

PUBLIC-PRIVATE PARTNERSHIP MODEL: A PARADIGM SHIFT FOR ANSWERING THE DILEMMA OF ROTTING INDIAN JAILS

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Abstract

The Supreme Court of India, time and again, reiterates the serious need of addressing concerns of increasing number of inmates in jails and their substandard conditions; yet the grass-root level situation is still indifferent. Observing the intensified moves of the current government-in-center towards privatisation of services, several experts in India including- NITI Aayog CEO Amitabh Kant and prison reforms pioneer Kiran Bedi are at the forefront to voice for the idea of private prisons as a major solution for effective and efficient prison administration in India. Obviously, as always, this idea is not new for India; several countries in the world have already accepted the idea of privatisation of prison sector and are performing quite well. In this paper, the authors have attempted to study the historical significance of private prison model, its legal development, merits and demerits of prison privatisation in several countries and its viability in Indian scenario. In so doing, the authors shed light on a wide range of unheard constitutional and administrative queries about both public and private corrections centres with the help of statistical and empirical data. Before concluding, a small effort has also been made to test the viability of public-private partnership prison model in India and the procedures required to translate this vision into realities.

"It is not the prisoners that need reformation, it is the prisons"

-Oscar Wilde

I Introduction

THE REVOLUTIONARY concept of liberalization and privatisation swept most of the countries across the globe, including India in the year 1991. The liberalised and privatised economic policy of India has become a *fait accompli* and almost irreversible since its inception.¹ Although, a substantial amount of contemplation has been given to the phrases like- privatisation, prison *etc.*, in the succeeding portions of this paper, the term 'privatisation', essentially and simply refers to a roll-back of the state in transferring or delegating the ownership or functions from the public to the private sector through leasing or otherwise. In a layman sense, privatisation involves government selling 51% or larger shareholding to private parties. For instance, conversion of public sector banks like Axis Bank and IDBI Bank are perfect examples of privatisation. This means, notwithstanding that privatisation changes state's role, it necessarily not reduces it. However, the regulations governing a privatized or even a public private partnership based prison system is also an equally perplexed issue of the day.

¹ J.P.S. Sirohi, J.P.S., *Criminology and Penology* 173 (ALA Publication, Faridabad, 6th edn., 2004).

Prison: a form of punishment

The definition of prison in the famous Oxford English dictionary is described as, “*a building to which people are legally committed as a punishment for a crime or while awaiting trial*”. Prison, which is also known by names like- ‘correction centre’ or ‘jail’ or ‘gaol’ or ‘penitentiary’ or ‘detention centre’ or ‘remand centre’, is an essential, indispensable and integral part of nation’s criminal justice administrative system. It has been in existence since beginning of the organized society where an accused or the convicted person is confined by the authority vested in the state. With the advent of the concept of state, came the trend of state punishment. According to the recorded history, it was Romans who first curated the idea of using prison as a method to punish, rather than to just detain. The concept of prison was in existence even during ancient and medieval times. In India, prison establishments are categorised in eight species- central jails, district jails, sub-jails, women jails, borstal schools, open jails and two special jails. Similarly, inmates lodged in prisons are classified in three species- convicts, under-trials, and detenu, where a convict, as per the Webster’s New World Dictionary, is “a person found guilty of a crime and sentenced by a court”. An under-trial, as per the Merriam-Webster Dictionary, is “a person who is currently on trial in a court of law,” whereas the meaning of ‘detenu’ in the same dictionary is given as “any person who is held in the authorised custody.” It is unfortunate that the way in which prison cells was seen during the British period was no less than the dens of torture and cruelty. In this regard Vaidyanathapuram Rama Krishna Iyer J, once observes: “*in our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters*”.² It is thus, realised by the political thinkers to initiate prison reforms in a timely manner. Resultantly, several efforts were made to humanize the prison system in India; one of such steps was the recommendations made by W. C. Reckless, a pioneer criminologist working in United Nation. Based on his suggestions on prison system in 1951, a committee was constituted to prepare an “All India Jail Manual”(in 1957-59) and to lay down norms for corrective treatment of inmates. Later, “All India Committee on Jail Reforms” (1980-83) was constituted which recommended setting up of a ‘National Prison Commission’ for bringing prison modernization in India. In 1997, the apex court also identified major problems that need immediate attention for implementing prison reforms.

Notwithstanding several prison reformation initiatives in India since independence, prisons in India are still riddled with problems like overcrowding, non-fulfilment of essential requirements, violence and mismanagement of prison administration. Obviously, the state can very well manage these issues by making huge investments, expenditure and a large-scale human resources based systematic deployments of man

2 Paras Diwan, *Human Rights and the Law* 169 (Deep and Deep Publications, New Delhi, 1996).

force in prison sectors; but this, in turn, will burdensome the weak economic shoulders of state governments. However, one possible way-out of alleviating the burden on state's economy is to embrace the idea of private-prison as has already been embraced by several other countries in the world.

In the course of this paper, the authors split the paper in five parts, in such a manner (a) so as to provide a conceptual framework of the advanced research, debates and resolutions on privatized corrections; (b) to provide empirical studies done and best practices adopted on privatised prisons existing globally; (c) to scrutinise the constitutionality of the private-prison model; (d) to examine the viability of Public-Private Partnership based prison model and; (e) to conclude the paper with most viable way-forward and suggestion.

II Idea of privatisation of prison management

The idea of private prisons came prevalently during 1990s, when privatisation of prison management became vogue in countries like Canada, the United States, Israel, Scotland, United Kingdom, Australia and New Zealand.³ As a result, a new kind of contentment and competition started amongst private players for delivering better prison services, which initially was made limited to a government's monopoly. The proponents of this idea strongly believe that the private operation of some prison functions can ensure the optimal-utilization of tax-payers' money in a cost-efficient manner and also the smooth implementation of corrective measures.

Jeremy Bentham's proposal for privatisation

Amongst first few staunch promoters of prison privatisation, it was Jeremy Bentham who first proposed the idea of correction-contracts at length in his book *Panopticon* in 1791. In fact, he believed that punishment to inmates should be given in as economic manner as possible. The study conducted by Bentham showed that inmates confined in the state-run prisons are subjected to excessive cruel treatments which, he believed, is not an effective and scientific method of correction services. He termed such cruel acts of the state prison administrations as a counter-crime committed by the authorities in the legal authority. He observed that in the post-American revolution time-period, one of the major problems confronted by the British regime was that of deportation of prisoners. These prisoners were working on bail as planters in America until then, which were now sought to be deported to Australia. In this context, Bentham in his book gave a unique idea about imprisonment which is organized around an architectural innovation. Therein he proposes two methods of ensuring accountability so as to limit costs and guarantee performance. These mechanisms are: First, there are few specifications given for the treatment of inmates by the contractors. He writes "*In the*

3 Lanza-Kaduce L., Parker, K. F. and Thomas, C. W., "A comparative recidivism analysis of releases from Private and public prisons" 45(1) *Crime and Delinquency* 28-47 (1999) .

first place, he shall not starve them.... In the next place, I don't know that I should be for allowing him the power of beating his boarders, nor in short of punishing them in any shape.' He envisioned that the contractor would be punished in case the prisoners suffer and the quantum of such penalty would be of such level that it severely deters him or the fellow contractor to repeat the mistake.⁴

Second mechanism that Bentham proposed was related with the issue of enforcement-how would the public be assured that the prisoners are sufficiently being fed and treated safely? Bentham's second mechanism is essentially similar to what is called as "sunshine provisions". By this he meant, while the contractor would be given autonomy with respect to the management and day-to-day operation of the prison by explicit contract, however, such activity would be subjected to unlimited scrutiny, supervision and monitoring. *"I will require him to disclose, and even to print and publish his account.... I will make him examinable and cross-examinable viva voce upon oath at any time."*⁵

Johan D. Donahue's idea of privatisation

Johan D. Donahue, a Professor in Harvard University, wrote a book⁶ wherein he observed that Bentham's model of constructing a prison infrastructure with efficient risk allocation, monitoring and surveillance cost, and the merits of the contingent contracts differing from usually determined contractual terms, indicates that his way of looking at the prison management system was much ahead of his era and it is his foresightedness that he could have foreseen the advanced version of private prison contracting laws. He dealt with the idea of prison privatisation in a bit economic sense. Under the existing circumstances, as it exists till date, inmates do not pay their part of expenses incurred on incarceration while using prison services; instead they become debts to the society thereby overburdening regular tax-payers of society. To change the *status quo*, Donahue believed the privatisation of prison may play significant role. As per him, the money an inmate earns could mainly be used by him in three-ways: to compensate the expenses incurred on him by prison administration owing to their own confinement; to give restitution money to the victims of the crime; to send financial help to their home.⁷ Thus, productive work behind private prisons may contribute in preventing prisoner's idleness, thereby reducing the chance of their involvement in gang warfare and other violence in prisons.

4 See John D. Donahue *The Privatization Decision: Public Ends, Private Means* 171 (Basic Books, New York, 1989).

5 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 172 (Batoche Books Kitchener 1970).

6 John D. Donahue, *Prisons for Profit: Public Justice, Private Interests* 3 (Economic Policy Institute, Washington 1988).

7 John D. Donahue *The Privatization Decision: Public Ends, Private Means* 67-71 (Basic Books, New York, 1989).

Private prisons versus private industries in prisons

For the purpose of this research paper, the phrases ‘Private Prisons’ and ‘Private Industries in Prisons’ have different meanings, where the former one is defined by the Justice Policy Institute, “as a construction of prison or assuming the managerial facilities by a for-profit organization through a public-private partnership (PPP) with a government contract.”⁸ In such contracts, private contractors get profit in terms of the average fee incurred per inmate per day.⁹ The major difference between an entirely privatised based model and a model based on PPP features is primarily of the ownership. In privatisation, it is permanently transferred to the private sector, while in PPP; the ownership might be retained by the government barring few types of contractual agreements. The entire idea of this paper is primarily based on privatisation of prison management infrastructure through a PPP model, while having steering function of the prison in the hands of state government. The term ‘Private industries in Prisons’ refers to ‘factories with fences’, as termed by the former Chief Justice of United States Warren E. Burger. With the phrase ‘factories with fences’, he means the “prisons which seek to turn prisoners into productive members of society by having them work at a wage and produce or perform services that can be sold in the marketplace”. The ‘Private Prison’ however, refers to the correctional system which includes private operations of aspects like- collecting fines, operating court and prison-based management system, community-based services, education courses, construction of prison, collection of court-ordered fines, development of security software, in-prison video visitation services, medical services or health care and other allied operations of residential facilities, prisons *etc.* Private prisons are basically a kind of corporation which runs for-profit purpose based on the contract that they enter with the government. The outsourcing of prison contracts in India can take place in numerous ways. Three models of outsourcing are mainly seen in place worldwide- *firstly* the ‘hybrid-model of privatised prison- wherein private corporates invest in financing for construction, improvement and operation of functions like kitchen, rehabilitative measures, maintenance, healthcare etc; *secondly*, the government contracts with a private corporate to construct and run the prison in its entirety; *thirdly*, the government contracts out only certain limited prison functions to private corporates within the existing framework of prison. For instance, infrastructure, record-keeping, health, sanitation, fire-safety, search and seizure, technology driven works, safe and secured custody of inmates, supervision of inmates *etc.*, are some of the responsibilities that may be entrusted upon the private prison contractors under the third model. The

8 Justice Policy Institute, “Gaming The System: How The Political Strategies Of Private Prison Companies Promote Ineffective Incarceration Policies” (June 2011), *available at*: http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf. (last visited on May 3, 2022)

9 *Ibid.*

first model is mostly practiced in the countries like- France, Latin America and Japan, and the second model of the prison is mainly seen prevalent in US and UK, while the third model is quite prevalent in various European countries.¹⁰

Indian perspective of prison privatisation

As stated earlier, the concept of prison privatisation came as a revolutionary concept having its ramifications all across the globe. India welcomed the idea of privatisation only in the year of 1991. Much like that of 1991 budget, the Narendra Modi led Government of India is also announcing its budgets since 2017 with a bundle of announcements for privatising key sectors of the erstwhile government sectors. The major sectors in India that have been privatised so far are transportation, airports, ports, security, power, irrigation, health, telecom, space, defence sector, some segment of work-force in armed forces so on and so forth. At the local level too, the list of local services provided by private firms is getting longer. The city's municipal corporation and municipalities contract out services as garbage collection, street maintenance, building fire protection, waste water treatment, local transportation, and parks and recreation. Similarly, the idea of privatisation of prisons has also received a great deal of public attention.

Indian courts have repeatedly found that the situations of prisons are at very dismal state in India as they suffer from the serious vices. One amongst such case was of *Rama Murthy v. State of Karnataka*,¹¹ wherein some nine-major issues pervading in the prison system of India were identified. Few of them are-poor living conditions, overcrowding, and poor management of services, health care, food and sanitation issues. It is arguably claimed by thinkers that the existing prison system in India would not permit for privatised prison as this function is considered as the most sacrosanct function to be necessarily performed by the government. Transfer of this core-function entirely to the private parties in India is a question that needs a light to be put on, and therefore the upcoming portion of the paper will see the detailed discussion on the possibilities of prison privatisation in Indian scenario.

The legal and constitutional perspective of the prison privatisation in India is significantly dealt in the part III of this paper. To appreciate the other important problems of the privatisation of prisons in India, it is imperative to appreciate that the exertion of legal force upon accused by governmental authorities is seen as a continuous phenomenon. To that end, the victim can always approach the constitutional courts against the illegal exertion of force against them through the available writs, thus punishing the government authorities thereby. Now, the question that arises here is, if the prison functions are being delegated to these private entities, will the similar writ

10 Penal Reform International, Resource, "Global Prison Trends 2015" (2015), *available at*: <http://www.penalreform.org/resource/global-prison-trends2015/>.(last visited on May 4, 2022).

11 AIR 1996 SC 787.

remedy be available with the victim against private prison contractors as well? The answer to this question after considering the current temperament of Indian judiciary is, 'Yes'. Various courts time and over, including the High Court of Madras as recent as June, 2019 held that although, writ petition is usually not seen maintainable against private bodies, however, in case the private body is discharging the public duty validly imposed on it, the writ petition would anyway be held maintainable.¹² To that end, the court even stretched to the extent that it observed as “*the public monopoly power is replaced by private monopoly power. Hence, it becomes necessary that the private bodies should be made accountable to judiciary within the judicial review*”. The Supreme Court in 2016 in the *CBI, Bank Securities and Fraud Cell v. Ramesh Gelli*,¹³ even held that officials of private banks will fall under the definition of ‘public servants’ for the purpose of the anti-bribery laws. Thus, it essentially means that with the help of purposive interpretation theory, the private prison contractors can also be imputed with similar liabilities as is with state authorities. The famous jurist Michelman once noted that privatisation makes government an “empty shell”; however Professor Elaine Genders have noted in their work that “*mere privatisation does not necessarily negate the idea of core-governmental functions since it does not automatically remove the state altogether from the process*”. What to delegate and what not to; what would be the extent of such delegation and what would not- will all depend upon the contractual terms governing the standards, procedures, accountability, and conditions- all of which will remain solely with the state.¹⁴

Essentially, it can now be said that although the concept of private prison was never thought of by the lawmakers in the past, it was also never forbidden by the lawmakers.

III Empirical studies and best practices

Research findings

Privatisation of prisons is altogether a new concept in India and thus, has a dearth of literature surveys as on date. The situation however is different in abroad. A substantial amount of research has already been done in several countries in the recent past examining the efficacy of prison privatisation. Strangely, the findings of the empirical studies done till the date, are not seen unequivocal in terms of whether the idea of private prison fulfills its promises and expectations to its fullest. However, majority of the findings do indicate that the practice of prison privatization has significantly brought efficiency in prison's running cost, quality, post-release change in behavior, socio-economic development of inmates and released inmates. This part of the paper

12 *Jasmine Ebenezer Arthur v. HDFC ERGO General Insurance Company Limited*, W.P.No. 22234 of 2016.

13 Criminal Appeal nos. 1077-1081 of 2013 and W.P. (Crl.) No. 167 of 2015.

14 Alexander Volokh, “A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons” 115 *Harvard Law Review* 1868 (2002).

conducts a detailed review of the empirical studies and offers guidance to the policy decision-makers on prison privatisation.

In a research conducted amongst private and state-run prisons in the United Kingdom, it was observed that the average time a prisoner spends in the meaningful and purposeful activity in the private-run prisons and state-run prisons are 26.7 hours and 22 hours respectively. This means, the quality time that an inmate spends in doing productive and purposeful activities in the private run prisons is quite better thus, improving the overall development and rehabilitation of the prisoners.¹⁵ This example may be considered to establish that private administered prisons perform much better than the state-run prisons. Furthermore, the Criminologist Alison Liebling made a comparative analysis between the private sector and public sector on the issue of prison administration.¹⁶ In her study, she concludes that private prisons, in most of the cases, provide for better and constructive services as they seem to have better command and control over the workforce. Along with this, she observed that “*it is a paradox that whilst public sector is characterised by sound and declared values at the highest level in the organisation, it has difficulty translating these values into practice at ground level*”¹⁷

Studies conducted abroad establish that private-prison contractors can easily facilitate managerial services at a lower cost and in a speedy manner.¹⁸ It is inferred that with the capabilities of investing more towards infrastructure development, they can accommodate prisoners in more humane-conditions. Prison personnel related costs can also be reduced through cost-effective and design-efficient facility designs in private prisons without compromising on the numbers of the personnel required to be deployed. Thus, it seems very clear that as private contractors know the means and methods to utilise human resources and technology, they can lessen the government expense with a certainty of better services. To understand this scheme in its entirety, let us take a hypothetical scenario. For instance, the per day cost on an inmate as borne by the government is around Rs175 per day, and in comparison the per day cost incurred by the private company is Rs 125. The government then may get services of the private contractors at Rs 150 per inmate for a day, thereby keeping a saving margin of Rs25 per inmate per day in its pocket. With this, the government ends up satisfying the

15 Prison Reform Trust, “Private Punishment: Who Profits?” (HM Prison Service, 2004); available at: <http://www.prisonreformtrust.org.uk/portals/0/documents/private%20punishment%20who%20profits.pdf> (last visited on June 5, 2022).

16 Alison Liebling, “Prisons in Transition” 29(5) *International Journal of Law and Psychiatry* 429 (2006), available at http://www.crim.cam.ac.uk/people/academic_research/alison_liebling/PrisonsinTransition.pdf (last visited on May 15, 2022).

17 *Ibid.*

18 Editor-in-chief, “Disadvantages and Advantages of Private Prisons” *Connect US*, Mar. 16, 2016, available at: <https://connectusfund.org/disadvantages-and-advantages-of-private-prisons>, (last visited on May 17, 2022).

needs of both the government and the private contractor who will be profited by certain money.

As per the ‘Report on Prison Statistics, by the National Crime Records Bureau, the average expenditure borne by the government on a single inmate has increased by more than twice during 2010-11 to 2014-15. Of which, more than 50% of the expenses were incurred on meals/catering services. The NCRB published ‘Prison Statistics India report 2019’ says that the sanctioned budget for the year 2019-20 (Rs 6,818 crores) has increased by 12.3% in comparison to the year 2018- 19 (Rs 6,068 crores) at All-India level. Out of the total, 47.9% (Rs 986 Crore) of expenditure on inmates were spent on meals/catering services followed by 4.3% (Rs 89 Crore) on medical matters, 1.0% (Rs 20 Crore) on welfare activities, 1.1% (Rs 22 Crore) on clothing and 1.2% (Rs 24 Crore) on vocational/ educational trainings.¹⁹ As per a general estimate recorded in 2015, after considering all costs, a state incurs an expenditure of average of Rs 81 against each inmate per day which itself is in the steady phase of increment. Thus, although the prison population pan India has increased by 33% since 2001, the total annual expenditure per inmate has risen by 243% over the same period.²⁰

The most important incentive by delegating correctional services to private sectors is that private run facilities are seen as less expensive, while at the same, as more efficient in administration.²¹ It is also observed that construction of prisons by private corporates results into faster and innovative infrastructure development—all while overcoming the burdensome bureaucratic hassles.²² A private prison is the best alleviator of overcrowding in public prisons and it ensures decent living standards of inmates. Thus, it is the high time for India to adopt this paradigm shift of privatizing the prisons.

Practices in abroad

Privatisation of prisons in Australia

The first country which came up with the idea of privatisation of prison was Australia. The structure of privatised prisons as built in Australia has medium-levelled security setup but with a minimum-security prisoners. The first functioning private prison in Australia was opened by the subsidiary of an American company named ‘Correctional Corporation of Australia’.

19 NCRB, “Prison Statistics India Report 2019” (August 2020), available at: <https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf> (last visited on May 17, 2022)

20 Ragini Bhuyan, “Prison economics and the gap between different states”, *Livemint*, Nov. 4th 2015, available at: <https://www.livemint.com/Opinion/Vr7bOdjTPNMwRU3NvzSCsM/Prison-economics-and-the-gap-between-different-states.html> (last visited on June 17, 2022)

21 Ira P. Robbins, “The Legal Dimensions of Private Incarceration” 38 *The American University Law Review* 531, 541 (1989).

22 *Ibid.*

Privatisation of prisons in New Zealand

‘Auckland Central Remand Prison’ was New Zealand’s first private prison that was established in 2000. Although, later in the year 2005, the then Centre-Left Government of New Zealand repealed the law allowing for private prisons, however the *status quo* got reversed when the conservative coalition came into power in 2009. Since then, the British company, ‘Serco’ has taken over the operations of the ‘Auckland Central Remand Prison’ and the numbers of private players in the prison industry are increasing day-by-day in New Zealand.

Privatisation of prisons in United Kingdom

The United Kingdom (UK) was the first country in Europe which adopted the private-prison model in 1990s. It is since then that the government started issuing prison contracts to private contractors for construction and regular administration of prisons in country. The first private-run prison in United Kingdom was established in May 1992 named as ‘HMPWolds’. At present, out of the total 123 prisons, there are 14 private prisons being contractually managed by private players.²³ The former Prime Minister of England Margaret Thatcher, professed the extension of free market in public services based on subtle assumptions that private sector has always been cost effective and efficient in functioning.²⁴

Privatisation of prisoners in United States

Popularly, Prisons in United States (US) are called as the ‘Correctional institutions’ so that it resonates with the theory that expands philosophy of corrections of prisoners. It is roughly estimated that there are a total of 158 private correctional facilities available in the United States. One of the main features of the United States is that it boasts the world’s highest incarceration rate.²⁵ Even though, United States has less than 5% of the world’s total population, it has a hub of 25% of the world’s prison population.²⁶ New Mexico is the state in United States which stores the highest number of prisoners (two out of five) in private facilities. Like the situation in India, the United States apex court had ruled in *Brown v. Plata*, that the overcrowding of prisons at the 200% capacity for over a decade violates prisoner’s fundamental human rights.²⁷ To answer the situation

23 Government of United Kingdom, *Departments*, 2022, available at: <https://www.gov.uk/government/organisations/hm-prison-service> (last visited on May 21, 2022).

24 Government of United Kingdom, Justice, *Contracted-out prisons*, 2022, available at: <https://www.justice.gov.uk/about/hmps/contracted-out>, (last visited on June 21, 2022).

25 Roy Walmsley, “World Prison Population List” 3 (International Centre for Prison Studies 12th edn., 2018), available at: <http://www.prisonstudies.org/sites/default/files/resources/downloads/wpp12.pdf>. (last visited on June 21, 2022)

26 Adam Liptak, “U.S. Prison Population Dwarfs That of Other Nations”, *New York Times*, Apr. 23 2008, available at: <https://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html> (last visited on June 22, 2022).

27 *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011).

of over-crowding and shortage of manpower with the government run prisons, the United States' executive opened the space for privatisation of prisons in 1990s by delegating prison construction and its management activities to the for-profit private companies.²⁸ A steep increment of 90% was seen in the occupancy rate of prisoners in private prisons since 1999.²⁹ In United States, the total percentage of prison population living in private prisons is at around 8% of the total prison population.³⁰

While several states in United States have different varieties of privately run correctional facilities, the highest usage of private run industry is seen in New Mexico—where approximately every second prisoners out of five are housed in private facilities.³¹ Although, there are several contractors working in prison industry in the United States, two corporations mostly dominate the United States' private prison industry. They are: Core Civic and the GEO Group.³² Together, these prison tycoons control three-fourth of the United States' private prisons.³³ The 'GEO Group' is a multi-national corporation that specializes in the “ownership, leasing and management of correctional, detention and re-entry facilities,” with having its operations in United States, United Kingdom, Australia, South Africa, and Canada.³⁴ Several state governments in the United States have legitimised privatisation of prisons through legislations with a view to preserve the government resources.³⁵ It is commonly seen that United States has the 'built-and-operate' model of prison contracts where the operation and management responsibilities are discharged by the private prison contractors in lieu of certain amount of money fixed for each prisoner paid by the government.

The apex court in the United States while deciding the delegation of prison related functions to private operators held in the case of *Pischke v. Litscher*³⁶ that, “we cannot think of any...provision in Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government...private exercises of government power are largely immune from constitutional scrutiny....expanding privatisation poses a serious threat to the principle of constitutionally accountable government.”³⁷ This signifies that

28 Lauren Salinsand Shepard Simpson, “Note, Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic” 44 *Loyola University Chicago Law Journal* 1193-94 (2013).

29 E. Ann Carson, “Prisoners In 2014” (Bureau Of Justice Statistics, September 2015), available at: <https://www.bjs.gov/content/pub/pdf/p14.pdf> (last visited on June 23, 2022).

30 *Ibid.*

31 *Id.* at 29.

32 Sharon Dolovich, “State Punishment and Private Prisons” 55 *Duke Law Journal* 437, 459 (2005).

33 *Ibid.*

34 The GEO Group, “Annual Report (Form 10-K)” (February, 2018), available at: <https://last10k.com/sec-filings/geo> (last visited on June 25, 2022).

35 See, Private Prison Contracting Act of 1986, Tennessee Code § 41-24-101 (1986).

36 178 F.3d 497, 500 (7th Cir. 1999).

37 *Pischke v. Litscher* 178 F.3d 497, 500 (7th Cir. 1999).

private prison model in United States have received sanction just because there is no embargo created by the constitution of United States. A similar initiative can also be taken by the Indian lawmakers.

IV Constitutionality of private prisons

Our Constitution envisages a society which allows for varieties of freedoms in the form of fundamental and other constitutional rights. The apex court in the landmark case of *Akasi Pradhan v. Orissa*³⁸ held that “*laws made for creation of state monopoly should be presumed to be in the interests of the general public.*” This kind of logic and support was also cited in the famous *Bank Nationalisation case*. Furthermore, in *Delhi Science Forum v. Union of India*,³⁹ the Supreme Court even said that “*the provisions regarding economic activities in the post-New Economic Policy era are well established*”.

Therefore, it seems very clear that Supreme Court of India is primarily of the view that unless the issues are especially forbidden by the law, everything is just. This, therefore, indicates that unless anything goes against the express provisions of the Constitution, there are no restrictions for the government to not venture into a new kind of economic policy. However, the moot question that whether the move of a government to delegate certain functions, like that of the prison management to private sector withstand the test of justifiability- is worthy of consideration.

In this regard, the 2010 judgment of the Supreme Court of Israel with regard to a private prison might render some instrumental guidance. In its case of *The Academic Centre for Law and Business v. Minister of Finance*,⁴⁰ the Israel Supreme Court struck down the law that allowed privatisation of prison administration in Israel for being held contrary to the country’s basic laws. The Court further held that allowing management of prisons by private for-profit organizations would lead to asystematic violation of prisoner’s basic rights, and hence should not be allowed. Surprisingly, this judgment did not connect with the issue of privatisation of core powers. It is said by critics that this judgment was very narrow in its approach and holds little ground in the contemporary jurisprudence of prison privatisation. Delegation of state’s functions so long as the basic rights of prisoners are protected, is permitted. Even toll functions are transferred to private parties. For traffic and law and order management also, civil society volunteers, Special Police Officer, Student Police Cadet *etc.* are deployed. The proper delineation of powers between private and public authorities is must, and if the same is ensured during the drafting of the contracts with private parties, it will be then less likely to be struck down.

38 *Akasi Pradhan v. Orissa*, 1963 AIR 1047.

39 *Delhi Science Forum v. Union of India*, 1996 SCC (2) 405.

40 HCJ 2605/05 (The Human Rights Division).

Furthermore, the approval to the model of prison privatisation was given by the Supreme Court of Philippines in a case,⁴¹ wherein it observed that “*while taking into account the question of sovereignty a country cannot be deemed to be existing in a vacuum and if a state wishes to voluntarily delegate some of its sovereign charges, it can do so. They may do so for greater benefits arising out of the same for the state.*”

V Viability of private prison model

The dimensions necessary for the discussion of privatisation of prisons are: (i) the boundaries of privatisation – including the amount and quality of services being delegated; (ii) its impact, especially over social control; (iii) efficiency; (iv) rate of recidivism. The discussion on these factors will fetch more accurate results if the same is supported by a balanced and evidence-based analysis that can identify the conditions under which private and public corrections, respectively, are needed and prove beneficial. There are number of reasons which support for the privatisation of Indian prisons.⁴² Few of them are:

- (i) Absence of skill and technology leanings in state jail administrative officials: Unlike, the state officials who do not know how to operate E-prison system in its fullest, private operators can very well take a lead on this task. In other words, technological tasks of prison administration can be outsourced to private operators for improving the skill and technology.
- (ii) Reduction in cost to the government in maintaining the establishments by contracting out it to the private entities. The detailed explanation with respect to this point has already been made in the preceding paragraphs.
- (iii) Privatisation promotes competition.
- (iv) Expansion of services with less expense: With couple of private players in the market, the efficiency of services gets increased in less cost. As the private company is continuously being checked and whipped by its shareholders by the way of balance sheets and income sheets, the functioning of the company would be monitored and scrutinised very minutely, which in turn, will assure the quality of the service provided. Also, the culture of flexible hiring and firings and promotions certainly increase the efficiency of prison officials to a large extent in private industries. Thus all said, private entities have the abilities to mould the efficacy of the prison service in affirmative.

41 *Tanada v. Angara*, 272 SCRA 18.

42 Martin E. Gold, “The Privatization of Prisons” 28 *The Urban Lawyer* 359-399 (1996).

In addition to the above given reasons, it is also pertinent to note that the extent of privatisation also play huge role in the proper functioning of the model of prison privatisation. Thus, the proper drafting of the contract between the state and private prison players does play a great role here and therefore, sufficient care and caution is must to be given during the contract drafting stage.

The phrase ‘Maximum governance with minimum government’, means the regulation of things with a limited corporeal presence of government. This also has importance in prison privatisation. The government which is already over-burdened with several nation-building important programs can simply prefer to ease off its prison-managerial responsibilities by delegating it with the private sector. The number of administrative personnel in private prison industry may be reduced *vis-à-vis* what is the current state of affairs in the bureaucratic structures of government correctional departments, provided appropriate complexes are built with sufficiently advanced technology inbuilt in it. In one of the previous interviews, one private-prison administrator having a vast experience of 14 years in prison management said that private prisons use roughly one-third of the total administrative personnel use.⁴³ Not only private prisons prove least expensive in its operation, but they may also contribute in generating employments for the localities. Furthermore, the private run prisons would not have much say in matters or decisions concerning sentencing, punishment or quantum thereof. In the recent developments taking place in India since last half-a-decades, the government has started shifting its possessive attitude from the hard-core monopoly of services such as- railways, electricity, aeronautics *etc* to opening them for fair and transparent competitive field. Till date, prisons system of India fall under the similar kind of monopoly and the time has come to encourage competition amongst private players to undertake managerial prison administration in India. For this, states may, on a pilot basis, do experimental exercises in certain chosen jails in a phased manner. Based on the findings taken thereof, the scheme of private prison can be brought to further heights.

Structural changes that need to be made so as to implement this idea

In the studies conducted by the several institutions and organisations abroad, it was observed that despite achieving immense success in addressing several challenges of prisons, the private prison model also suffers with several infirmities. In its report of 1987, the Council of State Governments in the United States highlighted major issue areas involving private prisoning such as areas regarding legal aspects of contracting, liability of prison administrators, request-for-proposals, contract monitoring, evaluation methods *etc*.

43 Editor-in-chief, “18 Big Pros and Cons of Education for Prisoners” *Connect US*, November 11 2019, available at: <http://connectusfund.org/category/pros-and-cons>, (last visited on June 26, 2022).

In the previous part of this paper, we have already discussed how the issues such as those concerning with constitutionality of prison contracting, liability of a contractor on account of misfeasance or malfeasance, protection of inmates' rights, cost-effectiveness analysis of a private prison model- are to be addressed. However, in order to set up any model from the scratch, basic policy and program related issues are to be analysed and studied.

Hence, in order to get a better picture, the Government of India needs to first do a pre-analysis of the contracting of prison services by inviting full-fledged consultations on the issues such as cost implications, service quality and contract monitoring implications, existence of adequate suppliers, possibility of defaults and their consequences and political issues. It may require States to share their related activities and studies relevant to the contracting of their respective prisons.

As the domain of prison falls in the purview of state list, it is appropriate for the Central Government to devise a model Request for Proposal and contract based on public-private partnership. While weaving out the contractual obligations for this proposed model, the government needs to adopt a uniform competitive bidding procedures and the selection committees for undertaking such task should see representation of all possible relevant stakeholders, but should necessarily include members from the Department of Health and Rehabilitation. The model contract for public-private model of prison system should thoroughly addresses the occupancy limits, incentives to keep cost of running at low, characteristics of the inmates to be placed inside such jails, control and supervision of the functions including admission and release of inmates, staffing patterns, qualifications, training standards of the employees deployed, insurance provisions of the inmates residing inside the jails, confidentiality of records *etc.*

In order to ensure that the services rendered by private players remains up to the mark and effective, it is advisable that the length of the contract should be made statutorily fixed for two years, and an explicit clause is inserted requiring expected performance standards and the power of monitoring the prison. Penal clauses for non/poor-performance and golden handshake clauses for good performance should also be included in the contract. In the contract, it should be made incumbent upon the government to same curriculum and training modules to private prison officers as are provided to the government prison officers so as to maintain uniformity in the prison practice all across the nation.

A proper background check of the private vendor's competence and solvency prior to contract negotiation is to be ensured. Apart from this, the scope for proper annual evaluation of the private contractor's operation should be provided in the model contract so that an objective perspective through an outside evaluator and a comparative analysis of the pre and post contracting measurable standards of performance is ascertained.

VI Conclusion

To reduce the overgrowing of the menace of overcrowding of prisons and violation of human rights of inmates, the governments across the globe have adopted various measures. These include construction and renovation of existing facilities, use of open-jail system,⁴⁴ and release on probation, community work release, house-arrest,⁴⁵ early release under government's mercy, and incorporating the concept of privatisation of prisons in place of traditional prison system.

The famous criminologist Elaine Genders remarked once that the mere idea of privatisation is not an anathema to the core-governmental functions as the privatisation process *per se* does not preclude the state altogether from the administration of any prison system which is rolled on the basis of public-private partnership model. All the powers of inserting clauses in the contract which includes the setting up of contractual terms, standards, monitoring-surveillance procedures, accountability, liability and conditions for rescission etc. – still remain a sole prerogative of the state.⁴⁶ It will be the state which will have the upper say in the whole process. In addition to several private, non-profit and for-profit organisations, even US President Commission's report of March 1988 had also affirmed the need for privatising the prison operations in certain manner. One excerpt of the same report says that "*the Department of justice should continue to give high priority to research on private sector involvement in corrections.*"⁴⁷

The basic premise behind the idea of private prisons was to introduce a way to save taxpayers' money while also ensuring quality service.⁴⁸ The United States' Bureau of Justice Assistance in its study found that private prisons provide faster and cheaper facilities at low cost, and also improve the quality of confinement and services.⁴⁹

As stated earlier, although state governments in India have not yet shown any interest in implementing the idea of private management of prisons till date, the soft attitude of the incumbent Central Government towards privatisation of several key-sectors of government instrumentalities and the comments made by the CEO of the NITI Aayog portray that it may not be a far reality sooner. As far as constitutionality of this system

44 Free Press Journal, "Bhopal: MP's 6th open jail inaugurated in Bhopal" May 2019, *available at*:<https://www.freepressjournal.in/bhopal/bhopal-mps-6th-open-jail-inaugurated-in-bhopal> (last visited on June 2022)

45 *Gautam Navlakha v. National Investigation Agency* 2021 (4) SCJ 236.

46 *Id.* at 14.

47 Alfred C. Aman Jr. and Carol J. Greenhouse, "Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate Over Private Prisons" 42 *Fordham Urban Law Journal* 175 (2016).

48 G. Gaes, "Prison privatization in Florida: promise, premise, and performance" 4 *Criminology and Public Policy* 83-88 (2005)

49 W. D. Bales and L.E. Bedard, S. T., D. T. Ensley and G. P. Holley, "Recidivism of public and private state prison inmates in Florida" 4(1) *Criminology and Public Policy* 57-82 (2005).

is concerned, it is highly that Indian courts may find any valid reason to withhold the law in this regard. Undoubtedly with this idea, there is great scope in India to lessen the burden on already-crowded and underemployed prison system and the bulk pendency of matters in courts. Therefore, the government should constitute a sole-dedicated committee in order to study the overall viability of this concept pan-India for coming up with a new model where prisoners are treated with dignity and enjoy their rights at the fullest.