Legitimizing the Imprisonment of Poor Debtors: Lawyers, Legislators, Judges

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The poor side of a debtor’s prison, is, as its name imports, that in which the most miserable and objected class of debtors are confined. . . . There was a kind of iron cage in the wall of the Fleet Prison, within which was posted some man of hungry looks, who, from time to time, rattled a money-box, and exclaimed in a mournful voice, “Pray, remember the poor debtors; remember the poor debtors.”

Charles Dickens, The Pickwick Club

In July 1949, shortly after the end of Israel’s War of Independence, the Attorney General, Ya’acov Shimshon Shapiro, inspired by Pinchas Rosen, Israel’s first Minister of Justice, directed the legislation department of his Ministry to “prepare a bill for the abolition of imprisonment for not paying a debt.” In August 1993, 44 years after that directive, the Deputy-Chief Justice of the Supreme Court, Menachem Elon, summarizing the facts in Perach v. The Minister of Justice, stated:

There arose before us a grim reality, unfortunate and difficult, in connection with the existing custom regarding the imprisonment of debtors, a reality which amounts to the denial of a debtor’s liberty, and a grievous affront to his honor as a human being created in God’s image.

What faced Elon was a reality that did not deal with marginal practice and few citizens, but with a legal and social phenomenon of wide scope, that led to the arrest of almost 24,000 debtors in the year preceding his decision. How is it possible to explain the enormous gap that Elon found between the

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The History of Law in a Multi-Cultural Society

Minister’s 1949 directive and the legal framework and practice of the Execution of Judgment offices, in 1993?

The discussion of this question, and of a number of issues that derive from it, will revolve around four main themes. The first entails an understanding of the difference between the Israeli legal system and other legal systems. In this context I will claim that while the major Western legal systems had already abolished imprisonment for debt in the second half of the nineteenth century, in the Israeli system, the importance of imprisonment increased between 1967 and 1992, and it continued to be an important tool of the Execution of Judgment system until the end of the twentieth century. The current arrangement in Israel derives, among others, from the nature of the link between local and foreign legal systems, European and non-European. The end product depends on the particular historical course of development of the Israeli system.

The second theme involves an examination of how the legal profession – judges and lawyers – influences the system of imprisonment for debt. I claim that it is the discourse, views, interests and ways of thinking of the legal profession that have significantly influenced the preservation of imprisonment for debt in Israeli law.

Third, the application of a class-based analysis to the development of the legal arrangement regarding the enforcement of obligations. My claim in this context is that since it is usually possible to predict which socio-economic classes are usually on the debtors’ side of the legal conflict and which on the beneficiaries’ side, those classes with greater political power have, throughout history, developed arrangements with which they were comfortable. These arrangements generally suited the needs of creditors and, occasionally, benefited privileged debtors through the establishment of different tracks for different kinds of debtors.

The combination of these three themes advances a fourth theme which is woven throughout the chapter and claims that a complex, and, perhaps, dialectical connection exists between the law and the non-legal spheres. Law is indeed instrumental and may serve powerful social groups to strengthen their status, legitimate their dominance, and exploit weaker groups. It therefore cannot be viewed as a discipline that evolves autonomously, stemming only from an inner continuity, designed by jurists alone, through purely doctrinal thinking and without regard for economic, social, and cultural developments. Rejecting an autonomous conception of law does not, however, entail conceiving it to be entirely functional, since its adjustment to extra-legal needs is bounded by the basic characteristics of
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legal culture, which constrain the reaction by the legal world to changes outside of that world, and sometimes create a synthesis of the two.⁶

In the present chapter, I shall present the chronological and geographical perspective needed to understand Israeli legal history in the area of imprisonment for debt. After briefly describing the rise and fall of imprisonment for debt in Western culture, I will focus on the English case to provide the class-oriented analytical tools, whose strength I will attempt to demonstrate against the background of the formation of English legal norms, and which I will later try to apply to the Israeli case. I will then deal with the legal history of the State of Israel in the years prior to 1967, and will try to answer the question presented at the beginning of this chapter: Why was no law abolishing imprisonment for debt enacted during the 1950s, and why did the law enacted in the 1960s actually broaden and strengthen imprisonment for debt?

The next section will address the meteoric rise of imprisonment for debt as a central means of execution of judgments between the enactment of the Execution Law in 1967 and 1992. The two final sections will address the 1993 Perach decision, which in absolute opposition to this process further limited imprisonment for debt considerably and the lawyers’ reaction to this decision, which aimed at the return to normalcy – imprisonment – and resulted in two important amendments in 1994 and 1999. The chapter will conclude with a discussion, on a number of levels, of the fundamental question: why hasn’t imprisonment for debt been abolished in Israel?

I would like to make clear, at the very start, my personal conception of the imprisonment for debt issue, a conception which doubtless effected the narrative below. From a social, economic, and legal point of view, I hold that imprisonment for debt should be abolished in Israel, for reasons which this chapter will clarify.

One last note before I begin. This chapter centers on the issue of the imprisonment of debtors for not paying a monetary debt. It does not deal with the imprisonment of debtors for the non-payment of alimony, which is a separate issue with special, family and gender-related characteristics, nor with the issues of non-monetary obligations, commonly addressed in discussions of contempt of court, or of debts to the State (fines, taxes, etc.). The discussion of other means and proceedings of execution of judgment, as well as of bankruptcy proceedings, does not purport to be exhaustive.
A. The Contrast: The Fall of Debtor Imprisonment in Western Legal Culture

The general direction of development in the major Western countries and international covenants is clear: executory action against property and future earnings is replacing action against the person of the debtor. The imprisonment of a person due to the inability to fulfill contractual obligations is held to constitute an infringement of basic rights.

In various legal systems of the ancient Middle East, the person of the debtor was major security for the payment of a debt. So also in Roman law and through the late Middle Ages: the major means against those who had not repaid their debts was imprisonment and forced labor until the debt was paid. In a process which began in the late Middle Ages and extended to the nineteenth century, the use of imprisonment for debt was limited and finally abolished in the leading countries of continental Europe. In France, it was annulled by law in 1867; in Germany, where imprisonment for debt was a sanction enforced by the State, not by private creditors, it was abolished by federal law in 1868 and in the 1877 Imperial Civil Procedure Code. In England, where imprisonment for debt peaked between the fifteenth and seventeenth centuries, it was declared null by the 1869 Debtors Act. However, this act included a number of significant exceptions and in practice, imprisonment for debt was absolutely abolished in England only in 1971.

In the United States, in the second or third quarters of the nineteenth century, most states passed laws or constitutional amendments that abolished, or at least severely restricted, imprisonment for debt. After World War II, international and regional organizations and institutions developed norms which reflected prevailing anti-imprisonment views. Clause 11 of the 1966 International Covenant on Civil and Political Rights states that “No person will be imprisoned merely on the ground of inability to fulfill a contractual obligation.”

In contrast to these tendencies, the Israeli arrangements appear extraordinary: imprisonment for debt increased after the late 1960s. This contrast, and the attempt to explain it, shall provide the central axis of this chapter.

Let us first turn to English law, and try to understand how debtors’ imprisonment developed there according to a class-oriented paradigm. This paradigm, based on well-developed legal-historical research in the English context, will provide important insights for relating to the Israeli context. In
my view, the class-related manifestations of imprisonment for debt can be understood only against the background of the arrangements and various tracks created for the enforcement of obligations, including the execution of judgments, bankruptcy, and shareholder liability in corporate liquidation. The section on England will map these various tracks and their class implications.

B. Developing the Conceptual Framework: A Class-oriented Analysis of Debtor Imprisonment Law based on the English Case

In the English system of execution of judgments, the wealthy tend to be on the creditors’ side, while the poor tend to be on the debtors’ side. Knowing *ex-ante* (with no veil of ignorance) which socio-economic groups are located on each pole of this system makes it likely that norm-setting and the implementation of norms, will have significant class-oriented implications. Therefore, imprisonment for debt seems to be an area of law in which class-oriented analysis can provide interesting insights even for those who are not Marxists or pundits of Critical Legal Studies (CLS), and are not normally inclined to hold a class-based perspective of the law. It should be emphasized that the class-oriented analysis presented below does not aim to draw a picture of one class that eternally exploits and another that is eternally exploited. Because English class structures are not static, the identity and scope of the groups situated at each end change from time to time.

1. The Prioritization of Imprisonment over Sanctions against Property

In England of the late Middle Ages and the early modern age, most capital took the form of land. A relatively restricted group of aristocrats and gentry controlled it, and through it controlled the military, financial and political power centers. The use of imprisonment as a means for collecting debts centered on the debtors’ persons rather than their property. Imprisonment was part of a wider legal arrangement (Insolvency Laws), which severely restricted the means of execution of judgment against real property, thereby granting almost complete immunity to the major source of wealth and status of the landed classes – their estates. This arrangement protected high-class debtors from having their real property sold as part of executory proceedings, an occurrence that may have marred not only the individual’s status, but also the exclusivity and imperviousness of the class as a whole.
The arrangement did expose high-class debtors to the possibility of imprisonment for debt, but their social connections and means often enabled them to evade imprisonment, and in the worst case, to be released on bail or imprisoned under vastly better conditions—sometimes even fictitious imprisonment outside prison walls, while preserving their property throughout.

The lower classes, from which most debtors came, were bereft of real property and had little movable property, and were thus less threatened by executory means against property. They were, on the other hand, vulnerable to imprisonment for debt. According to existing arrangements, lower class debtors were imprisoned even before judgment was given, *ex parte*, in summary proceedings with no jury or any need of independent evidence for the existence of the debt. From the moment of their arrest, the debtors bore the expenses of their imprisonment, including the jailers’ fees. Life expectancy in the debtors’ prison was short because of unsatisfactory sanitary conditions and epidemics. Even death did not bring the hoped-for release; the debtor’s family had to pay the costs of imprisonment before they could claim the body.⁸

Together with actual arrangements in the area of execution of judgments, institutional arrangements were established to advance class-related goals. Because creditors were forced to turn to expensive High Courts, or alternately, to inefficient local courts,⁹ more than 300 Courts of Request whose main business was small-debt collection were instituted in England and Wales between 1660 and 1846. Thus, during this period, an additional, economical, efficient apparatus evolved, which enabled creditors, mostly of the middle and high classes, to collect their debts from members of the lower classes through the extensive use of imprisonment, whether actual or as a means of deterrence, in the newly established Courts of Request.

2. Bankruptcy – Sanction or Class Privilege?

The conception of bankruptcy as a proceeding to enforce obligations developed during the Middle Ages influenced by Roman thought in the Italian centers of commerce, and migrated throughout Europe until it crossed the Channel and was received into English common law during the sixteenth century.¹⁰ Bankruptcy proceedings were mainly aimed at debtors’ property, not their person, and could purportedly end the enforcement framework which centered around the person of the debtor. This was not to be, however, since bankruptcy proceedings in England were initially
available only towards traders and those whose debt was comparatively high, at least £100. Therefore, only someone actively engaged in commerce could be declared bankrupt. Furthermore, laws centering on imprisonment continued to apply to members of the lower and lower-middle classes – laborers, craftsmen, small shopkeepers and the like – as well as to high-class landowners. In the sixteenth century, bankruptcy proceedings were conceived to be a restriction on tradespeople, mainly as an added sanction with criminal aspects, and as a stigma which tarnished the character of the bankrupt person. This legal arrangement was one result of the landed classes’ attempt to preserve the class hierarchy in England of the time, through increased supervision of the new capitalist classes.\textsuperscript{11}

A series of laws, passed between 1824 and 1883, gave bankruptcy proceedings new meaning. Control of the proceedings gradually passed from creditors to the court, and bankrupt debtors’ rights expanded: debtors could themselves initiate bankruptcy proceedings, and payment of a small percentage of the debt made it possible to be released from bankrupt status. In general, the element of the fresh start was emphasized, the stigma associated with the proceedings lessened and the proceedings provided de facto immunity from imprisonment. Commensurate with the rise of the middle class, bankruptcy proceedings evolved from proceedings discriminating against the middle class, to proceedings affording it special protection.

During the nineteenth century, as bankruptcy proceedings changed from sanction to privilege, other socio-economic groups began to covet them as well. In 1861, applicability of the proceedings widened and they were no longer restricted to active tradespeople. Still, because of the demand for a relatively high debt of £100 which remained in force as a condition for the initiation of bankruptcy proceedings, the necessity for at least two creditors, and the relatively high cost of the proceedings, bankruptcy proceedings remained actions against “capitalists” and the actual use of such proceedings against members of the lower classes was negligible. In practice, the lower classes remained subject to debt collection proceedings focusing on imprisonment.

3. Incorporation as a New Class Privilege

Simultaneous to the process described above, a further development removed most owners of large and middle-sized businesses from the reach of the legal framework of execution of judgment and bankruptcy law: the rise of joint-stock business corporations with limited liability. Until the end
of the seventeenth century, of the few corporations that existed, only some enjoyed a degree of limitation of liability, and even then, the scope of limitation was not uniform. Between the end of the seventeenth century and the end of the eighteenth century, shareholders’ limited liability became well-defined legal doctrine and an inherent characteristic of most business corporations. During this period, limited liability became a clear privilege of incorporation, and a major motive for individuals to organize into business corporations. This protection was extended after the mid-nineteenth century to smaller entrepreneurs and businessmen whose firms were also accorded limited liability.

Thus in the 1860s, the legal tracks for collecting debts were completely different than they had been two hundred years earlier. England’s social structure had changed, the middle class had become more influential and was able to avoid imprisonment for debt and other draconian arrangements for debt collection. Financiers, industrialists and men of commerce, whose social ascent during this period was the most dramatic, gained the most comfortable arrangement from their point of view: limited liability entailed by incorporation. The powerful classes – landowners, professionals and mid-level businessmen – enjoyed the protection of the reformed bankruptcy law, which by this time had become a privilege rather than a sanction. Only the poor – the small shopkeepers, low-level clerks, laborers in industry and agriculture and the unemployed – remained exposed to imprisonment for debt, which became increasingly threatening due to the relatively efficient mechanism in place for its enforcement.


In 1869, an “Act for the Abolition of Imprisonment for Debt, for the punishment of fraudulent debtors, and for other purposes” known as “The Debtors Act,” was passed by Parliament. Clause 4 of the act stated that “No person shall, after the commencement of this Act, be arrested or imprisoned for being default in payment of a sum of money.” How does the abolition of imprisonment for debt conform to the class-oriented analysis which holds that legal arrangements removed the high and middle classes from the threat of imprisonment, and left only the poor and the powerless? Was the class-related rationale of the arrangement abandoned in 1869? And if so, why?
The answer lies in Clause 5 of the act which contains substantial exceptions to the rule. It establishes that if, after an authorized court has given a judgment or decision, and the debtor is able to pay the debt but has refused to pay or has been negligent in paying, the court is authorized to imprison the debtor for up to six weeks. This exception made possible the continued imprisonment of debtors, though now not directly for non-payment of debts, but indirectly, under the guise of contempt of court.

On the declaratory level, a seeming equality was established between large and small debtors, to whom the new act applied equally; but in practice, the act was enforced only against small debtors. On average, only three persons who owed more than £50 were arrested each year under clause 5. In contrast, more than 7,000 persons who owed less than £50 were imprisoned each year. In all, more than 300,000 debtors were imprisoned in England between 1869, when imprisonment for debt was declaratively annulled, and the outbreak of World War I.

14 We can thus conclude that the new act did not significantly change the existing situation: its main result was further amplification of class distinction and of the social control prevalent under the earlier legal arrangement. In fact, the act served as barrier to reform, and not as its generator. Its importance was in creating renewed legitimacy of a practice that had begun to lose acceptance during the nineteenth century due to the increasing number of opponents of imprisonment for debt. The Debtors Act was something of a pre-emptive remedy, a reaction to this opposition, that passed because the proponents of imprisonment feared that if they continued to oppose all change, they would be swept away in the coming wave of reform. The new act created the illusion of equality before the law, of imprisonment not for debt but for contempt of respectable, and supposedly neutral, institutions – the Courts – and of a distinction between “evil” debtors, whose imprisonment was morally justified, and “virtuous” debtors, who would no longer be imprisoned following the liberal reform. Its power, therefore, lay in the false social consciousness it created, as if the wave had already passed, reform had already happened, and public discourse could now turn to another area and wreak its havoc there.

In retrospect, it appears that the tactic adopted during the enactment of the Debtors Act in 1869 had more than hoped-for success. The arrangement created by the act, centering around the legitimization of imprisonment for debt under the guise of contempt of court, survived for the next hundred years. The demand for annulment of imprisonment for debt did appear on the agenda from time to time in Parliamentary discussions, Commissions of
Inquiry and scholarly works. However, the strong opposition of interest groups close to the foci of decision-making, headed by politically well-organized bankers and merchants who often relied on credit; and the legal profession, both lawyers and judges, who were comfortable with, and made good money from the existing arrangement, prevented any change.\textsuperscript{17} I shall return to the use of a similar tactic in the Israeli context below.

5. The Abolition of Debtor Imprisonment – Second and Last Round

In 1969, the Payne Committee, appointed in the hope that it could provide a partial remedy to the unflagging problem of crowded debtor prisons, published its report.\textsuperscript{18} The committee surprised the government with its radical, sweeping recommendation that imprisonment for debt (even that carried out under the guise of imprisonment for contempt of court) be completely abolished. The committee’s position rested on a number of arguments: in principle, there is not and there never has been any justification for imprisoning people for business dealings; the time for imprisonment for debt has passed because of economic and social changes since 1869; arrest impairs the debtors’ earning capacity, and the present or future ability to pay off the debt; imprisonment involves additional costs which need to be paid; the credit market cannot function with the threat of imprisonment hanging over it; it is impossible to reliably examine the circumstances of each debtor before deciding whether there is cause for imprisonment; evidence exists that most of those arrested in practice are those lacking property, skills and luck, rather than crooks and scoundrels; the threat of imprisonment does not bring about the desired result and, in practice, despite the existence of the threat, a significant percentage of judicial decisions are not carried out. The recommendations were adopted by Harold Wilson’s Labor government and implemented in the 1970 Administration of Justice Act, which ruled out imprisonment as a means for the enforcement of obligations in England, except as concerns alimony and statutory debts. (Why this act was passed specifically in the year 1970 is outside the scope of this chapter.)

C. 1949-1967: The Failure of the Proposal for the Abolition of Debtor Imprisonment in Israel

During the late 1960s, when imprisonment for debt was in the process of being abolished in England, there was a significant increase in its use in
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Israel. By this time Israel was an independent state. But until 1948, it was Mandatory Palestine, part of the British Empire, and before 1917, it was part of the Ottoman Empire.

How is it that imprisonment for debt was not abolished in the Israeli system despite the fact that this system evolved out of legal systems that did abolish, or at least restrict, it? In the late nineteenth century, the Ottoman Empire experienced French-inspired legal reform. By the time of the reform, the French system had already abolished imprisonment. Why didn’t the Ottomans abolish it as well? The explanation lies in the fact that the 1879 Ottoman Execution Act was based on a practically literal translation of sections of the early 19th century Napoleonic codification. It did not adopt, either purposely or because its drafters did not follow the developments in France, the above-mentioned 1867 reform which abolished imprisonment for debt in France. The 1914 Ottoman Temporary Execution Act, which succeeded the Ottoman Execution Act shortly before the outbreak of World War I, was a piece of emergency legislation, based on the earlier act and tailored to suit Ottoman problems. It did not intend to reform Ottoman law based on European law.

When the British established their own legal system in Palestine after the collapse of the Ottoman Empire, they opted for legal continuation. This meant that the Ottoman Temporary Execution Act remained in force in Mandatory Palestine and later in independent Israel. Interestingly, the act survived in Palestine and then Israel for 35 years more than it did in Turkey itself. Thus its principles deserve a short presentation. The Act established a regime where, generally, debtors who could not prove that they were unable to pay their debts, and even some who could, were imprisoned. The maximum prison term was 91 days; costs of imprisonment were borne by the government (whereas in English law, they were borne by the creditor); and imprisonment did not exempt the debtor from repaying the debt. The arrangement was thus exceedingly beneficial to creditors.

The late 1920s witnessed the onset of the Anglification of private law in Palestine by the Justice Department of the Mandatory Government. A number of ordinances were enacted between 1929 and 1936, mostly in the field of commercial law, to replace what was considered to be anachronistic Ottoman law. The field of execution of judgments was also considered worthy of reform.

In 1931 an Imprisonment for Debt Ordinance was enacted, and detached and transformed only this facet of execution law. The Ordinance included many exceptions to the inability to pay rule. Maximum imprison-
The history of law in a multi-cultural society has been marked by significant changes and adaptations. For example, the Ottoman Temporary Execution Act, which gave administrative officials the authority to arrest debtors at the behest of creditors, was preserved. Creditors were now required to deposit the cost of the debtor’s maintenance in prison when submitting their application for an order for the debtor’s arrest; these costs could then be added to the debt. Several drafts of an Execution of Judgments Ordinance were prepared, two of which were even published in the Palestine Gazette. But two decades after beginning to draft the Ordinance, the last representatives of British rule left Palestine without having completed the process. It took another two decades before a new Execution Law was passed in 1968, annulling the 54-year old Ottoman Temporary Act.

The newly established State of Israel inherited the Ottoman Temporary Execution Act, as well as files of wide-ranging correspondence relating to the urgent need for sweeping reform in Execution of Judgment law as a whole. One of the first projects planned by Uri Yadin, the Justice Ministry official in charge of planning legislation, was the drafting of a new Execution Law to replace the antiquated Ottoman legislation. Concurrently, on July 7, 1949, the Attorney General, Ya’acov Shimshon Shapiro, encouraged by Minister of Justice Pinchas Rosen, wrote to the legislative department:

Please prepare a bill for the repeal of debtor imprisonment for not paying a debt. I myself rather doubt that arrest for non-payment of alimony should be repealed. I would leave this clause as is. The same goes for imprisonment for non-payment of fines.

At the 1953 annual meeting of the legal advisors of government ministries with the Minister of Justice, where plans for legislative work were discussed, the Attorney General reported that the Ministry of Justice intended, in the coming year, to deal with the Execution Law, as well as important legislation such as the Inheritance Law, a Criminal Code, the Law of Evidence and the Law of Personal Status. It appears that the Minister and the Attorney General, like the Mandatory legislators before them, quickly came to the conclusion that if their aim was to reform the legal situation regarding imprisonment for debt, they needed to separate the issue from the Execution Law as a whole.

Despite the Minister’s commitment to the abolition of imprisonment for debt, the first concrete step in this direction was not taken until 1955. The delay was probably due to intense legislative work on other issues,
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perceived as more urgent, if not by the Minister, then by Prime Minister David Ben Gurion, who was very influential in setting the legislative agenda. As a result, the Transition and Elections Laws, the Law of Return and the Law of Citizenship, the Defense (Military) Service Law, the laws of Abstainees’ Property and of Confiscation of Land, the National Education Law and the Labor and Social Security Laws were all drafted in the period between 1949 and 1954. [22]

1. The Drafting of the Earliest Bills at the Ministry of Justice

While work on the Execution Law awaited its turn, work on the more limited topic of imprisonment for debt began. On March 29th, 1955, a Memorandum of Suggestion for the Criminal Law Amendment Act (Evasion of Debt Payment), 1955, [23] signed by Haim Cohn, then Attorney General, was published. Though the name of the bill suggests a severe approach towards debtors, its content was entirely different. Nevertheless, this was not the abolition of imprisonment for debt to which Pinchas Rosen aspired in 1949. Haim Cohn explained the departure from that goal:

The recommendation by the Ministry of Justice to amend the Debt Ordinance (Imprisonment) so as to utterly repeal any imprisonment for the non-payment of a civil debt which is not a debt of alimony, has met with resistance from judges and others, who regard imprisonment as the only efficient way to force a debtor to pay the debt. [24]

Pinchas Rosen and Haim Cohn were compelled to compromise with the judges and lawyers. This may have simply been a tactical retreat from the beginning, as we shall see below. Their point of departure was that the absolute annulment of imprisonment for debt was impracticable. Therefore

An urgent need has arisen to assure that this means not be made use of, and that debtors not be deprived of liberty without first being given the opportunity to present their claims, and only after it has been determined that the grounds for non-payment was not poverty alone. [25]

How could this be ensured?

The best and most practical way to ensure this is by bringing the proceedings leading to an arrest order against a debtor into conformity with the normal track of criminal procedure. [26]
Practically speaking, the bill addressed three different kinds of debtors. The first were those who refused to pay alimony payments. These were to be imprisoned for one year unless they could prove they could not afford to pay. The second were debtors who had the means to repay their debt, but deliberately did not do so. These debtors were to be imprisoned for six months. The third were such debtors who had been found, in investigation and hearings, able to pay the debt, and whose creditors had not proved that they did not intend to pay it. These could expect imprisonment for 21 days. Debtors who did not fit into any of these categories, such as a debtor whose debt did not involve alimony payments, and whose creditor could not prove intention to evade payment, or lack of sufficient means to pay, could not be imprisoned at all according to the bill. In addition, arrest was possible only by decision of a Magistrate Court, following a standard criminal proceeding.

The memorandum was distributed to the entire judiciary, to legal advisors of government ministries, and to the Bar Association. On May 4th, 1955, Menachem Elon, then serving with the legislative department of the Ministry of Justice, summed up the initial reactions to the bill. Several judges opposed it, and believed that the Mandate period arrangement should be preserved. Judge Olsker, of the Tel-Aviv Magistrate Court, feared that as a result of the proposed legislation, activity at the Execution Office would practically stop, and a “virtual debtors’ paradise” would evolve. Kister, a District Court Judge (and a future Supreme Court Justice), considered that judges should be allowed discretion regarding imprisonment, and not only in cases of poverty. Therefore, the legislature should not intervene:

“We must keep in mind that, at this time of massive immigration and the ingathering of Jews from the Diaspora, many people still do not hold steady jobs but earn daily wages and the means of execution available to creditors do not allow them to confiscate and collect even a portion of the daily wage paid directly to the worker.”

The debtor who Kister envisioned in this context was a daily laborer without a regular job; yet he still considered the weapon of imprisonment applicable. I shall show below that the motifs of “local conditions” and “the time has not yet come” recur in the discourse concerning the proposal to abolish imprisonment for debt. Judge Ehrlich and Chief Justice Giladi of the Tel Aviv Magistrate Court also expressed these views; they had faith in
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the administrators of the Execution Office, and saw no need to relieve the debtors’ situation through legislative reform.Against the background of widespread opposition in judicial circles to the abolition of imprisonment for debt, the position of Judge Etzioni, who served on the Haifa District Court (and was later promoted to the Supreme Court), assumes significance. Etzioni wrote to the Attorney General that he was surprised at the judiciary’s opposition to the recommendation of the Ministry of Justice, but simultaneously that he opposed the specific bill proposed because:

With all due respect to the proponents of imprisonment for the non-payment of debt, it seems to me that imprisonment in such cases is a remnant of a reactionary system, and does not suit the period we live in today.

Etzioni opposed the bill for reasons directly counter to those of the majority of the judiciary: in his view, the proposed bill wasn’t lenient enough toward debtors.

After receiving the written objections, and conducting discussions at the Ministry of Justice, Pinchas Rosen decided to continue the legislative initiative on a different course than the one proposed in the original memorandum. A memorandum circulated in August 1955 differed from the earlier one in both name and content. No longer a criminal law amendment, the new proposal was a “Bill for the amendment of Execution Law (Imprisonment).” The Minister seems to have been convinced that the criminal prosecution of debtors, even in rare circumstances, worsened their condition. Still, the determined opposition of the majority of the judiciary made it impossible to return to his original proposal to entirely abolish imprisonment for debt. The new bill’s declared purpose was “to ensure that an Israeli citizen’s basic right to liberty not be denied unlawfully and unnecessarily.”

The bill sought to achieve this liberal goal on two fronts. One, to ensure proper judicial procedure, the power to issue arrest orders would be transferred from the head of the Execution Office to the courts, and the latter could not consider the application for the debtor’s arrest until the debtor had appeared before the court. The second, in order to restrict the circumstances that allowed debtors’ arrest and to curtail the term of imprisonment, only debtors who evaded payment without good faith would be arrested. These included debtors who had the means to pay, smuggled property, refused to be questioned as to their property, or did not pay two consecutive alimony payments. Persons under 18 years of age, those over
70, the sick, pregnant women, and women raising children would not be arrested. In addition, the duration of imprisonment under the Execution Law would be limited to 15 days.

2. The Deliberations in the Cabinet and the Ministerial Committee for Legislation

A memorandum on the bill was presented to the cabinet and considered by the Ministerial Committee for Legislation, which discussed its substance on November 21st, 1955. Attorney General Haim Cohn’s speech before the committee is instructive. At the start of the discussion, he said:

I have given up hope that we are becoming an enlightened country in this regard after the Minister of Justice, whose orders I obey, decided not to oppose the lawyers and the judges. We have therefore decided to propose a law that leaves imprisonment for debt in force, and includes exactly the restrictions, precautions and security measures that are in force in Germany and Switzerland. . . . If we develop a constitution, I, at any rate, will propose to add this clause [annulling imprisonment for debt, R.H.].

Toward the end of the discussion, the Attorney General explained the rationale for the proposed draft:

The intention is, indeed, to undermine the content of the law, so that a creditor will not consider it worthwhile to apply for an order for imprisonment of a debtor who can only be held for 15 days.

The way the Ministers referred to a number of specific clauses shows that they were divided concerning the world view on which the law should rest. Minister Bechor Shetreet of Mapai (Israel Workers’ Party), the central coalition party, claimed that “The law should suit social conditions. I am sorry to say that our society is not fair.” At another point in the discussion he added, “I don’t want such a humanistic law.” Minister Yosef Burg of the Mizrachi (Religious Zionists) criticized Haim Cohn: “Instead of educating judges, you change the law.” Minister Bar-Yehuda of Achdut Ha’avoda (a more leftist labor party than Mapai) said he would be willing to support the abolition of imprisonment for debt, if the prosecution initiated criminal proceedings in cases when the evasion of payment involved intentional offences.

Following that meeting, at which the imprisonment bill met with difficulties, and considering that progress was being made on the proposed
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Execution Law which would include the imprisonment for debt issue, Pinchas Rosen and Haim Cohn decided to abandon the bill in January 1956. They may have felt that if they proposed efficient alternatives to imprisonment by developing means for use against property, the opposition to the abolition of imprisonment would lessen. Or they may have reasoned that the imprisonment issue would be concealed among the other issues dealt with in the law. In May 1956, Pinchas Rosen submitted the proposed Judgements (Execution) Law to the government for review. The bill was approved by the Ministerial Committee for Legislation in August 1957, and published as a government-sponsored bill the following month.

From the explanatory remarks and the contents of the bill submitted to the Knesset in the autumn of 1957, it appears that Pinchas Rosen and Haim Cohn’s retreat early in 1956 was only tactical. The 1957 bill expressed the revolutionary conception that Rosen had held since 1949, which sought to abolish imprisonment for debt in Israel. There was no discussion of the duration of imprisonment, which branch should be authorized to impose it, or the exceptions to its use; this original Israeli Execution Law did not even include a section on arrests:

This proposal does not only aim to facilitate the repeal of the Ottoman Statute, or specifically to re-mold Execution Law according to current English law; its purpose is to facilitate carrying out judicial decisions and to make the necessary procedures more expeditious and less expensive, to limit such procedures to means against the debtor’s property, according to the tradition of Hebrew Law, and not against the debtor’s person, such as imprisonment and the like.

It seemed, indeed, a law that rejected foreign influences and adopted solutions inspired by Jewish tradition and law (what was often referred to as Hebrew law), but it soon became apparent that this was not the case, for two reasons. One was that the bill was not based on the traditions of Hebrew Law, at least not that of later generations, according to Menachem Elon, by then advisor to the Minister of Justice on Hebrew Law. The other was that the law generally drew on the Continental approach, with which its drafters Uri Yadin, Haim Cohn and Pinchas Rosen, German-born Jews, were familiar. In this approach, the apparatus of execution would be initiated by the court (in fact, by the State), and not by the complainant. The proper province of Execution Law, according to the bill, was in Administrative, rather than Private Law, where Common Law legal systems place it.
3. Knesset Deliberations on the 1957 Bill

On November 11th, 1957, Pinchas Rosen, the Minister of Justice, submitted the proposed 1957 Judgements (Execution) Law to the Third Knesset for the first of three necessary readings. It finally passed the third reading in the Sixth Knesset on August 8th, 1967, ten years less three months after its original submission. Between these two dates, a great deal of water flowed under the bridges of the Jordan river; there were a number of attempts to divert its waters; the Israeli Army returned to the Sinai desert; Ben Gurion retired to his desert retreat at Sde Boker; Dayan was appointed Minister of Defense; Elon became Professor of Hebrew Law; Haim Cohn was appointed Justice of the Supreme Court; and Pinchas Rosen was replaced in the government by Dov Yossef and later by his former Attorney General, Yaʼacov Shimshon Shapiro. During the historical discussion, after which the Execution Law passed its second and third readings, exactly two months after the Six-day War, Moshe Una, head of the Knesset’s Constitution, Law and Justice Committee, said:

MK Rosen’s astonishment that this law is still being discussed is understandable. But, MK Rosen, you can now see your labors reaching fruition.

The bill did indeed reach fruition on that day by being enacted, but it was not the version Pinchas Rosen had worked on since 1949. As passed, the law countered the government-sponsored 1957 bill on two major issues: the initiative for execution procedures did not pass to the State, and imprisonment for debt was not abolished, but was rather central to the new law. I shall now attempt to explain this dramatic turn of events.

The Execution Law reached its first reading during the Third Knesset, in the autumn of 1957 and the Fourth Knesset, in the summer of 1960. The bill was discussed on seven separate days and 35 members of Knesset from nine different parties spoke. A significant part of the discussion, both in 1957 and 1960, was dedicated to the question of imprisonment for debt. The group that supported the abolition of imprisonment for debt was led by Minister of Justice Pinchas Rosen, whose views we have already met. He and his Progressive (Centrist) Party were joined by a few General Zionists, but most of the support for the Minister came from the parties of the left: the Israeli Communist Party, Mapam (United Workers’ Party), and the Poalei Tzion (Labor Union party). This unusual coalition of liberals and socialists joined to abolish imprisonment for debt. Several Knesset
members based their opposition to imprisonment for debt on their awareness of its historical background. Hanan Rubin of Mapam noted that

There is a direct connection between primitive legal conceptions, conceptions prevalent at the very dawn of legal evolution, and imprisonment for debt; and I think we should now repeal it.\(^45\)

Nachum Nir-Refaelex of Achdut Ha'avoda argued that imprisonment for debt was a relic of the feudal, anti-democratic statutes of the Ottoman era, and other MKs expressed the view that imprisonment was an archaic remnant of the “darkest of the dark ages.”\(^46\) Ezra Ichilov of the General Zionists said that the bill does, and should, protect the debtor against imprisonment, but that it does not sufficiently protect debtors from investigation, search and confiscation of property.\(^47\) Mordechai Bibi of Achdut Ha’avoda pointed out that only debtors of modest means go to prison for debt. Esther Wilenska of the Israeli Communist Party supplied the orthodox Marxist analysis:

Characteristically, most debtors under the capitalist regime are working people, independent workers and wage-earners. . . . The basic point of departure should be protecting the working person from the creditor, from the various means the creditor commands with which to harm the debtor.\(^48\)

Against this wide coalition advocating progress, enlightenment, debtors’ rights and working class interests, was a group that supported creditors’ rights, preservation of the existing order, ensuring economic growth, and also, they argued, protection of the debtors themselves. This group represented an unusual coalition on the political map of the period. It included members of Mapai (Israeli Workers’ Party), Cherut (the right-wing Freedom Party), and a number of General Zionists (centrists).

Against the idealistic approach of the liberals and the socialists, the Mapai MKs, led by the lawyers amongst them, suggested a pragmatic, clever and efficient course. The most noteworthy of these were jurists David Bar-Rav-Hai and Haim Zadok.\(^49\) Several of the speakers reiterated the point that not every debtor is pitiful and lower-class, and not every creditor is a cruel person of means, “after all, social relations are not determined solely on the basis of one’s position on this or that side of the debt divide.”\(^50\) Once they declared the imprisonment for debt issue neutral from the standpoint of class, there was no reason for Mapai MKs to oppose
its annulment for substantive reasons. They proceeded to attack the proposal of the Minister of Justice as being too revolutionary and utopian:

This statute suffers from one flaw: it was created in an academic atmosphere, and not under the conditions of attorney’s offices with hundreds of cases in the Execution Office. It was drafted in a completely different atmosphere, on the desks of legally trained civil servants . . . consequently, it reaches very agreeable conclusions, but such that will not hold up in our reality. 51

The speakers concluded that imprisonment for debt could not be repealed at that time because such a step would harm creditors and the credit fabric, and eventually debtors would not be able to get loans and would also be harmed. Most important, it would curtail economic development.

Right-wing opposition to Rosen’s bill included Eliyahu Meridor of Cherut, who argued that the State apparatus should not be overly concerned with recalcitrant debtors:

Isn’t it simpler to say to a debtor who refuses to pay, “Instead of us sending policemen and detectives to search for where you have hidden your property . . . , we will put you in jail, and then maybe you will tell us, of your own free will, where your property is . . .”? 52

Moshe Binyamin Nissim of the General Zionists claimed that the heads of the execution offices, who were judges, could be trusted not to issue rash orders of arrest; that most debtors paid quickly to avoid imprisonment, evidence that they were able to pay all along; that without imprisonment the awarding of credit would be impaired; and that “imprisonment has, in fact, proved to be efficient in our reality.” 53 Zvi Zimmerman, also a member of the General Zionists, in an attempt to “understand what this great commotion is actually about”, noted that only a “small number” of debtors were actually arrested. He appealed to well-read MKs, versed in history: “We seem to be painting an imaginary picture, based on novels by Charles Dickens that impressed us long ago, when we were young.” He concluded by making a somewhat awkward statement for a centrist-liberal politician: “I feel that at the present time we should not be chasing a vision of liberalism.” 54

It is difficult to find a clear, homogeneous, ideological or self-seeking rationale in the arguments of those opposing abolition of imprisonment among the centrist and right-wing parties. None of these MKs was prepared to speak out plainly in favor of protecting the interests of capitalist and big
business creditors. These interests were probably not considered legitimate enough at the time, and their supporters had to hide behind indirect rhetoric.

A recurrent motif in the speeches of some of those who opposed the abolition of imprisonment was that even though these were worthy ideas, they did not yet suit the geographical region and the society. Baruch Azania of Mapai claimed that:

The time has not yet come for the annulment of imprisonment for debt, and I would like to explain what lies behind the words, “the time has not yet come.” The time has not yet come means that a strong, solid ethic has yet to be established among the borrowing public; there isn’t yet sufficient solidity, which will come.\footnote{55}

Zvi Zimmerman of the General Zionists claimed that “imprisonment for debt shouldn’t be annulled in our society, which is still in a formative stage, and in which no uniform morality yet exists.”\footnote{56} Yohanan Bader said: “Still I would say that even today, a substantial part of the citizenry lives according to oriental customs, and ‘property’ to many of them means gold or something similar, hidden in a sock. Sometimes all property is concealed. In a country like ours, imprisonment should, cautiously and with limits, be preserved.” In answer to a comment from the benches, Bader quickly added, “You understand that I do not wish to precisely identify that part of the citizenry, but I do not necessarily mean the Sephardi Jews.”\footnote{57} Whether Bader was referring only to Sephardi Jews, or to other groups as well, the ethnic genie who had haunted the deliberations was out of the bottle. It isn’t surprising that the discord between Jews of European and Oriental origin, which wasn’t always mentioned explicitly, was relevant to the discussion. At the end of the 1950s, against the background of mass immigration and accelerated economic development, began a division of labor and social stratification with clear ethnic characteristics.\footnote{58} If this were to be the path of social development, one could expect that there would be more borrowers of Oriental origin than lenders.

Despite the strong opposition to abolishing imprisonment for debt, Pinchas Rosen was able, in both the Third and the Fourth Knesset, to push the bill through the first reading and transfer it to the Knesset’s Constitution, Law and Justice Committee. During the first round in November 1957, Rosen was more prone to argue with his opponents. The Minister repeatedly pointed out that practically no countries in the world still allowed imprisonment for debt. He wasn’t convinced by those who
argued for the efficiency of imprisonment. In any case, the advantage to the creditors could not offset the harm to debtors and their families. Rosen also “got back” at his jurist opponents, both in and outside the Knesset:

It is well-known in the history of law, that whenever the abolition of a cruel means was suggested, whether for punishment, investigation, or some other purpose, the argument was raised, principally by judges and lawyers, that without that cruel, but proven and time-tested means, anarchy would prevail, and therefore that the abolition of that cruel means is a decree that most of the public could not live with.59

In the Third Knesset, the bill still had some momentum, and may have passed the second and third readings, but the Knesset adjourned before the Constitution, Law and Justice Committee completed its deliberations. Because the ratification process had to start anew with each new Knesset, complex, multi-clause statutes did not easily pass until the enactment of the 1964 Bills (Continuity of Deliberations) Law.60 At that time, the law had not yet been enacted, so the bill had to be reintroduced for the first reading in the Fourth Knesset. Summing up the discussion before the law came to a vote in August 1960, the Minister of Justice was more hesitant, partly because of increasing opposition to the law among members of Mapai, including some of the party’s elite. His self-confidence further diminished after a symposium on the bill held by the Bar Association, at which many lawyers severely criticized not only the abolition of imprisonment for debt, but also the Minister of Justice and the Attorney General.61 In the face of this opposition, the Minister declared in Knesset that the government would have to consider preserving imprisonment for non-payment of alimony. He did not preclude what he referred to as Haim Zadok’s “compromise proposal”, which allowed the imprisonment of wealthy debtors, following an investigation into their financial means at a hearing before a judge, according to all the rules of civil procedure. The Minister recommended that this proposal be seriously debated in the Constitution, Law and Justice Committee. In addition, if imprisonment for debt were not abolished, laws in other countries, primarily France and Germany, regarding limiting imprisonment should be examined.62 However, even his willingness to compromise did not help the Minister of Justice to push the Execution Law through the Knesset, since the opposition made sure that the law never emerged from Committee for the second and third reading.
Because the Constitution, Law and Justice Committee did not complete its deliberations before the adjournment of the Fourth Knesset, the 1957 bill, which had been approved by the government, twice affirmed in first reading and never rejected by the Knesset, was shelved in June 1961. In 1965, Dov Yosef, the new Minister of Justice (and the first to come from among Mapai ranks), formulated and submitted a new bill. It radically differed from the 1957 bill sponsored by Rosen on two key principles: conduct of execution of judgment procedures would remain with the parties and not be transferred to the State, in keeping with adversarial tradition; and imprisonment for debt would not be abolished. According to Dov Yosef, the decision not to abolish imprisonment for debt came after “wide-ranging, intense deliberation, taking into account the opinions of many jurists widely experienced in matters of execution of judgment.” These jurists, both lawyers and judges, combined with Mapai’s pragmatism, won the day. On the eve of its adjournment and with very little discussion, the Fifth Knesset passed the law through a first reading and submitted it to Committee. Due to the passage of the Bills (Continuity of Deliberations) Law, the Committee could resume its deliberations during the Sixth Knesset without another first reading.

The bill returned from the Committee to the Sixth Knesset for the second and third readings, and was placed on the agenda, along with many other bills, on the last day of the Knesset session, August 8, 1967. On that occasion, during a hasty discussion with only a few members participating, the final battle against the imprisonment for debt took place. The battle was fought by two members who had not taken part in the earlier rounds, but who represented the same ideological camps which had opposed imprisonment in the earlier deliberations. The speakers were Yitzhak Hans Klinghoffer of Gachal (the Cherut-Liberal Bloc), a professor of Constitutional Law, and Reuven Arazi of Mapam (the United Workers’ Party); once again, a liberal-socialist coalition. Klinghoffer listed a number of countries, including Switzerland, France and Italy, which had almost completely annulled imprisonment for debt on the grounds that it was “inherently unacceptable and inconsistent with the legal culture of our time.” Klinghoffer could find no argument, in this or earlier deliberations, which justified such imprisonment in Israel. He noted that in 1957 Pinchas Rosen had accurately explained opposition to the annulment of imprisonment in Israel as stemming from the conservatism of the legal
profession. Klinghoffer noted that non-payment of debt did not represent a prevalent ethical problem in Israel, and in those countries where imprisonment was abolished, the execution apparatus continued to function no worse than it did in Israel.

The denial of individual freedom for non-payment of debt, issuing an order of arrest as a means to collect a debt, are infringements of an individual’s personal freedom which modern, progressive legal thought rejects as conflicting with basic human rights. 68

Reuven Arazi of Mapam proposed that all clauses relating to imprisonment for debt be struck from the bill, except the clause that dealt with imprisonment for non-payment of alimony. He, too, referred to the lessons of history:

The institution of imprisonment for debt is an antiquated atavism that originated in Roman political conceptions. . . . Under Ottoman law, this instrument of coercion was still considered necessary but in progressive countries, imprisonment for debt does not exist and it is time for us to abolish it as well. 69

While Klinghoffer emphasized the violation of human rights, Arazi centered on the wrong caused to the lower classes:

This is mainly a means for collecting small debts. Those with large debts usually also own property, and if the Execution of Judgment Offices act quickly and efficiently, they can get at the property. Is it right and proper for us to utilize imprisonment especially for small debtors? This kind of debtor does not borrow money to live a life of luxury or to get rich at the expense of others. 70

Moshe Una of the National Religious Party, chairman of the Constitution, Law and Justice Committee, emphasized that the law conformed to Hebrew Law and asked to reject the objections, saying:

There’s a question of the attitude of the public . . . . That is the question we should address, and not whether it suits an enlightened, democratic State, or whether other countries have reached this stage. 71

The short discussion was concluded by Ya’acov Shimshon Shapiro, who succeeded Dov Yosef as Minister of Justice for Mapai. Ironically, Shapiro, who as Attorney General in 1949 had, on Rosen’s direction,
ordered the preparation of a bill for abolishing imprisonment, now was in charge of the legislative process that entrenched imprisonment. Shapiro of 1967, reassured by the comforting view that poor debtors could avoid imprisonment by being declared bankrupt, was willing to support the law. It was a further irony that a few years later, in 1976, an amendment was passed to restrict poor debtors’ access to bankruptcy procedures, leaving them exposed to imprisonment, and by this overturning the rationale of Shapiro’s position. The re-emergence of old heroes in new roles is, as we shall see, a recurring motif in our narrative.

Following the Minister’s short speech, a vote was taken, the objections were rejected, the law passed its third reading, and the Knesset immediately proceeded to vote on the next bill on the agenda. In that marathon 15-hour session on August 8, 1967, an incredible number of statutes – 16 – were approved.

D. 1967-1992: The Total Victory of Imprisonment for Debt in Israel

1. Imprisonment for Debt According to the 1967 Execution Law

When it went into effect on September 1, 1968, the 1967 Execution Law annulled the Ottoman Temporary Execution Act and the Mandatory Debt Ordinance (Imprisonment). It differed in its conception from all earlier statutes and bills. Imprisonment for debt was the subject of Chapter 7 of the law. The law made no mention of categorization of kinds of debts, or of the different rules of imprisonment, aspects found in the Ottoman legislation, the Mandatory Ordinance and the Israeli Execution bill of 1955. The 1967 law did not relate to the debtor’s intent or ability to pay, nor did it refer to the nature of the interest of the creditor. All debtors were subject to a uniform rule which allowed imprisonment for 21 days.

Orders of arrest issued by the Head of the Execution Office were limited by only two restrictions. The first, a procedural one, was that before handing down an order of arrest, a payment order, whether in installments or in a lump sum, had to be issued by the Head of the Execution Office. Such an order could be issued following an inquiry into the debtor’s means, according to an agreement between the parties, or on the basis of an affidavit by the creditor as to the debtor’s means. Thus the law did not require a personal hearing for the debtor, or the debtor’s written response before issuing an order for payment, followed by an order of arrest. The second limitation stated that there was no other way to impel the debtor to
obey the judicial decision. The meaning and scope of this vague, laconic limitation emerged only later, as creditors, lawyers and Execution Offices eroded it through practices consistent with their interests. The only procedural protection that the law afforded the debtor, and of which the drafters of the law were very proud, was that the debtor was to be brought before the Head of the Execution Office within three days of being arrested. This limitation was later weakened and finally undermined, as I shall show below. Even at this stage, however, the law left the issue of imprisonment to the discretion of the Head of the Execution Office, that Ottoman institution of judicial-cum-administrative character.

I shall examine developments in the area of imprisonment for debt over more than 30 years, from 1968, when the Execution Law went into effect, until 2000, when the latest amendment to that law was enacted, from three aspects. First, I will briefly examine the statutory amendments approved during that period; next, I will describe the bottom-up development of imprisonment practices at the Execution Offices; and finally, I will review the attitude that extended from the top – from the pinnacle of the judicial pyramid, the Supreme Court – regarding the legislation, amendments, regulations and the administrative and judicial practices which evolved at the Execution Offices.

Amendments During the 31 years between 1968 and 1999, a series of amendments and other legislation relevant to the Execution Law were passed, which transformed the statutory situation as it relates to imprisonment for debt. I will survey the major amendments, their effects and their interplay, but I will not, as in the previous section, analyze the legislative history of each piece of legislation. The change in methodology stems from several factors: the Ministry of Justice documentation of this period at the State Archives is not yet accessible to researchers (by law, there is a 30-year moving screen); Knesset debates on the issue were less ideological and much more laconic and technical in this period; and my major aim in this section is to present the cumulative effect of the amendments.

In a regulation known as Regulation 93 (later 114), published in 1968 after the passage of the law, the burden of proof regarding the debtor’s ability to repay the debt was transferred from the creditor (who in the original law had to prove that there was no means, other than imprisonment, to carry out the judicial decision) to the debtor (who now had to prove that an alternative means did exist).
In 1974, the right of debtors to be brought before the Head of the Execution Office within three days of their arrest was limited only to those debtors who had not undergone an inquiry regarding their means prior to their arrest. By 1978, debtors were no longer guaranteed a hearing before arrest: the Heads of the Execution Offices could now issue an order for installment payment of the debt on initiation of execution proceedings, and if the debtor failed to pay, the order of arrest could automatically follow.

A 1976 amendment to the Bankruptcy Ordinance required that courts take into account, among others, execution of judgment proceedings against the debtor that had been taken in the past or that may be taken in the future, before determining that bankruptcy proceedings could be applied to a particular case. This amendment allowed judges to annul a debtor’s bankrupt status, should they consider that status disadvantageous to creditors. A Supreme Court decision interpreted the amendment as requiring a debtor’s good faith as a condition for being granted bankrupt status. A debtor who applied for bankruptcy track, without having assets that could be divided among his creditors, was considered to be in bad faith. Thus for most debtors, and certainly for all who had no property, the bankruptcy track was effectively blocked.

By a 1983 statute, creditors were exempt from procedural fees when applying for an order of arrest against their debtors, and imprisonment costs were added to the debt which could at some future time be collected from the debtor. Meanwhile the State covered the costs. If the “future time” never came, which often happened, the result was that the State covered the costs of debtors’ imprisonment.

A 1989 amendment legalized standardized orders for installment payment, which could be issued by any official at the Execution Office, with no deliberation or discretion regarding particular cases. In 1990, a special police unit was legislated into existence, whose mission was to arrest any debtor within thirty days of the issuance of an arrest order, funded by creditors who paid half of the direct imprisonment costs, and to whom the police had to explain in writing if the arrest was not carried out. Thus creditors could buy semi-private and subsidized enforcement services from the police.

A 1992 amendment closed a final loophole in the law by determining that only debtors able to pay the sum of their debts within two years, or in special cases within three years, would be allowed to ask that their multiple Execution Office files be conjoined; such debtors would pay five percent of the sum of their debts when applying for “file merging,” and a similar sum
monthly until a decision in their application was handed down. De facto open-ended imprisonment became likely for debtors of multiple creditors who could not show that they were able to pay their debts within two or three years.

Through these amendments and regulations, imprisonment for debt came to be the major means for enforcement of obligations of poor debtors. The avenues of bankruptcy and “file merging” at the Execution Office were barred to them; the procedure for issuing orders of arrest was shortened, discretion was removed and review was curtailed; only weak procedural protection was left to debtors, while creditors were provided with a specialized, efficient police-assisted enforcement mechanism. In fact, by the early 1990s, once creditors had initiated proceedings against debtors of limited means, they could almost automatically receive an order of arrest, demand enforcement by the police special debt-collection squad, and bring about debtors’ swift imprisonment. Because this was the usual procedure at the Execution Office, creditors didn’t bother with enforcement means against the debtors’ property. Debtors who did not deny the existence of the debt, even if they showed their inability to pay it, often could not defend themselves and were imprisoned. This resulted in a meteoric rise of imprisonment for debt that did not exist during the feudalistic Ottoman period, in the era of British rule when natives’ rights were scorned, or during the collectivist period of the first two decades of Israel’s independence. This happened between the late 1960s and the early 1990s, when Israel was molding herself in the image of the liberal West. It took place more than a hundred years after the abolition of imprisonment for debt in most Western countries, and at about the time that imprisonment for debt was abolished in England.

How does the Westernization of Israeli society and economy conform to the developments in the area of imprisonment for debt? Westernization in Israel combined a liberal conception of human rights with a market culture. In the imprisonment for debt context up to the 1990s, it appears that it was the latter that dominated, while the former was completely absent.

Practices at the Execution Office As early as 1971, before the statutory amendments were enacted, Haim Cohn, now a Supreme Court Justice, pointed to the “worrisme” and “frightening” practice in which “an order of arrest naturally follows the initiation of execution proceedings” that seems inevitable to both lawyers and Heads of Execution Offices. This
attitude on the part of the Court inevitably resulted in legislation which was adjusted to fit current practice.

What were some of the practices which evolved in the area of imprisonment for debt in the years before the *Perach* decision of 1993? Execution Office heads signed, as a matter of course, orders of arrest against debtors who had not been brought before them, and without any information regarding the debtors’ income, property, or the nature of the debt. Piles of applications for orders of arrest were signed without even examining debtors’ files. Debtors were arrested without having been informed of the proceedings against them or about an order of arrest having been issued, often because of bureaucratic mistakes such as a file containing an incorrect address or because of the permissiveness of the delivery of legal documents rules of execution proceedings. They often learned of the proceedings against them from policemen who knocked on their doors in the middle of the night. Erroneous orders of arrest were issued to debtors against whom proceedings had been stayed, debtors who were repaying their debts as ordered and, in one case, to a 10 year-old girl. Some debtors were arrested for several consecutive periods, often for 21 days every month, for the non-payment of monthly sums to a single creditor or to several different creditors, or for not paying the original debt and then for not paying the accumulated interest on the original debt. Debtors were often held in police detention cells instead of in prisons because of a financial dispute between the police and the Prison Authority. When held in prisons, they were often jailed together with criminal prisoners due to the lack of separate debtors’ prisons. In many cases, the authorities did not abide by the statutory demand to bring debtors before a judge within three days of their arrest.77

Only very partial data exists regarding the number of debtors arrested between 1968 and 1993, and only for the end of that period: close to 300,000 new Execution Office files were opened annually between 1990 and 1992; about 176,000 applications for the issue of an order of arrest were processed at the Tel-Aviv Execution office alone in 1988 and about 175,000 of these were referred to the police.78 In 1992 about 24,000 debtors were imprisoned (including those owing alimony payments and fines), most of whom were released within 24 hours, but about 1,600 were imprisoned for a term of more than one week. Most debts processed through Execution proceedings were small: in 30 percent, the debt was less than 1,000 NIS (New Israeli Shekel) and in another 50 percent, it was between 1,000 and 10,000 NIS.79 This data indicates that this widespread
legal phenomenon brought about the imprisonment, in non-criminal proceedings, of many thousands of citizens each year.

These practices were a major cause for the alteration of the statutory arrangement. For example, the explanatory remarks to the Bill of Amendment 4 (1978) to the Execution Law note that since “in practice” it is sole discretion of the Head of the Execution Office to issue an order for installment payment of a debt without inquiring into the debtor’s means, there is no point in delaying the order until the receipt of the debtor’s response. The explanatory remarks to Amendment 8 (1989) Bill to the same law note that because orders for installment payment of debts are often given without an inquiry into the debtor’s means, Heads of the Execution Office should be authorized to issue such orders without reviewing each individual application. Both these amendments in essence legitimize post facto the practices which evolved at the Execution Offices. They answer the needs of the Execution system without considering the fundamental question of the justice of imprisonment for debt or its possible alternatives. It is important to stress that these practices did not stem from contempt for debtors, but from severe budgetary difficulties which created an impossible ratio between the hundreds of thousands of Execution Office files and tens of thousands of applications for orders of arrest, with only several dozen Heads of Execution Offices, most of whom simultaneously serving as judges or registrars.

Irrespective of the reasons for the practices, legitimizing them and restricting alternative means for the enforcement of obligations contributed to their expansion and to turning imprisonment into an accessible, self-evident and even necessary means. It is curious that human and civil rights organizations did not protest this issue, in spite of threats of imprisonment directed annually against tens of thousands of citizens who had not been convicted of any criminal offence.

*The Supreme Court*  In the autumn of 1971, not long after the Execution Law and its Regulations went into effect, many believed that the Supreme Court would intervene and interpret the authorization to imprison restrictively and the exceptions to imprisonment broadly, and thus protect debtors’ rights to freedom and due judicial process. In three decisions given within a month and a half, the Court deliberated on Clause 70, the imprisonment clause of the Execution Law, and decided operatively for debtors against whom orders of arrest had been issued.°° The most outspoken of the judges was, not surprisingly, Justice Cohn, who had been
one of the leaders of the struggle for legislative abolition of imprisonment for debt since the early 1950s. He took the opportunity to present his views on the normative level:

In my opinion – and I am not saying this for the first time – the legislature would do better if it abolished imprisonment for debt absolutely and completely. Maybe legislation of the Basic Law on citizens’ rights is the opportunity for this (see, for example, clause 59 of the Swiss Constitution).  

Justice Cohn questioned the legality of the evolving practices on the positive law level as well, noting that Regulation 93 (later, 114) of the 1968 Execution Regulations, which allowed the issue of orders of arrest, transferred the burden of proof from the creditor to the debtor, in contradiction to the Execution Law.

Even when the Supreme Court was granted a rare chance to declare Regulation 114 illegal, when it was indirectly challenged in 1989, it did not do so. Rejecting an application for permission to appeal, Justice Shlomo Levin stated:

Even the argument that the aforementioned Regulation 114 is ultra vires does not make it worthy of appeal; in this, I accept the position of the District Court that the Regulation does not conflict with the provisions of the law.  

It is interesting to note that four years later in the Perach decision, Justice Menachem Elon, focusing on the same legal question, arrived at the opposite conclusion and did not refer to Justice Levin’s opinion.

Why such a long time passed from the passage of the Regulation to its repeal is inexplicable in light of Justice Cohn’s opinion recommending its annulment in the framework of a published Supreme Court decision available to the legal community as early as 1971. The fact remains that it was a long time before this opinion had any effect. This phenomenon can be explained on two levels: the intra-legal – the structure of the judiciary, and the extra-legal – the financial standing of the debtors who needed protection and their de facto ability to initiate legal proceedings, which combined to deny the debtors access to the Supreme Court. I will discuss these aspects below.

The Israeli Supreme Court is generally considered to be highly accessible compared to courts of last resort in other legal systems such as the United States Supreme Court or the House of Lords in England, instances which have almost complete control over access to their halls,
and which can select litigants from their long rosters. A citizen has the right to appeal to the Israeli Supreme Court in many situations, and can petition it directly in its role as the High Court of Justice. Thus in most constitutional, administrative, criminal and civil cases, the Supreme Court is accessible as either the court of first or last instance. Imprisoned debtors, however, were in one of the few corners of the legal system from which the Supreme Court was nearly inaccessible, both practically and legally. Appealing orders and decisions of the Head of the Execution Office (which is adjunct to the court of the first instance – the Magistrates’ Court) to the District Court is, on most issues, at that Court’s discretion. Though the law did enumerate a number of decisions which sanction the right to appeal, for some reason the decision depriving a person of his liberty (for less than seven years) was not included in this category. Hence, to reach the Supreme Court by way of civil appeal, a debtor had to pass two discretionary gates, that of the District Court and that of the Supreme Court. Why couldn’t debtors bypass these hurdles by petitioning the unconstitutionality or the illegality of the enabling regulation directly to the High Court of Justice? Because as a rule of standing, the existence of an alternate remedy bars the way to the High Court of Justice and in this area, imprisoned debtors did theoretically have an alternate path: appeal, by permission, to the District Court.

The few cases in which debtors facing civil imprisonment were able to be heard by the highest judicial instance before 1993 were of two kinds. The first, when a debtor, who had already gained entrance into the bankruptcy track, was attempting not to return to execution of judgment track so as to prevent the issuance order of arrest. As bankruptcy proceedings, unlike execution of judgment proceedings, are within the first instance jurisdiction of the District Court, bankrupts had the right of appeal to the Supreme Court (as for any matters beginning at the District Court). The second instance was when the debtor was still in jail when the matter reached the Supreme Court. This could occur only if the debtor was serving time under criminal arrest, in addition to the 21-day civil imprisonment, an ironic situation, where those convicted of criminal offences could obtain a High Court of Justice review of their civil imprisonment because they were still in prison, whereas debtors who weren’t serving time for criminal offences were already out of prison by the time their review was scheduled to be heard.

Since the end of the 1980s, the Supreme Court has substantially restricted the possibility of debtors to move from execution-track
proceedings leading to imprisonment, to bankruptcy-track proceedings, in which debtors are immune from imprisonment. In 1989, reading the good faith principle into the 1976 Amendment 6 to the Bankruptcy Ordinance, and especially into clause 18 of the Bankruptcy Ordinance, the Court decided that it could refuse to grant a debtor’s application to be declared bankrupt if that application was not served in good faith. Though it grounded the good faith requirement in the statutory amendment, the Court initially considered its decision to be a continuation of decisions in the 1960s regarding the relationship between bankruptcy and execution proceedings. Later, the Court admitted that it had diverted from the decisions of the 1960s:

The common attitude in the past was that one of the main purposes of bankruptcy proceedings was to encourage debtors to make a fresh start through remission, thereby impinging on realization of creditors’ interests. Today, greater consideration is given creditors’ interest in repayment of the debt than to the debtor’s interests.

When the debtor’s only concern is to avoid proceedings at the Execution Office, including imprisonment, through bankruptcy proceedings, this may be considered an indication of lack of good faith and thus bar the debtor’s way to bankruptcy proceedings. A poor debtor who wished to display good faith would not initiate bankruptcy proceedings, but would then be exposed to repeated terms of imprisonment and would not be able to obtain remission of the debt.

The amendment to the law, together with the heavy load of litigation in the District Court, seem to have caused the Court to favor creditors’ interests and bar the bankruptcy track to debtors lacking financial means. Thus, in Israel in the late twentieth century, we find situations reminiscent of in the past, where separate execution and bankruptcy tracks could, by controlling accessibility, distinction and exclusion, be exploited by creditors of high social classes for furthering their interests at the expense of the lower-class debtors.

There was in the Supreme Court another voice, albeit a weak one, which somewhat moderated that of the dominant opinion:

Civilized society considers providing debtors with a life raft to save them from being slaves to never-ending debts, an important value. Still, we cannot accept a situation where debtors abuse this merciful option and turn it into a “safe haven” from their creditors where all are welcome.
And in the same decision:

Is it worthwhile to rehabilitate companies, yet not human debtors?!

This duality may reflect the internal struggle of some of the justices, or their dissatisfaction with the existing statutory arrangements and the need to surrender to the constraints of the system.

In the 1960s, the dominant conception had been completely different.

In a 1962 case, Justice Berinson said:

A person’s desire to forestall orders of arrest which exist, or which might be issued for non-payment of a debt is not a reason to deprive that person of the right granted to a debtor to declare himself bankrupt and start his life anew, without being ruthlessly hunted by his creditors.\(^94\)

In a 1967 case, Justice Sussman espoused Justice Berinson’s opinion and concluded:

The fact that a debtor has no assets, in itself does not indicate an abuse of bankruptcy proceedings, since the debtor’s desire to make a fresh start and to avoid imprisonment also constitutes a legitimate reason for justifying the proceedings.\(^95\)

In the same case, Justice Cohn spoke out, as was his tendency in cases of imprisonment for debt:

An abuse of bankruptcy proceedings? I do not know of a better use for them than the defendant’s use. If bankruptcy proceedings did not exist, saving a prisoner from his jailers would be exactly the reason to invent them.

Thus between the 1960s and the late 1980s, the Supreme Court’s conception of the availability of bankruptcy proceedings for debtors, and the nature of the relationship between the two proceedings, underwent a turnabout of 180 degrees. Bankruptcy proceedings in the later period were open primarily to creditors and wealthy debtors, while poor debtors had to make do with execution proceedings.

A further major impediment to the review of Regulation 114, and imprisonment for debt in general, by the Supreme Court was practical: time, money and legal representation.\(^96\) This problem was especially acute for most debtors, who had fewer means than the average litigant.
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A direct challenge to the legality of Regulation 114 became possible only in the 1980s, when the High Court of Justice broadened its standing and justiciability doctrines allowing, among other things, representative and public petitions. In group petitions, the question of an alternate remedy could not arise. Opening the gates of the High Court therefore had bearing both on politically-charged litigation as well as on some of the darker corners of the legal system. In our case, increasing recognition of public petitions gave Perach, a debtors’ association, standing at the High Court.

By providing the High Court with the impetus to review Regulation 114 almost 25 years after it was issued, the Perach case is an outstanding example of the way that the structure of the Court system combined with the right of standing to influence the formulation of norms in the legal system.

E. The 1993 Perach Decision: The Beginning of the End of Imprisonment for Debt in Israel?

In November 1992, the Perach Association (Perach is the Hebrew acronym for “Bankrupts and Debtors”, but also the Hebrew word for “flower”) petitioned the High Court of Justice against the Minister of Justice and the police. Perach had been founded not long before to protect its members (a group of debtors and bankrupt persons) and the debtor public in general. It was established at a time of economic crisis following a stock market crash, when interest rates were high. The impetus behind it was the increasing number of insolvent debtors, especially those who were guarantors of unpaid debts or whose debts had swelled due to high interest rates. The association was represented before the Supreme Court by attorney Eyal Simchoni, who had begun the struggle for the abolition of imprisonment for debt some years earlier from within the system, in his role as Magistrate Court Registrar and Head of an Execution Office in charge of imprisonment of debtors. He resigned from his post in 1991 and continued the fight from outside the system by petitioning the High Court of Justice and applying to other State authorities.

In Perach, Simchoni sought to repeal Regulation 114 of the Execution Regulations on the grounds that it was unreasonable and ultra vires the enabling statute. After three hearings and the submission of affidavits and written arguments, in a process that lasted more than nine months, the Court decision was handed down on August 31, 1993, by Deputy President
Menachem Elon, less than three months before his retirement from the judiciary. This decision was one of Elon’s final substantial judgments. Justices Barak and Mazza concurred.

After a detailed description of the prevalent practices of imprisonment for debt, Justice Elon asked: “Is this reality anchored in, or perhaps, heaven forbid, justified, by the Execution Law?” He went on to discuss the legislative history and its purpose and noted that

In the Explanatory Remarks to both bills, and in the Knesset deliberations on them, the central source was the position of Hebrew Law on various aspects of Execution Law, and especially on issues of imprisonment for debt.

His conclusion was that the position of Hebrew Law regarding this issue should be reviewed. He then turned to an exhaustive discussion based on the work of the leading scholar on the topic, Professor Menachem Elon. He referred to his own book, *Individual Freedom in Debt Collection Means in Hebrew Law* which had been published in 1964 and was based on his doctoral dissertation. The essence of that wide-ranging study which relied on a large number of sources, and especially the chapter on the position of Hebrew Law regarding imprisonment for debt, are summarized in the decision.

Elon’s thesis was that from its beginnings, Hebrew Law opposed imprisonment for debt. In the post-talmudic period, from the seventh century onward, there was increasing conflict between the demands of the socio-economic reality, which relied more and more on a credit market, and the Halacha, the ancient Jewish religious law, that opposed imprisonment. After a few hundred years of tension, beginning in the fourteenth century, a critical turnabout took place in the Halachic position, in which the Ribash, a major rabbinical authority, played a central role. Utilizing an interesting combination of different means of legal norm-creation such as custom, community law and interpretation of the scriptures, the position of Hebrew Law changed to allow the imprisonment of debtors so as to make debt-collection more efficient, but not as punishment. After that time, debtors who were able to repay their debts but avoided doing so, could be imprisoned, but not so debtors who lacked the means to do so. Conditions of imprisonment had to respect the dignity of the debtor. In practice, from time to time imprisonment was still used as punishment, but this practice was deplored by the Halachic sages.

When Justice Elon concluded his review of the position of Hebrew Law, as researched by Professor Elon, he went on to examine the Knesset
deliberations on the Execution Laws from 1957 to 1967 and noted the significant role of Hebrew Law in those deliberations. When he first presented his bill for abolishing imprisonment for debt to the Knesset in 1957, Minister of Justice Pinchas Rosen had claimed that it corresponded to Hebrew Law tradition, which rejected imprisonment for debt. In 1960, he recanted on this statement and clarified that though this, indeed, had been the position of Hebrew Law until the twelfth century, it later did not oppose the imprisonment of debtors who could afford to pay, as Elon’s scholarship showed. It seems that, as legislative advisor to the Minister of Justice, Menachem Elon informed Pinchas Rosen about his conclusions, and the Minister integrated them into his speeches to the Knesset. Therefore, in 1993, Supreme Court Justice Elon could base his opinion on Hebrew Law and Knesset deliberations on the subject of imprisonment for debt, with which he was thoroughly familiar from his earlier activity. The Perach case provided Elon, on the threshold of retirement, with an opportunity to close a cycle which began more than 35 years earlier, when he was as a young researcher at the Hebrew University of Jerusalem and a legislative advisor at the Ministry of Justice.

Justice Elon concluded that the 1967 version of the bill was based on the development of Hebrew Law after the fourteenth century, and hence, in essence, based on his own original research in the field. The position of Hebrew Law, and of the MKs who supported the bill, rejected absolute abolition of imprisonment but wished to restrict its use to special circumstances: as a last resort means of enforcement and not as means of punishment. It could be used only when no other means of enforcement were available, and then only after strictly adhering to due judicial process and the protection of human dignity.

Following this lengthy introduction, the actual decision on the legal question was surprisingly brief. The question, as framed by Justice Elon, was: “Is the Head of the Execution Office authorized to issue an order of arrest without the debtor having been brought before him?” Elon weighed the slight damage to the efficiency of the system against “the fundamental damage to the debtor, his freedom and human dignity, because the order of arrest is issued automatically, in his absence, and without allowing him to argue his case before being deprived of his liberty.” The conclusion is clear: Clause 70 of the Execution Law should be given an interpretation that places the burden of proof regarding the debtor’s ability to pay on the creditor, rendering Regulation 114, which transfers the burden of proof to the debtor, ultra vires and thus null and void. The fact that the case was
presented as simple and unequivocal, in which one consideration tremendously outweighs the other, makes it even more amazing that Regulation 114 had remained in effect for 25 years. I shall return to this enigma below.

F. Back to Normalcy: Imprisonment for Debt after the Perach Decision

The Perach decision is significant on many levels. First, it annulled Regulation 114, thereby returning the burden of proof regarding the lack of alternative means of enforcement to the creditor. Second, it reinterpreted Clause 70 of the Execution Law as intending that orders of arrest could not be issued against debtors before they were brought before the Head of the Execution Office for examination regarding the ability to pay the debts. Third, on the practical level, because the Execution Offices could not accommodate all the debtors whose cases needed to be investigated, imprisonment of large numbers of debtors became impossible. As a result, imprisonment practices ceased almost immediately after the Perach decision was handed down.

Perach forced the Execution Offices and the Ministry of Justice to fundamentally revise the execution of judgment system, once the main component of that system, imprisonment for debt, had been removed. The revision took the shape of a government-sponsored amendment published in February 1994, less than six months after the Perach decision.\textsuperscript{103} The bill was approved by the Knesset in the second and third readings in July 1994, and went into effect in mid-November of that year.\textsuperscript{104}

The revision brought about an improvement in the situation of debtors by shortening the maximum prison term for a single order of arrest from 21 to 7 days, while retaining the option of serving the debtor with consecutive orders of arrest, for a cumulative period of up to 30 days. However, a new track created at the Execution Office for debtors of limited means served the interests of creditors: poor debtors were still barred from the bankruptcy and file-merging tracks. They could not get a remission or a fresh start and had to remain in the newly-created track until full repayment of the debt, an unlikely event.

The amendment ignored one fundamental aspect of the Perach decision by requiring that debtors prove their inability to repay the debts, and stating that if this were not proved, the debtor would be regarded as a person of means who was evading repayment. Further, whereas the Perach decision stated that a debtor for whom an alternative means of enforcement
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existed could not be arrested, the amendment merely required that the Head of the Execution Office consider the efficiency of attachment proceedings against the debtor’s assets. Thus, a debtor could be arrested even if alternative means aimed at the debtor’s assets existed, when the Head of the Execution Office considered them not efficient enough. The amended law protected debtors better than the law and practices of the 1980s and early 1990s, but compared to the conceptions of the drafters of the original 1967 Execution Law, and to Justice Elon’s opinion in the Perach case, the amendment represented a step backward.105

The amendment brought about an interesting shift in the title and wording of clause 70 of the Execution Law, the clause which relates to reasons for debtor imprisonment. The wording was changed from imprisonment “for the non-payment of a debt” to imprisonment “for contempt of the Execution Office.” The rationale behind this revision was probably the wish to re-legitimize imprisonment for debt without having to argue with Justice Elon’s criticism in the Perach case and the Basic Law: Human Dignity and Freedom. The rewording is apparently meant to emphasize the fact that imprisonment was neither punitive nor a means of applying pressure, but a reaction to the debtor’s contempt for the central institutions of the legal system. In my view, what is interesting about this is its lack of originality. As I noted above, a similar revision had been written in England 125 years earlier, when the 1869 Debtors Act and subsequent judicial decisions changed the justification for imprisonment from the non-payment of debt to contempt of court. This shift has been interpreted in the English context by the legal historian, Gerry R. Rubin:

The explanation offered was of more than technical significance; for it was unquestionably easier, both ideologically and practically, to defend imprisonment for civil wrong where one could stigmatise small debtors as “quasi-criminals”, offending against the dignity of the court, than if the debtors were merely identified as victims of economic misfortune.106

Israeli legislators discovered only in 1994 what their English counterparts had grasped in 1869: arguing that debtors wreak havoc on public order and on the foundations of the legal system is considered more suitable in the world outside the Court than arresting them for lacking economic skills, financial talent or luck, or as part of a free service that the State provides to creditors. But once a device has been used successfully in a given period and locality and its purpose revealed, it may be less effective the second time around.
Despite the considerable pro-creditor components embodied in the 1994 amendment, big business, their lawyers and legal administrators still felt that it did not go far enough. They particularly viewed the procedure leading to imprisonment as overly long and complicated. They wanted a full reaction to the *Perach* decision, not only a partial one. A bill for that purpose was first drafted in 1997 and was enacted in 1999 as Amendment 19 to the Execution Law. The amendment allowed imprisonment of debtors even before a hearing was conducted to examine their ability to pay their debts. Furthermore, orders of arrest could be issued to debtors without even having to consider other means of debt collection, such as attachment of property or of earnings. In both respects, this was one more step to the benefit of creditors, compared to the 1994 amendment.\(^{307}\)

The combined effect of the 1994 and 1999 amendments was that in fact the burden of proof was placed once again on the debtor. Poor and underrepresented debtors were often unable to lift that burden. For them, imprisonment again became the major threat of the Execution of Judgments track. Thus the situation went full circle: the *Perach* decision was in effect reversed by the legislature and in a legal framework not far different from that in force until 1993. After 1999, the trends that were evident between 1968 and 1993 have returned.

### G. Conclusions: Why has Imprisonment for Debt Survived in Israel?

In this section, I would like to return to the basic enigma presented in this chapter: Why has imprisonment for debt survived in Israel, in spite of its fall throughout Western legal culture and despite attempts to bring about its abolition. To attempt to answer this question, I will connect the four themes presented in the introduction: I will begin by re-examining the links between the local legal system and other systems; turn to the role of legal institutions and players; to the effect of the legal culture – discursive structures and legal classifications; and finally examine the influence of extra-legal – social and economic – factors. I will conclude with observations on insights that can be applied to the study of the history of the Israeli legal system as a whole.

*Legal Transplantation*

The legal system of Israel continued the legal system of British Palestine that had succeeded the legal system of the Ottoman Empire. European law
was imported into the indigenous system in the middle of the nineteenth century but, partially as a result of mere chance, the abolition of imprisonment for debt was not. This outcome was partially a result of mere chance. Ottoman codifiers were not aware of French amendments; imprisonment was abolished in England only after the dissolution of the Mandate. This was also a result of the cultural perception of the relationship between Europe and the local system. Colonial administrators believed that what was good for England was not necessarily good for Palestine. And Israeli lawyers asserted that what suited Europe did not suit Israel, whose population included Oriental Jews.

Besides these complex relationships with the legal and cultural centers, there were also purely local factors at work. Practices that existed in the Ottoman period fit the needs of the declining Ottoman Empire. Imprisonment wasn’t abolished in Palestine during the British Mandate primarily because of Ottoman tradition and due to the opposition of the local elite to its abolition. Attempts to abolish imprisonment for debt during the first two decades of Israeli independence failed because the central coalition party, Mapai, preferred a secure credit market and economic growth over the protection of labor and debtors’ rights.

The Institutional Organization of the Courts

The institutional structure of the legal system played a major role in shaping its norms. In our case, the retention of imprisonment for debt can be partially explained by the existence of one institution that dealt with bankruptcy – the District Court, and one with Execution of Judgments – the Execution Office. This separation was created by the unique history of the legal system: The former institution was created by the British and the latter, by the Ottomans. This enabled legitimization of imprisonment of poor debtors, while offering discharge for debtors of means with legal representation. And, paradoxically, the fact that imprisonment for debt was administered by the lowest institution of the court system, a semi-administrative and semi-judicial body, rendered its practice unsupervised. The Execution Offices were not supervised by the administrative branch because they were considered part of the judiciary. And imprisonment was not supervised by the courts of appeal because imprisoned debtors only rarely had access to appeal courts. Even when they did appeal, the courts viewed these cases as unimportant and uninteresting. In addition, pro-debtor organizations could not petition the High Court of Justice for lack of
standing. Thus, human rights and liberal values injected into the legal system by the High Court of Justice did not reach the remote, dark halls of the Execution Offices.

The Players: Lawyers and Judges

The legal profession clearly played the major role in maintaining and expanding imprisonment for debt in Israel. This should not come as a surprise. Lawyers represent creditors. Legal administrators need to demonstrate performance, measured by fees collected. Both put their faith in a system that executes contracts, enforces judgments and protects the dignity of the court system against disobedient debtors who have evident contempt for the court. The social and economic background of debtors and the circumstances of their failure does not enter into this legalistic paradigm.

Supreme Court justices tend to have a viewpoint that is broader than that of lawyers and lower court judges. This seems to have been the case with respect to imprisonment until the early 1970s. A number of Supreme Court Justices and justices-to-be were part of the campaign for abolishing imprisonment for debt. Justice Berinson had worked for the abolition of imprisonment when he was legal advisor to the Histadrut, the then powerful General Federation of Labor, during the Mandate period. Justice Cohn, as Attorney General in the 1950s, led the legislation initiative of that time. Justice Etzioni called for the absolute annulment of imprisonment in various forums. In decisions handed down by these three Justices, as well as in those by Justices Kister and Sussman, discussed above, there is more than a little sympathy for poor debtors.

A generation change in the Supreme Court during the 1970s made a difference. Second-core generation justices were “born into” a regime in which imprisonment seemed natural and essential. They had not been involved in the deliberations of the 1950s and 1960s on the abolition of imprisonment. They assumed the bench at a time when statutory arrangements and practices legitimized imprisonment for debt. Their decisions were aimed to make what they took for granted as perfectly legitimate means of imprisonment, more efficient, and to prevent evasion. It may well be that the generation switch at the Supreme Court partially explains why for 20 years the Court did not deal with the legality of imprisonment for debt or its justification. It is not a coincidence that the only second-core generation justice who, as a young scholar and civil servant, had been
involved in the attempt to abolish imprisonment, was the one to decree it illegal when the opportunity arose in the 1993 Perach case.

Legal Classifications

Legal classifications played a central role in the legitimization and perpetuation of imprisonment for debt. Classifying the law of enforcement of obligations into execution law, bankruptcy law, and corporate law created a situation where completely different legal arrangements could develop without confronting one another or exposing the overall meaning of their coexistence. Thus comparatively satisfactory arrangements for debtors evolved under corporate and bankruptcy law, but debtors who could enjoy these arrangements were, more often than not, people who belonged to relatively privileged socio-economic classes and could afford superior legal representation. In execution law, however, arrangements increasingly tended to benefit creditors, and the debtor of few means, who was generally of the lower classes, was denied access to the other two tracks. Thus, in the Israeli case as in mid-nineteenth-century England, the classification of obligation enforcement law had significant class-related meaning that served to obscure the full picture and legitimize the status quo ante.

The classification of imprisonment into criminal and civil had much the same effect. Procedural rights that evolved under criminal law and protected those prosecuted by the State in procedural and evidentiary matters, including the right to due process and the presumption of innocence, were not fully transferred to the civil arena. Thus creditors could bring about the civil imprisonment of debtors in proceedings and under circumstances inconceivable in criminal actions. The later presentation of imprisonment for debt as imprisonment for contempt of court, located between criminal and civil imprisonment, contributes to its preservation as a legal island with exceptional arrangements. The new label enabled a new classificatory blurring. It made even more unclear whether it should be ordered by the principles of civil law, of criminal law, or, perhaps, by different, as-yet-undeveloped principles. Under such circumstances, accepted trends in constitutional and criminal law are not perceived by jurists to be directly applicable to imprisonment for debt.
Structuring the Discourse

The discourse on imprisonment for debt has been shaped to a great degree by those who favor continuing the practice. One of their main arguments is that the legal arrangements regarding imprisonment for debt do not directly bear on class-related issues because debtors do not necessarily have low socio-economic status and creditors do not necessarily belong to the higher classes. As a result, normative arrangements should \textit{a priori} be determined on the assumption of ignorance of the socio-economic status of future debtors and creditors, and should thus ignore class-related issues. The law of execution of judgment, they argued, should be formed in a neutral environment, detached from a concrete social context.

Supporters of imprisonment structured the discourse in such a way that their stance appeared to be a reasonable compromise. They invented a position, to which no actual group adhered, that supported the wide use of imprisonment for debt both as a punitive means and as a deterrent. At the other extreme was a position that demanded the absolute abolition of imprisonment. They thus created a continuum between two extremes, and placed themselves in the middle: a moderate, conciliatory camp that suggests modest use of imprisonment for debt, not applicable to all debtors, but only to the “bad” debtors. It was this moderate compromising stance that increased the legitimacy of this camp.

The location of execution law, including imprisonment for debt, was traditionally low on the public and judiciary agenda, and this fact favored those supporting continuation of imprisonment. The issue rarely awakened partisan discord or academic debate. It was presented as a legalistic, procedural, administrative, practical question, rather than a fundamental, theoretical one, and thus the discourse was mainly limited to lawyers and execution officials who viewed it more from the standpoint of creditors than of debtors.

Social and Economic Trends

The financial crisis of the 1980s resulted from a combination of causes: the stock market crash of 1983, government policy which put an end to hyper-inflation, and high interest rates. The crisis left many insolvent debtors unable to repay their debts. These included communal settlements (kibbutzim and moshavim), construction companies and other businesses, families who took out mortgages and individuals who purchased on credit.
The sharp increase in the number of debtors led to two contradictory trends. On one hand, in times of crisis, creditors utilized imprisonment more often and demanded that it be made more efficient. They also called for the closing of alternative tracks, bankruptcy and file-merging, to poor debtors. On the other hand, imprisonment for debt became a more real threat to a larger number of Israelis and consequently, opponents to imprisonment for debt grew in number, joined together and gained increased confidence. This group now included members of higher social classes, who had not previously been threatened with imprisonment for debt.

As in other contexts, the worse a situation, the nearer salvation. The fact that it was Deputy President of the Supreme Court Elon, with his personal interest in this issue, who sat on the *Perach* case, created the final trigger and enabled this new social and economic pressure to enter the arena for the first time in more than two decades. Nevertheless, this pressure was soon mitigated by the continued existence and activity of powerful supporters of imprisonment for debt. Their achievements in the post-*Perach* period were not insignificant. When public interest in *Perach* and in imprisonment for debt declined, the creditors and their lawyers again gained the upper hand.

The class struggle between rich creditors and poor debtors was not the only tension that played a role in shaping the law of execution of debts. Before concluding, I would like to highlight once again three other tensions that were evident at some points in this narrative. The first is the tension between religious and secular groups. This was evident for the first time during the Ottoman era, in the struggle between supporters of Muslim law and of secular westernized law, a tension that was still evident in Mandatory Palestine. In Israel, the tension manifested itself in the controversy over the issue of the integration of Jewish law (what Elon referred to as Hebrew law) into the legal system of the new State. The promoters of Jewish law found the campaign for the limitation or abolition of imprisonment an excellent opportunity for demonstrating the relevancy of Jewish law to modern Israel, and even more, for demonstrating that Jewish law can inspire more liberal and just legal reforms than can secular law.

The second tension is between lawyers and politicians of Eastern European (Polish and Russian) origin and those from Central Western Europe (Germany). Superficially, this was a tension between those strongly committed to the Continental legal tradition and those less immersed in and committed to it. On a deeper level, this was a tension between the “Catastrophe” Zionists of Eastern Europe and the “Utopian” Zionists of
Western Europe. The “Catastrophe” Zionists placed the State in the center and gave priority to any measures needed to advance national security, economic growth and social cohesion. The “Utopian” Zionists gave more weight to the rights of the individual. Eastern European lawyers and politicians unequivocally supported the continuation of debt imprisonment and viewed the attempt of their German-born colleagues to abolish it as one more example of their unpatriotic and unrealistic opinions.

The third is the tension between European Jews and Sephardi, or Oriental, Jews. Though European law was generally considered by Israelis of European origin as superior to non-European law, and particularly to Ottoman, Muslim and British (made-for-natives) colonial law, when it came to imprisonment for debt, these Israelis preferred to retain non-European law. The reason for this was more often hinted at, than explicitly stated; quite clearly, the population of Israel was not composed only of European Jews. Debtors of Oriental origins had to be disciplined by Oriental law, one that allowed imprisonment, otherwise they would not pay their debts. The correlation between socio-economic class and ethnic origin remained quite strong at the end of the twentieth century.

Thus, an analysis of the reasons for the persistence of imprisonment for debt in Israel needs to take into account not only class but also ethnic origin and religion. These three major cleavages in Israeli society are evident in our case. The microcosm of imprisonment for debt reflects the macrocosm of Israeli society.

The story of the formation and use of the doctrine of imprisonment for debt in Israel reflects a complex conception of legal development, one that is neither functional nor autonomous. The norms and practices in the area are the political products of a struggle among classes, ethnic and religious groups, interest groups, and political parties of various and changing wealth, status, power and organization. The various branches of the legal profession are also social interest groups whose participation in the struggle over imprisonment for debt is not insignificant. But the law, as we have seen in this narrative, is not merely an interest group of legal professionals. It also has institutional structures – the Knesset with its organs and legislative procedures, a hierarchical Court system, a judicial-administrative creature known as the Execution Offices, and law enforcement agencies – the police and the Prison Service – all with different interests, constraints and institutional perspectives. Beyond all these, the law is also an intellectual project that organizes and preserves ways of thinking, ideologies and ethos. This intellectual project placed
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imprisonment for debt in one category and not in another, according to one set of norms and not another, in the gray area between civil and criminal law, and apart from bankruptcy law. It elevated an ethos according to which legal obligations had to be fulfilled at almost any cost. It structured the legal discourse on the issue. It applied legal conceptions that evolved elsewhere, such as good faith and the right of standing, to the area of imprisonment for debt. The case of imprisonment for debt, therefore, provides interesting insights on the function of the legal system and the general characteristics of the law as a normative and social structure.

Notes

Works frequently cited in the notes have been identified by the following abbreviations:

KR (Knesset Record) Proceedings of the Knesset (All documents marked KR are in Hebrew).
MJ Ministry of Justice file (All documents marked MJ are in Hebrew).
SA State Archive (All documents marked SA are in Hebrew).

1 SA, Jerusalem 38/8-5668/C.
5 Class analysis of the law was quite popular in the late 1970s and early 1980s. It was influenced primarily by Neo-Marxist Social History and by the Critical Legal Studies Movement. See, for example, Douglas Hay, “Property, Authority and the Criminal Law” in Albion’s Fatal Tree, ed. D. Hay et al. (London: Pantheon, 1975); John Langbein, “Albson’s Fatal Flaws,” Past and Present 98 (1983): 96-120; Peter
The History of Law in a Multi-Cultural Society


Execution proceedings by way of arrest of the debtor were conducted in the high courts of the common law, where costs were relatively high. Those who were due smaller debts sought an alternative. Thus evolved an arena for the persecution of debtors whose debt wasn’t large enough to justify appeal to the high courts: the lower, local courts. To the creditors’ misfortune, however, many of these courts, including the County Courts, were inefficient and soon suffered from paralysis and even natural death, due to factors which fall outside the scope of this chapter.


1869, 32 & 33 Vict. Ch. 62 (hereafter: The Debtors Act).


No. 352, 4.6.1933, 349; No. 1367, 10.26.1944, 1,005.

SA 38/8-5668/C. Shapiro explained the preservation of imprisonment for non-payment of fines as a consequence of his concern for offenders, not for the State. He was concerned that the repeal of imprisonment as a means to enforce the payment of fines would cause the courts to prefer to mete out arrest sentences, which are easily enforceable, rather than impose fines which would be met with incompliance.

Details of the meeting of August 31th, 1955, SA C/22034/5708.

The first draft of an Israeli constitution, drafted in 1949 by Yehuda Pinchas Cohen and presented to the Constitution Committee of the Temporary Council of State, included in the chapter dealing with basic rights, Clause 13(5): “No person shall be arrested as a
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means for the payment of a debt or the carrying-out of an agreement, unless it be a case of deceit." See Yehuda Pinchas Cohen, A Constitution for Israel: A Draft and Explanatory Remarks (1949), 7 (Hebrew). But the draft, including the clause dealing with imprisonment for debt, was later withdrawn.

MJ H-5177, Law for the Amendment of Execution Law (Imprisonment).

Ibid., Clause C.

Ibid.

This idea has its roots in Germany, where Pinchas Rosen and Haim Cohn were educated. There, imprisonment for debt, while it lasted, was perceived to be a means of coercion on the part of the State, not on the part of the creditor. One consequence of this was that debtors were imprisoned together with criminal prisoners, instead of in a separate jail.


His letter to the Attorney General, April 24th, 1955, MJ H-5177.


Etzioni’s letter to the Attorney General, April 5th, 1955, MJ H-5177.

MJ H-5177.

Ibid., Clause C.


Ibid., 4. In addition to Cohn, participants at the meeting included Menachem Elon, Uri Yadin and several other Ministry of Justice employees.

Ibid., 1, 4.

Ibid., 4. Burg was also concerned that the District Courts were authorized to decide on the execution of decisions of Rabbinical Courts, a development that could diminish their status.

A. Livneh of the Ministry of Justice pointed out to the Attorney General, in his memorandum of January 1, 1955, the inconsistency between the imprisonment bill and the draft Judgments (Execution) Law, which the Ministry was formulating at that time. He suggested that the worthwhile provisions in the former should be included into the proposed Execution Law, and that the whole imprisonment issue be incorporated into the Law. In a hand-written reply on the memorandum itself, Haim Cohn wrote that he favored abandoning the Imprisonment Law and bringing the Execution Law to the government for consideration.

SA, Protocol of the meeting of the government on May 6th, 1956, clause 427.


The foreword to the 1957 bill.

This was the second attempt to transfer execution matters into the realm of Public Law; the first was the attempt to apply criminal law to imprisonment for debt.


I shall present the various positions put forward during both Knesset sessions as one aggregate, as the 1960 discussions were in fact a continuation of the deliberations of the earlier Knesset, and similar positions were expressed by the same parties, and some- times even by the same speakers.

Interestingly, Yohanan Bader of Cherut, one of the opponents of the annulment of imprisonment, found grounds in history for an opposite conclusion. Relying on what he called “serious historians,” Bader claimed that the restriction of imprisonment was responsible for the fall of the glorious Roman culture and the descent into the dark Middle Ages.

Referring to Ichilov of the General Zionists, and to the subsequent speaker, Hanan Rubin of Mapam (who made the point that in certain cases the creditor could be exploited by the debtor), Yidov Cohen of the Progressive Party interjected: “You are both in the wrong parties.” He meant that they were misrepresenting the class-oriented world views of their respective parties, evidence that class ideology was dominant, sometimes explicitly, sometimes implicitly, in the construction of Knesset discourse on the imprisonment for debt question. Hanan Rubin returned to the fold in 1960, when he argued passionately for the annulment of imprisonment for debt. See KR 23 (1958): 96-98.


S.H. 2 (Hebrew, hereafter: Bills [Continuity of Deliberations] Law). It seems to me that the passage of this law can partly explain the timing of the beginning of the new civil codification in the mid-1960s. Some complex new statutes, such as the Inheritance Law and the Immovables Law, for which a detailed debate in committee was held on each of their clauses, would have been nearly impossible to ratify in only one Knesset session.

The symposium was held by Bar Association (then still called the Lawyers’ Union) on January 9th, 1958. The first speaker was Haim Zadok, who opposed the repeal of imprisonment for debt, followed by Attorney General Haim Cohn, who favored it. Speeches by sixteen lawyers followed, mostly opposing the suggested repeal. In his concluding remarks, Haim Cohn said: “I should be going home tonight sad and miserable, since a vast majority of you are ready to hang me for my nerve to suggest the annulment of imprisonment. . . . But if the vast majority is against me, I have no choice but to appeal to a higher instance, and I promise you that I shall do my utmost to convince that instance that I’m right,” said Cohn, referring to the Knesset. Cohn took advantage of the opportunity to attack the legal profession: “We have learnt from experience, that every reform encounters initial resistance from the legal profession; I
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am therefore not surprised at the opposition of those dealing with this matter. There has been opposition every single time that we tried and succeeded at reform to date.” For a summary of the participants’ remarks, see “Apropos of Legislation: The Execution Bill – A Symposium Held at the Lawyers’ Union on January 9th, 1958,” HaPraklit 14 (1958): 370-380 (Hebrew).


I have no direct documentation of the work on the formulation of the bill at the Ministry of Justice, since this has not yet been deposited at the State Archive. For discussion of the ideological, political, and economic context which effected the turnaround in the government’s position, see Ron Harris, “Why was Imprisonment for Debt not Abolished during the Era of Labor Dominance?” in Law and History, ed. D. Gutwein and M. Mautner (Jerusalem: The Zalman Shazar Center for Jewish History, 1999), 423-440 (Hebrew).


For an attempt to place Mapai’s position on the issue of imprisonment for debt within the wider contexts of economic policy and the electorate, see Harris, “Why was Imprisonment.”


Ibid., 2,924.

Ibid.

Ibid., 2,925.

Ibid., 2,926.

Ibid., 2,927.

What occurred during that Knesset session was described by MK Uri Avneri in his radical newsmagazine Ha’Olam HaZeh on August 8th, 1967: “They had to wrap everything up – since the next day was dedicated to a millionaires’ conference at the Knesset – and there simply was no room left for the Knesset itself.” He concluded, “The last two days were a comedy. It was as if the Knesset was trying to put on a parody of itself.” Uri Avneri, “Minister Cole’s Nostrils,” Ha’Olam HaZeh, August 16th, 1967 (Hebrew). Avneri himself made ten speeches on that day, which, he claimed, was a Knesset record. See also the reference to this episode in “Apropos of Legislation: The Execution Law, 1967,” HaPraklit 23 (1967), 516 (Hebrew). Among the statutes approved that day were the Patent Law, The Civil Service Law (Pensions), The Population Registry Law, The Power Plant Law, amendments to the Libel Law and amendments to the Compensation and Rehabilitation of Invalids Law.

The only exceptions were debtors who were minors, unfit to stand trial, or soldiers, who were not to be arrested; and alimony debtors, who could be arrested unconditionally.

At least regarding small, unincorporated debtors, with few assets and limited future earning potential.

The case that Cohn was referring to was the Rechtman case, where the head of the Execution Office issued an order of arrest without bothering to read the court decision in which a compromise agreement had been reached, and in the wrong Execution Office file. C.A. 523/70 Rechtman v. Kork, P.D. 25 (2) 542 (Hebrew, hereafter the Rechtman case).
Evolving practices in the area of imprisonment for debt can be seen in many documents—the factual part of judicial decisions, explanatory remarks to bills, Knesset discussions, police statistics, literature on practice in execution law, affidavits served in the Perach case, etc. Most of the practices and data described here are taken from the description of the facts in the Perach decision, 722-732. They are based on statements by the police and the Courts’ Administration, and on those parts of affidavits served by the plaintiff which were not denied by the defendants. Not all practices necessarily existed simultaneously.

The fact that the number of arrest orders issued in Tel-Aviv that year almost equals the number referred by the Execution Office to the police seems to indicate that heads of Execution Offices approved such applications almost automatically. However, I have some doubt as to the reliability of the data.

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96 See, for example, the case of debtor Itzhak Dagani, against whom a number of arrest orders were issued by the Hadera Execution Office. Dagani applied for permission to appeal to the District Court and simultaneously applied for waiver of the appeal fee of 150 NIS. The District Court decided that Dagani would pay the fee in three monthly installments. To this Dagani responded with an application for permission to appeal this decision to the Supreme Court, together with an application that the Supreme Court fee be waived. Dagani, who represented himself, claimed at the hearing regarding the fees that he subsisted on his old-age pension. In the end, the fees were not waived, and he was ordered to pay further, though modest, costs of 75 NIS. At this point, he was still two proceedings away from a substantial discussion of the orders of arrest pending against him. This is indicative of the long road facing a debtor who wished to appeal the decision of the Head of the Execution Office. This road was twice as arduous when the debtor was really penniless, and could not afford legal representation, V.A. 246/88 (C.A. 426/88) Dagani v. Bank HaPoalim (Hebrew, not published).
97 Menachem Mautner, The Decline of Formalism and the Rise of Values in Israeli Law (Tel Aviv: Ma’agalay Da’at, 1993), 102-105 (Hebrew); Ze’ev Segal, The Right of Standing at the High Court of Justice, 2nd ed. (Tel-Aviv: Papyrus, 1993), 68-73. See also Menachem Mautner, “Law and Culture in Israel: The 1950s and 1980s,” this volume.
98 Representative public organizations had access to the High Court before the Court made itself more accessible for public appeals, but the approach initiated in the 1950s was that representative organizations could approach the Court only when the interest they protect is uniform and common to all members of the organization. The Perach association did not, to the best of my understanding, act solely in the interest of its members, and thus would probably not have been granted access to the High Court under this approach. It seems that the Perach association was accorded access despite the fact that it acted not only as representative of its membership, but also as a public petitioner acting to correct a wrong caused to a large public outside its membership. The recognition, since the early 1980s, of this interest, which is the foundation of the public petition gave the Perach association standing at the High Court. See Segal, Right of Standing, 86-89. See also H.C.J. 19/64 Israeli Insurance Agents’ Union v. The Insurance Supervisor, P.D. 18(3) 506; H.C.J. 202/66 Tel-Aviv Taxis, A Registered Society v. the Minister of Transportation, P.D. 20(4) 414 (Hebrew).
99 See the justification for giving a medal to Adv. Simchoni on December 12th, 1993 by Human Rights Medal (in memory of the late Emil Grinzweig) Commission, the Israeli Citizen’s Rights Association. Head of the commission was Haim Cohn, who, as Attorney General and judge, had sought the abolition of imprisonment for debt, and who now came full circle.
101 In the preface to his book, Menachem Elon makes clear that he became interested in imprisonment for debt and debt collection in Hebrew Law as a result of the Knesset debate, and the encouragement of Pinchas Rosen and Haim Cohn.
Elon had another, though more modest, opportunity in a case in February 1993, while the *Perach* case was still being discussed, C.A. 1100/91 *The State of Israel v. Ja‘afari*, P.D. 47(1) 418, 439 (Hebrew). In that case, Elon decreed that arresting a person only because of inability to pay a fine was not proper punishment policy. Here, also, he reached his conclusion based on, among other sources, his book on debt collection in Hebrew Law. An analogy from this case to the *Perach* case suggests itself.

A full analysis of the legality and constitutionality of imprisonment for debt in Israel today, after the *Perach* decision, the amendment to the Execution Law and the legislation of the Basic Law: Human Dignity and Freedom are outside the scope of the present chapter. For a discussion of these and for a theoretical analysis, from an economic and sociological point of view, of the justification for the existence of imprisonment for debt, and alternatives to imprisonment, see Ron Harris, “From Imprisonment to Discharge: Setting an Agenda for Reforms in Debtor-Creditor Law,” *Tel Aviv Univ. Law Review* 23, 3 (2000) 641-696 (Hebrew). Within this historical narrative, I can only present my position; one that rejects the continued existence of imprisonment for debt.
