HCJ 2605/05

1. Academic Center of Law and Business, Human Rights Division
2. Major-General (ret.) Shlomo Twizer
3. Yadin Machness

v.

1. Minister of Finance
2. Minister of Public Security
3. A.L.A. Management and Operation (2005) Ltd
4. Knesset

The Supreme Court sitting as the High Court of Justice
[19 November 2009]
Before President D. Beinisch, Vice-President E. Rivlin and Justices A. Procaccia, E.E. Levy, A. Grunis, M. Naor, E. Arbel, S. Joubran, E. Hayut

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: The Knesset enacted the Prisons Ordinance Amendment Law (no. 28), 5764-2004 ('amendment 28'), which provides that the State of Israel will establish, for the first time, a (single) prison that will be operated and managed by a private corporation rather than by the state. The constitutionality of this law was challenged by the petitioners, who argued that amendment 28 disproportionately violated the rights of prison inmates as a result of the actual transfer of imprisonment powers to a private enterprise, and as a result of the concern that human rights in a private prison would be violated to a greater extent than in a state-run prison.

Held: (Majority opinion — President Beinisch, Vice-President Rivlin, Justices Procaccia, Grunis, Naor, Arbel, Joubran, Hayut) Amendment 28 violates human rights disproportionately and is therefore unconstitutional.

(President Beinisch, Vice-President Rivlin, Justices Grunis, Naor, Arbel, Joubran, Hayut) The concern that human rights in a private prison will be violated more than in state managed prisons addresses a future violation of human rights, and there is no certainty that this will occur; therefore, it is questionable whether it constitutes a sufficient basis for setting aside primary legislation of the Knesset. However, the

human rights of prison inmates are violated *ipso facto* by the transfer of powers to manage and operate a prison from the state to a private concessionaire that is a profit-making enterprise. The denial of personal liberty is justified only if it is done in order to further or protect an essential public interest, and therefore the question whether the party denying the liberty is acting in order to further the public interest (whatever it may be) or is mainly motivated by a private interest is a critical question that lies at the very heart of the right to personal liberty. Therefore, amendment 28 causes an additional independent violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself.

When the state transfers power to manage a prison, with the invasive powers that go with it, to a private profit-making corporation, it violates the human dignity of the inmates of that prison, since the public purposes that give imprisonment legitimacy are undermined and the inmates becomes a means for the private corporation to make profits (Justice Grunis reserved judgment on this issue).

The main public purpose underlying amendment 28 is the economic purpose of saving the state money.

The 'additional' violation of constitutional rights deriving from giving imprisonment powers to a private profit-making corporation is disproportionately greater than the 'additional' public benefit that will allegedly be achieved by amendment 28.

The unconstitutionality of amendment 28 requires it to be set aside in its entirety, because it is a comprehensive arrangement in its structure and content, in which the granting of the powers relating to using force against the inmates is an integral part. Were only the provisions concerning the granting of the invasive powers set aside, the remaining provisions would be unable to stand independently.

(Justice Procaccia) The legal justification and moral authority for violating the basic liberty of a person by means of imprisonment depend upon the exercise of authority being entrusted to organs of the state, which are the people's representative in protecting the values of social order, on the one hand, and the basic rights of the individual, on the other. Transferring this power to a private enterprise undermines the legitimacy of law enforcement and sentencing, and the moral basis for exercising institutional authority over the individual offender.

The main purpose of amendment 28, as can be seen from its legislative background and context, is to promote the welfare of prison inmates by reducing overcrowding in the prisons, improving services provided in them and expanding the treatment and rehabilitation programmes available to the inmate. However, this benefit to the prison inmate and the economic benefit to the state are not commensurate with, and are even dwarfed by, the violation of the prison inmate's core human rights that can be expected to result from entrusting sovereign authority to a private concessionaire. In the ethical sphere, the duty of protecting the core human rights of the prison inmate against a serious potential violation overrides the positive purpose of improving the living conditions of prison inmates and increased economic efficiency for the state.

(Minority opinion — Justice Levy) The state has not divested itself of its powers but merely exchanged them for supervisory powers. It is hard to see how this conflicts with the constitutional role of the government, and the mechanisms of indirect government should be examined on their merits.
It is premature to determine whether a private prison will violate human rights disproportionately. Time will tell. The law should be put to the test before the court reaches any conclusions on this matter.

Petition granted by majority opinion (President Beinisch, Vice-President Rivlin, and Justices Procaccia, Grunis, Naor, Arbel, Joubran and Hayut), Justice Levy dissenting.

Legislation cited:

Basic Law: The Judiciary, s. 15(d)(2).
Basic Law: Freedom of Occupation, s. 4.
Basic Law: Human Dignity and Liberty, ss. 1A, 2, 5, 8, 9.
Basic Law: the Army, ss. 2, 3.
Basic Law: the Government, ss. 1, 44(a).
Basic Law: the Knesset, ss. 7(8), 7(9), 7A.
Criminal Procedure Law [Consolidated Version], 5742-1982, s. 12(a)(1)(b).
Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996, ss. 23, 67.
Deferral of Service of Full-Time Yeshivah Students, 5762-2002.
Emergency Powers (Arrests) Law, 5739-1979.
Execution Law, 5727-1967, s. 5.
General Security Service Law, 5762-2002, ss. 3, 4.
Internment of Unlawful Combatants Law, 5762-2002.
Knesset and Local Authorities 5730 Elections (Funding, Limits on Spending and Scrutiny) Law, 5729-1969.
Parole Law, 5761-2001.
Penal Law, 5737-1977, art. B1.
Police Ordinance [New Version], 5731-1971, s. 8.
Prisons Ordinance [New Version], 5732-1971, ss. 45A, 76(a), 78, 95B, 95D, 95E, 128F, 128G(a), 128G(b), 128I, 128K, 128K(c)(1), 128L, 128L(a)(1), 128L(a)(2), 128L(a)(3), 128M, 128O, 128R, 128R(c)(1), 128R(c)(4), 128R(c)(5), 128S, 128U-128X, 128V-128X, 128Y, 128Z, 128AA, 128AB, 128AE, 128AF-128AG, 128AF-128AL, 128AJ, 128AO, 128AS-128BA, 128AW.
Prisons Ordinance Amendment Law (no. 28), 5764-2004.
Release from Imprisonment on Parole Law, 5761-2001, s. 9(7).
State Comptroller Law [Consolidated Version], 5718-1958, s. 9(6).
Taxes (Collection) Ordinance.

Torts (State Liability) Law, 5712-1952
Treatment of Mentally Ill Patients Law, 5751-1991, s. 9.

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[1] AAA 7142/01 *Haifa Local Planning and Building Committee v. Society for the Protection of Nature in Israel* [2002] IsrSC 56(3) 673.
[2] AAA 2273/03 *Blue Island General Partnership v. Society for the Protection of Nature in Israel* (unreported decision of 7 December 2006).
[3] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[4] HCJ 4769/95 *Menahem v. Minister of Transport* [2003] IsrSC 57(1) 235.
[5] HCJ 6055/95 *Tzemah v. Minister of Defence* [1999] IsrSC 53(5) 241; **[1998-9] IsrLR 635**.
[6] CrimA 6659/06 *Iyyad v. State of Israel* (unreported decision of 11 June 2008).
[7] HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [1997] IsrSC 51(4) 367.
[8] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221; **[1995] IsrLR 1**.
[9] HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [2004] IsrSC 58(3) 503.
[10] HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security* (unreported decision of 12 February 2007).
[11] PPA 4463/94 *Golan v. Prisons Service* [1996] IsrSC 50(4) 136; **[1995-6] IsrLR 489**.
[12] CrimA 4424/98 *Silgado v. State of Israel* [2002] IsrSC 56(5) 529.
[13] HCJ 164/97 *Conterm Ltd v. Minister of Finance* [1998] IsrSC 52(1) 289; **[1998-9] IsrLR 1**.
[14] HCJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [1999] IsrSC 53(4) 673; **[1998-9] IsrLR 537**.
[15] HCJ 2303/90 *Philipovitz v. Registrar of Companies* [1992] IsrSC 46(1) 410.
[16] HCJ 4884/00 *Let the Animals Live Association v. Director of Field Veterinary Services at the Ministry of Agriculture* [2004] IsrSC 58(5) 202.
[17] HCJ 8340/99 *Gorali Kochan & Co. Law Offices v. Attorney-General* [2001] IsrSC 55(3) 79.
[18] HCJ 1783/00 *Haifa Chemicals Ltd v. Attorney-General* [2003] IsrSC 57(3) 652.
[19] HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* (unreported decision of 11 May 2006).
[20] HCJ 355/79 *Katlan v. Israel Prison Service* [1980] IsrSC 34(3) 294.
[21] HCJ 1163/98 *Sadot v. Israel Prison Service* [2001] IsrSC 55(4) 817.

[22] CrimFH 10987/07 *State of Israel v. Cohen* (unreported decision of 2 March 2009).
[23] HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [2006] IsrSC 60(1) 38; **[2005] (1) IsrLR 340**.
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[25] HCJ 5578/02 *Manor v. Minister of Finance* [2005] IsrSC 59(1) 729.
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[30] HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [1993] IsrSC 47(1) 749.
[31] HCJ 1384/98 *Avni v. Prime Minister* [1998] IsrSC 52(5) 206.
[32] HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [2006] (3) 464; **[2005] (2) IsrLR 335**.
[33] CrimApp 3734/92 *State of Israel v. Azazmi* [1992] IsrSC 46(5) 72.
[34] CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [1992] IsrSC 46(2) 464.
[35] HCJ 337/84 *Hukma v. Minister of Interior* [1984] IsrSC 38(2) 826.
[36] HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [1999] IsrSC 53(4) 817; **[1998 9] IsrLR 567**.
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[39] HCJ 2245/06 *Dobrin v. Israel Prison Service* **[2006] (2) IsrLR 1**.
[40] LCA 4905/98 *Gamzu v. Yeshayahu* [2001] IsrSC 55(3) 360.
[41] HCJ 7837/04 *Borgal v. Israel Prison Service* [2005] IsrSC 59(3) 97.
[42] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; **IsrSJ 1 90**.
[43] HCJ 153/83 *Levy v. Southern District Commissioner of Police* [1984] IsrSC 38(2) 393; **IsrSJ 7 109**.
[44] HCJ 142/89 *Laor Movement v. Knesset Speaker* [1990] IsrSC 44(3) 529.
[45] HCJ 410/90 *Bloom v. Knesset Speaker* [1992] IsrSC 46(2) 201.
[46] HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [1995] IsrSC 49(1) 758.
[47] HCJ 4676/94 *Meatreal Ltd v. Knesset* [1996] IsrSC 50(5) 15.

[48] HCJ 10203/03 *National Census Ltd v. Attorney-General* (unreported decision of 20 August 2008).
[49] HCJ 5009/97 *Multimedia Co. Ltd v. Israel Police* [1998] IsrSC 52(3) 679.
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[51] CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589.
[52] HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [1997] IsrSC 51(5) 67; **[1997] IsrLR 499**.
[53] CrimA 40/58 *Attorney-General v. Ziad* [1958] IsrSC 12 1358.
[54] PPA 7440/97 *State of Israel v. Golan* [1998] IsrSC 52(1) 1.
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[59] HCJFH 5361/00 *Falk v. Attorney-General* [2005] IsrSC 59(5) 145.
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[61] HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [2004] IsrSC 58(5) 807; **[2004] IsrLR 264**.
[62] CrimA 7053/01 *A v. State of Israel* [2002] IsrSC 52(1) 504.
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[64] HCJ 5678/02 *Physicians for Human Rights v. Minister of Public Security* (unreported decision of 9 March 2003).
[65] HCJ 1319/03 *Israel Bar Association v. Minister of Public Security* (unreported decision of 1 March 2004).
[66] HCJ 572/04 *Berry v. Minister of Justice* (unreported decision of 6 April 2005).
[67] HCJ 531/79 *Petah Tikva Municipality Likud Faction v. Petah Tikva Municipal Council* [1980] IsrSC 34(2) 566.
[68] CA 404/61 *Skivinskaya v. Uroshitz* [1962] IsrSC 16(1) 347.
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[71] EA 1/88 *Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [1988] IsrSC 42(4) 177.
[72] HCJ 410/91 *Bloom v. Knesset Speaker* [1992] IsrSC 46(2) 201.
[73] EA 92/03 *Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset* [2003] IsrSC 57(3) 793.

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[75] HCJ 212/03 *Herut National Movement v. Chairman of Central Elections Committee* [2003] IsrSC 57(1) 750.
[76] HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [2004] IsrSC 58(1) 529.
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[78] EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [1965] IsrSC 19(3) 365.
[79] HCJ 1074/93 *Attorney-General v. National Labour Court* [1995] IsrSC 49(2) 485.
[80] HCJ 761/86 *Miari v. Knesset Speaker* [1988] IsrSC 42(4) 868.
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[87] *Richardson v. McKnight*, 521 U.S. 399 (1997).
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[89] *Skelton v. Pri-Cor, Inc.*, 963 F. 2d 100 (6th Cir. 1991).
[90] *Rosborough v. Management and Training Corporation*, 350 F. 3d 459 (5th Cir. 2003).

For petitioners 1-2 — G. Barnea, A. Wasserman, E. Michaely, Y. Berda.
The third petitioner represented himself.
For respondents 1-2 — Y. Genessin, R. Giladi, R. Keidar.
For the third respondent — Y. Shalheveth, B. Fiel, R. Kook, O. Roth.
For the fourth respondent — N. Elstein, R. Scherman-Lamdan, I. Eshet.

JUDGMENT

President D. Beinisch

The Prisons Ordinance Amendment Law (no. 28), 5764-2004 (hereafter: 'amendment 28'), provides that the State of Israel will establish for the first time a (single) prison that will be operated and managed by a private corporation rather than by the state. The arrangement provided in amendment 28 leads to a transfer of basic powers of the state in the field of law enforcement — imprisonment powers — the exercise of which involves a continuous violation of human rights, to a private profit-making corporation. As we shall explain below, this transfer of powers violates the constitutional rights to personal liberty and human dignity, which are enshrined in the Basic Law: Human Dignity and Liberty. The question of the constitutionality of this violation lies at the heart of the petition before us. It should already be said at the outset that, for the reasons that will be set out below, we have arrived at the conclusion that the aforesaid amendment does not satisfy the test of constitutionality.

The main facts and the arguments of the parties

1. On 31 March 2004, amendment 28 of the Prisons Ordinance [New Version], 5732-1971 (hereafter: 'the Prisons Ordinance') was published. According to the amendment, chapter C2 was added to the Ordinance. This chapter is entitled 'Privately managed prison.' The amendment, which resulted in the addition of sections 128F-128BB, regulates the establishment of one prison that will be built, managed and operated by a private corporation, which will enter into an agreement for this purpose with the Israel Prison Service and act as a concessionaire in accordance with a special permit that it will receive. The amendment provides, *inter alia*, the procedure for granting and cancelling the permit, the qualifications that should be satisfied by the corporation and its employees, the scope of the powers of the corporation's employees and the supervisory measures that the state is required to undertake with regard to the activity of the corporation and its employees. In the Third Schedule to the Prisons Ordinance, it is provided that the privately managed prison will be constructed in the prison compound south of the city of Beer-Sheba, and its maximum capacity will be eight hundred inmates. The Schedule also lays down the conditions that should be satisfied with regard to inmates that will be imprisoned in the privately managed prison.

The petition before us was filed on 16 March 2005. The first petitioner is an academic institution, which is acting as a public petitioner in the petition

before us. The second petitioner is a retired senior officer in the Israel Prison Service. The third petitioner, who was subsequently joined as a party to the petition at his request, was, on the date that he was joined as a petitioner, an inmate of a prison managed by the Israel Prison Service. On 27 October 2005 an initial hearing of the petition took place before a bench of three justices. On 15 November 2005, the third respondent (hereafter: 'the concessionaire') was chosen as the winning group in the tender for the construction and operation of the private prison, and the concession agreement was signed with it on 2 January 2006. On 18 June 2006 a further hearing of the petition was held before a bench of seven justices, which was presided over by President A. Barak. Following this, an order *nisi* was made. On 31 August 2006, following a further hearing that took place before a bench of nine justices, and after the court was notified by the Knesset's legal adviser that draft laws had been tabled to repeal amendment 28, it was decided to postpone the hearing of the petition in order to allow the legislative proceedings that had apparently been restarted in the Knesset to be exhausted. Since these proceedings did not progress and the legal position set out in the statute under discussion was not changed, on 8 July 2007 we heard the actual petition. While the hearing of the petition was taking place, the proceedings for setting up the privately managed prison also progressed, and the third respondent was given the permit required under the law. The construction of the prison and its preparation for the initial partial admission stage were supposed to be completed by June 2009, but on 18 March 2009 we made an interim order that prevented the prison being put into operation. 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.

2. The petition is directed at the constitutionality of amendment 28 of the Prisons Ordinance, and the petitioners' argument is that this amendment should be regarded as a choice by the state 'to carry out a complete

privatization of prisons in Israel.' As will be explained below, the petition has two main arguments.

In the first argument the petitioners claim that 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. The main cause of this lies in the combination of the following: the 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 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. The petitioners claim that this combination is likely to lead to a violation of the inmates' rights to liberty and human dignity in the privatized prison. According to the petitioners, this expected violation of constitutional basic rights does not satisfy the limitations clause tests laid down in s. 8 of the Basic Law: Human Dignity and Liberty.

It is argued that a violation of the basic principle that the power to enforce criminal judgments is exercised exclusively by the state, in order to achieve an economic purpose, is not a violation that is made for a proper purpose. The petitioners argue that it is also not a proportionate violation. In this respect, the petitioners claim that from the viewpoint of whether the chosen means will lead to the desired purpose, they have expert opinions that indicate that experience around the world does not show a clear connection between the privatization of prisons and an economic saving; that there are other less harmful measures that are capable of realizing the economic purpose underlying amendment 28, including the building of additional public prisons or a partial privatization that only involves powers that do not contain a predominant element of the exercise of sovereign power; and that the damage that will result from a complete privatization of prisons is disproportionate to the benefit that will arise from such a privatization (especially, according to the petitioners, in comparison to the possibility of a partial privatization of prisons).

3. In the other argument, the petitioners claim that amendment 28 constitutes a violation of the constitutional rule laid down in s. 1 of the Basic Law: the Government, according to which 'The government is the executive branch of the state.' The reason for this is that the power of the state to operate prisons constitutes, according to the petitioners, a part of its authority to exercise executive power in order to enforce the law and maintain the peace; and as such the power lies at the heart of the basic principle that 'The government is the executive branch of the state.' According to the petitioners, since the Basic Law: the Government is a Basic Law, its normative status is a super-legislative one, and therefore any ordinary law that violates it should satisfy two requirements, one formal and the other substantive.

First, in the formal sphere, the petitioners argue that the violating law should be passed by a majority of at least 61 members of the Knesset in each of the three readings, according to the entrenchment provision set out in s. 44(a) of the Basic Law: the Government. Since amendment 28 was not passed with this majority, the petitioners claim that this alone should lead to its being set aside. *Second*, in the substantive sphere, the petitioners claim that the violating law should satisfy the tests of the limitations clause. The petitioners argue that these tests should also be applied, by way of judicial interpretation, to laws that violate the Basic Laws that concern the organs of the state, such as the Basic Law: the Government, even though these Basic Laws do not contain an express limitations clause like the ones provided in the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.

4. It should also be mentioned that we also heard the arguments of the third petitioner, Mr Yadin Machness, who at that time was serving a custodial sentence at Maasiyahu Prison. The third petitioner's arguments focused on the practical aspects relating to the services provided to inmates in the prisons of the Israel Prison Service, in fields such as health, food and education. According to him, there is a concern that the standard of these services will decrease in the privately managed prison as a result of the economic considerations that will motivate the concessionaire operating the prison. The third petitioner also raised in his arguments a concern that use will be made of the various powers given to the private concessionaire in such a way that will allow the concessionaire to worsen the conditions of the inmates in the privately managed prison and punish them, without it first being necessary to

charge the inmates in disciplinary proceedings, for which the Israel Prison Service remains responsible, even under amendment 28.

5. All of the respondents oppose the granting of the petition. Replies to the petition were filed by respondents 1-2 (hereafter: 'the state'), the concessionaire and the Knesset. In its reply to the petition, the state says that the construction of a privately managed prison is one of the solutions planned by it for contending with the serious shortage of prisons in Israel, and this is the main purpose underlying the enactment of amendment 28. The state also claims in the affidavit in reply that in addition to an improvement of the inmates' prison conditions, the construction of the prison that is the subject of the petition is very much in the public interest, since it will lead to an economic saving of an estimated amount of approximately 20-25 per cent in comparison to a prison of similar standards operated by the Israel Prison Service, and on the basis of experience around the world it can be estimated that the construction of a private prison may also lead to greater efficiency in state-run prisons.

According to the state, the privatization model adopted in amendment 28 of the Prisons Ordinance is a unique and experimental model, which constitutes a 'pilot' test that is expressly limited to one prison and includes mechanisms to protect the rights of the inmates and effective supervision and intervention mechanisms that are available to the state and will allow it, *inter alia*, to reverse the process at any stage and take back control of the prison because of a breach of the terms of the permit given to the concessionaire. The state emphasizes in its pleadings that the existence of a real concern of a serious violation of inmates' rights is one of the grounds provided in amendment 28 for the state to take away the power to manage the prison from the concessionaire. In this regard, the state further argues that amendment 28 provides measures for supervising the manner in which the concessionaire exercises the powers granted to it: these include the activity of the designated supervision unit of the Israel Prison Service inside the prison (even though the location of the supervision unit was not stipulated in amendment 28 itself, but only in the concession agreement and the permit); the supervisory powers given to the state with regard to the appointment of officers in the privately managed prison; and the extensive reporting duties imposed on the concessionaire with regard to various incidents, both under amendment 28 and under the concession agreement. According to this argument, the supervisory measures will guarantee the prison inmates' rights.

The state also points out that amendment 28 also provides that the permit for operating the prison and the concession agreement may be revoked by the state, if the permit's conditions are breached.

The state also goes on to say that, under s. 15(d)(2) of the Basic Law: The Judiciary and according to the case law of this court, from the moment that the concessionaire receives sovereign powers, it becomes directly subject to both administrative law and the jurisdiction of the High Court of Justice, without even resorting to the doctrine of the dual-nature corporation. In addition to the judicial scrutiny of the High Court of Justice to which the concessionaire is subject, the state says that an inmate in the privately managed prison, like every inmate in the Israel Prison Service, has the right to file a prisoner's petition to the District Court under the provisions of the Prisons Ordinance. This possibility of judicial scrutiny of the prison conditions constitutes, according to the state, an independent and very powerful means of supervision and control that is available to every inmate at all times. Additional control mechanisms with regard to the activity of a privately managed prison to which the state refers are the scrutiny of the State Comptroller, since the concessionaire is an audited body within the meaning of this term in s. 9(6) of the State Comptroller Law [Consolidated Version], 5718-1958, and the scrutiny of an advisory committee chaired by a retired District Court justice. According to amendment 28, this committee will advise the Commissioner of Prisons on the subject of upholding the rights of inmates in the privately managed prison, and also on the subject of their rehabilitation, welfare and health, and it shall submit its recommendations to the Minister of Public Security, the Commissioner of Prisons and the Internal Affairs and Environment Committee of the Knesset once a year. In view of the aforesaid, the state argues that there is no basis for the claim that it has divested itself of its powers, and it adds that in the Israeli model chosen for the privatization of the prison, a significant part of the sovereign powers is retained by the state.

The state goes on to argue that the rights of the inmates will be guaranteed not merely by the mechanisms provided in the law itself but also in the administrative sphere, by the permit for constructing and operating the prison, as well as in the contractual sphere, by the concession agreement with the concessionaire. In this regard, the state says that various powers that are potentially particularly harmful and are not essential for the ongoing management of the prison (which are given to governors of prisons managed

by the state) were not given by amendment 28 to the governor acting on behalf of the concessionaire. The state also says that, even if this court holds, contrary to its position, that amendment 28 violates constitutional human rights to a greater extent than the violation of prison inmates' rights under the general law, this violation satisfies the tests of the limitations clause.

6. Regarding the provisions of s. 1 of the Basic Law: the Government, which provides that 'the Government is the executive branch of the state,' the state claims that this provision is intended to define in a 'ceremonial' manner the nature and character of the government in relation to the other organs of state. According to the state, the purpose of this provision does not concern any specific executive power at all, merely the general position of the government within the democratic system. The state goes on to argue that in any case the government carries out its functions as the executive branch in a variety of ways, including by relying on private entities. Therefore the government does not stop acting as 'the executive branch of the state' when it carries out its functions through private entities or delegates certain powers to them. The state goes on to argue that even if s. 1 of the Basic Law: the Government can be used to set aside the delegation of powers made pursuant to a statute, there is no basis for using it to disqualifying amendment 28, since the privately managed prison will be run with the full involvement of the state, and therefore the amendment will not undermine the principle that the government is the executive branch of the state. The state further argues that even if amendment 28 can be regarded as a violation of the principle provided in the Basic Law: the Government, it is a negligible and very remote violation that lies at the margin of the principle and not at its centre.

The state also says that the Israeli model chosen for entrusting a prison to private management is based on the English model that is characterized by a regulatory approach, according to which the supervision of the activity of the private concessionaire is carried out by state inspectors who are stationed inside the supervised prison. Notwithstanding, according to the state, the Israeli model of delegating powers to manage one prison to a private concessionaire is more moderate with regard to the powers given to the concessionaire and more comprehensive, compared to similar legislative models in other countries, with regard to the powers to supervise the concessionaire, and it should therefore be regarded as an 'improved English model.'

In view of the aforesaid, the state claims that since the petition challenges a privatization determined by law, which does not violate constitutional rights, the intervention of the court should be limited to rare and extreme cases, in which the privatization shakes the foundations of democracy and the fundamental principles of the system of government; according to the state, circumstances of this kind do not exist in the case before us.

7. The concessionaire that was chosen in the tender to build and operate the privately managed prison also argues that the petition should be denied. It argues that not only will the operation of a privately managed prison not harm the liberty, dignity and rights of the inmates, but it will result in an improvement of their conditions, because of the high standards laid down by the state in the minimum requirements of the tender for the construction and operation of the prison (standards that the concessionaire claims it undertook to improve upon) and because of the extensive supervisory powers retained by the state. The concessionaire emphasizes in its reply to the petition the importance that it attaches to the social goals that the prison is intended to realize, including the rehabilitation and education of the inmates. The concessionaire further argues that there is no basis to the petitioners' claims regarding the concern of a violation of inmates' rights as a result of the legislation of amendment 28. In this context, the concessionaire argues that the petitioners' claim that the running of a prison with the assistance of a private enterprise necessarily leads to a greater danger of a violation of inmates' basic rights than a prison entirely managed by the state needs to be proved factually on the basis of research and empirical evidence; according to the concessionaire, however, the petitioners did not even attempt to discharge this heavy burden. The concessionaire goes on to argue that even if amendment 28 violates a constitutional right protected in the Basic Law: Human Dignity and Liberty, that violation satisfies the conditions of the limitations clause. With regard to the third petitioner's arguments regarding the concern that the concessionaire's economic motives will result in a deterioration in the inmates' prison conditions at the privately managed prison, the concessionaire argues that these claims do not address the constitutionality of amendment 28, merely the manner in which it is implemented, and in any case they are without merit, in view of the high standard for operating the prison set out in the conditions of the tender, the concession agreement and the concessionaire's bid.

With regard to the petitioners' claims that are founded on the provisions of s. 1 of the Basic Law: the Government, the concessionaire argues that this provision is a declarative constitutional provision that does not prevent a delegation of powers by the government, or the state availing itself of the assistance of private enterprises to carry out its duties.

8. An additional argument that is raised both by the state and by the concessionaire is the claim of *laches*. The state and the concessionaire say that the petition before us was filed approximately a year after the Knesset enacted amendment 28, without any justification for the delay in filing the petition. In this respect, it was argued by the state and the concessionaire that the delay in filing the petition adversely changed their position, since by the date of filing the petition they had already gone to considerable expense and invested significant work and time in the project — the state in preparing the tender and the documents of the tender, and the concessionaire in studying the documents of the tender and preparing a detailed bid for the tender. It was also argued that the cancellation of the project at a late stage would harm the foreign parties who had entered into contracts with the concessionaire and relied on the legislation of the Knesset, and it might even prejudice the attractiveness of the State of Israel to foreign investors and experts, as well as other national projects requiring large investments. We should already point out at this stage that we see no reason to dismiss the petition on the ground of *laches*. Even if we assume in favour of the state and the concessionaire that the rules of *laches* also apply to constitutional petitions, and that in the present case there were both an objective delay and a subjective delay on the part of the petitioners, in view of the constitutional importance of the issues raised in the petition — both from the viewpoint of the principles of the system of government in Israel and from the viewpoint of the effect on the human rights of prison inmates — there is no basis for dismissing this petition because of the delay in filing it (with regard to the tests for examining a claim of *laches*, see, for example: AAA 7142/01 *Haifa Local Planning and Building Committee v. Society for the Protection of Nature in Israel* [1], at pp. 678-679; AAA 2273/03 *Blue Island General Partnership v. Society for the Protection of Nature in Israel* [2], at paras. 86-101 of the judgment).

9. In addition to the replies of the state and the concessionaire, we also heard the position of the Knesset with regard to the petition. According to the Knesset, s. 1 of the Basic Law: the Government, which it will be recalled is

the basis for the petitioners' constitutional argument concerning the state divesting itself of its powers, does not contain any provision with regard to the manner of carrying out the government's powers; it does not contain any provision that restricts the Knesset's power to permit the government to act in various ways to discharge its executive function; nor does the section provide criteria for examining the constitutionality of laws. Therefore, the Knesset claims that s. 1 of the Basic Law: the Government is not relevant at all when considering the constitutionality of amendment 28. The Knesset goes on to argue that there is no basis for examining the constitutionality of the amendment in accordance with the provisions of a 'judicial limitations clause' that is based on the limitations clauses provided in the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation. In this respect the Knesset argues that no clear case law ruling has yet been made that the Knesset's legislative power is limited by the tests in the limitations clause even when the relevant Basic Law does not have an express limitations clause, and it adds that a substantive restriction of the kind that is found in the limitations clause in the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation is unsuited to the examination of legislation that *prima facie* conflicts with a provision in a Basic Law that concerns the organs of the state. It should be noted that in so far as the concrete question of the privatization of prisons is concerned, the Knesset included in its arguments a comprehensive description of the phenomenon of prison privatization around the world. The Knesset emphasized that this is a 'hard case' of privatization and it argued that the state needs to carry out close supervision of the private entity, and that the concessionaire should be made subject to the rules of public law.

Deliberations

10. Amendment 28 of the Prisons Ordinance, whose constitutionality is being challenged by the petitioners in this case, introduced a material change in the sovereign outlook of our system of government; it departs from the ordinary and accepted outlook of privatizing government activities in that it gives a private concessionaire various powers that, when exercised, necessarily involve a serious violation of human rights. In this petition we are required to decide whether granting these powers to a private concessionaire, i.e., privatizing these powers, is constitutional (with regard to the various definitions of the concept of privatization, see Y. Katz, *Privatization in Israel and Abroad* (1997), at pp. 23-30). On this question, our approach will be as

follows: first, we shall address the nature of the arrangement provided in amendment 28. Thereafter, we shall consider in brief the scope of judicial review of Knesset legislation. Our main deliberations on the question of the constitutionality of amendment 28 will focus on the Basic Law: Human Dignity and Liberty. At the end of our deliberations we shall address the arguments of the parties regarding the constitutional scrutiny of the amendment from the viewpoint of the Basic Law: the Government. It should immediately be pointed out that in view of the conclusion we have reached, that the amendment under discussion does not satisfy the constitutionality tests in the Basic Law: Human Dignity and Liberty, various questions that arise with regard to the constitutionality of the amendment from the viewpoint of the Basic Law: the Government do not require a decision.

The nature of the arrangement provided in amendment 28

11. The following are the main relevant provisions that were introduced by the aforesaid amendment 28.

Section 128G(a) of the Prisons Ordinance provides that 'The service [i.e., the Israel Prison Service] may, for the purpose of carrying out its functions as stated in section 76, rely on a corporation' that satisfies certain minimum requirements stipulated in the section, 'and to this end it may enter into an agreement with it to construct, manage and operate one prison' (it should be noted that the functions of the Israel Prison Service are defined in general terms in s. 76(a) of the Prisons Ordinance, which provides that the Israel Prison Service 'shall engage in the management of the prisons, the security of inmates and everything entailed therein'). The corporation to which s. 128G(a) of the Prisons Ordinance refers is therefore the concessionaire, which is supposed, according to the provisions of amendment 28, to construct, manage and operate the 'privately managed prison.' The various powers given to the concessionaire under amendment 28 are naturally derived from the scope of the responsibility imposed on it. Section 128L of the Prisons Ordinance defines the spheres of responsibility imposed on the private concessionaire in the following terms:

> 'Responsibility of the concessionaire
>
> 128L. (a) The concessionaire is responsible for the proper construction, management and operation of the privately managed prison, including:
>
> (1) maintaining order, discipline and public

security in the privately managed prison;

(2) preventing the escape of inmates that are held in custody in the privately managed prison;

(3) ensuring the welfare and health of the inmates and taking steps during the imprisonment that will aid their rehabilitation after the release from imprisonment, including training for employment and providing education;

all of which in accordance with the provisions of every law and the provisions of the agreement and while upholding inmates' rights.

(b) The concessionaire shall adopt all the measures required in order to discharge his responsibility as stated in subsection (a), including measures as aforesaid that are stipulated in the agreement, and *inter alia* he shall appoint for this purpose the concessionaire's governor and employees in accordance with the provisions of this chapter.'

The powers of the concessionaire and its employees, whose privatization within the framework of amendment 28 lies at the heart of the petition before us, are those powers that are derived from the spheres of responsibility provided in ss. 128L(a)(1) and 128L(a)(2) of the Prisons Ordinance, namely the responsibility of maintaining order, discipline and public security in the prison and the responsibility of preventing the escape of inmates that are held in custody in the prison. In order that the private concessionaire that manages and operates the prison can discharge its responsibility in these fields, the governor of the private prison on behalf of the concessionaire and the concessionaire's employees (subject to several important exceptions) were given various powers, which are parallel to the powers given to the governor of an Israel Prison Service prison and the prison employees that are subordinate to him. Exercising these powers — and this petition is directed

against granting them to a private concessionaire rather than against their actual existence — naturally entails a serious violation of various human rights, including the right to life, the right to personal liberty and the right to human dignity. Below we shall discuss several of the powers given to the private concessionaire's employees at their various levels.

12. The powers of the governor of the privately managed prison are defined in s. 128R of the Prisons Ordinance, which states the following:

'Functions and powers of the governor of a privately managed prison

> 128R. (a) The governor is responsible for the proper management and operation of a privately managed prison, as stated in section 128L(a), and in this respect all of the provisions under this Ordinance that apply to a prison governor shall apply to him, subject to the provisions of this section.
>
> (b) In order to carry out his functions as stated in subsection (a), the governor shall be given the powers given to a governor of a prison under this Ordinance and under every other law, except for the powers according to service orders and the following powers:
>
> (1) Making an order to transfer an inmate because of a contagious disease, under the provisions of section 13(b);
>
> (2) Extending a period during which an inmate is held in isolation under the provisions of section 19C(a);
>
> (3) Confiscating a possession under the provisions of section 44;
>
> (4) Jurisdiction regarding prison offences under the provisions of article 8 of chapter 2;
>
> (5) The power of an examiner with regard to a letter to a member of Knesset under

the provisions of section 47D;

(c) In addition to the powers given to the governor under the provisions of subsection (b), he shall also be given the following powers:

(1) The power given to a senior prison officer to order the holding of a prisoner in isolation, under the provisions of section 19C(a);

(2) The power to order the conducting of an external examination of the naked body of a prison inmate, when he is admitted into custody, as stated in section 95D;

(3) The power given to an Israel Prison Service officer to order the conducting of an external examination of the naked body of a prison inmate, under the provisions of section 95E(b);

(4) The power given to an Israel Prison Service officer to approve the use of reasonable force in order to conduct a search on a prison inmate, under the provisions of section 95F(b);

(5) The power given to an Israel Prison Service officer to order the taking of a urine sample from a prison inmate, an external examination of his naked body or the making of an external search, under the provisions of sections 95H(a) and 95I(c);

(6) The power given to an Israel Prison Service officer to order the conducting of an external examination of the naked body of a visitor under the provisions of section 95J(b);

(7) The powers given to a prison security guard under the provisions of section 128AA.'

A study of the provisions of the aforementioned s. 128R shows that although the governor of the privately managed prison was not given important powers that are given to the governor of an Israel Prison Service prison (including the power to extend the period for holding an inmate in administrative isolation for more than 48 hours and jurisdiction regarding prison offences), the law still gives him powers that, when exercised, involve a serious violation of the rights to personal liberty and human dignity. These powers include, *inter alia*, the power to order an inmate to be held in administrative isolation for a maximum period of 48 hours; the power to order the conducting of an external examination of the naked body of an inmate; the power to order the taking of a urine sample from an inmate; the power to approve the use of reasonable force in order to carry out a search on the body of an inmate; and the power to order an inmate not to be allowed to meet with a particular lawyer in accordance with the restrictions provided in s. 45A of the Prisons Ordinance.

It should be further pointed out that in addition to all these there is a series of invasive powers that are given to the governor of the prison on behalf of the private concessionaire, which are embodied in the concession agreement rather than in amendment 28 itself.

13. Additional invasive powers are also given to the concessionaire's employees that are subordinate to the governor of the privately managed prison. Thus, for example, s. 128Y provides which powers are given to a 'senior employee of the concessionaire,' which is defined in s. 128F of the Prisons Ordinance as a 'employee of the concessionaire who carried out command and management functions':

'Powers of a senior employee of the concession-aire

128Y. In order to carry out his functions, a senior employee of the concessionaire shall have the following powers:

(1) The powers given to a prison security guard under the provisions of section 128AA;

(2) The powers set out in section 128R(c)(1) to (6), in whole or in part, if the governor authorized him for this purpose, with the

approval of the commissioner, and in accordance with the authorization;

(3) The powers that are given to an examiner under the provisions of sections 47A to 47C, if the governor authorized him for this purpose, with the approval of the commissioner, and in accordance with the authorization;

(4) The power given to the governor to deny privileges, if the governor authorized him for this purpose, with the approval of the commissioner, and in accordance with the authorization.'

An additional position that was created within the framework of amendment 28 is the position of 'prison security guard.' This position in the privately managed prison is *de facto* equivalent to the position of a prison officer in the Israel Prison Service. The functions of a 'prison security guard' are set out in s. 128Z of the Prisons Ordinance as follows:

'Functions of a prison security guard

128Z. The functions of a prison security guard are:

(1) To maintain public safety and security in the privately managed prison;

(2) To prevent the escape of the inmates who are held in custody in the privately managed prison;

(3) To maintain order, discipline and routine in the privately managed prison;

(4) To discover or prevent offences that are committed within the compound of the privately managed prison or the surrounding area, when accompanying an inmate out of the privately managed prison or when chasing an escaped inmate, all of which with regard to a privately managed prison or inmate;

(5) To carry out any additional function that the agreement provides shall be carried out by a prison security guard.'

The powers given to a 'prison security guard' in order to discharge his aforesaid functions (powers that are all also given to the governor of the privately managed prison and to a 'senior employee of the concessionaire') are set out in s. 128AA of the Prisons Ordinance as follows:

'Powers of a prison security guard

128AA. (a) (1) When carrying out his job and for that purpose only, a prison security guard has the powers given to a prison officer under the provisions of this Ordinance, including powers to carry out the instructions of the governor or of a senior employee of the concessionaire, as stated in section 125R(c)(1), (3), (5) and (6), subject to the following changes:

(a) The power under the provisions of section 95 with regard to a weapon that is a firearm, according to the meaning thereof in the Firearms Law, 5709-1949, is given to a prison security guard in the following circumstances only:

(1) When he is carrying out perimeter security functions on the walls of the privately managed prison or in the area surrounding the prison;

(2) When he is accompanying an inmate outside the privately managed prison;

(3) In circumstances where there has been a serious violation of order and discipline in the privately managed prison, as stated in

section 128AJ(a)(1), in accordance with a permit from the commissioner and according to the conditions set out in the permit;

(b) He shall have the power to make an external examination of the naked body of an inmate when he is admitted into custody, under the provisions of section 95D, only in accordance with an order from the governor or from a senior employee of the concessionaire under the provisions of section 128R(c)(2);

(2) In this subsection, 'senior employee of the concessionaire' — a senior employee of the concessionaire who has been authorized for this purpose under the provisions of section 128Y(2).

(b) Notwithstanding the provisions of subsection (a)(1), a prison security guard shall not have the following powers:

(1) The powers given under the provisions of this Ordinance to a prison officer who belongs to the Anti-Drugs Unit, as defined in section 95A;

(2) The power to order an inmate to be held in isolation under the provisions of section 19C;

(3) Jurisdiction regarding prison offences, under article 5 of chapter 2, and any other power that is given to a prison officer under the aforesaid chapter.

(c) A prison security guard shall have the powers as stated in this section within the

> compound of the privately managed prison, or in the surrounding area, and when accompanying an inmate outside the prison or when chasing an escaped inmate; nothing in the provisions of this subsection shall derogate from the provisions of subsection (a)(1)(a).'

The aforesaid s. 128AA therefore gives a prison security guard, who it will be remembered is a employee of the concessionaire who operates the privately managed prison, powers that are given to a prison officer of the Israel Prison Service, subject to certain restrictions. These powers include, *inter alia*, the power to use a weapon in order to prevent the escape of an inmate from the prison, the power given to a policeman to arrest and detain a person without a warrant under ss. 23 and 67 of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996 (a power that is given to a prison employee under s. 95B of the Prisons Ordinance), and the powers provided in ss. 95D and 95E of the Prisons Ordinance to carry out a search on the person of an inmate when he is admitted into custody and during his stay in the prison. Exercising these powers also leads, of course, to a serious violation of the inmates' human rights. It should also be noted that a employee of the concessionaire who is not a prison security guard is also entitled in certain circumstances to use reasonable force and to take steps to restrain an inmate, in accordance with s. 128AB of the Prisons Ordinance, which provides the following:

'Powers of a employee of the concessionaire to use force

> 128AB. A employee of the concessionaire that is not a prison security guard, who has undergone training as provided in the agreement, may use reasonable force and take measures to restrain an inmate, until a prison security guard or a prison officer comes, if one of the following is satisfied:
>
> (1) The inmate commits in his presence a violent offence or causes real damage in his presence to a person or property;
>
> (2) There is a real concern of harm to the health or physical integrity of a person;

(3) There is a reasonable concern that the inmate is escaping or is trying to escape from the privately managed prison.'

The petition before us does not address the actual existence of the aforesaid harmful powers, nor does it deny the need for them in order to operate and manage a prison properly. As stated above, the petitioners' claims address the constitutionality of giving the aforesaid functions and powers to a private concessionaire and its employees.

The scope of judicial scrutiny of Knesset legislation

14. The premise for examining the constitutionality of amendment 28 is that it is a law passed by the Knesset that reflects the will of the representatives of the people, and as such the court is required to respect it; the court will therefore not determine lightly that a certain statute is unconstitutional (see HCJ 3434/96 *Hoffnung v. Knesset Speaker* [3], at p. 67; HCJ 4769/95 *Menahem v. Minister of Transport* [4], at pp. 263-264). Moreover, it should be recalled that a law that is enacted by the Knesset enjoys the presumption of constitutionality that imposes on someone claiming unconstitutionality the burden of showing, at least *prima facie*, that the statute is unconstitutional, before the burden passes to the state and the Knesset to justify its constitutionality. The presumption of constitutionality also requires the court to adopt the assumption that the statute was not intended to undermine constitutional principles (see *Hoffnung v. Knesset Speaker* [3], at p. 68; HCJ 6055/95 *Tzemah v. Minister of Defence* [5], at pp. 267-269 {663-667}). At the same time, the court should carry out the role given to it in our constitutional system and examine the constitutionality of the legislation enacted by the legislative branch. This examination should be made by striking a delicate balance between the principles of majority rule and the separation of powers, on the one hand, and the protection of human rights and the basic values underlying the system of government in Israel, on the other. This also means that the constitutional scrutiny should be carried out with caution and restraint, without reformulating the policy chosen by the legislature (see CrimA 6659/06 *Iyyad v. State of Israel* [6], at para. 29 of the judgment). This rule of caution and restraint when intervening in the policy chosen by the legislature is particularly applicable with regard to court intervention in matters reflecting economic policy. President A. Barak said in this respect:

> 'The court does not seek to replace the thinking of the legislature with its own thinking. The court does not put itself in the legislature's place. It does not ask itself what measures it would choose, were it a member of the legislature. The court exercises judicial scrutiny. It examines the constitutionality of the law, not its wisdom. The question is not whether the law is good, effective or justified. The question is whether it is constitutional. A "socialist" legislature and a "capitalist" legislature may enact different and conflicting laws, which will all satisfy the requirements of the limitations clause. Indeed, the Basic Laws are not a plan for a specific political course of action. Nationalization and privatization can both exist within their framework. A market economy or a centrally planned economy can both satisfy judicial scrutiny, provided that the economic activity that violates human rights satisfies the requirements of the limitations clause. Therefore, where there is a range of measures, the court should recognize a margin of appreciation and discretion that is given to the legislature… Determining social policy is the province of the legislature, and its realization is the province of the government, which both have a margin of legislative appreciation' (see HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [7], at p. 386; see also *Menahem v. Minister of Transport* [4], at pp. 263-264. For criticism regarding the limited scope of judicial intervention in economic policy, see B. Medina, '"Economic Constitution," Privatization and Public Funding: A Framework of Judicial Review of Economic Policy,' *Itzchak Zamir Book on Law, Government and Society* (2005) 583, at pp. 648-652).

Moreover, it is important to clarify that when speaking of legislation that results in a serious violation of protected human rights, the fact that the motive underlying the legislation is an economic one does not decide the question of the scope of constitutional scrutiny of that legislation. In such circumstances, the predominant element in the constitutional scrutiny will be the nature and degree of the violation of human rights, as well as the existence of possible justifications for that violation. The deciding factor will therefore not be the economic aspect of the legislation causing the violation, but the question whether the legislation leads to a serious and grave violation

of constitutional human rights and does not satisfy the tests of the limitations clause.

15. The constitutional issue lying at the heart of the petition before us is whether and to what extent the state — and especially the government, which is the executive branch of the state — may transfer to private enterprises the responsibility for carrying out certain tasks that for years have been its exclusive concern, according to the basic constitutional principles of the democratic system in Israel, when those tasks involve a significant and fundamental violation of human rights. The question that we are called upon to decide is, therefore, whether it is possible to determine that the privatization of sovereign powers in this case is unconstitutional, even though it is done pursuant to primary legislation of the Knesset.

An examination of the constitutionality of amendment 28 in accordance with the Basic Law: Human Dignity and Liberty

16. When we examine the petitioners' arguments that are founded on the provisions of the Basic Law: Human Dignity and Liberty, we should first decide the question whether granting the various powers involved in the management and operation of a prison to a private concessionaire, as was done in amendment 28, violates a constitutional right that is protected in the Basic Law: Human Dignity and Liberty. If we find that such a right has been violated, we should examine whether the violation is lawful, i.e., whether the violation satisfies the tests of the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty. If we ultimately arrive at the conclusion that amendment 28 violates a constitutional right that is protected by the Basic Law: Human Dignity and Liberty, and that this violation does not satisfy the tests of the limitations clause, we shall need to determine what is the appropriate constitutional remedy for the unlawful violation (regarding the three stages of constitutional scrutiny, see CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [8], at p. 428; HCJ 4128/02 *Israel Union for Environmental Defense v. Prime Minister of Israel* [9], at p. 517).

17. The first question that we need to decide, therefore, is whether the provisions of amendment 28 involve a significant violation of a constitutional right that is protected by the Basic Law: Human Dignity and Liberty. Our deliberations as to whether amendment 28 violates the human rights of the inmates of the privately managed prison are based on the premise that imprisoning a person and holding him in custody in itself violates his right to liberty and freedom of movement. This is the case even when the

imprisonment is lawful. In addition to this premise, there is another premise that has become a rule in our legal system, that the loss of personal liberty and freedom of movement of an inmate, which is inherent in the actual imprisonment, does not justify an additional violation of the other human rights of the inmate to an extent that is not required by the imprisonment itself or in order to realize an essential public interest recognized by law (see HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security* [10], at para. 11 of the judgment; PPA 4463/94 *Golan v. Prisons Service* [11], at pp. 152-156 {501-504}). In this respect, the remarks of Justice E. Mazza are apt:

> 'It is established case law in Israel that basic human rights "survive" even inside the prison and are conferred on a prisoner (as well as a person under arrest) even inside his prison cell. The exceptions to this rule are only the right of the prisoner to freedom of movement, which the prisoner is denied by virtue of his imprisonment, and also restrictions imposed on his ability to realize a part of his other rights — some restrictions necessitated by the loss of his personal freedom and other restrictions based on an express provision of law' (*Golan v. Prisons Service* [11], at pp. 152-153 {501}).

18. On the basis of these premises, we should examine the petitioners' arguments with regard to the violation of basic constitutional rights that arises from the provisions of amendment 28, which focus *de facto* on two issues. First, the petitioners argue that there is a real concern that the powers that were provided in amendment 28 will be exercised by the private concessionaire in a manner that violates the human rights of the inmates to a greater degree than the manner in which the corresponding powers are exercised in the prisons managed by the Israel Prison Service. Second, the petitioners argue that the transfer of powers to manage and operate the prison to a private concessionaire *ipso facto* violates the constitutional rights of the inmates in the privately managed prison to their personal liberty and human dignity.

As we shall clarify below, amendment 28, which allows the construction of a prison that will be managed and operated by a private corporation, leads to a violation of the constitutional rights to personal liberty and human dignity of inmates who are supposed to serve their sentence in that prison. This is because of the actual transfer of powers of management and operation

of the prison from the state to a private concessionaire that is a profit-making enterprise. We therefore do not need to decide the arguments of great weight raised by the petitioners regarding the potential for violating the inmates' human rights in the privately managed prison to a greater degree than the violation of the inmates' human rights in the prisons managed by the state. It should be noted that the petitioners' claims in this regard were mainly based on the provisions set out in amendment 28 with regard to the nature of the powers granted to the concessionaire's employees, the state's supervision of the private concessionaire's actions, the economic inducements that will present themselves to the concessionaire and the state with regard to the manner in which the prison is managed and the minimum conditions determined for the professional qualifications of the concessionaire's employees. In this context, the petitioners also raised arguments concerning the violation of human rights that has been caused by the operation of privately managed prisons in other countries, and especially in the United States.

19. We have examined the petitioners' claims that are based on the concern that the human rights of inmates will be violated in the privately managed prison to a greater extent than in state managed prisons. In this respect, we are of the opinion that the concerns raised by the petitioners are not unfounded and that there is indeed a concern that the manner of operating the privately managed prison will lead to a greater violation of inmates' human rights than in state managed prisons, because of the fact that the private prison is managed by a corporation that is a profit-making enterprise. It would appear that the aforesaid concern troubled both the primary legislature and the granter of the concession, and for this reason broad supervision and inspection powers were provided in amendment 28 to allay this concern. Notwithstanding, we have reached the conclusion that although the concerns raised by the petitioners are not unfounded, they address a future violation of human rights and there is no certainty that this will occur; therefore, it is questionable whether it constitutes a sufficient basis for setting aside primary legislation of the Knesset. In this regard it should be noted that the petitioners' claims regarding the ramifications of the privatization of prisons in other countries (and especially the United States) are an insufficient basis for this court to reach an unequivocal and *a priori* determination that the method of operating a prison by means of private management will necessarily result in a violation of human rights that is

significantly greater than the violation of human rights in state managed prisons. The reasons for this are, first, that the legislative arrangements in other countries are different from the legislative arrangement in Israel (especially with regard to the degree of state supervision of the concessionaire and the scope of the concessionaire's powers), and, second, that the comparative figures are not unambiguous (see: A. Volokh, 'Developments in the Law — The Law of Prisons: III. A Tale of Two Systems: Cost, Quality and Accountability in Private Prisons,' 115 *Harv. L. Rev.* 1838, 1868 (2002); U. Timor, 'Privatization of Prisons in Israel: Gains and Risks,' 39 *Isr. L. Rev.* 81 (2006), at pp. 85-88; D.E. Pozen, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom,' 19 *Journal of Law & Politics* 253 (2003), at pp. 271-276). Our decision will therefore be based on the assumption that, despite the potential violations indicated by the petitioners, there is no empirical proof that the manner of operating private prisons necessarily leads to a greater violation of the inmates' human rights than that in the state managed prisons. Notwithstanding, we have reached the conclusion that the actual transfer of powers to manage a prison from the state, which acts on behalf of the public, to a private concessionaire that is a profit-making enterprise, causes a serious and grave violation of the inmates' basic human rights to personal liberty and human dignity — a violation that should, of course, be examined from the viewpoint of the limitations clause. Let us now turn to clarify our reasons for this conclusion.

The violation caused by amendment 28 to the constitutional right to personal liberty

20. Sending someone to prison — whether it is managed privately or by the state — first and foremost violates the constitutional right to personal liberty. This right is set out in s. 5 of the Basic Law: Human Dignity and Liberty, which states the following:

> 'Personal liberty
>
> 5. A person's liberty shall not be denied or restricted by imprisonment, arrest, extradition, or in any other way.'

The right to personal liberty is without doubt one of the most central and important basic rights in any democracy, and it was recognized in our legal system before it was enshrined in the Basic Law. Denying this right is one of the most severe violations possible in a democratic state that upholds the rule

of law and protects human rights. A violation of the right to personal liberty is especially serious because it inherently involves a violation of a series of other human rights, whose potential realization is restricted physically, mentally and ethically. The special status of the right to personal liberty and the serious ramifications arising from a violation thereof were discussed by Justice Zamir in *Tzemah v. Minister of Defence* [5]:

> 'By virtue of s. 5 of the Basic Law: Human Dignity and Liberty, personal liberty is a constitutional right. Moreover, personal liberty is a constitutional right of the first order, and from a practical viewpoint it is also a prerequisite for realizing other basic rights. A violation of personal liberty, like a stone hitting water, creates a ripple effect of violations of additional basic rights: not only the freedom of movement, but also the freedom of speech, privacy, property rights and other rights… As stated in s. 1 of the Basic Law: Human Dignity and Liberty, "Basic human rights in Israel are founded on the recognition of the worth of man, the sanctity of his life and his being free….". Only someone who is free can realize his basic rights fully and properly. It is personal liberty, more than any other right, that makes man free. For this reason, denying personal liberty is a particularly serious violation. Indeed, a denial of personal liberty by means of imprisonment is the most serious sanction that a civilized state imposes on offenders' (see *Tzemah v. Minister of Defence* [5], at pp. 261-262 {656}; see also *Iyyad v. State of Israel* [6], at para. 28).

But like all human rights, the right to personal liberty, despite its exalted constitutional status, is not an absolute right.

From the provisions of s. 5 of the Basic Law: Human Dignity and Liberty, it can be seen that imprisoning a person — whether in a state managed prison or in a privately managed prison — violates his constitutional right to personal liberty. In this respect it is important to emphasize that even when a person is convicted of an offence and sentenced to imprisonment, this does not mean that he no longer has the basic constitutional right to personal liberty; however, in consequence of the conviction and the sentence that follows it, the scope of the protection afforded to this right is reduced and it is denied for the period stipulated in the sentence. This denial is justified under

the provisions of the limitations clause (see CrimA 4424/98 *Silgado v. State of Israel* [12], at p. 550).

21. The special constitutional status of the right to personal liberty and the fact that it constitutes a condition for exercising many other human rights mean that the legitimacy of denying that liberty depends to a large extent on the identity of the party that is competent to deny that liberty and on the manner in which that liberty is denied. The basic constitutional principle underlying this approach is that in a democracy that respects human rights, the basic justification for denying the personal liberty of the individual lies in the fact that denying his liberty results in the realization of some essential public interest. Of course, this condition is insufficient in itself for denying the personal liberty of the individual, but it is an essential condition. This essential public interest that may justify, and sometimes even necessitate, the denial of the personal liberty of a particular individual, can be of various kinds. Thus, for example, usually when we are dealing with the denial of personal liberty in criminal proceedings, the public interest is expressed in the various goals of criminal punishment, such as deterrence, retribution or rehabilitation. In addition to considerations of criminal punishment, the public interest in denying the personal liberty of a particular individual may also be based on the danger that he presents to state security (see, for example, the Emergency Powers (Arrests) Law, 5739-1979, and the Internment of Unlawful Combatants Law, 5762-2002).

22. According to our approach, which will be explained below, since the denial of the right to personal liberty is justified only if it is done in order to further or protect an essential public interest, the question whether the party denying the liberty is acting first and foremost in order to further the public interest (whatever it may be) or whether that party is mainly motivated by a private interest is a critical question that lies at the very heart of the right to personal liberty. The answer to the aforesaid question is of importance to the very legitimacy of the denial of liberty. According to the basic principles of modern political philosophy, the violation of the right to personal liberty resulting from giving a private enterprise the power to deny liberty within the context of the enforcement of criminal law derives *ipso facto* from the fact that the state is giving that party one of its most basic and invasive powers, and by doing so the exercise of that power loses a significant part of its legitimacy. In order to clarify the nature of the violation of the right to personal liberty that is caused by amendment 28, let us now examine the

principles underlying our aforementioned approach and the manner in which these principles apply to amendment 28.

23. According to modern political philosophy, one of the main factors that led to the organization of human beings in society, whereby invasive powers — including the power to send convicted offenders to prison — were given to the authorities of that society and especially the law enforcement authorities, is the aspiration to promote the protection of personal security and public order. This approach lies at the heart of the approach of the founders of modern political philosophy. In his classic work *Leviathan*, which was published in 1651, Thomas Hobbes discussed the nature of the roles of 'publique ministers' that are employed by the 'Soveraign':

> 'For Execution
>
> Publique Ministers are also all those, that have Authority from the Soveraign, to procure the Execution of Judgements given; to publish the Soveraigns Commands; to suppresse Tumults; to apprehend, and imprison Malefactors; and other acts tending to the conservation of the Peace. For every act they doe by such Authority, is the act of the Common-wealth; and their service, answerable to that of the Hands, in a Bodie naturall' (Thomas Hobbes, *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (1651), at chap. XXIII).

An additional expression of the manner in which modern political philosophy regards the role of the 'political society' in enforcing the law and punishing offenders can be found in the work of the English philosopher John Locke, *Two Treatises of Government*, which was published in 1690. In the *Second Treatise*, Locke presents his position that society rather than each of the individuals within it has jurisdiction regarding offences and the punishment for them:

> 'But because no political society can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto, punish the offences of all those of that society; there and there only is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it. And thus all private judgment of every particular member being excluded,

> the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established: whereby it is easy to discern, who are, and who are not, in political society together (John Locke, *Second Treatise of Government* (1690), at para. 87).

This outlook concerning the responsibility of society or the sovereign (and those acting on their behalf) to enforce the criminal law and preserve public order became over the years a cornerstone in the modern political philosophy of democratic states. Although, naturally, many changes and developments have occurred since the seventeenth century in the way in which the nature and functions of the state are regarded, it would appear that the basic political principle that the state, through the various bodies acting in it, is responsible for public security and the enforcement of the criminal law has remained unchanged throughout all those years, and it is a part of the social contract on which the modern democratic state is also based. An expression of the fundamental outlook concerning the nature of the basic functions of the state and the relationship between it and the citizen can be found in the remarks of Justice I. Zamir in HCJ 164/97 *Conterm Ltd v. Minister of Finance* [13], at p. 320 {34}:

> '... the relationship between the authority and the citizen is, in practice, a two-way relationship. Therefore, in my opinion, the authority's duty to act fairly necessitates a corresponding duty to act fairly on the part of the citizen. This requirement is deeply rooted: it springs from the social contract on which the state is based. Under this contract, as it is understood in a democratic state, the authority and the citizen are not opposing forces on different sides of a barricade but stand side by side as partners in the state. In a democracy, as Justice Silberg said, "... the government and the citizen are one and the same" ... The government (in my opinion we should say: the public administration) has a duty to serve the public – to keep peace and order; to provide essential services; to protect the dignity

> and liberty of every citizen; to do social justice. But the public administration, which has nothing of its own, can only give to the public if it receives from the public. The proper relationship between the administration and the public, which is in fact the essential relationship, is a reciprocal relationship of give and take.'

In principle, the dispute between supporters and opponents of the privatization of the prisons depends largely on the question of who is the authority that is competent to deprive a person of his liberty in order to enforce the criminal law, and whether it is permitted and desirable to depart from the rule that the exercise of power in this regard lies with the state in its capacity as the representative of the public, and entrust this power to a private enterprise, such as an interested capitalist. This debate has been conducted in academic and public circles, but it has not yet been decided in the courts (see: I.P. Robbins, 'The Impact of the Delegation Doctrine on Prison Privatization,' 35 *UCLA L. Rev.* 911 (1988); J.E. Field, 'Making Prisons Private: An Improper Delegation of a Governmental Power,' 15 *Hofstra L. Rev.* 649 (1987); A.A. White, 'Rule of Law and Limits of Sovereignty: The Private Prison in Jurisprudential Perspective,' 38 *Am. Crim. L. Rev.* 111 (2001), at pp. 134-145). This highlights the special role of the state in enforcing the criminal law and in managing public prisons for the aforesaid purpose. The remarks of the American scholar, Prof. J.J. Dilulio, Jr., are pertinent in this regard:

> 'At a minimum, it can be said that, both in theory and in practice, the formulation and administration of criminal laws by recognized public authorities is one of the liberal state's most central and historic functions; indeed, in some formulations it is the liberal state's reason for being… It is not unreasonable to suggest that "employing the force of the Community" via private penal management undermines the moral writ of the community itself' (J.J. Dilulio, Jr., 'The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails,' *Private Prisons and the Public Interest* (D.C. McDonald ed., 1990), 155, at pp. 175-176).

24. According to the aforesaid constitutional principles and the basic social and political tenets of the system of government in Israel, the state — through the government and the bodies that answer to it — is regarded as the

party that has the responsibility for ensuring security, public order and the enforcement of the criminal law. The various security services in Israel — including the Israel Defence Forces, the Israel Police, the Israel Prison Service and the General Security Service — take their orders from the government, and as a rule their heads are appointed by it (see ss. 2 and 3 of the Basic Law: the Army, s. 8 of the Police Ordinance [New Version], 5731-1971, s. 78 of the Prisons Ordinance and ss. 3 and 4 of the General Security Service Law, 5762-2002). When these agencies, which all constitute a part of the executive branch of the state, exercise their powers, they are acting on behalf of the state as an organized force that receives its orders from the government. Indeed, the subordination of the various security services to the elected government has always been one of the hallmarks of the State of Israel as a modern democratic state, and it is one of the basic constitutional principles underlying the system of government in Israel (for the constitutional basis for the special status of persons serving in the various security services (including the Israel Prison Service), see ss. 7(8) and 7(9) of the Basic Law: the Knesset, and the special limitations clause provided in s. 9 of the Basic Law: Human Dignity and Liberty).

25. In addition to the subordination of the security forces in the state to the government, one of the hallmarks of the great power that has always been held by the executive branch in Israel is the power given to it, through the police, the state attorney's office and the prison service, to enforce the provisions of the criminal law in Israel. The issue before us concerns the manner of implementing one of the main elements of the criminal law enforcement mechanisms in Israel — the power to deprive of their liberty those persons who have been convicted under the law and sentenced to imprisonment. This power is one of the most invasive powers that a modern democratic state has over its subjects.

It should be noted that *prima facie*, in so far as imprisonment as a sentence in a criminal trial is concerned, it might be argued that the violation of the right to personal liberty caused by the imprisonment derives in its entirety from the custodial sentence imposed by the court. Indeed, from a normative viewpoint, the decision of the competent courts of the state to sentence a particular person to imprisonment is the source of the power to violate the constitutional right of that individual to personal liberty. But the actual violation of the right to personal liberty takes place on a daily basis as long as he remains an inmate of the prison. This violation of the right to

personal liberty is inflicted by the party that manages and operates the prison where the inmate is held in custody, and by the employees of that party, whose main purpose is to ensure that the inmate duly serves the term of imprisonment to which he has been sentenced (subject, of course, to the provisions of the law) and complies with the rules of conduct in the prison, which also restrict his personal liberty.

In Israel the power to punish someone who has been convicted under the law and to imprison him in order that he may serve his sentence is, therefore, one of the most significant powers of the state, and under the law the body that is responsible for carrying out this function of the state is the Israel Prison Service. This power, as well as the powers of the other security services, is an expression of a broader principle of the system of government in Israel, according to which the state — through the government and the various security services that are subordinate to it — has exclusive authority to resort to the use of organized force in general, and to enforce the criminal law in particular (for a critical discussion of the question of the monopoly given to the state to use force, see C.J. Rosky, 'Force, Inc.: The Privatization of Punishment, Policing and Military Force in Liberal States,' 36 *Conn. L. Rev.* 879 (2004).

26. The monopoly given to the state — through the executive branch and the bodies acting through it — with respect to the use of organized force is of importance in two spheres. In one sphere, we need to take into account that the democratic legitimacy for the use of force in order to restrict the liberty of individuals and to deny various human rights relies on the fact that organized force exercised by and on behalf of the state is what causes the violation of those rights. Were this force not exercised by the competent organs of the state, in accordance with the powers given to them and in order to further the general public interest rather than a private interest, this use of force would not have democratic legitimacy, and it would constitute *de facto* an improper and arbitrary use of violence. In the other sphere, the fact that the organized force is exercised by a body that acts through the state and is subject to the laws and norms that apply to anyone who acts through the organs of the state and also to the civil service ethos in the broad sense of this term is capable of significantly reducing the danger that the considerable power given to those bodies will be abused, and that the invasive powers given to them will be exercised arbitrarily or in furtherance of improper purposes. Naturally, both of these spheres are interrelated and affect one another, since the democratic

legitimacy given to the bodies that exercise organized force on behalf of the state is what allows them in a substantive sense to exercise the powers given to them vis-à-vis any individual. At the same time, since those bodies act within the framework of the democratic political mechanism and are subject to its rules, their legitimacy is enhanced. Prof. Dilulio discussed the close connection between the identity of the party that uses force against prisoners and the legitimacy of the actual use of force in the following terms:

> 'In my judgment, to continue to be legitimate and morally significant, the authority to govern those behind bars, to deprive citizens of their liberty, to coerce (and even kill) them, must remain in the hands of government authorities. Regardless of which penological theory is in vogue, the message "Those who abuse liberty shall live without it" is the philosophical brick and mortar of every correctional facility. That message ought to be conveyed by the offended community of law-abiding citizens, through its public agents, to the incarcerated individual. The administration of prisons and jails involves the legally sanctioned coercion of some citizens by others. This coercion is exercised in the name of the offended public. The badge of the arresting police officer, the robes of the judge, and the state patch of the corrections officer are symbols of the inherently public nature of crime and punishment' (Dilulio, 'The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails,' *supra*, at p. 173).

27. Now that we have discussed the constitutional principle regarding the monopoly given to the state to use force in general, and to deny the personal liberty of individuals in order to enforce the criminal law in particular, let us now examine the relationship between this general principle and the arrangement provided in amendment 28. The main provision of amendment 28, which will form the focus of the constitutional scrutiny and from which all of the other provisions of the amendment whose constitutionality is under consideration are derived, is s. 128L of the Prisons Ordinance. This provision defines the spheres of responsibility of the private concessionaire, who is supposed to construct, manage and operate the privately managed prison. The wording of s. 128L appears in para. 11 above, but because of its importance in this case we shall cite the wording of the section once again:

'Responsibility of the concessionaire

128L. (a) The concessionaire is responsible for the proper construction, management and operation of the privately managed prison, including:

(1) maintaining order, discipline and public security in the privately managed prison;

(2) preventing the escape of inmates that are held in custody in the privately managed prison;

(3) ensuring the welfare and health of the inmates and taking steps during the imprisonment that will aid their rehabilitation after the release from imprisonment, including training for employment and providing education;

all of which in accordance with the provisions of every law and the provisions of the agreement and while upholding inmates' rights.

(b) The concessionaire shall adopt all the measures required in order to discharge his responsibility as stated in subsection (a), including measures as aforesaid that are stipulated in the agreement, and *inter alia* he shall appoint for this purpose the concessionaire's governor and employees in accordance with the provisions of this chapter.'

The constitutional difficulty presented by amendment 28 concerns the management and operation of the prison by a private concessionaire, and in particular the responsibility imposed on it for the matters set out in the aforesaid ss. 128L(a)(1) and 128L(a)(2), namely the responsibility for 'maintaining order, discipline and public security' and the responsibility for 'preventing the escape of inmates that are held in custody.' These spheres of responsibility, from which all the other invasive powers given to the governor

of the prison on behalf of the concessionaire and the concessionaire's employees are *de facto* derived, are the spheres in which, according to the petitioners, the state may not delegate or transfer its responsibility to a private enterprise. Moreover, it is important to point out that the provisions of amendment 28 may also to some degree affect the length of the term of imprisonment, since the conduct of the prison inmate has a not inconsiderable effect on the possibility of his early release from prison under the Parole Law, 5761-2001. In this respect it should be pointed out that under s. 9(7) of the Parole Law, the parole board acting under the law is required to consider, *inter alia*, the recommendation concerning the prisoner that was given by the governor of the privately managed prison, who, it will be recalled, is appointed by the concessionaire (it should be noted that the aforesaid s. 9(7) also relates to the possibility that one of the supervisors acting in the prison on behalf of the Israel Prison Service will submit a recommendation regarding the prisoner in the privately managed prison).

28. The powers involved in maintaining order, discipline and public security in the prisons and the powers involved in preventing the escape of prisoners from custody are traditionally powers that manifestly belong to the state. The sovereignty of the state and its power to use coercive force against its subjects are typified by the power given to it to imprison persons who have been convicted by the court, to supervise those prisoners strictly, continuously and closely, in a manner that seriously (but justifiably) violates their personal liberty, human dignity and privacy, and to take various steps — including the use of deadly force in a manner that endangers the right to life and physical integrity — in order to prevent the escape of the inmates from the prison. Therefore, a prison, even when it operates within the law, is the institution in which the most serious violations of human rights that a modern democratic state may impose on its subjects may and do occur.

We have already discussed the fact that according to the basic values of society and the system of government in Israel, the legitimacy for exercising powers that involve a serious violation of the constitutional right to personal liberty derives from the fact that these powers are exercised by and on behalf of the state, after the person with regard to whom they are exercised has been tried and convicted by the legal system of the state. Imprisoning a person is the culmination of the criminal proceeding initiated against that person by the state on behalf of the entire public. The power of imprisonment and the other invasive powers that derive from it are therefore some of the state's most

distinctive powers as the embodiment of government, and they reflect the constitutional principle that the state has a monopoly upon exercising organized force in order to advance the general public interest. In this context it should be remembered that when an offender who has been convicted by a competent court and sentenced to imprisonment serves his sentence, this is not merely a technical stage of implementing the criminal law; it is a significant and integral part of the criminal proceeding that the state initiates against the individual, without which the earlier parts of the proceeding lose a significant part of their significance. Indeed, just as the state through the legislature is responsible for regulating criminal legislation, so too it is responsible for enforcing the criminal law and punishing offenders according to the law through the executive branch — a responsibility that is realized, *inter alia*, by imposing the role of managing and operating prisons on the state (see Field, 'Making Prisons Private: An Improper Delegation of a Governmental Power,' *supra*, at p. 669).

29. The scope of the right to personal liberty and the power to violate this right lawfully are derived from the basic principles of the constitutional system in Israel that we discussed with regard to the responsibility of the state and those acting on its behalf to maintain public order and enforce the criminal law — a responsibility that justifies giving them extensive powers to violate human rights. Therefore, it is possible to say that when it is the state through its competent organs that exercises the coercive power inherent in denying prison inmates their liberty and when the state is *de facto* responsible for denying the liberty, the violation of the constitutional right to liberty of those inmates has greater legitimacy. Indeed, when the state, through the Israel Prison Service, denies the personal liberty of an individual – in accordance with the sentence that is imposed on him by a competent court — it thereby discharges its basic responsibility as sovereign for enforcing the criminal law and furthering the general public interest. By contrast, when the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined, since the sanction is enforced by a party that is motivated first and foremost by economic considerations — considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes.

30. It would therefore appear that amendment 28 gives rise to a question of paramount constitutional important that lies, as we explained in paragraph 22 above, at the very heart of the right to personal liberty, namely whether it

is possible to entrust the power to deny liberty to a party that operates in order to further an interest that is essentially a private one.

Amendment 28 provides an arrangement that authorizes a private profit-making corporation to violate the constitutional right to personal liberty; by making the prison inmates subservient to a private enterprise that is motivated by economic considerations, amendment 28 creates a violation of the constitutional right to personal liberty, which is an independent violation that is additional to the violation caused by the actual imprisonment under lock and key. This violation goes to the heart of the right to personal liberty, since it involves the actual power to hold a person in prison and the conditions of his imprisonment (including the possibility of denying various benefits inside the prison). The source of the violation of the constitutional right to personal liberty that is caused by amendment 28 is therefore inherent to the identity and nature of the body that has been given the powers to violate liberties that are involved in the management and operation of a prison, in two respects. *First*, the state, after it has determined through its courts that a custodial sentence should be imposed on a certain person, does not bear complete responsibility for the implementation of this decision, with the violation of human rights that arises from it. This situation undermines the legitimacy of the actual sanction of imprisonment and of the violations of various human rights that derive from it (and especially the constitutional right to personal liberty). *Second*, in addition to the aforesaid, the inmate of a privately managed prison is exposed to a violation of his rights by a body that is motivated by a set of considerations and interests that is different from the one that motivates the state when it manages and operates the public prisons through the Israel Prison Service. The independent violation of the constitutional right to personal liberty of inmates in a privately managed prison exists even if we assume that from a factual-empirical viewpoint it has not been proved that inmates in that prison will suffer worse physical conditions and invasive measures than those in the public prisons.

Indeed, when we examine the extent of the violation of the right to personal liberty inherent in placing a person under lock and key we should take into account not merely that person's actual loss of personal liberty for a certain period but also the manner in which he is deprived of liberty. The broad scope of the protected right finds expression in various ways, and this too justifies affording it broad protection. The right to liberty is not violated only by denying it in its entirety. The right can be violated on various levels.

The manner in which the constitutional right is violated and the nature and extent of the violation naturally affect the constitutional scrutiny of the violation from the perspective of the limitations clause (see and cf. HCJ 5936/97 *Lam v. Director-General of Ministry of Education, Culture and Sport* [14], at pp. 681-683, 692-693, 693-694 {545-549, 562-563, 564-565}; *Menahem v. Minister of Transport* [4], at pp. 260-261).

31. In this respect it should be stated that we see no reason to accept the concessionaire's argument that all that amendment 28 provides is tantamount to the state availing itself of the assistance of a private enterprise rather than delegating or transferring powers to it. It is well known that a distinction between an authority availing itself of the assistance of a private enterprise in order to carry out its duties and a delegation of powers to a private enterprise has been made in our administrative law, and the main distinction between the two situations concerns the scope of the powers and the discretion given to the party to whom the competent authority delegates its powers (see HCJ 2303/90 *Philipovitz v. Registrar of Companies* [15], at pp. 422-424; HCJ 4884/00 *Let the Animals Live Association v. Director of Field Veterinary Services at the Ministry of Agriculture* [16]; I. Zamir, *Administrative Authority* (vol. 2, 1996), at pp. 541-550, 561-562). In the circumstances of the case before us, even if there are certain differences between the scope of the powers given to the employees of the private concessionaire that operates the prison and the scope of powers given to prison officers of the Israel Prison Service, an examination of the provisions of amendment 28 shows that the private concessionaire was given wide-ranging powers with regard to the day-to-day management of the prison, including the enforcement of order and discipline therein.

The powers given to the private concessionaire are not merely technical powers. They are invasive powers that are involved on a regular basis when discretion is exercised by the prison governor acting on behalf of the concessionaire and the employees subordinate to him, who are in control of the managing the lives of the inmates in the prison on a daily basis. Moreover, the management and operation of a prison naturally require dealing with unexpected situations in the course of direct contact with the inmates and making quick decisions on an immediate basis, where the supervision and scrutiny of the making of the decisions and the manner of exercising the discretion can only be carried out retrospectively. Indeed, it would seem that in so far as the management of private prisons is concerned,

there is a very significant difficulty in making a clear distinction between the policy decision of the state and the actual manner in which it is implemented by the private concessionaire (see J. Freeman, 'The Private Role in Public Governance,' 75 *N. Y. U. L. Rev*. 543 (2000), at pp. 632-633; Dilulio, 'The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails,' *supra*, at p. 176). In these circumstances, it is clear that the arrangements provided in amendment 28 constitute a transfer (or at least a delegation) of powers from the Israel Prison Service to the private concessionaire, which is responsible for the management and operation of the prison, rather than a government authority merely availing itself of the assistance of a private enterprise, as the concessionaire claims.

32. We should further mention that, in their pleadings in reply to the petition, the respondents (the state and the concessionaire) argued that there are various other arrangements that allow private enterprises to exercise different sovereign powers. Examples of such arrangements are the possibility of appointing a private lawyer as a prosecutor in a criminal trial by virtue of an authorization from the attorney-general under s. 12(a)(1)(b) of the Criminal Procedure Law [Consolidated Version], 5742-1982 (see HCJ 8340/99 *Gorali Kochan & Co. Law Offices v. Attorney-General* [17]; HCJ 1783/00 *Haifa Chemicals Ltd v. Attorney-General* [18]); the possibility provided in s. 5 of the Execution Law, 5727-1967, of appointing a private individual, who has been authorized for this purpose, as an 'officer' for the enforcement of civil judgments; and the existence of nursing and psychiatric institutions, which operate for profit, where the members of staff have full control of the various aspects of the lives of the inmates of those institutions. The question of the constitutionality and legality of these arrangements does not arise in the petitions before us, and therefore we are not required to adopt any position with regard to it. But it is hard to deny that these are functions that are not so closely related to the manifestly sovereign functions of the state and that the violation of human rights that results from exercising them is less than that involved in the management and operation of a prison, which is the subject of the petition before us (for a discussion of the question of the constitutional and legal restrictions imposed on the privatization process, see D. Barak-Erez, 'Human Rights in an Age of Privatization,' 8 *Labour, Society and Law (Israeli Society for Labour Law and Social Security Yearbook)* 209 (2001); D. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' 30 *Tel-Aviv University Law Review (Iyunei Mishpat)* 461 (2008);

Y. Dotan and B. Medina, 'The Legality of Privatization of the Provision of Public Services,' 37 *Hebrew Univ. L. Rev. (Mishpatim)* 287 (2007); cf. also C.P. Gillette & P.B. Stephan III, 'Constitutional Limitations on Privatization,' 46 *Am. J. Company. L.* 481 (1998)).

33. In summary, the conclusion that we have reached is that amendment 28 causes an additional independent violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself. It can therefore be said that our position is that the scope of the violation of a prison inmate's constitutional right to personal liberty, when the entity responsible for his imprisonment is a private corporation motivated by economic considerations of profit and loss, is inherently greater than the violation of the same right of an inmate when the entity responsible for his imprisonment is a government authority that is not motivated by those considerations, even if the term of imprisonment that these two inmates serve is identical and even if the violation of the human rights that actually takes place behind the walls of each of the two prisons where they serve their sentences is identical. This conclusion gives rise to a question, which we shall consider below, as to whether it is possible to determine that this independent violation was made lawfully in accordance with the limitations clause.

Amendment 28 violates the constitutional right to human dignity

34. In addition to the violation of the right to personal liberty, amendment 28 also violates the constitutional right to human dignity that is enshrined in section 2 of the Basic Law: Human dignity and Liberty as follows:

'Preservation of life, body and dignity

> 2. One may not harm the life, body or dignity of a person.'

In order to examine the claim that the provisions of amendment 28 cause a violation of human dignity, we first need to discuss the content of the constitutional right to human dignity and the extent to which it applies in the circumstances of the case before us. In the judgment in HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [19] it was held that the model adopted by the Supreme Court with regard to the scope of application of the constitutional right to human dignity is an 'intermediate model'; in other words, the right to human dignity does not only include those clear violations that relate to a person's humanity, such as physical and emotional injuries, humiliation and defamation, but it does not encompass all

human rights. In that case President Barak addressed the content of the constitutional right to human dignity in the following terms:

> 'What is human dignity according to the approach of the Supreme Court? This question should be answered by means of constitutional interpretation of the language of the statute against the background of its purpose. This interpretive approach is based on the history of the provision in the Basic Law, its relationship to other provisions in the Basic Laws, the basic values of the legal system and comparative law. It gives central weight to the case law of this court regarding the scope of human dignity. On the basis of all of these, our conclusion is that the right to human dignity constitutes a set of rights that needs to be upheld in order for dignity to exist. The right to human dignity is based on the recognition that man is a free creature, who develops his body and mind as he wishes in the society in which he lives; the essence of human dignity lies in the sanctity of his life and his liberty. Human dignity is based on the autonomy of the individual will, the freedom of choice and the freedom of action of a human being as a free agent. Human dignity relies on the recognition of the physical and spiritual integrity of a human being, his humanity, his worth as a human being, all of which irrespective of the degree of benefit that others derive from him' (see *Movement for Quality Government in Israel v. Knesset* [19], at para. 35 of the judgment).

35. Whatever the content of the constitutional right to human dignity may be, no one denies that the right to dignity applies with regard to preventing the denigration of a person and preventing any violation of his human image and his worth as a human being. The right to dignity is a right that every human being is entitled to enjoy as a human being. Admittedly, when a person enters a prison he loses his liberty and freedom of movement, as well as additional rights that are violated as a result of the imprisonment; but an inmate of a prison does not lose his constitutional right to human dignity. A long time before the Basic Law: Human Dignity and Liberty was enacted, Justice Barak discussed how prison inmates and persons under arrest also enjoy the right to human dignity. Justice Barak held in this regard in HCJ 355/79 *Katlan v. Israel Prison Service* [20], at p. 298:

> 'Every person in Israel enjoys a basic right to physical integrity and to the protection of his human dignity. These rights are included in the "charter of judicial rights"… that has been recognized by this court. The right to physical integrity and human dignity is also a right of persons under arrest and prison inmates. The walls of the prison are not a barrier between the inmate and human dignity. The regime in the prison naturally requires a violation of many liberties that free people enjoy… but the regime in the prison does not demand that the inmate is denied his right to physical integrity and to protection against a violation of his dignity as a human being. The inmate loses his freedom, but he is not deprived of his human image.'

This finding regarding the right of prison inmates and persons under arrest to human dignity was, of course, given extra force when the Basic Law: Human Dignity and Liberty was enacted and the right to human dignity became a super-legislative constitutional right that every government authority is liable to respect. The social importance that should be attributed to the protection of the human dignity of prison inmates was discussed by Justice E. Mazza in the following terms:

> 'We should remember and recall that the human dignity of the prison inmate is the same as the dignity of every human being. Imprisonment violates the prison inmate's liberty, but it should not violate his human dignity. A prison inmate has a basic right not to have his dignity violated, and every government authority has a duty to respect this right and to prevent it from being violated… Moreover, a violation of the human dignity of a prison inmate does not merely affect the inmate, but also the image of society. Humane treatment of prison inmates is a part of a humane-moral norm that a democratic society is required to uphold. A state that violates the dignity of its prison inmates breaches the obligation that it has to all of its citizens and residents to respect basic human rights' (*Golan v. Prisons Service* [11], at p. 256).

36. Indeed, it is hard to deny that imprisoning someone under lock and key and imposing upon him the rules of conduct in the prison violates his human dignity. This violation is caused whether that person is imprisoned in a public prison or in a privately managed prison. Therefore, the question that

we need to decide in this case is whether imprisoning a person in a privately managed prison causes a greater violation of his human dignity than imprisoning him in a public prison.

Imprisoning persons in a privately managed prison leads to a situation in which the clearly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that arise from a private economic purpose, namely the desire of the private corporation operating the prison to make a financial profit. There is therefore an inherent and natural concern that imprisoning inmates in a privately managed prison 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 (cf. in this respect the question of employing employees in a prison (HCJ 1163/98 *Sadot v. Israel Prison Service* [21])).

37. The violation of the human dignity of prison inmates described above, which inherently derives from the existence of a privately managed prison, is naturally exacerbated by the invasive character of the powers that amendment 28 allows the private concessionaire and its employees to exercise vis-à-vis the inmates in addition to the violation inherent in the actual imprisonment. These include, as aforesaid, placing an inmate in administrative isolation for a period of up to 48 hours, the use of firearms in order to prevent inmates escaping from the prison, the use of reasonable force in order to conduct a body search on the inmates, a visual examination of the naked bodies of inmates and taking urine samples from inmates. It should also be noted that we do not accept the state's claim that the injury caused by the exercise of authority over an inmate by a employee of a private company lies in the subjective feelings of the person making the claim and that this is not essentially a legal argument. The violation of the human dignity of inmates in a privately managed prison is not an injury that derives from the subjective feelings of those inmates, but an objective violation of their constitutional right to human dignity.

38. An additional aspect of the violation of the constitutional right to human dignity that is caused by amendment 28 lies in the social and symbolic significance of imprisonment in a privately managed prison. This

aspect of the right to human dignity, which distinguishes it from other human rights, is discussed by the learned Prof. Meir Dan-Cohen, who expresses a view that the existence of a violation of human rights that derives from a certain act or institution depends on the symbolic significance that society attributes to that act or institution, whether the source of that symbolic significance lies in its clear and express content or in some form of social consensus with regard to the aforesaid act or institution, irrespective of the empirical data regarding that act or institution (which may be the source of that symbolic significance), and irrespective of the specific intention of the party carrying out an act of that type in specific circumstances. Prof. Dan-Cohen writes in this respect:

> 'Once an action-type has acquired a symbolic significance by virtue of the disrespect it typically displays, its tokens will possess that significance and communicate the same content even if the reason does not apply to them… As long as certain actions are generally considered to express disrespect, one cannot knowingly engage in them without offending against the target's dignity, no matter what one's motivations and intentions are' (see M. Dan-Cohen, *Harmful Thoughts: Essays on Law, Self, and Morality* (2002), at p. 162).

This fundamental approach to the special nature of the right to human dignity expresses an approach that befits the matter before us, when we consider the narrow and essential meaning of the right. Indeed, in many cases a violation of human dignity is accompanied by a violation of additional human rights such as a violation of the right to life and physical integrity and a violation of the right to privacy. Notwithstanding, a violation of human dignity may also be an 'independent' violation, when a certain act that is done or a certain institution that is created do not inherently violate other human rights, but they reflect an attitude of disrespect from a social viewpoint towards the individual and his worth as a human being. In so far as amendment 28 is concerned, this approach requires us to examine the significance that Israeli society attached to the imprisonment of a person in a prison that is managed and operated by a private corporation, whose employees are given various invasive powers over the inmates in that prison.

39. As we explained above, amendment 28 admittedly violates the constitutional right to personal liberty, but in addition it independently violates, as described above, the human dignity of the inmates in a privately

managed prison. This is because the imprisonment of a person in a privately managed prison is contrary to the basic outlook of Israeli society (an outlook that we discussed in paragraphs 24-25 above) with regard to the responsibility of the state, which operates through the government, for using organized force against persons subject to its authority and with regard to the power of imprisonment being one of the clear sovereign powers that are unique to the state. When the state transfers the power to imprison someone, with the invasive powers that go with it, to a private corporation that operates on a profit-making basis, this action — both in practice and on an ethical and symbolic level — expresses a divestment of a significant part of the state's responsibility for the fate of the inmates, by exposing them to a violation of their rights by a private profit-making enterprise. This conduct of the state violates the human dignity of the inmates of a privately managed prison, since the public purposes that underlie their imprisonment and give it legitimacy are undermined, and, as described above, their imprisonment becomes a means for a private corporation to make a profit. This symbolic significance derives, therefore, from the very existence of a private corporation that has been given powers to keep human beings behind bars while making a financial profit from their imprisonment (see, in this regard, I.P. Robbins, 'Privatization of Corrections: Defining the Issues,' 40 *Vand. L. Rev.* 813, at pp. 826-827 (1987)).

The relationship between the restrictions on the concessionaire's powers and the supervisory mechanisms provided in amendment 28, on the one hand, and the violation of the right to personal liberty and human dignity, on the other

40. When we seek to assess the nature and the intensity of the violation of the constitutional rights to personal liberty and human dignity that is caused by amendment 28, we are required to take into account the various restrictions on the private concessionaire's activity provided in amendment 28 and the various supervisory measures for the concessionaire's activity that were provided within the framework of the amendment. According to the state and the concessionaire, in view of the aforesaid restrictions and supervisory arrangements, it should not be said that the amendment reflects a shirking by the state of its basic responsibility for enforcing the criminal law.

41. Indeed, the respondents correctly argue that a significant attempt was made by the legislature to limit the violation of human rights caused by amendment 28; it is important to point out that no provisions were included

in the amendment that allow a more serious violation of the human rights of the inmates of a privately managed prison than the violation of human rights of the inmates in state managed prisons. Moreover, it should be noted that certain invasive powers that are given to the officers of the Israel Prison Service — including the power to disciplinary adjudicate inmates and the power to order an extension of the period during which an inmate is held in administrative isolation beyond 48 hours — are not given to the employees of the private concessionaire. Moreover, section 128K of the Prisons Ordinance, which was enacted within the framework of amendment 28, regulates the manner in which the provisions of the law regarding a state managed prison will apply to a privately managed prison, and in this regard s. 128K(c)(1) of the Ordinance provides that an inmate held in a privately managed prison shall have all the rights, benefits and services that are given to an inmate in a prison that is not privately managed. Moreover, s. 128I of the Prisons Ordinance imposes on 'the concessionaire, individuals with significant influence therein, the governor and the concessionaire's employees' the provisions of the Penal Law, 5737-1977, that apply to civil servants (cf. CrimFH 10987/07 *State of Israel v. Cohen* [22]). This provision was also intended to result in making the legal norms that apply to the employees of the private concessionaire the same as those that apply to the officers of the Israel Prison Service. In this respect it is not superfluous to point out that it would appear that the concessionaire operating the privately managed prison is subject to the judicial scrutiny of the High Court of Justice and the rules of administrative law, as it is a body that fulfils a public function under s. 15(d)(2) of the Basic Law: The Judiciary. In view of this, and since the powers of the employees of the private concessionaire are subject to restrictions parallel to those imposed on the powers of the officers of the Israel Prison Service, we cannot determine that the provisions of amendment 28, in themselves, allow the private concessionaire and its employees to violate the human rights of inmates in the privately managed prison to a greater degree than the violation of the human rights of inmates in a state managed prison.

42. In addition to the provisions described above, which were intended to make the normative position of the inmates in the privately managed prison equal to those of the inmates in the state managed prisons, amendment 28 provides various mechanisms for the state to supervise the activity of the private concessionaire (see sections 128S, 128U-128X, 128AF-128AL,

128AO and 128AW of the Prisons Ordinance). These supervisory mechanisms, which are apparently more comprehensive than the supervisory mechanisms that exist in other countries where private prisons operate in a similar format, are *prima facie* capable of reducing the concern that the violation of human rights in the privately managed prison will be greater than that in the prisons of the Israel Prison Service (regarding the supervisory mechanisms for private prisons that exist in the United States, Britain and other countries, see Pozen, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom,' *supra*, at pp. 276-281; C.M. Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective* (2007), at pp. 105-108; R.W. Harding, *Private Prisons and Public Accountability* (1997), at pp. 51-55). In this context it should also be pointed out that according to the presumption of constitutionality that amendment 28 enjoys, we should assume that the supervisory mechanisms provided in the amendment will operate properly; in any case, the arguments with regard to the manner of exercising them are the kind of arguments that are more suited to being examined in an administrative petition than in a constitutional one.

We have not overlooked the fact that amendment 28 contains a provision that is intended to contend with the concern that the violation of the human rights of inmates in the privately managed prison will be greater because of improper economic considerations. This provision appears in s. 128G(b) of the Prisons Ordinance, which provides the following:

'Agreement between the Israel Prison Service and the corporation regarding the construction, management and operation of a privately managed prison

> 128G. ...
>
> (b) The amount of the consideration for the concessionaire that will be determined in the agreement shall not be made conditional upon the number of inmates that will actually be held in a privately managed prison, but it may be determined in accordance with the availability of prison places in the number provided in the schedule or on a smaller scale as the commissioner shall determine with the approval of the comptroller-general at the Ministry of Finance.'

This provision is indeed intended to limit the concern that economic inducements will motivate the concessionaire operating the privately managed prison to act in improper ways to increase the number of inmates in the prison or to extend their terms of imprisonment.

43. The creation of the aforementioned supervisory mechanisms for the activity of the private concessionaire, as well as the various restrictions on the scope of its powers as provided in amendment 28, show that the legislature was also aware of the constitutional difficulty inherent in transferring powers to manage and operate a prison to a private corporation that is a profit-making enterprise. But the supervisory measures described above cannot provide an answer to the difficulty inherent in the very management and operation of a prison by a private concessionaire. As we clarified at length in paragraphs 29-30 and 36-39 above, and for the reasons set out there, in view of the degree of the violation of the constitutional rights caused as a result of the actual transfer of the powers of imprisonment and the invasive powers included therein to a private corporation, public supervision is insufficient to eliminate the violation and the damage that it involves. We shall discuss the relationship between the violation and the possibilities of supervision in greater detail in paragraphs 52-54 below.

Does amendment 28 satisfy the limitation clause tests?

44. Since we have found that granting powers to manage and operate a prison — together with the invasive powers involved therein — to a private corporation and its employees, as was done in amendment 28, violates the constitutional rights to personal liberty and human dignity of the inmates in the privately managed prison, we are called upon to examine whether this is a permitted violation. Indeed, the rights to personal dignity and human dignity, like the other human rights recognized in our constitutional law, are not absolute, and a certain act of legislation will not be unconstitutional solely because it violates a constitutional right. The violation of the constitutional rights to liberty and human dignity in amendment 28 will be lawful it is satisfies the conditions of the limitations clause in s. 8 of the Basic Law: Human Dignity and Liberty, which provides the following:

'Violation of rights

8. The rights under this Basic Law may only be violated by a law that befits the values of the State of Israel, is intended for a proper purpose, and to an extent that is not excessive, or under a law as stated by virtue of an express authorization therein.'

The limitations clause expresses the balance provided in Israeli constitutional law between the rights of the individual and the needs of society as a whole and the rights of other individuals. It reflects our constitutional outlook that human rights are relative and may be restricted. The limitations clause therefore fulfils a dual role — it stipulates that the human rights provided in the Basic Laws shall not be violated unless certain conditions are satisfied, but at the same time it defines the conditions in which the violation of the human rights will be permitted (see HCJ 5026/04 *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [23], at p. 52 {355}; HCJ 1661/05 *Gaza Coast Local Council v. Knesset* [24], at p. 546). The limitations clause provides that four cumulative conditions need to be satisfied in order that a violation of a constitutional right that is protected in the Basic Law: Human Dignity and Liberty, will be lawful: the violation of the right should be made in a law (or by virtue of an express authorization in a law); the law should befit the values of the State of Israel; the purpose of the law should be a proper one; and the violation of the constitutional right should not be excessive. If one of these four conditions is not satisfied, this means that the violation of the constitutional right is not lawful, and the provision of the law that violates the constitutional right is unconstitutional. Since we have found that amendment 28 violates the constitutional rights to personal liberty and human dignity, we should examine whether the conditions of the limitations clause are satisfied by it.

45. Regarding the first condition provided in the limitations clause — the demand that the violation of the protected constitutional right should be made by a law — no one disputes that amendment 28 satisfies this condition.

The second condition provided in the limitations clause, according to which the law that violates the constitutional right should befit the values of the State of Israel does not give rise to any real difficulty in our case. This condition refers, according to the purpose clause provided in s. 1A of the Basic Law: Human Dignity and Liberty, to 'the values of the State of Israel as

a Jewish and democratic state' (see *Design 22 Shark Deluxe Furniture Ltd v. Director of Sabbath Work Permits Department, Ministry of Labour and Social Affairs* [23], at p. 53 {356}). In their petition, the petitioners raised a claim that amendment 28 is inconsistent with the values of the State of Israel as a democratic state because it violates the principle of the separation of powers. We see no reason to accept this claim in the case before us. Indeed, the values of the State of Israel as a democratic state also include the principle of the separation of powers and it is possible that a particularly serious violation of this principle in a certain law will justify a determination that the law is unconstitutional, since it is inconsistent with the values of the State of Israel as a democratic state. Notwithstanding, the petitioners' claims in the petition before us did not focus on the question of whether this condition is satisfied, and it is indeed hard to see how this condition may be violated by anything other than unusual and exceptional circumstances; it is therefore possible to assume that amendment 28 satisfies the condition of befitting the values of the State of Israel.

The third condition provided in the limitations clause is that the violation of the constitutional right should be done for a proper purpose. The purpose of the law should be regarded as a proper purpose when it is intended to protect human rights or to realize an important public or social purpose, in order to maintain a basis for coexistence within a social framework that seeks to protect and advance human rights (see *Menahem v. Minister of Transport* [4], at p. 264). The nature of the violated right and the extent of the violation may also shed light on whether the purpose of the violating law is a 'proper purpose' (see *Iyyad v. State of Israel* [6],at para. 30 of the judgment). According to the state, the purpose of amendment 28 is to bring about a direct and indirect improvement of inmates' prison conditions at a reduced budgetary cost. This purpose of improving the prison conditions of inmates in Israel — even if it is combined with an economic purpose — is a proper purpose. It should be noted that the petitioners' claim with regard to the requirement of the proper purpose is that the purpose of economic efficiency does not in itself constitute a proper purpose that justifies a violation of constitutional rights. This claim of the petitioners is too sweeping, since there are situations in which an economic purpose will be considered a proper purpose that justifies a violation of human rights, depending on the type of purpose, its importance to the public interest and the extent of the violation of the constitutional right (see, for example, HCJ 5578/02 *Manor v. Minister of*

Finance [25], at pp. 739-740; HCJ 4947/03 *Beer Sheba Municipality v. Government of Israel* [26], at para. 11 of the judgment). As we shall clarify below, the weight of the economic purpose in amendment 28 is very significant, and this aspect is capable of affecting the manner in which we consider whether amendment 28 satisfies the requirement of proportionality and the constitutional balance that it requires between various principles and values. But in the circumstances of the case before us, the mere existence of an economic purpose that is combined with an attempt to realize the purpose of improving prison conditions, as expressed in amendment 28, cannot prevent the amendment from satisfying the requirement of a proper purpose. It follows that we need to examine whether the means chosen by the legislature to realize the proper purpose of amendment 28 satisfy the requirement of proportionality.

46. The fourth condition provided in the limitations clause, on which we shall focus our main deliberations, demands that the violation caused by the law under discussion to the protected constitutional right shall be 'to an extent that is not excessive.' This condition concerns the proportionality of the violation of the constitutional right; in other words, even if the violation of the constitutional right is effected by a law that befits the values of the State of Israel and that is intended for a proper purpose, the law may still be found to be unconstitutional if its violation of the constitutional right is disproportionate. The requirement of proportionality therefore examines the means chosen by the legislature to realize the (proper) purpose of the legislation.

The case law of this court has recognized three subtests that are used to examine the proportionality of the violation of a protected constitutional right by an act of legislation. The first subtest is the rational connection test, which examines whether the legislation that violates the constitutional right is consistent with the purpose that it is intended to realize. The second subtest is the least harmful measure test. This test requires us to examine whether, of all the possible measures for realizing the purpose of the violating law, the measure that harms the protected constitutional right to the smallest possible degree was chosen. The third subtest is the test of proportionality in the narrow sense. This test requires the violation of the protected constitutional right to be reasonably commensurate with the social advantage that arises from the violation (see *Menahem v. Minister of Transport* [4], at pp. 279-280;

Movement for Quality Government in Israel v. Knesset [19], at paras. 57-61 of the opinion of President Barak).

The three aforementioned subtests do not always require one option to be chosen in order to realize the purpose of the legislation. In many cases the legislature may be confronted by several options that differ in the degree to which they violate the constitutional right under discussion and the extent to which they realize the relevant legislative purposes. When there are various possibilities that may satisfy the requirement of proportionality, the legislature has a margin of legislative appreciation that we call the 'margin of proportionality,' within which the legislature may choose the possibility that it thinks fit. The limits of the margin of appreciation given to the legislature in a concrete case are determined by the court in accordance with the nature of the interests and the rights that are at issue. The court will intervene in the legislature's decision only when the measure that was chosen by it departs considerably from the scope of the margin of legislative appreciation given to it and is clearly disproportionate (see *Menahem v. Minister of Transport* [4], at p. 280; AAA 4436/02 *Tishim Kadurim Restaurant, Members' Club v. Haifa Municipality* [27], at pp. 812-813; *Gaza Coast Local Council v. Knesset* [24], at pp. 550-552).

47. With regard to the first subtest of proportionality — whether the legislative measure chosen is consistent with the legislative purpose — the dispute between the parties focuses on the question whether amendment 28 is expected to realize the economic aspect of its purpose. The petitioners claim in this respect that they have in their possession opinions that indicate that global experience does not show a clear connection between the privatization of prisons and an economic saving, and they argue that this conclusion can also be seen in various works of academic research. The state, on the other hand, relies on an opinion that was submitted to the tenders committee for the privately managed prison project, which argues that the bid of the concessionaire that won the tender is expected to bring about a saving for the state, which is estimated at approximately 20%-25% of the cost of operating a prison, with similar standards, that is built and operated by the Israel Prison Service. According to this opinion, the saving over the whole period of the concession is estimated at approximately NIS 290-350 million. This question of achieving the budgetary savings goal, as well as the goal of improving the prison conditions of the inmates, is a question that naturally depends on the manner in which the provisions of amendment 28 will actually be

implemented. In the case before us, we are not speaking of a situation in which *prima facie* there is no rational connection between the provisions of the legislation that violates the protected constitutional right and the purposes that the act of legislation is supposed to realize. In any case, at this stage of the 'privatization' planning process, the state cannot prove that better conditions for the inmates will indeed be achieved with the expected budgetary savings, nor are we able to determine that amendment 28 is not *prima facie* capable of realizing the purposes of an economic saving and improving the prisons conditions of inmates that it was designed to achieve. Therefore, we are prepared to assume for the sake of argument that the rational connection regarding the purpose of amendment 28 does exist.

48. The second test of proportionality is, as we have said, the least harmful measure test, which requires that of all the possible measures for realizing the purpose of the legislation, the measure that violates the protected constitutional right to the smallest extent should be chosen. With regard to this subtest, the petitioners argued that it is possible to achieve the economic purpose underlying amendment 28 with measures that violate human rights to a lesser degree. This can be done, according to the petitioners, by building additional state managed prisons or by means of only a partial privatization of powers that do not contain a predominant element requiring the exercise of sovereign power. The state claims in reply that it has not yet found a sufficiently effective means of furthering the purpose of improving the prison conditions of inmates in Israel at a reduced budgetary cost that involves a lesser violation of human rights (in so far as such a violation actually exists). In this regard the state emphasizes that the arrangement provided in amendment 28 includes many significant safeguards. The state further argues that when the policy concerning the privatization of the prisons was formulated, the 'French model' in this field was also examined. According to the 'French model' for privatizing prisons (which is also used in a similar form in Germany), there is cooperation between the state and the private enterprise in managing the prison, which is reflected in the fact that various logistical services provided in the prison are outsourced, but the issues of security and enforcement are not entrusted to the private enterprise.

As can be seen from the state's affidavit in reply, in June 2002 the Minister for Public Security approved the privatization of prisons on an 'expanded French model,' which also included the transfer to the private

enterprise of certain powers in the fields of security and guarding. However, the state claims that ultimately, after examining the experience that has been obtained around the world in operating prisons, it was decided that the privatization would be done in accordance with the 'English model' (according to the state, in accordance with an 'improved English model'), in which the management of the prison is entrusted to a private enterprise operating under the supervision of the state, which retains for itself a limited number of powers (especially powers to try and sentence inmates). The main reason given in the state's pleadings for rejecting the 'French model' for privatizing prisons is that the division of responsibility and powers between the Israel Prison Service and the private enterprise that operates the prison is expected, on the basis of experience around the world, to cause many problems in the proper management of the prison. The concessionaire states in this regard that there is serious criticism of the 'French model,' which in the opinion of many does not give expression to the advantages of privatization and the involvement of the private sector, and that the separation of the security functions from the administrative functions makes it difficult to create a uniform policy and to define goals. The concessionaire further argues that, to the best of its knowledge, at the stage when the state considered implementing the 'French model,' a considerable difficulty was discovered in finding international enterprises that would be prepared to enter into an investment and partnership in Israel on the basis of this model. From these arguments it therefore follows that, according to the state and the concessionaire, the model that was ultimately adopted in amendment 28 is the one that best realizes the purposes that giving the powers to manage and operate a prison to a private concessionaire was intended to realize.

49. From the state's affidavit-in-reply it can therefore be seen that after various options were examined with regard to the manner of implementing the privatization, each with its various administrative and economic significances, the option called by the state 'the improved English model' was chosen. This option is the one embodied in amendment 28. Since this option provides that powers to exercise force, which is essentially a sovereign function, will be transferred to the private enterprise's employees, it results in a more serious violation of the personal liberty and human dignity of the inmates than the 'French model' for prison privatization (a model which, as aforesaid, only includes outsourcing of the logistic powers in the prison, rather than the powers relating to security and enforcement). In the

circumstances of the case, we have arrived at the conclusion that the data presented to us is insufficient for determining that the option that was chosen does not satisfy the second subtest of proportionality. It is well known that the second subtest of proportionality does not merely examine whether there is a measure that violates the protected constitutional right to a lesser degree, but it requires us to examine whether that less harmful measure realizes the legislative purpose to the same degree or to a similar degree as the measure chosen by the legislature (see HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at paras. 88-89 of the opinion of President Barak). The state claims, with regard to the difficulty in implementing the French model, that this model does not realize the purpose of improving prison conditions with a budgetary saving to the same extent as this purpose may be realized by amendment 28. Since we are unable to determine in what less harmful way it is possible to achieve the combined purpose of improving prison conditions while making a budgetary saving, which according to the state underlies the purpose of amendment 28, and since this issue naturally requires proof that we do not have before us, the conclusion that follows is that amendment 28 also satisfies the second subtest of proportionality.

50. The third subtest of proportionality is the test of proportionality in the narrow sense. This test is essentially an ethical test in which we are required to examine whether the public benefit that arises from the legislation whose constitutionality is under discussion is commensurate with the damage to the constitutional right caused by that act of legislation (see *Gaza Coast Local Council v. Knesset* [24], at p. 550; *Movement for Quality Government in Israel v. Knesset* [19], at para. 60 of the opinion of President Barak). The existence of this proper proportion is examined by striking a balance between the relative social importance of the various principles underlying the expected public benefit from the act of legislation against the degree of harm to the violated human right. Within the framework of this subtest, we should examine the additional social benefit that arises from the legislation relative to the position before the law was enacted, and the additional damage to the constitutional right that is caused by enacting the law (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at paras. 91-92 of the opinion of President Barak). The third subtest of proportionality assumes that the constitutional violation satisfies the first two subtests of proportionality. It assumes that there is a rational connection between the act

of legislation that violates the constitutional right and the purpose that the act of legislation is intended to achieve, and that the measure chosen by the legislature inflicts upon the constitutional right the least possible harm that is required in order to realize the legislative purpose. Subject to the existence of these requirements, the third subtest examines whether the purpose of the legislation justifies the measures chosen to realize it. The special function of the third subtest of proportionality was discussed by President Emeritus Barak in HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [29] in the following terms:

> '... there is a major difference between the first and second subtests and the third subtest. The first two subtests — the rational connection and the least harmful measure — focus on the means of realizing the purpose. If it transpires, according to these, that there is a rational connection between realizing the purpose and the legislative measure that was chosen, and that there is no legislative measure that is less harmful, the violation of the human right — no matter how great — satisfies the subtests. The third subtest is of a different kind. It does not focus merely on the means used to achieve the purpose. It focuses on the violation of the human right that is caused as a result of realizing the proper purpose. It recognizes that not all means that have a rational connection and are the least harmful justify the realization of the purpose. This subtest seeks in essence to realize the constitutional outlook that the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one' (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [29], at para. 30 of the judgment).

In the case before us we are required, within the context of the test of proportionality in the narrow sense, to examine the relationship between the public benefit that arises from amendment 28 and the damage caused by amendment 28 to the constitutional rights to personal liberty and human dignity of inmates in the privately managed prison. When implementing this subtest of the requirement of proportionality, we are also obliged to take into account the provisions provided in amendment 28, which we discussed in paragraphs 41-42 above, that were intended to address the concerns of a

violation of the human rights of the inmates as a result of transferring imprisonment powers to a private corporation motivated by a desire to maximize its financial profits.

51. In our deliberations above, we discussed at length the type of violation of human rights created by amendment 28. In paragraphs 22-30 above, we set out in detail the special significances of the violation of liberty as a result of privatization of the prison. *Inter alia*, we clarified that the violation of the rights to liberty and dignity deriving from introducing a private prison system is not reflected in the actual power of imprisonment, which is invasive in itself, since the actual violation of the personal liberty also occurs when the imprisonment takes place in a state managed prison. In the case of a privately managed prison, the violation lies in the identity and character of the body to which powers are given to violate liberties in the format provided in amendment 28 of the Prisons Ordinance.

We mentioned the democratic legitimacy of the use of force by the state in order to restrict the liberty of individuals and to deny various rights that they have, when this violation is carried out by the organs of the state and for the purposes of protecting the public interest. By contrast, as we clarified above, when the power to deny the liberty of the individual is given to a private corporation, the legitimacy of the sanction of imprisonment is undermined and the extent of the violation of liberty is magnified. As graphically described by one of the scholars that criticize the privatization of prisons, there is a significant difference between a situation in which the party holding the keys to the prison is the state acting for and on behalf of the public, where the inmate is one of the members of that public, and a situation in which the key is entrusted to a commercial enterprise, which represents its own personal economic interest (N. Christie, *Crime Control as Industry* (second edition, 1994), at p. 104). This difference has implications for the type and extent of the violation. Imprisonment that is based on a private economic purpose turns the inmates, simply by imprisoning them in a private prison, into a means whereby the concessionaire or the operator of the prison can make a profit; thereby, not only is the liberty of the inmate violated, but also his human dignity.

52. Now that we have addressed the violation of human rights that will be caused by amendment 28, we need to examine, within the framework of the third subtest of proportionality, what lies on the other pan of the scales, namely the public benefit that amendment 28 is intended to advance. In its

affidavit-in-reply, the state argued that this benefit is a twofold benefit — achieving a significant financial saving, which according to the state is expected throughout the whole period of the concession (which according to the wording of the permit that was attached to the state's affidavit-in-reply is twenty-four years and eleven months) to reach the amount of NIS 290-350 million, while improving prison conditions for the inmates. In other words, it can be said that the state, in enacting amendment 28, was aware of the need to contend with the serious overcrowding that exists in Israeli prisons, which has also been addressed by this court (see *Physicians for Human Rights v. Minister of Public Security* [10]). The question before it concerned the means it should adopt in order to contend with this crisis, and in these circumstances the state chose a measure of dealing with the aforesaid crisis that in its opinion is the most economically viable. The purpose underlying the enactment of amendment 28 and the special arrangements provided in it was, therefore, an economic purpose. In our opinion this is the main public purpose that amendment 28 sought to achieve and it is the *raison d'être* that underlies it; had the economic savings not been the main consideration taken into account by the legislature, there would have been no need to enact amendment 28, and it would have been possible to contend with the problem of overcrowding in the prisons by building additional state managed prisons or by improving the existing prisons, in accordance with the normative framework that existed prior to the enactment of amendment 28. It can therefore be said that although amendment 28 was enacted with the aspiration of improving the prison conditions of the inmates, the purpose of the concrete legislative arrangement chosen as a means of achieving this worthy aspiration is to achieve as great an economic saving as possible for the state.

It is important to mention in this context that the special defence mechanisms for prison inmates' rights that were provided in amendment 28, on which the state and the concessionaire base their replies to the petition, do not constitute a part of the public benefit that amendment 28 is intended to achieve. An examination of these mechanisms as a whole — starting with the various restrictions that were imposed on the powers of the concessionaire's employees that operate the prison, continuing with the state's ongoing means of supervising the concessionaire's activity and ending with the possibility that the state will intervene in what is happening if the private concessionaire does not carry out its undertakings — show that these mechanisms were intended to prevent the private concessionaire abusing the invasive powers

given to it within the framework of amendment 28. The introduction of these mechanisms, as we said in paragraph 43 above, is an expression of the fact that the legislature was also aware of the difficulties that amendment 28 raises and the concerns inherent in giving imprisonment powers and the invasive powers deriving therefrom to a private concessionaire. We are therefore not dealing with legislative measures that were enacted merely because the legislature recognized a need to improve the protection of the human rights of inmates in Israeli prisons, but with preventative measures that were intended to neutralize, in so far as possible, the concerns that arise from a transfer of imprisonment powers to a private concessionaire, which was designed to achieve as large an economic saving as possible for the state. In this context we should further add that we are of the opinion that there is an inherent difficulty in estimating the economic benefit that is expected to accrue to the state from the operation of the privately managed prison, certainly when we are speaking of a concession period of almost twenty-five years. *Prima facie*, in view of the supervisory mechanisms that the state is required to operate by amendment 28, it would appear that the actual economic benefit of amendment 28 can be questioned. Notwithstanding, since it is impossible to determine categorically that amendment 28 is not expected to give rise to an economic benefit to the state, we are prepared for the purposes of our deliberations to assume, as we said in paragraph 47 above, that the economic benefit underlying amendment 28 will indeed be realized.

53. When we examine the question whether the expected benefit that will arise from realizing the purpose of amendment 28 — improving prison conditions while maximizing economic savings — is commensurate with the damage inherent in giving a private concessionaire power to harm inmates, we should remember that since the third subtest of proportionality is essentially an ethical test, it depends to a considerable extent on 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. These

differences between the various countries are expressed in the content of the constitutional arrangements laid down in each country. 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 fundamental and ethical, while rejecting what is transient and fleeting (see HCJ 693/91 *Efrat v. Director of Population Registry, Ministry of Interior* [30], at p. 780).

54. As to whether amendment 28 satisfies the test of proportionality in the narrow sense, we have reached the conclusion that the relationship between the intended social benefit of achieving an improvement in prison conditions while making a maximum financial saving by using a private concessionaire, as described in the state's affidavit-in-reply, and the degree of the violation of human rights caused by the provisions of amendment 28 is a disproportionate one. The violation of the inmates' human rights that is caused by establishing a privately managed prison in which the private concessionaire's employees are given extensive powers to use force, which is in essence a sovereign power, is not a violation that is limited to a single issue or an isolated incident. Amendment 28 results in the establishment of an organizational structure whose very existence seriously violates the personal liberty of the inmates of the privately managed prison, to an extent that exceeds what is required by imprisonment itself, and the human dignity of those inmates in the basic and fundamental sense of this concept. This violation is an ongoing violation that occurs continuously for as long as an inmate is confined within a prison where he is subject to the authority of the employees of a private concessionaire. As we have said, this violation is exacerbated by the invasive character of the powers given to the private concessionaire. Indeed, the various supervision and control measures may reduce, and maybe even prevent, the concrete violation of the inmates' human rights in the privately managed prison as compared with the violation of the human rights of inmates in state managed prisons from the viewpoint of prison conditions and routine; but as we said in paragraph 43 above, these mechanisms do not eliminate the violation of human rights involved in the actual transfer of imprisonment powers over inmates to a private profit-making corporation. In other words, in view of the great social importance of the principles

underlying the granting of power to imprison offenders and the invasive powers that derive from it solely to the state, in comparison to the result achieved by realizing the goal of improving prison conditions while making as large a financial saving as possible for the state, the 'additional' violation of the constitutional rights to personal liberty and human dignity deriving from granting the aforesaid powers to a private profit-making corporation is disproportionate to the 'additional' public benefit that will allegedly be achieved by amendment 28.

It should further be noted that the fact that amendment 28 allows the establishment of only one prison as a 'pilot' cannot affect the constitutional analysis that we have made. The reason for this is that, from the viewpoint of the inmates who are supposed to be housed in that prison, the violation of their human rights that derives from their imprisonment in the privately managed prison is caused irrespective of the question whether there are additional inmates imprisoned in other privately managed prisons (in this respect it should be noted that no argument was raised before us with regard to discrimination against inmates in the privately managed prison relative to the inmates in the prisons of the Israel Prison Service, and therefore we see no reason to address this issue).

Therefore, our conclusion is that the damage described above — the greater violation of rights that are in the 'hard core' of human rights — is not commensurate with the benefit, in so far as there is any, in the economic saving expected from the construction, management and operation of a prison by a private concessionaire. The purpose of having state managed prison authorities is to realize the law enforcement process by imprisoning persons who have been lawfully sentenced to imprisonment, and to realize sentencing goals with tools and means that the system of democratic government provides for this purpose. No one denies the need to take action to improve the welfare and living conditions of prison inmates in Israel; but blurring the boundaries between this proper purpose and the goal of financial saving, by allowing a private concessionaire of a prison to make financial profits, disproportionately violates human rights and the principles required by the democratic nature of the regime.

55. It should be noted that the petitioners claim that the important purpose of improving the prisons conditions of inmates in Israel can also be achieved in other ways that they indicated, such as building additional state managed prisons or building a prison in which the powers that will be privatized do not

include giving the private concessionaire's employees sovereign power over the inmates. *Prima facie*, it would appear that the main disadvantage inherent in these methods lies in the economic-administrative sphere, and we are prepared to assume in favour of the state and the concessionaire that the method of operating prisons adopted in amendment 28 will lead to greater economic and administrative efficiency than the methods indicated by the petitioners. But when we balance the violation of the human rights of prison inmates as a result of their being imprisoned in a privately managed prison that operates in the format set out in amendment 28 against the realization of the purpose of improving prison conditions while achieving greater economic and administrative efficiency, the constitutional rights to personal liberty and human dignity are of greater weight. In other words, for the reasons that we have explained above, the benefit to the public interest arising from a realization of the purpose of amendment 28 — improving the prison conditions of inmates while achieving a maximum saving by employing a private concessionaire — is disproportionate to the damage caused as a result of the violation of the human rights of inmates in the privately managed prison. Indeed, in so far as the state is required to improve the prison conditions of inmates — a proper and important purpose — it should be prepared to pay the economic price that this involves, and it should accept that 'efficiency' (whatever the meaning of this concept is) is not a supreme value, when we are dealing with a violation of the most basic and important human rights that the state is obliged to uphold.

Therefore, our decision in the case before us is that the social benefit arising from amendment 28 is not commensurate with the violation of protected human rights caused by the provisions of the amendment.

56. Since we have found that amendment 28 does not satisfy the third subtest of proportionality, we are led to the conclusion that the violation of the constitutional rights to personal liberty and human dignity caused by amendment 28 is a disproportionate one that does not satisfy the conditions of the limitations clause. Amendment 28 is therefore unconstitutional.

A comparative analysis of the question of prison privatization

57. Before we conclude our deliberations and examine the consequences of the unconstitutionality of amendment 28, we think it right to address in brief the parties' arguments regarding the phenomenon of prison privatization around the world. The petitioners argued that experience in other countries shows that the violation of the human rights of inmates of private prisons is

greater than the violation of the human rights of their counterparts in state prisons. The respondents for their part argued that the phenomenon of privatizing prisons is not unique to Israel, and various democratic countries, including the United States and Britain, have adopted this method of dealing with the problem of overcrowding in prisons and in order to save on the cost of imprisoning offenders. In none of these countries, it is claimed, has it been held that the privatization of prisons is unconstitutional, or that the state has a constitutional obligation to manage the prisons itself.

58. 'Privatized' prisons operate today in various countries around the world, but the manner in which the privatization is implemented and regulated differs from one country to another. This difference is reflected both in the spheres of activity within the prison that can be privatized and in the degree of the state's supervision of the activity of the party operating the private prison. Thus, for example, the possibility of entering into a contract with private enterprises in order to manage and operate prisons is regulated in legislation, *inter alia*, in the United States (both on the Federal level and at state level) and Britain. The various acts of legislation that regulate the privatization of prisons differ from one another, *inter alia*, in the scope of the powers given to the concessionaire in fields that have a potentially significant effect on the human rights of the inmates. In this respect it should be noted that the approach adopted in the United States is that it is possible to give the private concessionaire the responsibility for all of the aspects involved in managing and operating the prison, including the enforcement of discipline in the prison and the use of force against inmates; however, various individual states have determined in their legislation various arrangements regarding the degree of influence given to private enterprises that operate prisons on the dates of the inmates' release, determining disciplinary rules in the prison and determining disciplinary offences, classifying the inmates from the viewpoint of the benefits to which they are entitled and the degree of state supervision over the activity of the private enterprise (see W.L. Ratliff, 'The Due Process Failure of America's Prison Privatization Statutes,' 21 *Seton Hall Legis. J.* 371 (1997)). In Britain too, like in the United States, the private concessionaire and its employees have been given powers that include maintaining security and discipline in the prison and using force against the inmates; but, as a rule, the scope of the powers given to private enterprises that operate prisons is more limited in the British model than in the American model. It would also appear that the state's supervision over the activity of

the private prisons in Britain is more significant than the accepted level of supervision in the United States (see Pozen, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom,' *supra*, at pp. 277-278). As we said in paragraph 48 above, a different model of prison privatization has been adopted in France (and in Germany). According to the French model, private concessionaires were not given all of the duties and powers involved in managing and operating a prison, but, as can be seen from the Knesset's reply to the petition, only those relating to logistic services. The aforementioned differences in the characteristics of the privatization of prisons in various counties may naturally have considerable significance with regard to the question of the constitutionality of the privatization.

59. From the expert opinions that were filed in this petition — the opinion of Prof. I.P. Robbins for the petitioners and the opinion of Prof. J.F. Blumstein for the concessionaire — it would appear that the courts in the United States have not hitherto held that any of the various legislative arrangements in force in the United States regarding the privatization of prisons are unconstitutional. Indeed, it would appear that the premise of the courts in the United States when considering matters concerning the privatized prisons is that the privatization of the prisons does not in itself give rise to any constitutional difficultly (a good example of this is the judgment of the Federal Court of Appeals for the seventh circuit, in which Judge Posner explained that inmates who raised a constitutional argument against their transfer from a state prison to a private prison 'would be foolish to do so'; see *Pischke v. Litscher* [83], at p. 500; for a similar approach of the Federal Courts of Appeal in the United States, see: *Montez v. McKinna* [84], at p. 866; *White v. Lambert* [85], at p. 1013. See also the judgment of the Supreme Court of the State of Oklahoma, in which it rejected a claim that giving a permit to counties in the state to enter into contracts with private enterprises in order to manage and operate prisons was an unconstitutional delegation of powers by the legislature: *Tulsa County Deputy Sheriff's Fraternal Order of Police v. Board of County Commissioners of Tulsa County* [86]). It would therefore seem that the main questions that have been considered by the courts in the United States regarding the privatization of prisons concerned the scope of the tortious liability of the private prisons and their employees in relation to that of the state prisons and their employees (see *Richardson v. McKnight* [87]; *Correctional Services Corporation v. Malesko* [88]). It

should be noted, however, that several judgments in the United States have held that the public nature of the role fulfilled by the corporations that operate private prisons makes them subject to the provisions of the Constitution (see *Skelton v. Pri-Cor, Inc.* [89], at pp. 101-102; *Rosborough v. Management and Training Corporation* [90]).

60. It should also be noted that we have not found any consideration by the courts in Britain, South Africa and the European Union, as well as by the European Court of Human Rights, of the question of the constitutionality of the privatization of prisons. From the opinion of Prof. J. Jowell that was filed by the state, it would appear that hitherto no claims have been raised before the aforesaid courts with regard to the constitutionality of the privatization of prisons. Prof. Jowell's opinion is that were arguments of this kind to be raised before those courts, they would not be expected to be successful, *inter alia* because of the economic character of the issue and the lack of a ground of incompatibility with the provisions of the European Convention on Human Rights.

61. It is therefore possible to summarize by saying that a comparative analysis of the case law on the question of the privatization of prisons shows that no court has yet held that the privatization of prisons is unconstitutional. On the other hand, we have also not found any significant consideration of the questions of constitutionality that the matter raises. This situation is not insignificant and it is capable of justifying great care on our part when we consider the constitutionality of amendment 28, since a comparative examination of the law applying to the privatization of prisons in other countries around the world and of the constitutional questions that this phenomenon raises may help us decide some of the questions that arise in our case and show us additional aspects of these issues. But ultimately the manner in which we interpret the Basic Laws in general and the Basic Law: Human Dignity and Liberty in particular is determined in accordance with the fundamental principles of the system of government and the legal system in Israel.

62. As we said in paragraph 53 above, different countries are likely to have different outlooks on the subject of the duties and obligations of the state in general and of the government in particular. These outlooks are capable of influencing the manner in which the specific issue of the constitutionality of the privatization of prisons is examined. In this context it should be noted that both in the United States and in Britain — unlike in

Israel — there is a historical tradition of operating private prisons, which naturally is capable of influencing the manner in which the constitutionality of the privatization of prisons is regarded (see Pozen, 'Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom,' *supra*, at pp. 257-258); White, 'Rule of Law and Limits of Sovereignty: The Private Prison in Jurisprudential Perspective,' *supra*, at pp. 122-126). Notwithstanding, it should be emphasized that even in countries where prisons have been privatized the matter is subject to serious public debate, and there is also very critical literature regarding the experience that has been accumulated with respect to the operation of private prisons. The main concern raised in this critical literature is that economic considerations will give the private enterprise operating the prison an incentive to increase the number of inmates in the prison, extend their terms of imprisonment or reduce prison conditions and the services provided to inmates in such a way that ultimately this will lead to a greater violation of the inmates' human rights that what is necessitated by the actual imprisonment. Moreover, the literature raises a concern that parties with economic interests will have an influence on the length of the terms of imprisonment and the types and levels of sanctions. We should point out that this criticism should not be regarded as separable from the arrangements that exist in those systems (see, for example, S. Dolovich, 'State Punishment and Private Prisons,' 55 *Duke L.J.* 437 (2005), at pp. 518-523; D.N. Wecht, 'Breaking the Code of Deference: Judicial Review of Private Prisons,' 96 *Yale L.J.* 815 (1987), at pp. 829-830; J. Greene, 'Lack of Correctional Services' in *Capitalist Punishment – Prison Privatization & Human Rights* (edited by A. Coyle, A. Campbell and R. Neufeld, 2003), 56-66; M.J. Gilbert, 'How Much is Too Much Privatization in Criminal Justice,' in *Privatization in Criminal Justice – Past, Present and Future* (edited by D. Shichor & M.J. Gilbert, 2001), 41, at pp. 58-65 ; Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective*, *supra*, at pp. 110-111; White, *op. cit.*, at pp. 138-139).

In any case, we have not found anything in the pleadings on the subject of comparative law raised by the respondents that is capable of changing our position with regard to the unconstitutionality of amendment 28.

The petitioners' claims that are based on s. 1 of the Basic Law: the Government

63. Since we have found that amendment 28 is unconstitutional because it disproportionately violates human rights that are protected under the Basic Law: Human Dignity and Liberty, we do not need to consider the petitioners' claims that are based on s. 1 of the Basic Law: the Government. Indeed, we accept that the Basic Law: the Government, as a Basic Law, enjoys a super-legislative constitutional status, and therefore it is possible to engage in judicial scrutiny of provisions of 'ordinary' legislation that are alleged to conflict with the provisions of the Basic Law: the Government (see HCJ 1384/98 *Avni v. Prime Minister* [31], at p. 209); but in the case before us it would indeed appear, as the respondents argue, that s. 1 of the Basic Law: the Government, which provides that 'The government is the executive branch of the state,' is essentially a declarative section that is intended to establish in principle the role of the government in the Israeli constitutional system. There is therefore a difficulty in using it as a basis for arguments against the constitutionality of the privatization of various government services. The source of the aforesaid difficulty is that s. 1 of the Basic Law: the Government does not expressly determine specific duties or spheres of activity where the government has an exclusive responsibility to act. Notwithstanding, despite the aforesaid difficulty and especially in view of our outlook concerning the broad interpretation that should be given to provisions that have a constitutional status, we are inclined to interpret the provision of s. 1 of the Basic Law: the Government in a manner that enshrines on a constitutional level the existence of a 'hard core' of sovereign powers that the government as the executive branch is liable to exercise itself and that it may not transfer or delegate to private enterprises. As can be seen from the aforesaid, the powers involved in the imprisonment of offenders and in the use of organized force on behalf of the state are indeed included within this 'hard core.' Naturally, adopting an interpretation of this kind will require us to define clearly the limits of that 'hard core,' since it may be assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state, and this matter lies mainly within the scope of the discretion of the legislative and executive branches. Nonetheless, in view of the result that we have reached, we are not required to make any firm determination with regard to the interpretation of s. 1 of the Basic Law: the Government, and this issue can be left for consideration at a later date. Moreover, the absence of an express limitations clause in the Basic Law: the Government gives rise to the question of how the constitutionality of a

provision of 'ordinary' legislation can be examined when it is alleged that it conflicts with a provision of the Basic Law: the Government. In any case, in the matter before us no decision is required on the question of the manner of exercising judicial scrutiny with regard to ordinary legislation that conflicts with one of the Basic Laws that relate to the system of government, such as the Basic Law: the Government. In these circumstances, we are naturally also not called upon to decide the petitioners' claims regarding the majority with which amendment 28 was passed in the Knesset, since these claims are based on the assumption that amendment 28 conflicts with s. 1 of the Basic Law: the Government.

The constitutional relief

64. Amendment 28 is contrary to the basic principles of the system of government in Israel, since it gives the invasive powers involved in the management and operation of a prison, which until now have belonged exclusively to the state, to a private corporation that operates on a profit-making basis. We have therefore reached the conclusion that amendment 28 violates the constitutional rights to personal liberty and human dignity of the prison inmates that are supposed to serve their sentences in the privately managed prison. This violation does not satisfy the conditions of the limitations clause in the Basic Law: Human Dignity and Liberty, since it is disproportionate. Therefore we have reached the conclusion that amendment 28 is unconstitutional. This, then, gives rise to the question of the relief for the unconstitutionality.

65. Amendment 28 creates a complete arrangement regarding the privatization of one prison that will be managed and operated by a private corporation. From our judgment it can be seen that the unconstitutionality inherent in amendment 28 derives from the transfer of powers to imprison inmates and the invasive powers incorporated therein to a private corporation. Indeed, not all the provisions of amendment 28 directly concern the exercise of invasive powers against the inmates in the privately managed prison, and therefore *prima facie* we need to ask whether there is a basis for declaring amendment 28 void in its entirety. We see no alternative to this outcome, because the arrangement in amendment 28 is a comprehensive arrangement in its structure and content, in which the granting of the powers relating to using force against the inmates is an integral part, and therefore were we to set aside only the provisions concerning the granting of the invasive powers, the remaining provisions would be unable to stand

independently and the purpose of amendment 28 would not be realized (see *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at paras. 97-98 of the opinion of President Barak; A. Barak, *Legal Interpretation — Constitutional Interpretation* (1994), at pp. 736-737). In this context it should be noted that we have not heard any claim that it is possible to separate the various provisions of amendment 28, and during the hearing of the petition the constitutional deliberations concerned the provisions of amendment 28 as a whole. It should be made clear that we are not adopting any position with regard to the ideal arrangement that should replace amendment 28, but we think it right to point out that the petitioners did not dispute the constitutional propriety of transferring logistical powers in the prison, such as those relating to food services, construction work and laundry, to private corporations, and our rulings in this judgment do not exclude this possibility. In any case, when this court has reached the conclusion that a certain act of legislation is unconstitutional, it is not our role to determine the details of the legislative arrangement that will replace the unconstitutional act of legislation. This is the responsibility of the Knesset (see and cf.: *Israel Investment Managers Association v. Minister of Finance* [7], at pp. 415-416; *Tzemah v. Minister of Defence* [5], at p. 284 {687}).

It is also important to point out that our decision in this case is based on the violation of human rights that derives from the transfer of the actual powers to imprison offenders, which involve a violation of their human rights, to a private corporation that operates on a profit-making basis. We are not adopting any position on the legality of the transfer of other functions within the law enforcement system to private enterprises or to any other public authority. Similarly, our conclusions in this judgment do not express any opinion on the legality of the privatization of government services in other fields (such as health, education and various social services), which both in the extent to which they relate to the basic powers of the state and in the extent to which they violate human rights are different from the powers involved in holding prison inmates under lock and key.

66. After writing the aforesaid, I saw the opinion of my colleague Justice Procaccia. Obviously I am in agreement with her opinion, in so far as it relates to the state's liability to enforce the criminal law and the protection of public order and the importance of executive power being exercised by the state in order to protect the individuals under its authority. Our paths diverge

with regard to the analysis of the nature and character of the violation of constitutional human rights caused by amendment 28.

67. According to my colleague Justice Procaccia, the constitutional violation caused by amendment 28 is not a concrete violation of human rights but a risk that arises from the potential disproportionate violation of human rights of the inmate of the privately managed prison, beyond the violation caused to each inmate by his actual imprisonment. In her opinion, my colleague Justice Procaccia points to the concern that economic considerations that motivate the private concessionaire, which has been entrusted with sovereign authority, and the lack of control and deterrent measures such as those that restrict the exercise of authority by the civil service, will result in a potentially 'major, profound and ongoing' violation of the most fundamental basic rights of the inmates of the privately managed prison. These concerns are not unfounded, and as I said in paragraph 19 above, I too share them. Notwithstanding, in my opinion, were we only speaking of a potential violation of human rights, it is questionable whether this would justify a judicial determination regarding the unconstitutionality of primary legislation of the Knesset. As a rule, we exercise caution and restraint when exercising judicial review of Knesset legislation. Sometimes there is no alternative to exercising judicial review of legislation enacted by the Knesset, and the case before us is such a case; but I am of the opinion that the premise in constitutional scrutiny is that a mere potential violation of human rights is an insufficient basis for setting aside primary legislation of the Knesset.

Indeed, in so far as a certain provision of a Knesset law violates constitutional human rights in a manner that is inconsistent with the Basic Laws, its constitutionality should be examined in accordance with the accepted tests that our case law provides for this purpose. But in so far as we are dealing with a potential violation of human rights, as opposed to an actual violation, then as a rule such a violation will not justify judicial intervention to set aside legislation. The constitutional scrutiny of an act of legislation will take place at the stage of examining the results, after the manner in which it is implemented *de facto* has become clear (see and cf. HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [32], at pp. 483-484 {354}). Therefore, my position regarding the unconstitutionality of amendment 28 is not based on a potential violation of human rights caused by the provisions of the amendment, but on the actual violation of the

constitutional rights to personal liberty and human dignity caused by the provisions of the amendment themselves, irrespective of the manner in which they will actually be implemented. Moreover, apart from the fundamental difficulty inherent in exercising judicial review of Knesset legislation that is entirely based on a potential violation of human rights, I do not think that it is possible to do this in the circumstances of the case before us. The reason for this is that no adequate probative basis has been brought before us for a judicial decision regarding the potential violation that amendment 28 may cause to the human rights of inmates in the privately managed prison in comparison to the state prisons; certainly no sufficient basis was established in order for us to determine that there exists the degree of likelihood proposed by my colleague Justice Procaccia, namely 'a near certainty that when realized will materially and seriously violate a constitutional basic right' (see the end of para. 26 of her opinion). It should be remembered that the supervisory mechanisms provided in amendment 28 are capable, *prima facie*, of reducing the extent of the potential violation of the human rights of inmates discussed by my colleague Justice Procaccia. For this reason also it is hard to determine that the aforesaid probability test is satisfied in the circumstances of the case before us.

68. I should also point out that the approach of my colleague Justice Procaccia regarding the legislative purpose of amendment 28 is also, in my opinion, problematic. Indeed, I agree with the position of my colleague Justice Procaccia that the enactment of amendment 28 was based on a desire to improve prison conditions of inmates in Israeli prisons. Notwithstanding, I do not think that in the circumstances of the case and as can be seen from the state's reply it is possible to hold that improving the welfare of the prison inmates is the main purpose of amendment 28. As I said in paragraph 52 of my opinion, if it were not for the fact that amendment 28 is based on an economic purpose, there would have been no need to enact it. The purpose of improving the welfare of prison inmates is desirable and praiseworthy, and *prima facie* it could have been achieved without any need for any normative change. In the circumstances of the case, the purpose of improving the welfare of the inmates cannot be separated from the economic purpose underlying the privatization, which is the main purpose of amendment 28. For this reason, I also have difficulty in examining the constitutionality of the violation of inmates' rights caused by amendment 28 in relation to the proper purpose of improving the welfare of the inmates as proposed by my

colleague. Moreover, in my opinion there is a concern that if we accept the balancing formula proposed by my colleague Justice Procaccia, this will undermine to a large degree the manner in which the limits of permitted violations of human rights are defined within the context of the limitations clause, because it may be assumed that in a considerable number of cases (and especially when we are speaking of an act of legislation that satisfies the requirement of the proper purpose), it will also be possible to 'translate' the value of public interest that is weighed on the scales against the violated human right into another human right (and in this regard I attach no special importance to whether we are supposedly speaking of the rights of the same individual). An analysis of this kind is likely to obscure the distinction between the human rights that are protected in our constitutional system and the values and interests that may justify a violation of those rights. My concern is that this conceptual obfuscation contains a potential for weakening the extent of the constitutional protection of human rights in our legal system.

Conclusion

69. Amendment 28 of the Prisons Ordinance causes an unconstitutional violation of the human rights to personal liberty and human dignity that are protected in the Basic Law: Human Dignity and Liberty, and therefore amendment 28 should be set aside. Since the privately managed prison whose establishment is regulated by amendment 28 has not yet begun to operate, we see no reason to suspend the declaration that amendment 28 is void for the purpose of the prison being operated and managed by a private concessionaire. Therefore, if my opinion is heard, we shall determine that amendment 28 of the Prisons Ordinance is set aside with immediate effect because of its unconstitutionality. In order to remove doubt, it should be clarified that we are not adopting any position with regard to the ramifications of the finding that amendment 28 is unconstitutional on the relationship between the state and the concessionaire in the field of private law.

Justice E. Arbel

I agree with the opinion of my colleague the president and with her reasoning.

1. In the president's comprehensive opinion, she set out at length the functions and powers imposed on the private concessionaire within the framework of the Prisons Ordinance Amendment Law (no. 28), 5764-2004 (hereafter: 'amendment 28'), by virtue of which a privately managed prison is being built in Israel. All of the aforesaid functions and powers have been entrusted to the state since its establishment and throughout its history and have served as a fundamental element of its sovereignty. The question that lies at the heart of the petition is whether the state can unburden itself of these functions and powers and entrust sovereign functions and powers to private enterprises. Like the president, I too am of the opinion that the answer to this question is no. I would like to add three emphases of my own to her opinion: these relate to the exclusive role of the state in employing coercive force, the violation of the human right to dignity as a result of establishing the privately managed prison and the concern inherent in the privatization of prisons of a conflict of interests in certain matters.

2. Following the classical philosophers in the field of political science, which my colleague reviewed in her opinion, the power to exercise coercive force to deny or restrict liberty is given to the state by virtue of a metaphorical 'social contract' that is made between it and the citizens living in it, in which the citizens voluntarily given the state the power to deny liberties and to make use of coercive force, *inter alia* in order to guarantee their protection and security and to protect their property (see also Élie Barnavi's survey in his book *The Rise of the Modern State* (1995) (Hebrew), at pp. 68-76, 82-89, 97-108). This power that was entrusted to the state as the agent of the political community lies at the very heart of the government's sovereign functions, alongside the power to maintain an army, a police force and courts. The transfer of these functions from the state to a private enterprise undermines the justification that underlies the exercising of the power and amounts to a refusal by the state, albeit only a partial one, to play 'its part' in the social contract. It makes the state a bystander that does not seek to realize independent goals of its own.

Indeed, it is the state that, by virtue of the social contract, realizes the wishes of the community. It is the state that, under that same contract, is given the powers to implement these wishes. And it is the state only that is entitled to exercise coercive measures and employ force in order to realize this purpose, while taking into account public considerations and no others. Only the state has the power to distil the collective aspiration of the

community and to reflect the 'general wishes' inherent therein of upholding the human rights of each of its individuals (see E. Peleg, *Privatization as Publicization — Privatized Bodies in Public Law* (2005), at p. 92), including those whose voices are not heard, since it alone is motivated by the interests of the general public. Only when the state wields this power does it have democratic legitimacy because of the consensual aspect and the nature of its purposes. The agreement between the citizens and the government is not fully realized by transferring the power to employ coercive force, including by means of holding someone in prison, but also by the state being the one that exercises the power as the agent of the political community, since otherwise the justification for its existence will be undermined (see P. Moyle, 'Separating the Allocation of Punishment from its Administration: Theoretical and Empirical Observations,' 41 *British Journal of Criminology* 83 (2001)).

By transferring these powers to a private enterprise, we are no longer dealing with the realization of the wishes of the individuals members of society on the basis of their consent to transfer natural rights to the community in order to promote order and security, but with the transfer of powers to an outsider that is not a party to the social contract, is not bound by the norms inherent therein and does not necessarily seek to realize its goals. This weakens the moral standing of the state vis-à-vis the public in general, and vis-à-vis prison inmates in particular, and it *de facto* weakens the responsibility and commitment that it owes to the prison inmates, which are now based only on indirect supervision while the role of formulating criteria for exercising the power is left in the hands of the private enterprise. This also erodes to some extent the concept of justice, which no longer stands on its own as a goal in itself, and it may weaken the authority of the organs of state, the integrity with which they are regarded, public confidence in government and the nature of democratic government in its widest sense. In such circumstances, depriving the prison inmates of their liberty loses a significant element of the justification for it.

3. Transferring the relevant type of powers, which includes significant and persistent aspects of the use of coercive force that are given to the state as sovereign, to a private enterprise inherently violates human rights, including the human right to dignity and the human right to liberty.

The value of human dignity on which I will focus, which for a decade and a half has enjoyed a special status of a super-legislative constitutional right in

our legal system, recognizes the worth of human beings and regards them as an end in themselves (see A. Barak, *Legal Interpretation — Constitutional Interpretation* (1994), at p. 421; A. Barak, 'Human Dignity as a Constitutional Right,' 41 *HaPraklit* 271 (1994), at pp. 277, 280). As the philosopher Immanuel Kant said, a person should not be treated solely as a means of achieving external goals, since this involves a violation of his dignity, or in his words: 'Accordingly, the practical imperative should be as follows: act in such a way that you treat humanity, whether in yourself or in any other person, always also as an end, and never merely as a means' (Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals*). In particular, the value of human dignity contains a set of rights without which man's being a free creature has no meaning (see HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [32]). In the context before us, this right includes, *inter alia*, 'minimal civilized humane arrangements for the manner of satisfying these needs in order to uphold his dignity as a human being from a psychological viewpoint' (see CrimApp 3734/92 *State of Israel v. Azazmi* [33]). Indeed, when he enters the prison, the inmate takes with him all his human rights, except for those that he is necessarily deprived of by the imprisonment, and especially the right to freedom of movement. Therefore, the state and the organs of government have the duty not to violate the inmate's right to human dignity to a greater extent than required for achieving the purposes of the imprisonment. These are not mere words but a determination that has operative significance (see CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [34], at p. 526). The question of what will be regarded as a violation of human dignity requires us to take into account, *inter alia*, 'the circumstances of time and place, the basic values of society and its lifestyle, the social and political consensus and normative reality' (*Commitment to Peace and Social Justice Society v. Minister of Finance* [32], at para. 13). Within this framework, care should be taken, on the one hand, not to interpret 'human dignity' so broadly that every human right is included in it, and on the other hand not to limit its scope merely to extreme cases of torture and degradation, since this will frustrate the purpose underlying the right (see HCJ 4128/02 *Man, Nature and Law — Israel Environmental Protection Society v. Prime Minister of Israel* [9], at p. 518; Barak, 'Human Dignity as a Constitutional Right,' *supra*, at p. 285).

4. Imprisoning someone in a privately managed prison involves a violation of the right to dignity that is not merely a potential violation that depends upon the realization of concerns regarding the nature, standard and quality of the service that will be provided by the private operator, but a violation that is realized and comes into existence when the imprisonment powers and the powers ancillary thereto are exercised by a private concessionaire.

Indeed, in addition to the inmate being placed under lock and key, for the whole period of his sentence he is subject to a regime that is marked by the use of force against him in respect of each facet of his life. During his term of imprisonment, the inmate loses his independence, the strict daily schedule is dictated by the prison authorities, and his access to the protections that the law affords him against a violation of his rights is indirect and restricted. Alongside this, in prison an inmate is likely to encounter, often in an unexpected manner, concrete situations of an increased violation of his rights in certain circumstances and conditions, including the possibility of being held in administrative isolation, undergoing a body search that is carried out forcibly, being prevented from meeting a lawyer subject to various restrictions, being subjected to a visual inspection of his naked body, etc.. The power to carry out these actions, which include direct and potential aspects of a violation of the right to privacy, the right to liberty, the freedom of movement, the right to dignity and additional rights, is also granted under section 128R of the Prisons Ordinance, albeit subject to various conditions, to the governor of the privately managed prison.

Granting a power to employ invasive powers of these kinds to someone that is chosen by a private concessionaire, who is motivated by business concerns and is not subject to the authority and direct supervision of the government authority, its public traditions, its written and unwritten rules, the interest of the general public or the considerations that underlie the imposition of the sentence, undermines the rationale justifying the use of force as a proportionate measure for realizing public purposes. It implies arbitrariness, lessens the worth of human beings and violates their dignity. Employing coercive force in such a situation no longer relies on the broad consensus that is intended to allow a safe society, but on a shirking of a significant part of the direct responsibility and the need for accountability. It abandons the prison inmate, who is already at the bottom of the social ladder and in a sensitive and vulnerable situation, to his fate.

5. Moreover, transferring imprisonment powers from the state to a party whose main purpose is by definition the pursuit of profit invites the inclusion of foreign and irrelevant considerations among those weighed by that party. These are inconsistent with the need to guarantee the rights and welfare of the inmates. This conflict of interests does not need to be realized *de facto* or to find any practical expression, but it is not eliminated even if, as the respondents claim, the privatization may achieve its stated goal of benefiting the inmates and improving their conditions in certain respects. The fact that a private enterprise, which is chosen and operates on the basis of its ability to maximize income and minimize expenditure, is given the powers under discussion, with their invasive elements, is sufficient reason to regard actions that are usually permitted as forbidden; it violates the human dignity of the prison inmates and exacerbates the violation of their liberty that is caused by the actual imprisonment.

Indeed, imprisonment powers are not limited merely to 'technical' administrative matters that do not involve any exercise of discretion by the responsible party in questions concerning a violation of human rights. Examples of this can be found in amendment 28, *inter alia*, in the power given to the governor of the prison to order an inmate to be held in isolation for a period of up to 48 hours in certain circumstances and under certain conditions (s. 128R(c)(1) of the Prisons Ordinance); the power of the governor of the prison to order an inmate to provide a urine sample, to conduct an external examination of his naked body and to search his body while using reasonable force in certain circumstances and under certain conditions (s. 128R(c)(4)-(5) of the Prisons Ordinance); the duty of the parole board, when it considers the possibility of commuting the term of an inmate's imprisonment, also to take into account, among its other considerations, the recommendation regarding the inmate given by the governor of the privately managed prison (s. 9(7) of the Release from Imprisonment on Parole Law, 5761-2001), etc.. These powers involve a large element of discretion regarding parameters and criteria for exercising the power. Introducing economic considerations as independent considerations and even paramount ones, without it being necessary to reconcile the profit considerations with those underlying the imprisonment and the manner of implementing it, subordinates those considerations that are normally of the greatest importance to business considerations and allows them to be realized only in so far as they are consistent with the economic purpose, which constitutes the

premise. Thus the main goal of exercising the power of imprisonment openly and unashamedly becomes a business goal; the inmates become *de facto* a means of realizing this goal; the 'customers' to whom the corporation is accountable are its shareholders; the scope of considerations is restricted and may become distorted; and the public purposes underlying imprisonment unintentionally become a secondary goal. The aspiration to reduce costs, which according to the supporters of the market economy approach is restrained in ordinary business activity by the 'concealed hand' in the free market mechanism and competition, has no restraint in the present case where there is no competition (which is certainly as it should be). In such circumstances, this aspiration is likely to conflict with the need to protect inmates' rights, which costs money. Peleg, who considered the problem in a broader context, aptly said that —

> 'The altruistic trust approach, which prevails today in public law, will not be voluntarily upheld by the privatized body. Between the interests of the individual and the privatized enterprise there is a huge *conflict of interests* (emphasis in the original). Respecting the constitutional rights of the individual costs a considerable amount of money. The privatized enterprise seeks to make a profit… Minimizing expenditure also implies a reduction in the welfare and even the health of the patient. The corporation seeks to provide a service, but mainly to make as large a profit as possible as quickly as possible. It regards itself as loyal to itself only… The worker in the privatized corporation regards the owner as his "boss," as a kind of sovereign, who influences his welfare. Naturally he will do whatever serves his employer's interest, thereby serving his own interest. In a choice between the employer's interest and the patient's interest, his choice will be clear…
>
> The inherent conflict of interests is between the aspiration of the privatized enterprise to make as much profit as possible and the interest to improve the quality of the privatized service. The concern is strengthened when the customers are needy and weak. Privatization in the public interest is a privatization that ultimately improves the quality of the service; otherwise, one may well ask whether the privatization is really in the public

interest' (Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at p. 63).

As we have said, the violation of the rights of prison inmates, and especially the right to dignity, is not necessarily a concrete or a direct one. Admittedly, it is not possible, for example, to allay utterly the concern that in so far as the directors of the privately managed prison choose to reduce their costs for the salaries of prison employees whom they employ, this will lead, *inter alia*, to the employment of less experienced and qualified staff, who will change frequently and find it increasingly difficult to contend with the sensitive situations that arise from time to time in the prison. It is also not possible to rule out for certain the fear the hidden interests will be taken into account and that there is an increased risk of corruption when the party operating the prison is a private enterprise. But it is difficult to draw unequivocal operative conclusions from this potential that there is a greater probability of a worse violation of inmates' human rights in a privately managed prison. The same is true with regard to concerns that the quality of services that will be provided by a privately managed prison in fields such as health care, drug addiction rehabilitation, professional training and general rehabilitation, which *prima facie* are addressed in the contract between the state and the operator of the prison (see Y. Feld, *Crime Pays: What can be Learned from the American Experience in Privatizing Prisons* (Adva Centre, 2002)). But even if it is not possible to point to a specific violation, the transfer of the power to operate a prison to a private enterprise creates the impression that irrelevant considerations are involved when the invasive powers are exercised, something that undermines the moral authority underlying the activity of that enterprise and public confidence in it (Feld), since even if justice is done, it is not seen to be done. This is not a mere matter of aesthetics; the harm is real, since it upsets the delicate balance between the need to deny the liberty of the inmates in order to realize the social purposes at the heart of the criminal law and sentencing policy, and the desire to protect the basic rights of the inmates even while they are paying their debt to society. This results in an independent violation of the right of prison inmates to dignity.

6. It is true that the supervision for which the state is responsible and the standards which the private concessionaire is required to meet seriously curtail the concessionaire's ability to sacrifice the rights and welfare of the inmates in the privately managed prison to its profits. Indeed, as the president

said, amendment 28 includes several mechanisms that reduce the concern of a violation of the basic rights of the inmates and provide an effective 'address' to which complaints and grievances about what happens in the prison may be sent.

However, not only is it questionable whether these supervisory mechanisms are capable of 'covering' all the situations in which there is a concern that the human rights of the inmates will be violated, since it is sometimes hard to predict how these will occur, but it is also doubtful whether they can truly locate and identify the nature of the considerations underlying the employment of an invasive measure that is formally permitted by the law, and prevent the preference of economic considerations when these involve a violation of the inmates' rights. At the same time, it should be remembered that prison inmates are often a particularly weak sector of the population, and while in the prison they are in a susceptible and vulnerable position where they have been deprived of a significant number of their rights. In these circumstances, since the activity that takes place in the prison is hidden from the light of day, it is questionable whether some of the components of the supervision mechanism, which depends upon a direct flow of information from the victim to the supervisory body so that the latter can exercise its authority, will be effective. Therefore, the supervisory mechanism may become of limited value in ensuring that the privately managed prison discharges its duties, with the result that the concerns are not addressed. Moreover, the supervisory mechanism naturally provides relief in certain situations only after the event, and sometimes a period of time may pass before it is possible to prevent the continuation of an invasive practice. When we are dealing with the most basic of human rights like those that concern prison inmates that are serving their sentences, this fact may have serious repercussions. Even in places where the private concessionaire has incentives that are designed to induce him to improve from the outset the services that he provides, there is a difficulty in the fact that his decision as to whether to succumb to these incentives depends upon the degree of benefit that they afford him relative to the cost of improving the service he provides. Finally, as the president said, the aforesaid supervisory mechanism, which seeks to contend with every problem on an individual basis, cannot contend with the fundamental difficulty inherent in the transfer of imprisonment powers and the accompanying powers to a private enterprise. To a large extent, the detailed provisions regarding the mechanism highlight this difficulty.

7. This court has said many times that —

> 'Any human right that a human being has is retained even when he is held under arrest or in prison, and the mere fact of the imprisonment does not deny him any right unless it is required and implied by the actual loss of his freedom of movement, or when there is an express provision of law to this effect' (HCJ 337/84 *Hukma v. Minister of Interior* [35], at p. 832; PPA 4463/94 *Golan v. Prisons Service* [11]; HCJ 355/79 *Katlan v. Israel Prison Service* [20], at p. 298).

The harm to a prison inmate held in a privately managed prison includes an independent element of a violation of his dignity that goes beyond the violation that derives from the imprisonment itself. Indeed, if the state chooses to discharge its responsibility for a prison inmate by means of indirect supervision of the prison in which he is held, the dignity of that inmate is violated. If an inmate is held in a prison where the prison employees are chosen by a private profit-making enterprise on the basis of unclear criteria, the dignity of that inmate is violated. If the liberty of an inmate is denied on an ongoing basis by a private concessionaire that has discretion to employ again him far-reaching powers that violate his basic rights, the dignity of that inmate is violated. The value of human dignity deserves broad protection, even if it is not absolute, and in the struggle against conflicting interests it should be given great weight and protected against any violation that is unnecessary or excessive. Since in my opinion the aforesaid violations of the inmates' rights that result from the creation of the privately managed prison exceed their economic benefit, which itself is not free from doubt, and since the mechanisms provided by amendment 28 are incapable of preventing the aforesaid violations, which are of greater scope than any solution that may be given to a specific violation, I have decided to join my opinion to that of my colleague the president and order amendment 28 to be set aside.

Justice A. Grunis

I agree with the opinion of my colleague the president, subject to the reservation that I see no need to address the issue of human dignity in the context under discussion. It is sufficient merely to hold that there is a violation of personal liberty.

Vice-President E. Rivlin

I concur with the opinion of my colleague, the president. My colleague holds that transferring powers of imprisonment entrusted to the state over to a private enterprise violates the constitutional human rights protected under the Basic Law: Human Dignity and Liberty. My colleague also finds that this violation does not satisfy the provisions of the limitations clause, and as such, the Prisons Ordinance Amendment Law (no. 28), 5764-2004, should be set aside. I agree with my colleague's reasoning and her conclusions. There is no doubt that setting aside Knesset legislation is reserved for cases in which there is a fundamental violation of protected constitutional principles that fails to satisfy the limitations clause provisions. In this case, the arrangement provided for in the law does not merely allow the state to seek assistance of private enterprise in carrying out its sovereign obligations, but rather constitutes a real privatization of imprisonment and transferral of a significant part of its powers. The violation involved in the arrangement undermines the very structure of the democratic constitution. It is also possible to hold that we are dealing with a violation that exceeds the scope of the Basic Laws, and lies in the field of the social contract upon which the existence of the state is founded. Releasing the state from the monopoly granted to it with regard to the use of force in order to protect the public interest undermines the principles upon which the entire social and constitutional foundations of the state rest.

For this reason, as well as for those set out by my colleague the president in her comprehensive opinion, I concur with the conclusion that amendment 28 of the Prisons Ordinance is void.

Justice A. Procaccia

1. This proceeding concerns a constitutional question of great importance that touches on the limits of what the state may and may not do when exercising the coercive authority given to it in order to maintain public order and security, and regarding the transfer thereof to private hands. By the expression 'coercive authority' in this context I mean the powers that the state is given under the law to prosecute criminal proceedings at all of its stages — investigation, arrest, trial and imprisonment — while exercising the institutional power that allows it to restrict a person's liberty and violate

additional human rights that he has, including the rights to privacy, freedom of occupation, property and sometimes even his dignity as a human being.

2. My colleague, President Beinisch, devoted extensive legal research and analysis to the complex subject of the relationship between the duty of the state to maintain public order and security in its broadest sense and to afford a basic protection of human rights — in this case, the rights of prison inmates — in the context of the question whether the state may unburden itself of its direct sovereign duty to manage prisons and transfer it to private hands. I agree with the conclusion that in the complex balance between these values, the necessary outcome is that the sovereign responsibility of the state to manage a prison and its duty within that framework to exercise coercive authority over the individual as a part of the process of enforcing the criminal law and implementing sentences, cannot be transferred to private hands. This is because of the potential that the core human rights given to a prison inmate may be violated to a greater extent than is permitted under the limitations clause in the Basic Law: Human Dignity and Liberty (hereafter: 'the Basic Law'). Therefore, amendment 28 of the Prisons Ordinance [New Version], 5732-1971 (hereafter: 'the Prisons Ordinance' or 'the Ordinance') should be set aside.

3. I would like to make several comments regarding the analysis of the constitutional violation inherent in amendment 28 of the Ordinance, and especially with regard to the manner of striking the constitutional balance between it and conflicting interests and rights for the purpose of examining whether it satisfies the conditions of the limitations clause in the Basic Law.

The limits and restraint of sovereign power — the doctrine of balances in the exercise of sovereign power

4. The state has authority over and responsibility for all stages of criminal proceedings. The social contract on which the democratic political system is predicated assumes that for the purpose of ensuring the existence of human society, public order is essential, as well as a sovereign body that will be responsible for maintaining it. The state is responsible for preserving a normative system that will define the rules of what human beings may and may not do, and it will enforce compliance with these as an essential part of the protection of public order (H.L.A. Hart, *Punishment and Responsibility* (second edition, 2008), at pp. 4-5).

5. The enforcement of norms of conduct, for which the state is responsible, incorporates a power to exercise authority over individuals who

breach the rules of conduct and thereby undermine the social order. For this purpose, the executive branch is given powers to investigate, arrest, try, sentence and imprison. Exercising these powers naturally involves a potential violation of the basic rights of the individual — his liberty, occupation, property, privacy and sometimes even his dignity.

6. The potential violation of human rights that is inherent in the exercise of sovereign coercive authority within the context of criminal proceedings requires a strict definition of the limits of sovereign power. Indeed, the rules concerning the exercise of sovereign power have an inbuilt system of checks that defines its limits. The existence of sovereign power and the restrictions inherent in the exercise thereof are inseparable. The legitimacy of the exercise of sovereign coercive authority over the individual is derived from the restrictions on this power. It originates in the outlook that it may be exercised only to the limited degree necessary for maintaining public order, while violating the basic rights of the individual to the smallest degree possible. The restraint of sovereign power that is exercised over the individual lies at the heart of the democratic system of government, and is of its very essence (CrimFH 10987/07 *State of Israel v. Cohen* [22], at paras. 4-6 of my opinion).

7. Alongside the substantive criminal norms determined by the state for the purpose of ensuring public order, it is given powers to enforce these norms in a criminal proceeding. Within the scope of these powers, it is authorized to conduct interrogations and searches, seize property, carry out arrests, hold trials, impose sentences and imprison convicts. In the course of enforcing the norms in the criminal trial, human rights are violated, sometimes seriously. The rights to liberty and dignity, freedom of movement, freedom of occupation, property and privacy may be violated. The criminal proceeding and the basic rationale underlying it are based on an essential balance between the enforcement power given to the sovereign authority and the protection of the basic rights of the individual involved in that proceeding. The basic rules of the criminal proceeding are intended, *inter alia*, to restrain the sovereign power that is exercised over the individual involved in it and restrict it to the minimum necessary for achieving its proper purpose.

8. Therefore, at every stage of the criminal proceeding, whether it is the criminal investigation, the trial, the sentence or the imprisonment, a balance is continually required between the exercise of sovereign force that is

required to enforce the law and the protection of the human rights of the suspect, accused, convict and prison inmate. The organs of the state, which are each responsible for a different stage of the criminal proceeding, are constantly required to strike a balance between the essential degree to which executive coercive authority is exercised over the individual and the maximum possible protection of his basic rights as a human being, on as wide a scale as possible, subject only to realization of the proper purpose of the criminal proceeding. This applies to police officers at the investigation stage and when arresting a suspect; it applies to the court during the trial and when passing judgment; and it applies to the Israel Prison Service authorities when an inmate is serving a custodial sentence, which is also a part of the criminal proceeding (A. Harel, 'Why Only the State may Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions,' 14(2) *Legal Theory* 113 (2008) (according to the version in the appendix attached to the petitioners' notice)).

9. The enforcement power that is given to the state in the criminal proceeding is a power that is limited to the achievement of the enforcement purpose and no more, and it is based on a concept of proportionality: human rights should not be violated in the criminal proceeding unless it is to uphold an essential public interest, and to an extent that is not excessive in the constitutional sense of this term. The police investigators, who are responsible for exercising the authority of conducting a criminal investigation and who have the powers to carry out interrogations, make arrests and conduct searches, are subject to restrictions on the exercise of the powers given to them in order to protect the rights of the person under investigation, including his liberty, dignity and privacy. These limits on their power are dictated solely by the essential needs of the investigation, and exceeding these limits is not permissible (cf. HCJ 5100/94 *Public Committee Against Torture v. Government of Israel* [36]). In conducting the trial and passing sentence, the court is responsible for striking a balance between the sentencing power that it exercises over the offender and the concern for his rights as a human being and his rehabilitation. In the last stage of the criminal proceeding — the offender's imprisonment — the prison authorities, as organs of the state, have sovereign coercive authority to take steps against inmates in order to maintain order and security inside and outside the prison. This power is also limited in nature to what is absolutely essential in order to achieve the purpose for which it is exercised, and the authorities may not

exercise it in a given case beyond what is necessary. Thus sovereign coercive authority and the exercise thereof over the individual are rooted in a constant tension between guaranteeing the basic rights of the individual and protecting the community's interest in maintaining order and public security.

10. Limiting and restraining sovereign enforcement power derives from the respect for human rights in a constitutional system of government. The recognition of human rights as elevated rights is intended to protect the status of the individual in society and the status of the minority against the power-wielding majority. Basic rights, which include the rights to life, liberty, dignity, occupation, property and privacy, are intended to safeguard not merely the life of the individual *per se* but also the quality and meaning of his life in accordance with modern constitutional thinking. The principle of limiting sovereign power is a part of a general constitutional philosophy that is based on a recognition that in order to maintain a proper communal life, it is essential to provide a solution to society's need for order and public security, while at the same time respecting the basic rights of the individual. This combination of guaranteeing the public interest while protecting the rights of the individual lies at the heart of the constitutional system of government. It requires a continual balance between these two forces, around which the constitutional world revolves. The duty of striking a balance makes each of these values a relative one that cannot be realized absolutely. Notwithstanding, these conflicting values derive from the same source and reflect a general ethical outlook of a recognition of human rights in a civilized society. Human rights, despite the elevated status given to them in the constitutional system, are not absolute but relative, and they need to be balanced against and coexist with the essential interests of society. On the other hand, the sovereign enforcement power that is intended to protect public order, which is reflected in the criminal proceeding, is limited solely to what is absolutely essential for achieving its proper goal, since exercising it involves a violation of human rights. The tension that exists between the public interest in maintaining order and public security and the protection of basic human rights and the duty to strike a balance between them are among the most prominent characteristics of the system of government and constitutional law.

> 'The constitutional revolution does not set aside the right of society to protect itself against offenders… Our constitutional revolution was intended to allow a violation of human rights in

> order to maintain a social framework that upholds human rights. It recognizes a need to restrict human rights in order to build a state that promotes human rights. Indeed, human rights and the restrictions imposed on them derive from the same source and reflect the same values. Basic rights are not absolute. They may be restricted. But the restrictions on basic rights are limited to what is necessary to protect human dignity and liberty' (A. Barak, 'The Constitutionalization of the Legal System Following the Basic Laws and Its Implications for (Substantive and Procedural) Criminal Law,' 13(1) *Bar Ilan Law Studies (Mehkarei Mishpat)* 5 (1996), at p. 10).

In this tension between the public interest and the rights of the individual, the tendency is to protect in so far as possible the scope of human rights up to the point beyond which the public interest in law enforcement may be seriously and materially harmed.

The nature of sovereign coercive authority and the state's exercise thereof

11. The place of institutional coercive authority in modern human society, the restraint required in exercising it while continually striking a balance between it and human rights, the danger of a violation of basic rights inherent in any departure from the proper balance and the tools and means given to the state when exercising institutional power, as the party that laid down the rules for exercising that authority and that bears the legal, moral and public responsibility for implementing those tools and means, all lead to the conclusion that the sovereign body that is responsible for making the rules for exercising the authority should not be separated from the body that operates and implements them in practice.

12. The social contract, which gave the sovereign the responsibility to define norms of conduct in society, is what also gave it the responsibility for enforcing them. It delineates, in accordance with the principles of the system of government, the limits of the exercise of institutional power, the limits whereof are defined by the duty of respecting rights of the individual as a human being. The sovereign, which is responsible for determining the criminal norm and which has been given the power to punish criminals, within the broad meaning of this term, is legally, socially and morally responsible for exercising this power, while complying with all of its restrictions. In so far as the state is responsible for exercising sovereign coercive authority, so too it is responsible for guaranteeing the human rights

of anyone over whom it exercises this authority. This responsibility determines the limits and restraints of power, and it restricts its scope solely to what is essential in order to achieve the proper social purpose. The exercise of sovereign coercive authority and the limits upon the exercise thereof are one and the same and cannot be separated from one another.

13. The basic rights of persons under interrogation, defendants, convicts and prison inmates within the framework of the criminal proceeding are not safeguarded solely by the existence of proper norms that are enshrined in law. Safeguarding them is conditional upon the manner in which the norms provided by law are *enforced in practice* by the police, the courts and the prison authorities. Restraint in the exercise of institutional power, which is the result of the balance that needs to be struck between sovereign coercive force and the basic rights of the individual, is examined *de facto* by its implementation on a daily basis. In the criminal proceeding, the identity of the party exercising institutional coercive authority over the individual is of supreme importance in guaranteeing the proper balance in implementing the limits of the use of power.

14. It is the state that has always exercised sovereign coercive authority over the individual in criminal proceedings. As the party that determined the norms of conduct and is responsible for their enforcement, it is the party that is 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*.

15. Moreover, the state has an effective deterrent mechanism for the manner in which sovereign coercive authority is exercised by organs acting on its behalf, in the form of administrative and judicial scrutiny of its representatives' actions. This scrutiny has a significant deterrent effect against the abuse of sovereign power and authority by representatives of the state at the various stages of the criminal proceeding. The existence of this

supervisory mechanism is a most important guarantee of the restraint and limits of sovereign coercive authority that is exercised over the individual in a criminal proceeding. An organ of the state that exercises coercive authority over the individual is subject to the administrative supervision of state authorities, is bound by the rules of ethics and disciplinary procedures of the civil service and is required to comply with strict legal criteria within the framework of the judicial scrutiny of its mode of conduct (HCJ 2303/90 *Philipovitz v. Registrar of Companies* [15], at p. 424). It is therefore unsurprising that there are unequivocal restrictions on the recognition, by way of interpretation, of an implied power to delegate sovereign powers to private enterprises (I. Zamir, *Administrative Authority* (vol. 2, 1996), at p. 562). Indeed, such an interpretation is adopted sparingly, and only when there is a real need that justifies it (HCJ 1783/00 *Haifa Chemicals v. Attorney-General* [18], at p. 656). If there are restrictions on inferring the permissibility of a delegation of a sovereign power involving the exercise of administrative discretion to a private enterprise, similar restrictions apply *a fortiori* to the delegation of power involving coercive authority that can be exercised over the individual in a manner that violates the most basic of his human rights. It has been said of the power of criminal investigation:

> '*The power to conduct a criminal investigation involves a power, and therefore also a danger, of violating the privacy, dignity, liberty and property of persons under investigation* (*Public Committee Against Torture v. Government of Israel* [36], at p. 831). For this reason, as a rule *a power given by legislation to a government authority, which authorizes someone to investigate a suspicion that an offence has been committed, should be interpreted as referring to the appointment of a civil servant who is subject to the authority and supervision of the government authority and who is subject to the disciplinary procedures and rules of ethics that apply to members of the civil service… and because of the special character of the investigative function, which when exercised involves a concern of a violation of the basic rights of the individual, it should be entrusted to civil servants*' (CrimA 4855/02 *State of Israel v. Borovitz* [37], at pp. 833-834 (emphases added)).

16. Ensuring the limits of sovereign power exercised over the individual in the criminal proceeding at all its stages also requires it to be exercised in

such a way that it is entirely free of any suspicion of a conflict of interests of any kind. The involvement of an improper and irrelevant consideration in the exercise of sovereign coercive authority in the criminal proceeding creates a real potential risk of a distortion of the proper balance between the need to use power to achieve a purpose in the public interest and the protection of the human rights of the individual. The involvement of an improper consideration in the necessary balance between the public need for the preservation of public order and compliance with the law, on the one hand, and the individual's rights to liberty and personal dignity, on the other, may undermine the proper equilibrium between the various forces operating in this sphere and result in improper harm to the individual. Exercising sovereign power over the individual in criminal proceedings should be entirely divorced from improper considerations, and it should be done with a complete commitment to the rules of restraint in the use of force, upon which the fate of the individual who is subject to sovereign authority depends.

17. Finally, the sovereign coercive authority exercised by the state over the citizen in the criminal proceeding is a part of a broad social consensus according to which exercising it is essential for maintaining public order and a proper social life. This consensus assumes that the exercise of coercive force will be done by the state authorities, which derive their moral and legal power from the public that has placed its confidence in them. The sovereign authority is regarded as the trustee of the public and as someone who is entrusted by it to manage society's affairs, while showing concern for the individual that lives in that society. This public confidence is not given to any entity other than the state authorities. A private enterprise that exercises sovereign coercive authority over the individual in the criminal proceeding does not act as a public trustee. Its status and actions are not based on a broad social consensus, and its exercise of sovereign coercive authority over the individual does not enjoy the essential legitimacy that characterizes the actions of the government.

The risk in transferring the exercise of sovereign coercive authority to a private enterprise

18. Transferring the exercise of sovereign power to a private enterprise, which is not one of the organs of the state, is problematic in several respects, even though it is likely to bring with it, at the same time, social, economic and cultural benefits that serve the public interest in various fields. When speaking of a transfer of executive power that includes a real potential for

violating major human rights — including a violation of liberty and dignity — the difficulty in such a transfer is particularly problematic. The balance and restraint in the exercise of enforcement power at every stage of the criminal proceeding, for the purpose of protecting human rights, cannot be relied upon in the hands of a party that is not an organ of the state. The limits of power are not protected by the basic guarantees that are intended to serve as a deterrent against any overstepping in the exercise of sovereign power and against any abuse thereof: the private enterprise that is entrusted with sovereign power involving a potential for violating core rights of the individual is not governed by the rules of conduct and the criteria that dictate the manner of exercising institutional coercive authority and regulate the action of the organs of state. The private enterprise was not born and brought up in this framework, it is unfamiliar with its concepts and it has never internalized the doctrine of balances in the exercise of sovereign power, in all of its particulars and aspects. The doctrine of balances, which demands that the public interest in maintaining order should be weighed against the duty to limit the violation of human rights to what is absolutely essential for achieving the purpose, is a doctrine that it does not know. The mechanisms of training, education, supervision and discipline that are built into the civil service for its employees, and which define the rules of exercising sovereign power, do not apply to it. The constitutional doctrine of balances that directs the way in which sovereign coercive authority is exercised at every stage of the criminal proceeding is not a part of the experience of the private enterprise when it exercises this power.

19. Moreover, when it receives authority to exercise sovereign power, the private enterprise is unavoidably associated with substantial concerns regarding conflicts of interests in its actions. Its entry into fields that are clearly areas of sovereign activity is motivated by private considerations of profitability. Considerations of economic feasibility and private profit-making are completely foreign to the doctrine of balances in the exercise of sovereign coercive authority in the criminal proceeding. Introducing various elements of viability into considerations of exercising power involves a potential for a real violation of the proper equilibrium between the relevant considerations that should be taken into account when exercising the power (HCJ 4884/00 *Let the Animals Live Association v. Director of Field Veterinary Services at the Ministry of Agriculture* [16], at p. 213; HCJ 39/82 *Hanfling v. Mayor of Ashdod* [38], at pp. 540-542; *Haifa Chemicals v.*

Attorney-General [18], at p. 656; Y. Dotan and B. Medina, 'The Legality of Privatization of the Provision of Public Services,' 37 *Hebrew Univ. L. Rev. (Mishpatim)* 287 (2007), at pp. 309-310).

20. When sovereign coercive authority is exercised in a manner that violates core human rights — including the rights to liberty and dignity — a real concern arises that transferring it to a private enterprise will result in disproportionate harm to the individual, which may make such a transfer illegitimate. When sovereign authority given to the state, which is capable of violating core human rights, is exercised by a private enterprise that is motivated by considerations of its own profit, the moral and ethical basis underlying the exercise of sovereign power is undermined. According to the principles of the system of government, this power was entrusted to the sovereign as a result of a broad social consensus in order to achieve a defined purpose, and exercising it requires a strict observance of the criteria that are built into the system. There is no guarantee that these criteria will be observed by the private enterprise, and when the risk that they will be breached is likely to violate core human rights, the transfer of the powers becomes unacceptable *a priori* from a constitutional viewpoint. Finally, the private enterprise that exercises sovereign coercive authority does not lean in its actions on the broad confidence that society has in the state as a part of the social consensus, which gives the sovereign power and responsibility to uphold public order. The exercise of coercive authority by a party that is not the state, which violates core human rights, necessarily does not enjoy the confidence and acceptance of society. It lacks social, moral and constitutional legitimacy.

21. The existence of state supervision over the manner in which the coercive authority is exercised by the private enterprise may to some extent diminish the potential for harming the individual, but it cannot materially reduce the extent of the violation inherent therein. Such supervision is mainly an umbrella supervision, which extends over the whole system and has difficulty in encompassing, before the event, the whole scope of the routine actions of the party exercising the power, which are carried out continually. A supervisory mechanism, by its very nature, reacts only after the occurrence of an unconstitutional violation of human rights and focuses on the general normative aspect of the activity, as distinct from ordinary everyday activity, which presents the great danger of harm to the individual. By privatizing the exercise of sovereign coercive authority, the discretion to exercise this

authority is given to the private enterprise, even if the general guidelines and policy guidelines are laid down by the sovereign supervisory body. State supervision does not provide a proper solution to the dilemma involved in privatizing a power to exercise sovereign coercive authority, nor does it materially reduce the potential for harm to the individual that is likely to result from such a privatization.

22. Severing the essential connection between the party responsible for exercising the sovereign authority in order to maintain public order and the party responsible for guaranteeing the core human rights of the individual as the authority is exercised is likely to cause considerable harm to the democratic constitutional basis on which the political system in Israel is based. Entrusting sovereign coercive authority in the criminal proceeding to a private enterprise involves significant harm of this kind.

The constitutional violation in transferring sovereign coercive authority to manage a prison to a private enterprise

23. Sovereign coercive authority, which is exercised within the framework of the criminal proceeding, does not end when sentence has been passed and the judgment becomes absolute. Enforcement of the judgment by way of imprisonment is an additional element of the criminal proceeding, in which the organ of state is given the power to exercise its coercive authority in order to carry out the judgment, while guaranteeing order and security both inside the prison and outside it.

24. The prison inmate is subject to inherent restrictions that derive directly from his imprisonment. The infringement upon the freedom of movement, the freedom of occupation, the right to privacy, the right to property and the freedom of expression are a direct consequence of his imprisonment. But the restrictions on the human rights of the prison inmate are not limited to these. His rights may suffer additional violations as a result of the measures taken against him by the prison authorities in order to ensure the proper running of the prison and to protect the safety of its inmates and the public outside it. The authority that manages the prison has powers to impose various restrictions on inmates in order to maintain order and security inside it, protect the safety of the inmates and the security of prison visitors, and ensure the security of the public outside the prison against risks that the inmates imprisoned inside it may present. The management of the prison should protect the public from the concern that criminal offences may be committed by inmates inside the prison or outside it, and from serious

infractions of order and security inside it. Sometimes, restrictions need to be imposed on inmates for general considerations of state security (HCJ 2245/06 *Dobrin v. Israel Prison Service* [39]). The exercise of sovereign coercive authority for achieving these purposes adds to the infringement upon the inmate's core human rights that is a necessary consequence of his imprisonment. It depends on the existence of public purposes of special weight that justify an additional violation of inmates' rights that are required by the management of the prison. The exercise of coercive authority for this purpose should satisfy the tests of the limitations clause in the Basic Law. The more significant the human right involved, the stronger the reasons that are required for violating it. The measures adopted against a prison inmate to maintain order and security in their broad sense should not become an additional element of the sentence that was imposed on him. Their purpose is to achieve essential public goals that are required by the proper management of a prison (PPA 4463/94 *Golan v. Prisons Service* [11]; HCJ 337/84 *Hukma v. Minister of Interior* [35], at p. 832; CrimApp 3734/92 *State of Israel v. Azazmi* [33], at p. 81). The exercise of coercive authority in managing the prison is subject to the doctrine of balances that applies to the exercise of sovereign coercive authority throughout the criminal proceeding at all its stages. The guiding principle in this doctrine is intended to give maximum protection to the rights of the prison inmate so that they are not violated to a greater extent than what is essential for achieving the proper public purpose.

25. Thus, the exercise of sovereign coercive authority in the management of a prison, which involves violations of the core rights of the inmates — beyond the violation caused by the imprisonment *per se* — is subject to the doctrine of balances that characterizes the exercise of power at all stages of the criminal proceeding. The legality of the exercise of coercive authority in managing the prison, which is intended to secure a public interest, is dependent upon maximum insistence on the rights of the inmate, so they are not violated to a greater extent than what is required in order to achieve the proper purpose. The complex balance between the protected rights of the inmate and the needs of the prison system is the responsibility of the public authority, which is responsible for enforcing the sentence. The permitted violation of the human rights that an inmate retains while in prison depends upon the existence of a clear public purpose justifying the violation and the proportionality thereof (*Dobrin v. Israel Prison Service* [39], at para. 23). The responsibility for such a violation of the core human rights of the inmate is a

weighty one, and it requires full awareness and recognition of the criteria required for permitting such a violation, the existence of administrative, ethical and judicial scrutiny of its propriety, and especially the absence of improper considerations that may taint the proper discretion of the authority, which should be exercised when considering whether to carry out the action that causes the violation.

26. The protection of the core human rights that an inmate retains in the prison is not consistent with the transfer of the power to exercise sovereign coercive authority to a private enterprise that will be responsible for managing the prison. Such a transfer is inconsistent with the competent authority being aware and internalizing the need for restraint and limits in the exercise of power in light of the balance required by the protection of human rights. The private enterprise is not subject to the complex rules of checks and deterrents that are included in the rules of conduct that govern the civil service. Sovereign supervision of the acts of the private concessionaire, which amendment 28 of the Ordinance regulated, is an umbrella supervision that does not guarantee sufficiently effective control of the manner of exercising the discretion and the motives involved therein. In many cases, the supervision is carried out after the event and is incapable of preventing from the outset the harm to the inmates that is likely to result from the adoption of administrative, disciplinary and punitive measures that are disproportionate. In addition to all this, the private concessionaire is motivated by extrinsic considerations of profit, which naturally taint the objective discretion that should be exercised for the purpose of using force in accordance with the doctrine of balances. The management of a prison by a private concessionaire, which involves exercising coercive authority over inmates, is likely to be motivated by inappropriate considerations, including considerations of economic viability and profit, which were the goals that led it to accept the role. In view of this reality, the degree of the potential violation of the inmates' rights is significant, of great weight and persistent. It is directed at a particularly weak sector of the population, whose members in any case have been deprived of some of their human rights as a result of their conviction and the custodial sentence imposed upon them. The danger that irrelevant considerations will guide the private enterprise in carrying out its duties and in exercising coercive authority over the inmates is immediate and real. The considerations of increasing economic efficiency and the profits of the private enterprise may lead, for example, to a reduction in the staff that

operates the prison, a lowering of standards in order to reduce costs, and consequently to harsher methods of supervising the inmates, which could potentially involve a reduction in the measure of movement and freedom given to them within the prison compound. The violation of the remaining liberty of the inmates, beyond the essential violation caused by the sentence of imprisonment as such, is a distinct possibility, that if realized would materially and seriously violate a constitutional basic right (Harel, 'Why Only the State may Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions,' *supra*, at p. 25).

27. Moreover, the exercise of sovereign coercive authority over prison inmates by a private concessionaire does not enjoy a wide social consensus and public confidence as the nature of the power requires. It does not guarantee that the umbrella of human rights, which extends over every human being as such, including an offender in prison, will be upheld and protected, and that any violation thereof will always be conditional upon the reservations required by the constitutional system (*Dobrin v. Israel Prison Service* [39], at para. 23; HCJ 355/79 *Katlan v. Israel Prison Service* [20]). The exercise of sovereign coercive authority by a private enterprise in the context before us contradicts our basic sense of justice, which tells us that the exercise of coercive authority over prison inmates, whose core human rights have in any case been violated, should be done by the state, which is familiar with the requirements of the restraint of power, and which has full administrative, legal and moral responsibility for exercising this power. This was well defined by Prof. Harel in the aforementioned article, where he said:

> 'The most fundamental task of the state is the task of governing justly. Just governance requires the state to govern its citizens under constraints dictated by justice. Just governance presupposes the guidance of behaviour and the issuing of prohibitions. Note that the integrationist justification provided here is premised on the assumption that the state is justified in issuing prohibitions and that the violations of these prohibitions justifiably trigger the infliction of sanctions. The integrationist justification aims to show that when these conditions are satisfied, the state, and the state alone, ought to make determinations concerning the severity of these sanctions, and then inflict them. The state cannot thus delegate these powers to private entities' (Harel, 'Why Only the State may Inflict

> Criminal Sanctions: The Case Against Privately Inflicted Sanctions,' *supra*, at p. 18).

28. The legal justification and moral authority for violating the basic liberty of a person by means of imprisonment and exercising coercive force over him in prison depend upon the exercise of coercive authority being entrusted to organs of the state, which are the people's representative in protecting the values of social order, on the one hand, and the basic rights of the individual, on the other. Failing to comply with this condition undermines the legitimacy of law enforcement and sentencing, and the moral basis for exercising institutional coercive authority over the individual offender (J.J. Dilulio Jr., 'What's Wrong with Private Prisons,' 92 *Pub. Int.* 66 (1988), at pp. 79-83).

The purpose underlying amendment 28 of the Prisons Ordinance

29. Investigating the purpose of amendment 28 of the Ordinance is essential for the value-balancing endeavour needed to assess the constitutionality of the legislative arrangement that transfers the management of a prison to a private concessionaire.

The president in her judgment emphasized the economic purpose — of realizing an economic saving for the state by transferring the management of the prison to a private enterprise — that underlies the amendment of the Ordinance as the one that reflects the main concrete purpose of this legislation. According to her, if improving prison conditions is the general purpose underlying the amendment, the economic purpose of saving money is the specific purpose of the legislation. This is what she says in this regard:

> 'The purpose underlying the enactment of amendment 28 and the special arrangements provided in it was, therefore, an economic purpose. In our opinion this is the main public purpose that amendment 28 sought to achieve and it is the *raison d'être* that underlies it; had the economic savings not been the main consideration taken into account by the legislature, there would have been no need to enact amendment 28, and it would have been possible to contend with the problem of overcrowding in the prisons by building additional state managed prisons or by improving the existing prisons, in accordance with the normative framework that existed prior to the enactment of amendment 28. It can therefore be said that although amendment 28 was enacted with the aspiration of

> improving the prison conditions of the inmates, the purpose of the concrete legislative arrangement chosen as a means of achieving this worthy aspiration is to achieve as great an economic saving as possible for the state' (at para. 52).

In my opinion, the crux of the basic purpose of amendment 28 is somewhat different, and even though it does contain an element of economic efficiency, that is not the main motif but only a secondary one. Identifying the purpose of the law and its emphases is of great importance for its ramifications on the balancing of values required for examining the constitutionality of the law.

30. As I understand it, the main purpose of the amendment to the Ordinance, as can be seen from its legislative background and its context, is to promote the welfare of the prison inmate by reducing the serious overcrowding that currently exists in the prisons, improving the services provided in them and expanding the treatment and rehabilitation programmes available to the inmate. These purposes might have been realized by privatizing the management of the prison, which would allow the state to save large amounts of money over the period of the concession, which is twenty-five years.

31. The prison system has always struggled with the obligation to uphold the right of the prison inmate to basic living conditions as a part of the protection of his dignity as a human being, even when he is imprisoned for an offence that he committed against society. Guaranteeing basic living conditions for the prison inmate, as a part of his human dignity, also requires a proper balance between the inmate's human right to minimum living standards and the state's obligation, with its available resources, to budget for these standards (HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security* [10]).

32. The phenomenon of major overcrowding in Israeli prisons seriously violates the movement and breathing space of the inmate in the prison compound. Over the years, the state has struggled with a situation in which even the basic right of every inmate in Israel to sleep in a bed during his prison term has not been fully respected. The significant increase in the number of prison inmates and persons held under arrest in Israel, the serious long-term security problems that result in an increase in the number of security prisoners and detainees, the rise in serious crimes and the escalating number of foreign workers and illegal aliens held under arrest until they are

deported have all significantly increased the need for the resources and means required to maintain prison facilities to the required standards. These basic needs 'consume' the resources allocated in the state budget for managing prisons and detention facilities, and it is hard to find the additional resources needed to improve the welfare of prison inmates.

33. This court has held that the Basic Law: Human Dignity and Liberty enshrined the right to human dignity as a constitutional right and that this also includes the right to basic living standards that are intended to preserve the image in which humanity was created (LCA 4905/98 *Gamzu v. Yeshayahu* [40], at pp. 375-376; HCJ 5578/02 *Manor v. Minister of Finance* [25], at p. 736; HCJ 366/03 *Commitment to Peace and Social Justice Society v. Minister of Finance* [32], at paras. 14-15; *Physicians for Human Rights v. Minister of Public Security* [10], at para. 9). This approach has also been applied to the constitutional human rights of inmates in state prisons. It has been held that —

> 'A sentence of imprisonment imposed on a person does not deprive him of the constitutional human rights given to him by the principles of the constitutional system in Israel. The prison inmate is deprived of these rights only to the extent that the restriction thereof is a necessary consequence of his loss of liberty as a result of the imprisonment, and to the extent that the violation of a protected right satisfies the elements of the limitations clause in the Basic Law' (*Physicians for Human Rights v. Minister of Public Security* [10], at para. 10).

When a person enters a prison, he loses his liberty, but he does not lose his dignity (HCJ 7837/04 *Borgal v. Israel Prison Service* [41], at p. 101). Providing a person's basic needs, which is an absolute condition for living with dignity, is also necessary for an inmate serving his sentence in prison, and the state is obliged to provide them and allocate the necessary resources for this purpose. If the state has a duty to provide the basic needs of its inhabitants as a part of the right to human dignity, it has an even greater obligation to the persons who are in its custody and under its protection, for whom it is directly and immediately responsible. Protecting the dignity of the prison inmate as a human being goes beyond the interest of the individual inmate. It is the interest of society as a whole, which is responsible for determining the moral and ethical norms that apply within it to its members, including prison inmates, as human beings (*Golan v. Prisons Service* [11], at

p. 156). Thus it has been recognized that every prison inmate has a basic right to sleep on a bed, as a part of the protection of human dignity (*Physicians for Human Rights v. Minister of Public Security* [10], at p. 14). These basic needs are joined by the needs for food and drink, clean clothes, fresh air, a minimum living space inside the prison and responsible medical treatment. The right of a prison inmate to basic living conditions in prison has therefore been recognized as a protected constitutional right that can be qualified only when there is a conflicting value of special importance and particularly great weight, such as an exceptional emergency that may justify, in certain circumstances, a violation of the protected right. The state is obligated to provide these basic living conditions for inmates in its custody, and it must allocate the necessary budget for this purpose (see, for example, on the subject of realizing the right of every prison inmate to a bed, *Physicians for Human Rights v. Minister of Public Security* [10]).

34. Beyond the concern for the basic living conditions of prison inmates, which the state is obliged to provide regardless of any budgetary restrictions, there are additional elements of the inmate's welfare that go beyond the 'hard core' of the basic conditions. These elements include matters concerned with reducing the overcrowding in prisons, increasing the physical living space of the inmate in the prison beyond the basic minimum provided in prison regulations, improving treatment and rehabilitation programmes for the inmates, adding cultural enrichment programmes, improving the standard of the food and medical treatment, and additional matters. Providing these conditions, which goes beyond the basic needs that there is an obligation to provide, is of an optional nature, and depends upon the national priorities reflected in the budgets of state institutions. A welfare-state should strive unceasingly to provide these welfare conditions, which go beyond the basic needs, for its prison inmates. Notwithstanding, its ability to do this depends upon the complex picture of all the national needs and on the position of the question of prison conditions on the ladder of social issues for which the state is responsible, according to the relative importance of all the national needs. In the complex reality of social life in Israel, with its many essential needs, giving budgetary preference to improving the welfare of the prison inmate beyond the basic standards required by law is not assured.

35. As I understand it, amendment 28 of the Ordinance was mainly intended to promote the welfare of the prison inmate beyond the basic conditions that the state is obliged to provide without any qualification to

prison inmates, in circumstances where the allocation of budgetary resources for this purpose in the normal budgetary track is not guaranteed. The amendment to the Ordinance was intended to allow the welfare of the inmate to be advanced beyond the basic conditions that are provided for him and to which he is entitled, with an attendant significant financial saving to the state — an objective that is not guaranteed by means of ordinary budgetary measures. Indeed, the explanatory notes to the draft amendment to the Ordinance begin with the following remarks:

> 'The proposed arrangement is needed because of the crisis in Israeli prisons and the direct repercussions that it has on the conditions in which prison inmates and persons under arrest are held, as required by the provisions of the Basic Law: Human Dignity and Liberty, and by the provisions of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996' (explanatory notes to the Draft Prisons Ordinance Amendment (Privately Managed Prison) Law (no. 26), 5764-2003 (*Government Draft Laws* 73, 5764, at p. 270).

36. In enacting amendment 28 of the Ordinance, the state's main goal was to reduce overcrowding in the prisons and to improve significantly the living conditions of the inmates beyond the essential minimum. The state gives details in its reply of 24 October 2005 and in later replies, *inter alia*, that the living space of prison inmates in Israel is currently between two and four and a half square metres per person, as compared with a space of between six and ten square metres that is accepted around the world; that some of the existing prison facilities are very old and do not provide proper living conditions; and that a constant increase in the number of prison inmates each year exacerbates the existing crisis in prison conditions. According to the state, the privatized prison will significantly advance the welfare of inmates from the viewpoint of improving the inmate's living space, as well as in the fields of rehabilitation and treatment for inmates and the standard of the physical services that are provided in the prison. The average living space per inmate will increase significantly, as will the number of social workers; a major increase in the number of hours of education that inmates receive will also be possible. In addition to these improvements, the state will make a considerable financial saving (the state's supplementary response of 16 February 2006, at paras. 15-19).

37. In its response of 29 August 2006, the concessionaire also emphasized all of the planned improvements for inmates (para. 98 of the response). These include more formal education, an increase in the scope of the employment of inmates in various jobs, an increase in the financial remuneration for the work, an increase in the physical living space far beyond the essential minimum, an improvement in the food, an increase in the number of family visiting days, an increase in the educational staff, an improvement in medical treatment, an increase in the hours of activity for the inmates and additional improvements. According to the concessionaire:

> 'In practice, a careful examination… shows precisely to what extent the considerable thought that was devoted by the state and its representatives to drawing up the transaction with the concessionaire provides comprehensive and thorough solutions that allay the concerns raised by the additional petitioner in a manner that ensures that not only will the privately managed prison not harm the welfare of the inmates in comparison to a prison managed by the Israel Prison Service but to a large extent the opposite is the case: in the privately managed prison the conditions of the inmates are expected to be better than in the other prisons in Israel (supplementary main arguments of 31 December 2007).

38. The possibility of overcoming the problem of serious overcrowding in prison facilities, of improving the welfare of the inmates beyond the minimum conditions that need to be provided at all times and in all situations, while increasing efficiency and making a financial saving for the state, are to my mind the main purposes of amendment 28 of the Ordinance. It should be added that the amendment speaks at this stage of setting up one prison as an experiment, but the long-term planning is that if the experiment is successful, it will be expanded and this may affect a large population of prison inmates, *inter alia* by significantly improving both the physical and the therapeutic and psychological conditions in which they are held in custody in Israel.

The constitutional balance — the relationship between the harm caused to the prison inmate by privatizing the exercise of sovereign power and the expected improvement in prison living conditions

39. The privatization of the management of the prison in amendment 28 gives rise to a constitutional question of great significance. This question in essence is whether the potential violation of the prison inmate's core basic

rights that is caused by privatizing the sovereign coercive authority of managing a prison satisfies the constitutional test of proportionality, in view, *inter alia*, of the purpose of the amendment to the law which was intended to improve the welfare of the inmate beyond the minimum conditions guaranteed to him and at the same time to make a financial saving for the state. The potential violation of the inmate's core basic rights, which is expected to occur as a result of the privatization of the sovereign power, conflicts with the potential benefit to the inmate deriving from the improvement in his welfare and his living conditions, together with an economic benefit to the public. What is the result of the balance between these values, and which of them takes precedence? In this conflict, is the harm to the prison inmate so great that it justifies setting aside a law of the Knesset despite the benefit to the inmate's welfare that it bestows?

40. Constitutional law embodies the basic values and principles of the legal system. These values and principles require decisions that involve conflicting interests, values and rights. Often the conflict is between types of interests, values and basic rights that are all of the highest importance (HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [42], at p. 880 {100}). The conflict is resolved by striking a balance between the competing values, where each of the competing factors has its own importance and relative weight. The decision is made on the basis of the relative weight of the conflicting values.

> 'It is only natural that there are more important principles and less important principles; … the basic difficulty involved in constitutional thinking is how to ensure objective normative criteria… for deciding between the conflicting principles… The balance and weighing need to reflect the social consensus rather than the subjective outlooks of the constitutional jurist… The judge should reflect the basic values of a nation, as reflected in its national way of life… The Israeli jurist formulates the basic principles and their relative weight against a background of the spiritual, cultural and social mores of modern Israeli society. These mores are naturally influenced by our ancient heritage, but they reflect the social consensus of the present. However, objective criteria that provide a solution to every constitutional problem do not exist. Where objective guidelines cease, the constitutional jurist is left "on his own," and "his moment of

> truth" arrives. From this moment, the only guiding star that lights up his path is the constitutional principle of justice; the jurist should aspire to the solution that seems to him most just' (A. Barak, *Legal Interpretation: Constitutional Interpretation* (vol. 3, 1994), at pp. 71-72).

41. The constitutional purpose is built on the values and principles that the constitutional norm is intended to realize. Sometimes these values lead in the same direction; sometimes they conflict with one another. In cases where there is a conflict, a balance needs to be struck between them in accordance with their relative weight. The balancing formula reflects the relative weight of each value. There is no single balancing formula, but a wide variety of balancing formulae that adapt themselves to the wide variety of possible situations that occur in life and the innumerable conflicts that may arise (HCJ 153/83 *Levy v. Southern District Commissioner of Police* [43], at p. 401 {117}).

42. In our case, the constitutional balancing formula between the conflicting values is especially complex. *On one side* of the equation there is the potential harm to the core human rights of the prison inmate, and especially his rights to liberty and dignity, which is inherent in the privatization of the sovereign coercive authority in the management of a prison and its transfer from an organ of state to a private enterprise. The potential harm to the individual inherent in privatizing the sovereign coercive authority in managing a prison is very considerable for the reasons that I have discussed above. It undermines and erodes the guarantees inherent in the foundations of the legal system for protecting the limits and constraints of power, which apply to the state when it exercises its sovereign power. Any undermining of these guarantees, which may result in a significant violation of the core human rights of the prison inmate, is of particularly great weight.

43. *On the other side* of the balancing equation, there is the main value of the amendment to the law, which is intended to promote the welfare of the prison inmate and improve his prison conditions in various fields of life, while enhancing economic efficiency for the state. This purpose is of great weight in itself, since it is intended first and foremost to promote the welfare of individuals who are already in difficult circumstances. It contributes to the protection of his dignity and welfare. Expanding treatment and rehabilitation programmes may also lead to the inmate being released early, thereby

influencing his liberty and the other basic rights derived from the right to liberty.

44. The potential harm involved in the privatization of sovereign coercive authority, which is likely to violate the liberty and dignity of the prison inmate, is countered by the purpose of the privatization, which has an aspect of improving his living conditions in the prison. The improvement in such conditions has a direct effect on the realization of the inmate's basic rights. How can this conflict be resolved, when at its heart there are forces, on the one hand, that violate the inmate's rights and there are forces, on the other hand, that benefit him and promote his rights?

45. The dilemma in this balancing equation is particularly complex. It is not similar to the typical dilemma in which a right of one individual conflicts with the right of another individual or with a general public interest. In the equation in this case, there are conflicting interests and opposing forces that concern the same individual, the prison inmate. One seeks to eliminate the potential harm inherent in the privatization of sovereign coercive authority exercised against him in the prison, and the other seeks to uphold the law, despite the aforesaid harm, in order to enhance his welfare and improve prison conditions in the long term. We are confronted with a clash between conflicting forces that work on the prison inmate as an individual, where one seeks to prevent a violation of his basic rights resulting from a privatization of the force exercised against him, while the other seeks to contribute to his physical and emotional welfare that cannot be realized, at least at the moment, in any other way. The general public interest, which is reflected in the financial saving and greater economic efficiency that establishing the private prison will give the state, complements the factor of enhancing the welfare and improving the quality of life of the inmate in the privatized prison.

46. According to the president's approach in her opinion, with which I agree, the main problem in the process of balancing the conflicting values, which is required in order to examine the constitutionality of amendment 28, lies in the third subtest of proportionality, within the meaning thereof in the limitations clause in the Basic Law. The third subtest focuses on the nature of the violation of a human right that is caused in order to achieve a proper purpose, and it recognizes that the realization of the purpose does not justify every means that has a rational connection to the purpose and minimizes the harm. 'This subtest seeks in essence to realize the constitutional outlook that

the end does not justify the means. It is an expression of the concept that there is an ethical barrier that democracy cannot pass, even if the purpose that is being sought is a proper one' (HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [29], at para. 30 of the opinion of President Barak). The third subtest of proportionality is *ethical* in nature. It is intended to resolve the conflict between the various relevant factors in a manner that properly reflects the social and moral values enshrined in the social consensus, on which the democratic regime in Israel is based.

47. In our case, the question in its ethical context is what is the proper proportional balance between the improvement in living conditions for the prison inmate, together with the advancement of the economic interest of increased efficiency and a financial saving for the state, and the potential harm to the core rights of the inmate that is inherent in the privatization of sovereign coercive authority under the amendment to the Ordinance. Striking the proportional balance between the violation of the rights of the inmate caused by the privatization of the exercise of coercive authority against him and between the benefit that will arise in the future to the welfare of the inmate and the public in general from establishing a private prison is not easy. We need to decide which has greater weight: the expected harm to the prison inmate from the privatization of the coercive authority exercised against him, or the importance of improving the living conditions of the same inmate in the privatized prison, together with the saving and increased efficiency in the use of public money. It is possible to state the question as follows: does the enhanced welfare of the prison inmate anticipated from the amendment, together with the economic benefit to the state, diminish the potential harm to the inmate as a result of the privatization of the exercise of coercive authority to such an extent that it makes this harm constitutional in accordance with the test of proportionality in the narrow sense in the limitations clause?

48. The need to strike a balance between the constitutional violation of core human rights and the benefit to the very same person within the context of the same act of legislation that is subject to constitutional scrutiny does not arise often. It requires a comparison between 'good' and 'evil' that affect the same person, largely with respect to the same human rights. This is an atypical balancing equation that requires scrutiny in the special circumstances of this case.

49. In my opinion, in this balance, which is essentially an ethical one, the benefit to the welfare of the prison inmate, accompanied by a public economic interest, that will arise from the amendment to the law does not mitigate the potential harm to the inmate that will arise from the privatization of the sovereign coercive authority to such an extent that the harm becomes constitutional according to the test of proportionality in the narrow sense. The benefit to the prison inmate and the economic benefit to the state are not commensurate with, and are even dwarfed by, the violation of the prison inmate's core human rights that can be expected to result from entrusting sovereign coercive authority to a private concessionaire.

50. The potential harm to the individual that is inherent in the privatization of sovereign coercive authority in the criminal proceeding is great, and it goes to the very heart of the social order that gives the state the legal and moral force to exercise sovereign authority over the citizen, while restraining and limiting this power to the absolute minimum, in order to protect core human rights. The ethical, moral and legal structure of the system of government in Israel is inconsistent with the transfer of sovereign coercive authority involved in the management of a prison to a private enterprise, which may seriously harm the individual, even when it is accompanied by the positive and important purpose of improving the physical living conditions of the prison inmate and also by increased efficiency and a saving of public money. In the ethical sphere, the duty of protecting the core human rights of the prison inmate against a serious potential violation overrides the positive purpose of improving the living conditions of prison inmates and increased economic efficiency for the state. It should also be recalled in this respect that improving prison conditions, which is a part of the amendment to the law, does not concern the basic prison conditions that are in any case assured by the existing legal position, but conditions that go beyond the absolute minimum. Achieving an improvement in prison conditions, although important, cannot outweigh the potential violation of the core rights of prison inmates, which is inherent in giving power to the private concessionaire to exercise sovereign authority over individuals under its control. In a democratic constitutional state, the price of enhancing the welfare of a person should not be paid in a manner that causes a possible violation of his core human rights. Such a price should not be paid, and does not satisfy the constitutional test.

51. The potential harm that is inherent in the privatization of sovereign authority is integral to it and of such a degree that it does not allow for a process of experimentation and arriving at conclusions in consequence thereof. We should seek to improve the welfare of the prison inmate, but not at the price of allowing injurious measures to be carried out against him and allowing his core rights to be violated, as the legislation that is under scrutiny in this proceeding entails.

52. The exercise of coercive authority in the criminal proceeding, in so far as it violates the core human rights of the individual, should remain in the hands of the sovereign authority, which is answerable to the public and to the foundations of the constitutional system for *restraining and limiting* it. This applies to police power, it applies to judicial power and it also applies to the power to manage prisons and to exercise coercive authority over prison inmates.

53. The privatization of public services by transferring the responsibility to provide them to private enterprises has been effected in recent years in several fields (D. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' 30 *Tel-Aviv University Law Review (Iyunei Mishpat)* 461 (2008), at pp. 472-473; A. Benish, 'Outsourcing from the Perspective of Public Law,' 38(2) *Hebrew Univ. L. Rev. (Mishpatim)* 283 (2008)). The fields that have been privatized include, *inter alia*, the enforcement of civil judgments, private security guards and security companies, tax collection, etc.. The problems that arise with regard to the privatization of the management of a prison are completely different from those that arise in the other fields of privatization from the viewpoint of the scope of the exercise of sovereign coercive authority over the individual that they necessitate, and from the viewpoint of the extent of their potential violation of fundamental constitutional rights.

54. The privatization of the exercise of sovereign coercive authority in the management of a prison by transferring it to a private concessionaire should therefore be set aside, since it does not satisfy the test of proportionality in the narrow sense under the limitations clause.

55. It need not be said that there is nothing that prevents a privatization of all of the operations and services that are a part of managing a prison and that do not involve the exercise of sovereign coercive authority over prison inmates.

56. I agree with the president's position that the amendment to the Ordinance should be set aside in its entirety because it is difficult to apply a "blue pencil" to it and distinguish between its various terms that are all part of one whole. As stated, this does not preclude the privatization of those fields of management and services in the prison that do not involve the exercise of sovereign coercive authority, in so far as the competent authorities decide that this is proper.

For the aforesaid reasons, I agree with the president's conclusions that amendment 28 of the Prisons Ordinance should be set aside.

Justice E. Hayut

I agree with the opinion of my colleague the President, and with her conclusion that the Prisons Ordinance Amendment Law (no. 28), 5764-2004 (hereafter: Amendment 28), according to which powers to imprison inmates were transferred to a private concessionaire (as well as a long list of invasive powers inherent therein) should be struck down. This is due to the unconstitutional violation of the inmates' human rights to personal liberty and dignity that results from the establishment of a prison managed by a private corporation in which the inmates are subject to the authority of its employees.

1. ,The President discussed In her opinion how, according to the basic views of modern political thinking, the state is responsible to enforce criminal law and to preserve public order by virtue of the Social Contract whereunder humans have organized themselves as a society. The President goes on to say that this state function holds an invasive power to deprive offenders of their liberty and that the transfer of this basic and invasive power to a private corporation operating for profit, is contrary to the Social Contract that originally gave these powers to the state, since as a result of that transfer 'the exercise of that power loses a significant part of its legitimacy' and the constitutional right of prison inmates to personal liberty is violated (para. 22 of the President's opinion), to a greater degree that the actual imprisonment requires (para. 33 of the President's opinion). The President also discusses in her opinion additional aspects of the violation of the constitutional rights of prison inmates, and she mentions in this regard the violation of their dignity as human beings resulting from their imprisonment in a privately managed prison; she says that this model creates a situation in which the manifestly public purposes of the imprisonment are blurred and diluted by irrelevant considerations that derive from the private corporation's desire to make a

financial profit. Thereby, in her opinion, the prison inmates become 'a means whereby the corporation that manages and operates the prison makes a financial profit' and therefore her conclusion is 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' (para. 36 of the President's opinion). I agree with the President in this reasoning and her conclusion that these violations of the personal liberty and dignity of the prison inmates do not satisfy the tests of the limitations clause in the Basic Law: Human Dignity and Liberty, in which these basic rights are enshrined, because of the lack of proper proportionality between the social benefit that Amendment 28 provides and the human rights violation that it causes.

2. In addition to the examination of the constitutionality of Amendment 28 from the perspective of the prison inmates' rights to personal liberty and dignity, I am of the opinion that it is also possible to discuss the difficulties that this amendment presents from the perspective of the general public, as a law that conflicts with the basic principles of the system of government and the legal system in Israel. Much has been written about the Social Contract on the basis of which human beings have organized themselves into states. Since the 'Social Contract' is a fiction that was invented by the fathers of modern political thought, there is a wide range of different views with regard to the nature and content of this contract (see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (seventh edition, 2001), at pp. 111-118; W. Friedmann, *Legal Theory* (fifth edition, 1967), at pp. 117-127; C. Klein, 'On the Social Contract Before the High Court of Justice,' 5 *College of Management Academic Studies L. Rev. (HaMishpat)* 189 (2000)). Generally the state is regarded as having taken upon itself the role of protecting the safety, security and property of its citizens after they waived their natural rights to protect these interests and to punish anyone who harms them. For the purpose of realizing the role that is designated for it as aforesaid, the government is given powers and authorities that involve a violation of liberty. One of the core sovereign powers given to the state in order to enforce the law and protect the security of its citizens and the public order is the power to imprison anyone who has been found guilty in a trial and who has been given a custodial sentence, together with all the invasive ancillary powers that go with it. Indeed, the imprisonment of someone who has been convicted in a criminal proceeding is the last link in the sequence of actions that comprise the criminal proceeding for which the state has responsibility throughout.

This link, which concerns the realization and enforcement of the sentence, is admittedly the last stage in the aforesaid sequence of actions that comprise the criminal proceeding, but it is by no means the least important. On the contrary, to a large extent it is capable of being an indication of the effectiveness of the whole criminal proceeding. In view of the importance of the powers of imprisonment as a major link in the sequence of actions that are required to enforce the law and according to the view that the Social Contract creates a relationship of trust between the government as trustee and the citizens as beneficiaries, the divestment by the state of its powers of imprisonment that it was given by the Social Contract violates the terms of that contract and the fundamental principles on which the whole system of government is based and on which law-abiding citizens and victims of crimes rely, since, as we have said, in the Social Contract they waived the right that they themselves may bring offenders to justice (for another outlook, which some regard as a basis for a totalitarian system of government and which holds that the Social Contract can be undermined only by the individual and not by the sovereign, see Klein, 'On the Social Contract Before the High Court of Justice,' *supra*, at p. 199).

3. I concur with the President that it is difficult to locate a constitutional basis in s. 1 of the Basic Law: the Government for determining that the power of imprisonment is a core government power that cannot be transferred to private hands. Therefore, the question is whether the transfer of this power to a private enterprise — with all that this means from the viewpoint of the public in general – violates the basic principles of the system of government in a way that makes it is possible to strike down Amendment 28 even though these principles are not enshrined in the Basic Laws. Such a constitutional move raises problems that this court has addressed in its decisions over the years (see HCJ 142/89 *Laor Movement v. Knesset Speaker* [44], at p. 551; HCJ 410/90 *Bloom v. Knesset Speaker* [45], at p. 205; HCJ 5364/94 *Welner v. Chairman of Israeli Labour Party* [46], at pp. 801-802; see also A. Rubinstein and B. Medina, *The Constitutional Law of the State of Israel* (vol. 1, sixth edition, 2005), at pp. 61-62, 67-69; Y. Dotan, 'A Constitution for the State of Israel? Constitutional Dialogue after the "Constitutional Revolution",' 28 *Hebrew Univ. L. Rev. (Mishpatim)* 149 (1997), at pp. 177-179). It can be said that the approach of this court in this regard is that the examination of questions of the constitutionality of a law on the basis of fundamental principles 'that are not enshrined in a Basic Law' is

possible, if at all, only in very exceptional and extreme cases, when the law undermines the foundations of the system of government on which the whole constitution is based. President Barak discussed the great caution that should be adopted in this regard in HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [19], where he said:

> 'We should do all we can to decide questions of the constitutionality of a law that conflicts with basic values within the context of a decision regarding the constitutionality of the law in relation to a Basic Law. Israel is currently in the middle of a constitutional process that is being carried out through Basic Laws. Every interpretive effort should be made to decide the question of the constitutionality of the law within the framework of the arrangements provided in the Basic Laws' (*ibid.* [19], at para. 73 of the opinion of President Barak).

And President Barak goes on to say there that even if there is a narrow margin that allows the constitutionality of a law to be examined outside the framework of the Basic Laws, this will happen only in special and extraordinary cases where the law in question undermines 'the essence of democracy and negates the most basic characteristics required for a democratic system of government,' such as 'a law or Basic Law that denies the character of the State of Israel as a Jewish and democratic state' (*ibid.* [19], at para. 74; see also HCJ 4676/94 *Meatreal Ltd v. Knesset* [47], at p. 28; A. Barak, *The Judge in a Democracy* (2004, Hebrew edition), at p. 99). Thus, even according to the approach that it is not impossible for this court, in an appropriate case, to strike down a law that violates fundamental principles of the system that are not enshrined in the Basic Laws, this will only happen in very exceptional cases, when the law in question shakes the basic foundations of the whole constitutional and democratic system and threatens to destroy it.

4. The phenomenon of privatization that is becoming more wide-spread in Israel has many aspects (see D. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' 30 *Tel-Aviv University Law Review (Iyunei Mishpat)* 461 (2008); E. Peleg, *Privatization as Publicization — Privatized Bodies in Public Law* (2005)). But not everything can be privatized and no one would appear to dispute that certain powers and authorities that are given to government agencies may not be privatized, even by the legislative branch (see Barak-Erez, *op. cit.*, at pp. 493-496; Y. Dotan and B. Medina, 'The Legality of Privatization of the Provision of Public

Services,' 37 *Hebrew Univ. L. Rev. (Mishpatim)* 287 (2007), at pp. 329-330). As stated above, the divestment by the state of the powers of imprisonment given to it as the sovereign authority and as the body responsible for public safety and security and for maintaining public order, and the transfer of those powers to a private profit-making corporation, violate the basic principles of the system of government in Israel. Notwithstanding, it cannot be said that the statutory arrangement in Amendment 28 threatens to shake the foundations on which the whole constitution is based, especially since the model of privatization adopted in that amendment requires the state to closely supervise the private concessionaire's activities (see ss. 128S, 128U-128X, 128AF-128AL, 128AO and 128AW of the Prisons Ordinance). It can therefore be said that in Amendment 28 the state admittedly divested itself of its powers of imprisonment and transferred them to private hands, but it should not be regarded as having entirely abandoned and shirked its responsibility for carrying out these actions, at least as a supervisory body.

To sum up, I agree with the President's opinion that Amendment 28 should be struck down as it is disproportionately violates the human rights of prison inmates to personal liberty and dignity.

Justice S. Joubran

I agree with the comprehensive opinion and reasoning of my colleague the president.

The imprisonment of someone convicted in a criminal trial as the main sanction prescribed by the Penal Law does not constitute merely a marginal aspect of the criminal process, and there are even those who claim it is the main element in the modern penal process. As my colleague the president said, a prison inmate will be deprived of his liberty regardless of whether he is imprisoned in a privately managed prison or not; the walls of the privately managed prison are no higher than those of their state managed counterpart. But the essence of the prison cannot be summarized by the actual loss of liberty; despite its centrality, this characteristic cannot express the manner in which prisons serve as an institution that is sanction – an institution the entrance into and very existence of constitute the response of the state to offences against its laws.

This phenomenon of the prison and the development of its nature as a sanction carried out by the modern state are aptly described by the French

philosopher Michel Foucault in his book about the 'birth' of prisons. Because of their great relevance to our case, his remarks are worthy of consideration:

> 'In several respects, the prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual. His physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind; the prison, much more than the school, the workshop or the army, which always involved a certain specialization, is "omni-disciplinary"... Lastly, it gives almost total power over the prisoners; it has its internal mechanisms of repression and punishment: a despotic discipline. It carries to their greatest intensity all the procedures to be found in the other disciplinary mechanisms. It must be the most powerful machinery for imposing a new form on the perverted individual; its mode of action is the constraint of a total education:
>
> > "In prison the government may dispose of the liberty of the person and of the time of the prisoner; from then on, one can imagine the power of the education which, not only in a day, but in a succession of days and even years, may regulate for man the time of waking and sleeping, of activity and rest, the number and duration of meals, the quality and ration of food, the nature and product of labour, the time of prayer, the use of speech and even, so to speak, that of thought, that education which, in the short, simple journeys from refectory to workshop, from workshop to the cell, regulates the movements of the body, and even in moments of rest, determines the use of time, the time-table, this education, which, in short, takes possession of man as a whole, of all the physical and moral faculties that are in him and of the time in which he is himself' (Charles Lucas, *De la Réforme des Prisons* (1836), at pp. 123-124)'
>
> (Michel Foucault, *Discipline & Punish: The Birth of the Prison* (trans. Alan Sheridan, 1977), at pp. 235-36).

Indeed, the prison is not merely the walls that separates the inmate from the rest of society. Therefore, if one asks - what difference it makes whether the walls are owned privately or by the state? We should answer that by sending the convicted offender behind the prison walls the state has not ended its role in the sanctioning process, and in many ways the imprisonment is only the beginning and the heart of the process. Even if we say that the loss of liberty *alone* constitutes the offender's punishment, it cannot be denied that the entrance into the prisons caries with is myriad effects on the inmate's life,- whether it is restrictions laid on his way of life and on his body that are required in order to prevent his escapes and protect public safety; determining regulations that are required to maintain public order; or by controlling the inmate's daily schedule by other arrangements required by because the prison is a "total" institution that requires the address of every aspect of the lives of its inmates. All these are accompanied by internal sanctioning mechanisms, for the establishment and enforcement of discipline inside the prisons. Even if we do not see in all of these 'punishment' in the traditional sense, we cannot disregard the fact that the nature of the prison as a sanctioning institution revolves around these characteristics, when each and every moment in the lives of the inmates is dictated and formed by them. Thus, it is possible to claim that all of these actions carried out against the prison inmate in practice constitute the very heart of the exercise of sovereign force against the individual, far beyond the mere decision to send him behind bars.

It follows that the transfer of the management of a prison to private hands does not merely constitute a privatization of powers that are ancillary or supplementary to the punishment, but the divestment by the state of a central layer in its sovereign authority to punish its citizens. Even if it is possible to accept this decision as a matter of policy, from the perspective of the prison inmates it is an unacceptable step. As stated, all of their lives inside the prison walls, *beyond* the actual decision to imprison them, are replete with the exercise of sovereign force, which regulates and disciplines their lives and their bodies. The transfer of these powers over the inmates to private hands effectively makes '*pseudo*-subjects' of the private enterprise. Even though the powers of that enterprise over the inmates do not go down to the very root of punishment in its traditional sense and do not include the actual decision to deprive them of their liberty, and even if the powers given to them to impose disciplinary sanctions are limited in scope (although they should not be

treated lightly even within that scope), this does not negate the fact that the private enterprise has overwhelming control over their lives, through the accumulation of all these minute regulations of these lives — from the use of force against the inmates, placing them in isolation, examining their naked bodies, forcing them to give urine samples, confiscating their possessions, searching their bodies, through maintaining order, discipline and security in the prison, ending in making arrangements for the welfare, health, rehabilitation, training and education of the inmates. Giving this control to a private enterprise, which, despite the supervisory restraints retained by the state, is still motivated in its actions by commercial considerations, constitutes a violation of the dignity of the inmates as human beings that cannot be accepted.

Therefore, I agree as aforesaid with the opinion of my colleague the president that amendment 28 of the Prisons Ordinance should be set aside.

Justice M. Naor

I agree with the finding of my colleague the president that the Prisons Ordinance Amendment Law (no. 28), 5764-2004 (hereafter: 'amendment 28') unconstitutionally violates two constitutional rights that are enshrined in the Basic Law: Human Dignity and Liberty. I agree with her approach that the right to personal liberty (s. 5 of the Basic Law) and the right to human dignity (s. 2 of the Basic Law) of those inmates who are supposed to serve their sentences in the private prison is violated by the 'actual transfer of powers of management and operation of the prison from the state to a private concessionaire that is a profit-making enterprise' (para. 18 of the president's opinion). In view of the importance of the constitutional question that has arisen in this case and the existence of certain differences in approach, I would like to set out my position.

The violation of the constitutional rights enshrined in the Basic Law: Human Dignity and Liberty

The violation of liberty

2. Even though imprisonment *ipso facto* violates liberty, when it is implemented by the state, the violation is proportionate (see and cf. CrimA 4424/98 *Silgado v. State of Israel* [12], at p. 550). The question before us is simply whether the *identity* of the party that implements the imprisonment (a private profit-making enterprise) is likely to cause an *independent violation*

of the right to liberty that is additional to the violation that arises from the actual imprisonment. My colleague the president answers this question in the positive, and I agree with her position. Imprisonment that is carried out by a private profit-making enterprise causes a separate violation of the right to liberty. This violation may vary in its degree: it may be a minor violation, such as when the private enterprise exercises 'technical-administrative' sovereign powers (see HCJ 2303/90 *Philipovitz v. Registrar of Companies* [15]), and it may be a serious violation, such as when the private enterprise exercises the main and invasive powers of the state that involve broad discretion.

3. The doctrine of the delegation of administrative powers allows the state to avail itself of the 'assistance' of a private enterprise (*Philipovitz v. Registrar of Companies* [15], at p. 429; CrimA 4855/02 *State of Israel v. Borovitz* [37], at p. 833). This doctrine applies mainly in administrative law (see: Y. Dotan and B. Medina, 'The Legality of Privatization of the Provision of Public Services,' 37 *Hebrew Univ. L. Rev. (Mishpatim)* 287 (2007), at pp. 308-311; D. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' 30 *Tel-Aviv University Law Review (Iyunei Mishpat)* 461 (2008)). By analogy to this doctrine, were the concessionaire to exercise merely a 'technical' or 'administrative' power, it could be said that even if a separate violation of the right to liberty were proved, it would only affect the periphery of the right, or alternatively it would be an insignificant violation. Such a determination would probably justify judicial restraint (for the requirement that a violation is a 'real' one, see HCJ 10203/03 *National Census Ltd v. Attorney-General* [48], at para. 17 of my opinion).

In our case, however, the concessionaire is acting as an extension of the state in order to exercise one of its main and most invasive powers — the power to *enforce the criminal law and to maintain public order*. We are not speaking merely of a 'technical' or 'administrative' power. The concessionaire is wielding, on behalf of the state, real sovereign authority that involves the exercise of discretion (on discretion as 'the most important part of authority,' see I. Zamir, *Administrative Authority* (vol. 2, 1996), at p. 546). *Inter alia*, the concessionaire has been given powers to maintain order and discipline in the prison and to prevent the escape of inmates (as explained in para. 31 of the opinion of my colleague the president). The power given to *manage the prison* — the exercise of authority, power and discipline — is clearly recognized as one of state sovereignty and requires

discretion when exercising it (see and cf. HCJ 5009/97 *Multimedia Co. Ltd v. Israel Police* [49], at p. 693; see also: A. Harel, 'Why Only the State may Inflict Criminal Sanctions: the Case Against Privately Inflicted Sanctions,' 14(2) *Legal Theory* 113 (2008), at p. 117).

Therefore the law does not merely enshrine a 'policy of privatization' (see for example HCJ 5167/00 *Weiss v. Prime Minister* [50], at p. 471, but it changes the distribution of the state's sovereign powers. I agree with the president that powers that are characterized by the exercise of sovereign authority in order to enforce the criminal law and maintain public order, *when they are exercised by a private profit-making enterprise*, inflict a *separate and real* violation of the constitutional right to liberty. Therefore the judicial scrutiny required lies in the field of constitutional law.

4. My colleague bases her determination regarding a violation of liberty on the approach that the legal system in Israel has a basic principle that the state has a monopoly on the use of organized force, and this basic principle is a part of the constitutional right to personal liberty (para. 26 of her opinion). In my opinion, it is possible to determine that our case involves a violation of the constitutional right to liberty even without resorting to a fundamental principle regarding the system of government. My approach is that in view of the nature of the criminal proceeding and the fact that imprisonment is a part of the criminal trial and criminal law, the transfer of responsibility for it to private hands in itself violates liberty as a constitutional right in Israel.

5. According to my approach, the distinction between the handing down of a custodial sentence and its *de facto* implementation is an artificial one; we are speaking of one process of administering criminal justice that involves various levels of discretion (see and cf. P. Moyle, 'Separating the Allocation of Punishment from its Administration: Theoretical and Empirical Observations" 11 *Current Issues in Crim. Just*. 153 (1999), at pp. 157, 159, 170). According to my approach, both the sanction (imposing the custodial sentence) and its actual enforcement (in the prison) are a part of the 'process of administering criminal justice' and both involve the exercise of discretion. The tasks imposed on the inmates in the prison, as a part of 'prison management,' are also an integral part of the sentence imposed on them. This is obvious when dealing with matters of inmate discipline (see and cf. R. Harding, 'Private Prisons,' 28 *Crime and Justice* 265 (2001), at pp. 273-278, which is cited in the 'Knesset's Position' in paras. 244-248). It should be recalled that the law may also affect to some degree the duration of the term

of imprisonment (see para. 27 of the opinion of my colleague the president; s. 9(7) of the Release from Imprisonment on Parole Law, 5761-2001). Indeed, imprisonment is a part of criminal law and procedure (see and cf. L. Sebba, 'Human Rights and the Sentencing System,' 13 *Bar-Ilan Law Studies (Mehkarei Mishpat)* 183 (1996), at p. 188). Against this background, an opinion has been expressed that the question of privatizing prisons should be considered within the framework of criminal law rather than within the framework of the law concerning privatizations in general:

> '… prison privatization could be reviewed in conjunction with criminal justice policy and not just as part of the question of privatization more generally' (C.M. Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (2007), at p. 76.

See also S. Dolovich, 'State Punishment and Private Prisons,' 55 *Duke L. J.* 437 (2005), at pp. 544-545; Donnelly, *op. cit.*, at p. 256.

6. The constitutional right to personal liberty has been interpreted broadly, and it has been held that imprisoning a person *ipso facto* violates his constitutional right to liberty (see HCJ 6055/95 *Tzemah v. Minister of Defence* [5], at p. 261 {656}). When we say that the imposition of the custodial sentence and its actual implementation in the prison are a part of the criminal trial and criminal law, it follows that the manner in which the imprisonment is implemented — including the identity of the party implementing the imprisonment — is also 'covered' by the constitutional right to personal liberty. The whole process of criminal justice, including the element of implementing the actual imprisonment, is subject to the constitutional restrictions: 'Most of the government activity in the field of criminal law — whether legislative, administrative or judicial — is now subject to the Basic Laws. *Criminal law and its enforcement* need to be constitutional' (A. Barak, 'The Constitutionalization of the Legal System Following the Basic Laws and its Implications for (Substantive and Procedural) Criminal Law,' 13 *Mehkarei Mishpat (Bar Ilan Law Studies)* 5 (1996), at p. 13). As President Barak said, the administration of criminal justice 'is naturally closely connected to human rights. It protects the right of every human man to dignity, physical integrity and property' (CrimFH 2316/95 *Ganimat v. State of Israel* [51], at p. 654; see also HCJ 5319/97 *Kogen v. Chief Military Prosecutor* [52], at p. 81 {512}).

7. One might ask how it is possible to deduce from the right to 'liberty' that the state has a *duty* to exercise its powers in a certain way, i.e., by itself. The answer to this is twofold.

In the *constitutional sphere*, the violation of liberty as a constitutional right should satisfy the conditions of the limitations clause. The limitations clause is likely to require the state to exercise its powers in a manner that legitimizes the violation of the constitutional right. The centre of gravity therefore focuses on whether the violation is constitutional within the context of the limitations clause, which has great weight in determining the constitutional balance in the criminal sphere (Barak, 'The Constitutionalization of the Legal System Following the Basic Laws and its Implications for (Substantive and Procedural) Criminal Law,' *supra*, at pp. 13-14).

In the *administrative sphere*, the value of liberty is also likely to require the state to exercise its powers in a certain way. Thus, for example, this court has held that the power of a prison employee in carrying out his duties does not give him the authority to compel the inmates to carry out the work of cleaning the prison cells themselves: 'We find ourselves here in the area of the liberty of the citizen, and the rule is that in such a case great care should be taken only to deprive him of liberty to the degree and in the manner that are clearly dictated by the law' (*per* Justice Agranat in CrimA 40/58 *Attorney-General v. Ziad* [53], at p. 1364, and therefore 'it should be concluded, in the absence of any conflicting evidence, that it is practically possible that [the cleaning of the cells] will be done by persons whose job it is and who will be appointed specially for this task' (*Attorney-General v. Ziad* [53], at p. 1635). Thus the state was *de facto* required to carry out the cleaning of the prison cells itself or through another party, but not through the prison inmates themselves (as long as there is no contrary stipulation in legislation).

Moreover, in the *theoretical sphere*, constitutional interpretation is carried out with a 'broad perspective' (HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [19], at para. 24 of the opinion of President Barak). Thus, with regard to the word *liberty* the court should also give an interpretation that reflects values that are enshrined in the social consensus and in the ethical principles that are shared by society (see the remarks of my colleague the president at para. 53 of her opinion). This is the place to consider the interpretation of the word *liberty* in greater detail.

8. Montesquieu says in *The Spirit of Laws*:

> 'Il n'y a point de mot qui ait reçu plus de différentes significations, et qui ait frappé les esprits de tant de manières, que celui de *liberté*' (Montesquieu, *De L'Esprit des Loix (The Spirit of Laws)* (1748), XI, 2).
>
> 'There is no word that has been given more different meanings, and that has influenced the human spirit in more ways, than the word *liberty*' (tr. by the editor).

The word *liberty* has a strong relationship with political philosophy (for a survey, see Harel, 'Why Only the State may Inflict Criminal Sanctions: the Case Against Privately Inflicted Sanctions,' *supra*, at pp. 117-122; see also J.P. Day, *Liberty and Justice* (1987), at p. 101). Liberty is a central element in humanistic thinking (for the importance of liberty in Rawls' theory of justice, see J. Rawls, *A Theory of Justice* (1971), at pp. 201-205; J. Rawls, *Political Liberalism* (1993), at p. 181; see also Y. Dahan, 'On Democracy of Property Owners and Liberal Socialism: Economy and Welfare in Rawls' Theory of Justice,' in *The Philosophy of John Rawls* (D. Hyed and D. Attas eds., 2007) 126). Liberty is a central element in every definition of democracy (for the influence of various definitions of *democracy* and *liberty* on the legitimacy of privatizing prisons, see in detail Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective*, *supra*, at pp. 84-96).

We can use this theoretical basis to interpret the right to 'liberty.' It should be remembered that the question is not how 'liberty' is understood in the political philosophy of one person or in the moral beliefs of another. The question is how the right to 'liberty' is conceived as one of the values of the State of Israel (see and cf. A. Barak, *Legal Interpretation — Constitutional Interpretation* (1994), at p. 318). The court is supposed 'to reflect the outlooks of society… [and to give] expression to the values of the constitution as they are understood by the culture and tradition of the people, as it moves across the face of history' (*per* President Barak in CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [8], at p. 425). These are values that reflect 'deeply held beliefs of modern society' (*ibid*. [8], at p. 424; see also R. Dworkin, *Taking Rights Seriously* (1977), at pp. 116-117; cf. also the outlook of John Rawls regarding the overlapping consensus (Rawls, *Political Liberalism*, *supra*, at pp. 144-150), and the moral role of the Supreme Court in determining constitutional values (Rawls, *op. cit.*, at pp. 227-240).

9. My colleague the president cited in her opinion the remarks of two of the classical political philosophers of the seventeenth century, Thomas Hobbes and John Locke. This classical approach that is reflected in her opinion is still valid today. A clear expression of the approach accepted in the modern state, according to which it is part of the responsibility of the state to ensure public order and enforce the criminal law within its territory by itself, appears in the writings of Max Weber on sovereign authority:

> 'Today the relation between the state and violence is an especially intimate one… a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory' (Max Weber, 'Politics as a Vocation,' in H.H. Gerth and C. Wright Mills (eds.), *From Max Weber: Articles in Sociology* 77 (1946), at p. 78).

It would appear that even those who espouse the 'night watchman state' philosophy, in which the role of the state is limited solely to protecting the lives and property of citizens, recognize the duty of the state to *enforce public order*:

> 'In the nineteenth century, the philosophy of the *laissez faire* state was widespread. According to this approach, the state has a very limited role, mainly in the field of security… It is obliged to maintain an army, a police force, courts and prisons… It is not supposed to involve itself in other fields of social and economic life beyond what is essential for maintaining public order' (Zamir, *Administrative Authority* (vol. 1), at p. 31).

Even those who espouse capitalism as a necessary condition for freedom (M. Friedman, *Capitalism and Freedom* (1962)) are of the opinion that the state has two 'clear and self-evident' duties:

> '[the first duty is] the protection of individuals in the society from coercion whether it comes from outside or from their fellow citizens. Unless there is such protection, we are not really free to choose… [the] second duty goes beyond the narrow police function of protecting people from physical coercion; it includes "an exact administration of justice"' (Milton and Rose Friedman, *Free to Choose* (1980), at p. 29).

Milton and Rose Friedman base themselves in their book on Adam Smith, the author of the 'invisible hand' theory, who defined the basic role of the state as follows:

> 'According to the system of natural liberty, the sovereign has only three duties to attend to; … first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every member of the society from the injustice or oppression of every other member of it, or the duty of establishing an exact administration of justice; and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain; because the profit could never repay the expense to any individual or small number of individuals, though it may frequently do much more than repay it to a great society (Adam Smith, *Wealth of Nations* (1776, Book IV, Chap. IX)' (Friedman and Friedman, *Free to Choose*, at pp. 28-29).

It would appear that on this basis it can be said that an accepted approach is that 'by virtue of the basic principles of liberal democracy, certain products need to be included in the public sphere in such a way that privatizing them is not legitimate' (Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at pp. 329-330; see also B. Medina, '"Economic Constitution," Privatization and Public Finance: A Framework of Judicial Review of Economic Policy,' in *Zamir Book on Law, Government and Society* (Y. Dotan and A. Bendor eds., 2005) 583, at pp. 588, 654-655, 660), where he discusses the role of the state in 'protecting the public and maintaining public order'; also cf. E. Peleg, *Privatization as Publicization — Privatized Bodies in Public Law* (2005), at pp. 92-93, and the references cited there).

10. In my opinion, on the basis of the classical political philosophers that were discussed by my colleague the president in her opinion, and on the basis of the aforesaid and the values of the State of Israel as a Jewish and democratic state, it is possible to interpret the word *liberty* in the Basic Law: Human Dignity and Liberty as having two aspects: a 'negative' aspect ('The freedom that is guaranteed to every human being by the law, i.e., to conduct himself and act, think and speak however he wishes, unless the law imposes

on him a duty to act in a certain way, is what we have called the "supremacy of the law"' — see H.H. Cohn, *The Law* (1996), at p. 138; also see Day, *Liberty and Justice*, *supra*, at p. 103); and a 'positive' aspect, that may require the state, in certain circumstances and in a narrow range of basic roles, to exercise its powers itself. This was discussed by Isaiah Berlin:

> 'The first of these political senses of… liberty…, which… I shall call the "negative" sense, is involved in the answer to the question "What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons?" The second, which I shall call the "positive" sense, is involved in the answer to the question "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"'(Isaiah Berlin, 'Two Concepts of Liberty' (1958), in Isaiah Berlin, *Four Essays on Liberty* (Oxford, 1969)).

This approach also finds expression in the context before us. Thus, for example, the 'Right to liberty and security' in art. 5 of the European Convention for the Protection of Fundamental Rights and Freedoms, which has also been adopted in the United Kingdom in the Human Rights Act 1998, has been interpreted as having a 'positive' aspect that in certain circumstances prevents imprisonment by private enterprises:

> '… the positive obligations recognized under Article 5 have been relatively limited. It has been accepted that Article 5 imposes an obligation to protect vulnerable individuals from deprivation of liberty by private actors' (J. Wadham, H. Mountfield, C. Gallagher, E. Prochaska, *Blackstone's Guide to The Human Rights Act 1998* (fifth edition, 2009), at p. 168).

(For further discussion of the various meanings of liberty, see in general P. Pettit, 'Law, Liberty and Reason,' in *Reasonableness and Law* (G. Bongiovanni, G. Sartor, C. Valentini eds., 2009) 109).

11. One might ask whether the aforesaid interpretation of the word *liberty* overly limits the power of the state to transfer to private enterprises the responsibility for carrying out certain tasks. The answer to this is also twofold.

First, we are dealing in this case with privatization *in the context of criminal law.* Establishing and managing a prison is part of law enforcement and the administration of criminal justice:

> 'The construction and operation of a prison has traditionally been a government responsibility and an indispensable part of the administration of the criminal law. Corrections is not separate from the criminal law; rather, it is a component of an integrated criminal justice system. Just as the state is responsible for promulgating the criminal code, it also has a responsibility to see that the laws are enforced and its offenders are punished. Transferring the provision of corrections to the private sector is tantamount to transferring an important element of government responsibility' (J.E. Field, 'Making Prisons Private: An Improper Delegation of a Governmental Power,' 15 *Hofstra L. Rev.* 649 (1987), at p. 669).

In this context, in the field of criminal law enforcement, the law violates the right to liberty in its *most basic sense* — personal liberty:

> 'The danger of self-interested decision-making can be even more strikingly illustrated in the involvement of private actors in the administration of the criminal justice system, where a very fundamental right, the right to liberty, is at stake' (Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective*, *supra*, at p. 110).

The power that was transferred from the state to a private profit-making enterprise in our case — the power to manage and carry out sentences imposed by the criminal law — is a complex and very sensitive power. This is not an 'ordinary' administrative power, since is includes a *predominant element* of discretion in the exercise of authority. This was discussed by Field:

> 'Not only is corrections one of the government's most basic responsibilities, it is probably the most sobering. The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the government has' ('Making Prisons Private: An Improper Delegation of a Governmental Power,' *supra*, at p. 669).

Similarly, Justice Zamir said:

> 'The management of a prison is a very complex task. Just as it requires great power, it also requires great sensitivity… The power of the Israel Prison Service is not similar, from the viewpoint of its nature and scope, to an ordinary administrative power… Because of the great dependence of inmates on prison officers, and because of the concern that the power wielded by prison officers may be abused, since it is a power that is exercised behind tall walls, there is a very great need for judicial scrutiny of the Israel Prison Service. Admittedly, it is the court that sent the inmates to prison; but now, when they are behind the prison walls, the court is the protector of prison inmates' (PPA 7440/97 *State of Israel v. Golan* [54], at pp. 7-8).

Judicial scrutiny of an administrative power of this kind is exercised not only in the field of administrative law, but also in the field of constitutional law. As I have shown, a transfer of power to 'manage a prison' from the state to a private profit-making enterprise is a provision from the field of criminal law that amounts to a violation of the constitutional right to personal liberty. As such, it should satisfy the tests of the limitations clause (see Y. Karp, 'Criminal Law Legislation in Light of the Basic Laws,' 13 *Bar Ilan Law Studies (Mehkarei Mishpat)* 175 (1996), at p. 276).

It should be noted that even with regard to an 'ordinary' administrative power there may be matters that will *usually* be managed by the state *itself*. Thus, for example, it has been held with regard to the power of the attorney-general to appoint a prosecutor in criminal trials that 'it should be held that for certain types of offences — including the main offences of criminal law — the prosecution should be conducted by the District Attorneys' offices' (HCJ 1783/00 *Haifa Chemicals v. Attorney-General* [18], at p. 657) and that 'The rule is that where a power has been given to appoint a person as an organ of a competent authority or to delegate a sovereign power to him, that person should be a part of the sovereign authority' (*ibid*. [18], at p. 655).

12. *Second*, it is possible to say that the law before us is an extreme expression of the '"age of privatization" in which we find ourselves today' (*per* my colleague the president in CrimFH 10987/07 *State of Israel v. Cohen* [22], at para. 14 of her opinion, and see also paras. 7-13 of the opinion of Justice Rubinstein). It was with good reason that Justice Cheshin pointed out in *Multimedia Co. Ltd v. Israel Police* [49] that 'We have not yet arrived at

the privatization of the police. It is also to be hoped that we will never do so' (*ibid*. [49], at p. 689). But it would appear in a certain sense that we have.

Our judgment, however, does not determine any hard and fast rules regarding the broad range of products and services that may be privatized. The 'age of privatization,' which seeks to reduce government involvement in economic and social life, includes a broad range of matters that may fall within its scope: the sale of publicly owned companies; carrying out government activity or building public infrastructures through private contractors ('outsourcing,' as in our case); changing over from the supply of publicly funded products and services to their supply in return for payment ('commercialization'), etc. (see Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at pp. 467-478). Every type and case of privatization should be considered on its merits (for an all-inclusive model proposed in the field of administrative law, on the basis of the principle of constitutionality, see Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at pp. 329-333; for an all-inclusive model proposed in the field of constitutional law, see Barak-Erez, *op. cit.*, at pp. 492-498; for another model, which is based on the principle of 'publicization,' see Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, who takes for granted the actual legitimacy of privatization (*ibid.*, at p. 37), but raises constitutional questions while discussing theoretical justifications for 'publicization' (*ibid.*, at pp. 77-78)). Public law is one entity, but its application may change from one type of privatization to another and according to the circumstances of the case.

13. I should emphasize that we are dealing with a privatization of a power that is integral to criminal law. The interpretation give above to the right to 'liberty' was given in this context. The aforesaid interpretation does not lay down any hard and fast rules with regard to other senses of the right that may be derived from it with regard to the privatization of government services in the civil sphere (for privatization in the field of health care, see HCJ 4253/02 *Kariti v. Attorney-General* [55]; for privatization in the field of welfare, see A. Benish, 'Outsourcing from the Perspective of Public Law,' 38(2) *Hebrew Univ. L. Rev. (Mishpatim)* 283 (2008)). Therefore, the interpretation given to the right to 'liberty' in our case does not shed any light on the nature of the 'economic constitution' in Israel or enshrine the values of the State of Israel as a 'welfare state' (see A. Barak, 'The Economic Constitution of Israel,' 4 *Law and Government (Mishpat uMimshal)* 357 (1998), at p. 378). The

identification of an 'economic constitution' is a complex matter that is not required in this case (see Medina, '"Economic Constitution," Privatization and Public Finance: A Framework of Judicial Review of Economic Policy,' *supra*, at pp. 588, 654-655, 669; for further discussion of the difficulties involved in the identification of the economic constitution in the institutional sphere, see Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at pp. 493-494, and Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at pp. 341-343; on the range of ideological approaches to this matter with regard to public products, see Dotan and Medina, *op. cit.*, at pp. 301-303; see also different approaches that have been expressed on this matter in case law, such as in CA 975/97 *Eilabun Local Authority v. Mekorot Water Company Ltd* [56], at p. 446; CA 8558/01 *Eilabun Local Authority v. Mekorot Water Company Ltd* [57], at p. 782; for further discussion of these and other judgments, see Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at pp. 48-51; see also HCJ 7721/96 *Israel Loss Adjusters Association v. Commissioner of Insurance* [58], at p. 650).

Consequently, our judgment does not depart, in my opinion, from the premise of 'constitutional neutrality' in the context of political economics (see HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [7], at p. 386). All that has been said in this case, in brief, is that in the field of criminal law a transfer of power to enforce the criminal law and to maintain public order at the imprisonment stage, when we are dealing with a power that has a predominant element of discretion for exercising authority, from the state to a private profit-making enterprise, violates the constitutional right to liberty. It therefore needs to satisfy the conditions of the limitations clause.

The violation of human dignity

14. As I have said, I agree that there is also a violation of the constitutional right to human dignity. I would like to explain this violation from an additional perspective.

15. It is well established in case law that the principle of equality is a part of the constitutional right to human dignity, according to the 'intermediate model' adopted in the case law of this court with regard to the interpretation of the right to human dignity:

> 'It is also possible to include within the scope of human dignity discrimination that does not involve degradation, provided that it

> is closely connected with human dignity as expressing the autonomy of the private will, the freedom of choice and the freedom of action, and similar aspects of human dignity as a constitutional right' (*Movement for Quality Government in Israel v. Knesset* [19], at para. 38 of the opinion of President Barak).

In my opinion, the law violates the principle of equality between inmates. The violation of equality is reflected in the fact that the law creates a distinction between two groups of prison inmate: one group will be imprisoned in a private prison that is managed by a profit-making concessionaire, and the other group will be imprisoned in a *state* prison (see appendix H of the concession agreement, which gives details of the categories for selecting inmates for the private prison). The first group, which will be imprisoned in a private prison, is discriminated against relative to the second group, since the private profit-making enterprise is not subject to the same 'civil service ethos in the broad sense of this term' (*per* my colleague the president, at para. 26 of her opinion); in particular, it is tainted by an inherent conflict of interests in exercising sovereign authority, because it is an entity that is motivated by considerations of profit, which are improper considerations when exercising a sovereign power regarding the imposition of imprisonment and the manner in which it is imposed. This is an *a priori* conflict of interests that does not require any specific factual proof (see and cf. HCJFH 5361/00 *Falk v. Attorney-General* [59], at paras. 16 and 18 of the majority view in the opinion of Vice-President Mazza). This inherent conflict of interests creates a distinction that contains a relevant difference for the purpose of the discretion in exercising the power. The conclusion is that the first group that is imprisoned in the private prison are victims of discrimination. This discrimination is closely connected to human dignity according to the 'intermediate model' (see and cf. the requirement of equality in the possibility of consuming products and services in a privatization of the commercialization type, in Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at pp. 299-300, 330).

16. In her opinion, my colleague the president discussed the inherent conflict of interests. I agree with her remarks and will add two perspectives: *first*, the *modus operandi* of commercial confidentiality that typifies the concessionaire conflicts with the *modus operandi* of transparency and openness that typifies the civil service as a part of the concept of

accountability (on this idea, see Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at pp. 68-69); *second*, and following from this, the disparities in knowledge between the concessionaire and the state, despite its supervisory role, may be abused for the self-interest of the concessionaire and to the detriment of the inmates in its custody (R. Mandelkern and A. Sherman, 'The Privatization of Social Services Implementation in Israel,' (State Responsibility and the Limits of Privatization Research Project, The Centre for Social Justice and Democracy in Memory of Yaakov Chazan at the Van Leer Jerusalem Institute), at para. 2.3). This conflict of interests can also be understood from an economic perspective, as Prof. Chaim Fershtman says:

> '*Private ownership changes the inducements according to which the service is managed.* It affects the accountability of the service providers to the recipients of the service and to the public. Considerations of maximizing profit — even if they are restrained by regulation — will change the product itself… Even if the payment for a certain prison will be based on the existing number of prison places, it is clear that if the prison is full an additional prison will be needed to make additional profits. The opposition to private ownership is based on the desire that industry, which operates on a profit-making basis, will not influence or encourage imprisonment' (C. Fershtman, *The Limits of Privatization* (2007), at p. 25).

And as Donnelly says:

> '… the private interest of maximizing profit may conflict with the public interest in sound correctional policies: private managers in prisons may choose to lower costs by minimizing staff numbers, hiring under-qualified guards, or providing minimally adequate but substandard care' (Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective*, *supra*, at pp. 91-92).

Against this background, I agree with my colleague the president that the supervisory mechanisms in the law (including s. 128AE of the law) do not allay the concern that the discretion in exercising a power will reflect the business or other interests of the private enterprise in such a way that violates the rights of the inmates (see also Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at p. 136). The concern is built into

the discretion of a private entity. This was discussed by Walzer, who said that a private prison —

> '… exposes the prisoners to private or corporate purposes, and it sets them at some distance from the protection of the law' (M. Walzer, 'Hold the Justice,' *New Republic* (April 1985), at p. 12).

As Donnelly says:

> 'Private prison operators make decisions affecting the liberty interests of prisoners on a daily basis — even though they are incapable of removing their own profit interest from these decisions' (Donnelly, *Delegation of Governmental Power to Private Parties – A Comparative Perspective*, *supra*, at p. 110).

17. Section 76 of the Prisons Ordinance [New Version], 5732-1971, provides that the Israel Prison Service will engage 'in the management of the prisons, the guarding of inmates and everything involved therein.' As a rule, a power 'to manage a prison' is inherently ripe for abuse. A clear example of this concern relates to prison inmates' work. When the state, through the Israel Prison Service, is responsible for the inmates' work, the concern that the sovereign power to manage the prison will be abused is weaker, since the state regards the purpose of the inmates' work as mainly rehabilitative, whereas 'the economic interests involved in the inmates' work, although they exist, are only marginal' (*per* Justice Zamir in HCJ 1163/98 *Sadot v. Israel Prison Service* [21], at p. 836; see also the remarks of Justice Beinisch at p. 864: 'The work of a prison inmate… from the outset involves restrictions and is not for making profit'). By contrast, when the private enterprise is responsible for inmates' work, a problem of an inherent conflict of interests clearly arises. Does the private concessionaire also share the outlook that 'the work of inmates serves important purposes from the viewpoint of the inmates, the Israel Prison Service and the general public' (*Sadot v. Israel Prison Service* [21], at p. 837, *per* Justice Zamir)? I think that the answer to this is no, as Peleg says:

> 'The privatized enterprise tends to regard itself as a private concern that is accountable to itself and its owners. Its purpose is to maximize its profits. It seeks to be efficient and to reduce costs; it seeks to be profitable. Therefore the welfare of the individual is not one of its priorities… A private prison is capable of violating the dignity and liberty of the inmate on a daily basis, in view of the existence of an inherent interest in

> keeping as many inmates as possible in the prison' (Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at p. 38).

In this situation, there is a concern that the sovereign authority given with regard to inmates' work will be abused (see W.L. Ratliff, 'The Due Process Failure of America's Prison Privatization Statutes,' 21 *Seton Hall Legis. J.* 371 (1997), at p. 381, which was cited in the Knesset's Position in paras. 227-276). This concern becomes greater when we are speaking of a weak population, like the one in our case, which concerns a population of prison inmates who have lost their liberty (see Peleg, *op. cit.*, at p. 63). The aforesaid concern, in view of the character and nature of the power under discussion, is an inherent concern that is real and immediate (cf., in the context of administrative law, HCJ 4884/00 *Let the Animals Live Association v. Director of Field Veterinary Services at the Ministry of Agriculture* [16], at pp. 212-213; Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at p. 310).

18. In my opinion, the inmate's work for the private concessionaire turns him into a 'means of making profits' in a way that violates dignity. The 'intermediate model' for a violation of human dignity is also sufficient for reaching this conclusion, and there is no need for the 'degradation' model.

'When a person is treated not as an "end in himself" but as a "means only," the value of human dignity is violated' (A. Parush, 'Moral Responsibility, Criminal Liability and the Value of Human Dignity — On Some Recent Developments in Israeli Criminal Law,' 13 *Bar Ilan Law Studies (Mehkarei Mishpat)* 87 (1996), at p. 95). Recognizing a human being as an end and not as a means is 'closely and objectively' related to human dignity as a part of the 'intermediate model' in the interpretation of the constitutional right to human dignity (see Barak, *Constitutional Interpretation*, at pp. 406-407, 416). According to the 'intermediate model,' which was adopted as aforesaid in the judgment in *Movement for Quality Government in Israel v. Knesset* [19], 'human dignity regards a human being as an end and not as a means of achieving the ends of others' (Barak, *Constitutional Interpretation*, at p. 421). Admittedly, inmates' work is only a part of the activity in the prison, and according to law the concessionaire is also responsible for the activity of 'work training and providing education' (s. 128L(a)(3) of the law), but this fact does not negate the actual violation of the

constitutional right but merely concerns the question of the proportionality of the violation.

19. In summary, the violation of the principle of equality between inmates is built into the manner in which the private enterprise exercises its discretion when it exercises the power to 'manage the prison.' This violation of the principle of equality violates the constitutional right to human dignity — a violation that is separate from the violation of human dignity as a result of the actual imprisonment. It falls within the scope of the 'intermediate model' of the constitutional right to human dignity. It should be recalled that the law violates equality with respect to a very weak and vulnerable sector of society, which is a minority group of prison inmates who have lost their liberty (see M. Elon, 'The Basic Laws — Enshrining the Values of a Jewish and Democratic State: Criminal Law Issues,' 13 *Bar Ilan Law Studies (Mehkarei Mishpat)* 27 (1996), at pp. 68-69). This violation should also satisfy the conditions of the limitations clause.

The constitutionality of the violation of rights — the limitations clause

20. The determination that the constitutional rights to personal liberty and human dignity have been violated in this case does not rule out any kind of cooperation between the public sector and the private sector in managing a prison. The limitations clause makes it possible to 'legitimize' a violation that satisfies its conditions. I agree with my colleague the president that in our case the constitutional scrutiny focuses on the test of proportionality (with its three subtests).

I do not rule out the possibility of cooperation in the management of a prison if it is proportionate and constitutional. Administrative law allows cooperation as aforesaid on the level of the state availing itself of 'assistance' even *without* an express provision in primary legislation ('the law is presumed to have granted the power, since its purpose is to allow the person having the authority to receive assistance from others in exercising his authority,' and the scope of the assistance 'varies from one case to another and from one function to another,' (*Philipovitz v. Registrar of Companies* [15], at p. 429)). In my opinion, the fact that in our case the cooperation was expressly enshrined in primary legislation gives the executive authority a broader margin of appreciation than mere 'assistance' (for the legislature's margin of appreciation in primary legislation, see *Israel Investment Managers Association v. Minister of Finance* [7], at p. 386). But in view of the violation of constitutional rights, this margin of appreciation, which

derives from enshrining the privatization in primary legislation, needs to satisfy the tests of the limitations clause, including the constitutional proportionality test:

> 'The separation of powers gives the role of formulating a position as to the proper arrangement to the legislature, but the legislature's freedom of choice is subject to constitutional restrictions. These are not ideological restrictions of a political nature… The constitutional restriction imposed on the legislature is the one provided in the limitations clause' (HCJ 2334/02 *Stanger v. Knesset Speaker* [60], at pp. 794-795).

I shall therefore focus on the proportionality test.

The proportionality test

21. 'The violation of the rights of the prison inmate is subject to the general test of proportionality' (*Tzemah v. Minister of Defence* [5], at p. 266 {662}). The proportionality test should be examined against the background of the purpose of the law. I agree with the position of my colleague the president that the purpose of the law is an economic purpose combined with an attempt to improve prison conditions, and that this is a proper purpose (see para. 45 of her opinion; on the urgent need to improve prison conditions in Israel see HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security* [10], at paras. 12-14 of the opinion of Justice Procaccia). The question is whether the measure chosen in the law — a *massive* privatization of the power of managing the prison, including a predominant element of discretion when exercising authority — is a proportionate measure for the purpose of realizing the aforesaid purpose. In my opinion, the key to answering this question lies in the *second* subtest and the *third* subtest of proportionality and how they interrelate. I should point out here that I agree with the determination of my colleague the president that the supervisory measures set out in the law are incapable on their own of achieving a proportionate balance with regard to the law before us (para. 43 of her opinion).

22. The second subtest of proportionality (the least harmful measure test) stipulates that of the possible measures that realize the purpose of the legislation, the measure that violates the constitutional right to the smallest degree is chosen: 'The legislative measure is compared to a ladder, which the legislature climbs in order to achieve the legislative purpose' (*Israel Investment Managers Association v. Minister of Finance* [7], at p. 385).

As we have said, we are dealing with a law in the field of Israeli criminal law. Within the context of the question of proportionality, we need to examine 'the question of whether there are alternative less harmful measures that achieve the purpose which the provision of criminal law is intended to promote' (M. Gur-Arye, 'The Effect of the "Constitutional Revolution" on Substantive Criminal Law Following the *Silgardo* Judgment,' *The Barak Book — Studies in the Judicial Work of Aharon Barak* (E. Zamir, B. Medina and C. Fassberg, eds., 2009) 325, at p. 330). From the state's position it can be seen that in the course of preparing the law, a 'softer' option that the model that was finally adopted in the legislation was considered. This 'softer' option is based on the 'French model' of privatization (in the sense of 'outsourcing'), in which the concessionaire is given powers to build and operate the prison on a regular basis (maintenance, food, laundry, providing medical services), whereas the powers of management, security and discipline enforcement in the prison are retained by the state (hereafter: 'the French model'; details of the French model appear in the 'Knesset's position' that was filed in this court, in paras. 118 and 121-123). Section 2 of the French law concerning services in a state prison (Loi n°87-432 du 22 juin 1987 relative au service public pénitentiaire) provides that the state may authorize a private enterprise to build and operate a private prison, provided that it is not given powers relating to management, record-keeping and surveillance of inmates.

The French model is one of a partial privatization rather than a complete one (see U. Timor, 'Privatization of Prisons in Israel: Gains and Risks,' 39 *Isr. L. Rev*. 81 (2006), at pp. 102-103). This model may extend the scope of the 'assistance' that may be received from a private enterprise to include fields that are not technical, provided that these do not include the power to 'manage the prison.' It should be noted that the constitutionality of a law with a similar model of a 'partial privatization' was upheld by a majority in the Supreme Court of Justice of Costa Rica (see Sala Constitucional de la Corte Suprema de Costa Rica, Sentencia N. 2004-10492 de fecha 28 de septiembre de 2004), which is discussed in J. Troen and L. Ben-David, *Privatization of Prisons from a Comparative Perspective: Trends, Models and Constitutional Questions* (Knesset Research and Information Centre (10 August 2006)), at pp. 21-25; see also the Knesset's Position, at paras. 258-268).

The main reason given in the state's pleadings for rejecting a model similar to 'partial privatization' is that on the basis of *the experience*

accumulated around the world, it may be expected that there will be difficulties in operational collaboration and problems in the division of responsibility between the Israel Prison Service and the concessionaire (see para. 18 of the respondents' response, as discussed in para. 48 of the opinion of my colleague the president). Against the background of this position, my colleague the president holds that the law satisfies the second subtest, since it is not possible to say whether the 'French model' will satisfy the purpose of the law to the same degree or to a similar degree as the model that was ultimately adopted by the law (para. 49 of her opinion). It will be recalled that the second subtest requires the less harmful measure to realize the purpose of the legislation 'to the same degree or to a similar degree' as the measure chosen by the legislature (HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at paras. 88-89 of the opinion of President Barak).

23. In my opinion, the state's argument for rejecting the 'French model' on the basis of 'experience accumulated around the world' is unconvincing. In *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], the state presented what constituted in my opinion weighty arguments for rejecting the alternative measure proposed in that case, and it proved that the proposed alternative was totally impractical in view of the security position (*Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at para. 20 of my opinion). In our case, the state did not present any such weighty considerations. The 'partial privatization' model, like the 'French model' has not been tried and tested in Israel 'in the field.' Comparative research shows that 'softer' models of partial privatization have been operating for years in European countries such as France and Germany (see Troen and Ben-David, *Privatization of Prisons from a Comparative Perspective: Trends, Models and Constitutional Questions*, *supra*, at p. 5; Harding, 'Private Prisons,' *supra*, at p. 274). Therefore, in my opinion, the state did not succeed in showing that the 'French model' cannot be implemented in Israel. Consequently, it is possible that it could already have been determined at this stage that the law is unconstitutional because it does not satisfy the second subtest. Notwithstanding, it would not be right, in my opinion, to decide the question of the second subtest on the basis of burdens of proof. The fundamental question of who bears the burden of proof at the proportionality stage has not yet been determined in this court, and there are different approaches on this

subject (see *Movement for Quality Government in Israel v. Knesset* [19], at paras. 21-22 of the opinion of President Barak; although in that case the court reached the conclusion that the burden of proof regarding the second subtest rests with the state, see para. 69 of the opinion of President Barak). It should be recalled that 'frequently there are several models that satisfy the requirements of the limitations clause. All of these fall within the "margin of limitations." The choice between them rests with the legislature' (*Stanger v. Knesset Speaker* [60], at p. 795). In view of the margin of appreciation of the legislature in enacting primary legislation, the state 'passes' the second subtest.

According to my approach, however, this does not mean that the state can simply ignore the 'partial privatization' model. The 'partial privatization' model may serve as a comparative basis when implementing the third subtest of proportionality. *Neither* the concessionaire *nor* the state denies the constitutionality of this model. According to the concessionaire, 'for the purpose of adopting the French model, there was no need to make any legislative amendments, and it was possible to rely on existing legislation' (para. 30.5.3 of the third respondent's response to the petition); in a similar vein, counsel for the state said during the hearing before us, in reply to the court's question why the state did not choose legislation along the lines of the 'French model,' that 'this did not constitute a privatization at all, nor did it involve a transfer of powers… For this, not even the most prosaic delegation of power was needed; it is merely the purchase of services.' The *petitioners*, for their part, argue that the 'partial privatization' model is the proper alternative:

> 'There are other less harmful measures that realize the purpose underlying the passage [of the law]…. A partial privatization of powers that does not contain a predominant element of exercising sovereign power would achieve a similar purpose to the one achieved within the framework of a complete privatization as determined [in the law]… Therefore, this possibility should constitute an additional option within the framework of this constitutional test' (para. 143 of the petition).

24. The *third subtest* is the test of proportionality in the narrow sense. This test focuses not only on the measure, but also on the violation of the human right (HCJ 8276/05 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Defence* [29], at para. 30 of the opinion of President Barak). This

is an ethical test that requires the benefit arising from the realization of the purpose to be commensurate with the damage that is likely to be caused as a result to the constitutional right. As we have said, the petitioners, the state and the concessionaire do not deny the *constitutionality* of the 'partial privatization' model, and *de facto* it is not the subject of dispute (the 'partial privatization' model will be referred to below as: 'the alternative'). In these circumstances, the question is whether the law is proportionate (in the narrow sense) in comparison to the alternative. This question is limited in scope since the balance is examined *in comparison to the alternative*. This was discussed by President Barak:

> 'The test of proportionality "in the narrow sense" is usually applied with "absolute values," i.e., by directly comparing the benefit of the executive act with the damage that results from it. But it is also possible to apply the test of proportionality in the narrow sense "relatively." According to this approach, the administrative act is considered in comparison to a possible alternative to it, whose benefit is somewhat less than that of the original executive act. The original administrative act will be disproportionate, according to the proportionality test "in the narrow sense," if a small reduction in the benefit obtained from the original act, *for example by adopting the possible alternative*, ensures a significant reduction in the harm caused by the original act' (HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* [61], at p. 840 {297}; see also A. Barak, 'The Fundamental Constitutional Balance and Proportionality: the Jurisprudential Aspect,' *The Barak Book — Studies in the Judicial Work of Aharon Barak* (E. Zamir, B. Medina and C. Fassberg, eds., 2009) 39, at pp. 60-64).

Against this background, we should apply the third subtest in our case as follows: the question is whether the additional benefit in prison conditions and financial savings obtained by adopting the model ultimately chosen in the law rather than the alternative is commensurate with the additional violation of the personal liberty and human dignity of the inmates in a private prison.

From general principles to the specific case — is the enactment of the law rather than the alternative proportionate (in the narrow sense)?

25. Quantifying the 'realization of the purpose' side of the equation, namely the *additional benefit* in prison conditions and financial savings obtained by enacting the law as it stands rather than the alternative is a complex matter, and the tools available to the court for quantifying this are limited (see and cf. Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' *supra*, at pp. 328-329). The quantification should take into account, *inter alia*, the standard of the prison, the reduction in prison overcrowding, the cost of making the transaction with the concessionaire, the cost of supervision and regulation, the cost of unforeseen developments, etc. (see Mandelkern and Sherman, 'The Privatization of Social Services Implementation in Israel,' *supra*, at para. 2.4). There are opinions that we should also take into account in this context the cost of the harm to 'social preferences,' i.e., the fact that there are people who are 'concerned' that the service should be provided exclusively by the state:

> 'There may be a basis for regarding the Israel Prison Service as a product that the whole public consumes, and by means of this product the public enforces the rule of law… The very fact that the Israel Prison Service is universal is a value in itself, for which we are prepared to pay. It is important to us that the government will have a monopoly on bodies that have permission to employ coercive measures on behalf of the state (such as an army, a police force, a prison service, etc.). These preferences are no less important than our preferences regarding consumer products that we actually consume… Social preferences should not be dismissed as being of less value' (Fershtman, *The Limits of Privatization*, *supra*, at pp. 23-24).

It would appear that in the circumstances of the case before us, and in the absence of a sufficient factual basis for a decision, the quantification of the 'realization of the purpose' side of the equation does not lead to an unequivocal result. It cannot be determined that the enactment of the law as it stands rather than the alternative leads to a critical additional benefit in achieving the purpose.

26. By contrast, the quantification of the 'violation of the right' side of the equation leads to an unequivocal result. The enactment of the law as it stands rather than the alternative results in an additional violation of the personal liberty and human dignity of the inmates in a private prison that is clear and has 'critical mass.' Enacting the law as it stands rather than the alternative

gives the private concessionaire sovereign authority to enforce the criminal law and to maintain public order, and it gives it invasive sovereign powers that involve the exercise of a large degree of discretion. Indeed, the scope of the (partial or complete) privatization is of decisive important for quantifying the violation of the constitutional right (see and cf. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at p. 497). The aforesaid additional violation constitutes the *main violation* of the constitutional rights to personal liberty and human dignity. The extent of the violation of constitutional rights will be very greatly reduced by adopting the alternative to the law.

27. Therefore, in the balance between the realization of the purpose side of the equation and the violation of the constitutional right side of the equation when comparing the law as it stands to the alternative, the additional realization of the purpose of the law (in so far as there is any) is not commensurate with the additional violation of the constitutional rights of the inmates in a private prison. The conclusion is that the third subtest of proportionality is not satisfied, and it should therefore be held that the law is unconstitutional.

The constitutional relief

28. I agree with the conclusion of my colleague the president that there is no alternative to setting the law aside (para. 65 of her opinion). Nonetheless, I should point out that the finding that the enactment of the law as it stands rather than the alternative is not proportionate (in the narrow sense), such that it requires the law to be set aside, is a relatively *moderate* finding, since it leaves the legislature with a choice:

> 'Despite the unconstitutionality of the law, in this situation the legislature is not left with no resort. It does not need to return to the situation that prevailed before the law was enacted. It is able to limit the "damage" of the unconstitutionality. It will do so if it enacts the alternative… [thereby] the whole benefit will not be realized and the entire damage will not be undone. But the partial realization may satisfy the legislature's policy' (Barak, 'Fundamental Constitutional Balance and Proportionality: the Jurisprudential Aspect,' *supra*, at p. 63).

Regarding additional tools for constitutional judicial scrutiny

29. In view of the president's reasoning, with which I agree, there is no basis in my opinion for resorting to additional tools for constitutional judicial scrutiny and relying — as proposed by some of my colleagues in this case — on the basic principles of the legal system (see HCJ 142/89 *Laor Movement v. Knesset Speaker* [44], at pp. 551, 554) or on the social contract (see *Movement for Quality Government in Israel v. Knesset* [19], at para. 6 of Vice-President Emeritus Cheshin). In my opinion, these tools are a 'last resort' that should be used with care and great restraint, especially when the constitutional paradigm accepted in our legal system, which is built on the Basic Law: Human Dignity and Liberty and its limitations clause, leads to an identical result. The content of the social contract in Israel — as an idea that gives expression to society's common denominator — is susceptible to various interpretations and there is no need for us to make a decision on this matter in the case before us (see and cf. the different opinions of President Barak and Justices Cheshin and Zamir in HCJ 164/97 *Conterm Ltd v. Minister of Finance* [13]). These tools require profound consideration with regard to the constitutional remedy that results from applying them. At the present time, it is sufficient in my opinion to use the social contract as a tool for the *interpretation* of the constitutional rights enshrined in the Basic Laws.

Summary

30. For the above reasons, I agree with the opinion of my colleague the president that amendment 28 of the Prisons Ordinance unconstitutionally violates the constitutional human rights of personal liberty and human dignity, and should therefore be set aside.

Justice E.E. Levy

1. I regret that at this time I am unable to agree with the main conclusions that my colleagues have reached, or even with the result of their decision. I am of the opinion that this complex issue, with the question of its effect on basic human rights and other protected values, ought to be put to the test before we reach in this matter even those conclusions that the legal tools in our possession allow us to reach. If I have decided to speak further on the subject, it is because I am of the opinion that the judicial course that is the subject of this petition is extremely complex, and it ought to be properly clarified.

The rights argument

2. One of the main issues relating to the question of the privatization of prisons, in which I am in complete agreement with my colleagues' position, is the need to guarantee the basic rights of the inmates. Admittedly, the act of imprisonment implies, almost as a purpose, a violation of the right to liberty, but this should not exceed the proper degree. And as for human dignity, this is given to every human being, prison inmates as much as anyone else. 'When a person enters prison, he loses his freedom. A person loses his freedom, but he does not lose his dignity. A person's dignity accompanies him wherever he goes, and his dignity in prison is the same as his dignity outside prison' (*per* Justice Cheshin in PPA 4463/94 *Golan v. Prisons Service* [11], at p. 172 {529}). From this pair of rights one can derive a further right, which is the right to proper prison conditions, which has aspects of a social right that addresses the position of a prison inmate in society both before he is convicted and after he has served his sentence. As such, the state has a central role in realizing it: 'Social rights have huge importance from the viewpoint of the weaker echelons of society, who particularly require help and protection from the public administration. Social rights require considerable involvement on the part of the public administration' (I. Zamir, 'Public Supervision of Private Activity,' 2 *Law and Business (Mishpat veAsakim)* 67 (2005), at p. 85).

3. It cannot be denied, however, that at the present, because of budgetary and other crises, the subject of imprisonment finds itself frequently relegated to a low place in the order of the government's priorities.

> 'It has become clear that the public administration is incapable of providing certain services at the required time and in the proper manner, including services that were until recently regarded as proper, and even almost essential, ones for direct administration. One reason for this is the budgetary crisis and national priorities' (*ibid*., at p. 80).

In such circumstances, basic rights of persons under arrest and prison inmates are violated on a daily basis as a matter of course.

The heart of the problem is, in general, hidden from the public eye, and for many people it is a matter of no importance. But applications that are made to the courts shed light on it and portray quite a chilling picture of what happens in the prisons, despite the efforts of the Israel Prison Service to

improve the situation. In one case my colleague Justice A. Procaccia described —

> 'a serious picture of blatant departures from the minimum requirements for holding persons under arrest as determined in the law and regulations, especially with regard to the problem of 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' (CrimA 7053/01 *A v. State of Israel* [62], at p. 511).

In another case it was found that 'The Israel Prison service was compelled to have inmates sleep on mattresses on the floor, because of a serious shortage of prison places that currently exists in Israel' (HCJ 4634/04 *Physicians for Human Rights v. Minister of Public Security* [10], at para. 5). Regarding this practice it was said in another case that 'It is obvious that sleeping on the floor is not necessary, and it involves a serious violation of human dignity' (*per* Justice Dorner in LHCJA 818/03 *Zarka v. Israel Prison Service* [63]). These are merely several examples; see also HCJ 5678/02 *Physicians for Human Rights v. Minister of Public Security* [64]; HCJ 1319/03 *Israel Bar Association v. Minister of Public Security* [65]; and HCJ 572/04 *Barry v. Minister of Justice* [66].

Year after year, reports of the Public Defender's Office also reflect a very serious picture of the prison conditions of inmates in some of the prisons. Thus, *inter alia*, in a review that was carried out in 2008 of fifteen prison facilities of the Israel Prison Service, serious findings were discovered, which were summarized as follows:

> 'At the facilities that were inspected, the staff of the Public Defender's Officer noticed several serious violations of inmates' rights. The picture that was obtained at some of the prisons is, *inter alia*, one of physical neglect and very difficult living conditions, major overcrowding and suffocating cells, and of buildings that do not satisfy the basic criteria required by law' (The Public Defender's Office, *Arrest and Prison conditions in the Prison Facilities of the Israel Police and the Israel Prison Service in 2008*, at p. 7 (Ministry of Justice Web Site).[1]

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[1] See http://www.justice.gov.il/MOJHeb/SanegoriaZiborit/DohotRishmi for the reports for the years 2001-2008.

Not only in the field of infrastructure — a critical issue that lies at the heart of the question of privatization — have problems been discovered. In some prisons the persons making the inspection encountered —

> 'complaints 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… There is a serious shortage of therapy and educational groups for security inmates and preventative therapy groups for sex offenders [and] a shortage of positions for social workers' (*ibid*.).

More tangibly —

> 'In the isolation wing, the inmates are allowed out of the cell once a day for a short time only, and the rest of the time they are shut up in their cell. Instead of a wash basin and toilets, the inmates receive one bottle of water per day and also another bottle and a bag for relieving themselves' (*ibid*., at p. 30). 'In the solitary confinement wing, there was a persistent and nauseating stench' (at p. 26); 'during the visit the staff of the Public Defenders' Office saw many cockroaches running around the cells (*ibid*.); 'in most of the prison facilities inmates are compelled to shower in the same place where they or their cell mates have recently relieved themselves' (at p. 29); 'lunch is dirty with a poor selection' (at p. 42); 'the walls of the room were all smeared with blood stains and splattered insects, which resulted from attempts to deal with the abundance of fleas that plagued the cell' (at p. 46).

And in several recent cases we have addressed the well-known problem of protecting the life of the inmate, even when he is determined to take it himself. Can there be anything more important than this?

Indeed, even those who have concerns about the consequences of privatization will be compelled to admit that in the current situation the basic rights of inmates are being seriously violated:

> 'Israel still has a number of prisons in unsuitable buildings and in a terrible physical state, completely unsuitable for holding

> prisoners and caring for them. In addition, there is severe crowding in Israeli prisons, that among other things results in hundreds of prisoners sleeping on mattresses on the floors of their cells. In these conditions, on the face of it, it is difficult to provide prisoners with the rights to which they are legally entitled' (U. Timor, 'Privatization of Prisons in Israel: Gains and Risks,' 39 *Isr. L. Rev.* 81 (2006), at p. 100).

Justice H.H. Cohn also addressed this matter:

> 'Most of the moral problems that I have mentioned derive from the very nature of imprisonment. I do not ignore the many important improvements that have been made and that are being made to prison conditions; and I am aware of the fact that in practice modern penology focuses on finding new ways of making further improvements to prison living conditions. But *de facto* the nature of imprisonment has not changed, and is not changing; while there are important improvements and amendments that give hope, there are also frequent deteriorations of greater or less seriousness, whether because of the ever increasing number of inmates and the terrible overcrowding in the prisons, or because of the lack of trained staff with sufficient and proper motivation in the Israel Prison Service, or because of the decline in moral and disciplinary standards among the general public. The lack of resources is exacerbated by the tendency (which is not only found amongst jurists) to cling to established practices and to be suspicious of innovations…' (H.H. Cohn, '"Just" Sentencing — Thoughts After Judicial Service' 1 *Plilim — Isr. J. Crim. Just.* 9 (1990), at p. 11).

4. Amendment 28 of the Prisons Ordinance is an innovation. The arrangement proposed in it sought to contend with the problems that currently characterize the imprisonment of inmates. This arrangement is based on two foundations, which from time to time are associated with the idea of outsourcing executive activity and entrusting it to private enterprises: an improvement in professionalism, which is based on the assumption that private enterprises will succeed in doing what needs to be done better than government authorities, and economic efficiency, which is encapsulated in the ability to carry out the same tasks at a lower cost. Prof. Zamir explained:

> 'In certain spheres, the service that the public administration provides to the public is not cost-effective, it is inefficient or it is simply not good. The reason is sometimes a lack of financial resources and manpower, but there are additional reasons. One possible reason is bad procedures or bad management. Another common reason is the employment of employees who are not of sufficient calibre, either because of low salaries or because of political considerations, or difficulties in dismissing careless employees' (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 81).

Without resorting to unjustified generalizations, I would say these circumstances that are described by the learned Prof. Zamir are true of many of public services in the State of Israel. One does not need to study the matter in depth in order to understand that dealing with complex management tasks is often beyond the capabilities of government officials, and they do not have the same degree of success as persons in the private sector, who acquire — literally in both senses of the word — expertise in carrying out these tasks.

It is possible that scholars who called for a change in the situation were not thinking of an amendment of the kind that has been examined in this case. It is possible that the arrangement enacted with regard to the private prison is unsuited for the desired improvement. It is possible, as my colleague Justice Procaccia emphasizes in her comprehensive opinion, that granting the concession will exacerbate the present situation. It is possible that government officials that sometimes have difficulty in carrying out the task themselves, will have no less difficulty in properly supervising the activity of the private operator. It is possible that the state will not properly understand the dimension of accountability that remains its lot even after the concession is given to the private enterprise. Prof. Zamir also wrote this: 'There are already signs of an awakening to the fact that privatization is not a magic solution to the problem of efficiency in public administration' (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 83, note 63). Moreover, research around the world shows there is a concern that privatization and its incentives will undermine motivation to rehabilitate inmates and will thereby contribute to an increase, rather than a decrease, in the number of offenders (Timor, 'Privatization of Prisons in Israel: Gains and Risks,' *supra*, at p. 83). There is an ongoing debate regarding the effectiveness (including in the economic sphere) of privatizing prisons (*ibid*, at p. 85). It has been argued that the existence of a private prison will increase the concern of an improper

relationship between 'big money' and government (*ibid.*, at p. 91). See also Y. Peled, 'Crime Pays: What Can be Learned from the American Experience in Privatizing Prisons,' 82 *HaSanegor (The Defence Attorney)* 5 (2004); N. Carmi and E. Gal, *Crime and Punishment — the Privatization of Prisons: Position Paper* (Report of Physicians for Human Rights, 2005). On the other hand, it is possible that these serious consequences will not materialize, as can be seen from other opinions and research, which, as my colleague the president has already noted, often rely on conflicting findings.

5. It is fundamental in my opinion that my colleagues, who sought not to consider at this time the future state of the aforesaid rights, did not address all of the above. I am in full agreement with this approach. In my opinion, prospective constitutional scrutiny is possible only when there is a high probability — perhaps I should say a very high probability — that the assumptions underlying it will be realized. A concern of a future violation of a protected right can be used to prevent that violation *ab initio* — and it is better to prevent evil before it occurs (HCJ 531/79 *Petah Tikva Municipality Likud Faction v. Petah Tikva Municipal Council* [67], at p. 572) — provided that there is a sufficiently strong basis for this in current data. This is the reason why I have difficulty in reconciling myself to a position that is based on a *potential* violation of rights, when the chances that it will occur are not currently known.

6. Indeed, the deliberations in this petition should focus on the current, rather than the future, violation inherent in delivering sovereign powers, and particularly the most fundamental ones, into private hands. I am prepared to agree that the privatization of prison services inherently exacerbates the violation of the dignity of the prison inmate. There is an element of humiliation in a person knowing that another, who is no different from him, is responsible for his imprisonment and exercises force to deprive him of what only the state usually has the power to deny, while that other is deriving a personal profit, which some say is considerable, from that imprisonment. I am also prepared to assume — and this requires further study of the conceptual basis of the idea of liberty that is comprehensively discussed in the opinion of my colleague Justice M. Naor — that imprisonment at the hands of a private concessionaire also exacerbates the violation of this important right. The essence of the matter lies in the idea connecting the power of the state to deny someone his liberty and the protection that he seeks against its being denied by another (a private individual), and in the words of the English philosopher John Locke:

> 'Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community…' (John Locke, *The Second Treatise of Government*, chap. 8, para. 95).

7. Two interrelated elements are subject to the scrutiny of the law that seeks to protect these rights: entrusting the power to private hands and the financial benefit involved therein. But before I discuss these, I will say that in my opinion it is a mistake — and in this I am in full agreement with my colleague Justice Procaccia — to think that the privatization naturally focuses on the economic interest of the concessionaire or on the savings in the state's expenditure relating to the prisons. Not merely from the public perspective, although this is of paramount relevance, the privatization seeks first and foremost to realize the public interest in having a proper and efficient prison system. This can be seen from the introductory remarks of the draft law that ultimately became amendment 28 of the Prisons Ordinance:

> 'The proposed arrangement is needed because of the crisis in Israeli prisons and the direct repercussions that this has on the conditions in which prison inmates and persons under arrest are held, as required by the provisions of the Basic Law: Human Dignity and Liberty, and by the provisions of the Criminal Procedure (Enforcement Powers — Arrests) Law, 5756-1996. The proposed law was drafted and formulated with a view to the main purpose — ensuring that giving the power to obtain assistance from the private sector will not harm the proper management and operation of the prison and the rights of the inmates, and that during the period of the contract with the private enterprise, the Israel Prison Service will carry out close supervision and control over it to ensure that it fulfils in every particular its undertakings under the agreement that will be signed with it and under the provisions of the proposed law' (explanatory notes to the Draft Prisons Ordinance Amendment (Privately Managed Prison) Law (no. 26), 5764-2003 (*Government Draft Law* 73, 5764, at p. 270).

The economic incentive is merely a tool in the service of the public interest. The financial profit is merely a means of achieving the purpose of

the amendment, which is an improvement in prison conditions and making the prison system more efficient. The degree to which it is possible to further this purpose depends, *inter alia*, on the incentive mechanisms stipulated in the arrangements with the concessionaire and on their proper functioning. There is therefore a similarity between the economic incentive given to the private concessionaire and incentives that influence the activity of government officials — promotion in salary and rank, recognition and decorations, professional training or the accumulation of pension rights. Even if I assume that the private concessionaire will always place his economic benefit first, the supervision of the activity of the private prison, which the public administration retains under its control, is solely a matter of the public interest. 'Public supervision of private activity is intended to serve the public interest' (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 72). This, in my opinion, is capable of mitigating the extent of the aforesaid violation of rights, but not eliminating it in its entirety.

8. Let us return to what is the heart of the question under consideration, namely the judicial scrutiny of the constitutionality of the violation of human rights. This focuses on the question of a balance of benefits that requires us to compare the extent of the violation of inmates' rights that is inherent in the actual privatization with the potential better protection of these rights as a result of that very same privatization. But what is the proper 'geographic' place (to use the term of Justice Y. Sussman in CA 404/61 *Skivinskaya v. Uroshitz* [68], at p. 363) for making this comparison of the benefits? It may be claimed that the proper place for making this comparison is at the stage of considering the violation of the right, when approaching the limitations clause but before entering into its conditions. Thus, if an executive act detracted from the protected right to a certain degree but at the same time added to it (or it is reasonable that it will add to it in the future), does this not mean that the right is not violated at all? And in the absence of a violation, there is no need to consider the conditions for legitimizing it, namely the limitations clause.

I cannot accept this approach.

Like my colleague the president, my approach also relies on the recognition that amendment 28 of the Prisons Ordinance should be examined by considering its effect on protected basic rights in the light of the provisions of the limitations clause. The balance of the benefit usually finds its main place within the scope of the last part of this clause — the test of proportionality in the narrow sense — which makes it possible to consider all

the aspects of the violation of the right, not merely from within, i.e., the balance of the benefit and the damage that are directly related to the right, but also from without, i.e., those that encompass principles and interests that are external to it.

9. Unlike my colleagues, however, I am of the opinion that there may be no need to make a comparison of the benefits that is naturally required for an ethical decision on whose outcome not everyone will agree. If it is found that the amendment of the Prisons Ordinance is incapable of achieving the purpose for which it was intended (the first test of proportionality), or, alternatively, if it is possible to point to an executive act that will violate the protected right to a lesser degree (the second test of proportionality), then it is possible to reject the executive act that causes the violation, irrespective of the complex question of whether ultimately it is a force for good or not. Judicial scrutiny ought to act in this way, especially where it concerns a law of the Knesset, which reflects decisions of the greatest importance, which in our case are decisions of economic and social policy that the legislature addressed in depth. Indeed, if it is possible (although this is not always the case) to base the judicial scrutiny of laws on clear reasons, which are not vague or the subject of dispute, it is best to do so. This is the case with regard to the type of test that is applied by constitutional scrutiny, and it is also the case with regard to the content of the test that is used in each individual case.

However this may be, the main point in my opinion is that the *limitations clause* does not provide a firm foothold when we are dealing with theoretical assumptions. As I have said, it requires a high probability that each of the elements that need to be considered exist. It is only natural that it should prefer an examination that can be placed in perspective. But 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.

On this point also I cannot follow in my colleagues' footsteps. Personally, I am of the opinion that another outcome of the comparison of benefits is possible, depending upon the manner in which the arrangement is implemented in the future. According to my approach, it is therefore not right to make the comparison at this time, but since we are dealing with a question

that is basically an ethical one, I would like to make two comments in this regard.

First, whatever the attitude to privatization may be, it is not possible to ignore the fact — and this should be placed on the scales to counter the factors that oppose the privatization — that there are other cases where the privatization of core powers has already become firmly rooted in our legal system and it is clear that we have become reconciled to them (but see and cf. CrimA 4855/02 *State of Israel v. Borovitz* [37], at p. 833). One example actually comes from the field of sentencing. I am referring to the serving of a custodial sentence by way of unpaid work, which is enshrined in article B1 of the Penal Law, 5737-1977, and which is not necessarily served in state institutions but also in institutions that, although they do not operate on a profit-making basis, are defined as private. Another example is provided in the Treatment of Mentally Ill Patients Law, 5751-1991, which authorizes a district psychiatrist to hospitalize mental patients forcibly even in private hospitals (s. 9 of the law). An additional prominent example is that of administrative collection under the Taxes (Collection) Ordinance, in which various authorities are given a possibility of resorting to the assistance of private collection companies, and nothing need be said about the coercive force that they employ. We have also for many years reconciled ourselves to the *de facto* privatization of security services at public sites, especially in the last decade. And is not the reliance on defence counsel from the private sector, within the framework of the praiseworthy activity of the Public Defender's Office, not a *de facto* privatization of a task that the state sought to take upon itself? The same is true of the implementation by private enterprises, in a manner that some claim also involves the use of coercive force, of the 'Wisconsin plan' for increasing employment (D. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' 30 *Tel-Aviv University Law Review (Iyunei Mishpat)* 461 (2008), at p. 473). It is possible to discuss the similarities and differences of each of the examples brought, but it is hard to ignore the weight that has already been acquired in our society by the privatization of sovereign powers, some of which are quite close to the core activity of the state.

Second, we should set against the concern of a disproportionate violation of protected rights the supervisory mechanisms that have not been omitted from the normative arrangements surrounding the operation of the private prison. Those provided in the amendment to the Prisons Ordinance can be divided into two main classes: internal supervisory mechanisms, namely the

restrictions that apply to the activities of the concessionaire and its officers, and external supervisory mechanisms, namely the control exercised by bodies that are not a part of the prison management. The internal supervisory mechanisms are made up of several layers, where each layer adds a new element to the one before it, and all of them make up the complete system of control reserved for the state. The outermost layer gives the commissioner of the Israel Prison Service, with the approval of the responsible minister, the power to cancel the permit to operate the prison that was given to the concessionaire, when the concessionaire does not comply with the conditions laid down for it (s. 128I of the Ordinance). An additional layer concerns the identity and functioning of the prison governor, whose appointment requires approval and is subject to both continuous and periodic review (s. 128AJ of the Ordinance). At the same time, the governor is required to report to the chief supervisor on behalf of the Israel Prison Service of the use of various coercive powers against inmates, and of a concern of a breach of the duties that are imposed on the concessionaire's employees (ss. 128O and 128S of the Ordinance). The third layer of control mechanisms imposes similar restrictions on the other employees of the concessionaire (ss. 128V-128X of the Ordinance). The external supervisory mechanisms deal with the duty to appoint supervisors for the prison, whose function is to ascertain that the concessionaire and its employees are in compliance with the terms of the agreement and the law, and they are obliged to make investigations in any case where a complaint is received from an inmate with regard to his prison conditions (ss. 128AF-128AG of the Ordinance). An additional supervisory mechanism lies in the definition of the privately managed prison as an audited body within the meaning of s. 9(6) of the State Comptroller Law [Consolidated Version], 5718-1958 (s. 128AO of the Ordinance). Finally the law provides, in article 10, a broad supervisory mechanism in the form of an advisory committee for prison inmates' rights, rehabilitation, welfare and health, which has six members, including a retired justice of the District Court, a representative of the Public Defender's Office, a representative of the Criminology Council, a social worker and a representative of the Prison Inmates Rehabilitation Authority. This committee may speak with prison inmates and receive from the concessionaire any information that it needs (ss. 128AS-128BA).

10. Alongside all of these, the *agreement* deals extensively with the services that the concessionaire is liable to provide, including therapy and rehabilitation, education, food, and religious and health services; the rights of

inmates to furloughs, visits and the filing of claims and petitions regarding their prison conditions (appendix F of the agreement). An additional element in the agreement (appendix M, whose exact content was not brought before us, but which is discussed by the respondents in their response) provides criteria for examining the extent to which the concessionaire satisfies all the requirements. In this regard the agreement provides financial sanctions that will be imposed should the concessionaire not comply with targets or should an inmate die of unnatural causes (clauses 97-99 of the agreement). The agreement goes on to provide that if the prison is found to be unsuitable for inmates to live in, according to specified minimum conditions, the concessionaire will lose the payment for it. The respondents also claim there is a positive incentive mechanism, namely a payment to the concessionaire for strict observance of his duties, but I found no evidence of this in the text of the agreement submitted for our inspection. Finally, the agreement requires the concessionaire to permit Israel Prison Service authorities to conduct a professional inspection of the prison at any time (clause 91 of the agreement), and to establish a commission of inquiry for events that have major ramifications on its operation (chap. B5). In any case of an act, omission or breach of the agreement, the concessionaire is liable to the state and its representatives (clause 111 of the agreement).

In addition to the mechanisms that are addressed in detail in the amended law and the concession agreement, it is clear that the operation of an institution such as a privately managed prison — which is, at the very least, a dual-nature body and in my opinion is closer in status to an actual public body — is required to comply with the rules of administrative law. To these should be added the special rules for inmates' appeals against interim decisions; the rules of private law, including the application of constitutional public law norms; and the provisions of the criminal law; all of these are additional forms of protection that are *prima facie* capable of filling the void created by the lack of the disciplinary provisions and the rules of ethics that apply to civil servants (see D. Barak-Erez, 'Human Rights in an Age of Privatization,' 8 *Labour, Society and Law (Israeli Society for Labour Law and Social Security Yearbook)* 209 (2001), at p. 214; D. Spivak, 'The Rights of Prison Inmates and Arrestees in the Privatization Age,' 95 *HaSanegor (The Defence Attorney)* 40 (2005), at p. 43; HCJ 731/86 *Micro Daf v. Israel Electric Corp. Ltd* [69], at p. 460; CA 294/91 *Jerusalem Community Burial Society v. Kestenbaum* [34]).

If the question of financial incentives was discussed above, I should point out that I doubt whether the opponents of the law have taken into account in their decision an additional factor, which is that, in general, unlike the public administration in most respects, a private enterprise has no immunity against actions in tort. There is no basis, however, for deciding at this stage the question whether the umbrella of protection given to the state and its agents in the Torts (State Liability) Law, 5712-1952, can apply to the private concessionaire or not. In this matter s. 128K of the Ordinance, which states that 'The provisions under this Ordinance or under any other law, which apply to a prison, prison employee or inmate shall apply to a privately managed prison, a prison employee who has a position therein or an inmate held in custody therein,' may be relevant. On the other hand, see s. 128M of the Ordinance, which saw the need for an express provision that applies the provisions of the Penal Law, 5737-1977, to the concessionaire and its agents in the same way as it applies to civil servants. See also what is stated in the appendix to the concession agreement, namely that 'The concessionaire knows that an inmate is entitled to file *claims* [in addition to inmates' petitions] in the competent courts, *on any matter and subject whatsoever* (chap. 7, chap. C4: Inmates' claims and petitions, clause 1.1, p. 769 of vol. 2 entitled 'Appendix of Operating Services, part 1 (appendix F of the concession agreement — emphasis added)). However this may be, it is clear that the law of torts, whether its scope is the same as that applicable to a public authority or broader, has a significant effect when we are dealing with a private concessionaire that is motivated by economic considerations. Prof. Zamir wrote:

> 'Even in the absence of public supervision there are legal arrangements that are intended to prevent a violation of rights and to compensate for such a violation. These are, *inter alia*, the law of contracts, the law of torts and the law of unjust enrichment. These laws make private supervision possible in a certain sense. The concern of a business enterprise that it may be sued in tort is likely, in certain circumstances, to be no less effective that a whole department of supervisors' (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 91).

If I have seen fit to describe at length the supervision and control measures, it is because in my opinion a significant effort has been invested in these aspects from the outset, and this should be given weight when examining the amended law. Adding these to the range of tools in the law

creates the complete final picture that is designed to ensure that the state has not divested itself of its powers but merely exchanged them for powers with a new content, namely that of supervision. These mechanisms of *indirect government* (*ibid*., at p. 89) should be examined on their merits. Their action needs to prove that it is effective. Their weight, in an age of privatization, is of paramount importance, since 'the change that has recently taken place in the character of the state, the spirit of the free market, increases the importance of supervision' (HCJ 7721/96 *Israel Loss Adjusters Association v. Commissioner of Insurance* [58], at p. 650). But not only is it too early to determine whether there is any basis for a concern that the limitations upon the operations of the prison at the moment will be transferred, possibly even with greater effect, to the field of supervision, but — and this is the main point — it is possible to increase the investment in their implementation before it is determined that the amendment to the Prisons Ordinance cannot stand.

11. My position, in brief, is therefore this: time will tell. It is possible that had this petition been brought before us several months after the arrangement began to be implemented, I would find that my colleagues, the majority justices, are right, and I would not hesitate to add my opinion to theirs. But it is possible that an improvement would take place in the miserable state of prison conditions in Israel, and then the law would satisfy the limitations clause and emerge from it crowned with a constitutional seal of approval. Moreover, it is possible that we would see, if only in part, a realization of the hope that the objects of the privatization, the concessionaires, will have the wisdom to not discharge their obligation to protect the rights of the individual (E. Peleg, *Privatization as Publicization — Privatized Bodies in Public Law* (2005), at p. 17), and the conflict between a policy of privatization and the protection of basic rights would no longer appear to be predestined. As I have already said, since judicial scrutiny cannot rely on vague assessments, my position is that it should be left to the proper time rather than the point in time in which we find ourselves today. 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 (Mishnah, *Moed*, Betzah ch. A).

I think that the rights argument is not only premature, but also does not properly reflect the nature of the main difficulty in the privatization of prisons. This difficulty lies in the intuition of many of the persons who

consider this issue, and not so much in the discussion of rights. Prof. Dafna Barak-Erez wrote:

> 'The question of the limits of privatization in constitutional law arises in two spheres. In the institutional sphere, the question is whether there are actions that cannot be privatized at all, since they are an integral part of the character of the state. In the field of rights the question is whether privatizations violate basic rights in a way that does not comply with the constitutional tests' (Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at p. 493).

Taking the bull by the horns — which is an essential element in any decision made by the court — therefore requires us to consider the institutional question, both from a fundamental viewpoint and also with regard to what it tells us about the areas where judicial scrutiny should be exercised in relation to Knesset legislation. Some of my colleagues discussed this question within the context of the issue of rights, since in their opinion the breach of the institutional principles in itself is capable of exacerbating the violation of inmates' rights. But some of the reasons that were given in my colleagues' opinion relied, as I see it, on the impropriety of the state divesting itself of its powers and its departure as a result from the basis on which a state is based, namely the idea of the social contract, which I shall consider now.

The political philosophy argument

12. According to Prof. Barak-Erez —

> 'First, there is no consensus with regard to the definition of the minimum core activity of every state. The variety of opinions in this field is large. Some people give the state a monopoly on the use of coercive force; others give it a monopoly on acts that have elements of sovereignty; still others give it a monopoly on the role of supplying public commodities' (Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at p. 493).

The question that lies at the heart of defining the powers of the executive branch in particular and of the state in general is a hard and complex one. Any discussion of it gives rise to many difficult and profound questions. Any decision on this issue involves ethical and moral outlooks. Its ramifications touch upon all walks of life, not merely legal ones. In general, it is best to

leave it, *inter alia*, to philosophers and scholars of political science. But in view of the position that the privatization involves a violation that 'lies in the field of the social contract on which the existence of the state is based' (*per* my colleague Vice-President E. Rivlin, *supra*), it would appear that there is no alternative but to address this matter in brief.

The heart of the matter is the principle of state sovereignty. An accepted outlook is that the sovereign state contributes to the combined happiness of its subjects by guaranteeing their safety and welfare. It is also possible to say that each member of the community has 'a civil genetic code,' which leads him to define himself not only as an independent and separate entity but also as a part of a larger social-human fabric, of which the prime expression today is the sovereign state. An important theoretical basis for the principle of sovereignty lies in the concept of the social contract, which is a cornerstone in the life of modern civil society.

The theories of the social contract, which were developed during the seventeenth and eighteenth centuries, give an answer to the question why people chose to abandon the natural state and change over to the civil state, i.e., to membership of communities, and later a state. They describe a process in which, supposedly, human beings had the sense to realize that if they formed a society, they could protect their natural rights in the optimal fashion. Therefore they agreed to assign coercive power and the power to make decisions and adjudicate issues that they had as individuals to one entity — the state, which is called sovereign — and to look to it to act in accordance with their combined will.

Although it is quite old, the idea of the social contract has not lost its appeal, and it is also used with reference to political issues in the modern age. Notwithstanding, like most philosophical theories, its practical application is not at all simple. It admittedly equips someone who is seeking a broad conceptual outline, which is of unparalleled importance, to understand and analyze issues, but it does not provide a specific solution to them. It has been said in our case law that 'the social contract is not a historical fact whose content can be determined, nor even a legal document, whose meaning can be debated. The social contract is merely an idea that gives expression to the ideal image of society' (HCJ 164/97 *Conterm Ltd v. Minister of Finance* [13], at p. 340 {62}). In the case before us, the theory of the social contract makes it possible to hold a general discussion of the question of the state's powers, including its most central ones, but it does not provide us, in my opinion, with a clear answer to the question of the privatization of prisons.

The primary explanation for this determination can be found in the supreme importance that some of the social contract approaches attribute to the legislature or to the actual acts of legislation. These are regarded by those approaches as the acme of the political entity, since they express the sovereign outlook and the combined will — a synopsis of the essence of the whole theory (Locke, *The Second Treatise of Government*, *supra*; Jean-Jacque Rousseau, *Du contrat social, ou Principes du droit politique*, 1762). And if this is the case, the idea of the social contract will not easily support the setting aside of a law of the Knesset.

Another aspect concerns the relationship between the sovereignty of the state and the manner in which it makes use of its powers. If the sovereign has a course of action which, if implemented, will further the safety and welfare of the citizens, not by leaving the stage but by replacing direct action with control and supervision, is it impossible that this method will be consistent with the concept on which the political framework is based? As I have already shown, supervisory tools that are properly exercised may be very powerful. Correct use of them, which is planned in the case before us, will not necessarily result in a reduction of the state's sovereign power. This use will allow the state to keep in its possession a significant part of the sovereign discretion, the ability to make decisions and exercise discretion in important matters, and the supreme and ongoing duty to ensure that human rights, personal security and public order are preserved. Thus the state can go on to realize the purposes of its existence and carry out its duties faithfully. 'A privatized state,' in the words of Prof. Zamir, is not necessarily 'any less of a state':

> 'The policy of privatization, which has the status of a conceptual approach or a social ideology, has left its mark on the way in which the proper relationship between the state and the citizen is conceived… According to this approach, the public administration does not need to provide services that the private economy is capable of providing efficiently and properly. Therefore, the main role of the public administration, alongside the provision of essential services that the private economy is unsuited to providing or is not capable of providing, is to supervise the provision of the other services by the private economy. In other words, according to this approach, direct administration should be limited, in so far as possible without undermining the quality of the service to the public, and should

> be replaced by indirect administration, which will ensure that the private activity does not harm the public interest. An accepted analogy in this context speaks of the ship of state; the ship contains both public administration officials and private individuals. According to this analogy, the public administration does not need to pull the oars, but should leave the rowing to private individuals, while it stands at the helm and navigates the ship in the correct direction… It is perhaps possible to call a state that is run in accordance with this approach a "privatized state"' (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 82).

The modern state is a developing and changing entity, and the arrangements in force in it also reflect the changes in the times, without this implying that the state has lost its sovereignty. Prof. Zamir goes on to say:

> 'The pendulum of services, which has for years moved from the private sphere to the public sphere, recently changed direction, and is beginning to move from the public sphere to the private sphere. There are those who say that the state is currently at a stage where it is changing into a new kind of state — a contract state. Notwithstanding, the state is not expected to lose its status as a main player in social and economic affairs in the near future' (I. Zamir, *Administrative Authority* (vol. 1, 1996), at p. 34).

This is the place to consider the idea — which sometimes appears to be merely a wish, but this does not mean that we should not seek to realize it — according to which a proper pattern of privatization is one in which the private concessionaires are regarded as active partners of the organs of government (Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' *supra*, at p. 469), in such a way that adds weight to the duty of public trust. It adds but does not detract. Thus, the constitutional and administrative duties that apply to these concessionaires beyond their obligations in the private sphere will also become a part of the broad and extensive structure of the state (Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*; G.E. Metzger, 'Privatization as Delegation,' 103 *Colum. L. Rev.* 1367 (2003)).

13. The ambivalence in applying the idea of the social contract to a concrete issue such as the one before us can also be seen from the writings of the main philosophers of the theory, *inter alia* in those passages that address

the sovereign power to punish. The position of the English philosopher Thomas Hobbes, who was the first to lay the foundations of the theory of the social contract, is perhaps the closest to the position of the petitioners. In his work *Leviathan or The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*, 1651, Hobbes listed what he called the rights given exclusively to the sovereign, including the right to punish, 'which make the Essence of Soveraignty' and therefore cannot be forfeited without an express renunciation of the sovereign power (Hobbes, *Leviathan*, chap. XVIII, para. 12). The task of administering punishment, which also includes the apprehension and imprisonment of offenders, was seen by Hobbes as the sole prerogative of public officials (*ibid*., at chap. XXIII), and he clarifies that he is speaking of agents of the sovereign — 'Ministers, in that they doe it not by their own Authority, but by anothers; and Publique, because they doe it (or should doe it) by no Authority, but that of the Soveraign' (*ibid.*). But in *Leviathan* there is another statement, according to which —

> 'and whosoever has right to the End, has right to the Means; it belongeth of Right, to whatsoever Man, or Assembly that hath the Soveraignty, to be Judge both of the meanes of Peace and Defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done…' (*ibid*., at chap. XVIII, para. 6).

Thus Hobbes apparently left in the possession of the sovereign the choice of the means to be used in realizing his goal. In any case, we should remember that Hobbes's theories, in addition to the fact that they were written in the seventeenth century and were influenced by the historical circumstances of the time, also include outlooks that are not consistent with — and are even the complete opposite of — those of the modern democratic state.

I shall return to the philosophy of John Locke, the author of the *Two Treatises of Government* (1690). With regard to the power to administer punishment, he held that every individual who is a partner to the social contract should forfeit his power to punish others 'to be exercised by such alone, as shall be appointed to it amongst them; and by such rules as the community, or those authorized by them to that purpose, shall agree on' (Locke, *Second Treatise of Government*, at para. 127). Locke went on to say:

> 'Of other ministerial and subordinate powers in a commonwealth, we need not speak, they being so multiplied with infinite variety, in the different customs and constitutions of

> distinct commonwealths, that it is impossible to give a particular account of them all. Only thus much… we may take notice of concerning them, that they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the common-wealth' (*ibid*., at para. 152).

It follows that there is no fundamental impropriety in the idea of assigning sovereign powers under certain conditions, and each community has different ways of realizing the social contract on which it is based.

I shall conclude this short and inexhaustive discussion by referring once again to the teachings of the Swiss-French philosopher Jean-Jacques Rousseau. In his aforementioned work, *Du contrat social, ou Principes du droit politique* (1762), he described the state as a combination of the strength, rights and wills of the individuals, and gave it the power to lead society to a life of peace and welfare, according to the general will. But even Rousseau did not explain the content of this general will, and it may be assumed that this was for the reason that it may change from time to time and from one society to another.

To the aforesaid I would add that although the importance of the social contract theory is not disputed, the many ideas relating to it are merely a part of a broad spectrum of ideas regarding political philosophy, and it has not infrequently been the subject of criticism. The Scottish philosopher David Hume, for example, argued in his work *Of the Original Contract*, 1748, that the social contract is nothing more than a conceptual development that was intended to justify the outlooks of its authors or to explain the prevailing political situation, but it lacks universal application. Hume thought that the basis for the existence of states is not a valid agreement between their inhabitants, which was never actually made, but the pragmatic realization of human beings that compliance with sovereign power is preferable to a state of anarchy. Therefore, civil societies continue to exist even when the sovereign who stands at their head does not meet the needs of the public in the optimal manner, and even when they are conquered by a foreign ruler (David Hume, 'Of the Original Contract,' in *Three Essays, Moral and Political*, 1748). Approaches of this kind can also be found in modern-day philosophers, who hold that the idea of the social contract does not correctly define the existence of the political society, which is not based on a real contract between its citizens (F. D'Agostino, 'Contemporary Approaches to the Social Contract,' in *Stanford Encyclopedia of Philosophy* (1996, revised

2008)). Much more could be written about the variety of outlooks concerning the proper image of the state, in which we could mention the approaches of socialist philosophy, according to which many activities of the state should not be abandoned to market forces, and by contrast libertarian philosophies that seek to reduce the scope of state intervention in the lives of individuals to a minimum. Thus there are different outlooks on both sides of the political spectrum.

The main point is that an attempt to rely on a general reference to the 'social contract' as support for an approach concerning the process of privatization will, in my opinion, have difficulty in succeeding. It is admittedly possible to speak of an 'Israeli social contract' (Peleg, *Privatization as Publicization — Privatized Bodies in Public Law*, *supra*, at p. 85), but then it will be necessary to give this idea content and outline its boundaries, so that it will be clear to what extent this or any other outlook is incorporated in the concept of privatization.

Even then, even if a strong basis is found for the position that the basic principles of political philosophy support the principle of leaving sovereign power — and especially its most fundamental elements — in the hands of the executive authorities, we shall still need a connecting link that explains in what way that a breach of this principle justifies judicial intervention in an act of legislation. This link may take the form of an express or an implied constitutional provision — possibilities that I shall now consider.

Arguments concerning constitutional values

14. The tools that are used for constitutional scrutiny are limited, and the reason for this is the restraint that this court has imposed on itself with regard to intervention in the acts of the legislative branch. The far-reaching consequences of judicial intervention in a legislative act — the result of the democratic decision of the members of parliament, who are the representatives of the sovereign, i.e., the people — are what dictate this restraint. Unlike administrative scrutiny, which is exercised with regard to appointed government officials that are required to limit their actions to the narrow confines of the law and are not entitled to overstep the authority given therein, constitutional scrutiny focuses on the actual source of the law, either with regard to the manner in which it was enacted, or — which is more complex — with regard to its content.

Much ink has been spilled on the sources of constitutional scrutiny. At various points during its history — and not merely in the age of protected

basic rights, as is sometimes thought — it has been a subject that has engrossed Israeli law. Contrary to what some people think, the courts, and especially this court, have acted with considerable restraint and with great caution in applying it. There are those who try to portray this involvement in constitutional scrutiny as a struggle of titans over the sources of influence and power. In reality, it is more similar to walking on eggshells. The great importance of legislative activity and of the activity of its source, the Knesset, runs like a golden thread through the case law of this court.

The constitutional idea was not invented by the Supreme Court. It was the Knesset that laid down the principles of the legal system in Israel. The mechanisms of entrenchment, both in form and in substance, were introduced into the Basic Laws by parliament. This court followed the instructions of the Knesset when it held that the Knesset and Local Authorities 5730 Elections (Funding, Limits on Spending and Scrutiny) Law, 5729-1969, violated the entrenchment provision in the Basic Law: the Knesset (HCJ 98/69 *Bergman v. Minister of Finance* [70]). It followed the instructions of the Knesset when it held that a list whose principles conflicted with what is provided in s. 7A of the Basic Law: the Knesset could not stand for election (EA 1/88 *Neiman v. Chairman of the Elections Committee for the Twelfth Knesset* [71]). The court followed the instructions of the Knesset when it determined that holding someone under military arrest for a protracted period (HCJ 6055/95 *Tzemah v. Minister of Defence* [5]) or that prejudicial transition provisions for regulating the occupation of investment management (HCJ 1715/97 *Israel Investment Managers Association v. Minister of Finance* [7]) were inconsistent with the limitations clause laid down by the Knesset in the Basic Law: Human Dignity and Liberty and in the Basic Law: Freedom of Occupation — Basic Laws that were deliberately drafted by members of the Knesset and that were enacted after comprehensive deliberations in the plenum of the Knesset and in committees.

15. There are different opinions regarding the theory underlying the restriction that the Knesset imposed on its power of legislation (CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [8]; HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28]). A case law rule that has been formulated, and which has been affirmed in a host of cases that have come before the courts in almost a decade and a half since, is that the Knesset has the power to restrict itself not merely with regard to the majority that is required to enact legislation or with regard to

other aspects of the legislative process, but also with regard to the *substance* of the legislation.

Thus, if the decision in *Bergman v. Minister of Finance* [70] reflected what may be called the first constitutional age, i.e., restricting the legislature to its own instructions regarding formal entrenchment (and see also HCJ 410/91 *Bloom v. Knesset Speaker* [72]), following the human rights Basic Laws, and in accordance with the express instructions of the Knesset, the second constitutional age began, which is characterized by a recognition of the Knesset's power to restrict itself with regard to matters of substance, for which the criteria are provided in the limitations clauses (s. 4 of the Basic Law: Freedom of Occupation and s. 8 of the Basic Law: Human Dignity and Liberty). This automatically led to the question of the status of the provisions laid down in the *other* Basic Laws in relation to 'ordinary' legislation of the Knesset. Justice I. Zamir addressed this for the first time in HCJ 3434/96 *Hoffnung v. Knesset Speaker* [3] with regard to the substantive restriction imposed by the principle of equality in the Basic Law: the Knesset. This is what he said:

> 'Does one law apply to a violation of a basic right and another law to a violation of the principle of equality in elections to the Knesset? I tend to think that despite the difference in the language of the laws, in this respect there should not be a difference in the meaning of the laws. Indeed, equality in the elections is a central value, and it deserves maximum protection, like that of the most important constitutional values, like that of basic human rights, like that of human liberty and human dignity. But I do not think that equality requires absolute protection, beyond the protection given to basic human rights, since equality, like basic human rights, is not an absolute right… It may therefore be possible that there is a basis for saying that a violation of substantive equality, in the context of the elections to the Knesset, is a violation of the equality of opportunities that does not satisfy the threefold test: the values of the state, a proper purpose and proportionality. Such an interpretation will lead to a proper harmony between the laws that lay down the constitutional values, which the interpreter seeks to achieve' (*ibid.* [3], at p. 70).

16. This idea has been adopted in recent decisions of this court and has become established case law. It has been held that by means of an analogy it

is possible to import into the provisions of Basic Laws that do not relate to rights of the individual a 'judicial limitations clause' by means of which legislation will be examined in accordance with core values on which the Basic Law is based:

> 'The threefold test of the limitations clause has been regarded by our judicial consciousness as a proper tool for examining the constitutionality of legislation. Now that it is one of the basic principles of our constitutional system, the court is entitled to apply it even when there is no limitations clause in the Basic Law in relation to which the legislation under scrutiny is being examined' (*per* Justice E. Mazza in EA 92/03 *Mofaz v. Chairman of the Central Elections Committee for the Sixteenth Knesset* [73], at p. 811).

See also the interim decision in HCJ 3511/02 *Negev Coexistence Forum v. Ministry of Infrastructure* [74], at p. 106 {170}; HCJ 212/03 *Herut National Movement v. Chairman of Central Elections Committee* [75], at p. 755; HCJ 1435/03 *A v. Haifa Civil Servants Disciplinary Tribunal* [76], at p. 539; HCJ 4593/05 *United Mizrahi Bank Ltd v. Prime Minister* [77], at para. 6 of the opinion of President A. Barak; HCJ 7052/03 *Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of Interior* [28], at para. 53 of the opinion of President Barak.

This development led to a new chapter — a third age — in the constitutional law of the State of Israel (see A. Bendor, 'Four Constitutional Revolutions?' 6 *Law and Government (Mishpat uMimshal)* 305 (2003), at p. 306). In this, not only has it transpired that the Knesset, as the author of the Basic Laws, has the power to protect basic provisions by means of the tool of formal entrenchment, and not only does it have the power to protect basic rights against executive acts that violate them, but additional constitutional values enjoy substantive protection, the limits of which still remain to be ascertained. With regard to the constitutional protection of these additional values, it has been argued that the idea of a case law limitations clause, which derives its form from the limitations tool mandated by the Knesset in the human rights Basic Laws, has been raised until now in the context of values, which even if they are not enshrined in the Basic Law: Freedom of Occupation or the Basic Law: Human Dignity and Liberty, are conceptually related to the idea of the protection of rights. The following was said by Prof. A. Barak several years ago:

> 'Indeed, the elevation of all the Basic Laws — and not merely those relating to human rights — to a super-legislative constitutional status requires a recognition of judicial limitations clauses in all those cases where these Basic Laws determine human rights… When the constitutional arrangement does not concern human rights at all, there is no reason to assume *ab initio* the existence of a judicial limitations clause and each case should be examined on its merits' (A. Barak, *The Judge in a Democracy* (2004, Hebrew edition), at p. 352).

This qualification needs to be reconciled with the finding that constitutional scrutiny applies also to 'government arrangements provided in a Basic Law (such as the Basic Law: the Government)' (*per* President Barak in *United Mizrahi Bank Ltd v. Prime Minister* [77], at para. 6), and also to 'a finding that is implied by the Basic Laws (such as a violation of the principle of the separation of powers and the independence of the judicial branch)' (*per* President Barak in HCJ 6427/02 *Movement for Quality Government in Israel v. Knesset* [19], at para. 73 of his opinion). Personally, since I am of the opinion that the principle of the Knesset having the ability to restrict itself applies to all those values that the Knesset thinks should to be protected against the passing majority, on the one hand, and that no value is absolute but only relative, on the other, I see no basis for making a distinction between values relating to human rights and other important values. I am prepared to assume that a limitations clause, in the form accepted by our constitutional law, will apply in determining the limits of the protection of all those constitutional values, i.e., even those constitutional values that express an important public interest that does not involve rights. I will even say the following: I see no reason for concern that this will lead to basic rights losing their special status in our law (cf. the remarks of Justice Dorner in CrimFH 2316/95 *Ganimat v. State of Israel* [51], at p. 645). Obviously, not every public interest should be recognized as a constitutional value, and those that should can find their proper place relative to constitutional rights in so far as a conflict between the two will arise. In *A v. Haifa Civil Servants Disciplinary Tribunal* [76] the court did indeed consider, albeit *in obiter*, the difficulty that arises *prima facie* when an act of legislation is required to satisfy the tests of two limitations clauses in two Basic Laws that enshrine values that conflict with one another (see the remarks of Justice Dorner, *ibid.* [76], at p. 541). Notwithstanding, I am of the opinion that a solution to this problem can be found in the principle of constitutional harmony, which is

presumed to lead to uniformity in the result of scrutiny of the law in relation to each of the limiting principles (and see the position of President Barak in that case [76], at p. 539).

17. I have only discussed all of the above for the reason that the basic principle on which the opposition to the privatization of prisons is based — that the sovereign authorities should have a monopoly on sovereign power — may be regarded as a basic constitutional principle even though it does not directly relate to human rights. The same is true with regard to the idea that undermining the symbols of sovereignty — for example by allowing prisons to be run by employees of a private concessionaire who will not wear state uniforms or don its symbols — may obscure the representative character of the state authorities, its image and its status as the source of the power to impose sanctions, thereby leading to a contempt for the law, enforcement and sentencing (D. Shichor, 'Private Prisons in Perspective: Some Conceptual Issues,' 37 *Howard Journal of Criminal Justice* 82 (1998), at p. 93; J.J. Dilulio, 'The Duty to Govern: A Critical Perspective in the Private Management of Prisons and Jails,' in *Private Prisons and the Public Interest* 155 (D.C. McDonald, ed., 1990), at p. 174).

However, within the framework of the construction that I have just discussed, the condition for this is that these and similar principles will find a foothold in one of the provisions of the Basic Laws (other than the Basic Law: Human Dignity and Liberty and Human Dignity: Freedom of Occupation). It might be argued that these principles are based on the provision at the beginning of the Basic Law: the Government, which states:

> 'Nature
>
> 1. The government is the executive branch of the state.'

However, I think that some of my colleagues rightly pointed out that 'there is a difficulty in finding a constitutional basis in s. 1 of the Basic Law: the Government for the power of imprisonment as a core government power that cannot be transferred' (para. 3 of the opinion of my colleague Justice Hayut, *supra*), since it is 'essentially a declarative section that is intended to establish in principle the role of the government in the Israeli constitutional system' (para. 63 of the opinion of my colleague the president). I also think that it is going too far to introduce into this provision far-reaching institutional arrangements, which provide a basis for the existence of the political society and reflect protected constitutional values.

This conclusion can be seen, first, from the legislative history of the Basic Law. The discussion of the nature of the first section was brief and inexhaustive, and as can be seen from the Knesset debates before the Basic Law was enacted, s. 1 was intended to be a 'declarative section that does not intend to exhaust all of the functions of the government' (minutes of the subcommittee of the Constitutional, Law and Justice Committee of the Knesset of 29 Shevat 5728 (28 February 1968)). From the drafting of the other clauses of the Basic Law, which sometimes are phrased in no uncertain terms, it can be seen that when the Knesset wished to do so, it knew how to define the powers of the government precisely and specifically.

Second, and more importantly, the meaning of the section may be seen from the way in which our law works in practice, which is not consistent with the explanation give by the petitioners. Prof. Zamir said:

> 'The impressive declaration [in the aforesaid s. 1] is imprecise. If it intends to say that the government has the role of implementing laws, as opposed to legislative and judicial functions, it is imprecise, since the government often carries out legislative and judicial functions also. If it intends to say that only the government implements the laws, this too is imprecise, since additional bodies are involved in the implementation of the laws… and if it intends to say merely that the government is the third branch of state, which completes the full complement of the branches of the state, this too is a description that leaves something to be desired, since the government is only a part, albeit a central part, of the third branch' (Zamir, *Administrative Authority*, *supra*, at p. 328).

Even if I read the provision of s. 1 literally, in a parliamentary democracy the executive branch is the branch responsible for the implementation of the norms that are determined by the legislative branch (see Locke and Rousseau, *supra*; E. Rubinstein, *Paths of Government and Law* (2003), at p. 92; M. Cohen, *General Powers of the Executive Branch* (2008), at p. 8). If the Knesset determined, therefore, that the government would transfer a part of the power of imprisonment to private enterprises, and that instead it would focus its activity, as the executive branch, on the control and supervision of those enterprises, without losing its power to cancel the privatization process at any time, I find it hard to understand how this conflicts with the constitutional role of the government. This does not mean that the Basic Law: the Government, including s. 1 thereof, does not enshrine constitutional

values, but merely that ascertaining what those values are goes beyond the scope of this case, and should be left to the proper time. In this regard, the remarks of Prof, Barak-Erez are apt:

> 'Of course, the Basic Law enterprise has not yet been completed, and those Basic Laws that exist do not address the question of what are the issues that the state and its organs must administer and what may be entrusted to the responsibility or the implementation of private enterprises. In practice, it is hard to expect there to be detailed arrangements in this sphere, even if the work of the Basic Laws were completed. The constitutions of other countries do not contain concrete provisions regarding the spheres of activity of the public administration. Accordingly, decisions [concerning privatization] are usually regarded as policy decisions' (Barak-Erez, 'Human Rights in an Age of Privatization,' at p. 211).

But even were we to follow the petitioners' approach, then, in my opinion, we should put the proposed principle to the test of the judicial limitations clause, and this would lead to the conclusion that in the absence of data that we could scrutinize with the aid of this legal tool, the scrutiny is premature. If it were found, for example, that the proposed arrangement allows the government to retain in its possession a sufficient degree of control over the imprisonment of the inmates in the private prison, would it be possible to determine with certainty that this constitutional principle, according to the petitioners, has been violated? For these reasons, I am of the opinion that, even in a written constitutional provision in the same vein as the provisions that protect human rights, there would currently be no basis for setting aside the amendment to the Prisons Ordinance at this time.

The argument concerning the basic values of the legal system

18. A discussion of the fundamental problem that lies, in the opinion of many, in the delegation of the power of imprisonment to a private concessionaire, creates a basis for the belief that even in the absence of a written constitutional source the necessary outcome would be that the law should be set aside. It is therefore impossible to escape the conclusion that according to those who hold this opinion, an alternative proposition, that would serve to develop judicial tools of a kind that has not yet been accepted in case law, would allow judicial intervention to eradicate that fundamental problem.

An idea of this kind is not unrealistic. It is also not new. It has a clear and express foothold in remarks uttered in the past by justices of this court, in minority opinions or *in obiter*. The misgivings of Justice Barak in this regard in *Laor Movement v. Knesset Speaker* [44] are well known:

> 'What is the validity of a law that conflicts with basic principles, such as the principle of equality? The question is relatively "simple" if the basic principles are enshrined in a rigid constitution or in an entrenched Basic Law. But what is the law if there is no rigid constitution, and there are no entrenched Basic Laws: is an "ordinary" law capable of determining an arrangement that conflicts with the basic principles of the system? … In principle and in theory, there is a possibility that a court in a democracy will set aside a law that conflicts with basic principles of the legal system… [but] according to the social and legal outlook that is accepted in Israel, the court does not assume this power to set aside a law that conflicts with basic principles of our legal system. It is not desirable that we should depart from our approach… at this stage of our national life' (HCJ 142/89 *Laor Movement v. Knesset Speaker* [44], at pp. 551, 554, and see also the references cited there).

A similar conclusion was reached by President Barak in the yeshivah students case (*Movement for Quality Government in Israel v. Knesset* [19]), in which he said, as my colleague Justice Hayut has already mentioned above, that —

> 'We should do all we can to decide questions of the constitutionality of a law that conflicts with basic values within the context of a decision regarding the constitutionality of the law in relation to a Basic Law. Israel is currently in the middle of a constitutional process that is being carried out through Basic Laws. Every interpretive effort should be made to decide the question of the constitutionality of the law within the framework of the arrangements provided in the Basic Laws' (*ibid.* [19], at para. 73 of the opinion of President Barak).

But if at this time our 'national life' implies a different approach, an expression of this can be found in the position of Vice-President M. Cheshin, who considered in *Movement for Quality Government in Israel v. Knesset* [19] the constitutionality of the Deferral of Service of Full-Time Yeshivah Students, 5762-2002. In his remarks, which are consistent with his position in

United Mizrahi Bank Ltd v. Migdal Cooperative Village [8], at p. 545, he said:

> 'The legal pyramid is built on the fundamental values of society and the state. These values nourish at the roots the norms prevailing in the state, without which the state could not exist. Even the Knesset, which itself exists by virtue of those values, will bow its head before them. [We should recognize] a possibility — admittedly, an exceptional possibility — that the basic principles as such will decide a legal dispute that undermines basic values of the state' (*ibid*. [8], at para. 11 of his opinion).

Vice-President Cheshin went on to consider the relationship between those fundamental values and the Basic Laws that had already been enacted:

> 'The Basic Laws are the most exalted laws in the legislative and legal fabric of the state, both in their essence and partially also in their formal strength. This is the case, even according to those who think — and I am one of them — that the Knesset does not have constituent power. But even the Basic Laws are not at the summit of the pyramid, or perhaps we should say, at its lowest foundations. They are surpassed by basic principles in our lives — principles from which even the Basic Laws derive their life-force. These principles are principles of natural law and principles of the theory of Jewish democracy. These are what watch over us from the highest heights' (*ibid*. [8]).

A similar expression of this idea served as the basis for the decision of this court four years earlier to the Bergman case in EA 1/65 *Yardor v. Chairman of the Central Elections Committee for the Sixth Knesset* [78]). There, admittedly, no law of the Knesset was set aside, but basic principles of the legal system resulted in the prospective frustration — in the sense of a 'future voidance' — of future laws 'that undermine the existence or integrity of the state' (*ibid*. [78], at p. 378).

19. It could be argued that recognizing the existence of basic values of the legal system as a tool for quasi-constitutional scrutiny is inconsistent with the positive constitutional arrangement, according to which what has not yet been included in the Basic Laws amounts to an expression that there is no constitutional protection for those missing values. Those who support constitutional theories that do not place the emphasis on the formal status of

the norm, i.e., on the fact that it is written, but only on its content, would argue that this position should be rejected. This idea of a material constitution focuses on the identification of norms that inherently seek to realize the constitutional purpose, and for this reason alone they become a part of the constitution (see, for example, B. Medina, '"Economic Constitution," Privatization and Public Finance: A Framework of Judicial Review of Economic Policy,' in *Zamir Book on Law, Government and Society* (Y. Dotan and A. Bendor eds., 2005) 583; S. Weintal, *'Eternal Clauses' in the Constitution: The Strict Normative Standard in Establishing a New Constitutional Order* (Doctoral thesis, The Hebrew University in Jerusalem, E. Benvenisti (supervisor), 2005)). Thus, for example, theories will be proposed that regard the constitution as a means of expressing the economic and political theory on which a community is based, or a means of enshrining the narrative on which it is based, since anything that is a part of the constituent elements of that community will be considered a super-legislative norm, whether it is expressly listed in the constitutional provisions or not.

But it seems to me that resorting to these constitutional or quasi-constitutional tools has not yet found a firm foothold in our law. Adopting an approach of this kind amounts to the beginning of a new constitutional era, a fourth age, whose boundaries have not yet been sufficiently outlined, and the same is true of the criteria on which it is based and on the operative consequences of a decision within that framework (see Prof. Medina, '"Economic Constitution," Privatization and Public Finance: A Framework of Judicial Review of Economic Policy,' *supra*, at p. 666). In the yeshiva students case (*Movement for Quality Government in Israel v. Knesset* [19]), President Barak did indeed say that:

> 'Even if there is a narrow field in which it is possible to examine the constitutionality of a law other than within the framework of the Basic Laws, this restriction on the power of the legislature applies in special and exceptional cases where the constitutional change undermines the essence of democracy and denies the minimum characteristics necessary for a democratic system of government' (*Movement for Quality Government in Israel v. Knesset* [19], at para. 73 of his opinion).

But the characteristics of a scrutiny of this kind have not yet been discussed, and a limitations clause is not merely designed to limit the legislature, but also the scope of the constitutional scrutiny exercised by the judicial branch. We are therefore entering a legal field that has not yet been

fully ploughed, and if it has been ploughed, it has not been fully sown, and if it has been sown, the time of harvest has not yet arrived, since this issue has only been addressed in a limited number of cases and has not become established case law. It is possible that it is also for this reason that my colleagues decided to focus their consideration of this case on rights, a very fertile soil which has been well cultivated in our legal system.

20. But if there is a difficulty in adopting at this time a constitutional position that examines the privatization of a prison from the perspective of the basic values of the legal system, it too is subject to a premature decision. The basic principles of the legal system, the constituent values, if you will, are not subject to perpetual immutability. Even if they are not exposed to the whims of passing trends, they develop and change just as a new page is written from time to time in the story of the nation. It is difficult, in my opinion, to accept the finding that an innovative idea of privatization, which only recently hatched in the nest of the law, is doomed by the basic principles of the legal system even before it has spread its wings. Were this idea given sufficient time, and especially if it were regarded as a success, who can say that it would not be welcomed and become an integral part of the accepted principles of our legal system, just as other expressions of the idea of privatization have been incorporated in it? It is also for this reason that, in my opinion, the issue at the heart of this petition should be left to be examined from a satisfactory perspective, which is not yet possible.

Moreover, if we are dealing with fundamental outlooks, is there no basis for the question of what the constituent values of our legal system would tell us with regard to the proper scope of judicial scrutiny? Is the approach that 'Such an important and fundamental decision should be made — at this stage of our national life — by the people and its elected representatives' (*Laor Movement v. Knesset Speaker* [44], at pp. 554) still valid for deciding this petition? This issue should be considered carefully before it is decided one way or the other.

The question of privatization as a policy issue and public debate thereon

21. I do not want my remarks to be understood as support for the idea of privatization, nor as expressing any reservation with regard thereto. One can conceive of arguments against this idea, such as the argument that the first to be harmed by it, as well as the first to be used by it as social 'guinea pigs,' will be the weaker elements of society (Zamir, 'Public Supervision of Private Activity,' *supra*, at p. 83, note 63). Like every case of privatization, it is possible to examine the issue from the perspective of the concern of a

negative effect on work relations in the economy. And naturally, the question of its influence on the image of the state lies at the heart of the matter. But these claims, contrary to those that I discussed in the previous part of my remarks, basically amount to policy and outlook (see Dotan and Medina, 'The Legality of Privatization of the Provision of Public Services,' 37 *Hebrew Univ. L. Rev. (Mishpatim)* 287 (2007), at p. 330). As such, these arguments cannot be used — and, in my opinion, have not been used — by this court in its decision. This is not for the reason that the court does not make value-based decisions. We make these when we determine the proper model for defining a protected right (Prof. Medina in '"Economic Constitution," Privatization and Public Finance: A Framework of Judicial Review of Economic Policy,' at p. 648). We sometimes make these when we examine a violation of a protected right by means of the test of proportionality 'in the narrow sense,' or when striking a balance between it and the values of the State of Israel as a Jewish and democratic state. We make value-based decisions in additional contexts. But case law has always sought to keep away from decisions in which the weight of political policy is predominant:

> 'The basic premise is that the role of legislation has been given to the legislature. It is the faithful representative of the sovereign — the people. The question is not whether the law is beneficial, effective or justified. The question is whether it is constitutional' (*per* President Barak in *Israel Investment Managers Association v. Minister of Finance* [7], at p. 386).

Indeed —

> 'The proper scope of the phenomenon of privatization [is] generally a function of an extra-legal worldview. Consequently, the decision concerning it should be made in the public arena, and in general it should not be removed from the political sphere to the legal one. It is important to maintain the distinction between presenting a civil outlook with regard to actions that *should* not be privatized and presenting a legal position with regard to actions that *may* not be privatized. Establishing legal restrictions of a constitutional character should not be the typical way of dealing with all privatization initiatives' (Prof. Barak-Erez, 'The Public Law of Privatization: Models, Norms and Challenges,' at p. 466).

In this regard it should be emphasized that there has been great debate in recent years on the subject of privatization. The literature, both legal and otherwise, is considerable and it would seem that the public is not apathetic to what is happening. The subject has been discussed in the Knesset in proceedings that led to the enactment of the amendment to the Prisons Ordinance. The committee responsible for the law — the Internal Affairs and Environment Committee — considered the idea of privatization at length, together with representatives of a wide variety of bodies, including the Israel Prison Service, the Ministry of Finance, the Ministry of Public Security, the Ministry of Justice, the Attorney-General's Office, the Association for Civil Rights in Israel, academics and even a representative of the petitioners. The deliberations focused not merely on the proposed amendment, but on a variety of subjects relating to the question of privatization in general and privatization of prisons in particular, including overcrowding in Israeli prisons, the likelihood of the idea of privatization succeeding and its economic efficiency, the supervisory mechanisms provided in the law and the question of how effective they will be, economic incentives in the agreement with the concessionaire and the degree of protection for inmates' rights, as well as the nature and scope of the powers given to the holders of various positions in the private prison. Positions were heard from both camps, and one of the sessions was even devoted to a guest lecture of an expert opposed to the privatization (see the minutes of the meetings of the Internal Affairs and Environment Committee of the Knesset, between the months of December 2003 and March 2004).

In such circumstances as these, when, as I have said, the constitutional scrutiny is premature, my reply to the petitioners is that the 'conceptual and mental process,' to use the expression of Prof. Zamir ('Public Supervision of Private Activity,' *supra*, at p. 84), which is inherent in the decision to privatize a prison, should be left to the various fora of public debate. Whether 'the needs of society and the ways of the leadership of the modern state should limit themselves to the legal frameworks of the past' (*per* Justice M. Cheshin in HCJ 1074/93 *Attorney-General v. National Labour Court* [79], at p. 505), or whether they should find new tools should be left at this stage to the democratic dialogue. It is true that 'Where the sovereign finds that social and economic conditions justify changes in economic policy by means of a privatization of public services, the sovereign's right to implement such a policy should be recognized' (*per* Justice D. Levin, *ibid.* [79], at p. 504), but only — I would add — when constitutional conditions so permit.

Finally, regarding the legislative proceedings

22. Rejecting the substantive constitutional argument, with its various aspects, makes it necessary to return to arguments raised by the petitioners in another sphere, with regard to the propriety of the legislative proceedings, and I shall do this briefly. No one denies that the court also has power to exercise judicial scrutiny over proceedings in the Knesset, where a fundamental flaw has occurred (HCJ 761/86 *Miari v. Knesset Speaker* [80], at p. 873); HCJ 975/89 *Nimrodi Land Development Ltd v. Knesset Speaker* [81], at p. 157). But when it does this, the court acts with caution and restraint, and it will not lightly set aside a law, which is as it should be, in view of the principle of the separation of powers and the exalted status of the legislative assembly (HCJ 4885/03 *Israel Poultry Farmers Association v. Government of Israel* [82], at p. 40 {408}).

The petitioners ended their petition with a claim that in the course of enacting the amendment to the Prisons Ordinance major defects occurred, and these go to the heart of the democratic parliamentary process. It was claimed that the sessions of the Internal Affairs and Environment Committee of the Knesset took place very frequently and with undue haste, which prevented the participants from assimilating the material and considering their position in depth. The holding of a tender by the respondents, in which they undertook to compensate the winners if ultimately the privatization process was unsuccessful, before the law was passed, tied the hands of the members of the Knesset, who no longer regarded themselves as free to consider rejecting the idea of the privatization in its entirety. The respondents even refrained, so it is claimed, from presenting to the Knesset the draft tender and the names of the companies that won it, and thereby they undermined the transparency of the legislative proceedings. Finally, in the vote on the approval of the law in the committee, members of the Knesset took part without participating in the deliberations, and one of the opponents of the law was even replaced by another representative of his party, who supported the law.

These claims do not give rise to a ground for our intervention in the content of the law that was passed. First, an examination of the minutes of the deliberations of the Internal Affairs Committee and the comprehensive proceeding that took place as set out above undermine the claim that the members of the Knesset did not succeed in understanding the nature of their decision. Second, even if taking steps to realize the draft law when it was still under consideration was inappropriate, there is no basis for the conclusion

that advertising the tender prematurely tied the hands of the members of Knesset or affected their discretion in any other way. Third, this petition focused on the constitutionality of the law, as opposed to the legality of the tender proceedings, an issue that was the basis for another proceeding that took place in the District Court, and in that too the opponents' claims were rejected. The failure to disclose the tender documents is therefore not a substantive matter, and I fail to see how the lack of disclosure led to a fundamental defect in the legislative proceedings that justifies judicial intervention. Finally, and most important of all, this court has held in the past — *per* my colleague President Beinisch — that the role of judicial scrutiny 'is not to ensure that the Knesset carries out the optimal legislative process… [and] also not to ensure that the Knesset carries out a responsible and balanced process for each draft law' (*Israel Poultry Farmers Association v. Government of Israel* [82], at p. 54 {426}). Judicial scrutiny limits itself to the elimination of a concern of a serious and blatant violation of the basic principles of the parliamentary system — a departure from the principles of majority decision, free voting, equality between voters and the publicity of the proceeding (*ibid.* [82]), and I have found no such violation in the case before us. In view of all this, the claims concerning defects in the legislative proceeding cannot stand, and should be dismissed.

Summary

23. 'Before the court sets aside a law' — Justice Zamir wrote — 'it needs to take time to consider the matter, to examine thoroughly the language and purpose of the law and to ensure that it is absolutely convinced that it contains a problem that cannot be remedied' (*Hoffnung v. Knesset Speaker* [3], at p. 67). I have not been persuaded, at this time, that the legislature passed a law that contains a problem that cannot be remedied.

It seems to me that this is a case in which it would have been better to have first exercised judicial restraint and allowed the Knesset, public debate and experience to have their say.

Therefore, if my opinion were accepted, we would deny the petition.

Petition granted by majority opinion (President Beinisch, Vice-President Rivlin, and Justices Procaccia, Grunis, Naor, Arbel, Joubran and Hayut), Justice Levy dissenting.

2 Kislev 5770.

19 November 2009.