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Privatization and Patriarchy

• • • Prisons, Sanctions, and Education

Nili Cohen

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ABSTRACT: Examining two Israeli cases, this article addresses the highly controversial question about the privatization of state authority. The first concerns the Supreme Court decision that prohibits private prisons, a ruling that reflects the deep-rooted assumption that criminal punishment is a matter of state authority. The second case refers to the Israeli religious organization Takana Forum, which seeks to handle sexual offenses committed by authoritative figures within its community. The relation between privatization, privacy, and multiculturalism is presented as potentially perpetuating patriarchal authority in family life, education, and punishment. Following this discussion, different models of privatization based on the nature of the respective privatized authority are presented. The article concludes with an analysis of the conflict between communal and state law and its potential effect on Israel's collective co-existence.

KEYWORDS: contract, education, family, multiculturalism, patriarchy, prisons, private sanctions, privatization

From Status to Contract

In the midst of the nineteenth century, Henry Maine ([1861] 1920: 173–174) commented on a historical process visible in advanced societies that he called “from status to contract.” Status is heteronomy, that is, the rule of an external authority that imposes itself on individuals. Contract is autonomy, that is, the self-rule of individuals by virtue of their free will. Maine opined that, in due course, autonomy would replace heteronomy (Supiot 2000: 326) and that we are in transition to a world in which we shall be bound only by those fetters that we freely place on ourselves—in other words, contractual fetters.

This conception of contract, which expresses people's aspiration to write the story of their own lives, captured the imagination. It has long since been stretched almost to the limit of its capacity, to the extent that those who shaped the theory of the liberal state, even a couple of centuries before Maine, considered contract as the rational justification for the existence of the state. When it comes to the social contract between citizen and state, its validity is also rather problematic. Such a relationship is far more likely to reflect the heteronomy model, in which the state enforces its external authority upon individuals, rather than the contractual model. Therefore, Maine's narrative of a transition from status to contract can be deemed as resonating, rather prophetically, with the contemporary process of privatization. Such a process overlooks the artificial contractual bond between the citizen and the state, seeking instead to transfer state powers into private hands in the name of better efficiency and greater choice.

On the question of where to draw the line between private and public, and which areas should be transferred to private control, a bitter argument is raging (Barak-Erez 2008). Those like Milton Friedman (1962: 22–36), who believe that the state's only role is that of a ‘night watchman’, conceptually embrace and advocate the wholesale transition from status or authority to contract. In this view, the minimalist function assigned to the state is to maintain public order, while other services can be provided to the public by private individuals (see also Nozick 1974). Under a broader conception of the state, one that is associated with a social-democratic outlook, in addition to maintaining public order, the state must also see to education, health care, and general welfare (Gutmann 1987: 19–47). This approach holds that public authority or status is not yet defunct and that there needs to be a careful distribution of functions between the public and the private.

This question lies at the forefront of public debate around the world. In that framework, I will focus on some of the aspects relating to the privatization of punitive proceedings that have emerged from two Israeli legal cases. The first is the Israeli Supreme Court ruling prohibiting prison privatization, a case that refers to punishment as a natural authority of the state. The second stems from the activity of an Israeli organization called the Takana Forum, which is trying to contend with sexual offenses by figures of authority in the Religious Zionist public through the imposition of communal sanctions.

Both cases present common features relating to the punitive process, but their ideological basis is different. Through an analysis of both cases, an attempt will be made to challenge two strong presuppositions with regard to prison operations and community bodies. As for community institutions, I will question the belief according to which a community is a private sphere that is not subject to interference by the state. As for prisons,

I will examine historically and normatively the perceived notion of prisons as a natural state enterprise that cannot be subject to privatization. I shall also discuss the complicated relations between privatization and multiculturalism and point to the apprehension that the principle of multiculturalism may perpetuate patriarchic rule in the spheres of family, education, and community. Following this study of the two specific cases and related areas, I shall present models of privatization in light of the nature and purpose of the privatized authority and examine their applicability in Israeli law. Lastly, I shall show that Maine's forecast of a transition from status to contract has taken a peculiar twist. The proliferation of contractual freedom has not succeeded in liberating us from our bonds to status and past tradition; perhaps paradoxically, it has even propelled us backwards to the very status from which Maine sought escape.

Private Prison and Natural Authority

In 2009, the Israeli Supreme Court scuttled the possibility of a private prison in Israel.¹ The question in general has aroused a heated and widespread debate in Israel and around the world. Article 1 of the revised Israeli Basic Law: The Government (2001) provides that the government is the executive authority of the state. That includes the authority to safeguard the security of the state's citizens and residents, as well as to maintain public order in general. The state accomplishes this central objective through its military forces and law enforcement agencies, including the police, the state prosecutor, courts, and prisons. These authorities are the ultimate manifestation of the state's power.

Against this background, one might wonder why the state ostensibly sought to divest itself of its authority and pass on to a private body the handling of prisons. Ultimately, poor conditions in state prisons as well as the state's lack of resources to establish new facilities resulted in the government's initiative to pursue prison privatization. The government therefore decided to adopt a model being followed in European countries and in the US, according to which a private actor finances the construction and operation of a facility, which subsequently reverts to state control after a period of several years.² The initiative was supposed to be launched in the form of a single experimental private prison, which would provide an indication as to the potential success of this project. To that end, the Knesset enacted a specific law granting to the government the authority to transfer the construction and operation of prisons to private hands.³

It bears emphasis that, like all state authorities, Israeli security agencies, including the prison service, frequently solicit the services of private actors

in discharging their responsibilities. In the present case, however, it was not just subsidiary tasks that were entrusted to the private actor but executive powers as well—powers that lie at the core of the prison service's mandate.

The law gave to the concessionaire, among other things, the power to maintain order and discipline in the prison and to prevent the escape of prisoners. The state's intention was certainly not to divest itself entirely of its authority. Rather, acknowledging the sensitivities involved, the act set up special arrangements for state supervision of prison wardens, their performance, and the general operation of the prison.

The question as to whether there might be any danger of actual harm to the prisoners' welfare was not examined in the Court's judgment,⁴ since the central reason for striking down the law lay in the transfer of authority to private hands. The Court held that the act was unconstitutional as it violated the prisoners' human dignity and liberty (beyond the imprisonment itself). Indeed, the classic perception by which the state is the protector of public order, as expressed by the Israeli legal system, easily leads to the conclusion that the operation and administration of prisons are an inherent and natural expression of state power. The Court emphasized that even though state judicial tribunals are those responsible for denying prisoners' liberty, the prison is not a mere technical instrument but rather a substantive procedure in the course of the criminal process. The deprivation of one's freedom may be justifiable only if it conforms to the public interest, but it will not be legitimate in an attempt to advance private interests. Such economically driven incarceration, according to the ruling, violates the prisoners' liberty and human dignity, as it turns the prisoner into a profit-making instrument in the hands of a private actor.⁵

An additional, secondary consideration, not embraced by the majority, highlights the inherent conflict of interest between proper prison management and its owner's financial interests. In other words, when the owner strives to reduce expenses in order to generate higher income, the prisoners' well-being is at stake.⁶

The two grounds for the Court's intervention in prison privatization are, first and foremost, the state's natural authority, which cannot be delegated to a private actor, and, secondarily, the conflict of interest entailed in the operation of a state authority for the purpose of making a profit. The two grounds are different and may lead to different conclusions. According to the first, even if a philanthropic body were to be established and were to make a huge donation for the private, non-profit operation of prisons, its establishment would be invalid. According to the second, the establishment of an operation run by a non-profit body would not be invalid, for it would be a matter of sheer philanthropy, and there would therefore be no fear of any conflict of interest.

As explained above, I shall challenge, historically and normatively, the 'natural' division of public and private and the notion of prisons as a natural state enterprise that cannot be subject to privatization. Prior to this discussion, I would like to observe the other case of a private body asserting punitive authority by dint of contract, which won the approval of the prosecutorial authorities in Israel.

Offenses and Private Punishment

Shortly after the Court's decision regarding private prisons, in mid-February 2010, the Israeli public agenda was preoccupied with an incident involving a prominent rabbi, suspected of committing sexual offenses contrary to the rules of the Torah. The details of the affair were published by an organization called Takana Forum, which stated the following on its Web site:

In 2003 a Forum was established which unites within itself all of the important organizations in Religious Zionism. The Forum's members are men and women who are key figures in various fields in the Religious Zionist community. The Forum has made it its objective to develop a model for contending within the community with sexual offenses by figures of authority against those under their command, authority, or influence. The aim of the Forum is to create an additional way for the complainants to deal efficiently with the complaint and to prevent its recurrence to the complainant and to other women [sic].⁷

The Web site further stated that the Forum operates according to "articles of association for the prevention of harassment, based mainly on religious laws of segregation (of men and women), and meets the requirements of the law for the prevention of sexual harassment." The Forum's model of activity was brought to the notice of the attorney general and received his encouragement and support. It appears, then, that while the Forum sets out to "preserve the sacred values" that "the Religious Zionist community seeks to maintain,"⁸ the state's prevention of sexual harassment law is simply insufficient in this setting.

The Forum released an announcement saying, *inter alia*, that the rabbi had been in a clearly sexual relationship of long duration with a young male who had been under his spiritual authority. The Forum discussed the matter and decided that the rabbi was to desist from all educational activity: he was required to stop delivering sermons and could no longer provide personal counseling. The rabbi, who rejected the Forum's decision, decided to move to a village on the shore of the Sea of Galilee.

The contention was made that, after relocating to that village, he continued to transgress the prohibitions imposed on him—that is, he continued to engage in educational activity. Thus, the Forum chose to release an announcement on the matter to the media, making the affair public.

After the disclosure of the affair, the Forum released another statement: "The Forum does not replace the law and its enforcement agencies, but is intended to complement them, in cases where for various reasons the lawful authorities are unable to operate (e.g., complainants who would rather not turn to the police since they are unwilling to be exposed; cases not involving a criminal offense as defined by law, but are illicit, or even constitute grave misconduct from a religious aspect, etc.)." And why was the matter not referred to the police for handling? The Forum explains: "We have emphasized that we notified the attorney general, who made it clear that there is no way to contend with these specific complaints at the criminal level."⁹

According to the Israeli Penal Law, any disciplinary body must inform the attorney general of a criminal offense that it has encountered in the course of performing its duties, and only then is it allowed to carry on with its internal judicial activity.¹⁰ The Takana Forum acted likewise. At that stage, complaints against the rabbi may have been filed, but the Office of the State Attorney apparently did not believe that they could lead to a conviction. Half a year after the outbreak of the public controversy, however, and following a police inquiry, the police recommended the initiation of criminal proceedings against the rabbi for indecent acts by force with minors. Not long afterward, the public prosecutor embraced the police's position. On 2 November 2011, an indictment was submitted to the Court, and the criminal proceedings got under way.

The Forum's core activities are located at the point of intersection of several state powers since it is taking upon itself authorities that are equivalent to those of the state's criminal institutions: it is the investigator (parallel to the police), it decides whether to file a criminal action (parallel to the prosecution), and it imposes sanctions (parallel to the court). The offenses involved sexual behavior prohibited by the Torah by a person endowed with spiritual authority, but it was not clear whether it also violated state law from the start. The sanction took the form of cessation of any public activity by the rabbi, but when he defied it, an additional sanction was imposed—after several years—in the form of condemnation through public disclosure. It could be said that the two sides, the Forum and the rabbi, were acting under a form of communal-contractual arrangement to which the rabbi, who currently contests the validity of the procedures, had formerly submitted himself. Meanwhile, the state, through the agency of the attorney general, allowed the Takana Forum,

which is a private body, to determine 'offenses' and to impose sanctions on a member of the community. As mentioned above, however, the state did not find this sufficient.

Between Prison Privatization and a Private Punishment Forum

The two cases—imposing a prison sentence on a person who violated state law and punishing someone who has deviated from the rules of the community by requiring cessation of his public activity and by public condemnation—seem to share similar characteristics. In both instances, the individual is isolated from the community at varying degrees of intensity for a certain period of time, and the offense and its punishment are made public. In both cases, the offender's freedom of vocation is denied to varying degrees. In both frameworks, punitive functions are essentially being privatized. In the case of the prison, the imposition of a punishment is privatized, while the rabbi's case encompasses all criminal functions: determination of an offense, indictment, judgment, and punishment. In this sense, the latter case fully implies the potential of privatizing the entire criminal system: setting the rules, performing a judicial-like judgment, and determining the punishment, followed by its execution.

Nevertheless, there is a solid distinction between assigning the power to operate a prison by virtue of law, on the one hand, and a self-crafted authority to define offenses and their appropriate punishments by virtue of a community's contract, on the other. The difference is manifested in various contexts. First, the authority to operate prisons is formally vested in the state. In privatizing prisons, the state ostensibly divests itself of one of its conspicuous functions. It is precisely the act of transferring state powers into private hands that stands as the core concept of privatization. With regard to sexual harassment—the key area of the Takana Forum's activities—the state has allowed individuals to regulate the matter beyond the degree of regulation offered by the state. As such, the Forum interfaces to some extent with the state's powers in order to serve the values underlying the community, but the state does not divest itself of its power. Obviously, these community-oriented values are legitimate as long as they are not in conflict with state law. Second, whereas prison privatization serves an economic purpose (although consequently it might achieve more efficient results regarding rehabilitation of offenders), the activity conducted by the Takana Forum is anchored purely in ideological reasoning. Third, although both cases involve a contractual relationship, each is based on an entirely different viewpoint. While in prison privatization the affinity between the state and the concessionaire is purely commercial and is

solely contract-based, the Takana Forum's activities are solidly grounded in the community's ideology, which is not dependent on any contractual relationship. In the case of prisons, disengagement from the contract would break the connection between the parties, whereas the communal-social values shared by community members would endure even if the Forum's code were to be annulled. Were the code to be annulled, the prohibitions lying at its foundation would continue to endure by dint of the members' common faith, which imposes obligations on its community members, although obviously the power and methods of enforcement would be likely to change (cf. Fisher 2008a).

Private Sanctions in Organizations and Communities

The arrangement suggested by the Takana Forum honors the private sphere of communities and organizations. Such arrangements are deployed in a variety of domains in which these groups are allowed to introduce their own sets of rules and activities, according to their independent judgment. These provisions acknowledge cultural pluralism while recognizing that an ordered nation-state cannot always properly respond to social complexities. The arrangement offered by the Takana Forum is indeed capable of responding to the specific values and personal preferences of Religious Zionist community members, thus making possible a diversified spectrum of religious and cultural expression. A person who seeks to join a certain community ought to accept its rules; otherwise, he or she should leave. Yet the freedom to leave and embark upon another lifestyle, a crucial characteristic of a liberal community (Berlin 1958), is somewhat limited in many cases. For instance, the practical implication of renouncing one's membership in a monopolistic organization is that one can no longer engage in that occupation (e.g., a sports association or a bar association).¹¹ Very often leaving a community entails subjective difficulties as well—for example, leaving an Orthodox community sometimes carries with it various psychological or practical implications, especially for the weaker members of that community (such as women and children).

Private bodies, whether founded upon a shared ideology or based on commercial goals (as with private firms), are entitled to set up a disciplinary code that deals with violations of the rules of conduct in the community or place of employment and imposes significant sanctions. In some cases, disciplinary measures overlap with state offenses, while in others they apply to conduct that does not qualify as a criminal offense under state law. Such private sanctions, which strive to maintain some sense of 'professional' public order within the employment sphere while protecting

employers and employees, can be rather far-reaching and even lead to the loss of one's livelihood. Some argue that by turning private organizations into powerful legal entities, the fragile balance between democracy and bureaucracy is upset (Feldman and Suchman 1999; Supiot 2000: 326).

However, disciplinary regulations in private organizations are subject to the basic principles of the legal system, to fundamental individual rights, and to the rules of natural justice. Although the Takana Forum was approved in advance by the attorney general, community-based arrangements are not necessarily articulated in formal legal terms. But even if they are legally framed, such as in the case of communal regulations, some contend that the state should, in principle, refrain from intervening in the activities of such communities. According to this argument, inasmuch as the state does not interfere with discriminatory internal-domestic affairs affecting women, it should also refrain from intervening in community affairs, even if they involve constant discrimination against women, since a community is essentially a home, that is, a familial state-free environment emblemizing the private sphere.

When such community organizations deal with criminal cases, they are constantly risking the possibility of encroaching on the state's authority. Hence, on the one hand, the legitimacy of institutions such as the Takana Forum is considered unequivocal, as these groups advance and reflect the state's communal awareness, while, on the other hand, some communal institutions, such as the private judicial system of ultra-Orthodox Jewish groups, are in effect trespassing on the state's authority. The main problem in this context (to be discussed briefly below) concerns the relationship between the state's fundamental values and the community ethics that they encounter. Another problem raises the question of who has the natural authority in matters of punishment, to which I shall now turn.

Punishment and Natural Authority

Methodological Comment

In its decision precluding prison privatization, the Israeli Supreme Court discussed the question of the 'natural authority' to punish through a historical-positivist perspective. In this framework, I shall seek to point out the fundamental weaknesses of the 'naturalness' argument.

Arguments predicated upon either a current condition or a natural quality seem somewhat feeble. The attempt to identify intrinsic characteristics in a given social phenomenon will forever be charged with ideological assumptions originating in specific social and cultural settings. Some

contend that the assertion that certain social phenomena are 'natural' appears consistently on the conservative side of the debate, regardless of the issue (Hirschman 1991: 157).

From a historical point of view, the natural authority to punish (at least regarding a great many offenses) was actually vested in times past in the patriarch. This further reveals what can be regarded in Foucaultian terms as the 'contemporary limits of the necessary' in the sense that historical analysis demonstrates that well-grounded social definitions are merely cultural constructs, which can be reshaped and reformed in different social settings. What seems intrinsic, natural, built-in, or essential can be negotiated and transformed under different social or temporal circumstances (Foucault 1984: 32). Furthermore, even in positivistic terms the assumption under which the authority to punish is a natural monopoly of the state can easily be challenged and will be addressed below.

Punishment: A Natural Authority of the Patriarch

The operational policing system of the nation-state is a relatively new phenomenon. Prior to its constitution, the power to punish was mainly embedded in the patriarchal sphere. In ancient times, in addition to possessing the power to regulate, to judge, and to execute, the father was also considered to be the proprietor of his own family, slaves, and livestock. This is especially evident in the accounts of the biblical patriarchs. Moreover, the Bible makes it clear that a father can banish his children (Abraham and Ishmael) (Genesis 21: 9–14); offer them up for sacrifice (albeit by divine fiat) (Genesis 22); give preference to some of his offspring over others, contrary to the principle of primogeniture (Isaac, Esau, and Jacob; David and Solomon) (Friedmann 2002: 218–229); and even put his children to death, as illustrated by the story of Jephthah's daughter (Judges 11: 29–40).

Similar customs are traceable in ancient Rome, where sanctions on family members and slaves were in the hands of the *paterfamilias* (Filmer [1680] 1991: 18–19). The Roman father had almost unlimited powers over everything concerning the family, that is, his wife, children (including male in-laws), slaves, and property (*patria potestas*). The *paterfamilias* had broad powers of punishment over his family members in everything concerning uncouth behaviors. The severest of these measures were being sold into slavery, being banished (and disinherited), or being put to death (Gardner 1998; Hadley [1902] 2010: 116–138). Feudalism, the principal mode of governance in Europe after the collapse of the Roman Empire, was characterized by similar attributes and could be described as an extreme mode of privatization (Rubin 2010: 894).

Patriarchy and Social Contract

In his book *Patriarcha*, published in the seventeenth century, Robert Filmer ([1680] 1991) presented a theory that denies people's natural right to liberty. On theological, historical, and legal grounds, Filmer asserted that the monarch, as the conceptual successor to the ancient patriarchal system, is in fact the natural governor. Monarchical rule has gradually evolved into centralized rule, which monopolizes the authority to punish and restricts the powers of local patriarchs. What lies at its foundation, though, is the rule of the father. Filmer drew on various examples elucidating the patriarch's rule in the Bible, in ancient Greece and Rome, and in other legal systems (*ibid.*: 18–19).

Thomas Hobbes ([1651] 2008) and John Locke ([1689] 2010)¹² both rejected Filmer's views, each in his own way, and posited an inverted pyramid instead. For them, it is not the patriarch from whom authority derives but rather the people, who relinquish their natural freedom and, out of general consent (i.e., a social contract), construct a centralized apparatus in the attempt to maintain public order.

Hobbes and Locke outlined a shared fundamental picture of contract as the basis for the political existence of society, a much more attractive idea than Filmer's problematic ideology. They differed, however, on the question of the natural state of affairs. In historical terms, Hobbes's definition of the state of nature as a 'war of all against all' and as a legal void is somewhat dubious. The justification for a social contract, according to Locke, is not the absence of law but the problems entailed by the management of decentralized justice that natural law had created—problems that justified the transition to centralized rule of the people. In any event, whether we accept Locke's or Hobbes's account, it is doubtful that either of them had any historical pretension beyond sketching a model of the transition to a civil society. In this vein, the Israeli Supreme Court stated: "The social contract is not a historical fact, the content of which can be determined, nor yet a legal document, the meaning of which can be debated. The social contract is nothing but an idea that gives expression to the desired image of society."¹³

In past times, status and authority were intertwined, and it was the patriarch or local ruler who wielded the law (Bendix 1974: 157–159). Only after a lengthy historical process was the central authority assigned such legal powers. Indeed, a centralized legal system was a crucial prerequisite for the initiation of a centralized political system (Murphy 1997: 78–79), regardless of whether the authority to enforce private punishment remained with the communities and families involved. At the same time, the central government comprehensively acknowledged the patriarch's authority and the family's autonomy (Barshack 2004: 223–227).

According to John Stuart Mill ([1859] 1982: chap. 5, par. 12), it is in this very transitional phase between local and centralized authority that the state must interfere with "[t]he almost despotic power of husbands over wives." He rued the father's "absolute and exclusive control" over his children, asserting that "[i]t is in the case of children, that misapplied notions of liberty are a real obstacle to the fulfillment by the State of its duties." The fundamental principle that 'the king can do no wrong' aptly demonstrates the monarch's complete immunity in the face of law (Holdsworth 1922; Kantorowicz 1957: 4), while resonating with the patriarch's rule over his own kingdom, that is, his family (Siegel 1996: 2170–2171).

The family sphere, particularly within patriarchal settings, remained for many years a private, protected, and immune realm. Until the last few decades, children and wives could not inculpate the father of any offense, including those that involved violence, but the power of patriarchal reign has been gradually eroding. In Israel, family members are now allowed to testify against each other in cases of violent offenses (Harduf 2007),¹⁴ and the punitive-educational authority of the parents, recognized in common law (Markel et al. 2009: 26–27, 84), was abolished by a Supreme Court decision that prohibited the beating of children.¹⁵ However, the conception of the family as an autonomous unit that should be immune to judicial intervention still seems to be evident (Blecher-Prigat 2003: 547–551).

The problems emerging from such an approach are both normative and practical. As the concept of family is already a legal construct (Murray 2009), it can be asserted that, by refraining from any interference, the state *de facto* actually does intervene—for in the absence of active family regulation, the power is usually assigned to the father (Olsen 1985). Assigning absolute power to a single authority bears a common risk of arbitrariness. Hence, the better way to promote a balanced structure is to allocate control over the family to both the state and the family. This will decrease domestic violence, protect women and children, and amplify the individual's exercise of choice.

In this context, and with regard to prison privatization, a claim has been made that the reasonableness exercised by the state in operating the punitive process cannot be replaced by a private reasonableness, just as parental punitive authority is inalienable. In both cases, the punitive aspect is an integral part of the overall composition of authority. According to this view, it is impossible to isolate the punitive authority because the exercise of such authority in isolation from the general parental and state context would violate the essential relationship and would not be conducted on the basis of due reasonableness (Harel 2008; see also Dolovich 2009).

This analogy between state and parental authority poses a difficulty: is it possible to make a comparison between parental authority based on

emotional pre-existing relationships and other contexts devoid of such a characteristic? Also, the analogy specifies these two punitive authorities—the parental and the state—but does not take into account the competition between them.

The conclusions at this stage, then, are as follows. From a historical perspective, the invalidation of prison privatization by reason of the state's natural authority raises questions, for punishment in many cases in the past was lodged in the familial-communal domain. Generally speaking, when it comes to establishing a normative contention with regard to which authority should be vested with the ability to inflict sanctions, it is difficult to rely on the historical dimension of natural authority. Indeed, "recent privatization efforts cannot be opposed on the grounds that they relinquish inherently governmental functions into private hands. Arguments against privatization must be framed in more pragmatic, instrumental terms" (Rubin 2010: 896). And as we move on to the positivist existing state of law, the privatization of punitive powers is a growing trend. It is evident as well in the principles and rules of current Israeli law, to which I shall now turn.

Privatizing Punishment

In the framework of the overall debate over privatization, there has been a proposal to expand the model of private punishment, either to employ customary law, which would reflect an existing tradition, or to introduce a new scheme in which punishment would be carried out by private agents for the sake of profit (Fisher 2008b: 524–530). I shall briefly address this two-faceted proposal.

Continued recognition of customary law, which has the power to impose sanctions on members of a community, reflects the principle of multiculturalism, whereby the state expresses its recognition of communities of different faiths and traditions (as seen above regarding the Takana Forum). It must be kept in mind, however, that in many cases these communities are, in fact, founded upon patriarchal traditions that rest on gender inequality. This creates the familiar phenomenon of minorities within minorities (Barzilai 2003; Eisenberg 2005: 251–256; Eisenberg and Halev 2005a: 1; Okin 2005), which, as mentioned above, raises the question as to whether the state should be indifferent to non-liberal communal practices. In this respect, one has to differentiate between social and formal practices. It seems that social practices, such as a community boycott, are virtually immune from state interference, even when motivated by unlawful discrimination (Cohen-Almagor and Zamboti 2009; Mautner 2008b: 642). But what about formal, non-liberal practices operated through private tribunals? Is the answer

simply that in any event somebody who breaks the rules of a community has the right of exit from that community? To what extent is it a realistic option (Green 1995, 1998; Okin 2002: 206; Raz 1994; Weinstock 2005)? Or should the state be able to intervene in the decisions of private tribunals in which basic values such as gender equality are ignored? All of these questions are eventually encapsulated in the prevailing liberal ethos and its approach regarding non-liberal practices, a crucial point that will be briefly addressed in the next section.

This brings us to explore whether criminal law can be privatized through the operation of private profit-making agencies. The Supreme Court's decision on prison privatization appears to suggest that this type of privatization will not be deemed valid, given the natural authority of the state in matters of criminal sanctions. It bears mention that the privatization of civil law, such as in arbitration or mediation procedures, is considered an obvious, institutionalized phenomenon and is even extended to arbitration-like religious tribunals (Hofri-Vinogradov 2011). This massive privatization of civil adjudication has its origins in the inefficiency of the state's court system. Likewise, the proposal to privatize criminal justice by means of commercial agencies mainly stems from efficiency problems in public enforcement. According to this proposal, private punishment in most cases would be of an economic nature, and the victim would bear responsibility for its enforcement (Fisher 2008b: 524–530). Although it may seem revolutionary at first glance, historical scrutiny indicates how this actually returns society back to times of local, customary, communal private justice—essentially an amalgamation of tort law and criminal law—which held the victim responsible for enforcement (Plucknett 1956: 421–422; Raoult 2010).

Such proposals are not unfamiliar to Israeli penal legislation, which is strewn with provisions for partial privatization,¹⁶ even allowing the state to employ private prosecutors.¹⁷ The latter arrangement seems more far-reaching than prison privatization, as private prosecutors are entitled to initiate criminal procedures, conduct the proceedings, and propose the appropriate sanctions that, in their view, ought to be imposed. And yet this initiative was approved by the Israeli Supreme Court.¹⁸

Another example in the direction of privatizing the criminal process relates to the rights of crime victims (the Law of Victims' Rights, 2001), such as the right of obtaining standing to participate in the process. Also, victim-offender mediation procedures in criminal cases are becoming more common worldwide (Brown 1994), and in Israel experimental programs of this kind are also being conducted (Steinberg 2002: 153).

The law as it stands, then, does not hold the natural authority of the state in the criminal process to be sacrosanct. Historical scrutiny, too, does

not support recognition of a state monopoly in this matter; rather, it points to competition between the state, the victim and his or her family, and the community over the authority to sanction. All of this raises doubts regarding the position taken by the Supreme Court in the matter of prison privatization. Indeed, the question is whether considerations of efficiency justify privatization of prisons or whether there are overriding considerations that nevertheless preclude such a move. The answer worldwide is mixed. The British experiment, for example, has proved to be satisfactory (Rosky 2004: 946). In light of Israel's current poor prison conditions and the thorough preparations taken by the government that preceded its decision, it seems that the operation of an experimental private prison should have been allowed.

I shall now turn to the historical context of education and to the competition between the state, the family, and the community in this area, an analysis that will lead us to the issue of the Takana Forum and communal adjudication.

Family, Education, and Communal Punishment

Family and Education

In Israel, the patriarchal authority within the family is ostensibly awarded legitimacy and recognition by the state. Under Israeli law, civil marriage does not exist. Matters of marriage and divorce are primarily governed by religious law, and the forums administering that law—the rabbinical courts in the case of Jews—are also religious. Religious courts are subject to the supervision of the Supreme Court, which may intervene either by interpreting the jurisdiction of religious courts restrictively or by subordinating them to the fundamental principles of Israeli law (Halperin-Kaddari 1997: 691, 715–747; 2000). For years, the rabbinical courts acted as arbitrators in matters not within their formal jurisdiction until the Supreme Court ruled in 2006 that this practice was unlawful.¹⁹ Islamic tribunals are subject to a similar supervision.²⁰ It should be noted, however, that such judicial intervention is conducted only to a limited extent, and it cannot transform fundamental religious rules or core doctrines in matters of marriage and divorce even when they are clearly discriminatory toward women.

Subject, often coercively, to such a patriarchal legal regime, the secular public in Israel is compelled either to submit to religious law when entering or exiting marital relations or to renounce religious law and turn to contract law, common law marriage, or marriage abroad (Halperin-Kaddari 2003; Triger 2012). The civil courts as well as the legislators are not necessarily cooperative with the practices conducted within religious

courts in marital matters, as the increasing prevalence of non-traditional family arrangements indicate.²¹ Yet the fundamental marital arrangement is indeed religious, and it is being forced upon couples who do not wish to adopt patriarchal traditions in a way that challenges the liberal ethos and the pursuit of personal autonomy and equality. *De facto*, as long as the marriage proceeds with no disruptions, religious law is not being forced on the actual marital relations of secular families, and gender equality is being implemented in practice. Nevertheless, every occurrence of a marital predicament immediately exposes women to a whole host of discriminatory rules, anchored and embedded in a comprehensive patriarchal ethos.

It is important to mention that the application of religious law to marital relations in Israel does not extend to parental relations or educational matters. This leads us to education in general. In the past education, like punishment, was a private family matter. In this vein Jean-Jacques Rousseau ([1762] 1950: 15) stated that “The family ... may be called the first model of a political society: the ruler corresponds to the father, and the people to the children.” In contemporary terms, the family can be regarded as a shelter for multiculturalism in the sense that parents educate their children according to their own personal values and beliefs, which do not necessarily cohere with the hegemonic social majority.

With the rise of the nation-state, a concept that came into full flower during the nineteenth century, education became centralized (Maynes 1985; Meyer et al. 1992: 129–130; Soysal and Strang 1989; Tyack et al. 1987). Through education, the state sought to maintain a unified structure founded on shared cultural values. Articulated in Foucaultian terms, we may say that education has evolved into being part of the power mechanism employed by the state upon the individual. In this context, however, national education served as a counter-reaction designed to moderate the power exercised over individuals by the family and the community.

Prison and School

Like schools, prisons comprise a significant aspect of the modern nation-state; indeed, Jeremy Bentham's ([1791] 2009) structure of the Panopticon can be easily deployed on both schools and prisons. The architectural structure of the Panopticon, aimed at societal organization and disciplining, is based on the segregation and seclusion of prisoners or students, depending on the context, coupled with constant surveillance maintained by wardens or teachers.

In times past, as noted above, punishment in matters concerning individuals consisted mainly of economic sanctions in favor of the victim. Offenses committed against the crown or God resulted in more severe sanctions,

such as the death penalty, forced labor, physical sanctions, or deportation. The familiar modern notion of prison, whereby punishment takes the form of incarceration (deprivation of freedom being the punishment itself), is a relatively new idea that developed in Europe (beginning with England) in the nineteenth century. Before then, imprisonment served merely as a means of holding a defendant until the execution of his or her punishment, not as the punishment itself (Raoult 2010).

When Michel Foucault (1980) wrote about Bentham's Panopticon, he stressed that, contrary to the exertion of power by a superior force realizing and reiterating the sovereign's fortitude (such as bodily punishments and public torture), the Panopticon structure enables the exercise of internal power within society. Instead of abusing the body for the sake of punishment, the structure uses everlasting surveillance to discipline the individual's body. The Panopticon demonstrates the anonymity of power, for it is merely the distribution of space upon which power lies. The overseers, whether wardens or teachers, are as anonymous as they are replaceable. Their power derives solely from their position in the watchtower rather than from supernatural forces (as in the case of the king), and their glance is neither traceable nor returnable.

Furthermore, the Panopticon's structure in effect eliminates the need for an overseer. Power under this kind of arrangement operates according to two principles: it is visible, and it is not subject to verification or ascertainment. Although the prisoners do indeed see the tower, they can never know for certain whether the overseer inside is watching them. Thus, the prisoners are in constant fear of the overseer's watchful gaze, which prompts them to oversee themselves. In Foucault's view (1980: 155), Bentham had succeeded in devising a "superb formula" for exercising power in the most efficient way: "[T]he system of surveillance ... involves very little expense. There is no need for arms, physical violence, material constraints. Just a gaze. An inspecting gaze, a gaze which each individual under its weight will end by interiorizing to the point that he is his own overseer, each individual thus exercising this surveillance over, and against, himself."²²

It is doubtful whether the Panopticon was precisely the model imagined by the designers of the private prison considered by the Israeli Supreme Court. Nevertheless, it can be fairly assumed that its underlying principles were used as a source of inspiration (e.g., by installing closed-circuit televisions and monitoring cameras with no actual viewers, merely for the deterrent effect). Also, it can be argued that the Panopticon is simply an earlier form of the private prison, as in both cases the private supervisory authority is combined with the formal supervisor. In the case of private prisons, private authority was supposed to be combined with the governmental

authority; in the case of the Panopticon, besides the supervision of the overseer, there is supervision exercised by the prisoners themselves.

Throughout his writing, Bentham suggested also applying the Panopticon structure to schools, but as we have learned from history, the Panopticon positioned itself mainly as a theoretical foundation of the prison establishment. The point of interface between prisons and schools has to do with the disciplinary practices forced upon prisoners and students, which is manifested not only in a rigorous daily routine but also in the formation of mind, bodily practices, and physical gestures (standing, sitting, remaining in silence). Regardless of how Bentham's educational theory may differ from contemporary approaches, it is interesting to observe how, two centuries ago, an identical model was created that foreshadowed today's schools and prisons, both being relatively innovative, national, and discipline-oriented institutions, and both regulating powers that were formerly exercised wholly or partly within the family.

Communal Education, Patriarchy, and State Supervision?

In addition to emphasizing a unifying cultural legacy, the focus of public education is to teach skills for future employment while providing for equal opportunity. Can education be privatized? From the viewpoint of the state monopoly, although education is directed at the population at large and punishment is naturally more limited in its scope, the authority to educate is considered softer than the penal authority. Considering that states have always acknowledged educational capacities that are maintained by private institutions and co-exist with the official state system, how does this cohere with the social goal of instilling shared and mutual civil values?

Historically, Western countries have positioned two models to preserve their authority in matters of education. The first model is budgetary, based on the deprivation of state funds in cases of private—mostly religious—educational institutions and on control over the education system by the state. A second model, which is concerned with substance and quality, makes the allocation of public resources dependent on schools' compliance with certain curriculum requirements and requires supervision by the state. Both models provoke vigorous controversy within privatization debates. While privatization advocates stress the risks of handing over to the state the entire responsibility for matters of education (Chubb and Moe 1990; Michaeli 2010), those who oppose privatization point to the immense social values embedded in education and argue that the state must remain the central provider of education in order to ensure the pursuit of liberal, democratic, and egalitarian values (Gutmann 1987: 115–121).

Even though in Israel the first model was ostensibly adopted, there were cracks in the conception of public education from the outset, with the recognition of various educational 'streams' founded on communal values, some of them religious, some of them ethnic (Elboim-Dror 1990; Rabin 2002: 421–469). These streams already existed before the establishment of the state, so it can be said that the multicultural state of affairs antedates the state itself. Israel's State Education Law, 1953, although part of the endeavor to establish a unified and public education system, did in fact entrench the factional and multicultural trends that existed before it was legislated, sparking the privatization processes that erupted in the 1980s. With the evolution of privatization, various private education movements have emerged, some driven by ideology, others by the pursuit of excellence. Some of these movements were ultimately internalized into the state's public education system, while others were not formally considered public yet, nonetheless, were granted state funds.

The cracks began to widen with the expansion of the autonomy of the public streams and the recognition of private (ultra-Orthodox) streams, which were even granted state funding by a law passed in 2008.²³ This latter instance of private education suggests an alternative far removed from Israel's democratic values, as it excludes fundamental subjects from the curriculum, such as mathematics, English, and literature. It is unnecessary to stress how vital these core subjects are for the enhancement of pupils' autonomy, their exposure to alternative ways of life, and the need to equip them with an indispensable set of tools that will allow them to function outside their organic communities in the future. Despite the fact that such a private education system is likely to hinder its pupils' future possibility of ever leaving the community, it actually enjoys formal state recognition and is even granted considerable state funding. The fact that such a system is in place marks an escalation in terms of withdrawing from Israel's original founding values, given the dramatic gap between acknowledging practices of private communities, on the one hand, and benefiting these communities with legislation even though they stand in opposition to the state's most basic values, on the other.²⁴

Earlier I discussed patriarchal practices particularly with regard to family law. However, whereas family law was always considered a confined (albeit questionable) legal enclave, the education system was regarded as national per se, at least formally. This is the basis for the contention that the state is entitled to condition the granting of school funding on the requirement of schools to inculcate democratic values in their students, not to mention the need to provide a core curriculum that will facilitate their departure from the community with basic earning capabilities. In fact, not only is it entitled to do so, but the state is in effect obligated to do

so as part of the endeavor to protect its democratic nature (Cohen-Eliya 2008; Harel Ben-Shachar 2009).

In this vein, the Supreme Court's decision in the matter of the Beit Yaakov school for girls in Emanuel looms large. Beit Yaakov is a recognized yet informal school—that is, it is granted state funds and is subject to the supervision of the Ministry of Education, but it does not adhere to the national educational stream. The school was divided into two sections, separating the Ashkenazi girls from the Sephardi girls. In its decision, the Supreme Court distinguished between a cultural, customary-based division and an ethnic division, ruling that this case clearly reflects an ethnicity-based division rather than a cultural separation, as was initially claimed. The Court determined that this was a case of wrongful discrimination, and the school was consequently ordered to end any discriminatory practice; otherwise, its administrative license and funding privileges would be revoked. Yet, perhaps not surprisingly, the parents defied the decision, and in fact it was not enforced.²⁵

A similar decision was issued in the matter of Ethiopian children who had been subjected to discriminatory practices by a state-subsidized school, which had unlawfully refused to admit them. The Court declared that the principle of school autonomy is subject to basic constitutional principles such as equality, but in the end this particular case did not require any implementation due to a change of circumstances.²⁶

Although they were not implemented in practice, these judicial decisions bear great significance with regard to the selection process of pupils and the consequent discriminatory practices generated. Yet none of them deals with the substantive content of the schools' curricula, which, relying on traditional patriarchal values, reflect discriminatory beliefs and practices.

From Communal Education to Communal Forum

Education is a crucial meeting point for the issue of separate adjudication. From a chronological standpoint, obviously, it is often separate education that at a later stage gives rise to the need for separate adjudication, which is based on the same religious and communal values.

The Takana Forum, discussed above, constitutes a sort of normative and judicial alternative to the state's institutions. This was likewise and *a fortiori* also true of the kibbutz, which was to its members the center of their lives, employment, and livelihood and served as legislator, judge, and administrator of punishment (when needed), all rolled into one. Regarding the kibbutz, external legal intervention was rare. Such intervention from the outside, which would have broken the conspiracy of silence, might have sometimes prevented inappropriate injury. However,

to seek external intervention was considered illegitimate, as it is in the ultra-Orthodox community. It would erode solidarity and would be harmful to communal autonomy. It is interesting to note that, following the dissolution and privatization of the *kibbutzim*, judicial intervention also became more intensive.²⁷ The community's coercive power ebbed, and the option of exit became more readily available and less threatening. And perhaps it is precisely the case that judicial intervention, and certain members' success in achieving outcomes in its wake, derailed the effectiveness of the internal ordering mechanisms, which accelerated the crumbling of communal cohesion.

For many years and continuing today, the ultra-Orthodox public in Israel has been operating private non-state tribunals that set norms, settle civil and criminal disputes, and often serve as the exclusive judicial forum for its members. Members must not reach out, under any circumstances, to the state judiciary, and any attempt to invoke such interference would be severely sanctioned (Dichovsky 1991, 1996). As noted above, until only a decade ago, the state rabbinical courts had served as arbitrators in matters not within their vested authority until this practice was found by the Supreme Court to be contrary to law.

Perhaps this void has been filled by the large-scale growth of private religious courts among the Religious Zionist sector, which present a communal alternative to state civil courts. As opposed to the state rabbinical courts, the Israeli Arbitration Law, 1968, does apply to such private courts, which provide an efficient, speedy, and economical alternative. Most importantly, they are based on a religious set of norms and maintain an ideological affinity with the Religious Zionist public (Hofri-Vinogradov 2011).²⁸

Now, assuming that a discriminatory practice (e.g., excluding women from testifying) is being applied by a communal or a religious tribunal, is it possible to approve its judgments? In fact, the tribunals of the Religious Zionist sector do not apply the rule that a lawsuit must be proved by two religiously observant male witnesses. But the question might arise with regard to other tribunals.

In this matter, there are different views anchored in different ideas of liberalism (Benhabib 2002: 82–104; Levi 2000: 51–62; Mautner 2008a: 383–396). According to one concept of liberalism, the majority must not impose its own values upon a cultural minority. Such an approach to liberalism was adopted in the United Kingdom, where the judicial system acknowledges the validity and enforceability of the judgments of Muslim courts in civil and family matters, certifying them as arbitration awards (Taher 2008). The other version of the liberal concept maintains that a state must adhere to its fundamental constitutive principle—namely, human dignity and equality—and that therefore non-liberal cultural practices should not

be acknowledged. Such an approach is implemented in Canada, where litigants are subject exclusively to the Law of Civil Divorce (Shachar 2008).²⁹

A parallel issue arose when an American court faced the question of the validity of a Muslim prenuptial agreement reflecting gender discrimination. The decision, which recognized the validity of the agreement, was highly criticized for disregarding basic egalitarian principles and for ignoring the possibility of a defect in the intention of the woman who signed the contract (Oman 2010). In Israel, a similar problem was raised in the context of inheritance law in which, according to Muslim custom, a daughter must relinquish her right to inherit. Some maintain, on behalf of freedom of contract and the multiculturalism it posits, that the daughter's consent to renounce her right is indeed valid. Others argue that the daughter's right to inherit should be protected and that her renunciation is not only discriminatory but also raises doubts as to whether it reflects her true will (Kreiczer-Levy 2010; Zandberg and Hofri-Vinogradov 2010).

Models of Privatization

The concept of privatization is a product of disappointment with the functioning of the modern state (Freeman and Minow 2009; Rubin 2010). Privatization is a counter-response to the authority of the state, and it is based mainly on two premises: efficiency and communality. Prison privatization, private sanctioning institutes (such as the Takana Forum), and private education all present different models of privatization that are distinguished from one another by the nature of the privatized authority and by their classification (not easily drawn) as private or public. It should be noted that while the very concept of privatization presupposes a power that intrinsically belongs to the state, this is not always the case in the instances discussed in this article, such as the Takana Forum and private religious arbitrators. Within this theoretical framework, I shall use the idea of privatization in its broad sense, that is, I shall also include enterprises partially operated by the state, such as private initiatives that receive state funds. Along these lines, and without exhausting the possible situations, four models of privatization can be identified: (a) privatization of a central authority for reasons of efficiency (prisons, education); (b) privatization of a non-central authority for cultural-ideological reasons (communal institute imposing sanctions, such as the Takana Forum); (c) privatization of a central authority for cultural-ideological reasons (education); and (d) privatization of a non-central authority for reasons of efficiency (construction of roads or buildings).

The main problem arises with regard to the privatization of a central authority under models a and c. As for the efficiency-driven privatization

of a central authority (model a), the assumption is that individuals may conduct operations more efficiently than the state would; privatization in this context is ideologically neutral. But is there a limit to such ideologically neutral privatization? Should the power to punish be considered a natural power that intrinsically belongs to the state and cannot be privatized? Although it is still widely so regarded, historically speaking this power was within the hands of the patriarch or the community and was actually embedded in the relationship between the offender and the victim. Currently, we are witnessing an increasing tendency toward privatizing punishment authorities and modifying the traditional criminal process, as seen in, for example, the appointment of private prosecutors by the state and the growing involvement of victims in penal proceedings.

The primary claim of this article is that since the power to punish is not a 'natural' authority of the state, and since punitive authorities have been steadily and vigorously privatized over the past few years, it seems as though there is no compelling justification to oppose privatization as long as the appropriate state supervision is exercised. The fact that state-managed prisons are short of resources dedicated to the furtherance of prisoners' well-being, coupled with international experience gained in the field of private prisons, renders questionable the refusal to examine closely the introduction of experimental private prisons in Israel.

Obviously, a position that does not reject the privatization of a central authority for reasons of efficiency will lead *a fortiori* to recognition of the privatization of a non-central authority for reasons of efficiency. This has actually occurred and been approved, subject to the proper delegation of power and state supervision (model d).³⁰

A cultural-ideological privatization of a central authority (model c) may raise various difficulties. Parents are indeed entitled to educate their children in pursuance of their own personal preferences, but in liberal democracies the state also participates in the educational effort in a way that seeks to create a social common denominator and to generate social solidarity. This is certainly not the situation with regard to the Israeli education system, where public education is highly segmented and state funds are granted to discriminatory and patriarchal-based institutions. Hence, the objection to privatization for cultural and ideological reasons does not stem from its being a natural authority of the state (an authority that, from a historical perspective, the state did not have), but is due to the public significance of the education enterprise and to the concern that a private education might shelter non-liberal ideologies (such as gender discrimination). In this context, the privatization process merges with multicultural movements and supports them conceptually and practically (Margalit and Halbertal 1998: 94, 96).

Although this article has emphasized the difficulties emerging from privatization due to cultural-ideological reasons, this categorization is certainly not exhaustive. Along with cultural-driven aloofness, there are other considerations in introducing private education establishments, for example, academic excellence and efficiency and the ambition to provide a better 'product' or 'service' (model a). Such privatization is likely to widen educational gaps. Yet it seems rather difficult to resent it strongly, particularly in light of the recognition granted to non-liberal private schools that have seemingly been supported by the Court.³¹

Under the same logic, the privatization of a non-central authority for cultural reasons (model b), as with the Takana Forum, should hardly provoke objection, as long as it is in line with state law. This concerns a private-communal sphere in which it is legitimate for citizens to express their cultural and ideological diversity. The whole issue has to do more with privacy than with privatization, invoking a state-free, liberated, and personal realm comprised of individuals, families, and communities conducting their own life choices. Most of these forums, founded upon religious or other beliefs (e.g., *kibbutzim*), are pursuing the fulfillment of their respective values and life preferences. As long as their activities are deemed legal, the state should stand aside.³²

The typical complication created by the model of cultural privatization of a non-central authority (which in principle entails non-intervention) is that it may perpetuate the domination of politically powerful groups within the community and the vulnerability of its weakest links, such as women and children. However, in the case of the Takana Forum, which regulates the topic of sexual harassment, the private judicial and penal system operates *a priori* in reverse, as it directs its actions against the community's public and moral authorities who are accused of transgressions. Therefore, the activity of the Takana Forum, which is seeking to eradicate problematic practices within the community, should be welcomed.

Without reference to the special case concerning the rabbi, the question remains whether a member of the community, especially someone in a senior position within it, can disregard the basic rules governing the community's members, to which he willingly submitted himself. After all, the right of exit and consent are in principle the legitimate source of power of private organizations (Hills 2003: 161), and in principle a member is entitled to leave the community at any time—even to establish a new community under different rules (Rawls 1993: 221–222).

Yet in this case as well, questions can be raised as to the exercise of a member's free will to subject him- or herself to such private rules. Did the rabbi—confronted by the threat of public disclosure of his actions, which clearly would have meant mortal harm to his public image and

reputation—really have a choice not to cooperate? Put differently, even though the matter does not concern an authority considered central and ‘natural’, such as imprisonment, the problems it entails from the viewpoint of human dignity are no less grave. Hence, it might well be contended that, given the severity implied by communal sanctions and their grave implications, such a private process should be subject to a review by the state’s prosecution and judicial authorities.

Communitality and the Retreat from Contract to Status

In his book *Masculine Domination*, Pierre Bourdieu (1998: 84–85) remarks that masculine rule has until recently been perpetuated by three principal institutions—the family, Church, and school—while the state’s mission has been to reaffirm and multiply the patriarchal prescriptions and prohibitions. This account is somewhat arguable, since among most of the Western democracies (including Israel, to a certain extent) the state project is to uproot discrimination and to enhance equality. Nevertheless, parts of Bourdieu’s account may be relevant to the State of Israel.

Many communal groups reflect the cultural divisions in Israel, which antedate the establishment of the state and with which the state has not dealt adequately. This is manifest in the state’s marital regime as well as in education. Israel’s segmented communities, some of whose members absorb discriminatory norms and patriarchal practices from family and school, establish and institutionalize judicial systems that correspond to and epitomize precisely these discriminatory values. Some communities also refrain from any contact with legal services offered by the state. Along the axis of marriage–family–education–communal adjudication, there is a conspicuous process of reconciliation to the erosion of the central values that the state has endorsed, and in this matter there has been a retreat and departure from the constitutional values that are supposed to guide Israel.

As noted at the beginning of this article, Maine’s prediction of a transition from status to contract has taken an unexpected turn. The proliferation of contractual freedom has not succeeded in freeing us from our bonds to the status and tradition of an earlier era. Rather, and perhaps paradoxically, it has brought in its wake a return to that selfsame status from which Maine sought to escape.

Israel’s legal system raises particular concerns that have to do with the contradictory norms it conveys regarding the patriarchal regime. On the one hand, attempts are being made to restrain patriarchal domination through the same evidentiary and criminal doctrines and the implementation of egalitarianism within civil and public law. On the other hand, the state is relentlessly reiterating and validating discriminatory norms in

family law, while remaining indifferent when facing discriminatory values and practices within state-funded educational institutions.

Multiculturalism, reinforced by ideas of privatization, generates the well-known phenomenon of minorities within minorities, that is, the oppression of powerless groups within minorities. It seems quite difficult to reconcile the tolerance toward violations to human dignity of powerless groups generated either by virtue of neo-liberal theory or due to the status quo of state and religion with the non-tolerance shown toward the privatization of prisons. The former seems far more threatening than the latter.

Indeed, multiculturalism, reinforced by ideas of privatization, also raises the question as to whether the state ought to remain aloof from non-liberal practices. As we have seen, various approaches to liberal theory loom large in this context. The first approach, anchored in a narrow definition of the state’s power, argues that values, as a matter of principle, should not be forced upon cultural minorities. This is Rawls’s view (1985: 231), according to which, in light of the fundamental differences among humans regarding the good life, an “overlapping consensus” should be established—a narrow framework, detached from value systems, that will allow holders of differing views to conduct political life mutually (see also Dworkin 1985: 181, 191). This stance was developed mainly in the United States, where family law pertains to civil law, while public education is based on the separation of religion and state. Given the fundamental differences between American and Israeli legal and cultural backgrounds, it may therefore be quite challenging to gather useful comparative insights.³³

A different approach to liberal theory contends that the issue of public acknowledgment of worldviews, coupled with state funds, should cohere with the state’s basic democratic values, including human dignity and equality. This conception would grant protection to the overall collective of the state, as well as to powerless groups within minorities.

And there are those who reconcile themselves to the situation and who inject the value of pragmatism into liberalism in order to avoid a rift with major groups in the population, such as ultra-Orthodox Jewish communities and Arab populations (Lifshits 2007: 65). Others anticipate an introduction of legal rules (mainly by the Supreme Court) to challenge discriminatory legislation and deny its legitimacy, as well as to draw, based on the Basic Laws, a horizon on which civil marriage in Israel might be possible, in one format or another (Halperin-Kaddari 2003; Lifshits 2001). In the same sense, courts are expected to regulate the curriculum content of educational institutions.

The grave question in these circumstances concerns the division of labor between the courts and the other state authorities. While the task of inculcating norms and values is normally facilitated during childhood,

the state will not be able to ensure the endurance of liberalism and democracy if the legislative and executive powers distance themselves from the earliest stages of the course of people's lives. We have seen evidence of this in judgments that have dealt with ethnic segregation in education (discussed above).

In this context, the claim that the nation-state is dissolving because of globalization processes and is being replaced by universal values of human dignity and equality (Strange 1996) is highly questionable (Nagel 2005). So too is the argument that an individual is, in any case, entitled to leave her or his community, particularly in the context of children, for whom ideas of consent and the right to exit are plainly not relevant (Markel et al. 2010: 1894). Furthermore, we cannot foresee to what extent a domestic transformation within the community will actually lead to the anticipated turnover. In the absence of a comprehensive education system capable of solidly instilling values of equality in local and communal levels, the condition of powerless groups within cultural communities will be perpetuated; reinforced, and eventually exacerbated (Sunder 2001: 504–506). Inasmuch as communal law obedience will triumph over state law obedience, the fragile surface of Israel's collective co-existence will be massively eroded.

The current condition, which reflects a movement toward status (as opposed to contract), or at least an acceptance of such a movement, is not inevitable. Rather, it is a result of political developments that have strengthened a particular policy of segregation and separation. While political processes are not reversible, they do bear a dynamic character. Let us hope that in the future such social disintegration will be hindered and that the reconstruction of a common denominator will take place.

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NOTES

1. HCJ 2605/05, *Academic Center for Law and Business v. Minister of Finance* (unpublished, 2009) (hereinafter *Academic Center*). All translations from the Hebrew are my own.
2. This BOT (build-operate-transfer) model serves mainly for the construction of roads and various facilities, such as hospitals or courts, but not for the essential services that are provided in these facilities. For a review of the models of prison privatization in the world, see the Web site of Israel's Ministry for Internal Security at <http://www.mops.gov.il/BP/OnTheAgenda/PrisonPrivatization/WorldOverview/>. For a report on the British model of prison privatization, which was supposed to be applied in Israel, see http://www.nao.org.uk/publications/0203/performance_of_pf-prisons.aspx?alreadysearchfor=yes.
3. Amendment 28 to the Prisons Ordinance (Reformulation), 1971 (2004). In keeping with the amendment, Ch. C3, entitled "Prison under Private Management," was added to the Ordinance.
4. *Academic Center*, note 1, at par. 19 of Supreme Court President Beinisch's opinion.
5. The infringement of human freedom is discussed in *Academic Center* in pars. 20–33 and the infringement of human dignity in pars. 34–39.
6. *Academic Center*, note 1, pars. 16, 19–22 of Justice Procaacia's opinion. Her reasoning did not serve as a basis for the majority decision.
7. See <http://www.Takana.org.il>.
8. *Ibid.*
9. The law for the prevention of sexual harassment applied at the relevant time to the relations between teacher and student, therapist and patient, and an employer and worker or other person in his service, but not to the relations between a spiritual authority and someone who has recourse to him. In 2010, the Prevention of Sexual Harassment Law, 5758-1998, was amended to apply also to spiritual counseling or guidance. See Section 3(a)(6)(g).
10. Section 269 of the Israeli Penal Law.
11. Section 20 of the Israeli Chamber of Advocates Law, 1961 (Uniqueness of the Profession's Activities).
12. Locke wrote his book in direct reply to Filmer. The full title of Locke's book is *Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government*.
13. HCJ 164/97 *Contrans Ltd v. Minister of Finance*, IsrSC 52(1) 289, 340, in Justice Zamir's decision (1998). See also the minority position of Justice Levy in *Academic Center*, note 1, par. 12.
14. See, for example, section 5 of the Israeli Evidence Ordinance (New Version), 1971.
15. CA 4596/98 *Plonit v. State of Israel*, IsrSC 54(1) 145 (2000). For a critique of this ruling, see Barshack and Pugatch (2003). However, at the tort level there are limits to the parent's responsibility in Israeli law. See Section 24(7) and 27(6) of

- the Civil Wrongs Ordinance (New Version) 1968, which shields parents from liability for assault or false imprisonment.
16. See the list of legislation mentioned in the minority opinion of Justice Levy in *Academic Center*, note 1, par. 9, including Execution of Service Work in Private Bodies That Are Non-profit Organizations: Section B1 of the Penal Law, 1977; Forced Commitment of a Mental Patient in a Private Hospital: Section 9 of the Law of Treatment of Mental Patients, 1991; and Administrative Collection by Means of Private Collection Companies: Tax Code (Collection) (1990).
 17. The law allows the Office of the State Attorney to employ the services of private prosecutors who have been certified by the attorney general, especially in the area of violations of planning and construction laws. See *Certification of Prosecutors in Local Authorities and in Planning and Construction Committees*, Attorney General's Directive 8.1100 (1998), and *Purchase of External Legal Services by Government Ministries*, Attorney General's Directive 9.1001 (2010).
 18. HCJ 1783/00 *Hajfa Chemicals Ltd v. Attorney General*, IsrSC 54(3) 652, 656 (2003); HCJ 8340/99 *Gorali, Kohan & Ass.—Attorneys at Law v. Attorney General*, IsrSC 54(3) 79 (2001).
 19. HCJ 8638/03 *Amir v. Great Rabbinical Court—Jerusalem* (2006). In response to the judgment, a proposal was submitted for a Law of Rabbinical Courts' Adjudication (Marriage and Divorce) (Amendment no. 4) (Arbitration and Mediation), 2005, Government Decision 1220, which proposes expanding a rabbinical court jurisdiction to matters subject to arbitration or mediation, if both sides consent to it.
 20. See CA 3077/90 *Plonit v. Almoni*, IsrSC 39(2) 113 (1995).
 21. See, for example, CA 10280/01 *Yarus-Hakak v. Attorney General*, IsrSC 59(5) 64 (2005), which involved approval in principle of the adoption of a child by a lesbian couple.
 22. See Ainley (1998) about the extension of the Panopticon to closed-circuit television and to photography generally as a means of control and supervision. On the use of the metaphor of the Panopticon to justify police extra-legal measures, see Fan (2012).
 23. Law of Exceptional Cultural Educational Institutions, 2008, SH 742.
 24. The validity of this statute is now under consideration by the Israeli Supreme Court in HCJ 3752/10 *Rubinstein v. The Knesset*. The state attorney has objected to this petition, noting that these educational institutes "lie at the heart of the ultra-Orthodox community's unique lifestyle" (Glickman 2010).
 25. HCJ 1067/08 "*No'ar Kahalacha*" Association v. Ministry of Education (unpublished, 6 August 2009). For more on this decision, see Zarchin (2010). Later on, the Ministry of Education authorized the parents at the approach of the coming school year to open a private school, which would not be funded at all by the state and would allow them to maintain the strict segregation practiced by the community (see Bernovsky 2010).
 26. HCJ 7426/08 *Tabeka Justice by Law for Immigrants from Ethiopia v. Minister of Education* (unpublished, 2010).

27. In principle, the Court has noted that caution and restraint are to be exercised when dealing with decisions by kibbutz institutions; nevertheless, it has not infrequently intervened in them. See, for example, CA 11533/05 *Kibbutz Kalva v. Harty* (unpublished, 2009).
28. But the fact that a rabbi is an arbitrator (without specifically applying religious law to the arbitration) does not in itself allow him to disregard the principle of equality. See ACA 5061/11 *Ploni v. Ploni* (unpublished, 2011).
29. This is the position in Ontario, as provided by the Family Statute Law Amendment Act SO 2006 C.1. In Quebec, arbitration of personal status or family matters is prohibited by law. See Civil Code of Quebec SQ 1991, c 64 art 2639.
30. Cf. HC 5031/10 *Amutat Ir Amin v. Authority for Nature Preservation and National Gardens* (unpublished, 2012), whereby a statutory authority might transfer to a private entity operational as opposed to managerial powers. See also HC 1083/07 *Israeli Medical Union v. Minister of Health* (unpublished, 2012), wherein Justice Meltzer held that privatizing health services in schools should be coupled with proper resources and supervision.
31. Indeed, the Ministry of Education's fight against private-elite schooling has for the time being failed. See CAA 153/12 *State of Israel—Ministry of Education v. Chinnach Lemanhigut* (unpublished, 2012). The objection of the Ministry of Education to licensing a private school was denied, and the Ministry cancelled its appeal without reference by the Court to the substantive-financial matters—in particular, the claim that private schooling will have a negative effect on public education.
32. When does a family turn into a community? What are the limits of non-intervention? Can a communal settlement be required to admit candidates of whom it disapproves? In this matter, a distinction can be made between a settlement on private land and one located on public land, as was done in HCJ 6698/95 *Qo'adan v. Israel Land Administration*, IsrSC 54(1) 258 (2000). For a law currently governing the subject, see Law for the Amendment of the Cooperative Ordinance (No. 8), 2011, known as the Admission Committee Law, which strengthens the power of the admission committees in communal settlements.
33. On advocating the cultivation of the category of 'Israeliness' as a common denominator for all Israeli citizens, cf. Mautner (2011: 201–225).

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