

Perspectives of Prison Privatization as a Solution to the Prison System Crisis in Croatia

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Abstract

This paper presents arguments supporting the statement that the Croatian prison system has been in a crisis for years and presents pros and cons of introducing prison privatization as a possible solution/remedy as observed by researchers, journalists, government officials and the prison staff and prisoners themselves in other countries that have previously introduced or still use private prisons as a way of dealing with excess number of prisoners, which, in vast majority of cases, was/is the primary, but not the only incentive for turning to the private sector for help. The initial section of the paper focuses on defining the terms „prison system crisis“ and „prison privatization“ and classifying the possible models of prison privatization based on available research papers and articles published from the late 1980s onward, after which an brief overview of the prison privatization process worldwide since the beginning of the modern prison privatization process is given. The central part of the paper gives: 1) an answer to whether prison privatization is even legally achievable in Croatia, and if not, what changes need to be done in that regard, and 2) an overview of the overall condition of the prison system in Croatia based on several parameters as they change through the years (2005-2014). Parameters presented, defined and analysed include, but not exclusively: available prisons and penitentiaries, prison capacity, prison population, prisoner flow, imprisonment rate, remand prison, misdemeanour prison, supletory prison, recidivism rate, parole, prison violence, suicide attempts, the use of force, staff-to-inmate ratio, staff turnover rates, etc. The final section of the paper is dedicated to presenting arguments for and against prison privatization. In the conclusion the author gives his insight on the current situation with the Croatian prison system and whether Croatia should experiment with prison privatization.

Keywords: prison system crisis, prison privatization, privatization models, pros and cons, parameters

Introduction – Prison system Crisis

As any other part of the state government's public sector, prison system too is prone to crisis. And, just like with any other part of the public sector, the solution chosen to battle the crisis greatly depends on the existence of certain amount of political will to make (from a future political standpoint often risky) decisions, as well as financial constraints that a particular country's given budget presents.

Speaking of prison systems in this context is important because, judging from other countries' experiences, the debate about prison privatization does not arise until a prison system is no longer operating normally, and the question that then immediately arises is – what is prison system crisis and how do I recognize whether a particular prison system is in one?

And, indeed, it is not a question easily answered, but is, nevertheless, one that needs to be answered if one is to know whether something needs to be done and in which direction the changes should head, and, finally, if prison privatization is the way to go – which is the aim of this paper. Based on the literature researched for the purpose of this paper,¹ it would seem that certain guidelines exist that, if present and detected, would lead to the conclusion that the aforementioned question about the occurrence of prison system crisis should be answered affirmatively.

The parameters - as observed on the example of Croatia's prison system - are as follows (not necessarily in the given order):

available penitentiaries and prisons – in particular, their size (capacity) and state,

prison occupancy rate – % of total available prison capacities filled,

prisoner flow – the amount of prisoners who pass through the prison system (measured on a yearly basis),

imprisonment rate – prisoners per 100,000 people/citizens (EU average is 80-90)

remand prison – prison in which a person is held prior to being sentenced,

misdemeanour prison – sentence served as a result of committing a minor offence or a misdemeanour; many countries are not familiar with this form of prison sentence,

supletory prison – prison sentence occurring after a fine for committing an offence has not been paid in a given period,

recidivism rate – the amount of repeat offenders - sentenced twice or more times to serve time in a prison,

parole – conditional release of prisoners prior to serving full length of their sentence,

¹ Research materials included research papers, study reports, various official government and non-government association reports and releases, as well as a number of newspaper articles.

probation – out-of-prison supervision period of a convicted person used in place of a prison sentence if the prisoner does not repeat the offence or commits a new one,¹ and

various prison discipline and order parameters - prison violence, suicide attempts, the use of force, staff-to-inmate ratio, staff turnover rates, etc.

It is important to note that, as far as research done for this paper goes, it was noticed that a larger number of the listed parameters were present in almost every country affected by prison system crisis, but not necessarily all the parameters, most likely because the severity of a single one can disrupt the normal flow of prison life so much that a prison system would indeed be in a crisis. This is especially the case with prison population, when the number of prisoners greatly exceeds prison capacities. Interestingly, it was also noticed that this parameter (overcrowding) has been a constant in all observed examples.

The eleven listed parameters are used to assess the state of eight key aspects of prison life which Logan² described in his work, and are widely accepted as such in the scientific community: security, safety, order, care, activities, justice, conditions, and management.

Considering the fact that there are so many parameters and aspects to have in mind, hardly anyone has tried to give a definition of prison system crisis, the exception being Cavadino and Dignan, who tried to define it by stating that it is a longer-lasting condition of the prison system in which the prisons are overcrowded, which negatively affects living conditions, hygiene, health care, treatment programmes, which then results in negativity between prisoners and the staff and leads to unrest, riot, crimes, escape and the decline of treatment programme success rate and involvement (if voluntary).³

As we can see, the given definition is basically a sum of all the aspects of prison life, and, because of that, not particularly useful, and it might be prudent not to get involved in trying to establish one too much. For this paper's reach, it is enough to understand of what elements the term is comprised.

When contemplating about prison system crisis, one must always keep in mind that different areas of public sector are very much influenced by one another, which is

¹ In some countries, the supervision activity conducted upon parole (or early release of prisoners) by parole officers is also called probation, which can often lead to confusion.

² Logan, C. H. (1992). Well Kept: Comparing Quality of Confinement in Private and Public Prisons. *The Journal of Criminal Law & Criminology*. Vol. 83, No. 3, pp. 577-613; The idea was later adopted, with minor modifications, by Perrone and Pratt, as well as Makarios and Maahs; cf. Perrone, D., Pratt, T. C. (2003). Comparing the quality of confinement and cost-effectiveness of public versus private prisons: What we know, why we do not know more, and where to go from here. *The Prison Journal*. Vol. 83, No. 3, pp. 301-322, Makarios, M. D., Maahs, J. (2012). Is Private Time Quality Time? A National Private-Public Comparison of Prison Quality. *The Prison Journal*. Vol. 92, No. 3, pp. 336-357

³ Cavadino, M., Dignan, J. (2006). *Penal Systems – A Comparative Approach*. SAGE Publications. London, p. 43

particularly important when reviewing the influence of budgetary cuts and changes made to the criminal justice system¹ as a whole on the prison system.

The following section of the paper will focus on defining the term *prison privatization* and classifying different models of prison privatization that have seen the light of day in practice.

Prison Privatization, its Models and Aims

There is no single agreed-upon definition of the term *prison privatization* either, but in order to fully understand the rest of the paper and why it is even researched at all in this context, it is important to give an overview of what the term is used to describe and what models of privatization there are.

Prison privatization is a particular form of public-private partnership (or PPP) in which the state abandons a part of its prerogatives pertaining to building, maintaining and/or managing one or more prisons to a private sector investor: 1) in an attempt to save budgetary funds for other public sector areas and improve the conditions of existing prisons, or 2) in the situation where there is an immediate need of additional prison capacities.² The first situation may not necessarily be strictly in relation to prison system crisis, but often is.

Now, there is a very similar term that needs to be distinguished from prison privatization, and that is the term *prison industry*, which basically represents the involvement of the private sector in the productive aspect of prison life, and is today a standard in most countries' prisons, public or private. Therefore, public prisons with private sector involvement exclusively in production and distribution of prison products shall not be regarded as true private (or privatized) prisons.

Based on the given meaning of prison privatization and the possible degree of private sector involvement (excluding the above mentioned form of involvement), we can see that there are three basic models of prison privatization:

management model – private contractor takes over an already existing public sector prison and continues to manage it for the contracted period, ranging from several years all the way to several decades,

the so-called DCMF (*Design, Construct, Manage and Finance*) contract model – private investors agree to finance the construction of a new prison which is then under their

¹ Changes in the legislature (e.g. in the Criminal Code, Prison Act) and the overall prison policy shifts (which usually precede changes in the legislature).

² Roth, L. (2004). Privatisation of Prisons. NSW parliamentary library research service, Background paper, No. 3. [Online] Available: <https://www.parliament.nsw.gov.au/researchpapers/Documents/privatisation-of-prisons/bg03-04.pdf> (Apr 6, 2014), p. 2.; The proponents of prison privatization believe that private sector can manage prisons much more efficiently, and therefore appease both the contractors (the states) and the prisoners who are, in this context, the contract object (apart from prisons themselves), and will be further discussed in one of the following sections.

management, for which they are paid a specified sum by the state on a regular (monthly, yearly) basis,¹

and the semi-privatization model, also known as *outsourcing* – certain prison functions (such as medical care, prison maintenance or cooking) are performed by the private sector contractor.²

There are examples of prisons where a combination of two or all three of these models are used.

The discussion about the possibilities of prison privatization, as stated, usually doesn't start until the parameters show that the prison system is a long-lasting crisis, and that the prison conditions are steadily deteriorating. But even then, prison privatization does not always come up in debates, as there are many other ways (strategies) that, presumably, target specific flaws of the prison system, or try to alleviate the situation before the criminal procedure even reaches the imprisonment stage, such as:

decriminalization and depenalization,

additional restrictions to imprisonment in pre-conviction stages of the procedure,

abandoning or narrowing the usage of mandatory minimum prison sentences for certain offences, as well as the use of relatively short prison sentences,³

taking the current occupancy rates of prisons in consideration in the sentencing stage,

encouraging compassionate release of elderly and severely ill prisoners,

expanding the use of alternative sanctions (alternatives to prison sentence), an important part of which are the ones known as community sanctions.⁴

This paper will focus on the first two models of prison privatization for which it is characteristic that the amount paid to the private investor/contractor directly

¹ Genders, E., Player, E. (2007). The commercial context of criminal justice: prison privatisation and the perversion of purpose. *Criminal Law Review*, p. 3

² Miller, D. W. (2010). The Drain of Public Prison Systems and the Role of Privatization: An Analysis of State Correctional Systems. ProQuest Discovery Guides. [Online] Available:

http://www.antoniocasella.eu/nume/miller_2010.pdf (Apr 7, 2014), p. 3; For different classification example see e.g. Chang, T. F. H., Thompkins, D. E. (2002). Corporations Go to Prisons: The Expansion of Corporate Power in the Correctional Industry. *Labor Studies Journal*. Vol. 27, No. 1, pp. 45-69 or Cavadino, M., Dignan, J. (2006). *Penal Systems – A Comparative Approach*. SAGE Publications. London, pp. 304-324

³ It was recognized some time ago in many European countries that prison sentences up to one year can have more negative than positive effects on prisoners (for example, criminal infection). Therefore, they are slowly being abandoned and replaced by alternative sanctions.

⁴ More on this topic in Atabay, T. (2013). Handbook on Strategies to reduce overcrowding in prisons. UNODC. [Online] Available: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf (Jul 8, 2015), pp. 39-63, 174-180.

depends on the occupancy rate in prisons, increasing with higher occupancy rates of prisons.¹

Prison privatization itself does not include any particular aim or goal. It is simply one of the means with which the government (more concretely, the Ministry of Justice, a part of which is the Bureau of Prisons, and it is a structure commonly found in most countries) is trying to accomplish one of the following:

reduce the costs of managing the prison system (by far the most important in practice),

improve the effects of rehabilitation of prisoners, and

improve order, safety and security in prisons.

The decision to turn to prison privatization as a solution to the prison system crisis is not something to be taken lightly, and therefore, it is very important to access arguments of both its proponents and critics, and then weigh the possible risks and benefits of prison privatization in relation to other possible methods of relieving the pressure within the prison system, of which primary source is the growing prison population.

But before those arguments are discussed in more detail, the following section will give an overview of the process of prison privatization in countries that are deemed as leading countries in the area, either by being among the first to attempt it, or by how many prisoners are held in private prisons (in absolute numbers or in percentages – some fit both criteria, e.g. United States).

A Comparative Overview of Prison Privatization in the World

The United States of America (USA)

Considering the long historic development of prison privatization,² it is only fitting that the overview starts from *The United States of America (USA)*, as USA are the cradle of prison privatization, both its historic form and the modern prison privatization wave, which occurred in the beginning of the 80s. The modern privatization process started out as semi-privatization (involving education, catering,

¹ This is considered to be an argument against prison privatization, and will also be further discussed as such in one of the following sections.

² The history of prison privatization is so extensive (e.g. convict lease system) that it deserves its own dedicated paper; see: Mason, C. (2013). *International Growth Trends in Prison Privatisation*. The Sentencing Project. Research and Advocacy for Reform. [Online] Available:

<http://www.sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf> (Apr 6, 2014); Miller, D. W. (2010). *The Drain of Public Prison Systems and the Role of Privatization: An Analysis of State Correctional Systems*. ProQuest Discovery Guides. [Online] Available:

http://www.antonioacasella.eu/nume/miller_2010.pdf (Apr 7, 2014); James, A., Bottomley, K., Liebling, A., Clare, E. (1997). *Privatizing prisons: Rhetoric and Reality*. SAGE Publications; Šeparović, Z. (2003). *Kazneno izvršno pravo i uvod u penologiju*. Pravni fakultet Zagreb, pp. 145-149; Cavardino, M., Dignan, J. (2006). *Penal Systems – A Comparative Approach*. SAGE Publications. London pp. 305-321

cooking and building maintenance), and then expanded to full control of prisons, but progressing from juvenile detention facilities to adult prisons.

Prison privatization was viewed by many federal and state politicians as the right means to fight the ever-increasing prison population and overcrowding in prisons, which then led to worsening of prison conditions, as a result of which the courts started receiving more and more complaints from prisoners about inhumane conditions in which they were serving their prison sentences. Being respectful to the law, the courts started ruling in favour of prisoners and the states were faced with growing amounts of compensations and damages to pay, as well as with having to release prisoners which they did not deem fit to be released from prisons, simply because they could not meet the demands imposed upon them by court rulings. On top of all that, private lobbies sought to penetrate into more and more areas that were once considered inherent to and only performable by the state due to various constitutional legal and ethical constraints.¹

As it so happens, those were also the first years after the start of a longer period of the so-called *harsh on crime* politics in the USA (which carried on in the UK as well), which started in the period of the conservative government of president Ronald Reagan, which meant that politicians would gain support by publicly blaming crime for literally everything bad that was, at the time, going on with the US economy (e.g. budgetary deficits). Legislation was passed to authorize the new penal policy. More notably, there were *three strikes and you're out* laws which imposed mandatory prison sentences for repeat offenders, and many drug offences started being punished by mandatory minimum sentences which started overcrowding prisons all over the USA very shortly.

Of course, we cannot disregard the fact that the USA have also traditionally been a country in which debates about freedoms in order to score political points have been particularly fierce (even nowadays, e.g. in regard to carrying firearms). It was believed that the private sector will manage prisons more effectively, and that, by using PPP as a means to build new prison capacities, the complex and lengthy public procedure could be somewhat shortened.

The process started slowly, but has since then exploded,² and there are currently over 130,000 prisoners serving their prison sentences in private prisons (federal and state prisons), which amounts to 8,4% of total prison population. If we only take federal prisoners into account, the percentage goes up to 19,1%.³ As of 2014, out of a total of 50 states, 30 states have introduced some form of prison privatization, but percentages of prison populations vary greatly from state to state, ranging from 0,1%

¹ See: Lippke, R. L. (1997). Thinking About Private Prisons. *Criminal Justice Ethics*, Vol. 16, No. 1, pp. 26-38; Dolovich, S. (2005). State Punishment and Private Prisons. *Duke Law Journal*. Vol. 55, No. 3, pp. 438-546;

² Particularly in the 90s, see James, A., Bottomley, K., Liebling, A., Clare, E. (1997). *Privatizing prisons: Rhetoric and Reality*. SAGE Publications, p. 8

³ Carson, E. A. (2015). *Prisoners in 2014*. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (pdf). [Online] Available: <http://www.bjs.gov/content/pub/pdf/p14.pdf> (Nov 11, 2015), p. 1

in Maryland to 43,6% in New Mexico.¹ The overall private prison population has been on a slow decrease the last few years (since 2012), but not yet enough to encourage the private prison project rejection hypothesis.

The United Kingdom (UK)

Prison privatization in the United Kingdom lagged about 10 years compared to the USA, but the progression curve has since been quite similar, and the UK was still the first European country to experiment with modern prison privatization models. The then new conservative government of Margaret Thatcher tried to and succeeded in deregulating and transferring many public services to the private sector, as she believed it to be much more efficient.

However, she too hesitated to experiment with privatization within the prison system, that is, until 1987, when, after a British delegation's visit to certain private prisons in the USA, the British Adam Smith Institute suggested prison privatization as a means to make budgetary cuts in the justice department.²

A year later, in 1988, the Parliamentary Committee recommended building new prisons through PPP, and as a result, the first private prison, HMP Wolds was open in 1992, during John Major's governing period.

It was the initial idea that the progress should be gradual and rational, but then in the same year several more new contracts were signed.

Despite what he claimed during the political campaign process, Tony Blair and his government continued down the same road.

The most used prison privatization model since the beginning of the process has been the DCMF model, although all three models were/are present.

As of 2014, there are 16 private prisons in the UK, of which 2 are in Scotland, which is often examined separately in regard to prison privatization, as it alone holds the highest private prisoner population rate in the whole world (20%).³ The overall prison population rate of the UK is about 15%, which places it right behind Australia as the country with the 2nd highest private prisoner population rate in the world.

Some research⁴ suggests that the contemporary British government's view on private prisons is mixed, as there are reports that suggest that the best private prisons

¹ Galik, L., Gilroy, L. (2015). Annual Privatization Report 2015: Criminal Justice and Corrections. Reason Foundation. [Online] Available: <http://reason.org/files/apr-2015-criminal-justice.pdf> (Nov 12, 2015), p. 4

² Nossal, K. R., Wood, P. J. (2004). The Raggedness of Prison privatisation: Australia, Britain, Canada, New Zealand and the United States Compared. London University. [Online] Available: http://www.antonioacasella.eu/nume/Nossal_2004.pdf (Apr 6, 2014), p. 9

³ Vuletić, I. (2013). Prison privatisation as a solution for overcapacity of prisons in Croatia?. Zbornik z mednarodne vedecke konferencie Bratislavske pravnicke forum 2013, Bratislava, p. 1110

⁴ Privatisation in Scotland (2006). A Briefing Paper of the Scottish Consortium on Crime and Criminal Justice. Glasgow. [Online] Available:

<http://scccj.org.uk/documents/Prison%20Privatisation%20in%20Scotland.pdf> (Apr 6, 2014), p.4

operate better than the best public prisons, but also that the worst private prisons operate far worse than the worst public prisons. Also, there were several failures to comply with contractual obligations noted which then resulted in high fines for the private companies involved. Finally, it was noted that, upon examining daily prison routes, very few differences were found, which may lead to believe that prison privatization is not as effective as was presumed.

Australia

Australia was often used as a release valve for convicts whose numbers started building up in the UK since the late 18th century, and considering the age we live in, that was plenty of time for stable privatization models to develop. And, indeed, it was the case, as Australia is, next to the USA and the UK, the country with the most developed prison privatization system in the world.

The modern prison privatization process started in the late 80s, a few years before it started in the UK. The first private prison opened was the Borallon Prison in the Queensland Territory under great influence from the United States, noticeable by the fact that the key managerial functions in the prison and the prisons opened afterwards were given to Americans.

As of 2014, five of total eight Australian Territories have privatized some of their prisons, which represented a total of 29,000 prisoners and a private prisoner population rate of 19%, which means that Australia is the country with the highest private prisoners population rate in the world.

Developments in the Continental Europe, Asia and South America

Prison privatization was approached with extreme caution in the Continental Europe. Although all the countries initially expressed themselves negatively towards it, there has been some development in that area over the past two decades. One of those examples is France, where the hybrid semi-privatization model has been widely used. Similar processes have been noted in Belgium, the Netherlands and Germany.¹ There has also been speculation about possible prison privatization in Poland and Greece, but no projects have been put in motion as of yet. There are also countries who do not struggle with overcrowding and have started loaning prison capacities to other countries struggling with it through contracts, e.g. the Netherlands and Sweden.²

Apart from Japan, in which there are 4 private prisons (as of 2013), but only for first time offenders, other Asian countries have yet to experiment with prison privatization. There were some talks noted about Thailand and even China wanting

¹ See *Ibid.*; James, A., Bottomley, K., Liebling, A., Clare, E., *Privatizing prisons: Rhetoric and Reality*, SAGE Publications, 1997, p. 19

² See *ICPS News Digest*, 32nd Edition, March-April 2016, p. 13; *ICPS News Digest*, 18th Edition, November-December 2013, p. 3

to experiment, but as far as the author's information go, nothing concrete has been done yet.¹

Unlike Asia, South America has seen a more rapid prison privatization development in the 21st century. The first country to privatize some of its prisons was Chile in 2003, joined by Brazil soon later. Recent data suggest that it is also being seriously considered in Peru and Mexico, as well as in the Caribbean countries Jamaica and the Dominican Republic.²

The following section of the paper will focus on Croatia and will try to give an answer to whether its prison system is in a crisis and, if so, whether prison privatization could be one a valid solution.

Is Croatian Prison System Facing a Crisis?

Reviewing the provisions of the Constitution and the Prison Act, one could not find anything that would directly oppose prison privatization. Namely, it has been the standing point of theory for some time that, in order to legally and formally prevent prison privatization, it is necessary to enact the prohibition, since the lack of provisions would pose too much of a grey area ("wobble room"), because it is highly questionable whether prisoners in public and private prisons are being discriminated/treated differently in any way. In the USA, Illinois has done so specifically to prevent prison privatization.

Moreover, there is even a provision in Article 6. of the Prison Act which states that the Ministry can and does cooperate with other legal persons on improving the conditions in prisons, which, widely interpreted, could give way even for a process such as prison privatization.

To answer the question whether Croatia's prison system is in a crisis, it is important to get a grip on the current situation of the Croatian prison system in general.

For the purpose of this paper the data from 2014³ and earlier years will be used only, as the 2015 Report has not yet been published or gone through the necessary parliamentary procedure due to the Parliament dissolving on July 15 this year.

According to the 2014 Report (p. 7) by the Bureau of Prisons of the Justice Ministry of Croatia, there are 12 prisons and 8 penitentiaries in use, most of which were built decades ago in the former Yugoslavian Republic, and were often used to deal with political opponents.

Since the prison system (both types included) became overcrowded in 2004 (maximum security capacities), we can say that the current condition has been

¹ Mason, C. (2013). International Growth Trends in Prison Privatisation. The Sentencing Project. Research and Advocacy for Reform. [Online] Available:

<http://www.sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf> (Apr 6, 2014), p. 9

² Ibid., p. 3

³ Izvješće o stanju i radu kazionica, zatvora i odgojnih zavoda za 2014. godinu, Vlada Republike Hrvatske

ongoing for over a decade now,¹ with imprisonment rates constantly above EU average (more than 100 as of 2013). Overcrowding reached its peak in 2010 when the overall overcapacity was 54,13%. If we take a closer look at statistical data, we can notice that the overcapacity in maximum security prisons (which represent by far the greatest portion of total prison capacities) in the same year was 68%, and on top of all that, a great number of prisoners who should have been serving their sentences in maximum security conditions were forced to be moved to lower security conditions. In addition, some prisons have very recently (2013) been reported to have had over 100% overcapacity, as was noted by the Constitutional Court in one of its reports.²

Mihoci also states that Croatia's additional problem is the lack of educated prison staff and prison guards, which affects safety and security in prisons.³

The number of ECHR proceedings against Croatia has also been on an increase over the past decade, which has greatly increased public expenditure on equitable relief payments, to which the Ministry was also warned by the Constitutional Court in several decisions and reports.⁴ The Court also pointed out that the Croatian prison system was deemed inadequate by the CPT (Commission for the Prevention of Torture of the Council of Europe) during and after its several visits to Croatia.⁵

Several indicators of prison system crisis are still present in Croatia, even though a lot has been done in the past 2-3 years to relieve the pressure of the massive amount of prisoners on the whole system, which has seen the prison capacity occupancy rate finally drop beneath 100%⁶ (at least overall) and those are:

the occupancy rate for maximum security prisons is still above 100%, even if only measured on December 31, which opens up opportunities for potential manipulations with numbers for statistical purposes,

the number of released prisoners has declined,

remand prisoners represent 21,57% of total prisoners at the end of the year, but overall the percentage is even higher and sitting at 29,35%, which means that more than every fourth prisoner is imprisoned prior to or without being convicted and sentenced to prison, which indicates a problem earlier in the criminal procedure, and

¹ The Constitutional Court of Croatia first warned about this problem in a 2008 decision (8 years ago), and continued warning in 2012 stating that, considering the current state of the prison system, overcrowding would not get resolved for several years to come (which proved to be on point, even though the last available report at the time was the 2012 Report).

² Constitutional Court of the Republic of Croatia, U-X-5464/2012 (Jun 12, 2014), [Online] Available: <http://www.usud.hr/en/case-law>

³ Mihoci, M. (2006) Sigurnost kaznionica i zatvora, Hrvatski ljetopis za kazneno pravo i praksu, No. 2, p. 904

⁴ e.g. Constitutional Court of the Republic of Croatia, U-III-1437/2007 (Apr 23, 2008), Constitutional Court of the Republic of Croatia, U-X-5464/2012 (Jun 12, 2014).

⁵ Visits were made in 1998, 2003, 2007 and 2012.; Reports are available at <http://cpt.coe.int/en/states/hrv.htm>

⁶ As noted in the 2015 Report (p. 11).

even the possibility of misuse and overuse of an institute involving depriving people of their freedom,

recidivism rate is at a very high 36,7%, indicating that more than every 3rd prisoner is a repeat offender,¹

supletory and misdemeanour prisons are on decline, but still represent almost 10% of total prisoners passing through the system as of 2014,

2013 and 2014 have shown a big decrease in the number of prisoners involved in educational programmes, as well as their involvement in other treatment programmes, which has decreased from 41,59% in 2010 to 25,1% in 2014,

conditional release numbers are also on decline in 2013 and 2014,

the ammount of self-inflicted injuries has risen, but, more importantly, the percentage of the prisoners stating dissatisfaction with the result of the criminal procedure or their treatment in prisoners is again on the rise and almost back to the record level from 2009 (30%),

the number of visits has greatly declined in the past three years, which, coupled with the decrease of phone calls made and letters received, could indicate that prisoners are becoming more and more distant from the rest remainder of society, which may have a negative effect on rehabilitation as well as on post-release actions (which then affects recidivism rate),

the Ministry has stated the need for 4004 employees total in the prison system to cover every important aspect of prison life adequatly; however, the gap between that provisional and the actual number of employees has seen nothing but increases over the last 10 years, as evidenced from 2005 through 2014 Reports, partly due to the lack of funds, but partly also due to the lack of applicants for job openings (e.g. prison medical staff) as well,²

over 60% of all employees (in an already underemployed prison system) pertains to security guards, and

expenditure has been exceeded income in the prison sector since 2005 all the way up to 2012, which caused the budgetary deficit carried on to 2013 to be as high as 56,4 million croatian kuna (over 10% of total prison system income for that year), and even though it was drastically decreased in 2014, it seems that we are still several years away from the prison system being able to reach financial balance; namely, out of total income of just over 534 million kuna in 2014, which was the first year to more noticeably decrease the deficit carried on to the next year, 493,7 million kuna was

¹ Reports prior to the 2012 Report did not keep track of this statistical category, but the last three available suggest no improvement in this area.

² The 2014 Report suggest that the prison system is operating on a 32,72% employee deficit.

state financed through the state budget, and the total expenditure was 493,35 million kuna.

There are positive parameters, of course, but the amount and severity of some of the listed ones indicate that Croatia is indeed experiencing prison system crisis in several key aspects of prison life, particularly considering the fact that similar state has endured for over 10 years, and has withstood some drastic changes in the legislation, as well as the greatly increased use of probation since passing the Probation Act in 2012.¹

Arguments *For* and *Against* Prison Privatization

As was mentioned earlier in the paper, prison privatization debate has been a fierce one for almost 30 years, and it continues to have more and more educated people involved with their own opinions and analyses. Since there is a great number of papers trying to catalogue the for and against arguments, but even more papers who only represent one side of the story, this section will try to give an overview of all the main arguments from both proponents and critics of prison privatization.

Proponents of prison privatization mainly use the following arguments:

the private sector is more successful at management and innovation, so the privately managed prisons will be more cost-effective;² they support the argument by stating that: a) competition promotes ideas and pushes the boundaries of what can be accomplished with a set amount of resources, b) private prison administration is less burdened by bureaucratic procedures, c) private sector management has much more employment flexibility than the public sector prison administration,

since the private subject's profit will directly depend on how the prison operates, prison privatization will strengthen the responsibilities of prison administrators to ensure that prisoners get the necessary treatment and conditions, and that prisoners' rights are respected in every possible way, since the smoother the prison runs, the more profit the private sector subject will retain from the contract; prison privatization will also require of the government to find innovative, better ways to monitor how prisons operate, and it will be easier to perform the monitoring on private sector subjects than on itself,

in connection with the above presented argument, since private prisons will need to operate more efficiently, this will also set new standards for public prisons to follow, pulling the entire prison system forward and raise the standards bar higher.

¹ <http://dalje.com/en-croatia/probation-helps-reduce-the-number-of-prisoners-says-minister/499558>

² Critics warn that this is not the case and quote studies conducted by researchers which suggest the cost reduction to be minimum at best, and not worth the risks of privatization, especially on the safety, security and order aspects of prison life. Most important studies will be discussed in the following section.

Prison privatization *critics* usually present the following arguments:

the main argument of the critics is that the act of sentencing, as well as the execution stage of the criminal procedure is an inherent prerogative of the state as part of the social contract between the People who agreed to delegate the authority exclusively to the State; prison policy is an integral part of a wider, criminal policy, which cannot be delegated by the State to any third party, a legal construct different than the State itself, because imprisonment in itself contains limitations to person's fundamental rights and freedoms; simply put - when a person breaks the law, he/she expects to be sanctioned by the State, and his/her mindset is shaped in a way to be prepared to accept the consequences; therefore, the State will, by delegating imprisonment to private sector subjects, deal damage to its authority,¹

the motive for profit has never been, and should never be the goal of imprisonment, which, they claim, it clearly is for participating private sector subjects; the goals of punishment² and imprisonment are both well established in legal theory, as well as formalized in fundamental criminal law acts, such as the Criminal Code and the Prison Act (which is the case in Croatia);³ critics express concerns that this could mean: a) lowering standards to decrease expenditure, b) hiring less experienced personnel and paying them less, as well as providing them with less job security, which could have a demotivating effect, c) if private sector subjects know they will boost their profit by having more prisoners, i.e. being as close to full capacity as possible, while not exceeding it, it will suit them to keep their prisons filled by promoting lobbying for stricter laws, harsher sentencing practices and deliberately provoking prisoners in order to extend their prison stay by their actions, d) hiding problems within prisons from publicly available records to avoid financial repercussions,⁴ and e) accepting only prisoners who require less care and less security, as they less costly to keep imprisoned,

making profit from imprisonment is unethical,⁵ and even though there are private subjects in other branches of the public sector (e.g. private medical practice), they are

¹ Proponents claim that, since the authority to imprison did not originate within the State, but was given to the State by the People (is derivative), as long as there is no objection from the People, the State can further delegate this authority to other subjects, as long as it keeps supervisory powers over private subject's activities

² The aims are: retribution, deterrence, incapacitation and rehabilitation/reintegration, See van Zyl Smit, D., Snacken, S. (2009). Principles of European Prison Law and Policy. Oxford University Press, pp. 81-83

³ Art. 2 of the Prison Act states that the primary purpose of imprisonment is resocialize an individual and prepare one for life according to legal rules and social/ethical principles through humane treatment and respecting one's dignity.

⁴ Lundahl et al. (2009). Prison Privatization: A Meta-Analysis of Cost-Effectiveness and Quality of Confinement Indicators. Research of Social Work Practice. Vol. 19, No. 4, pp. 383-394, cf. Headley, A., Garcia-Zamor, J. C. (2014). The Privatization of Prisons and its Impact on Transparency and Accountability in Relation to Maladministration. International Journal of Humanities, Social Sciences and Education, Vol. 1, No. 8, pp. 23-34

⁵ More on the ethical dilemma of prison privatization in Reisig, M. D., Pratt, T. C. (2000). The Ethics of Correctional Privatization: Examination of the Delegation of Coercive Authority. The Prison Journal. Vol. 80, No. 2, pp. 210-222, Lippke, R. L. (1997). Thinking About Private Prisons. Criminal Justice Ethics, Vol. 16, No. 1, pp. 26-38, Barak-Erez, D. (2011). The Private Prison Controversy and the Privatization Continuum. Law & Ethics of Human Rights, Vol. 5, No. 1, pp. 138-157

aimed at relieving pain, not inflicting it, of which, though mostly not physically, imprisonment is a type.¹

Is Prison Privatization Worth the Possible Risks?

To answer this question, it is necessary to point out the possible risks of prison privatization.

Simply put, almost everything that the critics of prison privatization point out as arguments against prison privatization are possible risks associated with it, although there are certain arguments that critics tend to attribute particular characteristics specifically to private prisons, but are, in reality, present in both private and public prisons, albeit for different reasons.

A good example of such a characteristic would be the lack of personnel motivation for prisoner's treatment and overall rehabilitation in prison. On one hand, in private prisons, it would stem from the fact that their employee's jobs are less paid, more insecure, the personnel is often forced to work extra hours, they are often unprepared for the challenges of managing particular aspects of prison life on a day-to-day basis. On the other hand, in public prisons the personnel is less motivated because they do not feel the consequences of the failed treatment and resocialization on their skin since their jobs are usually well-protected, regularly and better paid (in comparison with private prison employees), and their jobs are often much more secure, whether the prison is operating at 50% capacity or 150% capacity. It is unrealistic to expect of them to go as far as to think about that the better the treatments work, the less prisoners will return to prison, and will result in reduced work load for the same "prize."

Hidden in this section's title is another question - are private prisons more cost-effective than public prisons? This is, in vast majority of cases, as stated earlier, the primary reason to privatise prisons. The remaining cases are usually situations in which an urgent expansion of prison capacities is necessary, and the private sector subjects will only invest and contract if they also take over prison administration for a minimum period of time.

Since the early 90s, several authors have published reports on studies they conducted in their countries trying to, on a case-to-case and more generally, compare several representative examples from both private and public prison sides, with the methodology advancing with nearly every comparison attempt. Some studies have approached the matter strictly from a financial perspective, while others have studied

¹Roth, L. (2004). Privatisation of Prisons. NSW parliamentary library research service, Background paper, No. 3. [Online] Available: <https://www.parliament.nsw.gov.au/researchpapers/Documents/privatisation-of-prisons/bg03-04.pdf> (Apr 6, 2014), pp. 36-60, cf. Gottfredson, S. D., McConville, S. (1987). *America's Correctional Crisis: Prison Populations and Public Policy*. Greenwood Press. Westport, Connecticut, pp. 230-232, Dimovski, D. (2014). Privatni zatvori. Zbornik radova Pravnog fakulteta u Nišu, Vol. 53, No. 68, pp. 551-557

both financial benefits and the prison life quality impact. There have also been authors who studied only the qualitative aspects of private prisons.

When it comes to the quality of prison services, it is the opinion of the majority of researchers that the services provided are roughly of the same quality, and will, for that reason, not be discussed further in this paper.

The attention here will, therefore, focus on answering, perhaps (opinions may differ here), the more important question - are private prisons more cost-effective? – even though, as it turns out, the comparisons yielded about the same results as the qualitative studies.

It is interesting to note that, as the studies progressed with time, it seems that it became more and more obvious that the differences in cost-effectiveness between private prisons and public prisons may not be as significant as was once believed to be the case. In fact, the only meta-analysis, which aimed to detect if there are differences in cost-effectiveness between private prisons and public prisons, conducted by Praat and Maahs in 1999, suggested that the ownership factor played an insignificant role in determining how well a particular prison would fare in the cost-effectiveness scheme. The determining factors proved to be:

economy of scale - the closer the prison population is to the maximum prison capacity, the lower the costs will be, and vice versa,

the state of prison infrastructure - the newer the prison, the lower the costs were, due to newer technologies used, requiring less maintenance and manpower, and relying more on electronic surveillance, and

security level of the prison - the higher the security level, the higher the costs were of running the prison.¹

The reason why meta-analysis is believed to be the most reliable method for this kind of analysis is the very nature of meta-analysis, which is basically applying statistical methods to already existing research papers selected by criteria that meet certain requirements set in advance, to avoid partiality while reviewing the findings of each paper included individually to reach a general conclusion.²

Should Croatia Turn to Prison Privatization as a Possible Solution to its Prison Crisis?

The purpose of this paper was to signify the prison system crisis Croatia has been dealing with for over 10 years, to try to at least crack the complexity of the term, to explain what prison privatization is and what its place is in resolving a prison system crisis.

¹ Pratt, T. C., Maahs, J. (1999). Are Private Prisons More Cost-Effective Than Public Prisons? A Meta-Analysis of Evaluation Research Studies. *Crime & Delinquency*, Vol. 45, No. 3, pp. 358-371

² More on the criteria used in *Ibid.*, pp. 363-368.

While there is a fair amount of evidence to suggest that prison privatization does not nearly meet the cost-effectiveness expectations as we were initially led to believe by certain politicians and early authors, there is still some validity in approving the prison privatization undertaking in situations which involve sudden and sharp increases in prison population. In those types of situations, resorting to the private sector for assistance might sometimes be the only way to relieve the strain on the prison system as a whole, but it is definitely not a permanent solution, as the real reasons for the existence of the need to privatize often lie in earlier stages within the criminal justice system (often it is the legislation or practice that requires adjustments). When the source of the prison crisis is within the prison system itself (reasons other than strict laws and harsh sentencing), e.g. better education of prison staff, investments in improving the monitoring system, delegating the monitoring activity to non-governmental institutions, etc., there are many safer ways to ensure improved prison conditions in public prisons.

Since Croatia traditionally belongs to the group of countries following the trends in Germany when it comes to criminal law, and the only present prison privatization model there is the one that isn't really prison privatization in the full sense of the term, and adding the facts that none of the surrounding countries have experimented with prison privatization yet, the fact that the prison population in Croatia has grown a lot, but steadily, and the fact that things have shown signs of improvement on their own in 2013 and 2014 in the mix, the only possible conclusion at this point can be that prison privatization is not something that would be recommended for Croatia at this time, but should be considered in future calculations when thinking about building new prison capacities, which are already necessary (since the prison infrastructure is mostly old and badly maintained), but will in near future become absolutely mandatory, if we are not to be constantly condemned and fined by the courts, both domestic and supranational (such as the European Court of Human Rights), and other institutions (e.g. CPT), because it does not seem Croatia, nor almost any other country for that matter, will ever have "spare" funds to finance the construction of new prison capacities. Private sector subjects could present a sort of an opportunity to pay the sum we would have to assign anyway over yearly installments with small interests.

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