

CONSTITUTIONAL LIMITS TO PRIVATIZATION: THE ISRAELI SUPREME COURT
DECISION TO INVALIDATE PRISON PRIVATIZATION

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Abstract

The Israeli Supreme Court recently decided to strike down legislation to establish a privately operated prison. The Court's decision to invalidate this legislation is interesting, as it stipulates that prison privatization is unconstitutional per se, irrespective of its specific characteristics or expected outcome. It ruled that executing governmental powers by prison staff employed by a for-profit organization violates the prisoners' basic rights to liberty and human dignity. This essay discusses this position, and points out some of its difficulties. It suggests that while the decision's ultimate outcome can be justified, it would have gained greater (normative) legitimacy if it were based on a constitutional norm prohibiting the privatization of "core" governmental powers rather than on an analysis of human rights.

INTRODUCTION 2

I. BACKGROUND: PRIVATIZATION AND THE ISRAELI CONSTITUTION 3

II. PRIVATIZATION AND THE ENHANCED RISK OF ABUSE OF POWERS 10

III. THE RIGHT NOT TO BE SUBJECT TO "PRIVATIZED" COERCIVE POWERS 16

 1. *Prison Privatization, Popular Legitimacy, and Social Meaning*

 2. *The Court's Reasoning*

 3. *Critical Evaluation*

IV. THE ROAD UNTAKEN: ENFORCING A CONSTITUTIONAL PROHIBITION
 AGAINST PRISON PRIVATIZATION 30

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INTRODUCTION

The Israeli Supreme Court recently decided to strike down legislation to establish a privately-operated prison.¹ The Court's decision to invalidate this legislation is interesting, as it stipulates that despite the popularity of this practice in the democratic world,² prison privatization is unconstitutional per se, irrespective of its specific characteristics or expected outcome. Moreover, while the academic literature on prison privatization generally concentrates on the constraint against delegating governmental powers to private entities,³ the Israeli Supreme Court ruled that executing governmental powers by prison staff employed by a for-profit organization violates prisoners' basic rights to liberty and human dignity.

The eight to one decision is based on two main factors. The first, presented by two of the Justices, is that a private entity employing governmental powers poses an unavoidable risk of an unjustified use of force. According to this view, the very "culture" of for-profit organizations creates a risk of an abuse of power. This risk is sufficiently high to classify the privatization as an infringement of prisoners' rights not to be subject to an unjustified use of force or otherwise humiliating treatment by the prison guards. While this is a consequentialist approach, as it points to the privatization's expected outcome, the Court's analysis is profoundly non-empirical, but rather one that is based on axiomatic assumptions about the outcomes of privatization.

¹ HCJ 2605/05 The Human Rights Division, The Academic Center for Law and Business v. Minister of Finance (November 19, 2009). An English translation is available at: http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf.

² For a list of the dozens of countries in which private prisons operate see, e.g., Richard Harding, *Private Prisons*, in 28 CRIME AND JUSTICE: A REVIEW OF RESEARCH 265, 268-69 (Michael H. Tonry ed., 2001). Indeed, several scholars have pointed out that in recent years "the terms of the debate have shifted from whether we should allow private prisons to how we can best manage them." David Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J. L. & POL. 253, 256 (2003).

³ See, e.g., Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 915 (1988) (the constitutionality of prison privatization under the delegation doctrine "is an extremely close one, and it would not be surprising if a court were to rule against constitutionality."); Warren L. Ratliff, *The Due Process Failure of American Prison Privatization Statutes*, 30 SETON HALL L. REV. 371 (1997); David N. Wecht, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987); Joseph E. Field, *Making Prisons Private: An Improper Delegation of Governmental Power*, 15 HOFSTRA L. REV. 649 (1987). See also *infra* note 13.

The second reason, supported by all eight Justices of the majority, stipulates that an inmate is entitled not to be subject to the use of coercive measures by employees of a private, for-profit corporation. According to this view, the very act of implementing incarceration powers by employees of a private entity infringes upon the inmates' rights to liberty and human dignity. This recognition of "a right against privatization" is the central novelty of the Israeli Supreme Court's decision.

This essay discusses these two positions, and points to some difficulties that each of them involves. I suggest that while the decision's ultimate outcome is justified, it would have gained greater (normative) legitimacy if it were based on a constitutional norm prohibiting the privatization of "core" governmental powers rather than on the analysis of human rights. The essay starts, in part I, by briefly presenting the background of the decision. It then moves on to discuss, in parts II and III, each of the two reasons suggested by the Israeli Supreme Court. Section IV concludes, by discussing the possibility of enforcing a constitutional prohibition against prison privatization.

I. BACKGROUND: PRIVATIZATION AND THE ISRAELI CONSTITUTION

Like other Western democracies, Israel has applied, in recent decades, a policy of extensive privatization.⁴ This policy consists of three main elements: a shift from public to private financing of the provision of several goods and services; empowerment of private entities to produce goods and services that were previously produced by state-owned corporations; and the delegation of governmental powers to private persons. These reforms aim mainly at providing better services at lower costs. In many areas, the reforms have been successful, while in others the privatization has invoked intense ideological and political debates.

From a legal perspective, implementing policies of privatization is (or was) generally considered to be well within the powers of the Executive Branch. However, Israeli law

⁴ See, e.g., PRIVATIZATION AND INCREASING COMPETITION IN THE ISRAELI ECONOMY (JCPA and the Milken Institute, 2000); AVI FIEGENBAUM, THE TAKE-OFF OF ISRAELI HIGH-TECH ENTREPRENEURSHIP IN THE 1990'S 33-48 (2007).

has some limitations to its power of privatization in the first element mentioned above—the requirement of individuals to pay for the consumption of certain goods and services. These limitations include mainly explicit provisions in legislation, which require the government to publicly fund certain services (in areas such as education, health care, and others), as well as some “social” rights, that are implicit in the right to human dignity (including the right to elementary education, health, housing, and other aspects of “basic living conditions”).⁵ Nevertheless, in other areas of privatization, Israeli law does not restrict the government’s discretion. The law sets only procedural requirements to prevent corruption and ensure efficiency, but does not impose limitations on the government’s power to privatize state-owned corporations that provide services (such as transportation, telecommunications, and so forth).⁶ The same used to be true regarding the delegation of governmental powers to private persons.

The Israeli Constitution does not include any explicit provision that limits the powers of the Knesset (Israeli parliament) or the government to delegate certain governmental powers to private persons. Until the judgment discussed here, the existing precedents suggested that the Executive Branch may delegate governmental powers to private entities even without explicit legislative authorization. The legitimacy of such privatization was subject only to process-based requirements, such as setting sufficient guidelines by the relevant public entity, taking steps to prevent potential conflicts of interests in the specific context, and implementing supervisory powers.⁷ In this respect, the rule resembles the non-delegation doctrine of the U.S., which does not define specific

⁵ See, e.g., HCJ 366/03 Commitment to Peace and Social Justice Society and others v. Minister of Finance (December 12, 2005). An English translation is available at: http://elyon1.court.gov.il/files_eng/03/660/003/a39/03003660.a39.pdf. See, e.g., Yoram Rabin & Yuval Shany eds., *Economic, Social, and Cultural Rights in Israel* (2004) (in Hebrew).

⁶ See, e.g., Aharon Barak, *Israel Economic Constitution*, 4 L. & GOVERNANCE 357 (2008) (in Hebrew); Barak Medina, “*Economic Constitution*,” *Privatization and Public Funding: A Framework of Judicial Review of Economic Policy*, in ITZCHAK ZAMIR BOOK ON LAW, GOVERNMENT AND SOCIETY 583, 648-52 (Yoav Dotan & Ariel Bendor eds., 2005) (in Hebrew).

⁷ See, e.g., FHCJ 5361/00 Falk v. Attorney General [2005] IsrSC 59(5) 145; HCJ 2505/90 Travel Agents Association v. Minister of Transportation [1990] IsrSC 46(1) 543; HCJ 39/82 Henfling v. Mayor of Ashdod [1982] IsrSC 36(2) 537. See also *infra* note 10.

functions as either properly or exclusively those of the government.⁸ Rather, the rule employs the due-process clause only for protection against uncontrolled discretionary power, and requires the private body to be guided by rules promulgated by governmental agencies and subject to review by a public body.⁹ Accordingly, a considerably wide range of governmental powers in Israel has been delegated to private persons and corporations in recent years. These include: the serving of a custodial sentence by way of unpaid work in private, not-for-profit institutions; the forcible hospitalization of mental patients in private hospitals; the empowerment of various tax collection authorities to resort to the assistance of private collection companies; the privatization of numerous security services; the assignment of private sector lawyers as prosecutors; and the appointment of private persons to serve in official planning and development committees.¹⁰

It should also be noted that this permissive approach towards privatization under Israeli law was supplemented (and can be possibly explained) by the implementation of the “quasi-public” entities doctrine. This doctrine subjects any body authorized to employ governmental powers to the norms of public law, most importantly human rights laws, as well as to the jurisdiction of the Israeli administrative courts, including the High Court of Justice.¹¹ Thus, the concern that was raised in the U.S., that since “private exercises of government power are largely immune from constitutional scrutiny, ...expanding privatization poses a serious threat to the principle of constitutionally accountable

⁸ See, e.g., Dean Cass, *Privatization: Politics, Law and Theory*, 71 MARQ. L. REV. 449 (1988); Clayton P. Gillette & Paul B. Stephan III, *Constitutional Limitations on Privatization*, 46 AM. J. COMP. L. 481, 482 (1998) (“it is hard to identify any function that, as a constitutional matter, has been characterized as inherently public”); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C.L. Rev. 397, 421-33 (2006). However, State law may impose such limits. A notable example is California State Civil Service Act.

⁹ See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). For a modern statement of this doctrine see *Todd & Co. v. SEC*, 557 F.2d 1008, 1012 (3d Cir. 1977), in which the court articulated a three-pronged test. For a review see, e.g., Robbins, *supra* note 3.

¹⁰ The Supreme Court explicitly approved most of these delegations of powers to private entities. See, e.g., H CJ 1783/00 Haifa Chemicals Ltd v. Attorney-General [2003] IsrSC 57(3) 652 (legitimizing empowering private lawyers to prosecute on behalf of the state); H CJFH 5361/00 Falk v. Attorney-General [2005] IsrSC 59(5) 145 (determining that there is no *a priori* conflict of interests in providing private persons with governmental powers, such that decisions of this sort are subject only to specific factual proof of conflict of interests).

¹¹ See, e.g., H CJ 294/91 Jerusalem Burial Society v. Kastenbaum [1991] IsrSC 46(2) 464.

government,”¹² is largely irrelevant in Israel’s case. The private exercising of government power is subject not only to (the required) effective supervision by the Executive Branch, but also to the judicially enforced duties set forth by public law norms. Under Israeli law, the delegation of governmental powers to private persons hardly changes the formal norms to which the power holder is subject.

Consequently, it was assumed that the government is authorized, at least in principle, to empower private corporations to administer a prison. In line with the prevailing view in other jurisdictions, prison privatization was assumed to meet the non-delegation challenge as long as a public body provides sufficiently detailed guidelines for running the prison, and applies effective supervisory powers.¹³ In addition, while in the U.S. the applicability of constitutional scrutiny of private prisons is ambiguous,¹⁴ an outcome that served several commentators to raise doubts about the constitutionality of the

¹² Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1373 (2003).

¹³ See, e.g., *Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999) (“[We] can[not] think of any ...provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government.”); *Montez v. McKinna*, 208 F.3d 862, 866 (10th Cir. 2000); *White v. Lambert*, 370 F.3d 1002, 1013 (9th Cir. 2004). See also Wecht, *supra* note 3, at 834 (“a reasoned application of non-delegation jurisprudence does not require a ban on prison privatization, since the Court’s holdings do not derive from an Article I doctrine of per se invalidity.”); Robbins, *supra* note 3, at 923-24 (“If a corrections agency promulgated rules of prison administration in the first instance, ...[and] control[s] over disciplinary proceedings ...[or] make[s] de novo findings and an independent decision on the violation and the penalty ...courts would uphold delegations to private prison companies.”). Robbins notes, however, that “the factual and philosophical differences between the private prison context and the cases discussed may well motivate a court to hold that a statute authorizing a state to contract with a private company to incarcerate its prisoners is unconstitutional.” *Id.* at 930. See also Connie Mayer, *Legal Issues Surrounding Private Operation of Prisons*, 22 CRIM. L. BULL. 309, 320 (1986) (to avoid legal challenge, it might be preferable for the state to maintain control over all disciplinary proceedings); Rachel Christine Bailie Antonuccio, *Prisons for Profit: Do the Social and Political Problems Have a Legal Solution?* 33 IOWA J. CORP. L. 577 (2008) (prisons privatization does not violate the non-delegation doctrine).

¹⁴ On the one hand, in *Richardson v. McKnight*, 521 U.S. 399 (1997) the U.S. Supreme Court held that private prison guards cannot claim qualified immunity in §1983; but on the other hand it ruled in *Correctional Services Corp. v. Malesko*, 534 U.S. 61(2001) that companies operating private correctional facilities are not subject to civil rights suits. See also *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 101-02 (6th Cir. 1991); *Rosborough v. Management and Training Corporation*, 350 F.3d 459 (5th Cir. 2003). For a discussion see, e.g., Alexander Volokh, Note, *The Law of Prisons: III. A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1838, 1879-87 (2002); Lori DaCrosse, Note, *Richardson v. McKnight: Barring Qualified Immunity from 42 U.S.C. §1983 for Private Jailers*, 26 PEPP. L. REV. 149 (1998). See also Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 Am. U.L. Rev. 531, 577-604 (1989).

privatization,¹⁵ in Israel it was clear, as already indicated, that the private prison and its staff will be subject to all public law norms.¹⁶ To remove doubts the government decided to base the privatization on legislation and after intensive and lengthy discussions, the Knesset enacted the Prisons Ordinance Amendment Law (no. 28), 2004. This Act legitimizes the establishment of one prison, with 800 prisoners, managed by a private corporation. The legislation, consisting of 54 sections, adopts the “British model” (The Criminal Justice Act, 1991), with highly prescriptive contracts, multiple levels of monitoring, and output-based evaluations. This model was chosen based on both the above-mentioned legal doctrine in Israel regarding the legitimate delegation of governmental powers to private entities, and the comparative experience that indicates that this model yields superior performance from the private sector.¹⁷

The Act determines that the prison operator “is responsible for the proper construction, management and operation of the privately managed prison, including: (1) maintaining order, discipline and public security in the privately managed prison; (2) preventing the escape of inmates that are held in custody in the privately managed prison; and (3) ensuring the welfare and health of the inmates and taking steps during the imprisonment that will aid their rehabilitation after their release from imprisonment, including employment training and education” (Section 128.12). On the one hand, the law empowers the employees of the private operator with most powers given to public prison-guards. For instance, the private prison director is authorized, among other things, to order an inmate to be held in administrative isolation for a maximum period of 48 hours, to order an external examination of the naked body of an inmate, and to approve

¹⁵ Robbins, *supra* note 14, at 604; Wecht, *supra* note 3, at 834-35; Metzger, *supra* note 12.

¹⁶ In its decision to invalidate the prison privatization the Israeli Supreme Court acknowledged that “the concessionaire operating the privately managed prison is subject to the judicial scrutiny of the High Court of Justice and the rules of administrative law... . In view of this, and since the powers of the employees of the private concessionaire are subject to restrictions parallel to those imposed on the powers of the officers of the Israel Prison Service, we cannot determine that ...the private concessionaire and its employees [are allowed] to violate the human rights of inmates in the privately managed prison to a greater degree than the violation of the human rights of inmates in a state managed prison.” HCJ 2605/05, *supra* note 1, para 41 (President Beinisch).

¹⁷ For a comparison between the UK and the US models in this context and a review of the research on the performance of each model *see, e.g.*, Pozen, *supra* note 2, at 271-84; RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY (1997).

the use of reasonable force in order to carry out the body search of an inmate. The private prison guards are authorized to use reasonable force and take steps to restrain an inmate, to use a weapon in order to prevent the escape of an inmate, and the power to carry out the body search of an inmate. At the same time, the Act also imposes a long list of restrictions. The Act explicitly states that an inmate held in a privately-managed prison shall have the same rights, benefits and services as an inmate in a state-managed prison (Section 128.11(3)(1)). It also requires all staff members to act according to the public interest, respect inmates' human rights, act reasonably and in accordance with public law norms in general (128.31). All employees are formally subject to the provisions of the Israeli Penal Code, 1977, which apply to civil servants (Section 128.9). In addition, the law does not give the employees of the private operator the power to disciplinary adjudication of inmates or the power to order an extension to the 48-hour period that an inmate is held in administrative isolation. It determines the qualifications required to serve as a staff member at the privatized prison, which are similar to those applied in public prisons. Finally, the Act establishes a comprehensive supervisory scheme that requires public-service supervisors to closely monitor the prison, empowers them to revoke the contractor's license to operate the prison (Sections 128.32-35), and imposes the prison director to report immediately any use of coercive measures against a prisoner.

The government estimated that running the 800-prisoner facility by a private corporation would enable substantial improvement of prisoners' living conditions, while saving the state approximately 350 million NIS (close to 100 million US dollars) over the entire license period of 25 years.¹⁸ In response to the concern that this policy will have adverse effects on prisoners, the supporters of this move pointed out that the privatization of only one prison will serve as a pilot and an advisory committee, established by the Act,

¹⁸ HCJ 2605/05, *supra* note 1, para 47 (President Beinisch) ("The state... [argued that the privatization] is expected to bring about a saving ... which is estimated at approximately 20%-25% of the cost of operating a prison, with similar standards, that is built and operated by the Israel Prison Service. According to this opinion, the saving over the whole period of the concession is estimated at approximately NIS 290-350 million."). For a discussion on the cost-benefit analysis of prisons privatization *see, e.g.*, CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 76-118 (1990); Travis C. Pratt & Jeff Maahs, *Are Private Prisons More Cost-Effective than Public Prisons? A Meta-Analysis of Evaluation Research Studies*, 45 *CRIME & DELINQUENCY* 358 (1999) (the empirical evidence regarding whether private prisons are more cost-effective than public institutions, however, is inconclusive).

will collect data and analyze the consequences of this experiment before deciding whether to expand this policy to other incarceration facilities or to cancel it altogether.

A petition challenging the constitutionality of the Act was filed to the Supreme Court in 2005. The Court did not resolve the case for several years as proposals to repeal the Act were discussed in the Knesset. Finally, in November 2009, after the legislation proposals were not accepted, the Court ruled, in an eight to one decision, that the entire amendment was invalid. This is the first time in Israel's short history of judicial review of legislation that an entire body of legislation, rather than specific provisions, was declared invalid.

Before turning to the Court's reasoning, it is important to add a few words on the Israeli Constitution and the judicial review of legislation. Following the failure to create a complete Constitution at the time of Israel's foundation in 1948, the Knesset, which serves as both the Legislative branch and as the Constitutive assembly, decided to create a Constitution in a piece-meal process. Each part is titled "Basic-Law," and the vision was that when all chapters are enacted, they will be combined to form the Constitution. Over the years, the Knesset enacted eleven Basic-Laws, including, in 1992, the Basic-Law: Human Dignity and Liberty. However, the Knesset left some ambiguity (probably on purpose) as to the legal status of these Basic-Laws in the interim period, before they are combined to form the Constitution. The Basic-Laws include neither an explicit "supremacy" clause nor enforcement mechanisms of their provisions over legislation. At first, the Supreme Court held that only (the handful of) provisions in the Basic-Laws that include explicit entrenchment clauses should be considered as limiting the legislature. However, in 1995, in the *Bank Mizrahi* case, the Supreme Court changed course.¹⁹ It ruled that even though the Basic-Law: Human Dignity and Liberty does not include an entrenchment clause, its provisions bind the legislature. The decision was based mainly on the inclusion of a "limitation clause" in this Basic-Law, which determines the requirements that an act that infringes upon basic rights should fulfill. At that decision the Court added that all Basic-Laws are the supreme law of the land, based on the view that

¹⁹ CA 6821/93 United Bank Ha'Mizrahi Ltd. v. Migdal [1995] IsrSC 49(4) 221.

the Knesset enjoys the powers of the Constitutional assembly, and every piece of legislation that is titled “Basic-Law” is the product of employing constitutive powers. However, in the years that followed this decision, the court almost entirely avoided reviewing legislation on the basis of the infringement of provisions in non-human-rights Basic-Laws. It is generally assumed that the lack of explicit “limitation clauses” in these Basic-Laws makes it much less legitimate to base judicial review of legislation on these provisions, both in terms of normative and popular legitimacy. Indeed, in the years following the *Bank Mizrahi* decision, in all of the almost ten instances in which the Israeli Supreme Court declared Acts of the Knesset invalid, the decision was based on the findings that the legislation infringes upon a basic human right enumerated in the Basic-Law: Human Dignity and Liberty (or Basic-Law: Freedom of Occupation). Given this background, it should come as no surprise that the Court’s analysis of the legitimacy of prison privatization focused on claims of human rights violations. I return to this point in part IV below.

As indicated, the Court’s decision consists of two main approaches. I begin with presenting and evaluating the approach endorsed by Justices Procaccia and Naor.

II. PRIVATIZATION AND THE ENHANCED RISK OF ABUSE OF POWERS

A common argument against prison privatization concerns the dangers of excessive and arbitrary use of force. The central claim is that private prisons would violate prisoners’ human rights more often than public ones.²⁰ Arguably, corporations can be

²⁰ See, e.g., Ahmed A. White, *Rule of Law and the Limits of Sovereignty: The Private Prison in Jurisprudential Perspective*, 38 AM. CRIM. L. REV. 111, 143 (2001) (“the intrusion of profit motives into management decisions is a pervasive problem with private prisons... [It] encourages not only the employment of under-trained and disinterested employees but aggregate reductions in staffing—practices which in turn account in part for elevated levels of abuse, inmate-on-inmate violence.”). White suggests that while “aggressive courts, competent legislatures, and zealous reformers *theoretically could* resolve all the diverse problems that plague private prisons ...the private prison seems a hopelessly problematic institution.” *Id.* at 146. See also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L. J. 439, 502 (2005) (“although existing oversight and accountability mechanisms are not wholly ineffectual, they fall far short of providing adequate safeguards against prisoner abuse [in private prisons]”); Harold J. Sullivan, *Privatization of Corrections: A Threat to Prisoners’ Rights*, in PRIVATIZING CORRECTIONAL INSTITUTIONS 139 (Gary W. Bowman et al. eds., 1993).

expected to mistreat inmates in order to cut costs, or may cut back on labor expenses, leaving inmates at the mercy of unscreened, untrained, understaffed, and underpaid employees.²¹

The problem with these arguments is that they are not supported by the data collected in countries that have adopted the policy of prison privatization, certainly those that have applied the “British” model of intensive regulations and supervisions.²² It is also unclear that the case-to-case judicial review of decision of the private prison authorities, even when applying heightened judicial scrutiny,²³ is insufficient to mitigate the risk of abuse. Thus, while this concern may well justify imposing restrictions on the legitimate form of prison privatization, and may even justify declaring invalid specific privatization practices that have proved to excessively violate human rights, it cannot justify determining that *all* prison privatization will cause an unjustified infringement of prisoners’ human rights and is thus unconstitutional per se.

These concerns notwithstanding, two of the Justices in the Israeli Supreme Court, Justices Procaccia and Naor, based their decision to invalidate the prison privatization Act primarily on the view that the risk of harm posed by *any* form of prison privatization is sufficiently high to justify declaring this policy invalid.

In their concurring opinions, Justices Procaccia and Naor based their position on an assessment of the expected effect of the privatization on two types of rights, both of them incorporated in the right to human dignity. First, inmates are entitled to the right to enjoy

²¹ For a review of the literature on the proposed contradiction between the provision of quality services and the financial self-interests of private prison contractors see DAVID SHICHOR, PUNISHMENT FOR PROFIT 135-65 (1995); Todd Mason, *For Profit Jails: A Risky Business*, in PRIVATIZING CORRECTIONAL INSTITUTIONS 163 (Gary W. Bowman et al. eds., 1993).

²² The empirical research is voluminous. For a review of the literature see, e.g., Pozen, *supra* note 2, at 281 (concluding that “[t]o the surprise of their critics and the satisfaction of their supporters, private prisons have a reasonable track record in the United States and the United Kingdom so far”); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 946 (2004) (“the claim that private punishment violates human rights more often than public punishment ... has been vigorously and carefully contested, and there is very little empirical evidence to support it.”). See also Logan, *supra* note 18, at 119-148; SHICHOR, *supra* note 21; Gaes et al., *The Performance of Privately Operated Prisons: A Review of Research*, in PRIVATE PRISONS IN THE UNITED STATES: AN ASSESSMENT OF CURRENT PRACTICE app. 2 (Douglas C. McDonald et al. eds., 1998).

²³ Wecht, *supra* note 3, at 834-35.

some minimal living conditions, including reasonable physical space, food, health services, and personal security, as well as the right to enjoy sufficient educational and rehabilitation programs. Following these requirements is an essential element to what is considered a legitimate form of punishment in a liberal democracy.²⁴ Second, inmates are entitled to the right not to be subject to an unjustified use of force or otherwise humiliating treatment by the prison guards.

Justice Procaccia pointed out the two conflicting potential outcomes of prison privatization. On the one hand, it may well improve prisoners' living conditions in all relevant aspects.²⁵ This prediction can be based on a simple economic analysis. The various dimensions of prisoners' living conditions can be easily measured and monitored by the state. As such, they are expected to be internalized by competing would-be private contractors. Indeed, the experience in other countries supports this prediction.²⁶ However, Justice Procaccia added that, at the same time, privatization creates an enhanced risk of abuse of the second type of rights mentioned above. This prediction, too, is based on an evaluation of the contractor's economic incentives. Presumably, it is notoriously difficult to closely monitor private prison employees' use of corrective measures against prisoners and their daily attitudes towards prisoners.²⁷ As a result, given the contractor's purpose of maximizing profits by minimizing operation costs, the likely result is an abuse of

²⁴ H CJ 2605/05, *supra* note 1, para 33-34 (Justice Procaccia) ("When a person enters a prison, he loses his liberty, but he does not lose his dignity. Providing a person's basic needs, which is an absolute condition for living with dignity, is also necessary for an inmate serving his sentence in prison, and the state is obliged to provide them and allocate the necessary resources for this purpose. ... Thus it has been recognized that every prison inmate has a basic right to sleep on a bed ... These basic needs are joined by the needs for food and drink, clean clothes, fresh air, a minimum living space inside the prison and responsible medical treatment. ... The state is obligated to provide these basic living conditions for inmates in its custody, and it must allocate the necessary budget for this purpose."); para 2 (Justice Levy). *See also*, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 409-19 (2004); *Brandon v. State Dep't of Corr.*, 938 P.2d 1029, 1032 (Alaska 1997) (prisoners have a constitutional right to rehabilitation).

²⁵ H CJ 2605/05, *supra* note 1, para 18 ("Transferring the exercise of sovereign power to a private enterprise ... is likely to bring ... social, economic and cultural benefits that serve the public interest in various fields."). *See also id.*, para 29-38.

²⁶ *See, e.g.*, Pozen, *supra* note 2, at 281 ("Private prisons' quality of service seems to have been particularly high in the United Kingdom.").

²⁷ H CJ 2605/05, *supra* note 1, para 21.

prisoners' right to human dignity.²⁸ The contractor's incentive schemes, and the lack of a "civil-service" organizational culture, pose a considerable risk of violation of prisoners' rights.²⁹ Justice Naor also referred to this risk of abuse of power by the contractor, mainly due to the lack of sufficient monitoring schemes.³⁰

According to Justice Procaccia, the legitimacy of privatization hinges on whether the privatization is in the prisoners' best interests. She ruled that the required "balance" is between the potential of providing prisoners with improved living conditions that *go beyond* the minimum required by law, and the risk of violating the "core" of prisoners' right to human dignity.³¹ Justice Procaccia held that the latter risk of privatization outweighs the former potential benefits and thus, found that privatization unjustifiably infringes upon prisoners' right to human dignity, and declared it invalid.³² She ruled that "the potential harm that is inherent in the privatization of a sovereign authority is integral

²⁸ *Id.* para 16 ("The involvement of an improper and irrelevant consideration in the exercise of sovereign coercive authority in the criminal proceeding creates a real potential risk of a distortion of the proper balance between the need to use power to achieve a purpose in the public interest and the protection of the human rights of the individual.").

²⁹ *Id.* para 18-20 ("The balance and restraint in the exercise of enforcement power ... cannot be relied upon in the hands of a party that is not an organ of the state. ... The private enterprise ... has never internalized the doctrine of balances in the exercise of sovereign power. ... The mechanisms of training, education, supervision and discipline that are built into the civil service for its employees, and which define the rules of exercising sovereign power, do not apply to it. ... [A] real concern arises that transferring [coercive powers] to a private enterprise will result in disproportionate harm to the individual, which may make such a transfer illegitimate.").

³⁰ *Id.* para 16 ("the disparities in knowledge between the concessionaire and the state, despite its supervisory role, may be abused for the self-interest of the concessionaire and to the detriment of the inmates in its custody."). *See also id.* para 15 ("[Private operator] is tainted by an inherent conflict of interests in exercising sovereign authority, because it is an entity that is motivated by considerations of profit, which are improper considerations when exercising a sovereign power regarding the imposition of imprisonment and the manner in which it is imposed. This is an *a priori* conflict of interests that does not require any specific factual proof.").

³¹ *Id.* para 50.

³² *Id.* para 50 ("Achieving an improvement in prison conditions, although important, cannot outweigh the potential violation of the core rights of prison inmates, which is inherent in giving power to the private concessionaire to exercise sovereign authority over individuals under its control. In a democratic constitutional state, the price of enhancing the welfare of a person should not be paid in a manner that causes a possible violation of his core human rights.").

to it and of such a degree that it does not allow for a process of experimentation and arriving at conclusions in consequence thereof.”³³

This position raises several difficulties. First, it substantially expands the definition of an “infringement” of basic liberty to encompass acts that merely have the potential to inflict harm, which is uncertain. Exposing a person to the risk of harm should be classified as an infringement of rights only if the magnitude of the risk, in terms of the type of harm and the likelihood of its realization, exceeds some substantial threshold.³⁴ There is clearly a basis for concern that the private operator’s incentive schemes will induce an abuse of power; and one cannot easily dismiss the possibility of an ineffective regulation, for instance, due to “capture” or the lack of expertise in the civil service when the state does not take part in administering prisons.³⁵ However, the scope of the risk that prison guards at a private prison will use unjustified force or that they will humiliate prisoners, are empirical and should be determined by a detailed examination of the specific provisions of the legislation, the scope of monitoring powers of the supervisors, and so forth. As already argued above, the data collected thus far in other countries do not support the view that the risk of harm to prisoners’ rights is sufficiently high to characterize any prison privatization as a human rights violation.³⁶ This is especially true given the comprehensive supervisory mechanisms implemented in Israeli law.³⁷

³³ *Id.* para 51. *See also id.* para 25-26 (Justice Naor).

³⁴ *See, e.g.*, Frank Jackson & Michael Smith, *Absolutist Moral Theories and Uncertainty*, 103 J. PHIL. 267 (2006); Ron Aboodi, Adi Borer, and David Enoch, *Deontology, Individualism, and Uncertainty: A Reply to Jackson and Smith*, 105 J. PHIL. 259 (2008). *Cf.* David McCarthy, *Rights, Explanation, and Risks*, 107 ETHICS 205, 208-12 (1997) (imposing even low-probability risks infringes (moral) rights).

³⁵ *See, e.g.* Pozen, *supra* note 2, at 282 (“[W]hile private prisons have performed respectably in the aggregate, their results have been highly inconsistent—including the troubling examples of riots in several U.S. private prisons and abuses ...in the United Kingdom. Rather than be seen as outliers, these breakdowns in prison management should be seen as indicative of the risks of contracting.”).

³⁶ *See supra* note 22.

³⁷ *See* HCJ 2605/05, *supra* note 1, para 42 (President Beinisch) (“These supervisory mechanisms, which are apparently more comprehensive than the supervisory mechanisms that exist in other countries where private prisons operate in a similar format, are *prima facie* capable of reducing the concern that the violation of human rights in the privately managed prison will be greater than that in the prisons of the Israel Prison Service. ...[W]e should assume that the supervisory mechanisms provided in the amendment will operate properly; in any case, the arguments with regard to the manner of exercising them are the kind of arguments that are more suited to being examined in an administrative petition than in a constitutional one.”). *See also*

Second, the characterization of the expected improvement in prisoners' living conditions to exceed the "minimum required" is debated. As pointed out by Justice Levy in his dissent, the current living conditions in Israel's prisons is far from satisfactory.³⁸ Justice Procaccia conceded that given the current budget limits,³⁹ and the fact that current and would-be prisoners fail to form an effective interest group, an improvement is likely only through privatization.⁴⁰ Justice Procaccia's position does not address the challenge that even if prisoners' current living conditions met the minimum set by law, they would fall below the requirement set by the human rights law.⁴¹ Indeed, a decision that privatization is required in order to terminate the continuing infringement of inmates' right to human dignity might be interpreted as an acknowledgement not only of the public prisons' failure, but also of the Court's inability to remedy this lasting injustice. However, this concern cannot justify the result of placing so little weight on the potential benefit of privatization. It seems that once the Court was willing to concede that a substantial improvement in living conditions cannot be expected in the near future other than through privatization, a greater weight should have been assigned to the expected benefits of privatization in comparison to its expected risks.

id. para 5 (Justice Levy, dissent) ("prospective constitutional scrutiny is possible only when there is a high probability ...that the assumptions underlying it will be realized. ...This is the reason why I have difficulty in reconciling myself to a position that is based on a *potential* violation of rights, when the chances that it will occur are not currently known.").

³⁸ *Id.* para 3 ("at the present, because of budgetary and other crises, the subject of imprisonment finds itself frequently relegated to a low place in the order of the government's priorities."). *See also* Uri Timor, *Privatization of Prisons in Israel: Gains and Risks*, 39 *Isr. L. Rev.* 81, 100 (2006).

³⁹ H CJ 2605/05, *supra* note 1, para 32 ("The significant increase in the number of prison inmates and persons held under arrest in Israel, the serious long-term security problems that result in an increase in the number of security prisoners and detainees, the rise in serious crimes and the escalating number of foreign workers and illegal aliens held under arrest until they are deported have all significantly increased the need for the resources and means required to maintain prison facilities to the required standards. ...[I]t is hard to find the additional resources needed to improve the welfare of prison inmates.").

⁴⁰ *Id.* para 34 ("In the complex reality of social life in Israel, with its many essential needs, giving budgetary preference to improving the welfare of the prison inmate beyond the basic standards required by law is not assured."). It should also be added that prisons privatization may indirectly induce improvements in the inmates' living conditions in public prisons too, through the greater public attention that the operation of private prisons attract. Logan, *supra* note 18, at 256-57.

⁴¹ *See supra* note 24.

Lastly, given the assumption that the purpose of privatization is to enhance prisoners' interests, such that the question is what its net expected effect would be, employing strict judicial review of the legislation in this case is hard to justify. There has been no claim that the legislature disregarded inmates' legitimate interests or decided the issue without sufficient research and consideration.⁴² The required assessment is merely what the actual expected outcome of privatization on inmates' interests and welfare is, and the Court should have shown greater deference to the legislature. The risks may or may not materialize, as the conflicting data from other countries indicate, and the expected improvement in living conditions may or may not outweigh the risk. It is unclear what is the basis of preferring the Court's prior assessment in this regard over that of the political branches.⁴³

III. THE RIGHT NOT TO BE SUBJECT TO "PRIVATIZED" COERCIVE POWERS

1. Prison Privatization, Popular Legitimacy, and Social Meaning

An alternative argument that has been made in the academic literature against prison privatization (and against the privatization of other uses of force, such as policing and military force) points to the effect of privatization on the *social meaning* of punishment and thus on its (normative) legitimacy.⁴⁴ This argument too starts with the premise that unlike the government, private corporations who run prisons pursue profits. However, the alleged concern does not focus on a prediction of the different outcomes of private and

⁴² Cf. Linda G. Cooper, *Minimizing Liability with Private Management of Correctional Facilities*, in *PRIVATIZING CORRECTIONAL INSTITUTIONS* 131 (Gary W. Bowman et al. eds., 1993) (governments who privatize prisons are not interested in safeguarding the rights of inmates but rather in promoting popular agendas and cutting costs); Rosky, *supra* note 22, at 944-49.

⁴³ See HCJ 2605/05, *supra* note 1, para 9 (Justice Levy, dissent). It should be noted that President Beinisch, who delivered the opinion of the Court, was probably aware of this difficulty, and stated that the social benefit of the privatization is merely economic saving. She thus ruled that the Court should avoid presenting the required scrutiny as a balance between the inmates' competing interests. *Id.* para 68 ("[T]he balancing formula proposed by my colleague Justice Procaccia, ...undermine[s] to a large degree the manner in which the limits of permitted violations of human rights are defined ...because it may be assumed that in a considerable number of cases ...it will also be possible to 'translate' the value of public interest that is weighed on the scales against the violated human right into another human right.").

⁴⁴ For a clear presentation and evaluation of this argument see Rosky, *supra* note 22, at 963-70.

public prisons, but rather on the symbolic or communicative aspect of incarceration. Presumably, liberal states impose sanctions not only to stop crimes, but also to send a message about the “public nature” of the punishment: “The badge of the arresting police officer, the robes of the judge, and the state patch of the corrections officer are symbols of the inherently public nature of crime and punishment.”⁴⁵

The claim is that implementing sanctions through private prisons conveys the wrong message of the practice of incarceration. The exercise of power by employees of a for-profit organization conveys a social meaning of “commodification” of the use of force, and that inmates in a private prison are only a means to an end.⁴⁶ It is also suggested that privatization places cultural “distance” between the use of force and the citizens of the liberal state.⁴⁷ This “distance” too, conveys a social meaning of disrespect to prisoners.⁴⁸

⁴⁵ John DiIulio, Jr., *The Duty to Govern: a Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST 155, 173 (Douglas C. McDonald ed., 1990). *See also id.*: “[T]he message ‘Those who abuse liberty shall live without it’ ...ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual. The administration of prisons and jails involves the legally sanctioned coercion of some citizens by others. This coercion is exercised in the name of the offended public.” *See also* Ira P. Robbins, *Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 827 (1987) (“[The] symbolic question may be the most difficult policy issue of all for privatization: Who should operate our prisons and jails ... assuming that prisoners and detainees will retain no fewer rights and privileges than they had before the transfer to private management? In an important sense, this is really part of the constitutional-delegation issue, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy, and therefore should not be delegated.”).

⁴⁶ Michael Walzer, *At McPrison and Burglar King It's ...Hold the Justice*, NEW REPUBLIC, April 8, 1985, p. 11.

⁴⁷ *Id.*; White, *supra* note 20, at 139 (“Private prisons tend to distance public officials from responsibility for the way private prisons are run.”). *See also* Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1008 (2004) (pointing at the practice of “tactical privatization,” which is motivated “by a desire to alter substantive policy: Private agents would be used to achieve public policy ends that would not otherwise be attainable, were the government confined to relying exclusively on members of the U.S. Armed Forces. ... [Privatization helps] to elude public debate, circumvent Congress’s coordinate role in conducting military affairs, and evade Security Council dictates...”).

⁴⁸ Walzer, *id.* at 12-13. A related moral, rather than cultural argument is offered by Alon Harel, who argues that private prison guards, but not public ones, are (morally) required to employ discretion about the legitimacy of depriving inmates of their right to freedom. Consequently, private entities which imprison people should not be regarded merely as executing or implementing public decisions, but instead as ones that employ their own private judgements concerning the justness of the sanctions they inflict. Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113 (2008).

This type of arguments raises several difficulties. First, the claim that the lack of “social” legitimacy deprives the practice of incarceration of its normative legitimacy is not explained. It is not clear what exactly the social message that the inflicting of punishment should convey as a prerequisite for its legitimacy.⁴⁹ Second, even if one could establish some kind of such an essential symbolic message⁵⁰ or “social meaning” to punishment,⁵¹ it has not been established that a prison operated by a private corporation necessarily conveys the wrong message.⁵² Arguably, the social meaning of punishment is shaped primarily by the role of the “public” in deciding on the sanctions and regulations of the prisons, and much less by the identity of the entity, which operates the prison.⁵³ Third, assuming that one may attribute some “cultural” or even moral deficiency in private prisons, the arguments suggested thus far in the academic literature do not specify any established constitutional doctrine that can be used to (legally) invalidate such a policy.

The decision of the Israeli Supreme Court aims to provide this missing link between the cultural and ethical theories and constitutional law. According to the Court’s approach, the symbolic social meaning of the privatization of the power to incarcerate amounts to an infringement of prisoners’ rights to liberty and human dignity, and since

⁴⁹ See Rosky, *supra* note 22, at 965 (n. 316) (“Commodification critics rarely trouble themselves to spell out normative conclusions and principles—to explain why the social meaning of punishment, policing, and military force is, or should be, important. . . . Social meaning does not stand alone; it stands alongside countless other serious compelling concerns. . . . In lieu of such arguments, cultural critics normally proffer canned assumptions and assertions that exercises of punishment, policing, and military force ‘must’ send public messages.”).

⁵⁰ For such attempts see, e.g., R.A. DUFF, TRIALS AND PUNISHMENTS 233-62 (1986) (the aim of punishment should be to censure offenders, in such a way as to provide them an opportunity for moral reform. Punishment must aim at the rational moral persuasion of offenders, convincing them to repent their wrongdoing and reunite with the community); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L.R. 1659 (1992) (the aim of punishment is to symbolically nullify the demeaning messages conveyed by certain types of wrongdoing and reaffirm the victim’s equal value).

⁵¹ Rosky, *supra* note 22, at 966 (“Liberal societies police and punish criminals to proclaim that crime is wrong and the social contract is right. . . . These social meanings are vital social resources; they are a large part of what binds us together and makes us behave. When we exercise punishment, . . . we strengthen the cultural foundations of our political, legal, economic, and social systems.”).

⁵² Richard L. Lippke, *Thinking About Private Prisons*, 16 CRIM. JUST. ETHICS 26, 35 (1997) (“private prisons [too] might be able to convey the right sort of message.”); Rosky, *supra* note 22, at 967-70.

⁵³ Rosky, *id.* at 967-68.

the state cannot show a compelling public interest in privatization, such a policy is invalid.

President Beinisch, who delivered the opinion of the Court, explicitly acknowledged that it was not sufficiently established that the operation of private prisons would necessarily result in more severe harm to inmates' basic rights, in comparison to public prisons.⁵⁴ The Court ruled that privatization is illegitimate based on the principle that the state, through its organs, must maintain its monopoly on the use of force and may not delegate this power to private entities. The authorization of private persons, who are not part of the public service, to employ coercive powers such as those granted to prison guards is illegitimate *per se*, regardless of the actual or expected use of these powers by such persons.⁵⁵

2. *The Court's Reasoning*

The Court ruled that a person is entitled, in addition to the right not to be incarcerated (as part of the right to liberty), to the independent right not to be incarcerated in a private prison.⁵⁶ The Court's decision that a person is entitled to the latter right, which is classified as part of both the right to liberty and to human dignity, is based on two main

⁵⁴ HCJ 2605/05, *supra* note 1, para 67 (“[N]o adequate probative basis has been brought before us for a judicial decision regarding the potential violation that [the prison privatization law] may cause to the human rights of inmates in the privately managed prison in comparison to the state prisons; certainly no sufficient basis was established in order for us to determine that there exists the [required] degree of likelihood, namely ‘a near certainty that when realized will materially and seriously violate a constitutional basic right.’”); *id.* at para 47 (“A[t] this stage of the ‘privatization’ planning process, we [are un]able to determine that [it] is not *prima facie* capable of realizing the purposes of an economic saving and improving the prisons conditions of inmates that it was designed to achieve.”).

⁵⁵ *Id.* para 67 (“[M]y position regarding the unconstitutionality of [the prison privatization law] is not based on a potential violation of human rights caused by the provisions of the amendment, but on the actual violation of the constitutional rights to personal liberty and human dignity caused by the provisions of the amendment themselves, irrespective of the manner in which they will actually be implemented.”).

⁵⁶ The Court stated that a person's right to liberty is infringed not only by the criminal court's decision to imprison that a person, but also by the execution of this decision. *Id.* para 25 (President Beinisch) (“Indeed, from a normative viewpoint, the decision of the competent courts of the state to sentence a particular person to imprisonment is the source of the power to violate the constitutional right of that individual to personal liberty. But the actual violation of the right to personal liberty takes place on a daily basis as long as he remains an inmate of the prison. This violation of the right to personal liberty is inflicted by the party that manages and operates the prison where the inmate is held in custody, and by the employees of that party, whose main purpose is to ensure that the inmate duly serves the term of imprisonment to which he has been sentenced ...and complies with the rules of conduct in the prison, which also restrict his personal liberty.”).

grounds—the “democratic legitimacy” of imposing sanctions, and the symbolic effect of private incarceration on the status of the inmate.

According to the first reason, employing coercive powers by persons who are not employed by state organs lacks “democratic legitimacy.” The (popular) legitimacy of the use of force is subject to the constraint that the power-holder aims, as an institutional matter, to promote the social interest rather than some private interest. In the words of President Beinisch:⁵⁷

“[T]he democratic legitimacy for the use of force ...relies on the fact that organized force exercised by and on behalf of the state is what causes the violation of ...rights. Were this force not exercised by the competent organs of the state, in accordance with the powers given to them and in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy, and it would constitute *de facto* an improper and arbitrary use of violence.”⁵⁸

This position, that only the exercising of criminal sanctions (and the use of force in general) by state organs gains sufficient “democratic” or popular legitimacy, seems to be based on two related positions: the enhanced risk that the authority to use force will be abused by persons whose employer is not a state organ;⁵⁹ and the concern that the exercising of criminal sanctions by private persons will convey the wrong social message of the act of inflicting punishment.⁶⁰ It is not clear whether the Court endorsed these

⁵⁷ *Id.* para 26.

⁵⁸ *See also id.* para 20 (Justice Procaccia) (“The exercise of coercive authority by a party that is not the state, which violates core human rights, necessarily does not enjoy the confidence and acceptance of society. It lacks social, moral and constitutional legitimacy.”); *id.* para 27.

⁵⁹ *Id.* para 26 (President Beinisch) (“The fact that the organized force is exercised by a body that acts through the state and is subject to the laws and norms that apply to anyone who acts through the organs of the state and also to the civil service ethos in the broad sense of this term is capable of significantly reducing the danger that the considerable power given to those bodies will be abused, and that the invasive powers given to them will be exercised arbitrarily or in furtherance of improper purposes. ...[S]ince those bodies act within the framework of the democratic political mechanism and are subject to its rules, their legitimacy is enhanced.”).

⁶⁰ *Id.* para 29 (President Beinisch) (“[W]hen the state ...denies the personal liberty of an individual—in accordance with the sentence that is imposed on him by a competent court—it thereby discharges its basic responsibility as sovereign for enforcing the criminal law and furthering the general public interest. By

positions. On the one hand, it explicitly stated, as already indicated, that “[t]he independent violation of the constitutional right to personal liberty of inmates in a privately managed prison exists even if we assume that from a factual-empirical viewpoint it has not been proved that inmates in that prison will suffer worse physical conditions and invasive measures than those in the public prisons.”⁶¹ The Court’s position may thus be that popular legitimacy of prison privatization is a precondition for its normative legitimacy, and the former is shaped according to popular perceptions (rather than those of the Court) of the expected outcome of such a policy. On the other hand, the Court refers extensively to the state’s obligations to maintain exclusive control over the prisons according to the “social contract.”⁶² This may indicate an objective, normative approach, rather than merely a popular one, about the legitimate form of punishment.

The second reason that the Court gave for the position that a person is entitled to an independent right not to be incarcerated in a private prison is the symbolic aspects of the interaction between the private prison guards and the inmate. The Court noted that “we should take into account not merely that person’s actual loss of personal liberty for a certain period, but also the manner in which he is deprived of liberty,”⁶³ and ruled that “the existence of a privately managed prison ...inherently [violates] the human dignity of prison inmates.”⁶⁴ The basis for this position resembles the argument mentioned above,

contrast, when the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined, since the sanction is enforced by a party that is motivated first and foremost by economic considerations—considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes.”).

⁶¹ *Id.* para 30 (President Beinisch). *See also supra* note 54.

⁶² *See, e.g., id.* para 23 (President Beinisch) (“Although, naturally, many changes and developments have occurred since the seventeenth century in the way in which the nature and functions of the state are regarded, it would appear that the basic political principle that the state ...is responsible for public security and the enforcement of the criminal law has remained unchanged..., and it is a part of the social contract on which the modern democratic state is also based.”); *id.* para 2 (Justice Arbel) (“The transfer of these functions from the state to a private enterprise undermines the justification that underlies the exercising of the power and amounts to a refusal by the state, albeit only a partial one, to play ‘its part’ in the social contract. It makes the state a bystander that does not seek to realize independent goals of its own.”); *id.* para 2-4 (Justice Hayut); *id.* para 4 (Justice Procaccia); and more.

⁶³ *Id.* para 30 (President Beinisch).

⁶⁴ *Id.* para 37 (President Beinisch).

about the alleged “commodification” of the use of force, and that in private prisons inmates are treated inevitably as only a means to an end.⁶⁵

“Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison ...turns the prisoners into a means whereby the corporation that manages and operates the prison makes a financial profit. It should be noted that the very existence of a prison that operates on a profit-making basis reflects a lack of respect for the status of the inmates as human beings, and this violation of the human dignity of the inmates does not depend on the extent of the violation of human rights that actually occurs behind the prison walls.”⁶⁶

The Court referred to the approach offered by Meir Dan-Cohen, according to whom “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.”⁶⁷ The Court added that “a violation of [the right to] human dignity [occurs] ...when a certain act that is done or a certain institution that is created reflects an attitude of disrespect from a social viewpoint towards the individual and his worth as a human being.”⁶⁸ It found such an “attitude of disrespect” in the context of prison privatization:⁶⁹

⁶⁵ *Id.* para 36 (President Beinisch).

⁶⁶ *See also id.* at para 51 (“Imprisonment that is based on a private economic purpose turns the inmates, simply by imprisoning them in a private prison, into a means whereby the ...operator of the prison can make a profit; thereby, not only is the liberty of the inmate violated, but also his human dignity.”); *id.* para 3-5 (Justice Arbel); *id.* para 18 (Justice Naor).

⁶⁷ MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 162 (2002).

⁶⁸ H CJ 2605/05, *supra* note 1, para 38 (President Beinisch).

⁶⁹ *Id.* para 39 (President Beinisch).

“When the state transfers the power to imprison someone, with the invasive powers that go with it, to a private corporation that operates on a profit-making basis, this action—both in practice and on an ethical and symbolic level—expresses a divestment of a significant part of the state’s responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise. This conduct of the state violates the human dignity of the inmates of a privately managed prison, since the public purposes that underlie their imprisonment and give it legitimacy are undermined, and ...their imprisonment becomes a means for a private corporation to make a profit. This symbolic significance derives, therefore, from the very existence of a private corporation that has been given powers to keep human beings behind bars while making a financial profit from their imprisonment.”

Finally, the Court emphasizes that this symbolic “injury, caused by the exercise of authority over an inmate by an employee of a private company, ...is not an injury that derives from the subjective feelings of those inmates, but an objective violation of their constitutional right to human dignity.”⁷⁰

Given the decision that privatization infringes upon prisoners’ basic liberties, the Court examined whether this infringement meets the proportionality requirement. It held that the harm to prisoners’ basic rights outweighs the expected benefit of operating private prisons,⁷¹ and thus declared the Act invalid and prohibited the operation of a prison by a private corporation.

⁷⁰ *Id.* para 37 (President Beinisch).

⁷¹ *Id.* para 52-55 (President Beinisch). It should be noted that while Justice Procaccia accepted the claim that the purpose of the privatization, and hence its social benefit, is to improve the prisoners’ living conditions (*see supra* Part II), President Beinisch ruled that the social benefit is merely economic saving: *id.* para 54, 68 (“I do not think that in the circumstances of the case ...it is possible to hold that improving the welfare of the prison inmates is the [privatization’s] main purpose. ...The purpose of improving the welfare of prison inmates ...could have been achieved without any need for any normative change.”). *See also supra* note 43.

3. *Critical Evaluation*

In my opinion, the Court's reasons are susceptible to the difficulties that were raised against similar arguments, as discussed above. In what follows, I try to evaluate the Court's decision from two main perspectives—the position that if incarcerating a person in a private prison lacks social legitimacy and conveys a symbolic message of disrespect toward the inmates, it amounts to an infringement of the inmate's rights to liberty and human dignity; and the view that private prison lacks social legitimacy and disrespects inmates.

I start with the first, more general perspective. The decision reflects an important development in human rights law. According to the prevailing approach, the concept of human rights deals primarily with a person's actual and concrete interests. The classification of a certain interest as a "human right" is often based on some normative, objectively defined reasons, but such a classification requires the relevant interest to also be significant to the individual, the right-holder. The Israeli Supreme Court's decision expands this definition as it holds that an inmate also has an interest, which is classified as a human right, that the discretion what specific measures will be used against him or her (for instance, to maintain order in the prison) will be employed by organs of the state and not by private entities.

To inquire this concept, consider the following two examples. The first deals with the status of intention. Is there a right not to be subject to intended harm, which is distinguished from the more general right not to be harmed?⁷² According to the more traditional view, which reflects a consequentialist approach, a person is entitled simply to the right not to be harmed, be the actor's subjective intentions or the act's objective purposes as they may. In contrast, a deontological approach calls for a distinction. For instance, the scope of protection of the right not to be subject to intended harm is

⁷² For different positions in this debate (and references to many more discussions), see Judith Jarvis Thomson, *Physician Assisted Suicides: Two Moral Arguments*, 109 *ETHICS* 497, 514-16 (1999); David Enoch, *Intending, Foreseeing, and the State*, 13 *LEGAL THEORY* 69, 79-81 (2007); William J. Fitzpatrick, *Acts, Intentions, and Moral Permissibility: In Defence of the doctrine of Double Effect*, 63 *ANALYSIS* 317 (2003); Joseph Shaw, *Intentions and Trolleys*, 56 *PHIL. Q.* 63 (2006).

significantly different from the right not to be subject to unintended harm.⁷³ In some cases, the latter interest is not even classified as a human right. For instance, consider the status of omission: while an intended omission by the state, in which the state intentionally avoids taking steps that could have saved a person's life, may well be considered as an infringement of the victim's right to life, an unintended omission that leads to the same fatal outcome is typically not classified as an infringement.⁷⁴ Even if, from the victim's subjective perspective, the actor's intention or the act's purpose may be irrelevant, as what matters to her may be only the act's ultimate outcome, there may still be a normative distinction here.

The second example that I suggest considering is the status of authorization by law. Should there be a distinction between the right not to be harmed by an act that was decided by the Executive Branch, without an explicit authorization by parliament, and the right not to be harmed by the same act that was explicitly determined by legislation? The right-holder may be indifferent to the two cases, while from a normative, objective perspective we may well justify taking into account the process of deciding on the act.

It seems that there is an important difference between the two examples. In the first example only, the objective principle or standard should be incorporated into the definition of the right itself. The basis of distinction may be the linkage between the normative principle and the right-holder's interests. Victims have, as a general rule, an interest not only in their fate but also in their status, in what can permissibly be done to them.⁷⁵ Normatively speaking, the intention to harm is an integral part of the harm itself ("even a dog knows the difference between being stumbled over and being kicked"). It is thus justified to define the scope of the right not to be harmed not only according to the outcome but also according to the manner in which the harm was inflicted, taking into account the fact that the harm was intended. Inflicting intended harm is a classic example

⁷³ See, e.g., Robert Cryer & A.P. Simester, *Iraq and the Use of Force: Do the Side-Effects Justify the Means?*, 7 THEORETICAL INQ. L. 9, 32-33 (2006).

⁷⁴ See, e.g., EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 33-40, 60-63 (2010).

⁷⁵ Adil Ahmed Haque, *Torture, Terror, and the Inversion of Moral Principle*, 10 NEW CRIM. L. REV. 613, 634 (2007).

of what Dan-Cohen referred to as “actions [that] are generally considered to express disrespect.”⁷⁶ In contrast, the principle discussed in the second example lacks such a status. The fact that the decision to harm a person is the result of a discretion employed by the Executive Branch rather than by the legislature is not an important element in characterizing the scope of harm inflicted, as it does not have a close enough effect on the status of the individual and his or her interests. Inflicting harm through an act decided by the Executive Branch is not “generally considered to express [more] disrespect” than a similar act decided by parliament. One may even speculate that in some cases the opposite is true, as the fact that the majority did not explicitly authorize the infringement may serve as a source of comfort and hope for change.

The question is then to which of the examples the case of privatization is closer. The importance of answering this question is clear: if a prisoner has a right not to be subject to the powers of private prison guards using force and other corrective measures against him, the prohibition against prison privatization becomes almost absolute, and is enforced through judicial review. It enables the court to enforce the unwritten norm against privatization by characterizing it as part of the prisoners’ basic rights. On the other hand, if a prisoner is only entitled not to be subject to the powers of prison guards using force and other corrective measures against him, the privatization itself does not infringe any human right, and its legitimacy should be determined on the basis of its specific nature, including the private prison staff scope of discretion, their required qualifications, the applicable monitoring properties, and so forth. In such a case, the enforcement of a general norm against privatization of prisons must be based on a Constitutional provision (possibly even an implicit one), outside the realm of the Bill of Rights.

To my view, we should distinguish in this respect between the Court’s two reasons for classifying prison privatization as an infringement of inmates’ basic liberties. The first reason, which deals with the privatization’s effect on the “democratic legitimacy” of imposing sanctions, and the state’s obligations under the “social contract,” seems closer to the second example presented above, regarding the lack of authorization by law. The

⁷⁶ See *supra* note 67.

principle that the state should decide not only on the sanction but also execute it, to ensure that it “discharges its basic responsibility as sovereign for enforcing the criminal law and furthering the general public interest,”⁷⁷ is a principle that deals with the public interest in general. It is a principle which is remote from the inmate’s interests. It seems difficult to sustain the view that an inmate having a substantial interest in the sanction that he or she bears actually “furthers the general public interest,” or conveys some social message. It is accordingly questionable to assume that the execution of punishment by a private entity, which thus lacks, arguably, popular legitimacy, expresses some kind of disrespect toward the inmate.

In contrast, it seems more plausible to accept the Court’s position as far as the second reason is concerned, which deals with the symbolic status of the inmate. An inmate has, at least as an objective matter, a substantial interest in being treated as a human being, not as a mere means for a private corporation to make a profit. If it can be shown that prison privatization brings about such a (symbolic) outcome, it is indeed justified to classify it as an independent infringement of inmates’ basic liberties.

This leads to the other aspect of the evaluation of the decision—the position that privatization as such, regardless of its specific nature, inevitably brings about the aforementioned symbolic and cultural consequences. In my view, this position is not sufficiently founded. One aspect is the relatively minor role that private entities play in shaping the social status of imposing sanctions. As already argued above, the social meaning of punishment is shaped primarily by the role of the public in deciding on the sanctions and regulating the prisons, and much less by the identity of the entity that operates the prison.⁷⁸ The inmate should not be considered as a mere means for making profits, since his or her status as an inmate was not determined by the private corporation but by public organs. The fact that the private corporation gains profits from the inmate’s sentence is a mere side effect of the criminal court’s decision to impose the sanctions, clearly not the criminal court’s intended outcome.

⁷⁷ H CJ 2605/05, *supra* note 1, para 29 (President Beinisch).

⁷⁸ Rosky, *supra* note 22, at 967-68.

An even more serious difficulty is the Court's reliance on a seemingly clear-cut distinction between "private" and "public" actors. Theorists and lawyers alike face notorious difficulties in their efforts to draw the line between private and public.⁷⁹ In fact, there is no clear division, but rather a continuum, between private and public entities.⁸⁰ According to the prevailing approach, the private-public distinction is normatively baseless, and is used, if at all, only for descriptive purposes. An activity is "private" if it is free of limitations, such that the actor is free to employ her discretion regardless of the interests of others, and it is "public" if the actor is subject to such limitations. The decision whether an activity should be subject to limitations is based on substantial reasoning, rather than on some formal, pre-defined classification as "private" or "public." The classification is the outcome of the substantive consideration, not its source. Consequently, it is difficult to make any meaningful distinction between prisons' staff according to the formal status of their employer, the state or a private corporation.

On the one hand, prison employees, who are employed by a private corporation, are far from being "private" in the above sense. As suggested by one commentator, "privatization can be a means of 'publicization,' through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state."⁸¹ Indeed, as already indicated, according to Israeli law, all employees of a corporation that operates a prison are formally defined as "civil servants." They are legally required to respect prisoners' rights, and may infringe upon these rights only as far as the public interest justifies it. In essence, the law does not grant any

⁷⁹ See, e.g., Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992); Verkuil, *supra* note 8, at 402-06.

⁸⁰ See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 302 (2001); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 548 (2000) (arguing that there is "no purely private realm and no purely public one ... [only] the set of negotiated relationships between the public and the private").

⁸¹ Jody Freeman, *Public Values in an Era of Privatization: Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285, 1285 (2003). See also Rosky, *supra* note 22, at 969. See also Verkuil, *supra* note 8.

“freedom” to those who work for a private corporation in comparison to the legal requirements imposed on a prison-guard who works in a public prison.

At the same time, so-called “public” prison staff do not necessarily act as public in the legal sense, and thus the assumption that there is a significant difference in the prison guards’ actual motivations is questionable. Both types of employees work to earn a living, both are interested in fulfilling their professional goals and developing their career, and both are interested in the success of their institution.⁸² Public workers often earn on the basis of their achievements (for instance, tax collectors must meet collection quotas), and classifying them as “public” rather than “private” is difficult.⁸³

It thus seems questionable to assume that the public perceptions of the symbolic meaning of prison privatization are shaped according to a formalistic distinction between private and public prisons, disregarding the substantial elements of both “public” and “private” legal norms and actors’ motivations in both types of incarceration facilities. There may well be a threshold level to a facility’s “privateness,” that is, a level of freedom left to the prison staff to shape the norms of behavior in the place, which can be reasonably assumed to bring about the symbolic and social meanings that the Court attaches to prison privatization. However, it is difficult to sustain the position that any type of privatization, even one with only marginal elements of “privateness,” should be assumed to inevitably bring about the above-mentioned symbolic consequences. Moreover, privatization is spreading, and over time, public perceptions of privatizing the provision of what used to be considered services provided exclusively by the state may well change.⁸⁴ Finally, under the Court’s theory, it is not clear what should be the status of inmates’ consent to be held in a privatized prison.

⁸² See, e.g., Lippke, *supra* note 52, at 34.

⁸³ *Id.* at 35 (“Prisoners in private facilities may wonder whether what they are compelled to do is for their own good or is calculated to promote the bottom line of the corporations that own the facilities. In fairness, similar questions may arise within public prisons, since state-employed prison administrators and guards have interests of their own to protect.”); Rosky, *supra* note 22, at 969.

⁸⁴ Rosky, *supra* note 22, at 967-68.

Consequently, I don't think that we should view incidents of the use of force by a prison-guard against a prisoner as "actions [that] are generally considered to express disrespect" just because the prison staff works for a corporation rather than the state. I agree that privatization is an important element in evaluating the legitimacy of taking measures against inmates, not only in terms of the actual risk of misuse of power by the "private" prison guards as compared to "public" ones, but also in terms of the concern that operating a for-profit prison will convey a message of disrespect to inmates. However, such suppositions cannot be made in the abstract, based solely on the formal status of the entity that operates the prison as a private one. It is essential to inquire what risks of abuse of power and symbolic disrespect can be reasonably assumed given the concrete details of the legislation under consideration. Some forms of prison privatization may well be classified as an infringement of inmates' rights to human dignity, as a result of the social message that they convey, but others may not. It thus seems that one may (partially) agree with the Court's principled approach, that prison privatization may infringe upon liberty and human dignity, but also question the view that such a conclusion is inevitable.

IV. THE ROAD UNTAKEN: DIRECT ENFORCEMENT OF A CONSTITUTIONAL PROHIBITION AGAINST PRISON PRIVATIZATION

There are two main legal routes to deal with the privatization of prisons, as well as other forms of governmental use of force. One path is the one accepted in almost all Western democracies—instead of fighting against privatization, working to "publicize" the applicable norms.⁸⁵ Privatization does not entail deregulation; to the contrary, privatization may lead to the demand of greater public accountability from the private entities that are empowered to implement governmental powers, as well as from those public offices that are in charge of guiding these entities and supervising them.⁸⁶ This

⁸⁵ Freeman, *supra* note 81.

⁸⁶ See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1236-37 (2003) ("Whatever the normative limitations of the arguments favoring public-

route includes heightened judicial scrutiny to prevent the violation of inmates' basic rights. Such scrutiny may well result in not only invalidating specific actions taken by a private corporation or requiring it to compensate those who were subject to its misuse of force, but also in a review of the activities of the supervising authorities. Moreover, in appropriate circumstances, when a repeated practice of human rights violation is evident, there may be a basis for invalidating the privatization itself.

As mentioned above, the Israeli Supreme Court has taken this path for the last three decades. However, the recent decision marks a choice of an alternative route, based on the presumption that (at least certain types of) privatization are invalid *per se*, as an *a-priori* matter. It seems, however, that this position requires the recognition of a Constitutional norm, which prohibits the privatization of certain governmental powers. The focal point of such a norm is not in protecting the interests ("human rights") of the specific individuals who are subject to the use of force by the private entity, but in enforcing a norm for the separation of powers in a liberal society. In its decision, the Israeli Supreme Court briefly addressed the possibility of identifying such a Constitutional norm that prohibits privatization of certain powers. In this respect, the Court referred to Article 1 of the Basic-Law: The Government, which states that "the Government is the Executive Branch of the State." The Court stated that this provision may well be interpreted as prohibiting certain forms of privatization:⁸⁷

"Article 1 of the Basic-Law: the Government does not expressly determine specific duties or spheres of activity where the government has an exclusive responsibility to act. Notwithstanding ...and especially in view of our outlook concerning the broad interpretation that should be given to provisions that have a constitutional status, we are inclined to interpret [Article 1] in a manner that enshrines on a constitutional level the existence of a 'hard core' of sovereign powers that the government as the executive

private partnerships, the trend is undeniable. State, local, and federal governments are widely exploring privatization. Skeptics should not simply decry this reality, but deal with it by demanding public accountability.").

⁸⁷ H CJ 2605/05, *supra* note 1, para 63 (President Beinisch).

branch is liable to exercise itself and that it may not transfer or delegate to private enterprises. ...[T]he powers involved in the imprisonment of offenders and in the use of organized force on behalf of the state are indeed included within this ‘hard core.’”

As indicated above, the Court also referred extensively to the concept of “social contract” in identifying a general prohibition against the privatization of the power to use force.⁸⁸

However, the Court decided not to base its decision on Article 1 or to explicitly identify an enforceable Constitutional norm against privatization, outside the realm of human rights law. The Court reasoned that interpreting Article 1 as prohibiting certain types of privatizations, or identifying such a general norm, would require the Court “to clearly define the limits of that ‘hard core’ [of sovereign powers that the government may not delegate to private entities], since it may be assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state, and this matter lies mainly within the scope of the discretion of the legislative and executive branches.”⁸⁹ The Court states that it is preferable to avoid making such a principled decision by the judiciary, and in the absence of an explicit Constitutional provision the Court should delineate this prohibition on a case-to-case basis.⁹⁰

It seems that the Court’s main concern was that explicitly identifying such a prohibition against privatization outside the realm of the Bill of Rights would lack sufficient ...“democratic legitimacy.” As indicated at the outset, since the “Constitutional Revolution” of 1995, the Israeli Supreme Court has not struck down legislation on the basis of its incompatibility with provisions of Basic-Laws other than those protecting human rights. An expansive interpretation of Article 1 of the Basic-Law: the Government

⁸⁸ See *supra* note 62.

⁸⁹ HCJ 2605/05, *supra* note 1, para 63 (President Beinisch). See also *id.*, para 3-4 (Justice Hayut).

⁹⁰ *Id.* para 65 (President Beinisch). The Court also pointed out that unlike the Basic-Law: Human Dignity and Liberty, which includes a “Limitation Clause” that determines the conditions in which a human right can be justifiably infringed, the Basic-Law: the Government does not include such a clause, and it is not clear in what terms, if at all, the government may privatize “hard core” powers. *Id.* para 63.

might have been perceived as invalidating legislation on the basis of “unwritten norms,” a move which is highly controversial.

It seems that the Israeli Supreme Court’s decision in this case aimed at having the cake and eating it too: It aimed at maintaining popular legitimacy of a judicial review of legislation by presenting it as based on the enforcement of a “written” provision of the Israeli Constitution, of prisoners’ rights to liberty and human dignity. In fact, the norm that was enforced lay beyond the scope of the Bill of Rights and is actually an unwritten one. Indeed, few of the Justices explicitly acknowledged the possibility that the expansion of the scope of the rights to liberty and human dignity, to include an independent right against privatization, amounts to an enforcement of an unwritten norm.⁹¹ As a political matter, this move can be praised, as it enabled the court to “save” the country from a policy that may well be wrong.⁹² Nevertheless, from the perspective of legal theory, it seems that given its position that the privatization of the use of force is prohibited, the Court should have identified explicitly such a Constitutional norm, rather than expanding the scope of rights to liberty and human dignity.

⁹¹ *Id.* (Vice-president Rivlin) (“The violation involved in the arrangement undermines the very structure of the democratic constitution. It is also possible to hold that we are dealing with a violation that exceeds the scope of the Basic-Laws, and lies in the field of the social contract upon which the existence of the state is founded. Releasing the state from the monopoly granted to it with regard to the use of force in order to protect the public interest undermines the principles upon which the entire social and constitutional foundations of the state rest.”); *id.* para 17-20 (Justice Levy, dissent); *id.* para 3-4 (Justice Hayut); *id.* para 29 (Justice Naor).

⁹² Somewhat surprisingly, given the often critical reaction in the Israeli popular discourse regarding Supreme Court decisions that invalidate legislation, the decision was supported by almost all commentators and politicians.