OUTSOURCING VIOLENCE?

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"And let these usurpers consider that they, much more than I, deserve that ignominy with which I am myself visited. For it is not I who kill the criminals who die beneath my blows; it is Justice that sacrifices them, it is Justice that makes me the avenger of society. Should not this appellation rather honour than abase me...Will philosophy not succeed in making my profession a glorious one"[2]

ABSTRACT

This paper develops a theory of "inherently governmental functions. I shall argue that inherently governmental functions concern powers designed to execute or implement fundamental state decisions, e.g., the decision to criminalize certain behaviour, the decision to inflict a certain sanction or to the decision to initiate or end a war.

While most theorists agree that fundamental state decisions of the type described above ought only to be made by the state, there are many theorists who believe that the power to execute or implement these decisions can be transferred to private entities. Thus, for instance, theorists maintain that while only the state can criminalize behaviour, private prisons can execute the punishment; while only the state can declare a war, mercenaries can carry it out etc. This paper disputes this claim. By transferring powers of "execution" or "implementation" of fundamental state decisions to private entities, the state severs the link between its fundamental societal decisions and the actions designed to execute or implement these decisions. Private entities which imprison people or soldiers who are hired to fight a war ought to be regarded not merely as executing or implementing public decisions. Instead, they ought to be regarded as private entities whose own private judgements concerning the justness of the sanctions they inflict or the justifiability of the wars they fight are prerequisite for the performance of their jobs. The contribution to the genesis of the action of the private entity made by the court's decision to inflict a sanction or the state's decision to go to war is, so to speak, superseded by the individuals' own judgements. Hence I maintain that it is impermissible on the part of the state to privatize the execution or implementation of fundamental societal decisions.

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[2]Complaints of the Public Executioner against Those Who Have Exercised His Profession without having Served Out their Apprenticeship from Arthur Isak Applbaum, Ethics for Adversaries: The Morality of Roles in Public and Professional Life 15 (1999)

I Introduction

Some forms of privatization such as privatizing armies, prisons, courts, the justice system, police etc raise great concern on the part of legal and political theorists. These concerns are often not technical or instrumental; they are not based on the conviction that the state is better capable of imprisoning people, conducting a trial or defending itself against aggression without violating the rules of war. They are founded on the belief that there are certain tasks which are "inherently governmental;" these tasks ought not to be privatized even if private entities are better capable of executing these tasks.[3] This paper is designed to identify what functions are "inherently governmental functions" and to explain what makes these functions inherently governmental.

A recent petition to the Israeli Supreme Court against the privatization of prisons illustrates the concerns underlying the opposition to privatization. In this petition the petitioners maintain that imprisonment is a "core governance function" which ought never or, at least, very rarely to be privatized.[4] As a matter of positive law, this petition maintains that private prisons violate *Basic Law: The Government*. Article I of this Basic Law dictates that "The government is the executive authority of the state." This Article is understood by the petitioners to reflect a more universal principle. Under this principle there are core governance functions which are essentially or intrinsically public and consequently ought not to be privatized even when privatizing them is economically efficient or instrumental to the realization of public goals. In identifying what these core governance functions are, the petition contrasts for instance the power to order a search on the body of a prisoner (a power which is categorized as a core governance function) with the power to take care of hygiene and the maintenance of prisons (a power which is not categorized as a core governance function and therefore can legitimately be exercised by private entities).

[3]This claim is not uncontroversial. Some theorists argue that governments should retain control of inherently governmental functions but that they do not have to perform these functions in house. See, e.g., David H. Rosnebloom & Suzanne J. Piotrowski, Outsourcing the Constitution and Administrative Law Norms 35 *The American Review of Public Administration* 103, 107 (2005). Yet many other theorists and policy-makers resist this view. In fact the insistence that inherently governmental functions ought to be performed in house is entrenched in the American federal government's policy. See *Id* at 107.

[4]HCJ 2605/05 *The Human Division of Academic College v. The Minister of Finance*. The petition prepared by attorney Gilad Barnea is still pending in the Court.

Yet, despite extensive attempts to explore what "inherently governmental functions" are, existing theories fail to explain why some functions ought to be classified as "inherently governmental." While the conviction that there are inherently governmental functions provides the basis for the opposition to private prisons,[5] mercenaries,[6] military companies,[7] the use of shame penalties[8] and other privatization or outsourcing initiatives, it is often unclear what unites these different functions and what is it that makes them "inherently governmental". One major obstacle to an understanding of "inherently governmental functions," is the inclination of opponents of privatization to use instrumental arguments. It is part of my contention in this paper that the instrumental arguments against privatization are merely a distorted shadow of non-instrumental convictions and that by investigating these non-instrumental convictions one may better understand the underlying reasons against privatization.[9]

In this paper I develop a theory of "inherently governmental functions." Inherently governmental functions involve the powers designed to execute or implement fundamental (and mostly uncontroversial) societal decisions, e.g., the decision to criminalize certain behaviour, the decision to inflict a certain sanction or the decision to initiate or to end a war. The fallacy of advocates of privatization or outsourcing is that they believe that while those fundamentally societal decisions should be made by the polity, they can (and sometimes ought to) be implemented or executed privately. For instance, advocates of privatization believe that one can sever the state's decision to issue a criminal law norm (prohibiting certain behaviour or determining what the just sanction for violating this norm is) and implementing the norm, i.e., inflicting the sanction. Similarly they believe that one can sever the state's decision to initiate or end a war on the one hand and fighting the war on the other hand. In contrast I argue that by transferring certain powers of "execution" or "implementation" of fundamental choices to

[5]See, e.g., Charles H. Logan *Private Prisons Pros and Cons* 4 (1990).

[6]See, e.g., Sarah Percy, *Mercenaries: The History of a Norm in International Relations* 1-2 (2007)

[7]Paul R. Verkuil, *Outsourcing Sovereignty*26-30 (2007).

[8]James Q. Whitman, What is Wrong with Inflicting Shame Sanctions?, 107 *Yale L.J.* 1055 (1998).

[9]I do not argue of course that instrumental arguments are irrelevant to the justifiability of privatization. My claim is only that in addition to any sound instrumental arguments against privatization there are also non-instrumental concerns and understanding these non-instrumental concerns sheds light on the controversy.

private individuals, the state, in effect, severs the link between its fundamental societal choices and the private actions designed to carry out these decisions. Private entities which imprison people (on the basis of the judgements of courts or legislatures) or soldiers who are hired by the state to fight a war (on the basis of the state's judgement that the war is just or necessary) ought to be regarded not as executing or implementing public decisions (such as inflicting a state-determined sanction or fighting a war on behalf of the state). Instead, they ought to be regarded as private individuals (or entities) which carry out the relevant tasks on the basis of their own private judgements concerning the appropriateness of the sanctions they inflict or the justifiability of the war they fight. The contribution to the genesis of the action of the private entity made by the court's decision to inflict a sanction or the state's decision to go to war is, so to speak, superseded by the individuals' own judgements. Consequently, the suffering of a criminal imprisoned in a private prison is ultimately a "private" suffering – a suffering resulting from and attributed to the private judgements of the private entity which runs the prison that the punishment is just. Similarly the violence inflicted on an enemy state or army by mercenaries is a private violence grounded in the mercenaries' own convictions concerning the justifiability of the war. Privatizing prisons or armies ought not therefore to be described merely as privatizing the *execution* of *state's decisions* to imprison a person or to fight a war but as a form of stripping the state of much more fundamental powers, e.g., the power to decide what behaviour ought to be criminalized, what sanctions ought to be inflicted for certain behaviour or what wars ought to be fought etc. It is a widely shared belief (which I am not going to defend in this paper) that privatizing these fundamental powers is impermissible.

At the core of my opposition to outsourcing stands the concept of the *normative attribution of responsibility* for fundamental societal choices. While, as a matter of fact, the decision to imprison a person in a private prison follows a judgement by a court, the imprisonment of a person in a (private) prison should be normatively attributed to the private entity which runs the private prison. It ought not therefore to be regarded as an execution of a criminal law norm whose content is determined by the state. Similarly while, as a matter of fact, the decision to fight a war may be rendered by a state, such a decision, if executed by a private entity, ought to be normatively attributed to the mercenary or to the private military corporation which fight the war. Consequently it ought not to be regarded as an execution of the state decision to fight a war. The impermissibility of privatizing prisons or armies derives its force therefore from the impermissibility of privatizing the decision to criminalize behaviour or to dictate what the just

punishment for transgressing criminal prohibition is or the impermissibility of privatizing the decision to initiate a war or end a war or dictate the ways in which the war ought to be fought.

Section II surveys some of the existing arguments against privatization. I focus my attention on the arguments concerning the uncontrollability of private agents and expose the flaws of these arguments. Then I suggest that the argument from uncontrollability ought to be understood not in terms of factual uncontrollability but in terms of normative uncontrollability. It is only if understood in terms of normative uncontrollability that a general argument against privatization can be defended without making dubious and over-broad empirical presuppositions. Section III identifies what "inherently governmental functions" are and provides a rationale against outsourcing these functions.

Although my analysis is motivated in part by doctrinal concerns in particular the persistent opposition of some legal systems to the privatization of prisons, the broad recognition of some legal systems of the notion of "inherently governmental functions", the prohibition of using mercenaries in international law, it does not purport to explain all these complex doctrinal intricacies. Furthermore it is not aimed at pointing out all the reasons against privatization. Presumably, besides the normative attribution argument developed here there are other instrumental reasons or perhaps other non-instrumental reasons against privatization. The concerns raised here should be regarded as part of a much complex and intricate mosaic of considerations all of which should contribute to the shaping of the norms governing outsourcing.

II The Argument from Uncontrollability

What are inherently governmental functions? It suffices for my purposes to look at some paradigmatic examples of inherently governmental functions. The examples I shall use include activities done by the military, intelligence, law enforcement authorities and the criminal justice agencies. These functions involve the exertion of violence. Characterizing these violence-related functions as "inherently governmental functions" supports the famous observation of Max Weber that "The state is that entity which claims a monopoly on the legitimate use of physical force."

But perhaps the state claims (or should claim) that its monopoly on the legitimate use of physical force is justified simply because it uses (or can use) physical force better than other entities. If this is indeed the case, the use of force ought to be reserved to the government but there is nothing *inherently* governmental about the use of force. The use of force is a governmental

function simply because the government is more likely to use it when it is needed (or desirable) and not to use it when it is not needed (or desirable) or because the government is more likely to use it in a manner which is more suitable or appropriate to achieving its goals. Privatizing the use of violence should therefore be resisted on the grounds that private power is less likely to be exercised when needed or less likely to be used in a way which promotes the goals for which it is being used in the first place. John Locke in his very famous discussion of state punishment used such instrumental arguments to justify the control of the state over the determination of punishment. In his argument against private punishment Locke argued:

> "To this strange, viz. That *in the state of nature, every one has the executive power* of the law of nature, I doubt not but it will be objected. That it is unreasonable for Men to be judges in their own Cases, that Self Love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed Government to restrain the partiality and violence of men. I easily grant that *Civil Government* is the proper Remedy for the inconveniences of the State of Nature, which must certainly be Great, where men may be judges in their own Case."[10]

Even a superficial reading of Locke reveals that what concerned Locke here was the power of the state *to determine* what the sanctions are rather than the power of the state *to inflict* the sanctions. Locke's instrumental argument, even if sound, does not preclude the possibility of privatizing *the infliction* of punishment. After all, it is possible that the state determines the nature and severity of the sanction and hires a private entity simply in order to execute it. The new initiatives to establish privatize prisons, or to privatize other components of the law enforcement system are all based on the conviction that while the decision concerning the severity and nature of punishment ought to be public, the execution of the punishment can be privatized without compromising the sovereignty of the state. Similarly in the context of mercenaries and private military corporations, a distinction could be made between the public decision to initiate a war, the public decision to end it and even the public decision to decide how to fight it on the one hand and the actual execution of the war on the other hand. Arguably while the former tasks are fundamental societal decisions which ought to be made exclusively by the state in order to be legitimate, the latter could be privatized without compromising the sovereignty of the state.

[10]John Locke, Two Treaties of Government: Second Treatise sec. 13 (Peter Laslett ed., 1960).

Opponents of privatization often raise concerns that a private entity assigned to execute a criminal sanction or to fight a war would not be faithful to the state's directives or goals. The unfaithfulness of private entities may take different forms. In some cases the private entity may fail to execute the orders dictated by the state. At other times, the private entity may fail to inculcate the spirit underlying the public enterprise. The private entity may comply with the rules dictated by the state but it may fail to exercise its discretion in a way which promotes the goals of the public enterprise. Arguably, running a prison, conducting a war or interrogating war prisoners are not merely technical tasks; their successful execution requires sensitivity to the public purposes justifying the infliction of punishment or fighting the war or conducting the interrogation.[11]This concern may raise doubts whether the sharp dichotomy between the fundamental public decisions (e.g., the decision to criminalize certain behavior to inflict a certain sanction or to fight a certain war) and the execution or the implementation of these decisions is tenable. Faithful execution of the polity's decisions presupposes the ability to exercise discretion in a manner which is responsive to the public purposes animating these decisions. Private entities are incapable of exercising such discretion.

Many theorists oppose privatization on such grounds. Opponents of private prisons raised concerns that private entities assigned with the task of inflicting criminal sanctions would fail to execute them faithfully. It has been argued for instance that such private entities would fail to protect and promote the well-being of prisoners and, furthermore, that they may interfere in the process of determining what the sanctions ought to be. Yet, while it is possible (and perhaps likely) that a private entity used by the state to inflict criminal sanctions would fail to execute these sanctions faithfully, it is also possible that public employees would similarly fail to act in accordance with the public interest.[12]When reforming an entrenched institution such as prisons, it is always easier to detect the potential deficiencies of the reform and blind oneself to similar or perhaps worse deficiencies of the existing institutional structure. It is certainly possible that given the proper set of incentives a private entity may be more likely to carry out faithfully or perhaps efficiently the state-dictated rules concerning punishments than public employees. Should not we prefer privately inflicted criminal sanctions whose nature and severity is dictated

[11]See Verkuil *supra* note 7 chap. 2.

[12]*Id.* at 40-41.

by the state to publicly inflicted sanctions whose nature or severity deviates (even to a slight degree) from those dictated by the state?

Similar concerns have been raised in the discussion of mercenaries and private military corporations. Moral objections to the use of mercenaries are deeply rooted in political theory.[13] One of the most deeply rooted fears takes the following form. The only legitimate wars are wars which are initiated by states and are fought in accordance with the will of the state for the sake of promoting the public good. It is only the state that can legitimately initiate a war, end it and dictate how it ought to be fought. Yet, it has been argued that mercenaries and their modern analogues in the form of private military corporations are too independent of the state which employs them and, consequently, may fail to execute the state's decisions in ways which promote the public good. The fear is therefore that "the more independent the fighter, the weaker the control of states and, potentially, the greater the threat to the stability of the international system."[14] This concern is so deeply rooted that some of the attempts to define what mercenaries are, are based on measuring the degree of control of the state over them. The more independent a fighter is, the more he should be classified as a mercenary rather than as a regular soldier.[15] Mercenaries are those soldiers who are less capable of being effectively controlled by the state which operates them.

This fear of uncontrollability of mercenaries is based on some historical precedents of uncontrollable mercenaries who pillaged European cities in the Middle Ages.[16] In twelfth century France mercenaries pillaged the countryside and were known also for attacking churches. Yet, already in early European history, the control of mercenaries was tightened. Pope Urban V was particularly instrumental in regaining control over the mercenaries.[17] In fact some theorists have pointed out that the norm against hiring mercenaries may frustrate the attempts of states to exert

[13]See Percy, *supra* note 6 1-2.

[14]Percy *id.* at 58.

[15]Percy *id.*

[16]*Id.* at 81.

[17]*Id.*

sovereignty as states would be barred from hiring mercenaries to assist them in fighting legitimate wars. It is therefore possible that "hiring mercenaries might actually *reinforce* state sovereignty because one of the attributes of a sovereign state is the ability to employ whom it chooses in order to augment security."[18]

Precisely as the alleged uncontrollability of private entities in executing criminal sanctions is an empirical question, so is the alleged uncontrollability of mercenaries in executing wars. While it is possible that a private entity used by the state to fight wars would fail to execute its mission faithfully, or would even try to interfere in the decision whether and what wars are to be fought, it is also possible that regular armies would fail to execute faithfully the mission dictated by the state. Should not we prefer mercenaries who fight wars precisely in accordance with the decisions and the rules dictated by the state to a regular army which fails to conform to these decisions and rules?

These examples illustrate the puzzle which is at the center of the debate concerning outsourcing. Much of the opposition to privatizing sanctions and to the use of mercenaries is grounded in the fear that private law enforcers or mercenaries are too independent of the state and therefore are less likely to execute its decisions faithfully. This concern rests ultimately on an empirical conjecture, namely on the conjecture that private prisons, mercenaries and other private entities are less controllable than public employees. These concerns are important but, as some theorists have pointed out, the intensity and the persistence of opposition to privatizing violence cannot hinge on these empirical conjectures. As Sarah Percy maintains "Our moral dislike of mercenaries may no longer be grounded in the realities of mercenary behavior and the potential benefits of private force may be obscured by the great strength of the anti-mercenary norm."[19]

Perhaps however the fear of actual uncontrollability of private entities in executing violence is merely an attempt to "instrumentalize" and thus "rationalize" a deeper and a more foundational moral concern. Under this view, opponents of privatization rationalize their opposition by providing instrumental arguments, e.g., by pointing out the alleged uncontrollability of private entities. If this is the case a closer observation may reveal a sense of abhorrence at the very idea of privatization which is independent of any instrumental concerns. In fact, I believe that the

[18] *Id.* at 219.

[19] Percy, *supra* note 6 at 247.

privatization of violence is indeed disliked because it challenges controllability. Yet it is a different type of uncontrollability which can both explain and justify the opposition to privatization of some functions which are labeled "inherently governmental."[20]

The concern of uncontrollability can be defended if it is understood as a concern of normative rather than merely factual uncontrollability. Even when private entities are factually controllable by the state (i.e., they carry out faithfully the state's orders) they are normatively uncontrollable (i.e., they ought not to be regarded as executing or implementing a state decision). Even if, *as a matter of fact*, private entities are faithful to the polity's fundamental choices and decisions, their actions are never to be regarded as a mere "execution" or "implementation" of these choices and decisions. The "execution" or "implementation" of fundamental choices and decisions carried out by a private entity presupposes a moral conviction on the part of that entity that the polity's fundamental decisions and choices (that they are about to "execute") are just or, at least, morally permissible. Effectively the private entity holds a veto over the "execution" or "implementation" of the polity's choices and therefore the private entity ought to be regarded as fully accountable for carrying out the task. Such accountability on the part of the private entity undermines the public nature of the act; it renders the act of punishing a criminal or fighting a war a private rather than a public act. Consequently, what is really at stake is not (only) the question whether, *as a matter of fact*, the private law enforcer or the mercenary is more or less controllable by the state than the public employee or the regular soldier. The question is whether *as a normative matter* the private entity's actions can be guided by the state and therefore can be executed or implemented in the name of the state.

III Inherently GovernmentalFunctions: A Philosophical Defense

[20]Here is an example of a statement revealing such a sense of abhorrence. One of the opponents of privatizing the interrogation of war prisoners asserted: "An interrogation, after all, is where the conqueror meets the conquered, where the invader meets the insurgent, where the American meets the face of his or her enemy. It's bad enough that the CIA has reverted to torture in its questioning of terrorist suspects and covered up the evidence by destroying the tapes; but it's even worse to hand these tasks over to private companies operating under classified contracts that are themselves illegal to disclose and who are answerable only to their stockholders. So let's paint a thick black line there: no private interrogators." See David Isenberg, Inherently Governmental? http://www.cato.org/pub_display.php?pub_id=9388

Eisenberg opens this paragraph by expressing his disgust at the practices of torture used by private entities and covering up evidence. Yet the lurking message behind its assertion is that it is even worse for private entities to engage in such practices. He ends therefore this paragraph by communicating his sharp (and almost visceral) resentment: "let us paint a thick black line there: no private interrogators."

The case of "inherently governmental functions" can be understood as one example of a broader category of cases in which the identity of an agent executing an enterprise or a task has a particular distinctive non-contingent significance. This paper argues that in the case of "inherently governmental functions," the government is not an agent which is chosen merely because of its contingent competence. To better understand such cases, it is useful to draw a distinction between two types of criteria to identify who the most appropriate agents to carry out a particular enterprise are. Some agents a*r*e chosen to execute an enterprise only because of their expected excellence in executing it when excellence in executing an enterprise is understood and evaluated independently of who the agent is. At other times excellence (or even competence) in executing an enterprise is inseparable from the identity of the agent. In the latter cases the quality of the execution of the enterprise cannot be measured independently of the identity of the agent.

Blood feuds can provide an example for the latter type of cases.[21] Some (perhaps all) of the readers may share my dislike of the practice of blood feuds. Yet, irrespective of whether this practice is commendable, it is interesting to observe that the identity of the agent performing the blood feud is essential to its successful completion. Blood feuds are ritualized ways of seeking vengeance for a wrong by killing or punishing a person belonging to the tribe or clan of the person who committed the wrong. Yet, the tradition is that only a male relative of the person who was wronged may avenge the wrong. A killing by the wrong agent is not merely impermissible; it does not even count as a blood feud and cannot redress the injustice.[22] The power to perform a killing properly classified as a blood feud is an agent-dependent power – a power that can be successfully exercised only by the proper agent. The agent involved in the blood feud is not perceived as a means to perform the (allegedly just) act of killing; instead it is the act of killing that provides an opportunity for the appropriate agent – a male relative of the deceased -- to act in order to redress the injustice.

A more contemporary example for agents whose identity has special significance in carrying out an enterprise is Joel Feinberg expressive theory of punishment. Under Feinberg's famous formulation of the expressive theory of punishment: "punishment is a conventional device for the

[21]This example is borrowed from Alon Harel, The Case against Privately Inflicted Sanctions 14 *Legal Theory* 113, 121 (2008).

[22]See Pamela Barmash, Homicide in the Biblical World 24 (2005).

expression of attitudes of resentment and indignation, and of judgements of disapproval and reprobation on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[23] Arguably, this function can only be performed by the state, since "punishment expresses the *judgement*... of the community that what the criminal did was wrong." In contemporary societies it is the state (and the state alone) that is understood to speak in the name of the community. Punishment of criminals performed by agents other than the state may of course deter wrongdoers, satisfy retributive concerns, and serve other important functions but it does not (and, given current understandings, cannot) have the same symbolic expressive significance that Feinberg believes punishment ought to have.

This section establishes the claim that the exercise of physical force on the part of the state resembles in some respects a blood feud or punishment governed by expressive concerns. The power to inflict criminal sanctions or to fight wars is an agent-dependent power – a power that can successfully be exercised only by the appropriate agent – the state. This is because in order to be legitimate, it is not sufficient that the agent inflicting the punishment or the agent fighting the war carry out its mission faithfully. To count as a criminal punishment inflicted by the state, it is not sufficient that the nature and severity of the sanctions determined by the state are carried out faithfully. In addition, it ought to count as an execution or implementation of the will of the state. There is a fundamental difference between state-inflicted criminal sanctions and suffering inflicted on the guilty in accordance with the will or intention of the state. Similarly to count as a war, it is not sufficient that the violence is controlled by the state, i.e., that the decision to initiate it, end it or determine its scope and intensity are made by the state and that the soldiers carry out faithfully these decisions. In addition it ought to be fought by the state. There is, I shall argue, a fundamental difference between a war fought by a state and a war initiated by the state but fought by mercenaries even when mercenaries follow the orders of the state and comply with its decisions.

Inherently governmental functions involve the execution or implementation of fundamental societal decisions or choices. These fundamental choices have two important characteristics. First these fundamental decisions or choices must not merely be followed, complied with or carried out. In addition these choices or decisions must be executed or implemented, i.e., the

[23] Joel Feinberg, The Expressive Function of Punishment, in A Reader on Punishment 74 (R.A. Duff & David Garland ed., 1994).

agents acting in conformity with these fundamental decisions must be understood to be executing or implementing state decisions. It is evident that not every state decision which is being carried out is also being executed or implemented. If I happen to lock up my neighbour for the same duration of time dictated by a judge I am not to be regarded as implementing or executing the judge's decision. Second, in the case of inherently governmental functions to count as an implementation or execution of the state's decisions these decisions ought to be conformed with by public officials rather than by private contractors or, more generally, the agents assigned with complying with these decisions ought to satisfy formal requirements affiliating them with the state and operating in its name.

If I am right, the infliction of criminal punishment is inherently governmental if i) the infliction of the punishment ought to constitute an execution or an implementation of a fundamental state decision (e.g., the decision that this punishment is appropriate for a particular crime and the decision to convict the person for this crime) and ii) In order to count as a sanction executed by the state (rather than merely a sanction whose severity happens to converge with the state's decision), it ought to be inflicted by public officials rather than private contractors or, more generally, by individuals who satisfy some formal requirements affiliating them with the state.

Providing an abstract characterization of "inherently governmental functions" does not of course establish that there are any functions which fall into this category. The great challenge is to establish why would ever a decision of the state, which is carried out faithfully by an agent who operates in accordance with the state's directives, nevertheless not count as an execution or an implementation of the state's decision? After all, section II established that some private entities may be more controllable (as a matter of fact) by the state than public employees. Should not such effective state control over carrying out its fundamental choices be sufficient to guarantee that acts are carried out in the name of the state and that they count as an execution of implementation of state's decisions?

In my view the opposition to private sanctions, mercenaries and other forms of publically-initiated privately-executed violence is grounded in the conviction that the answer to this question is negative. Even when private entities are (as a matter of fact) effectively controlled by the state, i.e., they carry out decisions made by the state, they are not always to be regarded as executing or implementing these decisions. More particularly acts which are carried out in accordance with public decisions by private entities ought sometimes to be understood as private

rather than public acts and the private agents who comply with the state's decisions ought not to be regarded as executing or implementing a state decision. Instead, they ought to be regarded as executing or implementing their own decisions on the basis of their own private judgements which simply happen to conform to the state's decision.

To establish this claim let me first share an anecdote. I was surprised to learn recently that modern English executioners were not state's employees but freelance agents. They were hired by the state and were paid for each execution performed by them. This small and arguably insignificant historical detail may help to illustrate the moral significance of the distinction between public and private exertion of violence.

Assume that you are being approached by a public official and asked to participate in the infliction of criminal sanctions on a convicted criminal. Presumably your first reaction would be (and should be) to investigate what the crime is and what the procedures used for her conviction were. Then you ought to make a judgement whether given the gravity of the crime and the procedures used in the trial, the infliction of the sanction is justified. It seems evident to me that it is impermissible for you to inflict sanctions unless you are convinced that the sanctions are proportional to the gravity of the offence and that the procedures used are fair. It is a moral duty on the part of the citizen to scrutinize the appropriateness of the sanction and, if convinced that the sanction is inappropriate to refuse to inflict it.

Assume now that after thorough investigation you are persuaded that the sentencing of the criminal is justified. The person was charged for having performed an offence; he benefitted from a fair trial and the sentence inflicted on him is proportional to the gravity of the offence. You decide therefore to inflict the sanction.

Given that in order to permissibly inflict the sanction, it was necessary for you to consider the justness of the infliction of the sanction, it follows that the sanction inflicted by you cannot be regarded as a mere execution of a publically-mandated decision. After all, the infliction of the sanction required moral judgement on your part – a judgement which you performed as a private citizen. The mere fact that your judgement in this case converged with that of the state is merely a happy coincidence. Your judgement concerning the appropriateness of the infliction of the sanction in this case is critical. The contribution to the genesis of your action – the infliction of the sanction -- made by the court's decision to inflict a sanction or the state's decision to go to

war is, so to speak, superseded by your own judgement that the sanction is appropriate or that the war is just. In short the infliction of the sanction ought not to be regarded as an execution of the state's will; it is your will that is responsible for it and it is you as a private individual that is accountable for it.

The analysis does not depend on whether the agents as a matter of fact scrutinized the state's decision. It is possible of course that *as a matter of fact* some agents fail to scrutinize the decision of the state concerning the infliction of the sanction and are willing to carry it out blindly. This fact however does not negate his responsibility. Irrespective of what the agent asked to inflict the sanction does or thinks and irrespective of how such an agent reasons his act is attributable to him rather than to the state.

This assertion is founded on fundamental liberal presuppositions. It is founded on the belief that individuals ought not to follow blindly the state's dictates, i.e., that they are accountable for acts performed by them. Under normal conditions the state cannot be trusted; its decisions, in particular decisions concerning the use of violence, ought to be scrutinized. The duty to scrutinize has important normative ramifications. The most obvious of these moral ramifications is that an agent who carried out the state's decisions but failed to scrutinize such decisions is morally accountable. A decision to inflict a sanction of a certain nature and magnitude is as attributable to the private agent executing it as it is to the state. Similar reasoning applies to the mercenary. In the absence of a judgement on the part of the mercenary that the war is just, the mercenary simply ought not to go to war. His decision to fight indicates his concurrence with the state's judgement that the war is just or necessary or, at least, permissible. The war is as attributable to the private convictions of the mercenary concerning its justness as it is to the public judgement of the state.

So far we have established that when a private agent carries out the state's orders, her act ought not to be normatively understood as a faithful execution or implementation of the state's fundamental choices or decisions. Instead, it ought to be regarded at least partially as a private act – an act for which the private entity is accountable for. But perhaps the argument is too strong. Perhaps this argument applies to everybody; in particular, perhaps it applies also to public officials. Perhaps the so called public executioner or the regular soldier is as obliged to scrutinize the state's judgements as the private executioner or the mercenary. If so, no action of the state is purely public. Every act of the state is equally tainted because every act is subject to scrutiny by

the entity who executes it. After all the state always needs an agent to execute its will; its will is never self executed.

In addressing this objection let me use the words of the French official executioner (Mr. Sanson) in an (imaginary) dialogue in which he is asked to justify his behaviour. Sanson who was both the king's official executioner and later on served the leaders of the French revolution with an equal degree of enthusiasm maintains that:

> "I have already explained to you why I believe that the role of executioner is worthy of a person's commitment, and you half believe it yourself. Having made such a commitment to the role, I cannot then reject the reasons for action the role provides. Only if the overall justification fails in any particular performance no longer an "execution," but a murder. As I said I am not an instrument. I must judge my role. But the judgement is of a life in role, not the particular acts the role requires me to perform"[24]

An analogous argumentation is common in liberal political theory. The famous distinction drawn by Rawls between justifying a practice and justifying a particular act falling under a practice is analogous (but not identical) to the distinction drawn by Sanson.[25] Rawls believes that the question of what justifies the institution of punishment is separable from the question of what justifies the infliction of a particular punishment on a particular offender within a particular system. Sanson maintains that his decision to serve as a public executioner is separable from the decision to execute a particular individual. He believes that it is morally permissible to become a public executioner. Once however a public executioner is in office she is barred from exercising discretion as to whom she executes since as Sanson says: "If I were to act on reasons that the role requires the executioner ignore, I would cease to be the executioner."[26]

Sanson's assertion is also founded on liberal presuppositions. An executioner is a servant of justice as understood by the state not of justice as understood by the executioner. To be counted as an act of state, an executioner must obey blindly (within certain boundaries) the orders of the state. It is this blind conformity that makes an executioner a public official in the first place and which also justifies labeling of the executioner's acts as acts of state.

[24]Arthur Isak Applbaum, Ethics for Adversaries: The Morality of Roles in Public and Professional Life 40 (1999).

[25]See John Rawls,

[26]Applbaum, *supra* note 24 at 41.

Sanson believes there is a fundamental difference between a citizen asked to execute a person and a public executioner. But can the distinction between the two be justified? What is after all the moral difference between the private citizen Sanson who is asked by the state (in exchange for a fee) to kill a convicted criminal on a one time basis and the public executioner Sanon who executes convicted criminals on a regular basis in exchange for a salary?

To see the difference let us return to the Rawlsian distinction between justifying a practice and justifying a particular act falling under it. This distinction maintains that some particular acts falling under the practice of punishment are justified only because they constitute part of a practice which is justifiable. It is essential therefore for these particular acts to be performed as parts of an ongoing practice in order to be justifiable. I wish to extend the scope of the Rawlsian observation from the case in which a societal practice or acts performed within this practice are challenged to the case in which the justifiability of employing a public official or the justifiability of acts performed as parts of one's duties as a public official are challenged. Rawls maintains that sometimes the best justification for the infliction of a particular punishment on a criminal is to point out that this punishment is part of a practice which is necessary and desirable. Similarly sometimes the best justification that an agent has for executing a particular task is to point out that this task is part of the duties of public officials and that employing public officials is necessary and desirable. Once a public official is in place, the justifiability of particular actions performed as part of their ongoing duties ought not to be challenged. The justifiability of many (although by no means all) actions performed by a public official are based on the justifiability of establishing the public office in the first place. Any particular action performed by the official is therefore judged as part of an ongoing enterprise whose overall justifiability hinges upon the justifiability of establishing the public office in the first place.

A public official or a state employee differs therefore from a private citizen in that the former ought (at least sometimes) to justify acts performed by him on the basis of a judgment that the particular act performed by him constitute faithful execution of his job and his job is necessary for the public good. In contrast, a citizen who is asked on a one time basis to execute an order of the state cannot resort to such a justification. He ought at least under normal circumstances to scrutinize whether it is permissible for the state to perform the act. The duty to scrutinize implies that the action performed by the citizen is at least partially a private act for which the citizen herself is accountable for and not a mere execution of a state's decision. Such accountability on

the part of the citizen does not necessarily imply that the action is impermissible. Perhaps the judgment of the state that a punishment ought to be inflicted on a person – a judgment shared also by the citizen -- is justifiable. But such a judgment implies that the punishment inflicted by the citizen ought not to be perceived as an execution or an implementation of the decision of the state even if the state initiated it and the citizen carried it out it dutifully.

Earlier I characterized inherently governmental functions as functions which involve the execution or implementation of fundamental societal decisions or choices. I argued that these fundamental choices have two important characteristics. First these fundamental decisions or choices must not merely be carried out or complied with. In addition they must be understood to be an execution or an implementation of state's decisions. Second, to count as an implementation or execution of the state's decisions these decisions ought to be carried out by state agents -- agents which satisfy formal requirements affiliating them with the state.

The argument above establishes why some functions, in particular functions which involve violence, may satisfy these conditions. The exertion of violence by a citizen requires a moral judgement; it ought not to be executed blindly simply upon request or demand by the state. Given that the exertion of violence in such cases requires such a private judgement on the part of the citizen it ought not to be regarded merely as an execution or implementation of state's decisions. Such an independent judgement on the part of the agent implies that that the relevant act is not to be normatively attributed to the state; it is to be understood as a private act.

Let me end this section with two important concessions. First, as mentioned above, this analysis does not imply that there are no limits to the duty of obedience of public officials. It is possible that a public official be obliged to execute faithfully and with no scrutiny some orders and be obliged to question or scrutinize other decisions. In fact I believe that public officials ought to scrutinize many of the orders that are currently carried out by them without engaging in such a scrutiny. My analysis only dictates that private citizens may have greater burdens in scrutinizing the state than public officials.

Second, the distinction drawn between public employees or public officials and private entities assigned to execute the state's decisions is not a simple one and it does not necessarily track legalistic distinctions. Legal technicalities such as whether the person is a government employee or a contractor need not necessarily dictate what the duties of scrutiny are. The duties of scrutiny

concerning the state's decisions depend on the type of relationship between the state and the individual. Legal technicalities may be relevant to answering this question but they are not necessarily conclusive. My guess is that some citizens who are not technically classified as public employees ought to be regarded as such for the purposes of this paper given the special relations between them and the state. I will not however pursue here this investigation.

IV Coda

This paper is an attempt to give a voice to some fundamental sentiments which I believe are shared by opponents of privatization. It is too often that opponents of privatization wish to "rationalize" their opposition to privatization. Rationality often takes the form of providing instrumental arguments against privatization. These instrumental arguments are often based on social science research purporting to establish that private agents are not capable (or less likely to be capable) of carrying out certain public tasks. In contrast this paper voices deeper concerns which require philosophical rather than scientific deliberation. It is time for philosophers to join forces with social scientists in examining the limits of privatization.