

The Contribution of Jewish Law to the Israeli Legal Doctrine of Prisoners' Rights

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In the significant rulings in which the Israeli Supreme Court developed the doctrine of prisoners' rights, Jewish law plays an important role. Some of the justices of the Supreme Court, first and foremost, Menachem Elon, considered Jewish law to be an important resource in defining the basic conception of prisoners' rights, the internal hierarchy of these rights, and the balancing formula between the rights on the one hand and the security and public interests of the prison system on the other. According to Elon, Jewish law was also significant in supplying the guidelines for the implementation of the rights in the complicated reality of imprisonment.

The centrality of Jewish law in the area of prisoners' rights may be surprising given the marginal role of imprisonment in the sources of Jewish law. Admittedly, the Bible tells of people being imprisoned,¹ but in biblical law, imprisonment does not appear as a punishment,² and in the literature

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1 For example, Joseph in Gen 39:20 or Jeremiah in Jer 32:2–3.

2 In two instances there is reference to detention before execution. See Lev 24:21 and Num 15:34. See also Menachem Elon, "Imprisonment in Jewish Law," in *Jubilee Book for Pinhas Rosen*, ed. Haim Cohen (Jerusalem, 1962), 172 (Hebrew); Aaron Kirschenbaum, *Jewish Penology: The Theory and Development of Criminal Punishment among the Jews Throughout the Ages* (Jerusalem: Magnes, 2013), 427–29 (Hebrew); Martin H. Pritikin, "Punishment, Prisons, and the Bible: Does Old

of the sages,³ imprisonment was almost entirely absent. Although it was mentioned that perpetrators of severe offenses, who could not be executed, were detained in a cell (a kind of dungeon),⁴ it is not clear whether this referred to imprisonment under harsh conditions or to a certain indirect type of execution.⁵ Later Jewish sources, from the Middle Ages and the early modern period, indicate that prisons were in existence in Jewish communities, but they were used also for temporary detention, until the end of legal proceedings, or as a means of pressuring recalcitrant husbands (who refused to grant a *get* to their wives) and debtors, and not only as an institution designed to punish offenders.⁶ The disparity between the straightforward meaning of the Jewish sources, which barely deal with the sentence of imprisonment, and the heavy weight ascribed to it by some of the justices of the Supreme Court when they formulated the Israeli doctrine of prisoners' rights, raises the question of the true contribution of Jewish law to the shaping of the doctrine. Has Jewish law indeed played a central role in the development of the Israeli legal doctrine of prisoners' rights, or has it had at most a rhetorical value, as a source of legitimacy for adopting a progressive legal approach?

To answer this question, we must first describe the Israeli legal doctrine of prisoners' rights⁷ and the stages of its formation. We begin by examining the background to the development of the doctrine, the formative stage, between 1970–92, when the legal doctrine was formulated, then trace its development during the constitutional era, from 1992 onward, when many prisoners' rights became constitutional.

Testament Justice Justify Our Retributive Culture?" *Cardozo Law Review* 28 (2007): 748–50.

- 3 Elon, "Imprisonment," 173–75; Kirschenbaum, *Jewish Penology*, 429–31; Pritikin, "Punishment," 750–51.
- 4 *M. Sanh.* 9:5.
- 5 Kirschenbaum, *Jewish Penology*, 256–61; idem, "Jewish Penology: Unanswered Questions," *Jewish Law Association Studies* 8 (1996): 128–29; Elon, "Imprisonment," 176–78; S. Shafat, "The Interface of Divine Punishment and Human Punishment in Rabbinic Thought" (PhD diss., Ben Gurion University, 2011), 245–51.
- 6 Elon, "Imprisonment," 185–96; Kirschenbaum, *Jewish Penology*, 431–34; Pritikin, "Punishment, Prison and the Bible," 752–53.
- 7 In this article, we are dealing only with convicted prisoners, not with detainees. Although there is an overlap between prisoners' and detainees' rights, the legal framework of these issues is different. Therefore, for the sake of coherence it is preferable to concentrate on prisoners' rights and treating the rights of detainees as the topic of another research.

During this discussion we will analyze the three elements of the Israeli legal doctrine of prisoners' rights: (a) the core of the doctrine, concerning the determination that a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken away by law; (b) the formula balancing prisoners' rights with the interests of prison authorities; and (c) the application of the prisoners' rights doctrine to new legal questions that emerge from daily life in prison.

The second part of the article examines the influence of Jewish law on each of the three elements of the Israeli legal doctrine of prisoners' rights. First, we investigate how different legal sources construct the Israeli doctrine of prisoners' rights according to the central rulings of the Israeli Supreme Court. At this stage of the discussion, we explore how the justices define the influence of Jewish law by comparison with other sources of legal inspiration. Next, in the critical part of our discussion, we investigate two separate questions regarding the influence that Supreme Court ascribed to Jewish law: (a) Is the Supreme Court's interpretation of Jewish legal sources sound and acceptable or is it innovative, and does it rest on the interpretative Jewish tradition or does it develop new and original readings of the sources? (b) Does the Supreme Court mention all the clear legal sources of the doctrine, or are the central ones omitted? Are there cases when, for example, modern common law doctrines are ascribed to Jewish law in Supreme Court rulings, and if so, why? The article concludes with an evaluation of the true influence of Jewish law on the Israeli legal doctrine of prisoners' rights.

1. Israeli Legal Doctrine of Prisoners' Rights

1.1 Background: The pre-doctrinal stage, from the establishment of the State to the 1970s

Until the 1970s, justices of the Supreme Court did not formulate any systematic doctrine regarding prisoners' rights. The very concept of "prisoners' rights" was barely mentioned. The legal examination of the conditions of incarcerated prisoners was carried out through an administrative review of the activities of the prison authorities. The criteria for this evaluation, and its limitations, were clearly formulated by Justice Cheshin, in the *Menkes* case:⁸

8 HCJ 94/59 *Menkes v. the Commissioner of Prisons* 1959 PD 13 1363, 1364.

We do not determine the prison arrangements. And it is not for us to delineate the way in which the Respondents (the Commissioner of Prisons) are to carry out their duty. This Court is required to protect civil rights, lest they are arbitrarily infringed by the administrative authorities. As long as these fulfill the provisions of the written law, they use properly and reasonably the discretion granted to them, and do not discriminate between citizens, this Court sees no need to provide relief for the sake of justice.

The term “prisoners’ rights” is not mentioned here or in the other rulings of the period, but the term “civil rights” appears in this ruling. The fact that Justice Cheshin mentioned civil rights in the context of a petition concerning prisoners’ rights shows that he believed that, like every citizen, prisoners also have rights, and that the handling of a prisoner’s case is not significantly different from that of any other citizen. The High Court of Justice must ensure, in the case of prisoners as well, that their rights are not violated and that the authorities treat them in accordance with the law, without discrimination, and exercise reasonably the discretion granted to them in the matter.

The criteria that Justice Cheshin established for administrative review were adopted in other rulings that dealt with prisoners’ petitions. In all the petitions, the High Court of Justice ensured that the administrative decision that was the focus of the petition was carried out according to law. If a decision was found to be contrary to the law, the Court ordered that it be annulled. For example, in the *Barder* case,⁹ the Court annulled the decision of the Commissioner of Prisons, on grounds of lack of authority, to withhold part of a prisoner’s money, so that it would serve as a fund for his future medical treatment. In rulings on prisoners’ petitions, the Court was often asked to examine whether an administrative decision amounted to improper discrimination, distinguishing between prisoners based on improper considerations. In several cases¹⁰ the Court ruled that if improper discrimination against the petitioner was proven, the Court would intervene and order that the action be annulled.

9 HCJ 105/61 *Barder v. Commissioner of Prisons* 1961 PD 15 1921, 1922.

10 HCJ 282/66 *Pahmawi v. Prisons’ Committee of Release* 1966 PD 20 (4) 121; HCJ 276/65 *John Doe v. Prison Service Commissioner* 1965 PD 19 281, 282.

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During this period, the High Court of Justice acted with great restraint with respect to the criteria that require reasonable exercise of discretionary powers and refrained from canceling administrative decisions regarding prisoners on grounds of unreasonableness. The definition of unreasonable decision in Israeli administrative law from this period was quite similar to the determination of Lord Green in the British ruling in *Wednesbury*.¹¹ “A decision... that no reasonable authority could ever have come to it.”¹² This definition included only the requirement that the decisions not be arbitrary and that they be based on logical and proper considerations. Criteria for assessment of the administrative discretion that appear in later rulings (from 1970 onward), such as weighing all the relevant considerations and establishing a proper balance between the interests of both sides, are not mentioned in rulings from this period regarding administrative petitions in general, or prisoners’ petitions in particular.¹³

11 *Associated Provincial Picture Houses v. Wednesbury*, [1948] 1 K.B. 223 (C.A.).

12 For a legal definition of unreasonable decision similar to the English ruling, see, for example, the opinion of Justice Berenson (C.A. 311/57 *Attorney General of Israel v. M. Dizengoff and Co. Ltd* 1959 PD 13 1026, 1029). With regard to prisoners’ rights, see the quotation from the *Menkes* case, above p. 30. For the development of the reasonableness test for intervention in administrative decisions in British law, see William Wade and Christopher Forsyth, *Administrative Law* (Oxford: Oxford University Press, 2009), 751; Margit Cohn, “Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom,” *American Journal of Comparative Law* 58 (2010): 583–629. For the development of unreasonableness in Israeli law, see Daphne Barak-Erez, *Administrative Law* (Tel Aviv-Jaffa: The Israel Bar Publishing House, 2010), 723–29 (Hebrew). For a comparison between British law and Israeli law in this issue, see Margit Cohn, “Unreasonableness in Administrative Law: Comparative Aspects and Some Normative Comments,” in *Or Book: Essays in Honor of Justice Theodore Or*, ed. Aharon Barak, Ron Sokol and Oded Shaham (Srigim-Lion: Nevo, 2013) (Hebrew).

13 Although judicial activism in general, and the evolution of unreasonableness review (as mentioned in the previous note) in particular, took place in several systems of law, some legal historians tried to explain the growing involvement of the Israeli Supreme Court in political decisions during the 1970s and the 1980s by historical and political events (for example the Yom Kippur War in 1973, the first Lebanon war in 1982, and the political turnabout of 1977) that undermined the stability of Israeli political system. Eli Salzberger noted “the decreasing ability of the political branches to reach coherent and far sighted... collective decisions, thereby leading to the delegation of decision-making powers to the courts” [“Judicial Activism in Israel,” in *Judicial Activism in Common Law Supreme Courts*, ed. Brice Dixon (Oxford: Oxford University Press, 2007), 223]. Menachem

1.2 The formative stage: From the 1970s to 1992

During this period, the Israeli doctrine of prisoners' rights, as we know it today, was formulated. The present discussion contains an overview of the historical development of the Israeli prisoners' rights doctrine and a detailed description of its three elements: (a) the core of the doctrine, the general attitude toward prisoners' rights, and the definition of their connection to human and civil rights in general; (b) the formula balancing prisoners' rights with the interests of the incarceration system; and (c) the application of the prisoners' rights doctrine to less trivial rights and to difficult cases that emerged from daily life in prison.

1.2.1 *The development of the core doctrine of prisoners' rights*

The main characteristic of the way in which the High Court of Justice treated the prisoners' petitions until the 1970s was the fact that it made no use of the discourse of rights and did not formulate a doctrine of rights. The first ruling in which the Court addressed prisoners' rights was in the case of *Rami Lioneh*.¹⁴ The ruling raised the issue of rights with reference to the reasonableness of an administrative decision. In the case at hand, the discussion was about the prison warden's order not to allow a book of Communist theory into the prison for fear that such books would provoke arguments between the prisoners and undermine order and discipline. It was clear that the prison

Hofnung emphasized the emergence of two political blocs (left and right) of equal size in the 1980s, which eroded the effectiveness of the political system. As a result, the Supreme Court became the only institution that was capable to make decisions in a controversial social issue ["The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel," *American Journal of Comparative Law* 44 (1996): 592–93]. In contrast to these views claiming that the Israeli Supreme Court was pushed by the events and the political situation to expand his involvement in political decisions, Menachem Mautner argued that the growing involvement of the Court in political issues was part of the effort of the liberal elite to preserve its power. The political turnabout in 1977 ended the hegemony of the Labor party, and the right-wing parties came to power, including social groups that until then had been excluded from political power, like new immigrants from Asia and North Africa and religious parties. To continue advancing their values and priorities, the old liberal secular elites resorted to judicial activism by transferring significant political powers from the legislative and executive branches to the Supreme Court, an institution in which the old liberal elite was heavily represented [*Law and the Culture of Israel* (Oxford: Oxford University Press, 2011), 143–58].

14 HCJ 144/74 *Rami Lioneh v. Prison Service* 1974 PD 28 (2) 686.

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warden had the authority not to admit such books, but Justice Cohn ruled that the decision was unreasonable. Maintaining calm in the prison is not sufficient reason for preventing arguments, and the prison warden must allow prisoners to conduct political arguments while ensuring order. Apparently, because the prison warden nevertheless acted out of a legitimate interest, Justice Cohn emphasized the interest that was critically harmed by this decision, which is the prisoner's spiritual freedom:¹⁵

Incarceration of a person does not deprive him only of freedom of movement. Many evils that are necessarily part of prison life are added to the denial of freedom. But we must not add to the necessary evils that cannot be prevented unnecessary and unjustified restrictions and harm... While incarceration in our prisons negates and limits the freedom of the body, it leaves intact the freedom of the spirit, and no one is entitled to revoke or restrict it.

The words of Justice Cohn already contain signs of the future doctrine of prisoners' rights, like the distinction between freedom of movement and other necessary infringements on the one hand and unnecessary ones on the other. Nevertheless, there is no mention of a right being violated but merely a poetic distinction between body and spirit.

The first structured development of a prisoners' rights core doctrine is found in the *Katlan* ruling,¹⁶ where the issue was a lack of administrative authority rather than unreasonableness, and the significance of the case lay in the characterization of the prisoner's rights as judicial rights. This ruling sought to clarify the legality of administering enemas to prisoners against their will to detect drugs in their bodies. The starting point for Justice Barak's ruling was a characterization of the right to human dignity and bodily integrity as a judicial rights that are also relevant to prisoners:¹⁷

Every person in Israel enjoys the basic right to bodily integrity and to the protection of his dignity as a human being. These rights are included in the "Charter of Judicial Rights," which was recognized by this Court. The right to bodily integrity and human dignity is also the right of the detainee and of the

15 *Rami Livneh v. Prison Service*, 690–91.

16 HCJ 355/79 *Katlan v. Israel Prison Service* 1980 PD 34 (3) 294.

17 *Katlan v. Israel Prison Service*, 298.

prisoner. Indeed, the prison regime demands, by its nature, the infringement of many liberties enjoyed by free persons, but it does not require the denial of the detainee's right to bodily integrity and the denial of protection against harm to his dignity as a human being.

The discussion of the rights appears at the beginning of the ruling because of the question whether the enema procedure needs to be enshrined in law. If it is possible to prove, from the outset, that the enema violates basic rights, it follows from the *Bejerano* ruling¹⁸ that it must be enshrined in law or regulation. In other words, the discussion regarding the question of authority depends on the discussion regarding the question of rights and on the development of an initial doctrine of prisoners' rights. Barak's distinction between the prisoners' rights that are unavoidably infringed by incarceration and those that are not necessarily infringed and that must be protected even under conditions of incarceration, stems from the legal discussion of the authority to order the examination by enema. If the enema infringed only the rights that the prisoner loses by necessity because of the mere fact of incarceration, no special authorization is required: the provision of the punishment in the law provides the necessary authorization. But if the criminal punishment does not necessarily infringe certain rights, a separate statutory provision is needed that permits their infringement.

In this ruling Justice Barak addresses only the basic rights of human dignity and bodily integrity that most likely could be recognized and respected also in prison conditions as well. During the 1980s,¹⁹ the Israeli Supreme Court discussed less elementary rights of prisoners, like the right to choose medical treatment or to vote for the Knesset (Israeli parliament). In these cases, Justice Menachem Elon needed to expand Barak's determination that prisoners have rights to human dignity and bodily integrity to all other rights

18 HCJ 1/49 *Bejerano v. The Minister of Police* 1949 PD 2 80, 82–84.

19 The construction of the prisoners' rights doctrine during the 1980s could be explained by the harsh report of the Kenth Commission, in 1981, regarding prison conditions in Israel. The Commission was established by the government after the uproar that erupted following the broadcast of two television shows, at the end of the 1970s, which exposed the dire conditions under which inmates were held. [See Uri Timor, "The Development of Prisons in Israel," *Glimpse into Prison: Crimes and Penalties in Israel—Theory and Application* 12 (2009): 17 (Hebrew)]. Judges used the doctrine to guide the authorities on how to protect prisoners' rights and diminish their infringement as much as possible.

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that are not necessarily infringed by the denial of freedom of movement. In the *Hukma* case,²⁰ Justice Elon formulated the core of the doctrine, describing it as a “fundamental rule”:

We have a fundamental rule, that a person is entitled to every human right by virtue of being a person, even when he is under arrest or imprisoned, and the fact of the detention alone does not deny him any right, except when it is necessary and stems from the denial of freedom of movement, or when an explicit provision in the law exists regarding it.

Justice Elon mentioned two groups of rights that can be violated in the case of prisoners: rights that are necessarily infringed by the denial of freedom of movement and rights that are infringed by an explicit provision of law. The second criterion expresses the pre-constitutional condition of Israeli law in the 1980s, in which an explicit provision of law could violate human or civil rights that were recognized by the Supreme Court (judicial rights).

1.2.2 *Development of the balancing formula between prisoners' rights and the interests of the incarceration system*

The core doctrine of prisoners' rights emphasizes that prisoners have the same rights as any other citizen and that these rights should be respected if they are not necessarily infringed by the limitations imposed by incarceration. It is not clear, however, whether basic prisoners' rights, like human dignity or physical integrity, which in principle can be respected even under conditions of prison, should be protected if in a concrete case they contradict an urgent need of the incarceration system, like security. Should these basic prisoners' rights be respected in all circumstances, or do the crucial interests of the incarceration system justify their violation? And if the latter is true, what should be the balance between prisoners' rights and the legitimate interests of the incarceration system?

These legal questions were raised in the *Darwish* case (1980).²¹ The ruling examined the order not to provide beds to state security prisoners, for fear that they would dismantle them, turn them into weapons, and endanger the

20 HCJ 377/84 *Hukma v. Minister of Interior* 1984 PD 38 (2) 826, 832.

21 HCJ 221/80 *Darwish v. Israel Prison Service* 1980 PD 38 (1) 536.

prison guards.²² In this ruling, there was disagreement between the Deputy Chief Justice, Haim Cohn, who supported the annulment of the directive not to provide beds to the prisoners, and Justices Kahan and Elon, who preferred to leave the directive in place in view of the security threat. The position of Justice Cohn was based on the fact that receiving a bed was part of the prisoner's basic right to civilized human life. He cited the UN Standard Minimum Rules for the Treatment of Prisoners, which states in Article 19 that "every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued." Because this is a basic right, it is granted to the prisoner even if it poses a security threat, and the prison authorities must be ready to confront the threat without depriving prisoners of their human dignity. Justices Kahan and Elon disagreed with Justice Cohn and argued that the directive not to provide beds for security prisoners was reasonable. It was based on a real security threat, one that had already materialized in the past, and on the fact that the infringement was not so severe, given that the prisoners slept on thick mattresses. Justice Kahan also disagreed with reliance on the Standard Minimum Rules for the Treatment of Prisoners, which have not been given legal validity in any country. In the *Darwish* ruling, the majority opinion held that even basic prisoners' rights are not absolute and that reasonable discretion of the prison authorities balances these rights with the security considerations of the prison.

The *Darwish* case illustrates an extreme instance in which a prisoner's basic right (sleeping on a bed) stood against the existential interest of the

22 This case deals with a group of prisoners who were convicted of offences against national security. Most of them were Palestinians from the occupied territories who were affiliated with terror organizations fighting against the occupation, Zionism, and the State of Israel in general. The group was significant in size. More than half the prisoners in the 1980s in Israel were Palestinians from the occupied territories, a portion of whom were criminal prisoners, but most were convicted on national security offences [see Ombudsman, *Annual Report* 36 (1984–85): 573–74]. But the issue of supplying beds to prisoners was not limited to Palestinian prisoners. According to the testimony of the Prison Service Commissioner, Avi Levi, to the Kenth Commission, in the beginning of the 1980s, many prisoners in Israel lied on the floor (Timor, "Development of Prisons," 19). It is reasonable to assume that this ruling is aimed at conditions in Israeli prisons in general. The only reason that can justify an absence of beds for prisoners is a well-founded concern for predictable harm to security. In all other circumstances, the absence of beds is indefensible.

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prison authorities to ensure prison security. In the *Tamir* case,²³ Justice Elon formulated a general balancing formula of prisoners' rights with various interests of the prison authorities, including such that have to do with reasonable investment of resources. Elon reached the general formula by reviewing court rulings that examined the reasonableness of decisions in which prisoners' rights clashed with the interests of the prison authorities. He cited the *Darwish*²⁴ and *Rami Livneh* cases, mentioned above,²⁵ as well as the *Abd al-Jafour* case,²⁶ which dealt with the right of adolescents to study under the Compulsory Education Law, and the difficulty of the prison authorities in allowing it. After discussing the rulings in each case, he devised the following formula:²⁷

In general, if the prison authorities wish to infringe on a prisoner's rights for reasons of balancing a given right granted to the prisoner with the duty of the authorities to prevent the prisoner's freedom of movement and with the need to safeguard the security of the prison, the prison authorities must not infringe this right unless they have a reasonable explanation and justification for it, for reasons of the safety of the public and of the regime of the prison of which they are in charge. The extent and proportion of the harm must not be greater than what is needed and necessary for these reasons... And the magnitude of the reasons needed to justify the infringement must match the magnitude of the infringed right.

The proper balance between prisoners' rights and the public interest of the prison authorities is based on several demands: (a) the interest of the prison authorities should be justified and based on the need to carry out the criminal punishment of restricting movement, as well as to serve prison security needs and the maintenance of prison arrangements; (b) the extent of the infringement of the right must not exceed the need to safeguard the interest (proportionality); and (c) the greater the right that is being infringed, the greater the justification required for the infringing interest. The third

23 APP 4/82 *Israel v. Tamir* 1983 PD 37 (3) 201.

24 *Israel v. Tamir*, 211–12.

25 See nn. 5–6, 8, and nn. 21 and 14.

26 HCJ 881/78 *Abd al-Jafour v. Warden of Damon Prison* 1979 PD 33 (1) 139.

27 *Israel v. Tamir*, 213.

demand was intended to distinguish between the *Darwish* case, in which infringement of fundamental rights of human dignity was permitted because of the need to ensure a vital security interest, and infringements of less basic rights, with respect to which is it possible to justify the infringement for the purpose of safeguarding less existential interests, such as considerations of proper prison administration and the saving of resources.

How can we distinguish between a fundamental right that requires a substantial justification to infringe it and a less fundamental one? In the *Weil* case,²⁸ Justice Elon stated that the definition of the right as a basic one depends on the values of society, which can change over time. An obvious example is the prisoners' right to vote, which has been rejected for years because of the technical difficulty of escorting prisoners to polling stations near their places of residence. Finally, after the Court made it clear to the legislature that such a basic right cannot be denied for technical reasons, the law was amended to allow the placement of polling stations in the prisons. In other words, the balancing formula of rights and interests has a "value-based" component. When the court reviews the reasonableness of an administrative decision, it must examine the balance between the rights and the public interests according to the values of society.

1.2.3 Implementation of the Doctrine of Prisoners' Rights

In the *Tamir* and *Weil* cases, another characteristic of the implementation of the prisoners' rights doctrine became manifest. In defining the relevant rights of prisoners, the Court did not limit itself to the basic rights that clearly persist in prison as well, such as the right to human dignity, bodily integrity, medical treatment, etc., but applied to prisoners other rights that may not appear to be relevant to life in prison, such as the right to choose medical treatment, which was debated in the *Tamir* case, and the right to conjugal visits, which was debated in the *Weil* case. The Court could have defined these as rights that are infringed by the very nature of imprisonment and cannot be realized, similar to the freedom of occupation. But the method of Justice Elon, who wrote the ruling in both cases, was the opposite: he defined the right to freedom of movement as the core right on which the prison sentence infringes, and he checked whether the prison sentence must necessarily infringe on any of the other rights and how such infringement can be minimized. In the *Tamir* case, Justice Elon examined when the right of

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the prisoner to choose his medical treatment becomes relevant;²⁹ in the *Weil case*, he examined when the prisoner can realize his conjugal rights despite the necessary limitations of incarceration.³⁰ Elon was assisted by the fact that he did not consider these rights separately, but together with existing rights. The right to choose medical care is part of the fundamental right to bodily integrity,³¹ which the Court had already discussed. The prisoner's conjugal right is also part of the right to human dignity,³² which had been discussed in previous rulings. In this way, prisoners' rights could be substantially expanded based on recognized judicial rights.

1.3 The constitutional stage: From 1992 onward

Enactment of the Basic Laws in 1992, which enshrined human rights (Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation), dramatically changed Israeli law. One may have expected that the area of prisoners' rights, which is concerned with preserving and guaranteeing human rights in the prison, would undergo a substantial change, as many of the prisoners' rights became constitutional. Yet, a review of subsequent Supreme Court rulings concerning prisoners' rights disproves this expectation.³³ In general, rulings following the constitutional revolution are consistent with the significant rulings of the 1970s and 1980s. It is difficult to find many innovations in them, although at times they explain in great detail what was stated briefly and vaguely in the earlier rulings. It is possible to identify, however, two points in which the doctrine of prisoners' rights has changed in the constitutional era.

- a. Until the enactment of the Basic Laws, the prisoners' rights could be revoked by an explicit provision of law. After the enactment, new statutory

29 *Israel v. Tamir*, 213–14.

30 *Weil v. Israel*, 499–503.

31 *Israel v. Tamir*, 206.

32 *Weil v. Israel*, 500.

33 See for example: DCR 4014/92 *Sason v. Israel* (published in Nevo, 26 August 1992); APP 4463/94 *Golan v. Israel Prison Service* 1996 PD 50 (4) 136; APP 1076/95 *Israel v. Kuntar* 1996 PD 50 (4) 492; APP 4714/04 *Amir v. Israel Prison Service* 2004 PD 59 (6) 145; HCJ 2245/06 *Dovrin v. Israel Prison Service* (published in Nevo, 13 June 2006); PAA 6956/09 *Yunes v. Israel Prison Service* (published in Nevo, 7 October 2010); HCJ 1475/10 *Cohen v. Attorney General of Israel* (published in Nevo, 14 April 2010); HCJ 1892/14 *Association for Civil Rights in Israel v. Minister of Public Security* (published in Nevo, 13 June 2017).

provisions needed to undergo constitutional review to determine whether they infringed rights mentioned in the Basic Laws, and if so, whether they met the tests of the limitations clause (compatibility with the values of the State of Israel, a deserving purpose, and the test of proportionality). This characteristic is not specific to the rights of prisoners and it applies to all infringements of human rights mentioned in the Basic Laws.³⁴

- b. Transformation of part of the prisoners' rights into constitutional ones (in other words, protected against infringement that does not meet the criteria of the limitations clause) changed the balancing formula between these rights and the public interests of the prison system. This is how Justice Mazza defined the change in the *Golan* case:³⁵

Yet, to the degree that the infringed right is more important and central, the greater weight will be ascribed to it within the framework of the balance between it and the conflicting interest of the authority. This approach has always guided our rulings. At present, after the human rights in our country have been enshrined in constitutional laws that have supra-legal constitutional status, we are obligated to be even more meticulous than in the past in safeguarding the human rights of prisoners...

The balancing formula for examining the reasonableness of the administrative decision has therefore not changed. The more important and central the infringed right is, the greater weight it is ascribed in the balance between it and the interests of the authority. What has changed is the status of the portion of the prisoners' rights that has become supra-legal (constitutional). The change requires that the decision maker or the judicial authority that reviews the administrative decision ascribe greater weight to these rights when seeking to balance them with the interests of the prison authorities.

34 Note that this is relevant only to statutory provisions that were enacted after the legislation of the two basic laws. The old statutory provisions (including most of the provisions of the Prisons Ordinance) are immune to change based on article 8 of Basic Law: Human Dignity and Liberty (Validity of Laws), which determined that "this basic law shall affect the validity of any law in force prior to the commencement of the Basic Law." For the interpretation of this article with regard to the Prisons Ordinance, see *Yunes v. Israel Prison Service* and *Cohen v. Attorney General of Israel*. See also Leslie Sebba and Rachela Erel, "Free-Style Imprisonment': On the Implementation of International Human-Rights Norms in Israel's Prison System," *Hukim* 10 (2017): 178–79 (Hebrew).

35 *Golan v. Israel Prison Service*, 151.

2. How did Jewish law influence the Israeli doctrine of prisoners' rights?

In this part we assess the influence of Jewish law on Israeli doctrine, with reference to the three main elements of the doctrine: (a) the influence of Jewish law on the core of the doctrine, that is, on the very determination that the prisoner has the same rights as ordinary citizens do, except for freedom of movement, the rights that are necessarily denied by virtue of the prison sentence, and the rights that are expressly denied by law; (b) the influence of Jewish law on the formula balancing the prisoner's rights against the public interest of the prison authorities; and (c) the influence of Jewish law on whether implementation of the doctrine is given a broad or a restrictive interpretation.

For each of the elements of the doctrine I describe first the legal sources of influence that are manifested in the central rulings of the Israeli Supreme Court dealing with prisoners' rights and the unique contribution of Jewish law, as opposed to other legal sources, to this ruling. In the second stage of discussion, I examine whether the interpretation of legal sources deriving from Jewish law by Supreme Court justices was sound or innovative. Likewise, I explore whether there are other legal sources that influence the construction of the prisoners' rights doctrine, which were not mentioned in Supreme Court ruling, and account for this omission.

Before delving into the discussion, it is necessary to clarify what we mean by the term "influence" in the context of this article. In legal scholarship, influence over judges or judicial writing refers to the basis for a given legal decision by a judge and attempts to break into the black box of the judge's conscience to reveal what really influences the judge's legal thinking and decision.³⁶ In this

36 This type of discussion is relevant when there are no explicit legal references in the ruling, and legal scholars need to reveal the external influences on the judge's legal decision; about the methodological problem with implicit legal sources in judicial writing see, for example, Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press, 2013), 72–73 and 222–23; David S. Law and Wen-Chen Chang, "The Limits of Global Judicial Dialogue," *Washington Law Review* 86 (2011): 527. The question arises also when citations of legal sources are present. In this case, legal scholars investigate whether the cited sources have truly influenced the judge's legal thinking or merely played an instrumental role in representing a legal preconception of the judge. For the role of citations in judicial writing see, for example, Bobek,

discussion, my aim is far less ambitious. I do not attempt to recreate the stages of legal decision making but to examine whether the judge's claim to base a ruling on Jewish law or other legal sources is sound. To this end, I investigate the Jewish and foreign legal sources that justices of the Supreme Court cite in the significant rulings of prisoners' rights and examine whether they could serve as a legal source for the legal conceptions that the justices try to ascribe to them. After analyzing the legal sources cited in the rulings, in the second stage of the discussion, I examine other legal sources that can shed light on the formulation of the prisoners' rights doctrine. In locating the legal sources, I endeavor to keep away from speculation and to focus on sources that could have reasonably affected the construction of Israeli doctrine of prisoners' rights. For example, if an Israeli ruling appears to be a nearly exact translation of the formulation of the basic principle of prisoners' rights doctrine present in previous common law rulings, it is reasonable to assume that these rulings were the main legal sources of the basic principle of the Israeli doctrine. Yet even in this stage of the discussion, I do not purport to reveal how judicial decisions regarding significant prisoners' rights were reached but merely to investigate reasonable legal sources of the doctrine formulated by the justices. This is not a historical analysis describing how Supreme Court justices reached significant judicial decisions about prisoners' rights but a legal doctrinal study investigating the reasonable legal sources of their argumentation.

2.1 How did Jewish law influence the core of the Israeli prisoners' rights doctrine?

As noted, Justice Menachem Elon was the first to formulate the "fundamental rule" of the prisoners' rights doctrine, according to which prisoners have the same rights as other citizens except the rights that are infringed by the denial of freedom of movement and those that are violated by an explicit provision of law.³⁷ Therefore, it is natural, when seeking the legal sources that influenced the core of the doctrine, to start with the two rulings of Justice Elon where it is first mentioned: the *Tamir*³⁸ and *Hukma* cases.³⁹

Comparative Reasoning, 225–27; David. J. Walsh, "On the Meaning and Pattern of Legal Citation: Evidence from State Wrongful Discharge Precedent Cases," *Law & Society Review* 31 (1997): 357–58.

37 See n. 7.

38 See *Israel v. Tamir*, 207.

39 See n. 20.

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When Elon addressed himself to the legal sources for the core of the doctrine in the *Tamir* case, he mentioned mainly Jewish law sources⁴⁰ that deal with issues related to the right to human dignity during the process of punishment. The first source he quoted is from chapter 24 of the Laws of Sanhedrin in Maimonides's Code.⁴¹ In law 9 in this chapter, Maimonides detailed several modes of punishment that rabbinic courts can impose upon criminals, including imprisonment. In law 10, Maimonides added:

With regard to all these disciplinary measures discretionary power is vested in the judge....But whatever the expedient he sees fit to resort to, all his deeds should be done for the sake of Heaven. Let not the honor of human beings be light in his eyes; for the respect due to man supersedes a negative rabbinical command. This applies with even greater force to the honor of the children of Abraham, Isaac and Jacob, who adhere to the true law. The judge must be careful not to do aught calculated to destroy their self-respect.

It is clear from this passage that according to Maimonides, the honor of human beings should be protected even when one is punished, which is what Elon sought to prove.⁴²

40 See *Israel v. Tamir*, 207–10.

41 Laws of Sanhedrin 24:9–10.

42 One can claim that because this law concerns the honor of the children of Abraham, Isaac, and Jacob it refers to the Jewish people and not all human beings. Therefore, this source is not relevant to modern Israeli law, which deals with the right to human dignity of all citizens and prisoners, Jews and non-Jews alike. But a careful reading of the law leads to the opposite conclusion. Maimonides indeed mentioned the honor of the children of Abraham, Isaac, and Jacob, but he emphasized that the judge should respect the honor of all human beings. Two important Jewish law scholars, Nahum Rakover and R. Aharon Lichtenstein, interpret this law from Maimonides's Code as proof that the term "honor of all human beings" refers also to non-Jews [See Nahum Rakover, *Human Dignity in Jewish Law* (Jerusalem: The Library of Jewish Law, 1998), 29 (Hebrew); Aharon Lichtenstein, "Kevod ha-Beriyot," *Mahanayim* 5 (1993): 8]. Because Maimonides distinguishes between the "honor of all human beings" and the "honor of the children of Abraham, Isaac, and Jacob," it is clear that the first term refers to all people, Jews and non-Jews alike. For other Jewish sources determining that the term "honor of all human beings" refers also to non-Jews see Rakover, *Human Dignity*, 29–31 and 157; Gerald J. Blidstein, "'Great is Human Dignity' – The

The second legal source from Jewish law for the core of the doctrine that Elon quotes is a rabbinic interpretation of the verse, “love thy neighbor as thyself.”⁴³ According to this interpretation, the verse referred also to a criminal who was sentenced to capital punishment. The sages taught that when one discusses how to carry out the four deaths that can be imposed by the court (stoning, burning, slaying by the sword, and strangulation), one must choose a “favorable death” for the criminal, that is, a respectful death that protects the physical integrity of the criminal’s body as much as possible.⁴⁴ Justice Elon sees in this interpretative rule an expression of an approach that seeks to preserve human dignity even in the process of capital punishment.

The third legal source that Elon mentioned in the *Tamir* case ruling is from *Hikekei Lev*, the responsa of R. Haim Palachi (a 19th century adjudicator from Izmir, Turkey).⁴⁵ R. Palachi wrote a detailed answer regarding imprisonment that defines the different conditions suitable for several types of prisoners or detainees. In his answer, Palachi determined that it is forbidden to imprison people from the Jewish community in a filthy place defiled by body waste, where it is impossible to pray, bless, or study the Torah. Elon saw this ruling as another example of the importance of maintaining human dignity during the process of punishment in general and during imprisonment in particular.⁴⁶ But a careful reading of the responsum suggests that Palachi’s rule is rather limited. It is relevant only to a place that is filthy but not to other harsh conditions of life in prison. For example, Palachi emphasized that while a debtor who refused to pay should be imprisoned in a respectable and roomy cell, he did not object to criminals being imprisoned in a crowded one. It is clear that the distinction Palachi makes between a crowded jail that is acceptable and a filthy one that is unacceptable is based on the consideration of whether it is possible to live a religious life in prison (praying, studying the Torah, etc.). It is possible to lead a religious life in a crowded jail, but not in a filthy one. If this is the source of the distinction, however, there is no foundation for Elon’s conclusion regarding the importance of human

Peregrination of Law,” *Annual of the Institute for Research in Jewish Law* 9–10 (1982–83): 175 (Hebrew).

43 Lev 19:18, in the JPS translation.

44 *B. Ketub.* 37b; *b. Sanh.* 45a and 52a.

45 *Hikekei Lev* HM #5.

46 See also Menachem Elon, *Freedom of the Debtor’s Person in Jewish Law* (Jerusalem: Magnes, 1964), 234 (Hebrew).

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dignity in Palachi's halakhic decision. What interested Palachi appears to be not human dignity in itself but the possibility of living religious life in jail and observing the commandments.

The fourth Jewish legal source that Elon quoted in the *Tamir* case to prove the importance of protecting human dignity during imprisonment was from the collection of ordinances enacted by the Jewish communities. According to a rule enacted at the Council of Lithuanian Jewish communities in 1637,⁴⁷ if a debtor is arrested because he did not pay his debt, his creditor should fund his food. Elon contrasted this rule with an English ruling⁴⁸ from the same period decreeing that a debtor who was arrested should live at his own expense or on the charity of others. This comparison emphasizes the important role of human dignity in prison in Jewish law, but the case does not address imprisonment as punishment. The debtor is not a criminal, and he was arrested to pressure him to pay his debt. We cannot infer from this case to the role of human dignity in punishment in Jewish law.

Until this stage, Justice Elon addressed only the role of human dignity in punishment in Jewish law. But the core of the doctrine of prisoners' rights includes all human and civil rights that should be protected unless they are necessarily infringed by the denial of freedom of movement. This is probably the reason why Elon mentioned a fifth legal source from Jewish law in the *Tamir* case, which should teach the general principle that the prisoner has the same rights as any other citizen. Elon had the following to say about this legal source:⁴⁹

It is written in Deuteronomy 25:3, "[lest] your brother be debased in your eyes." The Sages have formulated a fundamental rule in the Jewish doctrine of punishment: "After he has been lashed, he is [considered] your brother." This fundamental rule is true not only after he has completed his sentence, but also while serving the sentence, that is, he is your brother and your neighbor, and his rights and dignity as a human being are preserved and remain valid.⁵⁰

47 *Pinkas Ha-Medinah*, ed. Shimon Dubnov (Berlin: Ajanoth, 1925), 70.

48 *Manby v. Scott* (1663) 86 E.R. 781 (E.C.).

49 *Israel v. Tamir*, 209.

50 A proof for the centrality of this source in Elon's thinking is the fact that in the *Hukma* case he quoted this source as a sole basis for the core of the prisoners' rights doctrine.

Elon quoted, at first, a verse from a passage describing the punishment of lashes “[lest] your brother be debased in your eyes.”⁵¹ The simple meaning of this verse is that the court should be cautious not to whip the criminal more than 40 lashes, so that he will not be debased in your eyes. The interpretation of the rabbis⁵² whom Elon quoted subsequently is based on the fact that the verse refers to the criminal as “brother,” as opposed to the previous verses in this passage, which call him wicked.⁵³ The rabbis explain that before the criminal was punished, he was wicked. After the punishment he returns to his former status as a brother. Elon interprets the legal meaning of the status of “brother” as the preservation of the criminal’s human rights and dignity. He also expands the boundaries of this rabbinic interpretation and claims that the criminal is considered a “brother” also during the process of punishment, not only afterwards. This shift is significant because these rulings deal with prisoners’ rights, that is, the rights of criminals during the process of punishment and not with the status of former prisoners who were released. But Elon’s interpretation seems to be the opposite of the simple meaning of rabbinic interpretation, which emphasizes that the criminal becomes a brother after he was punished. In his interpretation, quite likely he referred not only to the rabbinic interpretation but also to the simple meaning of the verse itself. The verse warns the court not to add more lashes in order to preserve the human dignity of the criminal. Therefore, the verse deals with the human dignity of the criminal during the process of punishment itself, although this is relevant only to the protection of human dignity during the process of punishment and not to the protection of other rights.

In conclusion, careful examination of all the Jewish law sources that form the core of the doctrine of prisoners’ rights and which were quoted by Justice Elon in his rulings shows that most them are relevant only to the protection of human dignity during the punishment, and none of them form a general principle that concerns the protection of all rights in the process of criminal punishment.

In the *Tamir* ruling, Justice Elon mentioned⁵⁴ the U.S. Supreme Court verdict in *James v. Wallace*⁵⁵ as an example of the common approach regarding

51 Deut 25:3.

52 *M. Mak.* 3:15.

53 See the parallel in *Sifre Deuteronomy* 286.

54 See *Israel v. Tamir*, 209–10.

55 382 F. Supp. 1177 (1974).

prisoners' rights in American rulings. Although Justice Elon emphasized that he quoted this ruling only to broaden the scope of discussion, it is clear that the American ruling is the actual legal source for Elon's formulation of the prisoners' rights core doctrine. In this ruling, Justice Johnson decrees that: "It is now well settled that prisoners do not lose all their constitutional rights when they enter penal institutions... and that they retain all of their constitutional rights except for those which must be impinged upon for security or rehabilitative purposes."⁵⁶ It is clear that the formulation of Justice Johnson is quite similar to those of Justice Elon. They both assert that the prisoner has the same rights as other citizens, except those that are necessarily infringed by the punishment of incarceration.⁵⁷ In contrast to Jewish law sources quoted by Elon in the *Tamir* case, which concerned only the preservation of human dignity in punishment, the American ruling formulates a rule regarding the protection of all constitutional rights of prisoners.

If, however, the American ruling is more suitable as a legal source for the core of the doctrine of prisoners' rights than are the sources of Jewish law that Elon quoted in his ruling, why did he choose not to refer to it as his main legal source? Why did he claim citing it merely to broaden the scope of the discussion? It is well known that Justice Elon had a special sentiment for Jewish law, which was not only his academic field—integrating Jewish law into the modern Israeli legal system was a mission of his life.⁵⁸ Therefore, it seems natural that after having emphasized the important role of preserving human dignity in punishment in Jewish law, Justice Elon tried to locate Jewish legal sources for the core of the prisoners' rights doctrine, which would preserve all human and civil rights during punishment.

56 *James v. Wallace*, 1180.

57 Most of the differences between the formulations of Elon and Johnson can be explained in light of the differences between American and Israeli constitutional law in the 1980s. For example, Elon does not deal with constitutional rights because Israel did not have a constitution at this stage, and all the protected rights were judicial, that is, rights recognized and developed by the Supreme Court. Elon mentioned the option of a right being violated by an explicit provision of law because in the 1980s these rights were judicial and did not enjoy constitutional status.

58 Nir Kedar, *Law and Identity in Israel: A Century of Debate* (New York: Cambridge University Press, 2019), 56, 109, 190–91; Mautner, *Law and the Culture of Israel*, 32 and 42–43.

When considering the historical and legal context of both the *Hukma* and *Tamir* rulings, the Jewish element appears to be more than a sentiment or a general agenda. Justice Elon had a concrete legal reason for his effort to find a Jewish legal source for the doctrine of prisoners' rights. Recall that the *Tamir* and *Hukma* rulings, in which Justice Elon formulated the core of the doctrine of prisoners' rights and its legal sources, were given after the legislation of The Foundations of Law Act, in 1980. According to this Act, the legal linkage between Israeli and English law was severed, and it was decreed that "when the court faces a legal question requiring decision and finds no answer to it in statute law or case law, or by analogy, it shall decide it in light of the principles of freedom, justice, equity, and peace of the heritage of Israel." The formulation "the principles of freedom, justice, equity, and peace of the heritage of Israel" was a compromise between the religious and secular political parties. The former, after consolidating their political power in the turnabout of 1977, demanded the new law that included explicit reference to Jewish law; the latter insisted that no binding linkage should exist between Jewish and Israeli law.⁵⁹ The compromise served the interests of both sides. On the one hand, the religious parties could claim that, for the first time, Israeli law referred to the "heritage of Israel," a term that can be understood as alluding to Jewish law. The secular parties, for their part, could claim that Jewish law was not mentioned explicitly in the law, and that "the principles of freedom, justice, equity, and peace of the heritage of Israel" were too abstract and amorphous for creating a binding linkage between Jewish and Israeli law. Justice Elon, in his rulings⁶⁰ and academic writings,⁶¹ tried to show that the Foundations of Law Act refers to Jewish law. First, he defined the "heritage of Israel" as equivalent to "Jewish law." Elon explained that because we are dealing with a legal text, it is natural to understand the term "the heritage of Israel" as referring to legal content. Second, he saw the Foundations of Law Act as a fundamental provision, which establishes

- 59 For the historical context of the legislation see Kedar, *Law and Identity*, 104–8; Aharon Barak, "The Foundations of Law Act and the Heritage of Israel," *Annual of the Institute for Research of Jewish Law* 13 (1988): 280–83 (Hebrew).
- 60 EA 2/84 and 3/84 *Neiman v. Head of Central Elections Committee for the 11th Knesset* 1984 PD 39 (2) 225, 294; AD 40/80 *Kenning v. Cohen* 1982 PD 36 (3) 701, 742–43; HCJ 1635/90 *Gergevski v. Shamir* 1990 PD 45 (1) 749, 780–81.
- 61 Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), 1827–1842; idem, "More About the Foundations of Law Act," *Annual of the Institute for Research in Jewish Law* 13 (1987): 227–30 (Hebrew).

a mandatory linkage between Israeli law and Jewish law. He interpreted the phrase “a legal question requiring decision” in a broad sense as referring to any legal question that is not clear according to the law. The law ordered the judges to solve these legal questions according to the principles of Jewish law.⁶² Therefore, given his interpretation to the Foundations of Law Act, it is clear why Elon, when discussing the new right of choosing a medical treatment in the *Tamir* case, sought to locate legal sources from Jewish law and treated the American ruling only as an addition that served to broaden the scope of discussion.

In the *Hukma* case, in which Elon discussed the right of prisoners to vote, Elon stated explicitly the exact legal role of Jewish law.⁶³ In this case, the legal problem emerged from the provision of the election law that every citizen should vote at a ballot box close to his residence, but it did not define a separate arrangement for citizens who were in detention and could not reach their ballot box. According to Elon, because the Basic Law: The Knesset determines that every citizen has a right to vote and does not exclude prisoners, the absence of a special arrangement for prisoners to vote is a lacuna. Based on the Foundations of Law Act, this is a legal question requiring decision, and therefore it should be settled according to the values of Jewish law. As Elon mentioned at the beginning of the *Hukma* ruling, according to the values of Jewish law, a prisoner has the same rights as any other citizen. Therefore, the High Court of Justice, based on the values of Jewish law, should order the State to enable prisoners to vote even if the election law contains no specific legal arrangement regarding prisoners. Because only Jewish law is relevant in a case of a lacuna, Justice Elon quoted only a source from Jewish law as the basis for the core of the prisoners’ rights doctrine, and he did not cite legal sources from other systems of law.

Nevertheless, in these concrete cases, it is clear that the source of the “fundamental rule” (the core of the prisoners’ rights doctrine) that prisoners have the same rights as other citizens except those that are necessarily infringed by the denial of freedom of movement, is in common law systems. First, we find a similar formulation of this principle in the *Coffin v. Reichard* from the

62 For an analysis of Elon’s interpretation of the Foundation of Law Act, see Kedar, *Law and Identity*, 109–13; Mautner, *Law and Culture*, 41–44.

63 *Hukma v. Minister of Interior*, 835.

ruling of a U.S. Federal Court in 1944.⁶⁴ In this ruling, the court rejected the approach of the Supreme Court of Appeals of Virginia in *Ruffin v. Commonwealth of Virginia*, from 1871,⁶⁵ which regarded the prisoner as a slave of the state who loses all constitutional rights except those explicitly granted by law. In *Coffin*, the federal court adopted an entirely opposite conception: “A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.”⁶⁶ Similar formulations of this conception appear in two U.S. Supreme Court rulings from the 1970s, *Wolff v. McDonnell*⁶⁷ and *Pell v. Procunier*,⁶⁸ and their influence can be found, even if not explicitly mentioned, in other U.S. Supreme Court rulings from the 1960s,⁶⁹ which assume that prisoners preserve their constitutional rights during the period of incarceration.

In English law, we first find a formulation of this principle in a ruling of the House of Lords from 1982, in *Raymond v. Honey*,⁷⁰ where Lord Wilberforce determined that “under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication.” Although this conception has been explicitly manifest in English rulings only since 1982, nearly at the same time that this principle appeared in the ruling of the Israeli Supreme Court, Justice Webster defined it in a ruling from 1994 (*R v. Home Secretary, ex p Leech*)⁷¹ as an “axiom

64 143 F.2d. 443, 445 (6th Circ. 1944). For the evaluation of the legal importance of this ruling, see Susan Easton, *Prisoners' Rights: Principles and Practice* (London: Routledge, 2011), 36; eadem, “Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,” *Yale Law Journal* 72 (1962–63): 511.

65 21 Gratt. 790, 796 (1871); Easton, *Prisoners' Rights*, 37–38.

66 See n. 64.

67 418 U.S. 539, 555–56 (1974).

68 417 U.S. 817, 822 (1974).

69 *Monroe et al. v. Pape*, 365 U.S. 167 (1961); *Cooper v. Pate, Warden*, 378 U.S. 46 (1964). Regarding these rulings see Easton, *Prisoners' Rights*, 37–38; James B. Jacobs, “The Prisoners’ Rights Movement and its Impacts 1960–80,” *Crime & Justice* 2 (1980): 433–35.

70 [1982] 1 All E.R. 756, 759 (H.L. 1982).

71 [1994] Q.B. 198, 209 (C.A. 1993).

of our law that a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication."⁷²

During the late 1970s and the beginning of the 1980s, this principle appeared also in rulings of the Canadian Supreme Court. In *Solosky v. The Queen*,⁷³ we find a formulation nearly identical to that stated in early American rulings: "A person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law."

In sum, Israeli law had a solid base for the core of the doctrine of prisoners' rights in the common law systems of law. The principle that prisoners had the same rights as other citizens, except those expressly or by necessary implication taken from them by law, was present in American federal rulings since the 1940s. It is possible that this principle was also the basis for the English conception of prisoners' rights. It is no coincidence that in Israel this principle was first formulated in rulings of the Supreme Court at the beginning of the 1980s. During this period, the fundamental rule regarding prisoners' rights became widespread in the ruling of justices in common law systems of law. It is quite clear that the Israeli doctrine of prisoners' rights was based on common law systems that served as the source for the formation of modern Israeli law. Therefore, there is no need to resort to Jewish law when seeking the source for the core of the prisoners' rights doctrine.

2.2 How did Jewish law influence the balancing formula between human rights and the needs of the incarceration system?

When discussing the influence of Jewish law on the balancing formula, it is necessary to distinguish between the form of the balancing formula and its content. Regarding the form, that is, the definition of the conditions for balancing the rights of prisoners against the interests of the prison authorities, no justice of the Israeli Supreme Court ever claimed to have found a basis for it in Jewish law. As noted above, the balancing formula between prisoners' rights and the interests of the incarceration system contained three demands:⁷⁴ (a) the restriction of prisoners' rights should have a reasonable explanation;

72 For a survey of significant British rulings regarding prisoners' rights issues in the 1970s–80s, see Easton, *Prisoners' Rights*, 29–35; Liora Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of Germany and England* (Oxford: Oxford University Press, 2004), 199–209.

73 [1980] 1 S.C.R. 821, 823.

74 See above, p. 37.

(b) the extent and proportion of the harm must not be greater than what is needed and necessary for the public interest; and (c) the magnitude of the interest needed to justify the infringement must match the magnitude of the infringed right. In his formulation of the balancing formula in the *Tamir* case, Elon quoted⁷⁵ only one American federal ruling, *James et al. v. Wallace*,⁷⁶ as the basis for his legal construction. When we compare that ruling with Elon's formulation, it is clear that this ruling can serve as the basis only for the first demand for a rational explanation in the balancing formula. In this ruling Justice Johnson emphasized that "the state must provide a rational justification" for infringing prisoners' constitutional rights⁷⁷ but did not mention the other two demands that appear in Justice Elon's balancing formula.

We can locate the first two demands of Elon's balancing formula in two well-known American rulings from 1974 and 1980, close to the time when the Israeli prisoners' rights doctrine was devised. The first is the U.S. Supreme Court ruling in *Procunier v. Martinez*, given in 1974, which sets two conditions for justifying a regulation that infringes prisoners' constitutional rights:⁷⁸ (a) "The regulation must further an important or substantial governmental interest" (in the words of Justice Elon, a regulation that infringes prisoners' rights should have a "reasonable explanation and justification," like the safety of the prison public and regime), and (b) the limitation of constitutional rights "must be no greater than is necessary or essential to the protection of the particular governmental interest involved" (or in Elon's words, "the extent and proportion of the harm must not be greater than what is needed"). The second principle of Elon's balancing formula is also present in the Canadian Supreme Court ruling in *Solosky v. The Queen*, from 1980.⁷⁹ Similar to the formulation of Elon, it is stated that the restriction of the right "must be no greater than is essential to the maintenance of security..."

The third principle in Elon's balancing formula is manifest in rulings of the European Court of Human Rights from the 1970s–80s.⁸⁰ For example, in

75 *Israel v. Tamir*, 213.

76 382 F. Supp. 1177 (1974).

77 *James v. Wallace*, 1180.

78 416 U.S. 396, 413–14 (1974).

79 See [1980] 1 S.C.R. 821, 840.

80 Cohn, "Legal Transplant Chronicles," 612–13 and nn. 98–99.

a ruling from 1974, dealing with freedom of expression, the European court described its balancing formula as follows:⁸¹

It must now be decided whether the “interference,” complained of, corresponded to a “pressing social need,” whether it was “proportionate to the legitimate aim pursued, whether the reasons given by the national authorities to justify it are “relevant and sufficient under Article 10” [the article dealing with freedom of expression in the European Convention of Human Rights, Sh. Sh.].

The court here determined that there should be correspondence between the public interest (the pressing social need) and the interference of the authorities in the fulfilment of the basic right of freedom of expression, and that this correspondence must be reflected in the reasons the authorities are given to this interference.

This principle is quite similar to the third part of Elon’s balancing formula, stating that “the magnitude of the reasons needed to justify the infringement must match the magnitude of the infringed right.”⁸²

In sum, the form of Elon’s balancing formula, that is, the general principles that define the process of balancing, is influenced by American, Canadian, and European rulings from the 1970s–80s. Jewish law did not play any role in the development of the balancing formula between prisoners’ rights and the public interests of the incarceration system.

81 *The Sunday Times v. UK*, App no 6538/74, 26 April 1979, para 62.

82 For another example of the manifestation of this principle in ECtHR rulings around the time when the Israeli doctrine of prisoners’ rights was formulated, see *Abdulaziz, Cabeles, and Balkandali v. UK*, App no 81/9474, 28 May 1985, para 78. In this case, the court discussed sexual discrimination in immigration regulations and stated that: “As to the present matter, it can be said that the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention.” Infringement of the right to equality is therefore contingent upon the weight of the reason that can justify the public need for sexual discrimination. Later, in 1987, this conception was integrated into British rulings. See *Reg. v. Secretary of State for the Home Department*, Ex parte Bugdaycay [1987] A.C. 514, 531 (H.L. 1987) and Cohn, “Legal Transplant Chronicles,” 613–15. The integration of this EU legal concept into British rulings happened after the Israeli prisoners’ rights doctrine was formulated, therefore it is not relevant to our discussion.

The content of the balancing formula, however, that is, the meaning of what the judges implementing the formula intend to insert into it, is another matter. For example, what are we going to define as fundamental rights, which only a vital interest like security can infringe? Jewish law played a significant role in defining “human dignity” as a fundamental right of prisoners, as reflected in the position of Justice Cohn⁸³ in the *Katlan* case.⁸⁴ Justice Cohn stated that even if we enacted a regulation that would allow administering an enema against a prisoner’s will, he would disqualify it because it is not a reasonable application of the law that authorizes the minister to enact regulations. This follows from the fact that it debases human dignity, which is the main criterion for evaluating the reasonableness of statutory provisions and procedures. To stress the relevance of human dignity for the enactment of regulations, Justice Cohn quoted the halakhic rule, “The dignity of men is so great that it supersedes prohibitions of the Torah,”⁸⁵ and the talmudic commentary, which narrows the rule to rabbinic prohibitions only.⁸⁶ Thus, human dignity overrides only prohibitions decreed by the sages and not prohibitions from the Torah. Justice Cohn inferred from this principle that according to Jewish law, no regulations contradicting human dignity should be enacted. He saw Jewish law as a source of inspiration for modern Israeli law in the evaluation of the reasonableness of regulations. Just as Jewish law considers religious regulations that infringe human dignity as invalid, Israeli law should adopt the infringement of human dignity as the criterion for determining the reasonableness of regulations. Note that the sources of

83 Similar to Justice Elon, Justice Haim Cohn (1911–2002) also believed in the positive possible contribution of Jewish law to modern Israeli law, but he opposed the integration of halakhah to Israeli law without an adaptation to modern reality and values. Justice Cohn believed that the integration of Jewish law with modern Israeli law should be subordinated to the main objectives of law: peace, justice, and maximum utility. See Haim Herman Cohn, “Jewish Law in Our Life,” in *Being Jewish*, ed. Ruth Gavison (Or Yehuda: Dvir, 2006), 292–95 (Hebrew); idem, “Jewish Law in Israel,” in *Jewish Law in Legal History and the Modern World*, ed. Bernard S. Jackson (Leiden: Brill, 1980), 126–27; Amihai Radzyner and Shuki Friedman, “The Israeli Legislator and Jewish Law: Haim Cohn Between Tomorrow and Yesterday,” *Tel-Aviv University Law Review* 29 (2005): 167; Kedar, *Law and Identity*, 86–89.

84 *Katlan v. Israel Prison Service*, 305–7.

85 This halakhic rule appears several times in the Babylonian Talmud. See, for example, *b. Ber.* 19b.

86 *B. Ber.* 19b.

Jewish law cited by Justice Cohn refer to human dignity in general,⁸⁷ not necessarily to the human dignity of prisoners, and certainly not to the human dignity of prisoners in the event of conflict with the interest of the prison authorities. Yet, they are sufficient for him to ascribe weight to the value of human dignity and to consider it when enacting regulations.

In contrast to Justice Cohn, Justice Elon showed in his rulings⁸⁸ that it is possible to derive from the sources of Jewish law not only the value of human dignity in general but also its status as a mandatory constraint in the process of punishment. In the previous section, we discussed in detail the five Jewish law sources that Elon quoted in his rulings, which show that human dignity must be considered when devising a mode of punishment.⁸⁹ Two of the sources for rabbinic interpretations of the verses “Love your fellow as yourself” and “[lest] your brother be debased in your eyes” teach that human dignity plays a significant role in devising punishments.⁹⁰ The other three sources (the law in Maimonides’s Code, the responsa of R. Ḥaim Palachi, and the rule of the Lithuanian Jewish communities’ committee) specifically exemplify, according to Elon, the important role of human dignity in the definition of imprisonment in Jewish law. As noted above, whereas the law in Maimonides’s Code asks to consider human dignity in devising criminal punishment in general and imprisonment in particular, it is questionable whether the last two sources truly demonstrate the central role of human dignity in the shaping of imprisonment.⁹¹ In any case, they do suggest a tendency to limit the harshness of incarceration.

Above, we reviewed the positions of Justices Cohn and Elon regarding the significant role of human dignity in punishment and in the enactment of religious regulations in Jewish law. We also examined in detail the Jewish law sources they cited as the basis of their positions, and examined whether

87 To be precise, we should emphasize that the literal translation of the rabbinic term “*kevod ha-beriyot*” is not human dignity but the honor of human beings. Justice Cohn and other scholars of rabbinic literature interpret this term as synonymous with human dignity. On this interpretation, see below pp. 56–59 and n. 92.

88 CA 344/81 *State of Israel v. Shahar Segal* 1981 PD 35(4) 313, 327–28; *Israel v. Tamir*, 207–9.

89 See above, pp. 42–46.

90 For the talmudic source, see nn. 44 and 52.

91 See above, pp. 45–46.

these sources indeed prove the claims of Justices Cohn and Elon. We must now address the crucial terminological issue that casts doubt over the conclusions of Cohn and Elon. An exact or close translation of the term “human dignity” does not appear in rabbinic literature. The closest Hebrew term is “*kevod ha-beriyot*,” or “the honor of human beings,” but this may also have other meanings than that of value inherent in every human. Moreover, in certain sources (some of which were mentioned by Elon), even the term “the honor of human beings” is not mentioned, and we inferred that they deal with human dignity only based on their context. The risk of anachronistic reading, which interprets the sources of Jewish law according to modern conceptions, becomes clear and concrete. We should examine, therefore, whether the interpretation of Justices Elon and Cohn, which emphasized the central role of human dignity in Jewish law, is reasonable. Is it based on common academic or traditional understanding of rabbinic sources, or is it a manipulation, an experiment intended to implant modern conceptions, alien to old legal texts, into these texts? Two questions are in order: (a) Is it reasonable to identify the modern concept of “human dignity” with the talmudic concept “*kevod ha-beriyot*,” and (b) regarding the other legal sources that Elon cited, in which the term “the honor of human beings” does not appear, “Is it reasonable to claim that they reveal the centrality of human dignity in the construction of criminal punishments in Jewish law?”

During the last decades a controversy has emerged between scholars of Jewish law and rabbinic literature whether the term “human dignity” is synonymous with the Hebrew term “*kevod ha-beriyot*” (the honor of human beings).⁹² A dominant group of scholars either fully equate the two or at least

92 In addition to Justice Cohn, who held this position also in his academic writings [“On the Meaning of Human Dignity,” *Israel Yearbook on Human Rights* 13 (1983): 247], see also Blidstein [“Great is Human Dignity,” 128–29; idem, “Public Respect (*kevod ha-beriyot*) and Human Dignity,” in *Questioning Dignity: On Human Dignity as Supreme Moral Value in the Modern Society* (Jerusalem: The Israel Democracy Institute, 2006), 97–138 (Hebrew)]; Nahum Rakover [“The Protection of Human Dignity,” in *Jerusalem – City of Law and Justice*, ed. Nahum Rakover (Jerusalem: The Library of Jewish Law, 1998), 189]. The other group of scholars that distinguishes between the modern concept of human dignity and the rabbinic concept of *kevod ha-beriyot* includes Itzhak Englard [“Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework,” *Cardozo Law Review* 21 (1999–2000): 1906]; Lichtenstein [“*Kevod ha-beriyot*,” 10] and Orit Kamir [“Kavod and Kevod Ha-Adam in Israeli Society and Law,” in *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer and Eckart Klein (The Hague: Kluwer Law

hold that the terms largely overlap.⁹³ Moreover, in the late 1970s and early 1980s (when these rulings were issued and the prisoners' rights doctrine was formulated), the accepted academic opinion was that "human dignity" and "*kevod ha-beriyot*" are synonymous. Therefore, Justice Cohn's assumption that the terms are synonymous is not only reasonable but also well established in the academic literature concerning Jewish law.

Regarding the centrality of human dignity considerations in the shaping of criminal punishment in rabbinic sources, there is a dispute between academic scholars like Cohn⁹⁴ and Elon⁹⁵ (who in addition to their position as Supreme Court justices were also scholars of Jewish law) and Moshe Halbertal⁹⁶ whether the construction of punishment in rabbinic sources is derived from moral

International, 2002), 244]. Englard, Lichtenstein, and Kamir claim that while the modern conception of dignity emphasizes the internal worth of human being as such, the concept of "*kevod ha-beriyot*" in the Jewish tradition explains the honor that one should ascribe to human beings by being created in the image of God. This distinction has a practical implication regarding what ought to be respected according to each definition. For example, Lichtenstein and Kamir hold that one of the main differences between the modern secular approach to human dignity and the religious approach of *kevod ha-beriyot* is the status of autonomy. Although the respect for human autonomy is one of the important features of human dignity, it is not included in *kevod ha-beriyot*. Even if these scholars are right and there are substantial differences between the modern concept of human dignity and the religious conception of *kevod ha-beriyot*, they are not necessarily relevant to our discussion of criminal punishment. It is reasonable to assume that in the field of punishment, which raises a basic sense of human dignity, the differences between these conceptions have no practical meaning. Therefore, developing a conception of human dignity in punishment based on Jewish sources dealing with *kevod ha-beriyot* is not a problematic move.

93 See Cohn, "Human Dignity," 247; Blidstein, "'Great is Human Dignity,'" 128–29; Nahum Rakover, *ha-Hagana al Kevod ha-Adam* (Jerusalem: Ministry of Justice, 1978), 3–5.

94 See "Human Dignity," 248–49; idem, *Human Rights in Jewish Law* (New York: Published for the Institute of Jewish Affairs, London by Ktav Pub. House, 1984), 218–24.

95 "Constitution by Legislation: The Values of a Jewish and Democratic State in the Light of the Basic Law: Human Dignity and Personal Freedom," *Jewish Law Association Studies* 21 (2011): 101–5; idem, "Criminal Law in a Jewish Democratic State," *Bar Ilan Law Studies* 13 (1996): 60, 66–67 (Hebrew).

96 *Interpretative Revolutions in the Making: Values as Interpretative Considerations in Midrashei Halakhah* (Jerusalem: Magnes, 1997), 145–67 (Hebrew).

considerations, like human dignity,⁹⁷ or other assumptions.⁹⁸ It is natural to ascribe a pre-conception of human dignity to the early rabbinic sources⁹⁹ which Elon cited in his rulings. As noted above, the two sources cited by Elon deal with the preservation of the criminal's body during the process of execution and limiting flogging to thirty-nine so that the criminal is not humiliated, and demanding to consider the criminal as a brother after being punished. The connection of the second source to the framework of human dignity is clear because it deals with preventing humiliation, which is one of the core meanings of the right to human dignity.¹⁰⁰ The demand to preserve the human body during the process of execution can emerge from various religious or moral contexts. The Babylonian Talmud derives this demand from the verse, "Love your fellow as yourself"; based on this verse, it derives the penal principle, "Devise an easy death for him." Therefore, the demand to preserve the criminal's body even during execution probably derives from a moral concern with his human dignity. We conclude that regarding these sources, the interpretations of Justices Cohn and Elon are reasonable and well established. Even scholars who are skeptical about the centrality of moral

- 97 In contrast to Cohn and Elon, Halbertal is careful not to explain the early rabbinic construction of punishment by the modern concept of human dignity.
- 98 Yair Lorberbaum explained many features of the rabbinic construction of punishment by the theological conception of the image of God. According to this conception, the criminal punishment should not destroy the criminal's body because it reflects the image of God [*In God's Image: Myth, Theology and Law in Classical Judaism* (Cambridge: Cambridge University Press, 2015), 100–96]. See also Beth A. Berkowitz, who explained the rabbinic construction of punishment as an instrument to resist Roman law and order [*Execution and Invention: Death Penalty Discourse in Early Rabbinic and Christian Cultures* (New York: Oxford University Press, 2006), 153–79].
- 99 The second and fifth sources that Elon mentioned in his ruling (see nn. 17, 19–20). Regarding the sources from the responsa literature, we have already explained above (pp. 45–46) that it is problematic to see these as an example of the influence of human dignity on punishment.
- 100 There is a dispute between legal scholars about the scope of the constitutional value or right to human dignity. But even those who believe that it should include autonomy admit that non-humiliating treatment is part of it. See Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015), 120; Daniel Statman, "Two Concepts of Dignity," *Tel-Aviv University Law Review* 24 (2001): 541; Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton: Princeton University Press, 2004), 230–31; Catherine Dupre, "Unlocking Human Dignity: Towards a Theory for the 21st Century," *European Human Rights Law Review* 2 (2009): 190.

considerations in the construction of criminal punishment in rabbinic literature must admit that morality and human dignity play a significant role here.¹⁰¹

There is no doubt that Jewish law was not the only source that justices of the Supreme Court used to address issues related to the preservation of human dignity in the process of punishment. In several rulings, Supreme Court justices were inspired by international law and common law systems regarding the need to take standards of human dignity into account. For example, in the *Darwish* case,¹⁰² Justice Cohn noted that the prisoner had a right to a civilized human life and proposed deriving the standards from the UN regulations for the treatment of prisoners. In the *Katlan* ruling, Justice Barak quoted American and Canadian rulings according to which invasive tests like enema, administered by force to detect drugs, were a violation of one's conscience and of basic human rights.¹⁰³ All these sources of legal inspiration are concrete and specific to a certain legal question and do not address the right to human dignity and its role in the construction of criminal punishment in general. These legal sources of inspiration are therefore not doctrinal. They serve Supreme Court justices to solve specific legal problems but not to characterize the right to human dignity as a basic right within the framework of the prisoners' rights doctrine. But when Justice Elon, in his doctrinal rulings, described the centrality of the value of human dignity in punishment, he referred only to the sources of Jewish law and not to other legal sources.¹⁰⁴

101 See Devora Steinmetz [*Punishment and Freedom: The Rabbinic Construction of Criminal Law* (Philadelphia: University of Pennsylvania Press, 2008), 9], according to whom we should consider the case of the talmudic source cited by Elon regarding the mode of execution "part of a broader conceptual rubric of preserving the person's dignity." See also Yair Lorberbaum [*Image of God: Halakhah and Aggadah* (Jerusalem: Schocken, 2004), 195–96 n. 91 (Hebrew)], who claimed that according to the talmudic passages cited by Elon (see nn. 44 and 52), the motivations for constructing the capital punishment are moral, but they reflect the late anonymous layer of the Talmud rather than the ancient tannaitic sources.

102 *Darwish v. Israel Prison Service*, 539–40.

103 See *Katlan v. Prison Service*, 298–300. For another example, see *Rami Livne v. Israel Prison Service*, 691. In this case, Justice Etzyoni emphasized that the Israeli prison system should adopt the policy of British prisons and establish public libraries in prison to prevent spiritual degeneration.

104 Apparently, Justice Elon could establish the status of human dignity as a basic right of prisoners on other modern legal sources, like international covenants

In sum, whereas the form of the balancing formula was influenced by American, Canadian, and European rulings from the 1970s and 1980s, in the determination of human dignity as a basic right that should be infringed (according to the balancing formula) only by a vital interest of the incarceration system, Jewish law played a significant role.

2.3 How did Jewish law influence the implementation of the prisoners' rights doctrine?

The main contribution of Jewish law was in the interpretation of the doctrine of prisoners' rights and in its implementation with respect to specific rights. The questions of interpretation and implementation are of great importance because even if legal systems guarantee that the prisoner has all the rights of ordinary citizens except those that are inherently infringed by incarceration, the extent of the rights that we include in this category remains to be settled. Do we extend this category to anything that is not appropriate for prison life, or do we restrict it to those particular practices that harm security and discipline in prison? This is particularly relevant to those rights that are not basic but require that prison authorities invest effort and resources into realizing them, such as the right to conjugal visits, which came up in the *Weil*

and rulings from common law states that heavily influenced Israeli law. For example, Article 10 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted by the UN in 1966, describes the human dignity of prisoners as follows: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Likewise, rulings of the American and Canadian Supreme Courts used human dignity as a constitutional value which could serve as the basis for interpreting recognized constitutional rights. For the status of human dignity in international law and Canadian and American law, see Barak, *Human Dignity*, 37–42, 193–201, and 212–13; Maxine Goodman, "Human Dignity in Supreme Court Constitutional Jurisprudence," *Nebraska Law Review* 84 (2006): 740. The ideological agenda of Justice Elon to integrate Jewish law with modern Israeli law is likely to have played an important role in his choice to base the status of human dignity in criminal punishment on Jewish law sources. But there may have been also legal reasons why Justice Elon preferred not to mention other modern sources of inspiration. Israel did not ratify the ICCPR until 1991, after the doctrine of prisoners' rights was formulated. In common law systems, like those of the US and Canada, human dignity was only an instrument used to interpret other recognized rights. Therefore, it was problematic to base the status of human dignity on these foreign elements, while in Israeli law human dignity was recognized as a judicial right in itself.

ruling,¹⁰⁵ and other rights that were debated in subsequent rulings: the right to send articles to the press about prison life (the *Golan* case)¹⁰⁶ and the right to artificial insemination for a prisoner who for security reasons cannot be granted conjugal visits (the *Dovrin* case).¹⁰⁷ In these cases, the question was whether the judicial review sought to realize these rights as fully as possible under prison conditions, or did it assume that these rights were infringed by the very nature of the incarceration and could not be realized.

In my opinion, Jewish law has a strong effect on the interpretation that narrows the category of rights that are inherently affected by the nature of incarceration, and on the tendency of the High Court of Justice to extend the exercise of the rights of prisoners as far as possible. To examine this statement, we turn to the *Weil* ruling,¹⁰⁸ in which Justice Elon discussed the prisoner's right to conjugal visits. After reviewing the right to conjugal visits and the balancing formula, Justice Elon turned to the discussion of the sources in Jewish law.¹⁰⁹ He cited the sources we mentioned above, which state that human dignity must be preserved in the course of punishment in general and of incarceration in particular, but admitted that there are no sources specifically referring to the right to conjugal visits. But as a "reference to the matter," he discussed at length the punishment of exile to cities of refuge.¹¹⁰

Reviewing the biblical and rabbinic sources, Elon distinguished between the penal objective of exile to cities of refuge in the Bible and its objectives in rabbinic interpretations. In the Bible, the main objective is to protect the murderer from the blood avenger. According to rabbinic sources, the murderer is exiled to a city of refuge even if there is no blood avenger.¹¹¹ The exile therefore becomes a regular criminal punishment. Moreover, there are rabbinic sources quoted in the ruling of Elon that point to the rehabilitative purpose of the punishment of exile to the cities of refuge. We can identify the connection between cities of refuge and the rehabilitation of the murderer by the designation of the 42 cities of Levites as cities of refuge. The cities of Levites who devoted their life to learning and teaching the Bible had the

105 See n. 28.

106 See n. 33.

107 See n. 33.

108 See n. 28.

109 *Weil v. Israel*, 490–95.

110 *Weil v. Israel*, 495.

111 *Weil v. Israel*, 495. See *Sifre Deut.* 181.

ideal atmosphere for rehabilitating criminals.¹¹² To preserve this optimal atmosphere, a law mentioned in Maimonides's Code¹¹³ states that if the majority of the inhabitants in the city of refuge are murderers, it must not accept new ones. The same law also states that the city of refuge can accept murderers only if there are sages living in it. The purpose of these laws is to guarantee the rehabilitative atmosphere of the city of refuge. If a city is full of murderers or does not include role models like the sages, it cannot fulfill its rehabilitative role and must not accept other murderers.

In the *Weil* ruling, after examining rabbinic sources dealing with the punishment of exile, Justice Elon praised the principles of punishment expressed in the law of cities of refuge, which combine, on the one hand, restriction of the freedom of movement of the offender to a specific area, and on the other, a possibility for a full life in an environment that can rehabilitate him.¹¹⁴ At the end of his remarks on cities of refuge, Justice Elon discussed the implications of the sentence of incarceration:

The prison sentence, as it is defined and carried out today, does not amount merely to a deprivation of liberty. Many evils are attached to it and accompany it, both depressing and sick, that amount to debasement of the individual, trampling of his dignity, and corruption of his image. Perhaps there is some justification for this in the case of a prisoner who would severely endanger the public safety if he were allowed to walk freely in the public space, but except for such cases, a sentence of incarceration, as it is carried out in practice, even if it is according to law and regulations, raises serious and difficult concerns, both socially and from the point of view of conscience, and no statements in case law concerning the fundamental rights retained by the prisoner can help and change this grim reality. The idea and discussions inherent in the punishment of the deprivation of freedom of the prisoner-exile in the city of refuge serve as an example of the theory of ideal punitive imprisonment. It is good to aspire to it, even if there is no prospect in sight for realizing it in contemporary society.

112 *Weil v. Israel*, 496.

113 Laws Concerning Murderers and Life Preservation 7:6.

114 *Weil v. Israel*, 498.

Justice Elon's remarks are likely to raise eyebrows. After all, the legislator defined the sentence of incarceration as the main criminal punishment and rejected the abolitionist views that favor rehabilitation without punishment. What, then, is the point of mentioning the punishment of cities of refuge, which was aimed mainly at rehabilitating the offender, as an ideal objective for a criminal system that chose to follow the opposite path? Yet, Justice Elon appears to have sought to extract from the form of punishment of cities of refuge legal principles that are relevant to the shaping of the sentence of incarceration itself. The main principle is the narrowing of the sentence of incarceration to restricting freedom of movement only and reducing to a minimum all other restrictions on human rights that interfere with the rehabilitation of the offender. Therefore, it is necessary to aspire to allow the prisoner a full and normal life to the extent possible, which would enable him to correct his behavior, identify his strengths, and eventually integrate into society as a useful citizen. The horizon provided by the legal principle of cities of refuge is indeed ideal, because in practice, incarceration infringes on many rights and does not allow a normal life, but the message remains that one must aspire to grant the prisoner as full a life as possible.

Note that what assisted Justice Elon in outlining such an objective for the prison sentence was the doctrine of prisoners' rights that separated the infringement of freedom of movement, which defines the sentence of incarceration, from other rights, which incarceration is not meant to infringe in principle. This doctrine is well suited to the legal principle of the punishment of cities of refuge, which is primarily a combination of restrictions on freedom of movement on one hand, and full rehabilitation, which protects all other rights of the individual, on the other. Yet, this is not only about a match between the punishment of cities of refuge and the doctrine of prisoners' right, but also a guideline for the implementation of the doctrine. As we have seen, the prison sentence severely infringes many rights. The question is how to address this fact. Is it to be regarded as a necessity, or as something to be minimized as much as possible? The legal principle derived from the cities of refuge demands limiting and minimizing the infringement of the rights of the prisoner as much as possible, and limiting them to restrictions on freedom of movement. Naturally, this is not possible (which is why this is an ideal objective), but it should be the aspiration of the prison authorities and the criterion guiding the judicial review of their actions.

The conception that requires prison authorities to allow prisoners as normal a life as possible and to limit and minimize the infringement of their

rights did not emerge only from analysis of the penal principles of Jewish law. It is a modern conception that evolved after World War II and is firmly grounded in German law.¹¹⁵ In paragraph 2 of the German Prison Act that was enacted in 1976, resocialization of the offenders is defined as the purpose of imprisonment. To achieve this purpose, in paragraph 3, the Act defines three guiding principles of prison administration. According to the first principle, "Life in prison should, as far as possible, reflect the general relationships of the outside world." This principle reminds us of the legal principle that Justice Elon sought to derive from the punishment of the city of refuge in Jewish law. By definition, imprisonment includes limitations on freedom of movement. All the other limitations except freedom of movement should be minimized to guarantee a normal life for the prisoner, which could improve the chances for his rehabilitation and resocialization.¹¹⁶

Justice Elon chose not to mention modern German law and to base his ruling strictly on Jewish law. As several scholars of Israeli law have shown, in the first decades after the establishment of the State, Israeli Supreme Court justices and other senior jurists usually did not expose the German background of their legal positions.¹¹⁷ In this particular case, there is also a legal difficulty because the German conception of the normalization of prison's life is heavily based on the definition of resocialization as the purpose of imprisonment.¹¹⁸

115 Lazarus, *Contrasting Prisoners' Rights*, 84–86; Johannes Feest, "Imprisonment and Prisoners' Work: Normalization or Less Eligibility," *Punishment and Society* 1 (1999): 101.

116 Following the German law, the principle of normalization was adopted by the EU in the European Prison Rules, which were approved in 1987. Article 65 in this document states: "Every effort shall be made to ensure that the regimes of the institutions are designed and managed so as: a. to ensure that the conditions of life are compatible with human dignity and acceptable standards in the community." The prison rules were recommended by the Council of Europe around the time when this principle was enunciated by Justice Elon in the *Weil* ruling. For the principle of normalization in EU law, see Dirk Van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2009), 103–4.

117 Fania Oz-Salzberger and Eli Salzberger, "The Secret German Sources of the Israeli Supreme Court," *Israel Studies* 3 (1998): 172; Nili Cohen, "German Law in Israeli Courts," in *Comparative Studies in the Humanities*, ed. Guy G. Stroumsa (Jerusalem: The Israel Academy of Sciences and Humanities, 2018), 202–3; Yoram Shahar, "The Diary of Uri Yadin," *Tel Aviv University Law Review* 16 (1991): 555–56 (Hebrew).

118 Lazarus, *Contrasting Prisoners' Rights*, 78–79.

Israeli law makes no mention of resocialization,¹¹⁹ therefore it is difficult to import one principle from a complete legal framework without addressing its premises. But the fact that Justice Elon did not cite German law directly does not mean that he was not aware of this ideal modern conception of imprisonment as normal life with limitations on freedom of movement. He may have preferred the original position of Jewish law, which rejects imprisonment as criminal punishment, but he knew also that as a Supreme Court justice who needs to interpret the modern Israeli law, he needed to develop a practical alternative to normalize life in prison. Jewish law was an instrument for developing a legal principle that can integrate the modern conception of normalization of imprisonment into Israeli law. According to the law of the city of refuge and its interpretations in rabbinic literature, Elon was able to formulate a legal principle that is identical to the modern principle of normalization of imprisonment. Using the status of Jewish law as one of the sources of Israeli law,¹²⁰ he succeeded in paving the way for integrating the principle of normalization in Israeli law as the main guideline for the realization of prisoners' rights during incarceration.

The main contribution of Jewish law to the doctrine of prisoners' rights was, therefore, the way in which the doctrine was implemented, seeking to minimize to the extent possible the rights infringed by incarceration and to ensure as much as possible the full realization of human rights in prison. The effect of the rulings of Justice Elon on the manner in which the doctrine was implemented was significant, and it traced the path that subsequent rulings, because Justice Elon was the first to discuss non-fundamental rights, the exercise of which by the prisoners was not an obvious goal to achieve. The decision to allow the prisoner to choose his medical treatment to the extent possible (the *Tamir* case)¹²¹ and to grant furloughs to prisoners for conjugal visits (the *Weil* case)¹²² established a legal principle for implementing the doctrine, and at the same time paved the way for further important decisions in the constitutional era: the decisions to allow prisoners to send articles to

119 For punishments in Israeli law around the time the prisoners' rights doctrine was formulated, see Ruth Kanai, "The Effect of the Aims of Punishment on the Judge's Discretion in Sentencing," *Bar-Ilan Law Studies* 10 (1996): 39, 77 (Hebrew).

120 On the status of Jewish law after the legislation of the Foundations of Law Act, see above pp. 48–50 and nn. 60 and 61.

121 *Israel v. Tamir*, 201.

122 See n. 28.

newspapers (the *Golan* case)¹²³ and to approve a decision by the authorities to allow artificial insemination if conjugal visits cannot be carried out (the *Dovrin* case).¹²⁴

2.4 The influence of Jewish law on the doctrine of prisoners' rights in the constitutional era

In the constitutional era, Jewish law had a negligible influence on the case law involving prisoners' rights, although in the case dealing with the overcrowding of prisons, Justice Rubinstein referred extensively to Jewish law and the lessons to be learned from it regarding human dignity in punishment.¹²⁵ But except for the addition of several new sources regarding the centrality of human dignity in Judaism that had not been mentioned in previous rulings, there was no innovation in the opinions of Justice Rubinstein, who adopted the legal principles that Justice Elon derived from the sources of Jewish law as early as the 1980s.

It is possible to explain the change in the influence of Jewish law on case law by the retirement of Menachem Elon from the Supreme Court at the beginning of the constitutional era (in 1993). The combination of a brilliant halakhic scholar and a great and original jurist, highly committed to the enterprise of Jewish law, in one person, is rare, and there is no doubt that his absence affected the continuation of the integration of Jewish law into Israeli law in many respects. In the case of prisoners' rights, there may have been other reasons for the reduced influence of Jewish law. First, as we have seen, a significant part of the importance of Jewish law in the domain of prisoners' rights was the emphasis on the value of human dignity. Jewish law provided legitimacy and stressed the importance of the right to human dignity, which had no solid grounding in Israeli law. As part of the constitutional revolution, human dignity was mentioned at the top of the Bill of Rights of the Basic Law: Human Dignity and Liberty. After human dignity received strong legitimization from the legislative act of the Knesset, it was no longer necessary to reinforce its status based on Jewish heritage and the sources in Jewish law.

123 *Golan v. Israel Prison Service*, 136.

124 *Dovrin v. Israel Prison Service*.

125 *Association for Civil Rights in Israel v. Minister of Public Security*, para 69–86.

Another reason has to do with the second contribution of Jewish law to the implementation of the doctrine of prisoners' rights. Justice Elon was successful in this area, and the legal principle he outlined in the *Tamir*¹²⁶ and *Weil*¹²⁷ rulings shaped the implementation of the doctrine of prisoners' rights in the generation that followed. The justices who walked in his footsteps, Mazza (in the *Golan* case)¹²⁸ and Procaccia (in the *Dovrin* case),¹²⁹ no longer needed to invent the legal principle *ex nihilo*, but simply applied it to new cases. Although they did not mention the sources of Jewish law in their rulings, the legal principle that Justice Elon derived from these sources was their guiding light.

3. Conclusion

Jewish law made two main contributions to the construction of the prisoners' rights doctrine: (a) defining human dignity as a basic value that should be taken into account while constructing criminal punishment; the importance of human dignity affects its high ranking on the scale of the balancing formula, as a principle that only a vital interest of the incarceration system, like security, can violate; and (b) defining the guideline for the implementation of the prisoners' rights doctrine. According to this guideline, the incarceration system should enable prisoners to lead as normal a life as possible and minimize the infringement of their rights. These two contributions are not exclusive to Jewish law. The dominant status of human dignity is manifest in several international covenants, and it is recognized as a constitutional right in Germany and as a constitutional value in countries that have a common law system, like the U.S. and Canada. The principle of normalization is manifest in the German Prison Act, and was later adopted by the EU as part of its prison rules. But these principles are also compatible with the sources of Jewish law. It is acceptable to interpret the rabbinic texts that were quoted by Justice Elon in his rulings as demanding the consideration of human dignity in the construction of criminal punishment. It is also reasonable to infer from the law of the city of refuge and its interpretations in rabbinic literature the legal principle of normalization as a key instrument for the rehabilitation

126 See n. 23.

127 See n. 28.

128 See n. 33.

129 See n. 33.

of criminals. Justice Elon, who wrote the central doctrinal rulings regarding prisoners' rights in the 1980s, succeeded in finding a solid legal base for these legal principles in Jewish law and in advancing their integration into the framework of Israeli law. There is, however, a slight but important difference between the influence of Jewish law in the case of the status of human dignity and in that of the principle of normalization. In the case of the status of human dignity in the formulation of punishment, Justice Elon could easily base his ruling on other legal sources than Jewish law. In the case of the principle of normalization, the situation was different. In the beginning of the 1980s, this principle was not mentioned in international or EU legal documents and was not recognized in common law systems, which traditionally influenced Israeli law. It played a significant role in the German Prison Act, but this was not a natural source of inspiration for Israeli law. Here, Jewish law made a unique contribution by integrating this progressive modern conception into Israeli law. By grounding the principle of normalization in Jewish law, Justice Elon succeeded in establishing its status as the main guideline for the implementation of prisoners' rights during incarceration.