

Privatization: Between State and Market – Assessing the Prison Privatization Ruling

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In a seminal decision in 2010 the Israeli Supreme Court ruled that private prisons violate the constitutional right to human dignity. The opinion was considered a milestone in Israeli law because it was the first time the Court set a limit on the government's widespread privatization policy. The opinion gained wide public support. This article offers a critical reading of the prison privatization opinion and develops an alternative framework for analyzing state-market relations in privatization cases, a framework more suitable to this moment in the development of the Israeli welfare state.

The article's main argument is that the Supreme Court's opinion is the product of "institutional fetishism," an approach that assumes that the state and the market each have a single natural and necessary institutional expression. The article seeks to challenge this approach by showing that the state and the market, far from being inherently separate and distinct, are in fact mutually constitutive, fluid and dynamic institutional networks whose content as well as interconnections are malleable. The article suggests that in order to deal with the social and economic challenges of postindustrial welfare states it is time to rethink assumptions based on institutional fetishism. Institutional analyzers and designers should focus not on artificial state/non-state distinctions, but rather on a functional differentiation, that is attuned to the distributive outcomes of different institutional arrangements.