

PRELIMINARY DRAFT – PLEASE DO NOT CIRCULATE**The (UN)Constitutionality of Privatized Prisons –
Lessons Learned from the Israeli Experience**

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Part I – Introduction

Since the late 1970s, Privatization has proliferated in many countries around the world. Governments chose to privatize State held assets and services, sometimes whole sectors, for myriad economic, social and political reasons. In Israel this process started relatively late, gathering momentum from the mid-1980s onwards. Generally considered as part of Israel's conversion from a social-democracy to a neo-liberal economy, the change has been achieved with limited public resistance. Critique focused on job loss and on the severe attrition of the welfare state which endangered Israel's hard won social rights. As this process took place, Israel's highly activist Supreme Court kept out. Probably viewing the process as a legitimate economic policy that may be chosen by Israeli governments, the Court has avoided any effort to regulate or limit privatization. This is – until now. In November 2009 the Israeli Supreme Court ruled in ***The Human Rights Program v. The Minister of Finance***¹ that privately-run prisons are unconstitutional in Israel. The broad legal and political-science terms in which this decision was framed suggests significant implications on the future of privatization in Israel but are also easily relevant and applicable to other Western nations, grappling with the core duties of the modern nation state.²

¹ HCJ 2605/05 *The Human Rights Program v. The Minister of Finance* (2009) available at: <http://elyon1.court.gov.il/files/05/050/026/n39/05026050.n39.pdf> (in Hebrew). All translations are ours, except as otherwise noted.

² In a somewhat different context, several European national courts grappled with the question of what powers must remain in the hands of the nation states in reviewing the

This paper has five parts. Following this introduction, Part II, provides a brief overview of Israeli constitutional law and its special characteristics, to the extent required for understanding the case at hand. Part III provides a brief overview of the Israeli privatization process, providing the socio-economic context for prison privatization. Part IV, describes the Israeli present case, the arguments on both sides, and the court's reasoning. Part V provides our critical analysis explaining how the decision of the Supreme Court is problematic from both constitutional law and policymaking perspectives. We end the paper by trying to evaluate the impact off the case on areas of privatization – in Israel, and potentially, way beyond.

Part II – Israeli Judicial Review Powers – a Primer

When the State of Israel was established, in 1948, its Declaration of Independence stated that a constituent assembly was to be elected within just a few months with the goal of adopting a constitution shortly thereafter. The process was outlined in resolution 181 of the United Nations General Assembly which provided for the establishment of the state of Israel.³

For political and historical reasons the “original intent” of creating a constitution, never fully materialized.⁴ In 1950, the prospect of reaching a constitutional text approved by a wide majority was not promising. The Constituent Assembly established to write Israel’s constitution reacted to the impasse by declaring itself as Israel's legislature – the Knesset. The Knesset subsequently adopted a resolution which abandoned, at least temporarily (*i.e.*, from 1950 to date), the effort to reach a comprehensive constitution. Instead, the Knesset decided to work separately on drafting “Basic Laws”, each

domestic constitutionality of the EU's Lisbon Treaty. See <http://www.germanlawjournal.com/index.php?pageID=2&vol=10&no=8>

³ For a text of the Resolution, see <http://www.yale.edu/lawweb/avalon/un/res181.htm>. On the history of the declaration see Yoram Shachar *Histories of Legal Transplantations: Jefferson Goes East: The American Origins of the Israeli Declaration of Independence* 10 THEORETICAL INQUIRIES L. 589 (2009).

⁴ For a more detailed account, see Daphne Barak-Erez, *From An Unwritten To A Written Constitution: The Israeli Challenge In American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 312 (1995); Amos Shapira, *Why Israel Has No Constitution, But Should, And Likely Will, Have One*, 37 ST. LOUIS U. L.J. 283, 285 (1993); Dalia Dorner, *Does Israel Have A Constitution?* 43 ST. LOUIS L.J. 1325; Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective* 18 AM. U. INT'L L. REV. 585 (2000).

relating to a different constitutional subject, and enact each of them as a separate act of Parliament, in its capacity as the Constitutional Authority. The Knesset decided that only upon the completion of the process, all of the Basic Laws would be combined into a single-document Constitution.

Since 1950, eleven Basic Laws were enacted. Yet until 1992, all Basic Laws were structural in nature - empowering the branches of government and other State institutions.⁵ Laws protecting civil rights were not enacted until 1992, primarily because it was hard to overcome the differences of opinions on such delicate matters.

This does not mean that civil rights were not recognized and protected in Israel. The Israeli Supreme Court established by way of case law many civil and human rights of the kind that are usually stated in written constitutions. The freedom of expression, freedom of movement and many other rights were recognized as fundamental rights, and enforced by the Israeli Court. In the absence of a written constitution and without any statutory authority to do so the Court found the legal basis for upholding these rights as arising from the "nature of Israel as a freedom-seeking democratic state".⁶ As Professor Gelpe notes, the Israeli Supreme Court -

"[N]ot only developed the norm that such basic values exist, but also developed the principle that statutes should be interpreted to avoid impairing these values. The Court reads statutes in such a way as not to violate the rights it has recognized. The Court also uses the values when reviewing the validity of administrative actions. Administrative actions that violate the basic values are held invalid . . . Again, the Court developed this approach. The approach is inherent in the Court's understanding of the meaning of a basic value"⁷

⁵ These nine Basic Laws are: Basic Law: President of the State, Basic Law: The Knesset, Basic Law: The Government, Basic Law: The Judiciary, Basic Law: The Army, Basic Law: Jerusalem, the Capital of Israel, Basic Law: Israel Lands, Basic Law: The State Comptroller, and Basic Law: The State Economy. English translations of the Basic Laws are available at http://knesset.gov.il/description/eng/eng_mimshal_yesod.htm. The two remaining Basic Laws enacted in 1992 are discussed *infra*.

⁶ H.C. 25/53, *Kol Ha'am Ltd. v. Minister of the Interior*, 7(1) P.D. 165; H.C. 243/62 *Film Studios Israel v. Levi Geri*, 16 P.D. 2407.

⁷ Marcia Gelpe "Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space" 13 EMORY INT'L L. REV. 493, (1999) at 508-509. Also see Barak-Erez, *supra* note 4.

In 1992, the Knesset passed two Basic Laws relating to civil rights – Basic Law: Human Dignity and Liberty⁸ and Basic Law: Freedom of Occupation.⁹ Basic Law: Human Dignity and Liberty lists a series of enumerated constitutional rights, which include the protection of life, physical integrity and dignity (Articles 2 and 4), the protection of property (Article 3), personal liberty,¹⁰ (Article 5) the external freedom of movement (Article 6) and the right of privacy (Article 7). Article 8 of Basic Law: Human Dignity and Liberty allows the violation of rights "under this Basic Law" only by "a law befitting the values of the State of Israel enacted for proper purpose and to an extent no greater than is required."¹¹

Shortly thereafter, in 1995, the Supreme Court handed down the Israeli equivalent of *Marbury v. Madison*;¹² in the *Bank Hamizrahi* case.¹³ In *Bank Hamizrahi*, the Supreme Court held that both Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty, are constitutional laws in the sense that ordinary legislation which unduly contradicts or limits the rights enumerated in them are voidable by the Supreme Court. The Supreme Court thus held that it has the authority to exercise judicial review over the legislation of the Knesset and to hold laws unconstitutional.¹⁴

Since that decision, the Supreme Court has declared several Knesset Statutes partially unconstitutional and thus invalid.¹⁵ A Magistrates' (first tier)

⁸ Basic Law: Human Dignity and Liberty, 1992, S.H. 150.

⁹ Basic Law: Freedom of Occupation, 1992, S.H. 114. Given the current political situation in the Middle East it appears useful to clarify that "Occupation" is used as a synonym of vocation or profession.

¹⁰ "Personal liberty" is probably to be interpreted only in the physical sense, as the law reads: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise."

¹¹ A similar provision is included in Article 4 of Basic Law: Freedom of Occupation.

¹² 5 U.S. (1 Cranch) 137 (1803). This is the classic American case announcing that the Supreme Court has the power of judicial-constitutional review.

¹³ C.A. 6821/93, *United Bank Mizrahi v. Migdal*, 49(4) P.D. 221. For a detailed description of the case, see Barak Cohen, *supra* note 4, at 641-648.

¹⁴ For further analysis see Dorner, *supra* note 4; Joshua Segev *Who Needs a Constitution? In Defense of the Non-Decision Constitution Making Tactic in Israel* 70 ALB. L. REV. 409 (2007); Yousef T. Jabareen *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel* 26 WIS. INT'L L.J. 345, 352-354 (2008).

¹⁵ E.g. H.C. 1715/97 *Association of Investment Managers In Israel v. Minister of Treasury*, 41(4) P.D. 367; H.C. 6055/95, *Zemach v. Minister of Defense*, 43(5) P.D. 241; H.C. 1030/99, *Oron v. Speaker of the Knesset*, 56(3) P.D. 640;

Court invalidated another statutory section, holding that any court in Israel has the power to do so.¹⁶

These judicial decisions to invalidate legislation drew sharp criticism from Knesset members. Subsequently, the Knesset practically (although not formally) froze the enactment of additional Basic Laws and of the final constitution.¹⁷ As a result, several very important rights have not yet been incorporated into Basic Laws, despite the fact that Bills encompassing the rights were presented to the Knesset. These rights include freedom of expression, the freedom of association, freedom of religion and from religion, and the principle of equal protection (the right to equality). Neither criticism from the legislature nor the actions arising from such criticism have stopped the Court from continuing to broaden its sphere of power, resulting in still more controversy. In a series of cases since 1994, the Supreme Court has used the protection of human dignity in Basic Law: Human Dignity and Liberty as a springboard for upholding virtually every civil right normally found in complete bills of rights.

Clearly the court has taken an activist approach, which has put it on a collision course with various sectors of the Knesset. Not only has it held that it has the power to invalidate acts of Parliament despite the lack of explicit authority in a written constitution, but it has also used the tool of statutory interpretation in a very liberal manner, broadening the scope of the constitutional Basic Laws to set boundaries to the Knesset's omnipotence in its capacity as legislator. In doing so, the Court further limited policymaking authority by the legislature and executive branches and its investiture in the Courts through the enactment of a constitutional catalogue of rights and the establishment of judicial review.

The difference of opinion between the Court and certain parliamentarians, academics and most notably a recent Minister of Justice who came from academia without being a politician before and without a need

¹⁶ Cr. C. (T.A.) 4696/01 *State of Israel v. Hendelman* (unpublished decision).

¹⁷ In 2003 the Knesset's Law, Constitution, and Justice Commission launched a new effort to complete the constitution "by a wide consensus". At the time of the writing of this article, the process does not appear to be near completion.

to be re-elected,¹⁸ caused an unprecedented wave of criticism directed at the Court, coming even from mainstream politicians. The Speaker of the Knesset said recently that the Supreme Court constitutes a “danger to democracy”.¹⁹

It is important to note three further aspects of the Israeli court system. *First*, that The Israeli Supreme Court, acting as a High Court of Justice, serves as both first and final instance in reviewing most governmental action. *Second*, that the Israeli Court virtually eliminated the requirement of standing²⁰ and is basically allowing any public organization or private individual to bring a constitutional complaint before the Court. *Finally*, that the Court completely eliminated the requirement of justiciability, in the sense that it does not avoid adjudicating issues that in the U.S. and other democracies would be considered a “political question” that the courts should abstain from hearing.²¹

Part III – Privatization, the Israeli Society and the Court

As Israel approached its three decades of independence in the late 1970s, it was a small, secular, left-leaning nation, with a perennial socialist coalition at the helm and a highly controlled economy, a singular outpost of the West in the Middle East surrounded by Arab countries with all of which it was on hostile terms. But matters have changed significantly since then. A coalition of right wing, economically liberal and Jewish Orthodox parties has dominated Israeli politics almost continuously since 1977; the Israeli Supreme has changed from “a rather secondary political institution in the 1950s, and 1960s, to being a major political institution, even a hegemonic one, since the

¹⁸ We refer to Professor Daniel Friedman. See http://en.wikipedia.org/wiki/Daniel_Friedmann

¹⁹ See, e.g. Jonathan Rosenblum, *Court Under Fire* HAMODIA (May 30, 2003) available at <http://www.jewishmediaresources.com/article/586/>.

²⁰ The requirement that the petitioner bringing the action before the Court should have a personal interest in the proceedings and their outcome. See Suzie Navot CONSTITUTIONAL LAW OF ISRAEL 152.

²¹ Yaacov .S. Zemach, POLITICAL QUESTIONS IN THE COURTS: A JUDICIAL FUNCTION IN DEMOCRACIES – ISRAEL AND THE UNITED STATES (1976). *Cf.* In the United States *Baker v. Carr*, 369 U.S. 186, 217.(Holding that among the tests for determining the existence of a “nonjusticiable” or “political” question is a lack of judicially discoverable and manageable standards for resolving the question)

1970s, and principally in the 1980s and 1990s”;²² and peace treaties have been signed with Egypt (1979) and Jordan (1994) while peace talks are periodically been conducted with Syria and the Palestinian Authority.

While most Israelis and Israel observers have focused on the war-and-peace debate within Israel, a dramatic socio-economic shift has taken place, basically without debate –

“[T]he critical discourse is reserved is confined largely to the so-called ‘political’ domain. The ‘economic’ discourse, by contrast, is far less critical.... The ‘Washington Consensus’ of liberalization, deregulation, privatization, sound finance and the unwinding of the welfare state, is seen not as one of several possible paths of development, but as the natural course of things. It is almost as if the collapse of the old political consensus of Zionism has given way to a new economic consensus of free markets: ‘*Laissez-faire* – good; state intervention – bad.’”²³

This is not to say that the State has no role in Israel’s neo-liberal economy – but it is a markedly changed one: if in the 1950s the State was responsible for the industrialization, then in the 1960 it oversaw the emergence of the military-industrial complex, then since the 1980s it direct economic development through its economic policies, including extensive privatization of holdings and services.²⁴ Indeed, many commentators find the liberal economists of the Israeli ministry of finance to be the chief instigators of government policies that brought about market liberalization, extensive privatization and more generally the pull back of the social safety net. There is no singular moment when neo-liberalism took hold in Israel, but it probably has much to do with the dramatic economic meltdown that Israel experienced around 1985, a few years after the (first) Israeli-Lebanese War.²⁵ A recent

²² See Gad Barzilai *Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective* in: <http://poli.haifa.ac.il/~levi/book1.htm#2>.

²³ Jonathan Nitzan, Shimshon Bichler *THE GLOBAL POLITICAL ECONOMY OF ISRAEL* (Pluto Press, 2002) (Arguing that while there is extensive debate on such matters as war, peace, ethnicity, religion and formal political institutions, these are all part of a larger process “on which there is practically no debate at all: *the progressive emergence of Israel as a capitalist society.*”) (*Italics – in the original*).

²⁴ Cf. Daniel Maman “The Social Organization of the Israeli Economy: A Comparative Analysis” in: <http://poli.haifa.ac.il/~levi/book1.htm#2>. On the historical role of Israel’s government see: David Levi-Faur *THE VISIBLE HAND: STATE-DIRECTED INDUSTRIALIZATION IN ISRAEL* (Yad Ben-Zvi, 2001, Hebrew).

²⁵ For detailed analysis of the crisis see Michael Bruno *Crisis STABILIZATION AND ECONOMIC REFORM* (Clarendon Press, Oxford, 1993) at p. 78 et seq.

OECD report told the story of Israel's economic recovery in the following terms:

“A sea change in macroeconomic policy and a shift towards market-oriented structural reforms was prompted by chronic hyperinflation and unsustainable public-debt levels in the mid-1980s. Anti-inflationary measures were particularly successful, allowing the introduction of inflation targeting in the early 1990s, which brought price increases down to low, single-digit levels by the end of the decade. The early 1990s also saw the emergence of a world-class, export-based high-tech sector specialising in computer hardware and software, medical technologies and pharmaceuticals.”²⁶

As the economic rather than the military situation became dire, Israeli econo-bureaucrats in the Ministry of Finance and in the Central Bank have taken the lead in economic matters and have run the Israeli economy very prudently, for better or worse, ever since. On the one hand, these civil servants are often criticized by politicians and pundits for allegedly grabbing power from elected officials²⁷ (and for going through the revolving door into well paying private sector positions), but they are also praised for guiding Israel's economy safely through the recent worldwide turbulences.²⁸

Two facts, however, are quite clear: *first*, that Israelis' socio-economic views have changed and all recent governments, including Labor-led ones, have been pro-market, pro-privatization, and essentially of neo-liberal orientations; indeed, despite the critique against liberal economics, none of the contenders for leadership in Israel has espoused this cause. *Second*, that

²⁶ Org. Econ. Coop. & Dev. [OECD], Policy Brief, *Economic Survey of Israel, 2009*, 3 (Dec. 2009), available at <http://www.oecd.org/dataoecd/41/30/44383721.pdf>.

²⁷ One of the most problematic legal manifestations of these economists' dominance is what is known as “the arrangements act” – a statute presented to the Knesset annually as a supplement to the budget act and including a laundry list of legislative amendments on a broad range of economic issues. Passed with little time for discussion, it fulfils the governments' wish list of statutory amendments, most often at the behest of the treasury. Although similar in form and purpose to Omnibus Budget Reconciliation Acts common in the United States, the scope of reforms passed in this manner without an appropriate parliamentary debate is overwhelming, and has been the subject of much criticism.

²⁸ The civil servants at the Israeli Ministry of Finance and the Bank of Israel are credited for having “together brought Israel to balance its budget and behave conservatively and responsibly.” (Meirav Arlosoroff, *Soft Landing/Israel Teaches the World a Lesson in Economics*, HAARETZ (Isr.), Sept. 15, 2009, <http://www.haaretz.com/hasen/pages/ShArt.jhtml?itemNo=1114617&contrassID=2&subContrassID=2>, summarizing that “among the OECD nations, Israel behaved like the only responsible adult.”

privatization and the rolling back of social services have had significant and often unhappy social costs. Observed the OECD: Israeli “[g]overnment spending has been on a downtrend trend over the last two decades... social policy... spending went down ... to 15.8% of GDP in 2007 (about 6 percentage points below the OECD average).²⁹ There is good reason for mentioning the OECD: it was a great diplomatic triumph for Israel to join the organization in May 2010,³⁰ yet the OECD itself was critical of Israel’s socio-economic policies “Israel will join OECD as its poorest member,” ran the headline of the Jerusalem Post coverage. The report calls on Israel to give “due priority” to its “deep socio-economic cleavages.” It stresses that at 20% of households Israel’s poverty rate is higher than in any OECD country including Mexico, Turkey and Portugal, and is almost twice the OECD average. The OECD urged the Israeli government to accommodate higher investment in social policies. “The report shows the real picture of the socio-economic situation in Israel,” admitted Israel’s Social and Welfare Minister.³¹

With the OECD report, Israelis had proof to what many have suspected in recent years – Israel’s neo-liberal policies cut way beyond the ossified layers of fat in the nations’ social spending. There have been outspoken critics of Israel’s social policies for decades, but they were (and are) fighting an uphill battle, for two separate reasons:

First, they seem unable to garner wide public (or political) support for an expansion of public spending or for reversal of government privatization processes. In fairness, there are some indications of a potential change in mood among government bureaucracy and politicians; the former is indicated by official reports finding economic waste in government outsourcing and the latter by the Knesset defying the government coalition, which let expire the so-

²⁹ “[B]ecause of tightening access to benefits and cuts in income transfers to the working-age population including unemployment benefit, social assistance and in particular child allowances to the many large families. Compared to OECD countries, public spending on pension transfers (4.9% of GDP vis-à-vis an OECD average of 6.0%) and health (4.4% of GDP in Israel, 6.3% across the OECD) is comparatively low.” OECD, OECD REVIEWS OF LABOUR MARKET AND SOCIAL POLICIES: ISRAEL 18 (2010).

³⁰ With a unanimous vote including that of Turkey, a country unlikely to vote again in Israel’s favor in the foreseeable future. See Ami Kaufman “A Minefield of Missteps” 5/25/10 Jerusalem Post 16 [2010 WLNR 10905846].

³¹ See Sharon Wrobel “Israel will join OECD as its poorest member” 1/21/10 Jerusalem Post 17 [2010 WLNR 1582570].

called 'Wisconsin Plan,' an effort to privatize the government placement agency for the unemployed.³²

Second, and perhaps more critically, they have had trouble finding a legal support for their efforts to slow down the inroads made by neo-liberalism in Israel. To do so, would require two cumulative conditions: *one*, that critics could show a legal cause of action to force the government to maintain a certain level of public spending; *second*, they would need to find the Israeli Supreme Court willing to intervene, force the government to spend where both it and the Parliament are reluctant to do so, then establish clear standards on the limits of privatization and similar policies and finally spend vast political capital in forcing the political branches to enforce such rules.

Until the prison privatization case, social activists have repeatedly failed on both counts. This is actually somewhat surprising. If there is an area where the Israeli Supreme Court treaded lightly – slow in recognizing rights, sloth-like in defending them, it is in socio-economic rights. The Court has been reluctant to pass judgment on economic policies of the Israeli government, including its expanding privatization of state owned assets and state provided goods and services. Thus, while the Court was sharply attacked for being over activist over civil and political rights,³³ it has proved a disappointment to its human rights constituency for its under-involvement in the struggle over social equality and fairness in the use and distribution of public assets.³⁴

³² See <http://it.themarker.com/tmit/article/10668>; http://www.themarker.com/tmc/archive/arc.jhtml?from=aonline&ElementId=skira20100505_11_67277&origin=IBO&layer=hp; also <http://elyon1.court.gov.il/heb/MerkazMeyda.htm> (in Hebrew); and see Ruth Eglash "Welfare-to-work plan is being killed off, with nothing on the horizon to replace it" Jerusalem Post 4/30/10 [2010 WLNR 9215920] and <http://www.haaretz.com/print-edition/business/pm-looking-for-wisconsin-plan-alternative-1.287496>.

³³ Writing of the Israeli Supreme Court under the leadership of Court President Aharon Barak, Robert Bork described the Court as "simply the most activist, antidemocratic court in the world" ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 13 (2003). Also see Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53; Robert Bork, *Barak's Rule*, 27 AZURE 125 (2007).

³⁴ See, e.g., Israel Doron, *Tal Golan Aging, Globalization, and the Legal Construction of 'Residence': the case of Old-Age Pensions in Israel* 15 ELDER L.J. 1, 40 (2007) ("Much has been written in Israeli legal literature regarding the reluctance of the Supreme Court to intervene in the sphere of social rights in Israel."); on the limited protection for social rights in Israel see: Aeyal M. Gross *The Constitution, Reconciliation, and Transition Justice: Lessons from South Africa and Israel* 40 STAN. J. INT'L L. 47, 95-96 (2004).

The Court noted in its case law the significance of Parliament's taxing power and the importance of equipping the government with flexible judgment over spending money for the public good. But it also noted that the Israeli Constitution – such as it is – did not adopt a specific economic policy, and thus the government is free to adopt a free market policy.

But are there no limits? Has the State no socio-economic duties towards its citizens? Is there no minimal standard of living, healthcare or education the State must provide? More to our point – is there no core business the government must carry out itself – can it privatize itself to oblivion?

This is no mere theoretical concern. From one of the most egalitarian, welfare oriented nations, where the good of the nation was placed ahead of the needs of the individuals, a nation that came up with the Kibbutz, the idealistic form of collective settlement, the country has been transformed with an almost post-communist nation's zeal. Income inequality has surged,³⁵ the Kibbutzim have been largely privatized³⁶ and the government is constantly shirking its services, forcing Israelis to pay out of pocket for education, health and many other items previously State provided or subsidized.³⁷ It seemed as if there were no limits to the process – in effect, "I exist, therefore I can be privatized."³⁸

Until recently, Supreme Court pronouncements on socio-economic policies were very rare. In 2002 case the Court struck down a public land

³⁵ See <http://pluto.huji.ac.il/~msfalkin/02-03.pdf>; Ira Sharkansky *Israeli Income Inequality* ISRAEL STUDIES 1(1) 306 (1996); Momi Dahan *The Rise of Earning Inequality* in: Avi Ben-Basat THE ISRAELI ECONOMY, 1985-1998: FROM GOVERNMENT INTERVENTION TO MARKET ECONOMICS (MIT, 2002), in p. 485 et seq.

³⁶ As the Kibbutz movement celebrates 100 years in 2010 only "little resemblance to the ideals which once motivated [the Kibbutzim]... remain. Only a quarter of kibbutzim still function as equalized cooperatives, while the rest have begun paying salaries to their members." See <http://www.haaretz.com/hasen/spages/1140864.html>; <http://en.wikipedia.org/wiki/Kibbutz>; also: <http://www.haaretz.com/hasen/spages/826982.html>.

³⁷ See Ruth Sinai, First Education, Then Health – Now Welfare Faces Privatization, Haaretz (Isr.), Apr. 17, 2008, <http://www.haaretz.com/hasen/spages/975290.htm>; Avirama Golan, The Privatization of Children's Rights, Haaretz (Isr.), Jan. 17, 2010, <http://www.haaretz.com/hasen/spages/1143058.html>.

³⁸ Nurit Wurgaft, I Exist, Therefore I Can Be Privatized, Haaretz (Isr.), Dec. 10, 2009, <http://www.haaretz.com/hasen/spages/1132542.html>; *cf.* <http://www.icpa.org/icpa/jl/vp442.htm>; and more generally: http://en.wikipedia.org/wiki/Privatization_in_Israel.

appropriation scheme citing the lack of “distributive justice”³⁹ yet in a 2004 decision that refused to interfere with a severe cut in state welfare benefit, lowering the bar for court protection to a right to minimal conditions of subsistence.⁴⁰ Then, in late 2009 came the prison privatization case, where the Court took the rare step of holding a statute unconstitutional, and, in a long political-science-oriented decision provided broad ground rules on the privatization of sovereign functions in a democratic state.

Part IV – The Israeli Prison Privatization Case

A. Introduction

As noted, although privatization processes had been going on for some years in Israel, the Court has, in effect, refrained from reviewing and regulating them. Then, in November 2009 the Israeli Supreme Court ruled in ***The Human Rights Program v. The Minister of Finance***⁴¹ that privately-run prisons are unconstitutional in Israel. At the time of the decision, the first private, state-of-the-art, prison was fully built, and ready to be operated by the winners of a public tender. Following the Court's decision – handed down almost five years after the petition was made – the State had to pay 280 million NIS (approximately 75 million U.S. Dollars) in compensation to the prospective operator.⁴²

The decision to establish the privately run prison was made by a statute enacted in 2004 – technically, Amendment no. 28 to the Prisons Ordinance.⁴³ The law passed by a majority of 52 to 33, representing both a

³⁹ See H.C.J. 244/00 *The Association in Favor of the Democratic Discourse v. Minister of National Infrastructure*, P.D. 66(6) 25; for analysis see: Daphne Barak-Erez *Law and Politics in Israel Lands: Towards Distributive Justices* 14(4) ISRAEL AFFAIRS 662 (2008); http://pdfserve.informaworld.com/910811_731458845_903112168.pdf.

⁴⁰ See: H.C.J. 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* (unpublished); for context see: Yoram Rabin, Yuval Shany *The Case for Judicial Review over Social Rights: Israeli Perspectives* 14(4) ISRAEL AFFAIRS 681 (2008). http://pdfserve.informaworld.com/811739_731458845_903189627.pdf.

⁴¹ *Supra* note 1.

⁴² See http://www.themarket.com/tmc/article.jhtml?ElementId=abe20100328_77662 (in Hebrew).

⁴³ Law Amending the Prisons Ordinance (no. 28) 5764-2004 (hereafter: the Law or "Amendment 28"). For a comprehensive early analysis by a criminologist of the Israeli law with respect to the international experience, see Uri Timor, *Privatization Of Prisons In Israel: Gains And Risks*, 39(1)ISR. L. REV. 81 (2006).

comfortable majority and a relatively high participation of the members of the 120 member Knesset, the Israeli Parliament).

At that time, as in the present time, many countries including the United States, England, Germany, Australia, New Zealand and France had established private prisons, employing several different models, and with some public and academic debate as to the desirability of privatizing the prison system.⁴⁴ Not all prison privatizations are created equal. The scope of the privatized elements varies. In some cases, as in France and Germany, only logistical services were privatized. In other cases, such as in England and even more so in the United States, the private prison has also been granted authority to manage many aspects of prisoners' rights including the power to discipline prisoners who deserve it. The Israeli model was very detailed and the law specified thoroughly the requirements for all aspects of prison life.⁴⁵ The Israeli model was similar to the English model, involving oversight of the prison by government representatives stationed at the prison. Under Amendment 28, however, the authority given to the private operator was more limited than in England, and the government ability to oversee the private prison has increased. The State therefore referred to the Israeli model as an "Improved English Model".⁴⁶

Up to the present case, to our knowledge, no national court has held prison privatization to be illegal, let alone unconstitutional.

⁴⁴ This debate is beyond the scope of the current article. See, e.g., David Shichor, PUNISHMENT FOR PROFIT: PUBLIC PRISONS, PRIVATE CONCERNS (1995); Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons* 115 HARV. L. REV. 1838 (2002); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988). PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE (David Shichor & Michael J. Gilbert eds., 2001); Clifford J. Rosky, *The Privatization of Punishment, Policing and Military Force in Liberal States*, 36 CONN. L. REV. 879 (2004); Richard F. Culp, "The Rise and Stall of Prison Privatization: An Integration of Policy Analysis Perspectives", 16 CRIM. JUS. POLICY REV. 412 (2005); Warren L. Ratliff, *The due process failure of America's prison privatization statutes*, 21 SETON HALL LEG. J. 371 (1997); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); The reports by the University of Greenwich, England, available at <http://www.psir.org/ppri.asp>; For additional background, see Matthew Zito, Prison Privatization: Past and Present http://www.ifpo.org/articlebank/prison_privatization.html and the web sites of anti-privatization group at <http://www.privateci.org/> and <http://www.psir.org/ppri.asp> and that of one of the major corporations in the field at <http://www.correctionscorp.com/>.

⁴⁵ Paul Dost, "The Israeli Model for Private Prisons – the Best in the World" TheMarker July 27, 2006, at p. 11 (Hebrew).

⁴⁶ The Academic College, supra note 1, C.P. Beinisch at §6.

The Israeli Supreme Court was well aware of this, noting that claims of unconstitutionality have either been rejected by other national courts⁴⁷ or have not been presented to the courts in certain countries operating privatized prisons and would have been rejected if presented.⁴⁸

The State's motivation in its privatization scheme was twofold: to save funds by having the prison run more efficiently and to improve the physical conditions available to prisoners. Both aims were to be achieved by transferring the management of the prison to a private firm chosen by public tender, to then be closely supervised by the State in its actual operation. Although one of the main motivations for instituting private prisons was to save money, whether such prison would have indeed have saved money is open to debate.⁴⁹

An extraordinary enlarged panel of nine Justices, presided by Supreme Court President Dorit Beinisch, ruled in an 8-1 decision⁵⁰ that for the State to transfer the authority for managing the prison to a private contractor whose aim is to maximize profits would, in itself, unconstitutionally violate prisoners' constitutional right to dignity and freedom. The importance of the case lies in the fact that it does not condemn any specific attribute of the private prison, nor did it examine the conditions at a specific prison, in actual operation; rather, the Court held that the very concept of privatizing a prison, in general, is unconstitutional. This was the case although the decision to establish private prisons was an informed judgment of the legislator, and is a common

⁴⁷ In the United States - Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999); Tulsa County Deputy Sheriff's Fraternal Order of Police v. Board of County Commissioners of Tulsa County, 2000 OK 2 (2000).

⁴⁸ The State presented an expert opinion written by Professor Jeffrey Jowell QC, a former Dean of UCL's Faculty of Laws in London. Prof. Jowell wrote that privatizing prisons has not been challenged in England, South Africa or the European Union, and opined that should the issue arise, the constitutional challenges are likely to be rejected.

⁴⁹ Cf. Keren Harel-Harari, "The Supreme Court was Wrong, a Private Prison is the Solution" *TheMarker* June 22, 2009 available at http://www.themarker.com/tmc/article.jhtml?ElementId=skira20090622_1094614 (Hebrew) (arguing that the private prison would have saved approximately 350,000,000 NIS over 25 years) with Yoav Peled, "A Private Prison is not the Solution" *Haoketz* July 6, 2009 available at <http://www.haokets.org/default.asp?PageID=10&ItemID=4413> (Hebrew) (arguing that the cost of private prisons may actually be higher than that of government-run prisons).

⁵⁰ The main opinion was written by Chief Justice Beinisch, with whom Justices Arbel, Grunis (concurring except with respect to human dignity), Rivlin, Procaccia (concurring with most of the opinion), Hayut, Jubran, Naor. For simplicity purposes, we shall refer to the "Court" or to Beinisch's opinion interchangeably, and note significant differences of opinion by concurring Justices where applicable.

practice in other democracies. The decision has sparked international interest as a precedent of worldwide relevance, but commentators focused on the outcome, the prohibition against privatized prisons, and not on the constitutional framework which allowed the decision.

In this paper we examine the decision of the Court, focusing on two distinct aspects of it. The first is the constitutional aspect. There we focus not on the human rights dimension but rather on the structural dimension. We examine how, in the context of the Israeli constitutional law world, the Supreme Court has the ability to come into the picture at such a late stage and completely ban a government policy, approved after serious debate at the Parliament, and on the basis of values alone. The second is the effect that the case may have on the privatization debate which is ongoing in Israel and worldwide.⁵¹

B. The Petition and the Sides' Arguments

The decision to establish a privately run prison was made by a 2004 Statute.⁵² The decision to take this route was not taken lightly. The process included a series of discussions in the offices of the Ministers of Public Security, discussions in the office of then-Attorney-General Elyakim Rubinstein (currently a Supreme Court Associate-Justice), and a visit by a delegation to prisons in England, Scotland, and France.⁵³

The petition was filed by three: a law school, a former senior officer of the Israel Jail Administration and a former prisoner.

The petition was based on two separate grounds. The first was the argument that the complete privatization of prisons would cause unconstitutional harm to the prisoners' constitutional rights of personal freedom and of human dignity, and that the establishment of a privately run prison, in itself, is a

⁵¹ See, e.g., <http://blogs.law.yale.edu/blogs/compadlaw/archive/2009/11/22/cases-prison-privatization-judged-unconstitutional-by-the-supreme-court-of-israel.aspx>;

<http://www.comparativeconstitutions.org/2009/11/israeli-supreme-court-says-privatized.html> ;

⁵² For a comprehensive early analysis by a criminologist of the Israeli law with respect to the international experience, see Uri Timor, PRIVATIZATION OF PRISONS IN ISRAEL: GAINS AND RISKS, *Isr. L. Rev.* 81

⁵³ See Shmuel Hershkovitz A Privately Run Prison: Worthy Addition to Israel's Correction System, <http://www.idi.org.il/sites/english/OpEds/Pages/APrivatelyRunPrison.aspx> .

separate harm to the prisoners' rights in addition to the obvious (and constitutional) harm of putting them in confinement.

Petitioners also claimed that the decision to privatize a prison contradicts Article 1 of *Basic Law: The Government* which holds that "[t]he Government is the executive authority of the State."⁵⁴ Petitioners interpreted this Article as holding that the State cannot delegate its constitutional role to enforce the law and safeguard the public's safety.

The State argued in response that establishing the private prison is an important solution to the shortage of prison facilities in the country, that it will improve the conditions in which prisoners are held and that a private prison would save between 20-25 percent of the operating budget of a comparable public prison.

The State also emphasized that the current project was a one-prison-only pilot, and that it includes adequate mechanisms to protect the rights of the prisoners allowing the State to supervise the prison's operation and intervene if necessary. One of these safeguards allows the State to take over the prison at any time if the private operator breaches its obligations.

The State also noted that the prison operator is subject to judicial supervision, with all prisoners having the right to petition the judiciary. The prison operator was also to be subject to the supervision of the State Comptroller and to a yearly review by a permanent, special-purpose, advisory committee headed by a former senior judge. The statute clearly stated that the prisoners at the private facility would have the same rights, privileges and services granted to inmates at state prisons.⁵⁵ The Court agreed that these supervision mechanisms are more comprehensive than those available in other countries with similar private prison systems.⁵⁶

The State rejected petitioners' interpretation of Article 1 of *Basic Law: The Government*, suggesting instead that the provision is a "ceremonial" definition of the executive with respect to the other branches of the State. The government is often assisted by private entities in the performance of its

⁵⁴ Basic Law: The Government (2001).

⁵⁵ Prison Ordinance, §128(XI)(c)(1).

⁵⁶ The Academic College, supra note 1, C.P. Beinisch at §42.

duties, and does not cease to be the executive authority just because it delegates authority to private entities.

An important part of the State's response was based on a comparative analysis. The State claimed that the Israeli model for a private prison was based on that of the U.K., which includes supervision by State inspectors within the prison. That said, the powers that were to be given to the private operator in Israel were more moderate than in the U.K., while the supervision power over the private operator was to be broader.⁵⁷ The law provided that the private prison was to be closely monitored by the Israel Prison Service (IPS) and that rights of prisoners incarcerated at the private prison would be similar to those in public prisons.

The State concluded that since the privatization did not include a violation of prisoners' constitutional rights, Court intervention should be limited to "rare and extreme cases, in which the privatization shakes the foundations of the structure of the democratic regime and the basic principles of the legal system".⁵⁸ Needless to say the State did not think that the present petition presented such a case.

In a rare move, the Knesset, decided to appear before the Court as a party in its own right (aside from the government). The Knesset argued that *Basic Law: The Government* does not limit the Knesset's authority to authorize the government to act in various ways in the performance of its executive role. It should be noted that the Knesset is the source of both Basic Law: Human Dignity and Freedom (in its capacity as a constituent authority) and of Amendment 28 (in its capacity as the sovereign national Parliament), the former being used by the Court to strike down the latter.

The Knesset acknowledged that the issue of prison privatization was "a hard case" and that there should be tight supervision of the State over the private operator, which, in turn, should be, in the performance of its duties, subject to the legal rules applying to public entities.⁵⁹

⁵⁷ The Academic College, supra note 1, C.P. Beinisch at §6.

⁵⁸ The Academic College, supra note 1, C.P. Beinisch at §6.

⁵⁹ The Academic College, supra note 1, C.P. Beinisch at §9.

C. The President Speaks for the Court: stage one

Court President Beinisch stated that the legal question is whether the privatization, which gave the private operator official powers, the use of which inherently involves infringing civil rights, is constitutional.

Court President Beinisch noted that although certain traditional powers of a public prison director were not given to her private prison equivalent, the private prison manager and other wardens were to have many powers similar to those granted to their public prison counterparts, and that these powers infringe on human rights. Thus, the private prison manager has the power - to hold a defiant prisoner in solitary confinement; the power to examine a prisoner's naked body for security purposes; the power to order the taking of a urine sample; the power to use reasonable force to search a prisoner, and a limited power to lawfully limit the meeting of a prisoner with a specific attorney. Similarly, the private prison security guards were to have the power to use weapons to prevent the escape of a prisoner from the prison, and also search and arrest authorities. It should be noted that all these powers are currently vested in the public prison management and wardens, respectively, and their legality and constitutionality has always been upheld.

In the present case, as in many others, the Court states that it would not invalidate a statute lightly, and that any law is presumed to be constitutional until proven otherwise. The Court further states that the constitutional examination shall be done "prudently and in a restrained fashion, while refraining from redesigning the policy chosen by the legislature"⁶⁰

While stating that the non-intervention policy is especially applicable in matters of economic policy, the Court classified the present case as one potentially involving a significant harm to protected human rights, and held that in such cases the economic policy considerations become secondary, while the dominant element in judicial review will be the nature and the intensity of the potential damage to human rights.

⁶⁰ The Academic College, supra note 1, C.P. Beinisch at §14.

The Court refrained from holding that there is a significant risk that the powers granted to the private prison employees will be used in a more intrusive way than the same powers granted to their state prison equivalents. The Court stated that these risks involve a future harm to human rights, the occurrence of which is uncertain, and does not constitute a sufficient ground to invalidate an act of Parliament.⁶¹ This, however, was not the final stage of the analysis, quite the reverse.

D. Two-Step Unconstitutionality

The decision of the Court to hold Amendment 28 unconstitutional involved two stages: an initial holding that the statute infringes upon human rights and the further holding that such an infringement is impermissible under the constitutional standard of Basic Law: Human Dignity and Freedom as "a law befitting the values of the State of Israel enacted for proper purpose and to an extent no greater than is required."⁶² Both stages are required for the Court to find the law unconstitutional.

Step I: Does the concept of a private prison, per se, infringe on rights?

Obviously, the incarceration of a prisoner infringes on her right to personal liberty,⁶³ whether the prison is private or public. The Court points out that when the right to personal liberty is infringed upon, so are many other human rights, since the prisoner is unable to take full advantage of such rights as free movement, the freedom of profession and many others.⁶⁴

Court President Beinisch then holds that the legitimacy of the deprivation of personal liberty "depends to a large extent on the identity of the entity authorized to deprive liberty and the manner in which the deprivation of liberty is performed".⁶⁵ Since it has to be done for a public interest, Beinisch believes that where the entity depriving the liberty is acting to promote a

⁶¹ The Academic College, supra note 1, C.P. Beinisch at §19.

⁶² Basic Law: Human Dignity and Freedom, Art. 8.

⁶³ *Supra* note 10.

⁶⁴ The Academic College, supra note 1, C.P. Beinisch at §20, quoting H.C. 6055/95, Zemach v. Minister of Defense, PD 53 (5) 241, 261-262.

⁶⁵ The Academic College, supra note 1, C.P. Beinisch at §21.

private interest (being a for-profit company) much of the legitimacy of depriving from liberty is lost.⁶⁶

Given the President's emphasis on the prison operator's being a for-profit company, it is important to make the following observation: the remuneration that was to be paid by the State of Israel to the operator of the private prison was not to be based on the actual number of prisoners held in the facility but rather on the numbers of physical spots available in the prison. This is quite different than the arrangement common in other countries and gives the prison operator no direct financial incentive in the handling of individual prisoners.

Citing political philosophers such as Thomas Hobbes and John Locke, President Beinisch emphasizes the role of society or of the State in enforcing criminal law and views this as part of the "social contract" of the modern state.⁶⁷ When a prisoner is incarcerated, she views the infringement of her right to freedom as deriving not only from the judgment of the Court which sent him to prison, but also from the operation of the entity running the prison on a daily basis and its employees. In addition to the loss of democratic legitimacy in private prisons, Beinisch points to the increased risk of abuse where the power is in the hands of private entities.⁶⁸

The social contract is not merely the transfer of the authority to the state, but also the agreement that the state itself would use that power.

Concurring Justices make interesting theoretical observations. Justice Arbel views privatization as the transferring of public power to a party foreign to the social agreement, a party not committed to its norms, a party that does not necessarily seek to achieve its purposes.⁶⁹ Justice Procaccia emphasizes that the social contract makes the government agency legally, socially and morally responsible for the use of force. She argues that:

"The state . . . is directly responsible for the restraint required in exercising the power. It is supposed to be accountable to the public as to the manner of execution of its powers in criminal

⁶⁶ The Academic College, supra note 1, C.P. Beinisch at §22.

⁶⁷ The Academic College, supra note 1, C.P. Beinisch at §23.

⁶⁸ The Academic College, supra note 1, C.P. Beinisch at §26

⁶⁹ The Academic College, supra note 1, Arbel J., at §2.

proceedings, and it has within itself the body of education, knowledge, experience, tools and all means necessary to perform all the required balances. The art of balancing the use of force and the authority applied to the individual is in the 'genetic code' of the government agency. It is not in the hands of any other entity which was raised outside of the governmental authority, and for whom the duty of balancing is a foreign consideration, and is not a structured part of its *modus operandi*."⁷⁰

It is the State, she stressed, that has always applied coercive official authority against the individual in the criminal process; it is the State that formulated the code of conduct in the application of force and is directly responsible for its execution. As such it is also accountable to the public and has the depositories of knowledge, experience and all tools vital for the carrying out of such powers in a balanced manner. This balancing know-how is part of the public authorities "genetic code", she argues, and any other entity that grew outside of government lacks it in its operation.⁷¹

Taken to its fullest extent, this view clearly preferring nature over nurture may preclude privatization of any specialized government functions, ex-definition.

The private party, on the other hand, is operating under private efficiency considerations, such as profit making, which are foreign to the art of balancing.

Since the powers to preserve public order and discipline at the prisons, and the powers related to preventing prisoners from escaping are traditionally state powers, the legitimacy of the punishment is reduced, because the punishment is enforced by a for-profit company.

The Court's conclusion is that the infringement of the constitutional right to personal freedom of a prisoner in a private facility is more severe than the infringement of the right to personal freedom of a prisoner at a state

⁷⁰ The Academic College, supra note 1, Procaccia J at §14.

⁷¹ The Academic College, supra note 1, Procaccia J at §15.

prison, even if they are imprisoned for a similar period of time and the actual infringement of human rights in both prisons are identical.⁷²

Furthermore, Court President Beinisch also concludes that the very existence of a for-profit prison, in itself, reflects a lack of respect to the status of the prisoners as human beings, resulting in an infringement of their right to human dignity.⁷³ "There is", she stressed -

"[A]n inherent and built-in concern that the implementation of prison based on a private economic purpose turns the prisoners, in fact, simply by placing them in confinement in a private prison, into means for producing financial profit by the corporation that manages and operates the prison. To be precise: the very existence of a for-profit prison reflects a lack of respect for the status of prisoners as human beings, and this violation of the human dignity of the prisoners does not depend on the extent of human rights violations actually occurring within the prison."⁷⁴

The violation of human dignity is further increased, decides the President, by the various powers vested in the private prison operators.⁷⁵ She explains that the operator of a private prison cannot be said to be merely assisting a public authority in carrying out its functions; rather this is a case of delegations of powers.

The main distinction between the two situations involves the measure of power and discretion given to the private party by the granting authority. In this case, the examination of the provisions of Amendment 28 indicates that extensive public powers concerning prison management have been granted to the private franchisee.⁷⁶

The claim that an infringement of human dignity may occur from a symbolic manifestation rather than from any actual actions that violate human

⁷² The Academic College, *supra* note 1, C.P. Beinisch at §33. It should be noted, however, that Beinisch raises the possibility that imprisonment in a private prison may lengthen the term, since the behavior of the prisoner, and the opinion of the prison's manager, may affect early release decisions. *Id* at §27.

⁷³ Justice Grunis, who concurred in the opinion of the President, dissented on this specific point and did not concur as to the violation of human dignity.

⁷⁴ The Academic College, *supra* note 1, C.P. Beinisch at §36.

⁷⁵ The Academic College, *supra* note 1, C.P. Beinisch at §36-40.

⁷⁶ The Academic College, *supra* note 1, C.P. Beinisch at §31.

rights is based on a theory suggested by Prof. Meir Dan-Cohen. Dan-Cohen argues that:

"Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them... As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target's dignity, no matter what one's motivations and intentions are."⁷⁷

Step II: Can the infringement be (constitutionally) justified?

As noted above, the determination that Amendment 28 infringes on human rights is not the end of the analysis. Such infringement may be justified and hence permitted if it is the result of "a law befitting the values of the State of Israel enacted for proper purpose and to an extent no greater than is required."⁷⁸ The Court then addressed each element:

First, there has been no contest that the infringement is made by a law, since Amendment 28 is, indeed, a statutory instrument.

Second, quite surprisingly President Beinisch summarily dismissed the question whether the law is befitting the values of the State of Israel, explaining that the petitioners did not elaborate on the subject and that a law will be held to be breaching this condition only in very unusual circumstances.⁷⁹ We find this surprising since there appears to be a potential overlap between such holding and Court's holding that privatizing the public order sphere is contrary to the basic conception of the society, as discussed above.⁸⁰

Third, to be constitutional, the infringing law must be enacted for a proper purpose. Under prior case law, the protection of other rights or the fulfilling of an important public purpose were deemed proper purposes.⁸¹ The first of the two purposes in the present act was the improving of prison conditions, which is certainly a proper purpose. The second purpose was to

⁷⁷ Meir Dan-Cohen, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY (2002) 162.

⁷⁸ Basic Law: Human Dignity and Freedom, Art. 8.

⁷⁹ The Academic College, supra note 1, C.P. Beinisch at §31.

⁸⁰ See _____.

⁸¹ HC 4769/95 Menachem v. Minister of Transportation, PD 56 (3) 235, 264.

achieve economic efficiency. Petitioners asked the Court to reject this purpose as improper, but the Court refused to categorically find that saving money is not a proper purpose, although as will be shown shortly, the Court used the economic purpose in ultimately holding Amendment 28 unconstitutional.

*Four*t, for the statute to be held constitutional it is required that the harm caused by the infringement of right be to an extent no greater than is necessary. This is referred to as the proportionality requirement. In interpreting this element the Israeli Court, following Canadian jurisprudence,⁸² has long held that it is comprised of a three prong test:

"[F]irst, that the legislative means chosen are rationally connected to the proper purpose; second, that the means adopted impair the right minimally, i.e., that no other means available achieve the purpose (and no more than the purpose) with less restrictions upon the right, and third, that the infringement is proportional, or, in other words, that harm caused by the infringement is proportional to the harm prevented is proportional, or, in other words, that harm caused by the infringement is proportional to the harm prevented (or good attained) by the legislative purpose as achieved by the specific means under consideration. Under proportionality analysis, the court may reach a conclusion that fully achieving the legislative purpose involves inflicting harm on rights-holders that is disproportionate to the benefits accrued (or harm prevented), and therefore the legislative purpose can be achieved only as far as proportional to the harm inflicted."⁸³

In applying the three prong test in the present case, the Court refused to accept the petitioners' assertion that the legislative measure (Amendment 28) was not rationally connected to the proper purpose (economic efficiency). Petitioners' cited shows no significant correlation between the prison privatization and economic savings. The State, on the other hand, claimed that based on the offer of the winner of the tender, the private prison is expected to bring savings estimated at 20-25% compared with the cost of running a public prison in similar standards. The Court said it was too early to determine the issue.

⁸² R. v. Oakes, [1986] 1 S.C.R. 103.

⁸³ Amnon Reichman, "When We Sit To Judge We Are Being Judged" - The Israeli GSS Case, Ex Parte Pinochet And Domestic/Global Deliberation" 9 CARDOZO J. INT'L & COMP. L. 41, 51.

As for the second prong of the test – whether there are other means available to achieve the same target with fewer restrictions on civil rights – petitioners argued for the adoption of the so-called "French model" in which only logistical duties are privatized while all security and enforcement duties remain with the State. The State argued that this model does not fulfill the dual purposes of improving prison conditions and budget savings. Court President Beinisch stated that she was unable to determine, at present, that there is a less restrictive measure which would fulfill the State's purposes, and therefore did not declare Amendment 28 unconstitutional on this basis.⁸⁴

Up to this point, Court President Beinisch held for the State on all points and seemed poised to uphold the law despite its harm to human rights. Then came the final prong of the proportionality test. "The test", stated the President – "is essentially one of values". Its' application compares the challenged law's expected public benefit (as compared with the condition before it went into effect) with the damage it is set to cause to constitutional rights.⁸⁵

Essentially, this is a simple constitutional cost-benefit analysis, with no clear guidelines for judges to apply other than their feelings, mores and personal opinion. Indeed, the Court acknowledges that such a decision shall be -

"[D]ependent on the values and norms in the society in question. Naturally, different countries may have different positions regarding the scope of responsibilities of the State and the relationship between the types of activities that will be managed by the public sector and those which should be ran by the private sector. These positions are derived, inter alia, from political and economic ideologies, from the unique history of each country, the political structure, and from differing social values....

The role of the court, which is required to interpret and to cast content into the different constitutional arrangements is not, of course, to choose between different economic and political ideologies; the Court is required however, to express the values that are anchored in the social consensus and in a foundation of values shared by the members of society, to identify the

⁸⁴ Justice Naor, who concurred with the Chief Justice, dissented on this point and wrote that the State's rejection

⁸⁵ The Academic College, supra note 1, C.P. Beinisch at §50.

basic principles that make the society a democratic society."⁸⁶

The Court then returned to the stated purpose of saving money, and performed the constitutional cost-benefit analysis by balancing the expected savings against the perceived harm of giving the power to run a prison and to control prisoners to a private entity.

In applying this standard, the Court held that the benefit of improving prison conditions while saving State money is not proportional to the harm caused by the creation of a privately-ran prison, hence it fails the third prong – and the statute cannot be found constitutional.

In a concurring opinion, Justice Procaccia held that the main purpose of Amendment 28 was increasing prisoners' welfare by making prisons less crowded, and improving the services offered in them, rather than t saving the State money. Justice Levy, who wrote the only dissenting opinion in this case and would have allowed the law to stand until operation of the private prison can be tested in real life, concurred with Justice Procaccia on this point.

Justice Procaccia's analysis substantively changes the cost-benefit analysis. Under it, the harm to personal freedom and human dignity caused by the creation of a privately run prison does not need to be balanced against money savings but against the improvement in prison conditions. The choice is between a concern for the breach of the prisoners' rights by the very fact that they are confined in a privately-run prison and the concern for improving their tough physical conditions which cannot be achieved without the privatization.⁸⁷

Although it appears to us that this balancing should make it more difficult for the Court to hold Amendment 28 unconstitutional, Justice Procaccia still holds that the harm in privatizing the prison *outweighs* the benefits in improving prison conditions (and the ensuing cost savings); Justice Levy, the lone dissenter, would hold the statute, for now, to be constitutional, reserving judgment until the prison is actually operating.⁸⁸

⁸⁶ The Academic College, *supra* note 1, C.P. Beinisch at §53.

⁸⁷ The Academic College, *supra* note 1, Procaccia J. §45.

⁸⁸ The Academic College, *supra* note 1, Procaccia .J. §48-50.

Since Amendment 28 provides a comprehensive arrangement, the Court decided not to attempt to make some in it but rather declare it to be unconstitutional in toto. The Court emphasized that its decision does not prevent the transfer of *logistical services* to the private sector.⁸⁹

Part V – The Day After⁹⁰

A. A final Introduction

As is the case in many controversial decisions of the Israeli Supreme Court, where it intervenes with a major decision of the political branches, pandemonium ensued – politicians, legal analysts, social activists and pundits of all creeds opined.⁹¹

In fairness, in not “a bombshell”, as one commentator put it, this is still a dramatic case, on several distinct levels. On one level – a practical one – it froze completely a policy that enjoyed the support of both government and Parliament and, as the minority Justice Levy remarked, while the Court spoke its lofty words, there were prisoners in atrocious facilities, who have to watch a modern, well equipped prison, stand empty. On another level – the dramatic reversal in the Court’s policy – from non intervention in socio-economic matters to a full-force intervention in one singular policy leaves us guessing as to the reason for this change of heart and the correct way to interpret it.

As Judaic sources have long taught us, ever since the Temple was destroyed, prophecy has been taken from prophets and given to fools and children.⁹² As we hope we fall in neither category, we will limit ourselves to several educated guesses, and we will split our suggestions along the lines of our two respective areas of expertise: constitutional and administrative law. On the first front we shall note our significant regarding the Court’s constitutional analysis and voice our concern over its potential impact. On the

⁸⁹ The Academic College, *supra* note 1, C.P. Beinisch at §65.

⁹⁰ Cf. http://en.wikipedia.org/wiki/The_Day_After.

⁹¹ See, e.g., <http://www.haaretz.com/print-edition/news/international-legal-precedent-no-private-prisons-in-israel-1.3774>;

<http://www.haaretz.com/print-edition/news/beinisch-drops-a-bombshell-1.3776>;

<http://www.haaretz.com/print-edition/opinion/the-right-way-to-run-a-prison-1.3621>;

<http://www.haaretz.com/magazine/friday-supplement/correctional-facility-1.263165>;

⁹² See http://www.come-and-hear.com/bababathra/bababathra_12.html.

latter front we examine the question what this case bodes for future Court view on socio-economic policies, especially that of privatization.

A. A Constitutional Case

a. The Facial Review v. As Applied review Debate Revisited

U.S. courts disfavor "facial review" of statutes and prefer a case-by-case "as applied" judicial review. Explains Prof. Michael Dorf:

"Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face, or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances. The difference is important. If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances."⁹³

In **U.S. v. Salerno** the U.S. Supreme Court explained its preference:

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."

Under a separate classification, A Classic distinction between U.S. style judicial review and the system in many European countries is that -"In the United States, courts adjudicate constitutional issues in what is known as "concrete review," in which the parties raise claims of constitutional rights as a defense to the actual or threatened enforcement of law against them by the state or by other private parties The United States quite specifically rejects prepromulgation review of statutes and other kinds of "abstract review" commonly found on the continent of Europe in which specifically designated government officials have automatic standing to raise constitutional challenges to a statute without having to show

⁹³ Michael D. Dorf, *Facial Challenges to State and Federal Statutes* 46 STAN. L. REV. 235 (1994).

that resolution of the constitutional issue is necessary to determine their individual rights in a pending case.⁹⁴

We argue that from the perspective of a regulator attempting a major reform, the events of the present case provide significant support for facial review on the condition that it is made at an early stage of the reform. If, however, facial review has not been done at an early stage – and here, given the golden opportunity to do so, the Court waited, and waited⁹⁵ – it appears that the court should defer its holding until the reform can be assessed "as applied".

We shall demonstrate the argument with the somewhat tragic and definitely very costly results of the facts in this case.

A State attempts a significant legislative reform, for example, privatizing an important sector such as the prison system. In a constitutional system, the State's decision is subject to judicial review even if the action is supported by Parliament in the form of a law.

When the petition was filed, in March 2005, the tender process for the prison was not yet completed. Only in November of 2005 did the government choose the winner of the tender and only in January 2006 was an agreement signed with the private company, which then started to build the new facility. Meanwhile, the legal proceedings continued slowly. Only in March of 2009 did the Supreme Court actively intervene, issuing an interim injunction preventing the prison (already fully built) from starting operations.

The reform can be evaluated on two different levels: a facial review would review the reform at the inception stage, before the State has spent millions on the actual reform, or "as applied", when the prison is operated and it is clearer whether it helps the welfare of prisoners or damages it.

The matter of the timing was clearly presented by the Petitioners in the case. In an article published in 2006, when the Court refused to issue an

⁹⁴ John C. Reitz, *American Law In A Time Of Global Interdependence: U.S. National Reports To The Xvith International Congress Of Comparative Law: Section Iv: Standing To Raise Constitutional Issues* 50 AM. J. COMP. L. 437 (2002).

⁹⁵ Until some commentators thought the moment has passed – see, e.g., Avirama Golan comment that "[t]he High Court of Justice's reluctance to deal with the petition against privatizing prisons is liable to transform the issue into a theoretical debate." <http://www.haaretz.com/print-edition/opinion/prisoners-of-privatization-1.238238>.

immediate ruling, or at least an interim injunction (waiting for the parliamentary debate of several proposed amendments or repeal to the law authorizing the prison), the Petitioners' legal counsel foresightedly stated that: "the law is unconstitutional today just as it will be in three years."⁹⁶

But the Court chose the worst course possible from the regulators' perspective. It refused to issue an interim injunction (tantamount to an early facial review), allowed the regulator to enter into major financial commitments, and eventually held the reform unconstitutional not based on its implementation, but based on facial review, without any facts in the decision that were not known five years earlier.

In that respect, we should note that President Beinisch holds that a potential for future harm to human rights will generally not warrant a court intervention to invalidate a law. The constitutional examination of that law will only be when the results of the law are known and assessable.⁹⁷ Hence, her decision that Amendment 28 is unconstitutional is based on the immediate harm created by the very existence of the private prison.

b. Determining "the basic concepts of a society"

The holding of the Court is based on the determination that -

"[T]he Imprisonment of a person in privately-managed prison is contrary to the basic concepts of the Israeli society. . . regarding the responsibilities of State, acting through government, regarding the use of force against its subordinate "⁹⁸

The holding is therefore that the decision of the elected Parliament, in adopting a practice common in other democracies, after a lengthy debate and several unsuccessful attempts to repeal, may be held unconstitutional upon the Court's decision that it contrary to the core values of society.

This has happened before, in other countries with a judicial review system. But in this case, the determination of what is the "basic concepts" of Israeli society is based primarily on examining current Israeli law and finding

⁹⁶ Efi Michaeli, "Stop the Privatization Train" **Globes** September 7, 2006

⁹⁷ The Academic College, supra note 1, C.P. Beinisch at §67.

⁹⁸ The Academic College, supra note 1, C.P. Beinisch at §39.

that all authority relating to public order vested in the State.⁹⁹ Since under the existing law the authority is with the State, the Court finds it unconstitutional for the new law (Amendment 28) to move the authority to the private sector.

This of course is a run-around argument, where the law is held contrary to values – that are proven only by other laws.

The court did not use any public opinion polls, although it could have, since an independent poll by the Democracy Institute found that 54% oppose privatized prisons while only 23% support it.¹⁰⁰ Furthermore, a survey conducted by the Israel Prison Service found that 36% objected to the full privatization of prisons, while only 12% supported a major privatization and an additional 17% supported only the privatizing of services such as maintenance, kitchen and laundry.¹⁰¹ Neither of these was mentioned in the Court's decision. It is plausible that the Court refrained from citing these or any other opinion polls supporting its own position so as not to create a precedent that such polls may determine value judgments. In the absence of polls or any other convincing evidence, it is difficult to accept that the Court represents the values of society better than the elected parliament, who came to their decision after a serious debate.

C. An Administrative Law Decision

What does this holding tell us about the Court's current views on its administrative review of socio-economic policies? In truth – very little. It may be the final word on prison privatization,¹⁰² but is the holding applicable to other instances? Maybe, but most likely not. Here is why:

The widest reading – in terms of potential application – of the decision is that some core functions of the State cannot be privatized. The argument is that under the social contract – which serves as the basis of legitimacy for organized society – the State must carry out some functions by itself, or else, like the polar bear on the melting glacier, it might see its sovereignty melt

⁹⁹ The Academic College, supra note 1, C.P. Beinisch at §24-25.

¹⁰⁰ <http://www.idi.org.il/events1/RoundTableDiscussion/Documents/770.pdf>

¹⁰¹ <http://www.mops.gov.il/NR/rdonlyres/DD6353D8-384D-4500-A867-F09E6642BAB0/0/OmniShabas84.pdf>

¹⁰² Or it may not – cf. <http://www.israelnationalnews.com/News/News.aspx/130542>

away all around it. In a way, this is the mirror-image to the Nozickian “night watchman State” argument: if an anarchist like Robert Nozick¹⁰³ believes that the State should take a minimal role that would include functions such a protection against force, theft, fraud, enforcement of contracts etc. – then clearly the State must not shirk away from its responsibility in these core areas and if it does – then it draws away from the lowest common denominator that legal philosophers have coalesced around as needed for human co-existence in an organized society. Here follows a string of questions that seem to limit this potentially powerful holding:

(1) Is the State allowed to use private sector help to perform its duties more cost effectively? The typical answer would be – yes, as long as the government retains judgment over the main decisions and oversight over the entire operation. If we take the example of military contractors we can see the shortcomings of such notions: can the government really tell The Boeing Company how to manufacture aircraft? Can the government effectively control every gun-carrying contractor in Iraq or Afghanistan?

(2) How adamant is the Court that core public services the government pays for be carried out only by persons directly employed by it? One obvious example concerns public safety and security, a major concern in Israel. The provision of such services runs the gamut in Israel from being carried out by the Israeli Defense Forces or the National Police, to local government, private security firms and security personnel hired by private institutions – standing guard, guns in tow, at the entrance of supermarkets, cinemas, indeed our own lovely campus in Herzliya. For some years now there is evidence that the Israeli government is intent on privatizing, *i.e.* handing over to private security firms, the handling of the checkpoints between Israel and the Palestinian authority, which are analogous to an international border.¹⁰⁴ Is the Court likely to intervene? We highly doubt it.

¹⁰³ See [Robert Nozick](#) ANARCHY, STATE, AND UTOPIA (1974).

¹⁰⁴ The purely military checkpoints that the IDC holds within Palestinian territories will not be privatized. For information and critique see <http://www.pmo.gov.il/NR/rdonlyres/5D4C8D4D-4A2E-40E6-9A1B-AC250702641D/0/freeinfo.doc>;
<http://www.knesset.gov.il/protocols/data/rtf/pnim/2007-05-01.rtf>;
<http://www.ir-amim.org.il/Uploads/dbsAttachedFiles/StateComptrollerReport.DOC>;

(3) Another potentially limiting factor to the holding is that the current case involved not only a suspected unconstitutional delegation of powers – but a specific class of citizens who stand in harm's way. Of all categories of protected individuals, incarcerated citizens face perhaps the most extreme predicament. If the current decision is to be limited to its facts it seems unlikely to effect any other privatization that is currently undergoing in Israel. True, shrinking public contribution to healthcare funding sharpens the socio-economic distinctions in Israel, in terms of the availability of healthcare¹⁰⁵ – but is the decline in services provided so much a vital part of the 'social-contract' as the handling of prisoner by for-pay contractors? Again, we doubt the likelihood of Court intervention on such matters.

<http://www.knesset.gov.il/plenum/data/00491810.doc>
<http://www.nrg.co.il/online/1/ART1/711/304.html> (Hebrew) and -
<http://www.haaretz.com/magazine/week-s-end/outsourcing-the-checkpoints-1.230416>.
¹⁰⁵ <http://www.ynet.co.il/articles/0,7340,L-3904888,00.html>.