



APPLYING ADMINISTRATIVE LAW TO PRIVATIZATION IN ISRAEL

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I. Introduction: The Transition to Privatization

Like other Western countries, Israel is presently engaged in a privatization process. From the 1980s onward, all Israeli governments have moved toward privatization, forsaking a policy supported by Labor-led governments during the first 30 years of the country's existence. The Labor party, which held continuous political hegemony until 1977, had championed significant government involvement in the country's economic life. The government established, owned, and administered substantial segments of Israeli industry. This policy can be ascribed to several factors: the socialist oriented ideology of the ruling party; a national interest in developing technology and military industries, which at the time were not considered to be profitable; and mass immigration, which necessitated the creation of jobs.

The government had started by developing economic initiatives through various ministries, each in its designated field of activity, and then moved on to establish "government companies." Government companies are managed according to the private law of corporations, as complemented by the Government Companies Law 1975.¹

The government also remained the paramount factor in the land sector. Only 7% of the land in Israel is privately owned,² reflecting a government policy seeking to secure public ownership of most of the land. This policy was constitutionalized by Section 1 of Basic Law: Israel Lands.

Thus, although Israeli law accepted free market principles as its starting point,³ the government remained a prime player in the economic field.

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1 Hereinafter: Government Companies Law.

2 Most of the land is owned directly by the state. The rest is owned by a statutory corporation – *The Development Authority* – and by the Jewish National Fund.

3 At present, the protection of the right to property has even been constitutionalized by Section 3 of the Basic Law: Human Dignity and Liberty.





At present, Israel is in a transition state, moving from a cultural and political orientation where government initiatives prevailed, toward a privatized economy. This shift is prompted by both internal developments and international trends. A socialist-oriented ideology no longer dominates Israeli political life. Since 1977, coalition governments in Israel have been led mainly by the rightist Likud party, which has traditionally leaned toward private economy, at least formally. In addition, the Labor party, despite its name, has gradually become a centrist party and no longer adheres to a socialist agenda. Many government industries proved inefficient, and thus unjustifiably costly. External factors, including a pervasive American influence as well as general international trends, have also made private-oriented economy more attractive to the public, setting official Israeli policy on a privatization course.

II. The Role of Administrative Law in the Privatization Process

Administrative law has a crucial role to play in an ongoing privatization process in order to guarantee maximum utility together with fairness and equal opportunities. Transactions involving the sale of government enterprises to private entities necessarily have distributive effects. When public officials choose the future owners of publicly owned assets, their decisions have a major impact on the future distribution of wealth and power in society. Safeguards against favoritism and inequality are therefore imperative. These safeguards are not designed to hinder the process of privatization per se, but rather to set limitations on how its advantages might be enjoyed. In this light, administrative law should be considered the most relevant branch of law in the context of privatization. Although constitutional law sets down the basic parameters of the legal system, it tends to be unspecific regarding privatization. Issues bearing on the public ownership of economic assets are generally not within the purview of constitutions, and government decisions to buy or sell are, basically, policy matters. I discussed the relevance of constitutional law to privatization in a previous report, describing its relatively marginal influence in this context.⁴ As

4 Daphne Barak-Erez, "Constitutional Limitations on Privatization in Israel" in Alfredo Mordechai Rabello, ed. *Israeli Reports to the XV International Congress of Comparative Law* (Jerusalem, Sacher Institute, 1999) 317.



a rule, governments are usually free to privatize, and questions arise concerning the administration of this policy. Constitutional documents are generally vague regarding the operative aspects of public administration.⁵

III. Types of Privatization

The privatization discourse in Israel often centers on the process of selling government facilities and industries. This is, however, only one aspect of the matter. Privatization is a policy designed to decrease government involvement in economic life, an aim that may also be achieved by other means, including the performance of public tasks by hiring the services of private companies (contracting out/outsourcing), minimizing government economic initiative to leave room for private initiatives, etc. A list of the various facets of privatization would include:

- A. selling government companies;
- B. allocating rights in public land (the distinction made here between land and other government assets is specific to Israel, as I explain below);
- C. contracting out of tasks within the purview of administrative authorities;
- D. privatization by omission, namely, narrowing government initiatives and leaving room for private ones;
- E. privatization through licensing;
- F. privatization in the form of BOT (Build, Operate, and Transfer).

The common denominator of all these forms of privatization is the importance of equal opportunities, although the application of this general principle may vary from one case to another.

5 Basic Law: The Government, which states the powers and responsibilities of the Israeli government, provides little guidance on how the government should implement its power (via ministries or otherwise). Moreover, it does not even detail all the powers of the government, merely stating that the government is the "executive authority." See: Section 1 of Basic Law: The Government (references are to the new version of the Basic Law, enacted in 2001). It adds that the government holds residual powers to act when power is not vested in any other authority. See: Section 32 of Basic Law: The Government.



A. Selling Government Companies

Since public discussions of privatization tend to focus on this aspect, it is the one most strictly regulated. The sale of government assets usually takes the form of selling government-owned shares in enterprises known as government companies and ruled by the Government Companies Law. This law was amended in 1993 through the addition of chapter H1 entitled "Privatization" (sections 59/1–59/6).⁶ The provisions of this chapter mandate the establishment of a ministerial committee on privatization, headed by the Prime Minister and including the Minister of Finance and the Minister of Justice.⁷ This committee is charged with deciding whether a government company is targeted for privatization and the method of privatization to be used. The methods mentioned include several options, such as selling government shares, diluting the government's holdings, issuing shares, selling a significant asset owned by the company, etc.⁸ Although the committee makes the final decision, the more active role in the process of privatization is assigned to the Government Companies Authority (hereinafter: the Authority), an administrative agency originally established under the Government Companies Law to monitor the activities of these companies.⁹ In the last few years, the Authority's main concern has been to prepare government companies for privatization.¹⁰ According to the law, the Authority is entrusted with the drafting of the proposals submitted to the ministerial committee for privatization.¹¹

This pattern of decision-making describes only the institutional dimension of privatization. The substantive question concerns the method and, more exactly, how the method ensures equal opportunities together with utility. Regarding utility, the question is how to guarantee that the price paid for the government's holdings in a company reflects their real value and does not represent a windfall for the buyer. Although statutory provisions do not mandate the assessment of a company's value, this is a regular component of the preliminary decision-making process within the Authority. The real guarantee against a windfall for the buyer is to adopt a process of selling by tender, which involves competition between several offers.

6 Government Companies Law (Amendment No. 7), 1993.

7 Section 59/1 of Government Companies Law.

8 Section 59/2 of Government Companies Law.

9 Sections 51-56 of Government Companies Law.

10 Section 54 of Government Companies Law.

11 Section 59/2(b) of Government Companies Law.



According to precedents set by the Israeli Supreme Court in the early 1990s, every allocation of public assets has to be based on equal opportunities. Hence, as a rule, no allocation should be made without competition, either through open bidding or otherwise.¹² Along the same lines, the Mandatory Bidding Law 1992,¹³ which went into effect shortly after the noted Supreme Court precedents, sets even stricter rules concerning a mandatory open bidding process as the baseline for government contracting.¹⁴ This law, however, concerns transactions involving "goods", "land" and "services" and, therefore, does not apply directly to the sale of shares. According to the rules of interpretation, the term "goods" does not include rights, and shares are considered "rights."¹⁵ Furthermore, the rules set by the Mandatory Bidding Regulations, 1993,¹⁶ exempt from the duty of mandatory bidding all transactions relating to credit, capital stock, money investments, and banking services.¹⁷ This provision is not specific to sales of shares in government companies, but certainly applies to them. Yet, given the general principle set by judicial precedents, the privatization of government companies will still require competition, although not necessarily through open bidding.

In practice, the Authority handles most privatizations through one of the following channels:

1. *Private Sale*: This is a process whereby the Authority makes known its intent to sell government shares in a company and invites potential bidders to take part in a competitive selling process. Interested parties are invited to buy the transaction's regulations and then submit detailed questionnaires. The competition is not intended to be a standard open bidding. At this stage, there is a preliminary sorting of the candidates according to such criteria as potential conflicts of interests, economic capability (capital), business experience in areas relevant to the activity of the company at hand, and integrity (mainly, lack of a criminal record). After this step, all competitors that were not disqualified are invited to

12 See: *Poraz v. Minister of Housing and Construction* 46(2) P.D. 793; *Elyakim v. Israel Land Administration* 48(2) P.D. 158.

13 Hereinafter: Mandatory Bidding Law.

14 Section 2 of the Mandatory Bidding Law.

15 See the definition of the term "goods" in Section 3 of the Interpretation Law, 1981 as "tangible property."

16 Hereinafter: Mandatory Bidding Regulations.

17 Regulation 2(14) of the Mandatory Bidding Regulations.



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submit bids, which serve as basis for competitive negotiations with all participants until a decision is finally reached. The final winner has to be authorized also by the anti-trust authority.

2. *Offers to the Public*: When the government does not wish to sell its shares in a company as a package, it offers them to the public. In this case, competition is guaranteed, as the sale is open to all.

The Authority's Report for 1999,¹⁸ covering privatization data updated to the end of June 2000, summarizes progress regarding the privatization of government companies between 1986 and June 2000. The report states that 75 companies were privatized during this 15-year period, in the sense that they were no longer considered "government companies," namely, they were no longer controlled by the state.¹⁹ The list includes important firms, such as Paz Oil Ltd. (a mother company of 28 others); Israel Shipyards Ltd.; Israel Chemicals Ltd. (a mother company of 22 others); and Israel National Oil Ltd. During the same period, privatization initiatives proceeded apace in four other important companies through a reduction of the government's share, including Bezeq Ltd., which I discuss in detail below.

The privatization of the Israeli banking system also moved forward. During the 1980s, the government won ownership of most Israeli banks when it decided to buy their shares in order to prevent the collapse of their value. The government's stated policy is to sell back these shares to private owners, and the report indicates significant progress in this initiative as well (although the eventual full privatization of the banks is still far ahead).

When the management of government tasks targeted for privatization is still incumbent on a particular government department rather than on a commercially oriented government company, the first step is to establish a government owned company to replace this government department. At a later stage, it is easier to consider the privatization of this activity by selling the shares of the newly

18 Government Companies Authority, *Report on Government Authorities for the Year 1999* (Report No. 39, June 2000).

19 According to Section 1 of the Government Companies Law, the level of control required for defining a government company is above 50%, namely, when the government holds more than 50% of the shares, or has power to nominate more than 50% of the directors.





established company. Examples of activities transferred from a government department to a government company include those of Israel Military Industries Ltd.²⁰ and Bezeq Ltd., which was established to replace the telecommunication engineering services of the Ministry of Communications. Bezeq Ltd. was first established as a government company and enjoyed a broad franchise in its field. At a later stage, it was gradually privatized and lost its monopoly.

Several years ago, a Supreme Court decision paved the way for shortening the transition process from a government department to a government-owned company. The Court ruled that the government may initiate the establishment of a corporation outside the regime set by the Government Companies Law. According to this law, "government companies" to which the law applies²¹ are only those in which the government owns more than 50% of the shares, or has power to nominate more than 50% of the directors. Before the Supreme Court ruling on this matter, the plausible assumption was that the mechanism determined by this law is the only one available for establishing companies by the government. The Supreme Court ruled otherwise in *Barzilai v. Government of Israel*.²² This petition was targeted at a new initiative of the Ministry of Health, known as the "corporatization" initiative of government hospitals. The idea was to convert government hospitals, managed as departments of the Ministry of Health, to a corporate mode of operation. The concrete plan was to establish corporations that do not meet the conditions of the Government Companies Law since their formal shareholders would be public figures. Surprisingly, the court held that this law is not the sole available route for establishing government controlled corporations.

In other cases, an intermediate stage between performing a public task through a government department and total privatization, involves creating a statutory corporation rather than a government company registered according to corporate law.²³ Although still an administrative body, a statutory corporation has a separate

20 RAFAEL, a Hebrew acronym for Israel's Armaments Development Authority, is currently undergoing a similar process, shifting from a mode of action as a government department to a government company. In contrast, Israel Aircraft Industry Ltd. has operated as a government company for decades.

21 Section 1 of Government Companies Law.

22 46(1) P.D. 536.

23 For example the Postal Authority established by the Postal Authority Law, 1986. Other significant authorities established even earlier, before the current wave of privatizations,





budget and an independent management and can gain familiarity with the methods of private businesses while operating in this fashion. The operation of the statutory corporation may later on serve as a basis for the establishment and operation of a government company.

Future developments may involve privatization initiatives in companies established and owned by municipalities.²⁴ For example, the Water and Sewage Corporations Law, 2001²⁵ which authorizes municipalities to manage their water and sewage systems through a company in their ownership,²⁶ enables these companies to enter contracts for the purpose of discharging their tasks²⁷ and also allows municipalities to sell their control in such companies.²⁸

B. Allocating Rights in Public Land

The privatization of land is in a category of its own in Israel, due to the constitutional constraint on the sale of public land. As noted, Basic Law: Israel Lands stipulates that publicly owned land must never be transferred to private hands.²⁹ This constitutional provision was influenced by the centralized method of land acquisition prior to the establishment of the State of Israel; the socialist orientation of the political leadership in the state's formative years; and, no less, by national considerations in light of the Israeli-Arab conflict, since public ownership is a highly efficient tool to guarantee national hegemony of the land.³⁰ Land, therefore, is administered by a government body responsible for this function, the Israel Land Administration.³¹

Despite this formal limitation, however, the Israeli land market is undergoing substantial changes, since the government leases land to private entities (including

are the Ports and Trains Authority (established by the Ports and Trains Authority Law, 1961) and the Aviation Authority (established by the Aviation Authority Law, 1977).

24 Sections 249(30) and 249/1 of the Municipalities Ordinance [New Version] (hereinafter: Municipalities Ordinance).

25 Hereinafter: Water and Sewage Corporations Law.

26 Sections 3 and 4 of the Law.

27 Section 24 of the Law.

28 Sections 74 and 76 of the Law.

29 Section 1 of Basic Law: Israel Lands.

30 See: Joshua Weisman, "Israel's State Owned Land" (1991) 21 *Mishpatim* 79 [Hebrew]; Baruch Kimmerling, *Zionism and Territory* (1983) 143-146.

31 Section 2 of the Israel Land Administration Law, 1960.



promoters and building contractors) for prolonged periods, thereby reducing its dominant standing in the land market. The government's inclination is to retain ownership only at an abstract level. The land market could thus be described as semi-private, afflicted by some serious bureaucratic problems, including political influences concerning leasing decisions tending to favor organized interest groups.³²

In principle, the Israel Land Administration must follow the rule of mandatory bidding set by the Mandatory Bidding law. In actual fact, however, the regulations enacted on this matter exempt many of the transactions administered by this body from open bidding.³³

Another major influence on the informal privatization of the land resource was the initiative to enable enhanced development of the traditionally agricultural lands, following the increasing demand for land for residential use, due to the influx of immigrants from the former Soviet Union during the 1990s. This initiative secured the backing of the agricultural lessees by the decision to compensate them with respect to the new value of their land after rezoning. The new development of the land was intended to be carried out by private entrepreneurs. The agricultural lessees, who expected to significantly gain from this new policy, strongly supported it.³⁴

This decision was, however, at the expense of other considerations – environmental concerns about accelerated destruction of Israel's scarce open land resource as well as social concerns regarding the quick enrichment of a relatively small group (entrepreneurs and former farmers) from public resources. A few petitions were filed in this matter to the Supreme Court (residing as the High Court of Justice). The public and legal campaign against the decisions was mainly led by the Mizrahi Democratic Rainbow group, an association of intellectuals who are descendents of the Jewish mizrahi immigrants (from the Arab countries), claiming to represent the relatively impoverished population of

32 See also: Daphne Barak-Erez, "'An Acre Here, An Acre There' – Israel Land Administration in the Vise of Interests Groups" (1998) 21 *Tel-Aviv U.L.Rev.* 613 [Hebrew].

33 Regulation 25 of the Mandatory Bidding Regulations.

34 In fact, the original decisions in this matter were overruled by the Supreme Court based on the rules against conflict of interests, because they were accepted by the Israel Land Council following discussions in which representatives of the agricultural lessees took part. See: *Mehadrin Ltd. v. Government of Israel* 49(3) P.D. 133.





Israel (among the Jewish majority). In its petition to the Supreme Court, this group claimed that the new decisions distributed a major source of public wealth to a relatively small segment of society, thus broadening social gaps. This petition was followed by additional petitions filed (for entirely different motives) by other associations and public interest groups, such as the Society for the Protection of Nature in Israel, the leading environmental group in the country.

In a precedential decision, the Court decided to uphold the petitions brought against the decisions of the Israel Land Council in this matter.³⁵ At the core of the Court's decision was the principle of distributive justice, introduced to the domain of judicial review for the first time. Justice Orr ruled that the decisions of the Israel Land Council were flawed because they did not consider the principle of distributive justice – their effect on the various segments of population in Israel. These decisions disproportionately benefitted certain groups (the current lessees) at the expense of other groups and the public interest at large (which merits the saving of land resources for the future and refraining from overuse of the scarce land resource). In other words, the decisions did not properly balance between the various interests at stake.

C. Contracting Out (Outsourcing)

Another feature of privatization is the gradual shrinking of state and municipal bureaucracies. The performance of various tasks is contracted out, including, for example, garbage collection and school bussing. Contracting out of government tasks, whether central or local, is usually possible, with some limitations applying to official actions requiring discretion. According to Basic Law: The Government, the delegation of statutory powers vested in government ministers is restricted to "public servants" - that is, to the employees of administrative authorities.³⁶ This provision applies only to statutory powers vested in the ministers themselves. A similar limitation applies to the delegation of statutory powers by other public officials, based on precedents of the Supreme Court.³⁷

The prohibition against delegating powers to private entities applies only to issues entailing statutory discretion. Acquiring technical assistance from private

35 *Association for New Deliberation for Democratic Deliberation v. Minister of National Infrastructure* 56(6) P.D. 25.

36 Section 33(b) of Basic Law: The Government.

37 See: *Henefling v. City of Ashdod* 36(2) P.D. 537; *Philipovitz v. Companies Registrar* 46(1) P.D. 410, 454-425.





bodies, therefore, is not forbidden, and public tasks are increasingly contracted out to private parties, mainly for financial grounds bearing on the costs of the same activities when performed by the government as opposed to private contractors.³⁸

The main concern in this regard is fair competition. The principle of competition or equal opportunity formulated by the Supreme Court is relevant in this context as well, as are the specific provisions of the Mandatory Bidding Law, which applies to government ministries and to all organs of the central government. As for contracting out by municipalities, specific statutory rules of mandatory bidding also apply to them.³⁹ As noted, exemptions from bidding are stated in regulations, but they are usually not relevant to ordinary transactions.

D. Privatization by Omission

Other areas become private only because the government ceases, or at least reduces, its activity in them, thus leaving room for private initiative.

The areas of education and the health system provide some good examples, though neither is officially targeted for privatization. These are the two quintessentially public domains in Israel. Mandatory free elementary education became law during Israel's first year of independence.⁴⁰ Several years ago, the government initiated the legislation of a State Health Insurance Law,⁴¹ which guaranteed health insurance to all according to a regulated "basket" of services. Due to constant pressures to limit the budget for welfare and social services, however, the bureaucracy resorts to surreptitious techniques to limit entitlements in these fields. In the area of education, payment is now required for additional classes and enrichment courses provided by the public education system ("grey" education). Private academic colleges have now emerged, whereas all academic institutions in Israel had once been public, at least in the sense of being subsidized

38 The authorities, therefore, may change a decision to contract out a certain project if they realize that the work can be done at lesser cost by a government organ. See: *Binui ve-Pituah ba-Negev Ltd. v. Minister of Defense* 28(2) P.D. 449.

39 For example, see Section 197 of the Municipalities Ordinance and the Municipalities (Bidding) Regulations, 1987.

40 Compulsory Education Law, 1949.

41 State Health Insurance Law, 1994.





by the government. In the area of health care, some areas not covered by the law enable the development of private initiatives (e.g., nursing care for the elderly). The unsatisfactory level of services provided within the framework of the law has also led to private initiatives in the shape of "supplementary" health insurance for affluent patients who can afford it, resulting in partially privatized health services. Last, but not least, private operations are performed in public hospitals through an arrangement known as "contributions to the research fund," based on payments by patients and additional salaries to the medical and para-medical teams.

The picture as a whole suggests that some significant moves toward privatization might be a consequence of government passivity. The role of the law in this context is relatively minor. The government does not choose the entrepreneurs who will be granted commercial opportunities through open competition; they simply compete in a void created due to government inaction or retreat. Even in these circumstances, however, the government has a role to play. The Ministry of Education, using its supervisory powers, could have prohibited private initiatives within school premises in the form of extra-curricular hours financed by parents. The Ministry of Health could have prohibited private initiatives involving the use of the expensive medical equipment available in public hospitals. The "contribution to the research fund" arrangement has been in force in public hospitals for many years by virtue of a contract that, in fact, raises issues of equal opportunities. Other health corporations would also have appreciated free access to the facilities and equipment available in public hospitals.⁴²

Comprehensive discussion of the competition issue in these areas of "privatization by omission," however, is still lacking. In other words, the crucial role of the government in the distribution of wealth, even by doing nothing, is not yet fully recognized within Israel's legal system.

42 In the case of *Care Medical Services v. Minister of Health* 51(1) P.D. 29, a petition to the Supreme Court against the contract with the research fund was dismissed due to a formal argument: since the contract had preceded the enactment of the Mandatory Bidding Law, the law does not apply to it.





E. Privatization through Licensing

Another facet in the growth of social and economic private activities in Israel concerns new venues of licensing in areas previously operated exclusively by public bodies.

The most obvious cases are those of the telecommunication services and the electronic media. In the past, the government was the sole player in the area of telecommunications. The telephone system which used to be considered a natural monopoly was directly administered by the Ministry of Communications. The first stage toward privatization was that Bezeq Ltd. a government company, took over the operation of telephone services and was licensed to provide additional telecommunication services.⁴³ Later on, the scope of Bezeq's license was narrowed,⁴⁴ and new licenses for telecommunication services were awarded to private companies, mainly to private cellular telephones companies, and to private companies that began operating competitive international telephone services.

The electronic media is the second obvious instance of privatization by licensing. In the past, radio stations and the only television station were administered by a statutory corporation, the Israel Broadcasting Authority, and governed by the provisions of the Broadcasting Authority Law, 1965. At present, according to the provisions of the Second Authority for Television and Radio Law, 1990 private television stations and private regional radio stations have been licensed.⁴⁵ In addition, the Communication Law was also amended, enabling

43 Following the enactment of the Telecommunication Law, 1982, which was heavily amended over the years and recently formally renamed as Communication (Telecommunication and Broadcasting) Law, 1982. The change appears in Section 1 of the Telecommunication Law (Amendment 25), 2001 (hereinafter: Communication Law).

44 According to the original version of Section 50 of the Communication Law (still under the name Telecommunications Law), Bezeq Ltd. was the only company licensed to operate a country-wide telephone system and international telephone calls. This exclusivity in Bezeq's status was progressively curtailed. The first stage was an amendment in Section 50, excluding cellular telephone services and international calls from Bezeq's guaranteed sphere of exclusivity. Later, Section 50 was abolished altogether, leaving Bezeq without any exclusivity guarantees although, de facto, it remains the operator of the existing wire-telephone system.

45 Hereinafter: Second Authority for Television and Radio Law.





the licensing of cable network stations⁴⁶ and satellite television services,⁴⁷ all privately owned and solely regulated by the authorities.

It is worth noting that these new licenses were granted to private operators on the basis of bids, in order to ensure equal opportunities. The Second Authority for Television and Radio Law mandates a formal bidding process for the allocation of broadcasting franchises,⁴⁸ which is understandable given that broadcasting frequencies are considered scarce resources. Similarly, the original provisions of the Communication Law in this matter mandated a formal bidding process for the selection of franchise holders operating regional cable networks.⁴⁹ With the move from a franchise system to a licensing system in the area of cable TV,⁵⁰ the bidding process is left to the discretion of the relevant authority.⁵¹ Regarding the satellite-based network, a formal bidding process is only an option.⁵² In addition, the law mandates a bidding process for allocating a license to a channel that will broadcast via the cable and satellite networks.⁵³ Decisions concerning winners in some of these bids were subject to legal proceedings and were reviewed according to the law of government bidding, a relatively detailed and developed area of administrative law.⁵⁴

Another case of privatization by licensing concerns the import of meat, which is of special importance in Israel due to religious considerations. Meat imports had previously been implemented through central government purchase, in line with a traditional perception making the government responsible for the supply of food, as well as political pressures to ensure availability of "kosher" meat to satisfy the needs of the Jewish religious public. The trend seeking to weaken government intervention in the market led to a decision to "privatize" the import

46 Chapter B1 of the Communication Law.

47 Chapter B2 of the Communication Law.

48 Section 38 of the Second Authority for Television and Radio Law.

49 Section 6/8 of the Telecommunication Law (as originally enacted).

50 This change was brought about by the 2001 Telecommunication Law (Amendment No. 25).

51 Section 6/8 in its current wording.

52 Section 6/46 of the Communication Law.

53 Section 6/32/2 of the Telecommunication Law.

54 See: *Eden Broadcasting Ltd. v. Afik-Rom—The New Israeli Channel Ltd.* 56(1) P.D. 917 (in the matter of the franchise for the new television commercial channel, overruling *Afik-Rom—The New Israeli Channel Ltd. v. The Second Authority for Television and Radio*, 2001 P. Minhali 241, Haifa District Court); *Israel News Ltd. v. Minister of Communication* 56(2) P.D. 97 (in the matter of licensing a new news channel for cable or satellite



of meat by issuing import permits to private dealers, an initiative that resulted in several petitions to the Supreme Court. One concerned the method of allocating import permits. The Supreme Court ruled that, as in other matters, the principle of equal opportunities should prevail. Although the authorities need not rely on bidding, since the Mandatory Bidding Law applies only to transactions and not to licensing, they must apply egalitarian measures. In this context, then, a lottery is also a legitimate approach.⁵⁵ Another issue is the government's power to prohibit the import of non-kosher meat, a product in which some of the private importers were interested. As a result, the government decided to postpone privatization, pending legislation of a new law prohibiting the import of non-kosher meat. The Supreme Court held that the refusal to issue import permits due to religious considerations was not authorized by the legislation on imports and added that any prospective legislation to that effect would have to meet the constitutional standards of Basic Law: Freedom of Occupation.⁵⁶ This precedent led to a constitutional amendment of the Basic Law, adding an override provision that authorizes the legislation of statutes failing to meet regular constitutional standards. The result was the enactment of the Import of Meat and Meat Products Law, 1994 prohibiting the import of non-kosher meat, which the Israeli Supreme Court, in a later decision, ruled to be constitutional.⁵⁷

To some extent, an implicit trend of privatization by licensing can also be detected in the area of education, which I discussed above from another perspective. Over the last few years, parents' associations have initiated the establishment of private schools, usually described as "democratic" schools, on the grounds that they wish to educate their children according to less conventional methods. These schools start off as private initiatives financed by the parents, but they have to be licensed by the Ministry of Education. Several schools have already been licensed, but the Ministry is quite hostile to the trend due to its potential to threaten the public system (when stronger groups forsake it). The policy in this regard is still being shaped.

broadcasting, overruling *Israel News Ltd. v. Minister of Communication*, 2001 P. Minhali 737, Tel-Aviv District Court).

55 *Meatrael v. Minister of Commerce and Industry* 47(1) P.D. 521.

56 *Meatrael Ltd. v. The Prime Minister and The Minister for Religious Affairs* 47(5) P.D. 485.

57 *Meatrael Ltd. v. The Knesset* 50(5) P.D. 15.





F. Privatization in the Form of BOT

A special type of privatization through licensing is used for building new national facilities. In this context, franchise holders, who bear the cost of building the facility, ensure a right to collect fees for its use by the public. According to this model, known worldwide as BOT (Build, Operate and Transfer), private investors are expected to build the facility at their expense, operate it for a relatively long period in order to recover their investment at a profit, and then transfer the facility to the government.

The paramount instance of the use of this model in Israel concerns the building of new roads. The new cross-national highway presently in construction (but already partially in use) is planned to operate as a toll road,⁵⁸ as is also a new tunnel now being built in Mount Carmel.⁵⁹ Both these roads are being constructed by franchise holders chosen in an open bid,⁶⁰ which guaranteed equal opportunity to all participants. Franchise holders are authorized by law to decide on toll charges, within the constraints of the contracts signed with them,⁶¹ as an exception to the general rule stating that only official authorities decide on fees.⁶²

58 Toll Road (National Road of Israel) Law, 1995 (hereinafter: National Road Law).

59 Toll Roads (Carmel Tunnels) Law, 1995 (hereinafter: Carmel Tunnels Road).

60 Section 3 of the National Road Law; Section 3 of the Carmel Tunnels Road.

61 Sections 4 and 6 of the National Road Law; Sections 4 and 6 of the Carmel Tunnels Road.

62 Another example of a BOT bid, which was subject to litigation, related to the building and operation of new municipal purification plants for Beer-Sheba. See: *Mey-Rom (Beer-Sheba) Ltd. v. Municipality of Beer-Sheba* (not published, decision from 12.1.00) (approving *Minerv Purification Plants (1998) Ltd. P.D. 481 58(6)*).





IV. Protecting the National Interest in Privatization

What are the ways to protect the national interest in assets which were privatized? This question centers mainly on the first two types of privatization noted above, when ownership is transferred from the government to private hands.

In the case of government companies, this question has two aspects:

1. How to prevent purchase by hostile agents, mainly citizens from enemy countries?
2. How to prevent suspension of a vital service supplied by a privatized company?

Israeli law has dealt with these concerns as follows:

1. The question of enemy ownership can emerge at the initial selling stage or at a later stage, when the first private owner wishes to sell. The initial selling phase is easier to control, especially when privatization is implemented through a private sale, namely, when the government chooses a buyer relying on information about the purchasing company and its shareholders. As for later stages, the government can either use the option of a "golden share," which preserves its right to veto future transactions, or the option of statutory limitations, which mandate major shareholders of the company's stock to obtain permission for their holdings.

Both of these techniques have been used in Israeli privatizations. The "golden share" option was used in the privatization of Israel Chemicals Ltd.,⁶³ and is now being considered in the planned privatization of Zim Ltd., the Israel Shipping Company.⁶⁴ I will concentrate here on the statutory limitations alternative, since it is within the domain of administrative rather than corporate law. This mode of operation was applied in the privatization of Bezeq. According to Section 4/4 of the Communication Law, the sale of a controlling status in a vital telecommunications operation has to be authorized. In addition, the Prime Minister and the Minister of Communications are authorized to issue an order specifying additional conditions bearing on the citizenship and residence of shareholders with controlling status, the citizenship and residence of employees in charge of areas involving security concerns, etc. Accordingly, the Minister of Communications issued the Bezeq Order (Decision on the Vital Services Supplied

63 See Section 6.20 of Israel Chemicals Ltd.'s prospectus.

64 See also: Michal Agmon, "'Golden Share' and Privatization" (1993) 41 *Hapraklit* 138 [Hebrew].





by Bezeq, The Israel Communications Company, Ltd.), 1997.⁶⁵ In a similar spirit, a new law grants the Minister of Defense a special authority to approve the sale of shares affecting control in companies involving state defense interests.⁶⁶

Another example concerns the newly enacted provisions dealing with the control of companies holding licenses for cable broadcasting. According to these provisions, at least 26% of the controlling shares in the company must be held by an Israeli citizen and resident.⁶⁷ An even stricter rule used to apply to the control of a company licensed to broadcast news,⁶⁸ but it was later on relaxed.⁶⁹

A less specific type of regulation was implemented in the Water and Sewage Corporations Law, which only subjects the transfer of control in the company to administrative authorization.⁷⁰

2. The provision of vital services is ensured by legislation granting the government power to operate these services if the company fails to do so. These powers may rest on specific legislation, as is the case concerning vital telecommunication and electricity services,⁷¹ or on the government's general emergency powers based on Basic Law: The Government, authorizing the government to issue emergency regulations that can even overrule ordinary legislation for up to three months.⁷² These regulations apply to all private enterprises, whether or not previously owned by the government, but seem especially important in the context of privatization, since many privatized companies were originally established with national interests in mind.

65 Concerns have lately been voiced concerning the effective enforcement of this order. An approved purchaser (Gad Ze'evi) was later suspected of being backed by others who might not have been approved.

66 Defense Corporations (Protection Defense Interests) Law, 2006.

67 Section 6/8/2 of the Communication Law.

68 The decisions concerning the licensing of the new news channel for cable or satellite broadcasting (in the case of Israel News Ltd.), are cited *supra* n. 54.

69 Section 6/20/2 of the Communication Law.

70 Section 76 of Water and Sewage Corporations Law.

71 Sections 4/4-4/5 of the Communication Law; Section 58 of the Electricity System Law, 1996 (hereinafter: Electricity System Law).

72 Section 39 of Basic Law: The Government.





National interests are also highly relevant in the context of land privatization.⁷³ In this area, however, the government has secured at least formal ownership, as noted. In principle, therefore, the government can exercise ownership power by refusing, for instance, to lease land to foreigners.

V. Protecting Employees' Rights in Privatization

Employees' rights have so far been at the crux of the public debate over privatization in Israel. Public service employees tend to resist privatization initiatives, fearing it could lead to tighter economic management, wide-scale layoffs, and harsher working conditions.⁷⁴ The analysis of this issue lies outside the confines of this discussion, which centers on the relevance of administrative law to privatization initiatives. The view of the labor courts on these questions, however, is worth noting. The National Labor Court has ruled that workers have a legitimate interest in a privatization process that may affect them, and that the state must therefore relate to negotiations with them as part of this process.⁷⁵ This is indeed the practice. Still, generally speaking, employees tend to resist privatization.⁷⁶

VI. Administrative Regulation after Privatization

Privatization has to go hand in hand with a growing regulatory regime, as government ownership is an alternative mode for influencing the market. When an economic field is privatized, it has to be regulated. Many privatized operations are vital for the economy of the country and influence the quality of life of its residents. Hence, the role of administrative authorities in a privatized context is

73 Compare: Joshua Weisman, "Restrictions on the Acquisition of Land by Aliens" (1980) 28 *Am. J. Comp. L.* 39.

74 On various strikes following privatization initiatives, see: *State of Israel–General Federation of Labor* 26 P.D.A. 87; *General Federation of Labor–Bezeq The Israeli Communications Company Ltd.*, 25 P.D.A. 367; *Employees Union of Tel-Aviv–Jaffa Municipality – The Municipality of Tel-Aviv Jaffa*, 31 P.D.A. 109.

75 *Mo'adim – Ministry of Defense* 33 P.D.A. 441.

76 A major decision of the Supreme Court on employees' rights in privatization is *New Labor Union v. Israel Aircraft Industries Ltd.* 58(6) PD 481.





to create a regulatory scheme that guarantees quality of services, reasonable prices and a decentralized control in vital economic activities. In a decision dealing with the regulation of the insurance market, Justice Itzhak Zamir expressed the view that, when the state no longer supplies services and goods, government regulation becomes more rather than less important.⁷⁷

A good example of a statutory scheme adapted to an age of privatization is the Electricity System Law, which established a regulatory regime in this area headed by the Public Services Authority – Electricity. The privatization of Israel's electric company through the sale of government shares is not being considered as yet. The new law, however, sets the basis for the initial stages of privatization in this area by recognizing an option for licensing the production of electricity apart from its supply, enabling independent power producers to function parallel to Israel's electric company. A similar separation between production and supply was adopted in the privatization of the natural gas market. Here, the government decided to issue a bid for the building of a supply facility for natural gas, which would to be operated by a common carrier banned from any involvement with other interests in this market.⁷⁸

A major regulatory concern at the initial stage of privatization is to ensure new licensees a chance to compete against well-established players already operating in the relevant field, with proven experience and established clients. The policy adopted by the authorities and upheld by the Supreme Court in several contexts has been to limit free competition against new licensees in order to avoid unfair strategies, such as dumping. This policy is reflected in the limitations set in the updated license given to Bezeq, with a view to enable the introduction of new competitors in the telecommunication area.⁷⁹ Similar decisions were also upheld concerning new licenses in the areas of public transport and the electronic media. Concerning public transport, the court ruled that privatization by licensing

77 *Union of Insurance Assessors in Israel v. The Commissioner of Insurance* 55(3) P.D. 625, 650.

78 *See: Samedan Mediterranean Sea v. The Oil Commissioner at the Ministry of National Infrastructures* 55(4) P.D. 312. The High Court of Justice refused to grant remedy to a corporation licensed to engage in oil and gas production, which claimed to be entitled to build a supply system for its products. Later on, the Knesset enacted the Natural Gas System Law, 2002.

79 *Bezeq-The Israeli Company for Communications Ltd. v. the Minister of Communications* 49(3) P.D. 661.





new companies to operate service lines competing with the Egged cooperative, practically the only one operating country-wide transport services so far, could be accomplished by barring this cooperative from competing for new licenses.⁸⁰ In the area of cable and satellite networks, the court upheld a similar decision of the Council for Cable and Satellite Broadcasting. The decision had granted the new satellite company the right to sell targeted "channel packages" during its initial period of operation, while limiting the cable companies (operating in the Israeli market for several years) to the sale of their standard package. This regulatory decision was driven by the desire to enable the new satellite company to compete in a market already controlled by the cable companies.⁸¹ The same rationale guided the Supreme Court when it upheld a decision forbidding the private operators of the only commercial TV channel (Channel 2) to participate in a bid for a new commercial channel franchise.⁸²

VII. Conclusion

The privatization of government owned enterprises and public services will probably remain an important item on the agenda of Israeli governments in the foreseeable future, and administrative law will continue to adapt to the new questions raised by this process. At the preliminary stage of privatization, whether at stake is the sale of assets, the allocation of rights in land or licensing, the central challenge is to ensure equal opportunities for all. At a later stage, in areas already transformed by privatization, administrative law will focus on the regulation of activities conducted by private economic players. So far, the role of administrative law has been least evident in gradual privatizations effected through government omission, when areas of activity are taken over by private initiative because the government no longer fulfills its traditional role in them. Nevertheless, the law is still relevant to this area of privatization as well. These so-called private initiatives have so far developed in cooperation with

80 *Egged-Cooperative Association for Transport in Israel Ltd. v. the Minister of Transport* 52(5) P.D. 705, 713.

81 For example, see: *Golden Net v. the Minister of Communications* 53(5) P.D. 423.

82 *Reshet Communication and Production Company (1992) Ltd. v. the Government of Israel* 54(5) P.D. 451.





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administrative bodies, such as private education services operated in public facilities. Due to lack of awareness of the meaning of these developments, however, the legal analysis of this aspect of privatization has only begun.

