

HCJ 2605/05

Petitioners:

- 1. Academic Center of Law & Business, Human Rights Division**
- 2. Major General (Retired) Shlomo Twizer**
- 3. Yadin Machnes**

v.

Respondents

- 1. Minister of Finance**
- 2. Minister of Public Security**
- 3. A.L.A. Management & Operation (2005) Ltd.**
- 4. The Israeli Parliament (Knesset)**

Petition for an Order *Nisi* in the Supreme Court sitting as the High Court of Justice

[October 27, 2005; June 18, 2006; August 31, 2006; July 8, 2007]

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

For petitioners: Attorneys Gilad Barnea, Aviv Wasserman, Efy Michaely, Yael Berda

For respondents 1 and 2: Attorneys Yochi Gansin, Ra'anana Giladi, Renana Keidar

For respondent 3: Attorneys Yuval Shalhevet, Boaz Pile, Rami Kook, Oren Roth

For respondent 4: Attorneys Nurit Elshtein, Roxanna Sherman-Lamdan, Iddo Eshet

Facts:

This is a petition challenging the constitutionality of the Law Amending the Prisons Ordinance (No. 28), 2004 (hereinafter: Amendment 28) which, for the first time, establishes (one) prison in the State of Israel to be operated and managed by a private corporation and not by the state. There are essentially two levels to the petitioners' arguments: First, there is a tangible fear that the powers established in Amendment 28 – powers of incarceration – would be exercised by a private concessionaire, operating for profit, in a manner more harmful to the human rights of prisoners than the manner in which the same powers are exercised in prisons under the administration of the Israel Prison Service. Second, the petitioners argue that the transfer itself of the

authority to manage and operate a prison to a private concessionaire operating for profit violates the constitutional right to individual liberty and human dignity of inmates held in a privately-managed prison. It is further argued that Amendment 28 constitutes a violation of the constitutional rule in Section 1 of the Basic Law: The Government whereby “the government is the executive authority of the state.”

Held:

The High Court of Justice granted the petition by majority opinion (President D. Beinisch, with Vice-President E. Rivlin, Justices A. Procaccia, A. Grunis, M. Naor, E. Arbel, S. Joubran, and E. Hayut concurring in separate opinions, and Justice E.E. Levy dissenting), ruling that Amendment 28 is void in its entirety, for the following reasons:

President of the Supreme Court, Justice Dorit Beinisch (opinion of the Court): The point of departure for examining the constitutionality of Amendment 28 is that this is a law of the Knesset (Israeli Parliament) expressing the desire of the people’s elected representatives, and, as such, must be respected by the Court; therefore, the Court does not easily declare a law to be unconstitutional. The constitutional examination is conducted by strictly maintaining the necessary delicate balance between the principles of majority rule and separation of powers, on the one hand, and by protecting the underlying human rights and fundamental values of the Israeli political system, on the other, showing caution and restraint, and avoiding a redesign of the legislator’s chosen policy. This rule is especially correct with regard to intervention by the Court in matters reflecting economic policy.

Application of the aforesaid to the case at hand leads to the conclusion that Amendment 28, which allows for the establishment of a prison to be managed and operated by a private corporation, causes a violation of the constitutional right to individual liberty and human dignity of those inmates who are supposed to serve their sentences in said prison; this is due to the transfer itself of the authority to manage and operate the prison, from the hands of the state to the hands of a private concessionaire operating for profit. This violation of constitutional rights protected by the Basic Law: Human Dignity and Liberty (personal liberty and human dignity) does not meet the

test of its limitations clause (sec. 8 of the Basic Law) (the test of proportionality, in the narrow sense).

The constitutional problem raised by Amendment 28 concerns the transfer of responsibility for managing and operating a prison to the hands of a private concessionaire and, more specifically, the responsibility for matters specified in Sections 128L(a)(1) and 128L(a)(2); namely, the responsibility “for maintaining order, discipline and public security” and the responsibility “to prevent the escape of prisoners being held in custody.” Traditionally, these powers are clearly held by the state, by virtue of its sovereignty, and they reflect the political principle granting a monopoly to the state in the exercise of organized force designed to further the general public interest – a fundamental principle that is an integral part of the constitutional right to individual liberty. When the state, through its authorized bodies, is the one that exercises the coercive power entailed in depriving prisoners of their freedom and is the one actually responsible for the deprivation of liberty, this bestows greater legitimacy to the violation of the constitutional right to personal liberty of said prisoners. When the power to deprive an individual of his liberty is placed in the hands of a private corporation, this detracts from the legitimacy of a prison sentence and there is a much stronger harm to personal liberty; this is because the punishment is enforced by an entity that is motivated, first and foremost, by economic considerations, which are essentially irrelevant to the realization of penal objectives, which are public goals.

Furthermore, transferring the power to incarcerate prisoners into the hands of a private corporation operating for profit, in and of itself “independently” harms the human dignity of the inmates of the prison under private management. This is because it undermines the underlying public objectives of incarceration, which grant it legitimacy, and their imprisonment becomes a means for profit by a private corporation.

Given the severity of the infringement of constitutional rights resulting from the transfer itself of the powers of incarceration to a private corporation, and the harm that this entails, the supervisory mechanisms and various limitations on the scope of the concessionaire’s powers, as set forth in Amendment 28, are insufficient safeguards against the potential harm to protected constitutional rights.

Is this a permissible harm? The relation between the intended social benefit of an improvement in conditions of incarceration and a maximization of savings by a

private concessionaire (the goal of Amendment 28), on the one hand, and the severity of the attendant human rights violation, on the other, do not withstand the third of the secondary tests of proportionality (the narrow test of proportionality), and therefore do not satisfy the proportionality requirement in the limitations clause of the Basic Law.

The harm described above – an intense violation of rights at the hard core of human rights – is not justified by the resulting benefit – insofar as there is any such benefit – in the economic savings to be expected from the establishment, management, and operation of a prison by a private corporation. The establishment of prison authorities operating on behalf of the state is designed to achieve law enforcement objectives by incarcerating prisoners lawfully sentenced in order to realize penal goals with tools and by means allocated for this purpose by the apparatus of a democratic government. There is no dispute regarding the need to protect the welfare and to improve the conditions of prisoners in Israel; however, to blur the boundaries between this worthy goal and that of incarceration designed to achieve economic savings – by allowing a private concessionaire to profit financially from running a prison – is to disproportionately violate human rights and principles dictated by the democratic nature of the regime.

Therefore, Amendment 28 is unconstitutional. Since the arrangement set forth in Amendment 28 is comprehensive in structure and content, with the grant of powers related to the exercise of force against prisoners being an integral part thereof – there is no alternative but to declare that Amendment 28 is void in its entirety.

Since this is the outcome, the High Court of Justice was not required to address the serious arguments raised by the petitioners regarding the potential violation of human rights suffered by prisoners held in a privately-operated prison as compared to those of inmates in public prisons. Although the fears raised by the petitioners are not baseless, they concern a future violation of human rights, the potential of which is uncertain; accordingly, it is doubtful that this is sufficient to establish a constitutional basis for voiding primary legislation enacted by the Knesset.

Regarding the violation of Section 1 of the Basic Law: The Government, the Court held that there is no tangible need to decide in this matter, despite its view that this provision “constitutionally establishes the existence of a ‘hard core’ of government powers, which the government, as the executive authority of the state must exercise on its own and is forbidden from transferring or delegating to private

entities. And, as it emerges from the aforesaid, the powers entailed in the incarceration of prisoners and the exercise of organized force on behalf of the state are indeed included within the bounds of said ‘hard core.’ Naturally, an acceptance of this type of interpretation would require that the boundaries of said ‘hard core’ be drawn clearly; this is because it may be assumed that there is no constitutional impediment preventing the privatization of a vast number of governmental services provided by the state, and this is a matter primarily within the discretion of the legislative and executive authorities.” In any event, given the outcome reached by the Court, a decision in this matter was unnecessary.

Justice Edna Arbel (concurring): Stressing three additional points: The exclusivity of the state in the exercise of coercive force; the violation of the human right to dignity resulting from the establishment of a prison under private management; and the fear of a conflict of interest in various aspects, embodied in the privatization of prisons.

Justice Asher Grunis (concurring): There is no need to rely upon human dignity when it is enough that we are dealing with a violation of individual liberty.

Vice-President Eliezer Rivlin (concurring): The harm entailed by the arrangement goes to the root of the constitutional democratic structure. It is even possible to assume that this is a harm that goes one step beyond the realm of basic laws, and is located in the realm of the social contract at the foundation of the state’s existence

Justice Ayala Proccacia: concurring with the ruling that the sovereign responsibility of the state to run prisons, and its obligation to exercise coercive authority over the individual, as part of the process of law enforcement and criminal punishment, are not transferable to private hands. This is due to the potential harm to the core of human rights granted to prisoners, which deviates from the permitted constitutional scope of the limitations clause in the Basic Law: Human Dignity and Liberty. Therefore, Amendment 28 should be declared void.

Nevertheless, with regard to the manner for analyzing the essence and nature of the harm to constitutional human rights caused by Amendment 28, Justice Proccacia’s opinion differs from that of the President. In her view, the constitutional harm caused by Amendment 28 is not the tangible violation of human rights, but

rather the potential danger that stems from a disproportionate violation of the human rights of an inmate held in a privately-managed prison, which exceeds the harm caused to every prisoner by incarceration itself. This is because the economic considerations motivating the private concessionaire – who is given sovereign, coercive authority – and the absence of adequate means for supervision and deterrence, such as those limiting the exercise of coercive force by a public service, would lead to a potential, “substantive, significant, and continuous” harm to the core of the fundamental rights of inmates in a privately-managed prison.

Furthermore, according to Justice Proccacia, the underlying statutory objective of Amendment 28 is to improve the welfare of the prisoner by reducing the severe overcrowding in prisons, to improve the services received by the prisoner, and to expand the rehabilitation programs available to the prisoner. (As stated above, it is the President’s position that the aim of the amendment is to improve prison conditions while maximizing economic savings, with an emphasis on the economic objective). (Even Justice Proccacia’s analysis accepts the conclusion that the harm does not pass the narrow test of proportionality pursuant to the limitations clause, and the Amendment should be voided in its entirety). She further rejects the possibility of using a “Blue Pencil” to isolate and remove certain terms, since Amendment 28 is a whole that can not be taken apart.

Justice Esther Hayut (concurring): Noting the problems also raised by this Amendment from the perspective of the public-at-large, as an amendment clashing with the fundamental principles of the Israeli political and legal system.

Justice Salim Joubran: Emphasizing that the transfer of a prison’s management to private hands does not just constitute a privatization of the powers associated with or supplementing punishment, but also a waiver by the state of a central layer of its sovereign power to punish its citizens (citing and relying on Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 235-36 (trans. Alan Sheridan, 1977)).

Justice Miriam Naor (concurring): Among other things, it may be said that there is a violation of the constitutional right to personal liberty even without relying on a fundamental “political” principle. Given the nature of the criminal process, and given that incarceration is a part of this process and of the criminal law, the transfer of

responsibility to private hands inherently harms freedom as a constitutional right in Israel. Indeed, Justice Naor also “illuminates” the violation of the constitutional right to human dignity from another perspective – the harm to the principle of equality among prisoners.

Justice Edmond Levy (minority opinion): Agreeing with his colleagues regarding the need to guarantee the fundamental rights of inmates. He is also willing to agree that the privatization of prison services increases the harm to the prisoner’s dignity, and even to assume that placing incarceration in the hands of a private concessionaire increases the harm to the right to personal liberty. Nevertheless, in his opinion, at this stage, prior to the implementation of Amendment 28, the examination is premature. In his view, forward-looking judicial review is only possible when there is a high likelihood, even very high, that its underlying assumptions would be realized. In his opinion, the limitations clause does not offer a stable foothold when it concerns theoretical assumptions. He also believes that it is proper to leave “the conceptual and emotional process,” embodied in the decision regarding the privatization of a prison, to the public discourse at its various levels.

This is not an official abstract or translation of the Judgment.