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COURTS, PRISONS, BUDGETS, AND HUMAN DIGNITY: AN ISRAELI PERSPECTIVE

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I. INTRODUCTION

Prisons tend to be at the bottom of the budgetary food chain. In many jurisdictions, political candidates will include in their platforms proposed budget increases for education or other socially favorable purposes. If additional money is found for the criminal justice system, it will typically be earmarked towards increasing the number of law enforcement agents, and perhaps their pay, training, and equipment. But improving the living conditions of murderers, rapists, and other criminals? That is, most often, not politically appealing,[1] especially when in some jurisdictions prisoners are barred from voting[2] and cannot organize as a significant political force.[3] At the same time, there is public support for a 'law and order' agenda to counteract evolving societal challenges – drug abuse, illegal immigration, terror threats – all potentially resulting in increased incarceration rates. Maintaining state prisons costs money. In Israel, the monthly upkeep of a prisoner in state prisons runs above the average monthly salary.[4] Having more prisoners costs even more money,[5] and

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[1] *Cf.* Dashka Slater, *North Dakota's Norway Experiment: Can Humane Prisons Work in America? A Red State Aims to Find Out*, MOTHER JONES (Jul.-Aug. 2017), http://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/.

[2] In the United States, the Fourteenth Amendment of the U.S. Constitution allows states to adopt rules about disenfranchisement "for participation in rebellion, or other crime". U.S. CONST. amend. XIV, § 2; *see also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (1st ed. 2006). In the United Kingdom, many felons, including incarcerated criminals, cannot vote. Representation of the People Act 1983, § 3, 3A (UK). In Israel, prisoners are entitled to vote. Since there are no absentee ballots, polling stations are operated within prisons. Elections to the Knesset Act, § 116B(b) (Isr.).

[3] *See generally* Alex Mayyasi, *How Does Prison Gerrymandering Work?*, PRICEONOMICS (Oct. 20, 2015), https://priceonomics.com/how-does-prison-gerrymandering-work/; Heather Ann Thompson, *How Prisons Change the Balance of Power in America*, THE ATLANTIC (Oct. 7, 2013), https://www.theatlantic.com/national/archive/2013/10/how-prisons-change-the-balance-of-power-in-america/280341/;

[4] In 2016, the monthly upkeep ran at 10,000 NIS a month while the average monthly wage per employee was 9,557 NIS. Estimates are that the recidivism rate for Israeli prisoners is 41%, and that such 'repeat players' cost an average of 3.1 million NIS in terms of incarceration costs, wage loss, crime damages, etc. *See* CENTR. BUREAU OF STATISTICS, AVERAGE MONTHLY WAGES PER EMPLOYEE AT CURRENT PRICES (2017), http://www.cbs.gov.il/www/y_labor/e4_01.pdf; Tali Heruti-Sover, *The Prison System in Israel is One of the Most Stringent in the World – But it Does Not Help Against Crime,* THE MARKER (Jul. 14, 2016), https://www.themarker.com/career/1.3006335.

[5] In the United States, state and local spending on prisons and jails has risen, since 1990, more than three times faster than spending on schools. This is mainly the result of

longer sentence terms, often promoted as a solution to rising crime rates, result in additional welfare costs for treating elderly prisoners.[6] Moreover, any effort at prison reform has a cost too.[7] What is there to do when the political process is unhappy to provide the significant additional funds needed? As one academic puts it, referring to prisons in Latin America: "when many law-abiding citizens face poverty, malnutrition, insecurity, inadequate public services and abusive police, improving prison conditions sounds more like a cruel joke than a realistic political priority."[8] Not surprisingly, when there is a financial crisis, these budgets are likely to be among the first to be cut further.[9]

Enter the court system, the least politically accountable branch. Courts in liberal democracies often rule in ways that affect how prisons are run. The basis is typically constitutional grounds which are brought before a court in lawsuits by individual prisoners, and less frequently, in public petitioners' actions aimed at affecting significant changes to the prison system as a whole. Such actions may have significant budgetary implications.

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the rise in the incarcerated population due to the war on drugs and mandatory minimum sentencing policies. States spend $71 billion per annum on prisons. Indeed, in 18 U.S. states more tax money is spent on prisons than on higher education. *See* Christopher Ingraham, *The States that Spend More Money on Prisoners than College Students*, THE WASH. POST (Jul. 7, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/07/the-states-that-spend-more-moey-on-prisoners-than-college-students/?utm_term=.525f560d1c5f.

[6] "Prisons are now the largest providers of residential care for frail and elderly men in England and Wales and are increasingly turning into hospices, providing end-of-life care for older prisoners and even managing their deaths." *See* Amelia Hill, *Prisons Taking Role of Care Homes and Hospices as Older Population Soars*, THE GUARDIAN (Jun. 19, 2017), https://www.theguardian.com/society/2017/jun/20/prisons-taking-role-of-care-homes-and-hospices-as-older-population-soars*; see also* Melissa Bailey*, More Prisoners Die of Old Age Behind Bars*, KHN.ORG (Dec. 15, 2016), http://khn.org/news/more-prisoners-die-of-old-age-behind-bars/.

[7] *See generally* Alan Travis, *Prison Reform Will Fail Without Extra Funds, Says Former Jail Chief*, THE GUARDIAN (May 18, 2016), https://www.theguardian.com/society/2016/may/18/uk-prison-reform-programme-fail-phil-wheatley-director-general.

[8] Pien Metaal, Julita Lemgruber, & Benjamin Lessing, *What Is Behind the Problems in Latin America's Prisons?*, LATIN AMERICA ADVISOR (Jan. 23, 2014), http://www.thedialogue.org/resources/what-is-behind-the-problems-in-latin-americas-prisons/.

[9] For example, in Poland, the impact of the 2008 economic crisis had major implications on the prison service. In the years 2008 – 2012 expenditures on prisons fell by 175 million euros. This primarily affected investments in improving the living conditions of prisoners. PIOTR KŁADOCZNY & MARCIN WOLNY, EUR. PRISON OBSERVATORY, PRISON CONDITIONS IN POLAND (2013), http://www.prisonobservatory.org/upload/Prison_Poland.pdf.

Courts are, of course, well aware of that and are therefore careful in their rulings. But sometimes they seem to come the conclusion that, despite all the cautionary considerations, intervening is precisely what they have to do, and that it is their place to take the lead and change the harsh reality of prison. This would seem to be the case in two Israeli Supreme Court cases that bookend this paper, where the Israeli Court took a much more pro-active role than is usual, even by its own, rather activist standards.[10] Using two different tactics, both based on the constitutional right of human dignity to limit and delineate the State's options regarding the holding conditions of prisoners, the Court has had, and is expected to have in coming years, a major effect on the prison system in general and on its budget in particular. These two seemingly unrelated landmark decisions, handed in 2009 and 2017, are discussed in this article. Between the two of them, the effect is to make the State spend more money on state prisons than it ever planned to.

The first of the two, the *Prison Privatization Case*, created a worldwide precedent.[11] Here, the Israeli Supreme Court emphatically declared prison privatization, legislatively authorized by the Knesset, Israel's Parliament, to be unconstitutional *per se* in Israel.[12] Privatizing prisons, the Court declared, constitutes a violation of the constitutional right to human dignity of the prisoners, and thus an entirely impermissible avenue for the State.[13] No other national court has held prison privatization unconstitutional.

The ruling had two direct results: *first*, it completely closed off the private prison avenue, which allows, inter alia, for costly immediate construction programs to be shifted into long-term, and hopefully more efficient, operational budgets; a *second* direct result of the Court's ruling, specific to the Court's denial of a temporary restraining order when the petition was initially filed, was that the Court essentially let the construction of a state-of the-art prison be completed, and only then

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[10] Writing of the Israeli Supreme Court under the longtime leadership of Aharon Barak, Robert Bork described the Court as "simply the most activist, antidemocratic court in the world" and stated that "[t]he Israeli Supreme Court is making itself the dominant institution in the nation, an authority no other court in the world has achieved." ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 13, 111 (2003)*; see also* Robert Bork, *Barak's Rule*, 27 AZURE 125 (2007); Richard A. Posner, *Enlightened Despot*, NEW REPUBLIC, Apr. 23, 2007, at 53; *but cf.* Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1 (2007).

[11] HCJ 2605/05, Acad. Ctr. of Law and Bus. v. Minister of Fin. (ACLB) [2009] (Isr.), available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf. We cite the English version, except as otherwise noted**.**

[12] *Id*.

[13] *Id* at 34.

declared the private prison to be per se unconstitutional, leaving the State with no choice than to pay the private contractor and take over the high quality prison it would not have otherwise built.[14]

Almost a decade has passed. The State did not significantly invest in the construction of new prisons or the improvement of existing ones. In June 2017 came phase two of the Supreme Court's activist role in forcing the State to increase the prisons budget, again based on human dignity. This time the price tag was going to be a lot higher. In the *Prison Overcrowding Case*,[15] the Israeli Supreme Court made substantial demands on the State regarding the prisoners it holds: the Court ordered the State to increase the cell room allotted to each individual prisoner in Israel within nine months to a minimum of 3 square meters; this is to be further increased to 4 square meters or to 4.5 square meters (including the space of a toilet and a shower) within eighteen months.[16] The standard set by the Court in stage one would require improving the conditions of over 40% of the prisoners; stage two would double the existing space in many facilities, and require the increase of living space for 61% of the prisoners.[17] Indeed, at the time the case was heard, a mere 21% of all prisoners in Israel were held in cells that were up to the 4.5 square meter standard [18]

In short, unless the State decreases the number of prisoners in Israel (for example by releasing prisoners, decriminalizing offenses, or opting for punitive measures other than incarceration), the State is left with virtually no legal option but to significantly and immediately increase direct state funding of prison facilities so as to improve prisoner conditions.[19]

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[14] As affirmed by the Chairman of the Knesset Internal Affairs Committee. *See* Minutes of the Internal Affairs and Environment Committee, DK (2017) 379 (Isr.), https://oknesset.org/committee/meeting/14218/?page=1.

[15] HCJ 1892/14, ACRI v. Minister of Internal Security (ACRI) [2017] (Isr.).

[16] *Id*.

[17] *Id*.

[18] *See id*. at § 4.

[19] The measures considered in Israel are discussed in Chapter IV.D below. On California's years-long litigation over reducing its prison population deemed unconstitutionally overcrowded by the U.S. Supreme Court in 2010, *see* Allen Hopper et al., *Shifting the Paradigm or Shifting the Problem? The Politics of California's Criminal Justice Realignment*, 54 SANTA CLARA L. REV. 527 (2014); Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013); *see also* Nicole Flatow, *California Tells Court It Can't Release Inmates Early Because It Would Lose Cheap Prison Labor*, THINK PROGRESS (Nov. 17, 2014), https://thinkprogress.org/california-tells-court-it-cant-release-inmates-early-because-it-would-lose-cheap-prison-labor-c3795403bae1; Adam Liptak, *Justices, 5-4, Tell California to Cut Their Prison Population*, THE N. Y. TIMES (May 23, 2011),

Almost needless to say, the 'price tag' from this single holding is huge. The State has estimated it in its argument before the Court to be a whopping 2.7 billion NIS.[20] By comparison, in late 2016 the Government was rolling out a new plan whereby it would spend, from 2019, 60 million NIS per annum on prison construction.[21] If the current number of prisoners holds, the State will have to spend the equivalent of what it intended to spend in 45 yearly budgets at once just to catch up. Even assuming that the State will be able to somewhat decrease the number of prisoners, as discussed in Chapter IV.D, infra, the budgetary effect is expected to remain very large.

The Israeli Court was well aware of the costs of its holding. Yet, the Court held that basic constitutional rights should not be retreated solely because of budgetary considerations, and that a society that respects human rights must be ready to bear the financial burden required for their protection.

The two prongs now fully linked: in the Prison Overcrowding Case, the Israeli Supreme Court has considerably narrowed the options available to the political branches. Its 2009 decision precluded the State from using private actors and constructing private prisons by private, for-profit, operators. Its 2017 decision mandates the State to dramatically improve the physical conditions of the exclusively state-run prisons in terms of the space available to each prisoner. The result: the State can either start a massive release of prisoners so that fewer prisoners share the available space, or start a massive building scheme to improve their living conditions in which there can effectively be no private sector participation. Ergo, the State must immediately budget and build prisons.

We think this is not a coincidence. We think the Israeli Supreme Court's patience towards government inertia with prison conditions has run out, and with each case, it decided to make its expectations of the political branches ever clearer. Finally, the Court expected critique of its

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http://www.nytimes.com/2011/05/24/us/24scotus.html?pagewanted=all&_r=0; Michael Martinez, *California to Challenge Court Order to Release 10,000 Inmates by Year's End*, CNN (Jun. 20, 2013), http://edition.cnn.com/2013/06/20/justice/california-prison-overcrowding/index.html.

[20] HCJ 1892/14, ACRI, at §19 [2017] (Isr.).

[21] *See* EYAL KAFMAN, THE KNESSET, DESCRIPTION AND ANALYSIS OF THE BUDGET OF THE MINISTRY OF PUBLIC SECURITY FOR THE YEARS OF 2013-2014 (2013), https://www.knesset.gov.il/mmm/data/pdf/m03249.pdf; Motti Basok, *Ministry of Public Security Budget: 77% of the Money Flows to Wage Payments and Pensions*, THE MARKER (Sep. 20, 2015), http://www.themarker.com/news/1.2734113; *see also* Ron Rosenberg, *ראה תשובת המדינה - מיום 11מכתב צמבר צמבר,* ACRI.ORG (2016), http://www.acri.org.il/he/wp-content/uploads/2017/06/bagatz1892-14-crowding-in-prisons-meshivim-0217.pdf.

activist if not interventionist role. But in matters directly effecting individuals' human rights, people of a limited political voice of their own, the Court seemingly felt on better public support grounds than in reviewing government decisions in matter of national security, which the Court often looks into. We describe and analyze the two prison related cases in four chapters that follow this introduction:

Chapter I is a short primer on the Israeli constitutional framework, focusing on the legal protection of human dignity in Israel. Chapter II details and analyses the 2009 Prison Privatization Case and the decision that held private prisons to be unconstitutional *per se*. Chapter III details and analyses the 2017 Prison Overcrowding Case.

Chapter IV analyzes in greater depth three issues arising from the two Israeli cases, which we believe would be interesting to the discourse in other jurisdictions.

First, we look at the comparative law aspects. The Israeli Supreme Court, which often draws inspiration from comparative foreign law of other democracies, operated in two strikingly opposite ways in the two cases. In the Prison Privatization Case, the Court dismissed the fact that many other democracies authorized private prisons, and issued a worldwide precedent. In the Prison Overcrowding Case, the Court relied heavily on comparative law to support what may turn into its costliest order to the Government ever.[22] To conclude the comparative law analysis, we note the highly active and unique role of the European Court of Human Rights in the area of prison overcrowding.

Second, we look at the ban on prison privatization in the broader context of the privatization efforts of the Israeli government.

Thirdly, given that the Israeli Supreme Court is not limited in time and can make its decisions at any time from the day of the petition to several years later, we note the substantive and expensive effects of the Court's timing. A brief conclusion summarizes the paper.

II. THE CONSTITUTIONAL FRAMEWORK AND HUMAN DIGNITY IN ISRAEL – A PRIMER

In this chapter, we attempt to provide a brief constitutional framework of the applicable Israeli law. We note the Court's activism in many, but not all, areas, and the special constitutional position of human dignity, the basic right that the Court used in the cases discussed in this article to ban

[22] The final cost depends on the measures that the State may take to reduce overcrowding without massive construction of cell space. *See* discussion *infra* Chapter IV.D.

private prisons and to order the State to rapidly solve severe overcrowding.

A. The Israeli Supreme Court's Judicial Activism

No commentator would term the Israeli Supreme Court 'deferential' in its administrative and constitutional review of government acts. Quite the opposite, the Court has been called "simply the most activist, antidemocratic Court in the world."[23] This state of affairs is based on the cumulative effect of several features of the Israeli court system: *First*, the Israeli Supreme Court serves as both the first and final instance in reviewing most governmental action. *Second*, the Court chose to virtually eliminate the requirements of standing[24] and justiciability, thus allowing not only the aggrieved party but virtually any private or public entity appeal before it with complaints in issues that Courts in many democracies would consider a 'political question' and thus abstain from hearing.[25] *Third*, the Justices' expansive – and thus activist – understanding of their democratic role, and their influence on judicial appointments.[26]

While judicial activism has been a large reason for its rise in prominence,[27] it has also been the source of its setback in recent years. The Court's activism has been the source of massive political pressures on this institution, attempts by politicians to have greater say in judicial appointments, and has probably dramatically decreased the public's trust in the judiciary.[28]

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[23] BORK, *supra* note 10, at 13.

[24] 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, THE CONSTITUTION OF ISRAEL – A CONTEXTUAL ANALYSIS 205-06 (2014).

[25] *See id.* at 206-11; *cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (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); *see generally* YAACOV S. ZEMACH, POLITICAL QUESTIONS IN THE COURTS: A JUDICIAL FUNCTION IN DEMOCRACIES – ISRAEL AND THE UNITED STATES (1976).

[26] *See* Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law and Politics*, in APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 241-59 (Kate Malleson et al. eds., 2006).

[27] The Israeli Supreme Court 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 1970s, and principally in the 1980s and 1990s." Gad Barzilai, Abstract, *Courts as Hegemonic Institutions: The Israeli Supreme Court in a Comparative Perspective,* in ISRAEL: THE DYNAMICS OF CHANGE AND CONTINUITY 293 (David Levi-Faur et al. eds., 1998).

[28] *See generally* ASHER ARIAN ET AL., AUDITING ISRAELI DEMOCRACY – 2010: DEMOCRATIC VALUES IN PRACTICE (Keren Gliklich ed., Karen Gold trans., 2010),

But the point we really want to make is how unexpected the Court's activism was in the two cases discussed in the paper. The reason is that unlike its activism in the 'big issues' concerning Israeli policy – most notably the Israeli-Palestinian conflict – the Court has long been 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.[29] The Court has noted the significance of the Parliament's taxing power and the importance of equipping the Government with deference over spending money for the public good. That said, the Court has also noted that the Israeli Constitution – such as it is – did not adopt a specific economic policy, and thus the Parliament was free to adopt a free market policy.[30]

B. On Israel's Chapter-by-Chapter Constitution and the Rise of the Right to Dignity

When the State of Israel was established in 1948, its Declaration of Independence[31] followed Resolution 181 of the United Nations General

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https://en.idi.org.il/media/6235/index2010-eng.pdf; TAMAR HERMANN ET AL., THE ISRAELI DEMOCRACY INDEX 2016, 115 (Daniel Barnett ed., Karen Gold trans., 2016), https://en.idi.org.il/media/7811/democracy-index-2016-eng.pdf.

[29] *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 Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 95-96 (2004).

[30] The Court used language akin to Justice Holmes' famous dissent in Lochner v. New York, 198 US 45, 75 (1905) (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."). In a 1997 lecture, the highly influential Israeli Supreme Court President, Aharon Barak, said the Court is concerned with the constitutionality of a statute, not its wisdom. "A 'socialist' legislator and a 'capitalist' legislator," he notes, "may legislate different and contradicting laws" and both can be found constitutional. "Establishing social policy, whether economic or other," Barak states, is handed to the legislative branch and its fulfillment to the executive, and they must have a margin of appreciation to maneuvers. Aharon Barak, *The Economic Constitution of Israel*, 4(2) MISHPAT UMIMSHAL 357, 376 (1998).

[31] On the history of the declaration, *see* Yoram Shachar, *Jefferson Goes East: The American Origins of the Israeli Declaration of Independence*, 10 THEORETICAL INQUIRIES IN L. 589 (2009).

Assembly[32] and stated that a constituent assembly was to be elected shortly with the goal of adopting a constitution for the new state.[33]
For political and historical reasons, the "original intent" of creating a constitution never fully materialized.[34] In 1950, the prospect of reaching a widely-acceptable constitution 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, the effort to reach a single-document constitution.[35] Instead, the Knesset decided to draft and enact separate "Basic Laws".[36] Each of these would decide a different constitutional subject (somewhat equivalent to an Article or an Amendment in the U.S Constitution) and be enacted as separate acts of Parliament in its capacity as the Constituent Authority.[37] The Knesset decided that only upon the completion of the process, all of the Basic Laws would be combined into a single-document Constitution.[38]

Since 1950, the Knesset enacted twelve Basic Laws, yet until 1992 all Basic Laws were structural in nature – empowering the branches of government and other State institutions.[39] Laws protecting civil rights were not enacted until 1992, primarily because it was hard to overcome the wide differences of opinions on such delicate matters in Israeli polity.[40]

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[32] G.A. Res. 181 (II) (Nov. 29, 1947), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/181(II). The resolution provided for the establishment of the State of Israel.

[33] *Id*.

[34] 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); Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585 (2003); Dalia Dorner, *Does Israel Have a Constitution*?, 43 ST. LOUIS U. L.J. 1325 (1999); Amos Shapira, *Why Israel Has No Constitution, but Should, and Likely Will, Have One*, 37 ST. LOUIS U. L.J. 283, 285 (1993).

[35] Barak-Erez, *supra* note 34 at 312-13.

[36] *Id*.

[37] *Id*.

[38] *See* SUZIE NAVOT, CONSTITUTIONAL LAW IN ISRAEL 21-23, 35-38 (2d ed. 2016).

[39] These nine Basic Laws are: Basic Law: The Knesset, 5718; Basic Law: Israel Lands 5720; Basic Law: The President of the State, 5724; Basic Law: The Government, 5761; Basic Law: The State Economy, 5735 Basic Law: The Army, 5736; Basic Law: Jerusalem, the Capital of Israel, 5740; Basic Law: The Judiciary, 5748; and Basic Law: The State Comptroller, 5748. English translations of the Basic Laws are available at http://knesset.gov.il/description/eng/eng_mimshal_yesod.htm. In 2014, the Knesset added another structural basic law - Basic Law: Referendum, 5774.

[40] Barak-Erez, *supra* note 34 at 311-13.

The absence of a written bill of rights did not prevent the Israeli Supreme Court from protecting civil rights. The Court established and strongly protected most civil and human rights that are usually stated in written constitutions. The freedom of expression, freedom of movement, freedom of religion, equality under the law, and many other rights were recognized as fundamental rights and enforced by the Court.[41] 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".[42] As one commentator notes, the 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.[43]

In 1992, the Knesset started discussing two several Basic Laws bills relating to civil rights. The bills were Basic Law: Human Dignity and Liberty[44] and Basic Law: Freedom of Vocation.[45] Basic Law: Human Dignity and Liberty lists a series of enumerated constitutional rights, which include the protection of life, physical integrity, and most important for our current discussion, human dignity (Articles 2 and 4), the protection of property (Article 3), personal liberty (Article 5)[46] the external freedom of movement (Article 6) and the right of privacy (Article 7).

Article 8 of Basic Law: Human Dignity and Liberty, often referred to as the Limitation Clause, allows the violation of rights "under this Basic Law" only by "a law befitting the values of the State of Israel enacted for

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[41] *Id*. at 315-17.

[42] HCJ 243/62 Film Studios Israel v. Levi Geri, 16 PD 2407 [1962] (Isr.); HCJ 73/53, Kol Ha'am Ltd. v. Minister of the Interior, 7(1) PD 165 Interior [1953] (Isr.).

[43] 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, 508 (1999); s*ee also* Barak-Erez, *supra* note 34.

[44] Basic Law: Human Dignity and Liberty, 5752.

[45] Basic Law: Freedom of Vocation, 5754. This Basic Law is often referred to as Basic Law: Freedom of Occupation. Given the current political situation in the Middle-East, we prefer the name "Freedom of Vocation".

[46] 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." Basic Law: Human Dignity and Liberty, 5752.

proper purpose and to an extent no greater than is required."[47] This section served the Supreme Court shortly thereafter in 1995, when the Court handed down the Israeli equivalent of *Marbury v. Madison*[48] - the *Bank Hamizrahi* case.[49] In *Bank Hamizrahi* the Court held that the two Basic Laws of 1992 are constitutional in the sense that no ordinary legislation can contradict or limit the rights enumerated in them except to the extent permitted by them, most notably in the aforementioned Article 8.[50] In this way the Court interpreted itself as having the power of constitutional review, *i.e.*, the power to strike down a statute which infringes a right included in Basic Law: Human Dignity and Liberty if that statute does not hold to the standards of Article 8.[51]

Since *Bank Hamizrahi*, the Israeli Supreme Court has declared over a dozen Knesset Statutes partially unconstitutional and thus invalid.[52] This drew sharp criticism from politicians, one result being that the Knesset has practically (though not formally) frozen the enactment of any additional Basic Laws which were brought before it.[53] As a result, several very important rights have not yet been incorporated into Basic Laws. These include freedom of expression, the freedom of association, freedom of religion and from religion, and the principle of equal protection (the right to equality). The practical solution, once again, was Court activism, resulting in still more controversy.

In a series of cases since 1994, the 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 other bills of

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[47] *See* NAVOT, *supra* note 38, at 217-18. A similar provision is included in Article 4 of Basic Law: Freedom of Occupation, 5754.

[48] Marbury v. Madison, 5 U.S. 137 (1803). This is the classic American case announcing that the Supreme Court has the power of judicial-constitutional review.

[49] CA 6821/93, United Bank Mizrachi v. Migdal, 49(4) PD 221. For a detailed description of the case, *see* Cohen, *supra* note 34, at 641-48.

[50] *Id*.

[51] For further analysis, *see generally* Dorner, *supra* note 34; Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007); *see also* 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, 352-54 (2008).

[52] *See, e.g.*, HCJ 1030/99 Oron v. Speaker of the Knesset, 56(3) PD 640 [2002] (Isr.); HCJ 6055/95 Zemach v. Minister of Defense, 43(5) PD 241 [1999] (Isr.); HCJ 1715/97 Association of Investment Managers in Israel v. Minister of Treasury, 41(4) PD 367 [1997] (Isr.). A Magistrates' Court invalidated another statutory section, holding that any court in Israel has the power to do so. CrimC (TA) 4696/01 State of Israel v. Hendelman, PM (unpublished).

[53] In 2003, the Knesset's Law, Constitution, and Justice Commission launched an effort to complete the Constitution by a wide consensus that did not succeed. The only exception is the Basic Law: Referendum, which was passed in 2014.

rights. A simplified explanation of the general form of these decisions is this: one cannot have human dignity to its fullest without having freedom of expression/equal protection, etc., hence the right to human dignity includes these non-enumerated rights.[54] In this manner, the Supreme Court may invalidate a statute for unduly infringing a basic right which was not elevated to constitutional status in the slow piecemeal legislative process, simply by viewing this right as a part of human dignity. Thus, the right to dignity, a right with very little presence in the U.S. legal system,[55] became the cornerstone of the Israeli partial bill of rights. Interpreted broadly, it became a major tool for Israeli judicial review of legislation and administrative actions, and served as the constitutional basis to both banning private prisons and ordering the State to eliminate overcrowding, as described in Chapters II and III, respectively.

III. THE PRISON PRIVATIZATION CASE (2009) – BANNING PRIVATE PRISONS AS A *PER SE* VIOLATION OF HUMAN DIGNITY

A. The Legislation Authorizing Private Prisons

The decision to establish privately-run prisons was made by a statute enacted in 2004.[56] The law passed by a majority of 52 to 33, representing both a comfortable majority and a relatively high participation of the members of the 120 member Knesset.

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[54] For a broader description and analysis, *see* Tamar Hostovsky Brandes, *Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel*: *Definitions and Parameters*, in ISRAELI CONSTITUTIONAL LAW IN THE MAKING 267, 269-83 (Gideon Sapir et al. eds., 2013) and Izhak Englard, *Human Dignity: From Antiquity to Modern Israel.'s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1925 (2000).

[55] On human dignity and U.S. law, *see, e.g.*, Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 780 (2006); Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse,* 65 MONT. L. REV. 15 (2004). Interestingly, however, the concept of dignity was mentioned in the U.S.'s most important prison overcrowding case, Brown v. Plata, 563 U.S. 493 (2011). But human dignity was not the constitutional right breached here but rather the "basic concept underlying the Eighth Amendment." *Id.* at 1928 (quoting Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958))). *See* Benjamin F. Krolikowski, *Brown v. Plata: The Struggle to Harmonize Human Dignity with the Constitution*, 33 PACE L. REV. 1255, 1255 (2013).

[56] Law Amending the Prisons Ordinance (no. 28) 5764-2004 [hereinafter 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 ISR. L. REV., Issue 1, Spring 2006, at 81.

The decision to establish private prisons 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 (who would end up writing the main opinion for the Court in the Prison Overcrowding Case in 2017), and a visit by a delegation to prisons in England, Scotland, and France.[57]

Then as now many countries including such major democracies as the United States, England, Germany, Australia, New Zealand and France had established private prisons, employing several different models of privatization; then as now there is an ongoing public and academic debate as to the desirability of privatizing the prison system.[58]

Not all private prisons are created equal. The scope of the privatized elements varies. In some cases, such as in France and Germany, initially only logistical services were privatized.[59] In other cases, like 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. The Israeli statute was very detailed and thoroughly specified its

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[57] *See* Shmuel Hershkovitz, *A Privately Run Prison: Worthy Addition to Israel's Correction System*, ISR. DEMOCRACY INST. (Jan. 9, 2008), https://en.idi.org.il/articles/10507.

[58] This debate is beyond the scope of the current article. *See generally, e.g.*, DAVID SHICHOR, PUNISHMENT FOR PROFIT: PUBLIC PRISONS/PRIVATE CONCERNS (1995); DAVID SHICHOR & MICHAEL J. GILBERT, PRIVATIZATION IN CRIMINAL JUSTICE: PAST, PRESENT, AND FUTURE (eds., 2001); Richard F. Culp, *The Rise and Stall of Prison Privatization: An Integration of Policy Analysis Perspectives*, 16 CRIM. JUST. POL'Y REV. 412 (2005); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Warren L. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371 (1997); Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal State*s, 36 CONN. L. REV. 879 (2004); Alexander Volokh, *A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 HARV. L. REV. 1868 (2002). For discussion of privatization generally, *see* the reports by the Public Services International Research Unit of the University of Greenwich, England, *available at* http://www.psiru.org. For additional background, *see* Matthew Zito, *Prison Privatization: Past and Present*, INTERNATIONAL FOUNDATION FOR PROTECTION OFFICERS (2003), http://www.ifpo.org/articlebank/prison_privatization.html, and the websites of anti-privatization groups *see* PRIVATE CORRECTIONS WORKING GROUP, http://www.privateci.org (last visited Nov. 4, 2017), and PUBLIC SERVICES INTERNATIONAL RESEARCH UNIT, U. GREENWICH, http://www.psiru.org, and the website of a major corporation in the field, CORRECTIONS CORPORATION OF AMERICA, http://www.cca.com.

[59] Rachel Knaebel, *When Prisons, Inmates and Detention Policies Become Investment Products*, MULTINATIONALS OBSERVATORY (Sep. 13, 2016), http://multinationales.org/When-Prisons-Inmates-and-Detention-Policies-Become-Investment-Products.

requirements for all aspects of prison life.[60] The model established by the Israeli statute was similar to the English model, involving oversight of the prison by government representatives permanently stationed at the prison.[61] Yet under the Israeli statute the authority given to the private operator was more limited than in the United States, and the Government's ability to oversee the private prison was increased.[62] The State therefore referred to the Israeli model as an "Improved English Model".[63]

It is worth noting that, since the 1990s, all Israeli governments – whether right, left, or centrist, pursued an energetic privatization policy.[64] While criticized by social activists and some academics,[65] it was met with little political resistance and very limited judicial scrutiny.[66] Indeed, *to the best of our knowledge*, the Israeli Supreme Court did not hold any other privatization scheme undertaken by the Israeli government illegal, let alone unconstitutional either before the Prison Privatization Case, or since.[67] The Court also noted in its holding that claims of unconstitutionality have either been rejected by other national courts[68] or have not been presented to the courts in certain countries operating privatized prisons and would have been rejected if presented.[69]

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[60] Tali Heruti-Sover, *The Israeli Model of Private Prisons - The Best in the World*, THE MARKER (Jul. 27, 2006), https://www.themarker.com/misc/1.373808.

[61] *Id*.

[62] *Id*.

[63] HCJ 2605/05, **ACLB,** at §§ 48-49 **[2009] (Isr.).**

[64] Danny Gutwein, *Israel's Socioeconomic Debate: a New Perspective*, in HANDBOOK OF ISRAEL: MAJOR DEBATES 364 (Ben-Rafael et al. eds., 2016).

[65] The Center for Social Justice and Democracy in Jerusalem's Vanleer Institute is arguably the preeminent body monitoring and critiquing privatization (and nationalization) in Israel. *See* Ctr. for Soc. Justice & Democracy, *Annual Reports of Privatization and Nationalization in Israel*, VAN LEER JERUSALEM INST., http://www.vanleer.org.il/en/content/report-privatization-and-nationalization-israel (last visited Nov. 5, 2017).

[66] Raising many legal questions, many still unanswered. *See generally* Daphne Barak-Erez, *Civil Rights and Privatization in Israel*, 28 ISR. Y.B. ON HUM. RTS. 203 (1998), http://www.tau.ac.il/law/barakerez/articals/CIVILRIGHTSandPRIVATIZATION.pdf.

[67] The Court has at most criticized some privatization schemes, and pressured the Government to find viable solutions, especially in the sensitive area of public healthcare services. *See infra* note 265.

[68] In the United States, *see* Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999); *see also* Tulsa Cty. Deputy Sheriff's Fraternal Order of Police v. Bd. of Cty. Comm'rs of Tulsa Cty., 995 P.2d 1124 (Okla. 2000).

[69] The State presented an expert opinion written by Professor Jeffrey Jowell QC, a former Dean of UCL's Faculty of Laws in London. Professor 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. We discuss the Israeli Supreme Court's somewhat selective use of foreign precedent *infra* Chapter V.

The State's motivation in its privatization scheme was twofold: to save funds by having the prison built and more efficiently operated, and to improve the physical conditions available to prisoners in a brand-new prison.[70] The latter objective is clearly achievable, yet there is much debate as to whether private operators are actually cheaper than State run institutions.[71]

B. The Petition and the Parties' Arguments

The petition against the prison privatization scheme was filed by three parties: a law school's legal clinic, a former senior officer of the Israel Prison Service, and a former prisoner.

The petition was based on two separate grounds. The first, which ultimately determined the case, was the claim

> [T]hat a complete privatization of the prisons constitutes an unconstitutional violation of the constitutional rights to personal liberty and human dignity. In this context, the petitioners claim that several factors combine in this respect to cause an unconstitutional violation of constitutional basic rights . . . . [T]he nature of the powers that are being privatized, which include the actual power of imprisonment and the powers relating to the human dignity of the inmate and his personal liberty (such as holding a prisoner in administrative isolation, carrying out an external examination of a inmate‘s naked body and using reasonable force to carry out a search on an inmate); the low standards that have been set, according to the petitioners, for staffing the positions in the privatized prison in comparison to the

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[70] Keren Harel-Harari, *The Supreme Court was Wrong: A Private Prison is the Solution*, THE MARKER (Jun. 22, 2009), https://www.themarker.com/law/1.535444.

[71] *See generally* Sasha Volokh, *Are Private Prisons Better or Worse Than Public Prisons?* THE WASH. POST (Feb. 25, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/25/are-private-prisons-better-or-worse-than-public-prisons; Megan Mumford et al., *The Economics of Private Prisons*, BROOKINGS INST. (Oct. 20, 2016), https://www.brookings.edu/research/the-economics-of-private-prisons; *compare id.* (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*, HAOKETS (Jul. 6, 2009), http://www.haokets.org/2009/07/06/%D7%91%D7%99%D7%AA-%D7%A1%D7%95%D7%94%D7%A8-%D7%A4%D7%A8%D7%98%D7%99-%D7%90%D7%99%D7%A0%D7%A0%D7%95-%D7%94%D7%A4%D7%AA%D7%A8%D7%95%D7%9F/ (Hebrew) (arguing that the cost of private prisons may actually be higher than that of government-run prisons).

> standards in the Israel Prison Service; and the inadequate supervision, according to the petitioners, of the actions of the private enterprise that will operate the prison.[72]

The petitioners also claimed that the decision to privatize prison contradicts Article 1 of Basic Law: The Government, which holds that "[t]he Government is the executive authority of the State."[73] Petitioners interpreted this Article as holding that the State cannot delegate its constitutional role to enforce the law and safeguard the public's safety to private actors.[74]

The State argued in response that establishing the private prison is an important solution to the shortage of incarcerations facilities in the country, that it will improve the conditions in which prisoners are held, and that a private prison would save 20-25% of the operating budget of a comparable public prison.[75]

The State also emphasized that the case related to a pilot project, constituting of a single prison, and, substantively, that it's scheme contained adequate mechanisms to ensure that the rights of the prisoners would be similar to those held by prisoners in public prisons.[76] The scheme allowed the State to supervise the prison's operation and intervene if necessary.[77] The State could even take over the prison at any time if the private operator breached its obligations.[78] All prisoners were to have the right to petition the judiciary for review of their grievances.[79] Finally, 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.[80] 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.[81] The Court

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[72] HCJ 2605/05, ACLB, at § 2. [2009] (Isr.).

[73] *Id* at § 3.

[74] *Id*.

[75] *Id* at § 5. A report by the Prison Service in 2009, shortly before the Supreme Court banned privatization, claimed that in fact that "[n]ot only will a privately-run prison not save the Government 15 percent of a jail's operating expenses, as originally thought, but it will actually cost 20 percent more." Hillel Fendel, *Private Prison to Cost 20% More Than Thought*, ISR. NAT'L NEWS (May 17, 2009), http://www.israelnationalnews.com/News/News.aspx/131402. The Prison Service is of course an interested party.

[76] HCJ 2605/05, ACLB, at § 5 [2009] (Isr.).

[77] *Id*.

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] Prison Ordinance, § 128(XI)(c)(1).

agreed that these supervision mechanisms were more comprehensive than those available in other countries with similar private prison systems.[82]

As for the argument concerning Article 1 of Basic Law: The Government, the State responded that it should be viewed as a 'ceremonial' definition of executive powers, noting that private entities often assist government in the performance of its duties, and that the Government does not cease to be the executive authority just because it delegates certain powers to private entities.[83]

An important part of the State's response was a comparative analysis. The State claimed that the Israeli model for prison privatization was based on that of the U.K., which includes supervision by government inspectors within the prison.[84] 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 supervisory power over the private operator was to be broader.[85]

The State argued that since the privatization did not violate the prisoners' constitutional rights, judicial 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."[86] Clearly, the State did not think that the present petition presented such a case.

C. The Ruling

Court President Dorit Beinisch,[87] writing for the Court, noted that although certain traditional powers of a public prison director were not given to their private prison equivalent, the private prison manager and other wardens were to have many rights-infringing powers similar to those granted to their public prison counterparts.[88] These included 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

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[82] HCJ 2605/05, ACLB, at § 42 [2009] (Isr.).

[83] *Id.* at § 6.

[84] *Id*.

[85] *Id.* at §§ 5-6.

[86] *Id.* at §§ 6-7.

[87] Justice Beinisch, the first woman appointed as President of the Court, led an eight-justice majority against a lone dissenter. Due to the importance of the case, the regular three-justice panel was increased to a rare 9-justice panel. We refer to Justice Beinisch's opinion as speaking for the Court, then refer to the concurring opinions and the dissent. For general background on Justice Beinisch, *see generally* Galia Eliahou, *Dorit Beinisch*, JEWISH WOMAN'S ARCHIVE (Mar. 2009), https://jwa.org/encyclopedia/article/beinisch-dorit.

[88] HCJ 2605/05, ACLB, at § 11. [2009] (Isr.).

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.[89] 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 were given search and arrest powers.[90] All these powers are vested in the public prison management and wardens, and their legality has, if questioned, always been upheld. The constitutional issue was whether giving these same powers to a private, for-profit company, violates in itself the human dignity of the prisoners.

In the present case, as in many others, Justice Beinisch stated that the Court would not invalidate a statute lightly, and that any law is presumed to be constitutional until proven otherwise.[91] Justice Beinisch further stated that the constitutional examination shall be done prudently and in a restrained fashion, while refraining from redesigning the policy chosen by the legislature.[92]

While stating that the non-intervention policy is especially applicable in matters of economic policy, Justice Beinisch 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 to the nature and the intensity of the potential damage to human rights.[93]

Justice Beinisch 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. These risks, she held, 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.[94]

The decision of the Court to hold Amendment 28 unconstitutional involved two stages: an initial holding that the statute infringes upon human rights, and a further holding that such an infringement is impermissible under the constitutional standard of Article 8 of Basic Law: Human Dignity and Liberty, which allows the derogation from a right by "a law befitting the values of the State of Israel enacted for proper purpose and to an extent no greater than is required."[95]

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[89] *Id*. at § 12.
[90] *Id*. at § 13.
[91] *Id*. at § 14.
[92] *Id*.
[93] *Id*.
[94] *Id*. at §§ 18-19.
[95] Basic Law: Human Dignity and Liberty, Art. 8, 5752.

Obviously, the incarceration of a prisoner infringes on their right to personal liberty,[96] whether the prison is private or public. Justice Beinisch 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 freedom of movement, the freedom of profession, and many others.[97]

Justice Beinisch then wrote 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".[98] Since deprivation has to be done for the public's interest, Justice Beinisch believes that where the entity depriving the liberty is acting to promote a private interest (being a for-profit company) much of the legitimacy of deprivation is lost.[99]

Given the Court'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, Justice Beinisch emphasizes the role of society and the State in enforcing criminal law and views this as part of the "social contract" of the modern state.[100] The social contract is not merely the transfer of authority to the State, but also the agreement that the State itself would use that power.[101] When a prisoner is incarcerated, she views the infringement of their 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 and employees running the prison on a daily basis. In addition to the loss of democratic legitimacy in private prisons, Justice Beinisch points to the increased risk of abuse where the power is in the hands of private entities.[102]

The concurring Justices made their own interesting theoretical observations. Justice Arbel views privatization as the transferring of public power to a party foreign to the social contract, not committed to its norms,

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[96] *Id*.

[97] HCJ 2605/05, ACLB, at § 20 [2009] (Isr.) (quoting HCJ 6055/95 Tzemah v. Minister of Def., 53(5) PD 241, 261-62 [1999] (Isr.)).

[98] *Id.* at § 21.

[99] *Id*.

[100] *Id*. at § 23.

[101] *Id*.

[102] *Id*. at §§ 25-26.

a not necessarily seeking to achieve its purposes.[103] Justice Procaccia emphasizes that the social contract makes the Government legally, socially, and morally responsible for the use of force. Justice Procaccia argues that:

> It is the State that has always exercised sovereign coercive authority over the individual in criminal proceedings…. [i]t is the… directly responsible for the restraint and checks required by the exercise of power. It is the party that is supposed to be accountable to the public for the manner in which its powers in the criminal proceeding are exercised, and it has the weight of education, knowledge and experience, the tools and all the essential resources for making the necessary balances that dictate the limits of the use of power. The doctrine of balances in the exercise of sovereign coercive authority over the individual is part of the 'genetic code' of the sovereign authority. It is not found in the makeup of some other party that originated outside the sovereign authority, for which the duty of striking balances is foreign to its thinking and is not an inherent part of its *modus operandi*.[104]

Taken to its fullest extent, Procaccia's view clearly preferring nature over nurture may preclude privatization of any specialized government functions. This is because the private party is operating under private efficiency considerations, such as profit-making, which are foreign to the art of balancing. And 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 when 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 prison, even if they are imprisoned for a similar period of time and the actual infringement of human rights in both prisons are identical.[105]

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[103] *Id.* at § 2 (Arbel, J., concurring).

[104] *Id.* at §§ 14-15 (Procaccia, J., concurring).

[105] *Id.* at §§ 33-34 (Beinisch, J., majority opinion). 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.

Furthermore, Court Justice Beinisch also concludes that 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.[106] "There is therefore", she stresses

> [A]n inherent and natural concern that imprisoning inmates in a privately managed prison that is run with a private economic purpose *de facto* 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.[107]

The violation of human dignity is further aggravated by the various powers vested in the private prison operators.[108] Justice Beinisch 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.[109]

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.[110]

The claim that an infringement of human dignity may occur from a symbolic manifestation rather than from any actual actions that violate human rights is based on a theory suggested by Professor 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

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[106] 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. *Id.* at § 114 (Grunis, J., concurring).

[107] *Id.* at § 36.

[108] *Id*. at §§ 36-40.

[109] *Id*.

[110] *Id*. at § 31.

> disrespect, one cannot knowingly engage in them without offending against the target's dignity, no matter what one's motivations and intentions are.[111]

Having found a violation of human rights, the Court moved to the Article 8 analysis which may have saved the law from being declared unconstitutional. The Court then addressed each element of Article 8.[112] *First*, there was no argument the infringement was made by a statute.[113]

Second, quite surprisingly Justice 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.[114]

We find this conclusion somewhat surprising, since it appears that there should have been a potential overlap between the "befitting the values of the State" test, which the law easily passed, and the Court's holding that privatizing the public order sphere is contrary to the basic conception of the society.[115]

Third, to be constitutional, the infringing law must be enacted "for a proper purpose".[116] Under prior case law, the protection of other rights or the fulfilling of an important public purpose were deemed proper purposes.[117] 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 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.

Fourth, for the statute to be held constitutional it is required that the harm caused by the infringement of a right be to an extent no greater than is necessary.[118] This is referred to as the proportionality requirement.[119] In

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[111] MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 162 (2002).
[112] HCJ 2605/05, ACLB, at § 44 [2009] (Isr.).
[113] *Id*. at § 45.
[114] *Id*.
[115] *Id.* at § 39.
[116] *Id*. at § 45.
[117] HCJ 4769/95, Menahem v. Minister of Transp. 56(3) PD 235, 264 [2004] (Isr.).
[118] HCJ 2605/05, ACLB, at § 46 [2009] (Isr.).
[119] *Id*.

interpreting this element the Court, following Canadian and German jurisprudence,[120] 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.[121]

In applying the three-prong test in the present case, the Court refused to accept the petitioners' assertion that Amendment 28 was not rationally connected to a proper purpose (economic efficiency).[122] Petitioners argued that there was no significant correlation between the prison privatization and economic savings.[123] 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.[124] The Court wrote that it was too early to determine the issue.[125]

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

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[120] *See* Eric Engle, *The History of the General Principle of Proportionality: An Overview*, DARTMOUTH L.J., Winter 2012, at 1.

[121] 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 (2001).

[122] HCJ 2605/05, ACLB, at § 47 [2009] (Isr.).

[123] *Id*.

[124] *Id*.

[125] *Id*.

enforcement duties remain with the State.[126] The State argued that this model did not fulfill the dual purposes of improving prison conditions and budget savings.[127] The Court wrote that it was unable to determine whether there was a less restrictive measure which would fulfill the State's purposes, and therefore did not declare Amendment 28 unconstitutional on this basis.[128]

Up to this point, Justice Beinisch held for the State on all points and seemed poised to uphold the Amendment 28 despite its harm to human rights. Then came the final prong of the proportionality test. The test, stated the Justice, is essentially one of values.[129] It's application compares the challenged laws expected public benefit, as compared with the condition before it went into effect, with the damage it is set to cause to constitutional rights.[130]

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 dependent, to a large degree

> [O]n the values and norms that are accepted in the society under discussion. Naturally, in different countries there may be different outlooks with regard to the question of the scope of state responsibility in various fields and the relationship that should exist between the fields of activity that should be managed by the public sector and the fields in which most activity will be carried out by the private sector. These outlooks are determined, *inter alia*, by political and economic ideologies, the special history of each country, the structure of the political system and the Government, and various social arrangements. . . . The role of the court, which is required to interpret and give content to the various constitutional arrangements is not, of course, to decide between various economic and political ideologies; notwithstanding, the court is required to reflect the values enshrined in the social consensus and in the ethical principles that are common to the members of society, to identify the basic principles that make society a democratic society and identify what is

[126] *Id*. at § 48.
[127] *Id*.
[128] *Id.* at § 49.
[129] *Id*. at § 50.
[130] *Id*.

> fundamental and ethical, while rejecting what is transient and fleeting.[131]

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.[132]

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.[133] Hence, Amendment 28 fails the third prong and the statute cannot be found constitutional.[134]

In a concurring opinion, Justice Procaccia wrote 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 saving the State money.[135] Justice Levy, who wrote the only dissenting opinion in this case and would have allowed the law to stand until the operation of the private prison could be tested in real life, concurred with Justice Procaccia on this point.[136]

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 privatization.[137]

Although it appears to us that this balancing should make it more difficult for the Court to hold Amendment 28 unconstitutional, Justice Procaccia still wrote that the harm in privatizing the prison *outweighs* the benefits in improving prison conditions (and the ensuing cost savings).[138] Justice Levy, the lone dissenter, would hold the statute, for now, to be constitutional, reserving judgment until the prison is actually operating.[139]

Since Amendment 28 provides a comprehensive arrangement, the Court decided not to attempt to leave parts of it intact but rather declared it

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[131] *Id*. at § 53.
[132] *Id*. at § 54.
[133] *Id*.
[134] *Id*.
[135] *Id.* at § 45 (Procaccia, J., concurring).
[136] *Id*. at §§ 48-50 (Levy, J., dissenting).
[137] *Id.* at §§ 44-46 (Procaccia, J., concurring).
[138] *Id*.
[139] *Id.* at §§ 1-23 (Levy, J., dissenting).

to be unconstitutional in toto.[140] However, the Court emphasized that its decision does not prevent the transfer of *logistical services* to the private sector.[141]

Of the nine justices – an exceptionally large panel for the Israeli Supreme Court, which normally operates in three-Justice-panels – there was a lone dissenter, Justice Edmond Levy.[142] Justice Levy begins his analysis by deriving from the combination of the right to dignity and the right to liberty "a further right, which is the right to proper prison conditions."[143] Next, Justice Levy observes that given "budgetary and other crises . . . basic rights of persons under arrest and prison inmates are violated on a daily basis as a matter of course."[144] Justice Levy goes on to describe the violations created by the existing situation, including "overcrowding and overpopulation and the lack of sufficient living space for each person, sleeping on the floor without a bed, the lack of cleanliness and sanitary rules and the lack of sufficient ventilation"[145] and

> [C]omplaints of violence of prison staff against inmates; extreme and collective disciplinary punishment; a shortage of basic equipment that exposes the inmates to the vicissitudes of the weather; problems in providing medical treatment for inmates; and problems in realizing the right to contact with family members, the right to meet with a lawyer and the right of free access to the courts.[146]

Therefore, when Justice Levy examines the possible human rights violations in the future private prison, he balances it with the existing violations in the state-run prisons. And while the former is a future likelihood, the latter are a harsh current reality. Justice Levy is "prepared to agree that the privatization of prison services inherently exacerbates the violation of the dignity of the prison inmate."[147] Yet he objects to the Court's refusal to examine whether the private prison will improve prisoners' conditions by holding it unconstitutional *per se*:

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[140] *Id*. at § 69. (Beinisch, J., majority opinion).

[141] *Id.* at §§ 65-66.

[142] *See generally* Ofer Aderet, *Edmond Levy:1941-2014*, HAARETZ (Mar. 12, 2014), https://www.haaretz.com/israel-news/.premium-1.579285.

[143] HCJ 2605/05, ACLB, at §2 [2009] (Isr.) (Levy, J., dissenting).

[144] *Id.* at §§ 2-3.

[145] *Id.* (citing previous Supreme Court case law from 2001 that describes the physical conditions of incarceration in Israel).

[146] *Id*.

[147] *Id.* at § 7.

> For my colleagues this is unimportant, since it would appear that according to their approach the violation of rights resulting from the privatization is so serious that nothing can mitigate it. By way of analogy, even if the private prison were to promise a seven-day feast for everyone in it, this would not mitigate the degradation and loss of liberty that is the lot of those imprisoned in it, because they are at the mercy of a private concessionaire[148]

After a thorough analysis of the supervisory mechanisms that were included in Amendment 28 to the Prison Ordinance and in the agreement between the State and the Concessionaire, Justice Levy concluded that "the State has not divested itself of its powers but merely exchanged them for powers with a new content, namely that of supervision."[149]

Justice Levy then added: "[m]y position, in brief, is therefore this: time will tell".[150] It is possible that had the petition been filed *after* the private prison went into operation, he too would have found that the constitutional rights of the prisoners are violated, and would have joined his brethren.[151] He then cites this somewhat puzzling analogy from the Mishnah, the oldest major work of Rabbinic thought:

> We are therefore dealing with an egg that has not yet been laid. We do not yet know if the day on which it will come into the world will be a good one or not, nor do we know if it will be edible.[152]

Justice Levy concluded that given the absence of data on how the controls in the private prison would work in fact, the Court's scrutiny was premature.[153] He would have denied the petition, allowed the private prison to operate, and get to the cost-benefit analysis that caused the majority to ban completely private prisons after it could be analyzed in practice.

IV. THE PRISON OVERCROWDING CASE (2017)

A. The Factual Background

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[148] *Id.* at § 9.
[149] *Id.* at §§ 9-10.
[150] *Id*. at § 11.
[151] *Id.*
[152] *Id*. at § 11(quoting Mishnah, *Moed*, Betzah ch. A).
[153] *Id.* at § 17.

One of the social problems judges are most familiar with is that of living conditions in prisons. It is the judiciary that sends people to incarceration and it is the judiciary that hears their appeals on all matters throughout their terms in prison. In Israel, the law specifically designates judges (as well as several other officials, such as the attorney general) "*Official Visitors*" of prisons, and authorizes them to enter any prison in order to examine the conditions therein, the handling of prisoners, and the management of prisons.[154] The law authorizes judges to visit any part of the prison at any time and talk with any prisoner.[155]

However, the judiciary is not alone in recognizing overpopulation in Israeli prisons. Various State bodies have looked into the matter for decades and the facts are quite simple: State investment in building and improvement of the prison facilities has barely kept up with the growth of the prisoner population.[156]

The Court notes that despite the construction of new prisons, and "the presumption that the Prison Authority is making efforts in this respect . . . . This welcome direction has not yet at the end of the current day brought to a significant improvement in the average living space allotted to each prisoner and arrested person which has been for the last 25 years approximately 3 square meters per person, currently 3.16 square meters."[157] Data provided to the Court by the Prison Service shows that while the average system-wide space was 3.16 square meters per prisoner, about 40.5% of all prisoners were held in cells that averaged less than 3 square meters per prisoner.[158]

Over the past two decades, the number of prisoners in Israel jumped from 11,000 in 2002 to over 20,000 in 2015. The reason for this is a 50% rise in the number of incarcerated criminal offenders; a decline in the number of Palestinian security prisoners to under 6,000 in 2015; and the number of detained infiltrators has remained steady since 2009 at 2,000.[159]

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[154] Prison Ordinance (New Version), 1971 §§ 72, 72A.

[155] *Id*.

[156] Daniel K. Eisenbud, *Overcrowding 'Unprecedented Crisis' says Israel Prison Services*, THE JERUSALEM POST (Dec. 5, 2017), http://www.jpost.com/Israel-News/Overcrowding-unprecedented-crisis-says-Israel-Prison-Services-517070.

[157] HCJ 1892/14, ACRI, at § 2 [2017] (Isr.).

[158] Note that the prison bed alone covers 1.5 square meters. *See* HCJ 1892/14, ACRI, at §§ 4, 40 [2017] (Isr.).

[159] *See* Heruti-Sover, *supra* note 4; *see also Palestinian Prisoners of Israel*, WIKIPEDIA, https://en.wikipedia.org/wiki/Palestinian_prisoners_of_Israel (last updated Sep. 7, 2017); *Illegal immigration from Africa to Israel*, WIKIPEDIA https://en.wikipedia.org/wiki/Illegal_immigration_from_Africa_to_Israel (last updated Nov. 13, 2017). In recent years, the Israeli government has sought various detainment solutions for this population. It is worth noting that on the same day of that the Prison Overcrowding Case was handed down, the Court ruled in the matter of the conditions in

This tripartite division matters when calculating the Israel incarceration rate with a comparative perspective. When the calculation includes only the criminal offenders, the figure for 2015 is 147 prisoners per 100,000 people, which would be the 105th highest prison population rate in the world.[160] But if we bring into account the non-Israeli citizens of the other two incarcerated groups, the rate climbs to 265 prisoners per 100,000 people, second only, within the OECD, to the United States.[161]

This is not data. These numbers have a real-life effect, one of them – familiar to us in many contexts – being the difficulty keeping up with evolving demand with underinvested infrastructure.[162] The problem exists all over the world. Overcrowding reaches 200% of designated levels in many South American countries.[163] And even in Europe, where the prison population fell by 6.8% from 2014 to 2015, the annual Council of Europe survey found "that there is no progress in tackling overcrowding" which remains a problem in 15 countries.[164]

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the detention center holding African infiltrators; there too Justice Rubinstein also wrote the main holding for the Court and there too he demanded the State improve living conditions. The cases are somewhat different. First, because African infiltrators have committed no crime beyond illegal entry into Israel, and they await the determination in their request for asylum, and second, because they are free to leave the holding center during daytime as long as their return in the night hours. *See* HCJ 4386/16 Tesfahiwut Mediu et al. v. Israel Prison Service [2017] (Isr.); *see generally* Sigal Rozen, *Immigration Detention in Israel: Annual Monitoring Report*, HOTLINE FOR REFUGEES AND MIGRANTS (Mar. 2016), https://il.boell.org/sites/default/files/2016_detention_monitoring_report.pdf.).

[160] HIGHEST TO LOWEST - PRISON POPULATION RATE, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Jan. 5, 2018).

[161] *See* Oren Gisel Eyal, *The Misleading Graph of Incarceration Rates in Israel*, THE SEVENTH EYE (Sep. 6, 2016), http://www.the7eye.org.il/217419. Furthermore, both figures are dramatically higher than the incarceration rate in such countries as Canada, France, and Italy, with 118, 98, and 87 prisoners per 100,000, respectively.

[162] Hans-Jörg Albrecht, *Prison Overcrowding: Finding Effective Solutions, Strategies and Best Practices Against Overcrowding in Correctional Facilities*, in 2011 REPORT OF THE WORKSHOP: STRATEGIES AND BEST PRACTICES AGAINST OVERCROWDING IN CORRECTIONAL FACILITIES, UNITED NATIONS ASIA AND FAR EAST INSTITUTE FOR THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS 65-130, *available at* http://www.unafei.or.jp/english/pdf/Congress_2010/13Hans-Jorg_Albrecht.pdf.

[163] *See* Cindy S. Woods, *Addressing Prison Overcrowding in Latin America: A Comparative Analysis of the Necessary Precursors to Reform*, 22 ILSA J. INT'L & COMP. L. 533 (2016).

[164] *See* Press Release, Europe's Prison Population Falls, But There Is No Progress in Tackling Overcrowding, Says Annual Council of Europe Survey, COUNCIL OF EUROPE (Mar.14, 2017), https://wcd.coe.int/ViewDoc.jsp?p=&Ref=DC-PR031(2017) (last visited Nov. 26, 2017) (The most overcrowded were the prisons of "the former Yugoslav Republic of Macedonia" (138.2 inmates per 100 places), Spain (133.1), Hungary (129.4), Belgium (127), Albania (119.6), France (113.4) and Portugal (113)); *see also* May

A 2013 report by the Ministry of Justice's Public Defense unit, a report cited by the Supreme Court in the Prison Overcrowding Case, outlined the troubling living conditions in Israeli prisons, from both an absolute and comparative perspective.[165] The report states that in the majority of prison facilities, inmates reside in conditions of severe and inhuman density which average 2 to 3 square meters per prisoner, or less.[166] Even if the official data, that claims the national average living space per inmate to be 3-3.5 square meters, is true, it not only represents no improvement over early 1990s standards, but it falls short of both the standards for the building of new prisons set in zoning plans approved in the early 1980s and in regulations from 2010.[167] The former set a standard of single prisoner cells no smaller than 6.5 square meters and three-inmate cells of a minimum size of 15 square meters; the latter required a minimal space of 4.5 square meters per prisoner.[168] The Israeli conditions fall well short of the norms in Western countries, which vary from 6 to 12 square meters per prisoner, and average 8.8 square meters.[169] The report's recommendations include the setting of mandatory minimal standards for prisoners' living space, the improvement of prison facilities, an effort to find alternatives for physical imprisonment and arrest, and making greater use of the power of 'administrative release', *i.e.*, the shortening of prison sentences when the total number of prisoners exceeds a benchmark figure.[170]

In November 2015, a high-level State-appointed Committee on criminal sentencing recommended that the State use a variety of methods to decrease the number of prisoners.[171] The Committee, headed by retired Supreme Court Justice Dalia Dorner, was appointed four years earlier following public criticism of what was seen as *overly lenient* criminal

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Bulman, *Two Thirds of Prisons Overcrowded Prompting Warnings UK Penal System Has Reached 'Toxic' Levels*, INDEPENDENT (Apr. 15, 2017), http://www.independent.co.uk/news/uk/home-news/prisons-overcrowding-prisoners-ministry-of-justice-howard-league-a7685641.html (2017 government statistics for England and Wales show that 68% of prisons hold more inmates than their usable "certified normal accommodation").

[165] ISRAEL PUB. DEF., REPORTS OF CONDITIONS OF DETENTION AND IMPRISONMENT (2017), http://www.justice.gov.il/Units/SanegoriaZiborit/DohotRishmi/Pages/DohotRishmi.aspx.

[166] *Id*.

[167] *Id*.

[168] *Id*.

[169] *Id*.

[170] *Id*.

[171] *See* Sharon Pulwer, *Israeli Panel Calls for Shorter Jail Terms, Improved Rehab for Offenders*, HAARETZ (Nov. 3, 2015), http://www.haaretz.com/israel-news/.premium-1.683888.

sentencing.[172] But the Committee ended up recommending shorter prison terms and an emphasis on rehabilitation, through the increased use of community service and probation,[173] community courts,[174] and half-way houses.[175]

Adopting the recommendations is easier and faster than implementing them, and this was the case with the recommendations of the Dorner Committee. The Government decided in August 2016 to adopt the main principles of the Dorner Committee.[176] The detailed text of the Government decision reveals that this was going to be quite a lengthy process, with a very limited short-term impact.[177] Indeed, the parts of the report that require a statutory amendment have not been legislated as of the writing of this paper, almost two years later.

As discussed below, we assume that the Prison Overcrowding Case will now cause the expedited adoption and implementations of these recommendations to help the State to meet the short deadline set by the Court.

B. The Petition and the Parties' Arguments

Three public petitioners, the Association for Civil Rights in Israel,[178] the College for Law and Business,[179] and Physicians for Human Rights[180] petitioned the Court in 2014. The petition was not aimed at the conditions

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[172] *Id*.

[173] *Id*.

[174] Diana Karafin, *Community Courts Across the Globe: A Survey of Goals, Performance Measures and Operations*, CENTER FOR COURT INNOVATION (2011), http://www.courtinnovation.org/sites/default/files/community_court_world.pdf.

[175] THE PUB. COMM. FOR THE REVIEW OF PUNISHMENT POLICY, THE DORNER COMMITTEE REPORT (2015) [hereinafter Dorner Report], http://weblaw.haifa.ac.il/he/Events/dorner/Documents/%D7%93%D7%95%D7%97%20%D7%A1%D7%95%D7%A4%D7%99%20%D7%97%D7%AA%D7%95%D7%9D%20%D7%A0%D7%95%D7%91%D7%9E%D7%91%D7%A8.pdf.

[176] Gov't Decision No. 1840, 2016, KT (Isr.), *available at* http://www.pmo.gov.il/Secretary/GovDecisions/2016/Pages/dec1840.aspx.

[177] *Id*.

[178] Founded in 1972 and modeled after the American Civil Liberties Union (ACLU), this is one of the most significant non-profit organizations aimed at protecting human and civil rights operating in Israel. *See* ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (2017), http://www.acri.org.il/en/.

[179] Also known as the Academic Center of Law and Business. It was the first and most significant petitioner in the Prison Privatization Case. This is a rare occurrence where a law school plays such a continuous role in the change and achieves through a series of legal proceedings a major change in the nation's prison system. *See* COLLEGE OF LAW AND BUSINESS, http://www.clb.ac.il/english/index.html. (last visited Oct. 11, 2017).

[180] PHYSICIANS FOR HUMAN RIGHTS (2017), http://www.phr.org.il/en/.

in which a specific prisoner was held or a specific prison. The petitioners challenged the system-wide average living space, thus making the petition a direct demand for a huge budgetary increase.[181]

The petitioners based their challenge to the legality of the current situation on both domestic and international law. In essence, they argued that prison conditions in Israel were infringing on prisoners' rights to human dignity and the protection of their body (given the health risks posed by overcrowding), and privacy (when many prisoners were put in once cell).[182] They also claimed prison conditions were a non-proportional limit on the right to liberty, thus accepting that a prison sentence meant a mandatory limit of that right, but claiming the prison conditions made that limitation excessive.[183]

In their domestic argument, the petitioners asked the Court to set a binding standard in the absence of such standard in existing legislation.[184] In fact, existing legislation was not completely silent on the issue of what the living space allocated to prisoners should be like. In 2012, The Knesset amended the Prison Ordinance by adding a declaratory provision that "a prisoner shall be held in appropriate conditions that would not harm his health or dignity".[185] Moreover, Regulations promulgated by the Minister of Public Security in 2010 stated that the average cell space shall not be less than 4.5 square meters.[186] However, these regulations only applied to the construction of *new* permanent facilities and "as much as possible to the planning of renovations of existing prisons".[187] In other words, these standards did not apply to all existing facilities and were not mandatory even if the current facilities were renovated. The petitioners thus argued

[181] HCJ 1892/14, ACRI [2017] (Isr.).

[182] *Id*.

[183] *Id.* Obviously, the imprisonment of a felon justifiably infringes on the right to liberty, but under Israeli constitutional law, justified infringements on rights must be "proportional" which means, *inter alia*, that the infringement be as minimal as possible to achieve the justified purpose.

[184] *Id*.

[185] Prison Ordinance (Legislative Amendments), 5772-2012, HH (Knesset) No. 42 Sec. 11B(b) (Isr.) (A similar provision has been included since 1996 in the law applicable to the conditions in which people under arrest were to be held); Criminal Procedure Act (Enforcement Powers – Arrest), 5756-1996, HH (Knesset) (Isr.).

[186] The Prison Regulations (Imprisonment Conditions), 5770-2010, KT Reg. 2(h) (Isr.) (The space calculation measures the space between the walls of the cell (i.e. without the walls) and includes the bathroom space, the sink, and the shower (as long as there is a shower in the cell) divided by the number of beds in the cell).

[187] *Id.* at Reg. 8.

that the existing legislation lacked a binding standard for a minimum living space for existing prisons, and called upon the Court to set it.[188]

The State, for its part, argued that the legislature did set standards, but chose to apply them only to new construction, deciding not invest the resources needed for an immediate application of the standard to existing prisons,[189] and in essence, grandfathering the conditions of existing prisons.

The petition also addressed overcrowding from the perspective of the number of prisoners in each cell. Here, the regulations applicable to new prisons and renovations of existing facilities called for a maximum of four beds per cell.[190]

The petitioners also raised claims grounded in international law.[191] This line of argument referred to the International Covenant on Civil and Political Rights ("ICCPR"), which holds that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[192] Reference was also made to the U.N. Standard Minimum Rules for the Treatment of Prisoners[193] and to the European Prison Rules.[194] The argument was that the holding of prisoners in conditions that are lower on average than what is common in other democracies and from the standard set by the UN amounts to cruel, inhuman or degrading punishment, as prohibited by Article 7 of the ICCPR.[195]

The petitioners also pointed to decisions of other courts in the world, which intervened in the overcrowding of prisons.[196] The State argued

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[188] HCJ 1892/14, ACRI, at § 11 [2017] (Isr.).

[189] *Id.* at § 18.

[190] HCJ 1892/14, The Prison Regulations, ACRI 5, at Reg. 2(g). [2017] (Isr.).

[191] HCJ 1892/14, ACRI [2017] (Isr.).

[192] Art. 10(1), International Covenant on Civil and Political Rights, G.A. Res 2200, 21 U.N. GAOR Supp. No. 16, at 52, UN Doc. A/6316 (1966), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx. Israel signed the Covenant on December 19, 1966, and ratified it on August 18, 1991. The Covenant has been in force in Israel since January 3, 1992. *See* HCJ 1892/14, ACRI, at § 49 [2017] (Isr.).

[193] Standard Minimum Rules for the Treatment of Prisoners, U.N. CONGR. ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS (1955), *available at* https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

[194] COUNCIL OF EUROPE, EUROPEAN PRISON RULES (2006), https://rm.coe.int/16806f3d4f.

[195] HCJ 1892/14, ACRI, at §§ 14-15 [2017] (Isr.).

[196] Some of these decisions are discussed further on. *See infra* Ch. V. A.

against the comparisons drawn from other countries, and claimed that the Israeli parliament should be afforded deference.[197]

C. The Ruling

The Court's Vice President, Justice Elyakim Rubinstein wrote the main opinion for the Court.[198] Two additional facts are worth noting: *first*, that Justice Rubinstein has had a uniquely diverse career. He was recognized an exceptional jurist early on and served as legal advisor in both the ministry of defense and the ministry of foreign affairs, as cabinet secretary, attorney general, an appellate court judge, and finally as Supreme Court Justice.[199] Thus, he has gathered enormous life and legal experience, including on prisoner conditions.[200] *Second*, that Justice Rubinstein noted in his opinion that he frequently made use of his status as an 'official visitor' to prisons, detailing letters he wrote to the prison service after each visit.[201] Indeed, the topic was so important to him that he chose this opinion to be read at his last day at the bench, the day of his retirement at age 70.[202] The case turns out to be deeply personal for Justice Rubinstein and his opinion is surprisingly frank.

The holding, which comes after over 100 preliminary sections, is very clear and simple. Justice Rubinstein focuses on section 11b of the Prison Ordinance (stating that "a prisoner shall be held in appropriate conditions that would not harm his health or dignity").[203] He poses the question as whether the words "appropriate conditions" mean, as a matter of statutory interpretation, that all prisoners and detainees held in Israel are entitled to a minimal living space.[204]

Following prior case law, Rubinstein examines both the *subjective* and the *objective* intent of the statute. On the former he holds, not without some doubts, that the subjective intent of the statute leans towards the interpretation argued by the petitioners, namely that it is the duty of the

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[197] HCJ 1892/14, ACRI [2017] (Isr.).

[198] *Id*.

[199] Revital Hovel, *Israeli Supreme Court Justice Ends Illustrious Career With Two Human Rights Rulings*, HAARETZ (Jun. 13, 2017), https://www.haaretz.com/israel-news/.premium-1.795420.

[200] HCJ 1892/14, ACRI, §§ 9, 45, 106 [2017] (Isr.); *see generally* Revital Hovel, *Israeli Supreme Court Justice Ends Illustrious Career With Two Human Rights Rulings*, HAARETZ (Jun. 13, 2017) https://www.haaretz.com/israel-news/.premium-1.795420.

[201] HCJ 1892/14, ACRI [2017] (Isr.).

[202] Justice Rubinstein notes this point in his decision – as do all other justices in turn. *Id*. at § 87.

[203] *Id*. at §§ 102-07.

[204] *See id*.

State to supply prisoners appropriate conditions, which include a minimal living space.[205] On the latter, Justice Rubinstein holds, with less doubt, that Section 11b intends to set, at the very least, a minimal standard for a prisoner's living conditions, including the space of his cell.[206]

He also draws on Basic Law: Human Dignity and Liberty, on Jewish law, and on comparative law – concluding that all the sources point to the conclusion that Section 11b establishes the appropriate and minimal incarceration conditions (including the space of a jail cell) which will to all prisoners be made available.[207] Minimal living space is a necessary condition to maintain human dignity and the right to minimally dignified existence.[208] The undeniable facts are that the vast majority of prisoners in Israel are held in conditions that, according the State itself as well as international and comparative law, do not rise up to the minimal living conditions that allow the prisoners to have a dignified existence.[209]

Justice Rubinstein adds several supporting factors: *firstly*, the paucity of 3 square meters as a minimal living space, rhetorically asking, "how would we feel (being) in a living space of 3 [square meters] for years?"[210] *Secondly*, "even assuming there was room to interpret this way or that, when dealing with basic human rights we must choose the interpretation that sustains wider rights than the reverse."[211] *Thirdly*, Rubinstein interprets Sections 2(h) and 11 of the Prison Regulations as amended in 2010 as immediately applicable.[212]

D. After the Ruling

The bottom line of the Prison Overcrowding Case is that the Supreme Court has ordered the State to increase the cell space allotted to each

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[205] *See id.* at §§ 108-11.

[206] *Id*. at § 112. Justice Rubinstein writes: "The objective intent of a piece of legislation, unlike the subjective intent, wishes to seek the intent of that reasonable legislator, to whom the foundational principles of the system, morality, fairness and justice are the guiding lights." *Id*.

[207] *See id.* at §§ 113-15.

[208] *Id*.

[209] *Id*.

[210] *See id.* at § 115; Justice Rubenstein later adds that "it is conceivable that a prisoner or detainee who lies to sleep and wakes up in the morning, day by day, week by week, month by month and year by year in a cell that is 2.2 [square meters] . . . . Lives his live 'in dignity and heath', as required by law? Can we, the judges of Israel, ignore reality on the ground and keep sending the criminally convicted . . . however harsh their crimes nay be . . . to incarceration conditions unworthy for human living . . . ." *Id.* at § 121.

[211] *See id.* at § 115.

[212] *Id.* For the various interpretational and disciplinary tools employed to reach this conclusion, *see id.* at §§ 116-20.

prisoner in Israel in two phases, within a very short deadline. The State has nine months to reach a minimum of 3 square meters of living space for each and every prisoner, and eighteen months to reach a further increase to 4 square meters (or to 4.5 square meters including the space of a toilet and a shower).[213] The data presented to the Court showed that in the first phase the State has to improve the conditions of over 40% of the prisoners increase the living space of 61% of the prisoners, in many cases doubling the existing space in many facilities.[214]

Overcrowding can be reduced by either constructing new prisons or additional cells, by reducing the number of inmates entering the prison system, or by releasing those incarcerated before the end of their sentence. Justice Rubinstein notes the common route would be for the State to arrange for prison fixing and expansion within the timetable, but also lists options to reduce the number of prisoners, concluding that "the Government and Parliament have discretion on how to operate in order to uphold our decision under the timetable, and in a manner befitting with law, case law, and the basic right of every person to dignity,"[215]

One way to reduce the number of prisoners is to expand the use of community service as a substitute for imprisonment. Under the current Israeli law, such conversion is possible if the sentence is no longer than six months.[216] Following the recommendation of the Dorner Committee, the Government intends to extend community service to sentences of six to nine months.[217]

There appears to also be plans to allow more prisoners early release. Data collected by the Dorner Committee shows that while in 1990 63.4% of all prisoners were granted early release, that number has decreased dramatically to 33% in 2012.[218] A reversal of this trend may help reduce overcrowding.

In addition, the Commissioner of Prisons is granted administrative powers to release certain prisoners up to 24 weeks before their full

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[213] *Id.* at §§ 124-27.

[214] *Id*. at § 4.

[215] *Id.* at §§ 124-27.

[216] Penal Law, 5737-1977, § 51(b) (Isr.).

[217] Dorner Report, *supra* note 175. There is no precise data as to the number of convicted felons who may evade prison (and help resolve the overcrowding problem) if this law is passed. Recent data has 1,400 prisoners for periods of up to 1 year (out of a total of 20,000 prisoners), but some of these are sentenced to more than 9 months and others may not be suitable for community service. The numbers are in Heruti-Sover, *supra* note 4. Other methods to reduce entry into imprisonments include increasing electronic monitoring and expanding the community courts model which tend to use solutions other than imprisonment. Government Decision No. 1840 authorized the establishment of four community courts until the end of 2018.

[218] Dorner Report, *supra* note 175, at 44.

sentence when the number of prisoners in the country exceeds the capacity as determined for that year.[219] If the formal capacity figure is changed following the judgement of the Court, the Commissioner may be able to use this power in a broad way.

The construction option appears, at the time of printing this article, the least feasible option, especially given the very tight deadline. Construction of jails is a complicated matter in many aspects such as zoning, security, and the need to go through public tenders.

Oren Gazal-Eyal, Dean of the Haifa University Law School and the Coordinator of the Dorner Committee, wrote, in reviewing the Prison Overcrowding Case, that the courts should reduce the prison terms in their sentences, but that the main burden to uphold the judgment rests with the State prosecution.[220] Unlike the court system, prosecution is organized in a hierarchical way, and if so ordered, the prosecutors can ask for less pre-trial arrests, agree to jail substitutes such as house arrest under electronic monitoring, change their policy as to the prison terms they ask the courts for, and agree to early release in more cases.[221] Gazal-Eyal calls upon the state prosecution to set interim goals and to completely change their attitude.[222] Here, too, time will tell.

V. WHAT THE TWO CASES TELL US: THREE ADDITIONAL INSIGHTS

There is much to learn from these two extensive cases, and we have tried to reflect about what we consider the essence of both cases. Yet we see the cases as reflecting some wider insights into the Court's jurisprudence and long-term views. We focus here on three elements: the use of comparative law, on the privatization of core State functions, and the importance of a timely decision.

A. On the Court's Use of Comparative Law

The present study presented us with two insights on comparative law:

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[219] Prison Ordinance (Legislative Amendments), 5732-1971, HH (Knesset) § 68 (Isr.).

[220] Oren Gazal-Eyal, *The Obligation to Reduce Overcrowding in the Prisons Lies with the Courts, the Prosecutor's Office and the Police Persecution*, ICON-S-IL BLOG (Jun. 27, 2017), https://tinyurl.com/Gazal-Icons.

[221] *Id*.

[222] *Id*.

i. On the Selective Use of Comparative Law

In both cases, the Israeli Supreme Court made use of comparative law, but did so very differently. In the Prison Privatization Case, the Israeli Court considered itself the avant-garde, carving a way where no Court has gone before, *i.e.*, ruling against a backdrop of contradictory comparative law. In the Prison Overcrowding Case, the Israeli Court aligns Israeli law with the accepted standards of comparative law. This is not to say that we are averse to courts using comparative legal materials, quite to opposite, but these cases bring to mind many of the critiques of the practices raised by the late Justice Scalia in his scathing dissent in *Roper v. Simmons*,[223] especially the inconsistent use of comparative materials by his liberal brethren. Scalia writes:

> More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law . . . .
>
> The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution's requirement that 'Congress shall make no law respecting an establishment of religion . . . .'
>
> And let us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. . . .
>
> The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned* basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.[224]

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[223] *See* 543 U.S. 551 (2005). The question before the Court was whether the U.S. Constitution permits the imposition of the death penalty on juvenile offenders. The Court noted the overwhelming weight of international opinion against the juvenile death penalty and found that it provided respected and significant confirmation for the Court's own decision on the matter.

[224] *Id.* at 624-27.

In the Prison Overcrowding Case, the petitioners made many references to international and foreign law on overcrowding while the State struck a more cautious tone. Justice Rubinstein notes that while it is clear that each state has its own character, needs, and capabilities, he believes that:

> [T]he sheer scope of the comparative law on the issue at hand – together with the fact that, to a large extent, this is a universal issue of human dignity – require that we also cast our look overseas. Clearly, this does not mean the outright adoption of the regime applicable at a certain state into our legal system; the survey is only meant to enlighten us, as we seek a solution to an issue that is at our doorstep. The inmate-man in of himself is one and the same across the universe.[225]

That said, the Court, in reaching its potent holding, clearly relied on the fact that other courts in the world have taken a highly activist role, ordering States to make dramatic changes to reduce overcrowding, despite the huge budgets (or massive release of suspects and convicts) necessary to achieve this goal.[226]

The Israeli Supreme Court concludes from the comparative law analysis that while overcrowding constitute a problem in many countries, there is "increased willingness by international mechanisms and courts of various states to employ active measures to fix the phenomenon of overcrowding."[227]

ii. On the Continued Relevance of American Law

Much has been written on the declining international influence of American constitutional law.[228] In this instance, the Israeli Supreme Court clearly took note of its American counterparts. The Israeli Court found little support in the U.S. litigation on prison overcrowding for the premise that a small cell space may in itself constitute cruel and unusual

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[225] HCJ 1892/14, ACRI, at § 48 [2017] (Isr.).

[226] *Id*.

[227] *Id*.

[228] *Cf.* Adam Liptak, '*We the People' Loses Appeal With People Around the World*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html.

punishment under the Eighth Amendment.[229] Yet the Court also took note of the 2011 *Brown v. Plata*[230] case, where the U.S. Supreme Court affirmed a lower court holding which ordered California to reduce its prison population to 137.5% of design capacity within two years from nearly 200%. The Israeli Supreme Court, in making what may be its costliest judgment to date, chose to quote the dissent of Justice Scalia in *Plata*: "[t]oday the Court affirms what is perhaps the most radical injunction issued by a court in our Nation's history."[231] For the Israeli Court, the decision in *Plata*, which was based on examining overcrowding based on design capacity, represents the willingness of the U.S. Supreme Court to view overcrowding in itself as unconstitutional without examining its actual effect on the prisoners, as was done in *Rhodes v. Chapman*.[232]

iii. On the Institutional Role of the European Court of Human Rights

The European Court of Human Rights (ECHR)[233] has taken probably the most active role among high courts against prison overcrowding, providing judgments against several European countries. The basis of the European Court's actions is Article 3 of the European Convention on Human Rights, the "Prohibition of Torture", which holds that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[234] The ECHR first made detailed assessments of prison conditions, including the availability of heat, ventilation, and light, and within that assessment viewed a minimum of 4 square meters per prisoner, not including the bathroom space, as a major factor in the determination

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[229] Rhodes v. Chapman, 452 U.S. 337 (1981) (holding double celling did not amount to cruel and unusual punishment where it did not lead to deprivations of essential food, medical care, or sanitation, nor did it increase violence among inmates or create other conditions intolerable for prison confinement); Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2362-71 (2000); Lauren Salins & Shepard Simpson, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding Epidemic*, 44 LOY. U. CHI. L.J. 1153, 1157 (2012).

[230] 563 U.S. 493 (2016).

[231] *Id.* at 550.

[232] 452 U.S. 337 (1981).

[233] This international court has jurisdiction in 47 countries, and should not to be confused with the Courts of the European Union. *See* EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/ (last visited Dec. 16, 2017).

[234] *See* Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 3., Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter European Convention on Human Rights], *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

whether the prison conditions were legal.[235] That said, the ECHR has also ruled that where the space allocated to a prisoner was less than 3 square meters, the overcrowding itself would constitute a breach of the prohibition against inhuman punishment.[236]

The decisions of the ECHR are especially interesting since they provide the Committee of Ministers of the Council of Europe, a powerful executive body, with the authority to enforce compliance on the respondent member State. The State has to file timely action plans detailing the measures it will take to resolve the issues that arose in the specific case. These action plans are discussed by the the Committee of Ministers until it is satisfied that the judgment has been complied with.[237]

Thus, after the ECHR held in two cases that Italy violated the European Convention by holding the petitioners in overcrowded prisons, Italy had to take significant measures to end overcrowding.[238] After the 2009 holding of *Sulemanovic v. Italy,*[239] Italy's actions were relatively modest.[240] But following the next judgment, the 2013 holding of *Torrreggiani v. Italy*,[241] Italy had to take significant measures to resolve overcrowding. These measures included legislation aimed at reducing prison entry flows and enabling inmates to leave the prison system, the implementation of an "open prison" regime for inmates in medium or low security facilities in order to improve living conditions by increasing their time and freedom of movement outside their cells, and a plan for the construction of additional facilities and renovating existing facilities.[242]

In addition to these measures, the most interesting lines of action included domestic remedies. These were to include compensation to those

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[235] Badila v. Romania, App. No. 31725/04, § 72, Eur. Ct. H.R. (2011); Karalevicius v. Lithuania, App. No. 53254/99, § 36, Eur. Ct. H.R. (2005); Peers v. Greece, App. No. 28524/95, § 70 Eur. Ct. H.R. (2001).

[236] Lonia v. Croatia, App. No. 8067/12, § 76, Eur. Ct. H.R. (2014); Ananyev v. Russia, App. No. 42525/07, § 145, Eur. Ct. H.R. (2012); Badila v. Romania, App. No. 31725/04, § 72, Eur. Ct. H.R. (2011); Kalashnikov v. Russia, App. No. 47095/99, § 97, Eur. Ct. H.R. (2002).

[237] For a description of the European human rights system structure and success in fighting prisons overcrowding, *see* Yesenia Judith Barberena, *Prisoners in Latin America: What the Inter-America Human Rights System Can Do to Protect Prisoners' Human Rights*, 47 GEO. WASH. INT'L L. REV. 669, 679, 687-92 (2015).

[238] Federica Favuzza, *Torreggiani and Prison Overcrowding in Italy*, 17 HUM. RTS. L. REV. 153, 156 (2017).

[239] App. No. 22635/03, Merits and Just Satisfaction, Eur. Ct. H.R. (2009).

[240] For a description of Italy's responses and the ensuing decisions of The Committee of Ministers, *see* Favuzza, *supra* note 238, at 155-56.

[241] Torreggiani and Others v. Italy, App. No. 43517/09, Eur. Ct. H.R. (2013).

[242] For a detailed analysis, *see* Favuzza, *supra* note 238, at 161-62.

who have served imprisonment terms in inadequate conditions.[243] The compensation scheme would reduce the remaining sentence by one day for every ten days of detention already served in conditions non-compliant with Article 3 of the convention.[244] Those who had already served their entire sentence would receive a pecuniary compensation of 8 euros for each day of detention in non-compliant conditions.[245] Upon receiving further information that the various measures were in fact implemented by the Italian authorities, the Committee of Ministers closed the examination of the execution of the *Sulemanovic* and *Torreggiani* cases, satisfied that Italy had adopted the required measures.[246]

The ECHR also granted directly monetary compensation to individual prisoners held in overcrowded prisons.[247] So did domestic courts.[248] But these individual cases appear to be less effective since they only apply to the case at hand, and therefore require individual litigation that is time-consuming and costly.

The ECHR also showed that states can use alternatives to imprisonment in order to alleviate overcrowding. For example, Italy introduced a possibility of house detention for people serving a sentence of up to 12 months and for the final part of a longer sentence,[249] following the European Court of Human Rights judgment against it on overcrowding in *Sulemanovic*.[250]

The success of the ECHR in reducing prison overcrowding is not obvious. But it has been noticed, with proposals to apply similar rules in

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[243] *Id*. at 159.

[244] This measure has the obvious added benefit of helping to reduce overcrowding in addition to the compensation to the affected prisoner. The European Court of Human Rights expressed appreciation for the positive outcome of this measure. Stella et. al. v. Italy, App. No. 49169/09, 54908/09, 55156/09, Eur. Ct. H.R. (2014).

[245] Communication from Italy concerning the case of Torreggiani and Others v. Italy, App. No. 43517/09, Eur. Ct. H.R., Updated Action Plan (2014), DH-DD (2014) 1143, (Oct. 1, 2014).

[246] Favuzza, *supra* note 238, at 164-65. For a critique of the execution of the Italian measures in practice, *see id.* at 168-70.

[247] Marin v. Romania, Eur. Ct. H.R App. No. 79857/12 (2014); (compensation of 15,300 euros based in part on the overcrowded prisons in which petitioner was held for about 10 years); Lonia v. Croatia, Eur. Ct. H.R App. No. 8067/12, § 76 (2014) (compensation of 10,000 euros based in part on the petitioner being held for a year in a prison space smaller than 3 square meters); Olszewski v. Poland, App. No. 21880/03, Eur. Ct. H.R (2013) (compensation of 5,000 euros to the petitioner who was held in a space smaller than 3 square meters for total periods amounting to five years).

[248] For example, in Italy, a judge has ordered the Ministry of Justice to pay a prisoner 220 euros as compensation for non-pecuniary damage. See Favuzza, *supra* note 238, at 156.

[249] *Id.*

[250] Sulemanovic v. Italy, App. No. 22635/03, Eur. Ct. H.R (2009).

Latin America, where prisons are violent and full of human rights violations.[251]

B. On the Privatization of Core State Functions

The Prison Privatization Case was big news in Israel and abroad. It clearly represented the Court's final word on the privatization of prisons, and many commentators tried to analyze it.[252] But was this an outlier case or applicable law for other instances? Almost a decade after the decision was made, our impression is that the case is more the former than the latter, but the jury is still out.

Read at its widest breadth, the Prison Privatization Case is a clear warning 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 away all around it.[253] In a way, this is the mirror-image to the Nozickian "night watchman State" argument: if an anarchist like Robert Nozick[254] believes that the State should take a minimal role that would include functions such as protection against force, theft, fraud, enforcement of contracts, etc., then clearly the State must not shirk away from its responsibility in these core areas.[255] 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.[256]

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[251] *See* Barberena, *supra* note 237, at 687-92 (comparing the European and Latin American systems and proposing to amend the Latin American system to resemble the European system).

[252] *See* Barak Medina, *Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization*, 8 INT'L J. OF CONST. L. 690 (2010); Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 L. & ETHICS OF HUM. RTS. 138 (2011).

[253] For a critical analysis of the private privatization case as reflecting the mismatch between the traditional understanding of the public/private distinction and a much messier reality in which the private and public spheres keep changing, and intermingling in new ways, *see* Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and the Regulatory State*, 15.1 THEORETICAL INQUIRIES IN L. 1, 1-25 (2014).

[254] *See* generally ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[255] *Id*.

[256] Professor Malcolm Feeley understands the Israeli Supreme Court's holding as arguing that the State has a monopoly on the administration of punishment and thus private prisons violate basic principles of modern democratic governance. Feeley argues that that the state monopoly theory against privatization is fundamentally flawed. *See* Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401

In the Prison Privatization Case, the Court held that it had violated its democratic commitments, but what are we to learn from this? The fact is that the Court has not followed this holding with similar holdings – not in the privatization issue, nor in any other part of jurisprudence. One dot is not enough to draw a line. At the same time, it is also true that in recent years there is greater critique of the privatization process[257] and its pace has significantly slowed; there have even been cases of nationalization, with the State fully taking over failed privatizations.[258] We hesitatingly reach several conclusions, for the present time:

First, despite the holding of the Prison Privatization Case, which precludes any civilian contractor participation in prisons, it is likely still good law that the State may employ private sector entities to provide cheaper and more efficient services. This is likely the case as long as the Government retains discretion over major decisions and oversight over the entire operation. But that's easier said than done. Take the example of military contractors: can government really tell *Boeing* how to manufacture the aircraft that it commissions? Can the Government effectively control every gun-carrying contractor in Iraq or Afghanistan?

Second, it is probably easier to explain why cases come before the Court than why they don't. Is it possible that the Prison Privatization Case achieved its intended consequence – sending a clear warning to all policymakers in Israel that privatization is not without limits and bounds?

Third, can we conjure up a similar scenario to that which arose in the Prison Privatization Case: privatization of a core State function, private contractors entrusted with the use of potentially lethal force, potential infringement of the core human rights of politically, economically and socially weak groups, and Supreme Court Justices at their most equitable? We can think of two such instances, and in both the Court has not produced a holding similar to the Prison Privatization Case, and we think is highly unlikely to.

(2014).

[257] One of the main critiques concerns the state monopoly theory, which is at the heart of the Israeli Supreme Court's Prison Privatization decision. Notable supporters of this theory include Israeli legal theorist Alon Harel and his colleagues, while notable critics include Malcom M. Feeley. *Compare* ALON HAREL, WHY LAW MATTERS (2014), *and* Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUB. AFF. 67 (2013), *and* Alon Harel, W*hy Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113 (2008), *and* Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011), *with* Feeley, *supra* note 256, at 1503.

[258] One example is the Tel-Aviv light rail project, which was nationalized in 2010. *See* Julie Steigerwald, *Tel Aviv Light Rail Tows a Hefty Load*, THE JERUSALEM POST (Jul. 23, 2015), http://www.jpost.com/Metro/Tel-Aviv-Light-Rail-tows-a-hefty-load-409969.

One issue concerns privatization in the sphere of public safety. At first blush the idea that private corporations serve police functions – employing firearms and curtailing private liberties as police do – seems almost as abhorrent as a privatized prison. But there are many factors specific to the Israel that make this a likely case for Court interference. *First*, with Israel's unique security threats (unfortunately now becoming more familiar to other nations), security guards are needed at any place of public gathering like supermarkets, cinemas, and museums. The Israeli police cannot meet such demands, but does oversee and instruct the private security sector.[259] *Second*, the Israel Defense Force has been undergoing a smartly managed, slow and cautious privatization scheme. This process has included, so far, mostly the handing back of military resources to the civilian sector (government and private) and the use of private contractors in auxiliary, non-core military functions.[260] *Thirdly*, the Government sometimes moves security functions among State security agencies, or delegates them to the civilian agencies of government or private entities based on many public policy considerations.[261] This is likely to withstand judicial review. One example is the decision to privatize the daily security operations of checkpoints between Israel and the Palestinian Authority.[262] These checkpoints are analogous to (but pointedly not recognized by Israel as) international border crossings. Thus, this privatization has drawn criticism from Human rights activists and Arab-Israeli spokespersons, but has evaded judicial review.[263]

A second issue concerns the encroaching privatization efforts in Israel's national health care system. In theory, such efforts and other cost-

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[259] Haim Bior & Adi Dovrat-Meseritz, *Record Demand for Security Guards in Israel as Store Sales Plummet After Terrorist Attacks*, HAARETZ (Oct. 14, 2015, at 9:44 PM), https://www.haaretz.com/israel-news/business/.premium-1.680282.

[260] *See* Guy I. Seidman, *Privatizing the Israeli Defense Forces: Retracing the Public-Private Divide,* in GARY SCHAUB JR., PRIVATE MILITARY AND SECURITY CONTRACTORS: CONTROLLING THE CORPORATE WARRIOR 75 (Ryan Kelty & Nikolas Gardner eds. 2016).

[261] Antony Loewenstein & Matt Kennard, *How Israel Privatized Its Occupation of Palestine*, THE NATION (Oct. 27, 2016), https://www.thenation.com/article/how-israel-privatized-its-occupation-of-palestine/.

[262] *Id*.

[263] *See* Shira Havkin, *The Reform of Israeli Checkpoints: Outsourcing, Commodification and Redeployment of the State*, LES ÉTUDES DU CERI 174 (2011), http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/Etude174_english.pdf; Antony Loewenstein & Matt Kennard, *Private security – The Fastest Growing Industry in the Start-Up Nation*, JEWS FOR JUSTICE FOR PALESTINIANS (Nov. 30, 2016), http://jfjfp.com/?p=88723; *Private Security Companies and the Israeli Occupation*, WHO PROFITS RESEARCH CENTER: THE ISRAELI OCCUPATION INDUSTRY (Jan. 2016), https://whoprofits.org/sites/default/files/private_security_companies_final_for_web.pdf; Meron Rapoport, *Outsourcing the Checkpoints*, HAARETZ (Oct. 2, 2007), http://www.haaretz.com/magazine/week-s-end/outsourcing-the-checkpoints-1.230416.

conscientious efforts by the Government have the potential to erode the healthcare that Israelis are guaranteed by law. And surely the rights of the sick and infirm are in need of particularly strong protection. Nonetheless, the Court has rarely prevented such measures and certainly did not take as adamant a position as in the Private Prison Case.[264]

Sometimes Time Heals, Other times Time is Money
"You may delay, but time will not."
- Benjamin Franklin[265]

i. The Timelines

Prison privatization first came before the Court on March 17, 2005 and was finally decided more than four and a half years later, on November 19, 2009; the Prison Overcrowding Case first came before the court March 12, 2014, and finally decided more than three years later, in June 2017. Given that these were cases heard before the highest court of the land as a court of first and last instance, with a limited evidentiary process, this could seem like an example of procrastination. Indeed, given the tone of the final decisions, it is difficult to understand why the Court did not hand down the decision very close to day one. Why the delays? What are their results? It would be easy to blame delays on the huge case load that the Israeli Supreme Court is burdened with, acting in effect as a court of first instance with a duty to hear all cases (in public law cases) and as a court of appeal (in civil and criminal case).[266]

We argue that the significant time the Court took in ruling on the two cases should be viewed differently in each. In the Prison Overcrowding Case, the delay served a useful purpose. In the Prison Privatization Case, the delay caused either harm or an unintended benefit, depending on one's standpoint.

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[264] Petitions came to the Court of issues such as the privatization of school nurses services and use of public hospitals for private practice; The Court opined and sometimes decided this way or that – but without a dramatic 'line in the sand' holdings as in the Prison Privatization Case. *See* Aeyal Gross, *Is There a Human Right to Private Health Care*, J. OF L. & MED. ETHICS 138, 138-46 (2013); *see also* Guy I. Seidman, *Regulating Life and Death: The Case of Israel's "Health Basket" Committee*, 23 J. CONTEMPORARY HEALTH L. & POL'Y 9 (2007).

[265] *See* BENJAMIN FRANKLIN, POOR RICHARD IMPROVED 1758 (2017), https://founders.archives.gov/documents/Franklin/01-07-02-0146.

[266] For data and discussion, *see* YOAV DOTAN, LAWYERING FOR THE RULE OF LAW: GOVERNMENT LAWYERS AND THE RISE OF JUDICIAL POWER IN ISRAEL, 19, 23-28 (2014).

ii. Time Heals? The Prison Overcrowding Case

The facts of the Prison Overcrowding Case tell its story, which requires some elaboration on the nature of the Israeli Supreme Court sitting as a High Court of Justice. It is precisely because the Court is the only effective avenue for pleas in the most difficult cases before the public eye and the only forum where decision-makers – senior bureaucrats and politicians – have to face the people effected by their decisions, that the Israeli Court has taken on a much more complex role than a mere adjudicator of cases and controversies. The Court often offers the last opportunity to resolve and settle heated legal disputes. The Court mediates, offers advice, nudges the sides to compromise and reach equitable solutions; some would say the Court pushes too hard, perhaps trying hard *not* to rule - an easy premise to understand given that its ruling is precedent that goes way beyond the matter at hand.[267] In other words, and as a matter of fact, the significant delays in deciding the case may have been the result of efforts to reach a solution without a written decision by the Court.

In the Prison Overcrowding Case, Justice Rubinstein details the process in which the State informed the Court several times – while the Court was staying its judgment – on pending improvements.[268] The State informed the Court of its intention to build new prisons and the Court permitted an extension.[269] This was followed with further, less optimistic, State updates regarding funding for prison construction and renovation and prisoner education and rehabilitation.[270] After several years had passed, [271] the Court stated that:

> We have had a number of hearings in the case, and despite our pleadings and the long time that has passed since the statutory instruments and the relevant regulations were enacted, to our distress the crowding in the holding cells has remained almost as it was before the regulations were established . . . . As the scholar Barak-Erez has observed, 'judicial flexibility has limits which come into effect in cases of ongoing foot-dragging, which amounts to shirking

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[267] *See also*, Guy Seidman, *Judicial Administrative Review in Times of Discontent: The Israeli Supreme Court and the Second Palestinian Uprising*, 14(4) ISR. AFFAIRS 640, 640-61 (2008).

[268] HCJ 1892/14, ACRI [2017] (Isr.).

[269] *Id*.

[270] *Id*.

[271] *Id*.

> the duty to keep the requirements of the law.' . . . . Let us say once more: we do not, hardly, attribute evil or malice, to the entities involved, but the priorities that they have dictated required a 'recalculation of course.' In the current state of things, it is difficult to assume, as the State would have it, that an improvement in the conditions is imminent . . . . A judicial intervention is required.[272]

Overcrowding is not a black and white situation. It concerns the living conditions of tens of thousands of inmates, during all 24 hours of the day. It is likely that had the Court been satisfied with the pace in which the State moved in the right direction, it may have hesitated to intervene so boldly in the allocation of resources. But as the Court observes, over the last 25 years the average space has increased by only 0.16 square meters.[273]

So, as Justice Levy foretold, time did tell. His opinion did not tell us whether prisoners' constitutional rights would have been infringed in a prison run by a private contractor. Nor did his opinion mandate what the State would do to alleviate prisoners' harsh incarceration conditions, which also infringe on their rights. The long time that the Court took trying to mediate and make the State come up with solutions of its own to the overcrowding problem could have resulted either in an out-of-court satisfactory advancement of the overcrowding issue, or, as it happened ultimately, with a moral justification to order a strict deadline despite the budgetary implications.

iii. Time is Money – The Prison Privatization Case

The delays in the Prison Privatization Case tell a different story. Apparently, no real mediation took place during the proceedings, and it is hard to find a justification for the way in which the Court chose to operate – refusing to grant a temporary injunction and thus allowing the private prison to be completely built, only to be banned before the first prisoner

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[272] *See* HCJ 1892/14, ACRI, at § 122 [2017] (Isr.) (citing a preeminent administrative 2010 textbook by Professor – now Supreme Court Associate Justice, appointed 2012 – Daphne Barak-Erez); *cf.* Brown v. Plata, 563 U.S. 493, 511 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."); Cruz v. Beto, 405 U.S. 319, 321 (1972) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners.").

[273] *See* HCJ 1892/14, ACRI [2017] (Isr.).

set foot in it. What appears to be a legal mistake came with a significant price tag.

The Knesset passed the statute authorizing a private prison in March 2004.[274] The State started a complicated tender process that was not completed by March 2005, when the petition was filed.[275] The petitioners asked for an interim injunction that would stop the tender process.[276] In a one line decision, the Court denied the request in April 2005.[277] As the Court realized the importance of the case, the decision was made in May 2006 to decide the case with an enlarged panel, rather than the regular three-justice panels that generally hear cases.[278] In June 2006, the Court issued an *order nisi* requiring respondents to defend the constitutionality of their actions, and asked for the State's position as to a temporary restraining order.[279] The State opposed their request, claiming that the process should move on, that a decision was expected before the end of construction, and that even if the petition was accepted, the prison will be operated by the State Prison Service.[280] The request for an interim injunction was turned down again a month later.[281] For this decision, the panel was enlarged again, to a highly unusual nine-justice panel.[282]

Almost three years later, in March 2009, the Court surprised the parties by issuing an interim order prohibiting the operation of the private prison.[283] The Court noted in the one paragraph decision that when the *order nisi* was issued three years earlier, the respondents were aware that the constitutionality of Amendment 28 had not been decided and proceeded at their own risk.[284] The full decision followed in November 2009.

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[274] Amendment 28, *supra* note 56.

[275] HCJ 2605/05, ACLB v. Minister of Fin. [2005] (Isr.), https://www.nevo.co.il/psika_html/elyon/05026050-b03-et.htm.

[276] *Id*.

[277] *Id*.

[278] HCJ 2605/05, ACLB. v. Minister of Fin. [2006] (Isr.), http://elyon1.court.gov.il/files/05/050/026/N14/05026050.n14.htm.

[279] *Id*.

[280] HCJ 2605/05, Petitioner's Request for Temporary Injunction, ACLB. v. Minister of Fin., Nevo Legal Database [2006] (Isr.), https://www.nevo.co.il/psika_html/elyon/05026050-a19-e.htm.

[281] HCJ 2605/05, ACLB v. Minister of Fin. [2006] (Isr.), http://elyon1.court.gov.il/files/05/050/026/A17/05026050.a17.htm

[282] *Id*.

[283] The Court asked the respondents to answer within seven days why the request for a temporary restraining order should not be granted. HCJ 2605/05, ACLB v. Minister of Fin. [2009] (Isr.), http://elyon1.court.gov.il/files/05/050/026/n36/05026050.n36.htm.

[284] *Id.*

By that time, the construction of the modern and relatively spacious prison was a *fait accompli*, funded by the investment of the private operator. The State then had no choice but to compensate the private operator for the breach of the agreement made with it, paying 280 million NIS for both the construction expenses on the loss of future profits expected for the actual operation of the prison and in compensation to the prospective operator.[285] If there is a silver lining, it is that the structure was incorporated into the Israel Prison Service and now serves as a State-run prison.[286]

The delays in this case are much harder to explain. The constitutional questions posed by the petitioners[287] were black or white questions: Either the operation of the private prison is an unacceptable violation of the human dignity of the prisoners or it is not. Given the final holding, it is difficult to understand the Court's longtime refusal to grant an interim injunction, and, indeed, the passage of years until the ruling was finally made. The Court tried to explain the delay:

> It should be noted that the delay that has occurred in giving this judgment derived from the complexity of the issues under consideration, which raised constitutional questions of significant importance that have not yet been decided in our case law, but mainly from the court's desire to allow the Knesset to exhaust the legislative proceedings mentioned above and the public debate that the Knesset wished to hold on the privatization phenomenon during the 2007-2008 winter session, as stated in the Knesset legal adviser's notice of 28 June 2007, before we considered the complex question concerning the setting aside of primary legislation of the Knesset.[288]

Here, there was no real mediation in the courtroom. True, there was an attempt by the opposition in the Knesset to repeal Amendment 28. But this was a longshot, not really an effort by the State itself, and cannot really justify the long delay and its very expensive cost. In an article published in 2006, when the Court refused to issue an interim injunction, the petitioners' legal counsel prudently stated that "the law is

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[285] *See* Avi Bar-Eli, *The state nationalized private prisons - Africa and Minrav will be compensated by 280 million NIS,* THE MARKER (Mar. 28, 2010), http://www.themarker.com/tmc/article.jhtml?ElementId=abe20100328_77662.

[286] Opened April 2010, and now called *Ela Prison* it is located outside Beer-Sheba. DEP'T OF COMMC'N AND INFO., ISRAEL PRISON SERVICE (2012), https://i-hls.com/wp-content/uploads/2013/01/Israel-Prison-Service-Prospect.pdf.

[287] HCJ 2605/05, ACLB, at §§ 1-2. [2009] (Isr.).

[288] *Id.*

unconstitutional today just as it will be in three years."[289] Surely, they were right. We cannot tell if the Court granted the interim injunction in the initial stage of the project, the State would have chosen to spend the money required for the construction of a fancy new prison. In a roundabout way, it is possible that the Court significantly improved the welfare of Israeli prisoners with its choice to delay the decision. Not enough, as shown by the overcrowding case, but every little bit helps. The Chairman of the Knesset's committee overseeing prisons had no doubt: "it was luck that they made this mistake and tried to privatize. This way someone built a prison. Otherwise we wouldn't even have that."[290]

VI. CONCLUSION

In common law legal systems,[291] much of the evolution, the dynamism, and the change in law occurs through gradual, case-by-case adjudication by the high courts. However, there are conventions in every legal system which set the boundaries of proper action for each branch of government. This applies even to the judiciary, given its dual role as an actor (as one of the three branches) and the officiator (of all three). In this academic paper, we attempted to make two main observations from our vantage point as academics. First, we wanted to show how both major cases presented here, 'push the envelope,' in the sense that they involve the Israeli Supreme Court using its utmost power – and some would argue, even transgressing beyond its legitimate constitutional rule. Second, while in each individual, the Court, having the final legal say, has significant control over the narrative, and can present facts and legal arguments in the way that best explains its decision to the public, each case remains a single – albeit a major – dot on the map. The role to link these dots into a picture is often left to commentators. We cannot be sure if the Court – a body of 15 justices, sitting mostly in three-justice panels, can be considered a single body with a clear policy in mind. And most often common law does not seamlessly interlock. But, we think that the two cases discussed in the present paper, together with the Committee Report of former-Justice

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[289] Efi Michaeli, *Stop the Privatization Locomotive*, GLOBES (Sep. 7, 2006).

[290] Minutes of the Internal Affairs and Environment Committee, DK (2017) 379 (Isr.), https://oknesset.org/committee/meeting/14218/?page=1.

[291] We strongly believe that Israel is predominantly a common law system; some commentators argue that influences from other legal systems make Israel a mixed legal system. *See generally* Aharon Barak, *Some Reflections on the Israeli Legal System and Its Judiciary*, 6.1 ELEC. J. OF COMPARATIVE L. (2002), *available at* https://www.ejcl.org/61/art61-1.html; *see also* Eliezer Rivlin, *Israel as a Mixed Jurisdiction*, 57 MCGILL L. J. 781 (2012).

Dorner are sufficiently robust for us to suggest an effort by a large number of Israeli Supreme Court Justices to forcefully nudge into action the Israeli Government and Legislature to address one of the most troubling human rights conditions taking place in prisons: the place where tens of thousands of individuals are placed, by Judicial rulings, in State run facilities.