established a stark separation between public law — constitutional, criminal and administrative law — and the law of private transactions — contracts, property, torts and commercial law.

Using this legal architecture, as Morton J. Horwitz explains, jurists tried to “create a legal science that would sharply separate law from politics” by establishing a “neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics.”¹¹ At the heart of private law lay the will theory, built on the Millian harm principle¹² that governments should protect individual rights in order for individuals to realize their wants, and restrain individual action only as necessary to prevent undue infringement.¹³ The will theory therefore led to constant restraint in the regulation of market activity in order to preserve as much liberty and freedom — as much room for individual will — as possible.¹⁴

9 As Frances Olsen notes, the public/private distinction traditionally has had at least two functions in legal consciousness since classical legal thought (CLT): the distinction between the public state and private sphere of market and family (“civil society”) serves one function, and the distinction between the public market and the private family serves another. In the former iteration of the distinction both the market and the family are thought of as a part of “private” civil society in opposition to the “public” state. Yet in the former iteration of the distinction, in relation to each other, the family is considered private to the market’s (relative) and the state’s (full) public-ness. Thus, there are two dichotomies at play under the CLT public/private distinction — the family/market and the civil society/state distinctions. Olsen, *supra* note 4, at 1501-02. Here I analyze the public/private distinction focusing on the state/market dyad.

10 Kennedy, *supra* note 5, at 25-37.

11 Horwitz, *supra* note 8, at 1425.

12 Mill argued that harm should be a necessary condition for legal enforcement. Individuals are free, and have a right, to act in any way that does not harm others and the state should limit itself to regulation of harmful conduct. JOHN STUART MILL, *ON LIBERTY* (London: Penguin Books 1985) (1857).

13 Kennedy, *supra* note 5, at 26.

14 While the will theory allowed for a limited regulation of the market, it was not applied to another private realm — the family, where hierarchy was understood to be legitimate, natural, and fundamental. Despite being part of the private sphere, the family was understood as a sphere of hierarchy and altruism and thus differed significantly from the private market, which was understood as a

CLT, and the public/private distinction that stood at its center, were heavily criticized by those seeking first to reveal the social-interventionist nature of law, and then to employ it for their own ideological ends — such as the legal realists, and later critical legal scholars, feminists and others.¹⁵ Their main criticism was that the classic liberal understanding of the public/private distinction ignores the fact that all law is both coercive (impacts liberty) and distributive (impacts equality), and accordingly private law cannot be neutral. Rather, in delegating coercive (public) power to individuals, private law inherently embodies public policy choices.¹⁶ They argued that the idea of regulative nonintervention in the private sphere serves as a misleading rhetoric of neutrality, when in fact nonintervention represents an ideological preference toward the status quo, and as such it is just as active, coercive, and distributive as any other regulative policy.¹⁷

This critique translated into social legislation that acknowledged power disparities in market transactions and the role of law in sustaining them, and sought to balance these disparities through legal intervention, predominantly in labor relations, landlord-tenant relations, consumer protection, and social welfare.¹⁸ Social legislation, in a sense, aimed to make “the market more like the family” — less individualistic and more altruistic, solidaristic and infused with relation-based responsibilities.¹⁹ As Kennedy explains, this social legislation “expand[ed] the regulatory functions of the state, carving out and redefining as public law vast areas that had fallen safely within the domain of right, will, and fault [under CLT].”²⁰ Criticism of the ideological artificiality of the public/private distinction translated into an understanding

sphere of formal equality, individualism, and self-interestedness. Olsen, *supra* note 4, at 1504-07.

15 Kennedy, *supra* note 5, at 37 (calling this period “the social”: “The critique was that the late nineteenth-century European mainstream abused deduction in legal method and was ‘individualist’ in legal substance. The slogan of the second globalization was ‘the social.’”).

16 Horwitz, *supra* note 8, at 1426.

17 Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Robert Hale, *Bargaining Duress and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). For a synthesis of these arguments, see Joseph W. Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 482-87 (1988).

18 Kennedy, *supra* note 5, at 42-43. For a detailed discussion of this turn in labor law, see Karl Klare, *The Decentralization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

19 Olsen, *supra* note 4, at 1529-30, 1543.

20 Kennedy, *supra* note 5, at 43.

that, in an important sense, all law is public. The progressive critique of CLT therefore sought to “empty” the private, suggesting that most (if not all) law is public and that the private has no distinct content that is neutral in relation to distribution and that distinguishes it from public policymaking.²¹ As a result of this criticism, beginning in the 1920s, socially oriented legal thought developed based on a deconstruction of the distinction and leading to a significant redrawing of the boundaries between the public and the private.²²

The tripartite institutional view of the state, market, and family was challenged, and in its place emerged an institutional picture that recognized a public state with overtly political laws, coexisting with, and at the same time constituting, the institutions of market and family. Legal regulation of all spheres is then understood as equally political and public, due to the economic and social interdependence of the three spheres. Yet the critique of CLT, arguing that all law — and not just public law — has political and distributive consequences, brought with it a legitimacy crisis.²³ If there is no public/private distinction what does law have to offer beyond politics?

II. PUBLIC/PRIVATE IN CONTEMPORARY LEGAL THOUGHT

In his characterization of the three globalizations of legal thought, Kennedy explains that the contemporary moment in legal thought, beginning roughly after World War II, reflects an attempt to reconstruct law’s legitimacy by reconfiguring elements of both CLT and its socially-oriented critique in an unsynthesized fashion. He suggests that during this time

one trend was to think about legal technique . . . as the pragmatic balancing of conflicting considerations in administering the system created by the social jurists. At the same time, there was a seemingly contrary trend to envisage law as the guarantor of human and property

21 Singer, *supra* note 17, at 482.

22 Kennedy, *supra* note 5, at 37-59. While this attack on the notions of private nonintervention and the will theory helped to transform commercial law, it thoroughly revolutionized family law, seeking to remove the veil of privacy from the family altogether. *Id.* at 51.

23 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (1992) (tracing the collapse of CLT along with the social scientific conceptions that underlay it due to legal realist critique and the ongoing legitimacy crisis that has ensued).

rights and of intergovernmental order through the gradual extension of the rule of law, understood as judicial supremacy.²⁴

Kennedy suggests that the current moment can be characterized by two different approaches to legal analysis. One is rights-based neoformalism grounded in judicial supremacy. Contemporary rights-based analysis is neoformalist, Kennedy argues, because it proceeds in “a mode of deduction within a system of positive law presupposed to be coherent.”²⁵ Its analytical roots are in CLT, but it applies to human rights as much as to property rights. While in CLT the legal science revolved around obligations, its contemporary form focuses on rights. The second approach is pragmatic policy analysis, also known as conflicting considerations, or proportionality. Under this logic, lawmakers constantly create legislation and, more broadly, legal regimes that are understood to be compromises between conflicting individualist and social considerations, rather than as a clear advancement of one set of values over another. Its analytical roots are in legal realism, but it no longer purports to advance a single desirable social end but rather to balance conflicting considerations and produce compromises between competing right claims.²⁶ While currently, around the globe, we see vestiges of CLT in the form of the will theory in contracts, alongside it we see vestiges of its critique in the form of social legislation, such as labor law. What is missing, argues Kennedy, is “a new conception at the same level of abstraction” as in the two previous eras.²⁷ As a result, law does not correspond to a single unified logic, “but rather to the contingent outcomes of hundreds of confrontations of the social with CLT.”²⁸

Significantly, Kennedy describes the different modes of legal thought as “consciousnesses” or “languages” — they provide the vocabulary through which numerous kinds of regulations, cases, and justificatory legal arguments can be articulated and interpreted. Modes of legal thought are therefore not political ideologies: CLT, socially oriented lawmaking, neoformalism, and conflicting considerations have all had right and left, conservative and progressive articulations on the ground.²⁹

What happened to the public/private distinction in contemporary legal consciousness, following the legitimacy crisis brought about by the socially oriented critique of CLT? One possible answer can be elaborated using a

24 Kennedy, *supra* note 5, at 22.

25 *Id.* at 63.

26 *Id.* at 63-66.

27 *Id.* at 64.

28 *Id.*

29 Kennedy, *supra* note 5, at 22.

“reservoir metaphor”³⁰: if CLT introduced the distinction, and its social critique constituted a (complicated) attempt to “empty” the private, the current moment can be roughly characterized by an attempt to “empty” the public and use considerations thought to be private as the measure of all things, including public services and institutions. This can be seen in labor market deregulation, the rolling back of various social security benefits and welfare state functions, and the widespread privatization across the Western world.³¹ What were once understood to be strictly state functions are increasingly contracted out, delegated, or simply relegated to what were once understood to be strictly private entities. From military contractors, to prisons, to social security and charter schools, an intermediate space between the state and the governed has opened up and become populated with myriad “private” entities, some aimed at social and administrative control, others at giving voice to the otherwise voiceless.

The colonization of the public by the private, accompanied by the decreased power of the state in relation to the market, is one possible way of understanding the public/private distinction at the current moment³² that has, perhaps, some descriptive and theoretical impetus. But I would like to cautiously suggest that this reservoir theory might not capture the full extent of the change. If we accept Kennedy’s characterization that the current moment in legal thought is not a mirror image of previous moments, nor is it a synthesis between CLT and its critique, but rather represents an “unsynthesized coexistence of transformed elements” of both periods,³³ then it also follows that the reservoir theory might be an oversimplification of what’s going on. An alternative way of thinking about the public/private distinction that draws on Kennedy’s characterization may be to depart from the dichotomous architecture of the public/private distinction, and instead reveal the dynamic and unstable nature

30 The reservoir metaphor was suggested to me by Roy Kreitner. By it I mean to reflect the common understanding that increase in public regulation necessarily depletes the private sphere and increase in private sphere responsibility necessarily shrinks the public sphere.

31 JOHN L. CAMPBELL, *INSTITUTIONAL CHANGE AND GLOBALIZATION* 163 (2004); Paul Pierson, *Introduction: Investigating the Welfare State at Century’s End*, in *THE NEW POLITICS OF THE WELFARE STATE* 1, 1-8 (Paul Pierson ed., 2000).

32 See, e.g., Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 *INT’L J. CONST. L.* 162, 164 (2013) (“The large literature offering varying assessments of the novelty, import, utilities, and distributive impacts of privatization and globalization reads them (jointly and severally) as eroding the sovereignty of states while embedded in and produced through states”).

33 Kennedy, *supra* note 5, at 63.

of each of the spheres and the division of labor between them, brought about by vestiges of CLT that sustain the distinction, and vestiges of its critique that undermine it, thus challenging assumptions about the inherent nature of the dichotomy altogether.³⁴

I would like to argue that in relation to the public/private distinction we can trace transformed elements of the two previous eras. We encounter CLT-style attachment to the distinction in discourses about the harms or promise of privatization³⁵ and concerning the right to privacy.³⁶ Yet alongside this trend there is also great willingness to challenge the distinction: a progressive demand that public (social) values govern private market transactions on the one hand (such as dual function entities doctrine,³⁷ and application of constitutional rights to private market transactions³⁸), and a parallel development on the other hand of introducing market logic to public spheres traditionally foreign to it, either directly via privatization or indirectly through the adoption of standardized market-like goals in the administration of public institutions.³⁹

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- 34 Latent in some popular versions of the “reservoir theory” is an assumption that at the contemporary moment the state is disappearing or has significantly weakened to the extent that it has willfully relinquished, or un-willfully lost, its traditional power due to global economic forces and the pressures posed by shared global risks (such as terrorism, economic crisis, epidemics, nuclear weapons and climate change). The alternative explanation would interrogate the public/private distinction without the assumption that there ever was a coherent state form that can now be described as losing power. For such an approach, see, for example, Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31.
- 35 See, e.g., Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013).
- 36 Brenda Cossman, *Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project*, in PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM 169 (Brenda Cossman & Judy Fudge eds., 2002) (exploring the differences between the visions and strategies of neo-liberalism and neo-conservatism and their implications for the privatization project in family and social welfare law).
- 37 This is a doctrine that applies public law norms to private entities that serve a public function. For an elaboration of this doctrine in Israeli law, see Daphne Barak-Erez, *Israeli Administrative Law at the Crossroads: Between the English Model and the American Model*, 40 ISR. L. REV. 56, 69-70 (2007).
- 38 See, e.g., HUMAN RIGHTS AND THE PRIVATE SPHERE: A COMPARATIVE STUDY (Dawn Oliver & Jorge Fedtke eds., 2007).
- 39 Calum Macleod & Rune Todnem, *An Overview of Managing Organizational Change in Public Services*, in MANAGING ORGANIZATIONAL CHANGE IN PUBLIC SERVICE 3, 7-10 (Rune Todnem & Calum Macleod eds., 2009) (discussing the

The restructuring of the relationship between the spheres, emanating first from the legal realist critique of the distinction and then carried on by the neo-liberal privatization agenda,⁴⁰ transformed both spheres to such an extent that the public/private labels in many cases have become confusing or even misleading. Such a departure from the CLT conception of the private and the public rejects an either/or understanding of the spheres,⁴¹ as well as an understanding of the distinction in terms of the colonization of one by other. Rather, it leads to a more complex view of the transformations of each sphere, of their continually negotiated content and contours, as well as of options of hybridization.⁴² This conceptualization draws on the pragmatic policy analysis trend: it is less tethered to conceptual deontological non-instrumentalist distinctions and more strongly wedded to instrumentalist and consequentialist legalism, and therefore lends itself more easily to functional institutional analysis.

A. Three Challenges to the Traditional Public/Private Distinction

The challenge the contemporary moment presents to the classic public/private distinction is composed of three main layers: the first relates to the ability to identify each sphere's core features and functions; the second relates to the "separateness" of the spheres; and the third draws attention to the institutional decision-making mechanisms involved in delineating the spheres.

First, the current discourse around the public/private distinction shakes up the categories of public and private to the extent that scholars and judges now seek to define whether there is *anything* that can be safely located at the core

widespread trend towards importing generic management techniques from the private to the public sector and its shortcomings).

40 See Alon Harel, *Public and Private Law*, in OXFORD HANDBOOK OF CRIMINAL LAW (Markus Dubber & Tatjana Hörnle eds., forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320031:

Ironically it is the victory of the left in undermining the autonomy of private law that made privatization possible. The erosion of the autonomy of private law implied that private individuals who sign a contract or who commit a tort can be used to promote public ends such as efficiency or distributive justice. If this is so, there is no principled reason why private agents not be used to provide other public services.

41 ULRICH BECK, *THE REINVENTION OF POLITICS: RETHINKING MODERNITY IN THE GLOBAL SOCIAL ORDER* 1-3 (1997).

42 See, e.g., MINOW, *supra* note 1; Jody Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).

of each of the spheres.⁴³ The current moment in legal thought is characterized by attempts to crystallize basic concepts and a return to preliminary questions, such as what are the state functions, if any, that ought to be inherently public in order to guarantee the values of liberal democracies, and whether there is a predetermined content to this possibly required “public-ness.” While various authors focus on exploring what they perceive to be the inherent public nature of coercive bodies, such as police,⁴⁴ prisons⁴⁵ and military forces,⁴⁶ to resist trends towards their privatization, let us examine what may seem the most public of institutions — the parliament. We normally accept that elected bodies that determine policy, most notably the legislature, should be public in the sense that they should be immune from market forces, represent the will of the people, or at least have such immunity and representative capacity as a regulatory ideal. Yet this “clear” example already points to the complexity of attempting to identify a public core, since legislatures, by their very nature, are expected to reflect private interests due to their election (and hoped for reelection) by private individuals, through a political process often conceived in terms of competitive market dynamics. However, the fact that they are *popularly* elected is their most defining public characteristic. Struggles over the role of lobbyists in the regulatory process and regarding campaign financing suggest that even at this most hallowed public institution, questions about the role of private actors are ever-present and ever-changing.⁴⁷ Identifying a core of public institutions is therefore a far from easy task.

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- 43 See, e.g., H CJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin. (Nov. 19, 2009), Nevo Legal Database (by subscription) (Isr.) (accepting a petition against the establishment of a private prison in Israel); Sundar v. Chattisgarh, (2011) 7 S.C.C. 547, ¶ 73 (India) (accepting a petition against the state of Chattisgarh for privatizing part of its police force); Dorfman & Harel, *supra* note 35; Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113 (2008); Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023 (2013); Resnik, *supra* note 32.
- 44 See, e.g., David A. Slansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89 (2006).
- 45 See, e.g., Sharon Dolovich, *State Punishment and Private Prisons* 55 DUKE L.J. 439 (2005).
- 46 See, e.g., Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005).
- 47 See, e.g., Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); James Bopp, Jr., Joseph E. La Rue & Elizabeth M. Kosel, *The Game Changer: Citizens United's Impact on Campaign Finance Law in General and Corporate Political Speech in Particular*, 9 FIRST AMENDMENT L. REV. 251 (2011); Moshe Cohen

The second challenge the contemporary moment poses to the classic distinction relates to the ability to distinguish and separate the spheres. The two challenges are interrelated, yet while the first relates to the distinct content of each sphere, the second relates to the spheres' interaction. We ask whether the private and the public can at all be considered spheres that operate according to distinct logics and separate rationales with clearly set characteristics, or rather each represents a "bundle of sticks" that can be mixed and matched.⁴⁸ This set of questions blurs the lines of the public/private distinction and explores the dynamic content and fuzzy boundaries of the allegedly separate spheres, finding that private elements and public elements can in theory and do in reality coexist in all social and legal institutions.⁴⁹ Accordingly, for lawyers, policy-makers, or institutional designers the task at hand is to understand distributive outcomes of different institutional structures rather than to police an imagined contamination of one sphere by another. Ralf Michaels seeks to reorient the discussion in this direction when he asks:

Do we not care more about good versus bad governance than we care about state versus non-state governance? And if we do, is the difference state/non-state or the difference public/private really the prime criterion by which to assess governance? . . . Instead of the formal and artificial differentiation state/non-state, we should look for functional differentiations between different modes of governance.⁵⁰

The third challenge relates to the process that determines the scope and depth of the transformation of the spheres. Given the constantly shifting boundaries between private and public and the challenge to the mere architecture of a

Eliyah & Yoav Hammer, *Nontransparent Lobbying as a Democratic Failure*, 2 WM. & MARY POL'Y REV. 265 (2011); Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1 (1996); Ingrid van Biezen, *Political Parties as Public Utilities*, 10 PARTY POL. 701 (2004).

48 Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 96-106 (2011); Tsilly Dagan & Talia Fisher, *The State and the Market — A Parable: On the State's Commodifying Effects*, 3 PUB. REASON 44 (2011); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1229-30 (2003); Alexander Volokh, *Prisons, Privatization, and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012).

49 MINOW, *supra* note 1, at 6 ("Yogi Berra said 'You can observe a lot by watching.' If we start by watching connections between federal and state governments, religions, non-profit organizations, and business we can observe some striking shifts along each of the borders.").

50 Michaels, *supra* note 34, at 33.

distinction between the spheres, how do we decide on the optimal public/private composition of social, legal, and economic institutions? And who is the most suitable decider of such questions? Does courts' rights analysis have anything to say about drawing these boundaries, or is this a polycentric matter more suited to the capacities of the legislative and executive branches? How should such institutional configurations be normatively evaluated? According to efficiency criteria? Distributive consequences? Or through a deontological analysis of core public roles of "the state" (again, assuming we can characterize such roles)? Should these questions be solved using conflicting considerations analysis or a rights-based analysis? Currently some of these questions are more settled than others, and receive different answers in different fields of law and in different parts of the world.

I will now turn to provide an example of the triple challenge to the public/private distinction in contemporary legal thought — challenging whether each of the spheres has an inherent core; whether they have settled boundaries; and finally how transformations in each sphere and in the division of labor among them should be decided and by whom. I will first discuss the transformation of the welfare state and the provision of social services in postindustrial capitalist economies through the rise of the regulatory state. The welfare state — defined widely to include state response to social and economic needs — has been an important site for public/private transformation and boundary redrawing due to widespread retrenchment and waves of privatization. Then, in Part III, I will use the example of a case concerning prison privatization in Israel to illustrate this shifting public/private dynamic and the role courts might have in it.

B. Public/Private in the Regulatory State

Despite significant institutional and economic changes, the welfare state remains a staple of the Western nations at least since World War II. At the same time, all over the Global North, the current economic and political order is characterized by welfare state retrenchment and transformation.⁵¹ This transformation does not mean that the state is disappearing and that social services have been fully relegated to individual choices and non-regulated market transactions.⁵² Rather, the division of labor between the state and civil society (market, family, and other civil society institutions) is changing, with

51 Paul Pierson, *Coping with Permanent Austerity: Welfare State Restructuring in Affluent Democracies*, in *THE NEW POLITICS OF THE WELFARE STATE*, *supra* note 31, at 410.

52 *Id.* at 421-28.

the state adopting an increasingly regulatory role, rather than that of a direct provider of services.⁵³ This is a development that began in the United States already in the Progressive era (late nineteenth and early twentieth centuries — high CLT time), with what is known as “the rise of the regulatory state.”⁵⁴ In Europe the regulatory state developed more fully only in the last two decades.⁵⁵

The rise of the regulatory state created a transnational repertoire of policy vocabulary and institutions as well as a large diversity of specific national regimes. At the greatest level of generality, the regulatory state represents a shift from a focus on redistribution and from majoritarian, party-political and national politics towards a non-majoritarian, technocratic type of politics, in which market coordination, rather than ownership, is the paradigmatic governmental role.⁵⁶ The move from the classic welfare state, which relied on public ownership, centralized administration, and direct provision of social services, towards a regulatory welfare state that predominantly regulates market activity and opts for private ownership and outsourcing welfare functions, is seen by some as a move that has ruined the welfare state, and by others as a move that rescued it.⁵⁷

53 MICHAEL MORAN, *THE BRITISH REGULATORY STATE: HIGH MODERNISM AND HYPER INNOVATION* 12 (2003).

54 Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LITERATURE AEA 401 (2003).

55 GIANDOMENICO MAJONE, *REGULATING EUROPE* (1996); Giandomenico Majone, *The Rise of the Regulatory State in Europe*, 17 W. EUR. POL. 77 (1994).

56 See MORAN, *supra* note 53, at 17. Of course these characteristics are mere ideal types. In reality institutional “cross-dressing” occurs quite often, with the regulatory state being distributive and the welfare state being technocratic, etc. See Oren Perez & Daphne Barak-Erez, *Whose Administrative Law Is It Anyway? How Global Norms Reshape the Administrative State*, 46 CORNELL INT’L L.J. (forthcoming 2014).

57 Peter Taylor Gobby, *Hollowing Out Versus the New Interventionism*, in *THE END OF THE WELFARE STATE?: RESPONSES TO STATE RETRENCHMENT* 1, 4-11 (Stefan Svallfors & Peter Taylor-Gooby eds., 2002) (discussing two schools of thought: one that decries the end of the welfare state and sees current changes as a “hollowing out process,” and another that sees contemporary changes as the only way to preserve the welfare state under conditions of globalization and austerity). For an example of the second, more positive, approach, see Deborrha Mabett, *The Regulatory Rescue of the Welfare State* (Jerusalem Papers in Regulation and Governance, Working Paper No. 28, 2010), available at <http://regulation.huji.ac.il/papers/jp28.pdf> (arguing that the regulatory state rescued the welfare state because it “enhanced the robustness of the welfare state in the face of international market integration”).

Whether ruined or rescued, what is clear is that the welfare state is not disappearing but rather undergoing deep change. The move towards a regulatory welfare state does not merely shift to the (private) market functions that used to be (public) state functions, but also redraws the boundaries between private and public and the content of each in a way that makes the spheres bleed into each other and intermingle in new ways that challenge the idea of their separateness — their presumed dichotomous nature — and aspects of their “institutional DNA.” The regulatory state therefore brings with it the two challenges mentioned earlier: regarding the spheres’ distinctive core, and stable, predetermined content.

The deep transformation of the private and the public brought about by regulation is clearly evident in various markets: markets for insurance, banks, securities, transportation, gas, postal services, education, food and drug companies, communications and more.⁵⁸ What is clear is that increasingly, perhaps even more clearly so after the 2008 market crisis and financial sector bailout, calling these “free” private markets would mischaracterize them.⁵⁹ While the massive bailout and regulatory reaction of governments after the collapse of the financial system reminded the public of the central position of the state in markets,⁶⁰ it also reflected the increasing willingness of states to regulate markets, as well as act as market actors,⁶¹ without taking over direct ownership and service provision. In these regulatory processes, both the public and the private spheres are transformed and the supposed boundaries between them become more difficult to detect.

Do the sweeping waves of privatization, liberalization, and regulation lead to greater equality and efficiency? There is no single answer to this question. Beyond classic right and left disagreements (themselves in some disarray in the aftermath of the bailouts), the answers may be mixed depending on the context and the process. In terms of distributive justice, in some cases changes such as privatization deepen inequality, because they introduce or reinforce market stratification. In other cases, however, often when privatization is

58 MORAN, *supra* note 53, at 109-15 (discussing the diversity of regulatory institutions in the United Kingdom following waves of privatization).

59 Joseph Stiglitz, *The IMF’s Switch in Time*, *ECONOMISTS VOICE*, May 2011, at 1; Robert Wade, *Financial Regime Change?*, 53 *NEW LEFT REV.* 5, 5-7 (2008); Philomila Tsoukala, *The Euro Zone Crisis and the Future of Social Europe*, *COLUM. J. EUR. L.* (forthcoming 2014) (on file with author).

60 Michaels, *supra* note 34, at 32.

61 For a discussion of the multiple roles states play in markets, beyond ownership and regulation, with a focus on governments as market actors, see Robert C. Hockett & Saule T. Omarova, “Private” Means to “Public” Ends: Governments as Market Actors, 15 *THEORETICAL INQUIRIES L.* 53 (2014).

followed by the establishment of effective regulation, they may lead to redistribution and greater equality. In terms of efficient production, more intensive regulation may create more room for market-based activity, private entrepreneurial agency and competition; or it may appear as heavy-handed government “intervention” stifling private actors.⁶² As unsatisfying as this answer may be, any thorough analysis and attempts at categorization will have to be sensitive to the context of the shifting public/private boundary, the regulatory details, and the institutional history. Therefore, it appears that being for or against privatization or nationalization processes cannot be a constant right or left position, at least not from a consequentialist standpoint.

An analysis in the mode of rights-based neoformalism may reach a wholly different answer to the one offered in the previous paragraph.⁶³ Under a deontological approach to the public/private institutional division of labor, the public and private may seem to hold constant, stable and rights-infering meanings. Accordingly, a process of boundary redrawing through, for example, privatization may be seen as harmful per se, by the mere public/private transformation, regardless of the consequences.

A 2009 Israeli High Court of Justice case that concerned a petition against prison privatization⁶⁴ can serve as an example of the dual challenges of identifying core functions and drawing boundaries, and of the tension in contemporary legal thought between pragmatic interest-balancing and deontological rights neoformalism. It further demonstrates the third challenge — regarding the design of the processes of transformation themselves — since it reflects on the role and capacities of the Israeli Supreme Court *vis-à-vis* the legislature and the executive branch, in the context of determining the division of labor between the spheres.

62 See, e.g., JORG FLECKER ET AL., PRIVATISATION OF PUBLIC SERVICES AND THE IMPACT ON QUALITY, EMPLOYMENT AND PRODUCTIVITY (2009) (examining the effects of privatization and liberalization of public service (electricity, postal services, transportation and health services) in six European countries and showing that the outcomes of privatization and regulation vary and depend to a large extent on the level and sophistication of the regulatory apparatus established); Catherine Donnelly, *Privatization and Welfare: A Comparative Perspective*, 5 LAW & ETHICS HUM. RTS. 336 (2011); Stavros Gadinis, *Can Company Disclosures Discipline State-Appointed Managers? Evidence from Greek Privatizations*, 13 THEORETICAL INQUIRIES L. 524 (2006) (studying the varying impact of partial privatization on corruption and profitability).

63 I argue below that the legal analysis of the majority’s opinion in *H CJ 2605/05 Academic Ctr. of Law & Bus. v. Minister of Fin.* (Nov. 19, 2009), Nevo Legal Database (by subscription) (Isr.), reflects such an approach.

64 *Id.*

III. PRISON PRIVATIZATION IN ISRAEL

In a 2009 opinion, the Israeli Supreme Court declared legislation that established a private prison in Israel unconstitutional. The majority opinion, written by Chief Justice Beinisch, is a fascinating moment of confrontation between judicial neoformalist rights-based legal consciousness and pragmatic policy and conflicting considerations analysis, in dealing with a public/private transformation. The case is interesting for various reasons, and received significant academic attention.⁶⁵ For the purpose of this Article, I will focus on its treatment of the public/private distinction, and the way it reflects contemporary legal consciousness as well as highlights latent tensions within it.

The Prison Privatization Act⁶⁶ established the first private prison in Israel as a pilot program. After much deliberation, the legislature rejected the U.S. and French models of privatization and adopted an (allegedly improved) British model. The U.S. model offers the most extensive privatization scheme

65 See, e.g., Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 LAW & ETHICS HUM. RTS. 138, 153-56 (2011) [hereinafter Barak-Erez, *The Private Prison Controversy*]; Daphne Barak-Erez, *Three Questions of Privatization*, in COMPARATIVE ADMINISTRATIVE LAW 493 (Susan Rose Ackerman & Peter L. Lindseth eds., 2010); Yael Berda & Gilad Barnea, *Constitutional Theory, Strategy and Public Interest Lawyering in the Petition Against the Prison Privatization*, 3 MAASEY MISHPAT [TEL AVIV U. J.L. & SOC. CHANGE] 145 (2010) (Isr.); Richard Harding, *State Monopoly of 'Permitted Violation of Human Rights': The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 PUNISHMENT & SOC'Y 131 (2012); Alon Harel, *On the Limits of Privatization (Following HCJ 2605/05)*, 2 MISHPATIM ONLINE [HEB. U. L. REV. ONLINE] 1 (2010) (Isr.); Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749, 767-80 (2011); Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. CONST. L. 690 (2010); Yoav Peled & Doron Navot, *Private Incarceration: Towards a Philosophical Critique*, 19 CONSTELLATIONS 216 (2012); Resnik, *supra* note 32; Hila Shamir, *Privatization: Between State and Market — Assessing the Prison Privatization Ruling*, 35 IYUNEY MISHPAT [TEL AVIV U. L. REV.] 747 (2013); Michal Tamir & Assaf Harel, *Privatization, Freedom of Choice and Human Dignity — Can the Three "Walk Together" (Following HCJ 2605/05)*, 41 MISHPATIM [HEB. U. L. REV.] 663 (2012) (Isr.); Volokh, *supra* note 48; Shaul Weisman, *The Prison Privatization HCJ — Could It Be Written Differently?*, 5 HA'ARAT DIN [LAWATCH] 131 (2011) (Isr.).

66 Act for the Amendment of the Prison's Order (No. 28), 5764-2004, SH No. 1935, p. 348 (Isr.).

under which all aspects of prison function and day-to-day administration and management are privatized, including the authority to discipline inmates while incarcerated. The French model offers limited privatization of logistical services such as food catering and healthcare provision by a private entity while the management and administration of the prison remain public. In the British model which inspired the Israeli legislation, a private entity is responsible for prison administration and management while a public agency regulates and supervises the operation of the prison, and has the final say regarding disciplining actions.⁶⁷ The Israeli legislature created what was said to be an “improved British model” under which extensive regulatory and supervisory mechanisms were instituted, the private entrepreneur’s powers and discretion were severely restricted, and infringement on certain prisoners’ rights meant contract discontinuation. Furthermore, the private entrepreneur and its employees were all subjected to the same norms and disciplinary codes that apply to public sector workers.⁶⁸

The petitioners — public interest organizations making use of Israel’s lax standing barriers — argued the Act was unconstitutional based on two grounds. First, they argued, Article 1 of Basic Law: The Government⁶⁹ — which states that “[t]he Government is the executive authority of the State” — should be interpreted as mandating government to operate by itself functions considered “core” executive powers. The petitioners further argued that this core includes the operation of prisons, a matter directly connected to the enforcement of criminal law, one of the most significant traits of sovereignty. Second, they argued, experience with prison privatizations around the world shows a track record of violations of prisoners’ human rights — specifically the rights to liberty and human dignity — and such violations do not withstand a constitutional proportionality test. The petitioners filed their petition, and the court handed down its opinion, before the private prison began its operation. Accordingly all consequentialist arguments by petitioners and by the court were based on comparisons to experiences with prison privatizations in other countries around the world.

C.J. Beinisch, writing for the majority (which included some of the more conservative justices on the Court, including its subsequent president, Justice Grunis), rejected the first argument but accepted a version of the second.

67 H CJ 2605/05 ¶¶ 47-49 (C.J. Beinisch); Dani Biran, *The Private Entrepreneurs Prison*, PRISON AUTHORITY’S J., Sept. 22, 2003, at 8, 9-10, available at www.ips.gov.il/NR/rdonlyres/E340E894-A9DD-4034-A689-6E537D263530/0/privatization.pdf (Isr.).

68 Medina, *supra* note 65, at 710-11.

69 Basic Law: The Government, 5728-1968, SH No. 1396, p. 214 § 1 (Isr.).

Regarding the first argument, the Court declined to identify a clear core to the state's executive authority on the basis of Article 1 of Basic Law: The Government. C.J. Beinisch did, however, declare the Act unconstitutional based on the argument that it infringes upon fundamental rights of the prisoners. However, she explained that the infringement does not stem from the petitioners' consequentialist concern that a for-profit organization would create a risk of an abuse of rights. C.J. Beinisch found that it was not established that prisoners would suffer harm due to the tendency of for-profit entities to be led by financial interests, coupled with the potential lack of satisfactory supervision by the state.⁷⁰

Rather, the leading opinion offered a profoundly deontological neoformalist rights-based justification. The court based its decision on the argument that an inmate has an independent constitutional right not to be subject to the use of coercive measures by employees of a private, for-profit corporation, regardless of the actual conditions of incarceration.⁷¹ 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, in a way that does not withstand the proportionality test. It held that the harm to prisoners' basic rights outweighs the expected social benefits — namely, budgetary saving — of operating a private prison.⁷² The Act was struck down based on an axiomatic assumption about the nature of “the private” versus “the public” and the symbolic implications of imprisonment by a private entity, rather than by a public one.⁷³

C.J. Beinisch's opinion exhibits what may be termed a neoformalist “institutional fetishist” view in relation to the public/private distinction, which rejects any pragmatic exploration of the actual difference between private and public governance, and assumes the public/private distinction remains inherently stable and static.⁷⁴ For the court to reach a decision based on this a priori argument about the nature of the public and the private, it had to assume certain characteristics regarding each sphere. It assumed that the market has a single stable content: it operates only for-profit and is both uncontrollable and unsupervisable, thus undermining attempts at effective regulation. It further

70 HCJ 2605/05, ¶ 19 (C.J. Beinisch).

71 *Id.* ¶ 42 (C.J. Beinisch).

72 *Id.* ¶¶ 51-55 (C.J. Beinisch).

73 For a more detailed critique of the analysis of the public/private distinction in the opinion, see Shamir, *supra* note 65.

74 I define institutional fetishism, following Roberto Unger, as “the belief that abstract institutional conceptions, like political democracy, the market economy, and a free civil society, have a single natural and necessary institutional expression.” ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME* 6 (1996).

assumed that the state always operates to promote the public interest and its actions are transparent to the public and effectively controlled by courts, despite evidence to the contrary in many areas, including the publicly run prisons in Israel.⁷⁵ Finally, it glossed over the fact that ongoing privatization in the Israeli economy and welfare state in the last three decades has already taken root, leading to myriad complex public/private interactions in similar fields such as involuntary psychiatric hospitalization, the foster care system, and border-crossing control.⁷⁶ By disregarding such developments, the majority opinion could avoid an investigation of the actual nature of the public/private distinction in Israel today in general, and in the proposed private prison in particular.⁷⁷

The Court's assumptions regarding supervision, control, and the motives of private actors discounted the carefully crafted supervisory and regulatory mechanisms put in place by the Prison Privatization Act. The supervisory and regulatory mechanisms made the private less private — they created financial incentives that attempted to align the financial interests with the protection of prisoners' rights, via, among other things, ensuring easy contract cancellation; and they applied the obligations of public servants to the private entrepreneur and its employees, borrowing from the doctrine of public/private hybridity developed in Israeli administrative law.⁷⁸ The supervisory mechanism put in place also meant that the state would not be relinquishing all responsibilities: the public Prison Service maintained significant discretionary power regarding the prisoners' rehabilitation processes and corrective/punishment measures, including isolation and prevention of prisoner privileges. Furthermore, the public Prison Service was given significant supervisory powers and duties regarding all other aspects of prison administration, including setting prison policies. In other words, though the "private prison" was clearly no longer a fully public enterprise, neither was it a fully private one.⁷⁹ By maintaining a fixed *a priori* view of the separate spheres, the court relieved itself of the need to closely examine these mechanisms, explaining that the details were of no consequence since the privatization in and of itself — as if the notion of that which is privatized holds a fixed meaning — violated prisoners' human rights.

The court's assumptions about the nature of public prisons similarly ignored the actual content of this public institution. Annual reports by the Department

75 See *infra* note 80 and accompanying text.

76 HCJ 2605/05 (Justice Levy's minority opinion).

77 Medina, *supra* note 65, at 711.

78 See Barak-Erez, *The Private Prison Controversy*, *supra* note 65.

79 Cf. Jody Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003).

of Justice and various reports by the State Comptroller reveal the harsh living conditions and systemic violations of prisoners' rights in Israeli public prisons. These reports have shown that severe and extreme punishment, prison guard violence, unhygienic living conditions, bed shortages, insufficient healthcare, and discrimination against Palestinian prisoners are common characteristics of the public prison system in Israel.⁸⁰ This, of course, does not mean that the solution to the problems is privatization, but it does show that the image portrayed by the court of a public system that is inherently public-regarding in a transparent and easily controlled manner is also far from true.

While the case of the prison system in Israel is perhaps an extreme example of a problematic public institution, various studies of public bureaucracies suggest that fixed assumptions about public institutions and public workers may be unfounded. Studies of bureaucratic behavior suggest that the decision-making processes of street-level bureaucrats are influenced by a wide array of factors and depend on public service institutional structure, workers' ability to voice their concerns and shape the policies they are required to implement, their incentive and promotion structure, and the level and type of supervision of their work.⁸¹ Furthermore, public workers' decision-making is often influenced by private biases, prejudices, and prior experiences. Studies comparing public and private bureaucracies show that public sector workers do not apply their discretion in an *inherently* different way than private sector workers. Furthermore, it turns out that budgetary considerations may play a significant role in the decision-making processes of both groups of workers, depending on workplace culture and policies.⁸² This closer look at the public

80 See the biannual reports by the Israeli Public Defender's Office on incarceration and detention conditions in Israeli prisons in the last decade, *Israeli Public Defender's Office: Annual Reports*, MINISTRY OF JUSTICE, www.justice.gov.il/MOJHeb/SanegoriaZiborit/DohotRishmi/dohot (last visited Aug. 11, 2013).

81 See, e.g., MICHAEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 13-50 (1964); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 29-33, 48-53 (2010); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 23-28 (1989); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR — THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 2-15, 278-99 (1968); Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013); William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1223-45 (1983).

82 Volokh, *supra* note 48, at 5-6. A source of significant difference between public and private sector workers is job security. Public sector workers tend to be unionized and therefore enjoy greater job security than private sector workers. However, this is not the case in relation to prison guards in Israel. Prison guards

sector as a day-to-day working environment suggests that there is nothing inherent about the stark difference assumed by the court between public and private officials.

The majority's decision refused to deal with the petitioners' argument about the consequences of privatization, or the respondents' arguments about the extent and scope of state supervision and regulation. Instead of looking at possible consequences and regulatory mechanisms, the court opted for a deductive exercise from the universal, abstract constitutional norm of human dignity, joining to it an essentialist understanding of the public and the private.

Yet, the opinion involved a lengthy conflicting considerations analysis as well, through the proportionality analysis applied by the court. After finding that the Act violates the prisoners' right to dignity, C.J. Beinisch went on to apply the Basic Law's proportionality clause, balancing that harm against the legitimate purposes of the Act. There was some disagreement among the justices regarding the purpose of the decision to privatize the prison. While some justices thought that the purpose of the privatization, and hence its social benefit, was to improve the prisoners' living conditions,⁸³ C.J. Beinisch ruled that the dominant and primary social benefit is fiscal saving.⁸⁴ After going through the three-pronged proportionality test (incorporated into Israeli constitutional law by way of judicial adoption from Canadian and German law), she found that the (completely abstract) harm to prisoners' basic rights outweighs the expected social benefit of operating private prisons.⁸⁵ The result was an opinion that reads like an even-handed logical deduction.

When this decision is situated in the wider context of the last three decades of sweeping waves of privatization in the Israeli economy and welfare state,⁸⁶ it seems it should also be read as a warning sign regarding the contradictions between neoformalist rights-based legal consciousness and pragmatic mode of analysis characteristic of contemporary legal thought. From a pragmatic standpoint, in an era in which the public and private are significantly intertwined, and are being transformed by social, economic, and political pressures, it would arguably have been more productive for the jurisprudential development of privatization doctrine in Israel to admit this dynamism and try to assess it on its own terms. The regulatory state, as discussed above, plays a major role in

are one of the few groups that are excluded from the right to collective action.
See Prison Authority Order, 5732-1971, SH No. 21, p. 459 art. 129A.

83 *See, e.g.*, HCJ 2605/05 ¶ 35 (Justice Procaccia).

84 *Id.* at ¶ 52 (C.J. Beinisch).

85 *Id.* at ¶ 56 (C.J. Beinisch).

86 Daphne Barak-Erez, *The Public Law of Privatization: Models, Norms, Challenges*, 30 IYUNEI MISHPAT [TEL AVIV U. L. REV.] 461, 464-65 (2008) (Isr.).

this context. The Israeli welfare state currently suffers from a regulatory deficit: privatizations and new public/private ventures are often not accompanied by adequate regulation to structure the new relationship between the spheres.⁸⁷ The private prison could have been a rare exception, evident in thoughtful regulatory and supervisory mechanisms the legislature sought to establish. The prison privatization opinion was therefore a missed opportunity for the court to guide regulators as to how to shape the relationship between public entities and private actors, in a sensitive era of transformation.⁸⁸

Yet for the court to offer such guidance, it would have had to recognize the shifting and unstable nature of the public/private spheres — i.e., acknowledge that market actors are not free from governmental restrictions and that the state may have the ability to effectively intervene in the market and regulate it — thus denaturalizing the status quo. Such a position requires a judiciary willing to face the three challenges the current moment poses to the classic understanding of the public/private distinction: to relax assumptions about a presupposed core of each of the spheres; to destabilize both the public/private image emanating from the social critique of the distinction (that of emptying the private) and the public/private image promoted by neoliberalism (that of emptying the public); and to adapt the judicial role to the realities of the regulatory state, rather than to dismiss this development as irrelevant to rights adjudication.⁸⁹

CONCLUSION

Considering the thorough critique of the classic conception of the public/private distinction and the elaborate academic discussion about the distinction, one would think that this particular issue should by now have been resolved in

87 David Levi Faur, Noam Gidron & Smadar Moshel, *The Regulatory Deficit in the Era of Privatization*, in *PRIVATIZATION POLICY IN ISRAEL: STATE RESPONSIBILITY AND THE PRIVATE PUBLIC DISTINCTION* (Amir Paz Fuchs & Yitzhak Gal-Nor eds., 2013), available at http://hazan.kibbutz.org.il/cgi-webaxy/sal/sal.pl?lang=he&ID=969775_hazan&act=show&dbid=categories&dataid=4 (Isr.).

88 See, e.g., H CJ 1083/07 Israeli's Medical Union (Histadrut) v. Ministry of Health, (May 24, 2012), Nevo Legal Database (by subscription) (Isr.) (Justice Meltzer in obiter dictum drawing the contours of state responsibility for services provided following privatization through outsourcing, in a case related to the privatization of public schools' student health services).

89 Donnely, *supra* note 62.

legal theory. Surprisingly, this is not the case.⁹⁰ The public/private distinction vexingly keeps reemerging and remains a primary concern in the theory and practice of law. While we are perhaps all realists now,⁹¹ and understand that state and market cannot be separated, that the state alters social power relations and that therefore in some sense all law is public, we are also in a neoliberal economic moment. Neoliberalism brings with it growing power to market actors and an insistent call for freer markets, smaller more efficient states, and expansion of the laws of the market to what were previously purely public functions. Despite the declared decline of the public/private distinction,⁹² it still appears to be alive and well.

Are we having the exact same debate again and again? In this Article I suggested that we ought not repeat ourselves. As the Israeli prison privatization case suggests, courts are facing shifting institutional grounds in adjudicating the distinction. Yet with the rise of the regulatory state, the links between state and market are even stronger and the distinction between the two is harder to make. Accordingly courts are in need of novel normative arguments, ones that do not repeat and fetishize the old public/private tropes, but rather assess governance structures on their own terms, in order to develop constitutional jurisprudence that fits the complex institutional realities that are emerging in contemporary regulatory states.

90 For the same question asked in the early 1980s, see Horwitz, *supra* note 8, at 1427:

By 1940 it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms. No advanced legal thinker of that period, I am certain, would have predicted that forty years later the public/private dichotomy would still be alive and, if anything, growing in influence. What accounts for this surprising vitality?

91 Singer, *supra* note 17, at 467 (“[T]o some extent, we are all realists now”).

92 Kennedy, *supra* note 4.

