IN THE

SUPREME COURT OF THE STATE OF ISRAEL

SITTING AS THE

HIGH COURT OF JUSTICE

HCJ 355/79
HCJ 370/79
HCJ 373/79
HCJ 391/79

Before: **Hon. President M. Landau**
Hon. Vice President H. Cohen
Hon. Justice A. Barak

Petitioners: **1. Aryeh Ben Binyamin Katlan,**
2. Shimon Tzion Dovivechi,
3. Meir Ben Aharon Marciano
v.
Respondents: **1. Prison service**
2. Ramla Detention Center Administration

Argued: **8 Av 5739 (August 1, 1979)**
9 Kislev 5740 (November 29, 1979)
Decided: **24 Nissan 5740 (April 10, 1980)**

The Supreme Court sitting as the High Court of Justice
[April 10, 1980]
Before President M. Landau, Vice President H. Cohen and Justice A. Barak

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

Facts: The Prison Service was struggling with the phenomena of drugs smuggling into the Ramla Detention Centre by inmates who swallowed drugs packages while outside the Centre. Prison authorities decided to deal with the matter by performing enemas on detainees. On July 31, 1979 the Prison Authority issued a directive regulating a policy of administering enema's to detainees, where the warden of the Detention Centre established probable cause to suspect that the detainee was smuggling drugs inside his body. The procedure was to be performed discreetly in a manner consistent with all hygiene rules and medical guidelines. The directive allowed carrying out an enema against the will of the detainee if a doctor provided assurances that it would not be detrimental to his health. If the inmate resisted and the medical staff believed his resistance made it is impossible to conduct the procedure, the detainee would be put into solitary confinement for no longer than 48 hours, in order to supervise the discharge of the drugs. Each of the Petitioners had been administered an enema, but no drugs were found. The main question arising from the petitions was whether the Respondents were authorized to perform enemas on the detainees without their consent.

Held: Every person in Israel, including inmates and detainees, has a fundamental right to physical wellbeing and human dignity. The performance of enemas on detainees without their consent and without medical justifications, infringes these rights. Therefore, the Court held that for the Prison Service to be able to administer such procedure there must be a statute allowing them. It was determined that although Section 5 of the 1971 Prisons Ordinance permitted the searching for and confiscation of prohibited items, it did not allow for the search to be invasive. The Court ruled that the term "search" used in the Ordinance refers only to search of [over] the inmate's body and not to an invasion of his body. It reflected that a search inside the body of the person may lead to consequences that are inconsistent with human rights in Israel. The court determined that the authority to maintain order and discipline within the prison does not include the power to conduct invasive searches. Thus, the Court adjudicated that the directive that allowed for the performance of enemas on detainees, without their consent, and the procedures that were carried out in accordance with it, were illegal. It further determined that the best way to deal with the matter concerned was through primary legislation. President *Landau* preferred not to provide the Knesset with guidance on how to resolve the issue and determine when it is justified to conduct an invasive search against the detainee's will. He noted that the prevention of drug crimes in detention facilities and prisons is necessary, not only in order prevent lawlessness, but also for the protection of weaker prisoners from stronger ones.

On behalf of the Petitioners: Adv. S. Ziv (Aryeh Ben Binyamin Katlan)
Pro Se (Meir Ben Aharon Marciano, Shimon Dovivechi)

On behalf of the Respondents: Adv. M. Naor

JUDGMENT

Justice A. Barak

1. A significant amount of dangerous drugs have been smuggled into the Ramla Detention Center.

[Over time], the ability to smuggle drugs into the detention center has improved and the main importers [of the drugs] are the detainees themselves. Every evening, approximately one hundred detainees are returned to the detention center after being questioned at the police station or after appearing in court. Apparently, they obtain the dangerous drugs in the hallways of the court or at the police station when they have the opportunity to meet with friends or suppliers. Although the detainee is accompanied by a police officer, all that is needed is a momentary distraction for the detainee to obtain the drugs and either hide them under his tongue or swallow them. The drugs are packaged so that they will not break up when swallowed and remain intact inside the body. Once back in the detention center, the detainee discharges the drugs upon defecating. The drugs are then available to the detainee either for personal use or as a way of gaining power and standing in the detention center. According to the Prison Service, in exchange for the drugs, the detainee may obtain servants and partners for homosexual intercourse. Drug smuggling has created an environment of interdependence, and violence may be expected to break out any time a detainee breaks the "rules."

2. The prison authorities must face this serious phenomenon. They have tested various alternatives [in order to try to solve the problem]. External body checks have proven fruitless because the drugs are inside the detainee's body. According to the Prison service, isolating the detainee until he defecates is ineffective because reality has proven that the detainees do not recoil from re-swallowing the drugs after passing them. After trial and error, the Prison service

concluded that the only way [of dealing with the phenomenon] was by administering an enema to the [suspected] detainee. On July 31, 1979, the prison's administration approved the following procedure. The terms of the directive state that the warden of the detention center may order the administration of an enema only when there is probable cause, based on reliable evidence, to suspect that the detainee has drugs inside of him. The enema can only be administered by a medic under the professional auspices of the medical department. The enema is administered privately, discreetly and in a manner consistent with all hygiene rules and medical guidelines. The detainee is offered the opportunity to sign a consent form stating that he is willing to undergo the procedure. If he refuses, the warden of the detention center may order the procedure against the will of the detainee provided there is a signed statement from a doctor to the effect that the procedure will not harm the health of [the detainee]. If the detainee forcefully resists the procedure and the head of the medical clinic determines that it would be impossible to administer the procedure due to the detainee's resistance, the detainee is placed in solitary confinement for no longer than 48 hours, in order to supervise and monitor the discharge of the drugs. Isolation for longer than 48 hours requires the approval of the Commissioner of the Prison service.

3. Enemas that were conducted in the Prison Service in the spirit of the [aforementioned] procedure, even before it was formulated in writing, [produced impressive results]. Since the opening of the Ramla Detention Center, prison officials have intercepted a significant amount of dangerous drugs (44 hashish joints, 200 grams of opium, 17 grams of heroin, 7 grams of cocaine, hundreds of methadone tablets and hundreds of other pills). The vast majority of these drugs were discovered by means of the administration of an enema. A study conducted at the end of 1978 revealed that approximately 70% of the detention center's population use dangerous drugs. Another study conducted in April 1979 revealed that drug use fell to 2%. Prison officials credit

the use of the enema procedure as the reason for this decline. Furthermore, the significant decline in the amount of dangerous drugs successfully smuggled into the detention center has positive residual effects, as there are no longer stabbings, instances of homosexual intercourse or other violent phenomena, [associated] side effects of the use of drugs.

According to intelligence gathered by relevant authorities, the fear of being caught with drugs during the administration of an enema prevents detainees from using this method [of drug smuggling].

4. The administration of the detention center had intelligence that [established] reasonable grounds to assume that each one of the Petitioners in these four petitions carried dangerous drugs inside his body. In light of this information, each one of them was administered an enema, but drugs were not found. The Respondents claim that the Petitioners consented to have the enema administered, but the Petitioners deny that this is so. Even though there is ample reason to believe the detainees did consent in writing to the procedure, counsel for the Respondent has agreed that we adjudicate this case on the assumption that the Petitioners were administered an enema without consent and despite their resistance (they ceased to resist before the enema was administered). The Petitioners claim, each one in his own words, that the administration of an enema is humiliating, degrading and violates their privacy and dignity. The question before us is whether the Respondent is authorized to order the procedure without the consent of the detainee.

5. Every person in Israel is entitled to the fundamental right of physical wellbeing and to the protection of their right to human dignity. These rights are included in the "scroll of judicial rights", as President *Landau* put it in HCJ 112/77 *Fogel v. Israel Broadcast Authority*, IsrSC 31(3) 657. Even detainees and inmates are entitled to these rights. Prison walls do not sever a detainee's right to human dignity. While the nature of life in prison does infringe upon many of

the rights of a free individual (*see* HCJ 269/69 *New Communist Party v. Police Minister*, IsrSC 23(2) 233; HCJ 881/78 *Mutzlah v. Warden of Deman Prison*, IsrSC 33(1) 139), prison life does not require the deprivation of a detainee's right to physical wellbeing and protection from infringement of his human dignity. His freedom is taken away, not his rights as a human being. The administration of an enema to a detainee without his consent, without any medical reason, violates his physical well being and infringes upon his privacy and his human dignity. Referring to such an intrusion into one's body, Justice *Frankfurter* said, "This is conduct that shocks the conscience." *(Rochin v. People of California*, 342 U.S 165, 72 S. Ct 205, 209).

Therefore, for the Prison service to be able to administer an enema without the consent of the detainee, and thereby justify a potential criminal offence and a civil act of battery, there must be a statute allowing them to do so. Ms. Naor, who, on behalf of the Respondents made an exhaustive effort to present a comprehensive and balanced picture of the problem, pointed to two legal sources which may authorize the Prison service to administer an enema to detainees and inmates. The first is a law which allows the Prison service to search detainees and inmates, and the second is a law which authorizes the Prison service to maintain order in prisons. Do these statutes serve as a statutory basis for the administration of an enema?

6. Section 5 of the Prisons Ordinance (new version) states, "During the intake of an inmate, he shall be searched and any prohibited items are to be confiscated." The term "inmate," as used in this ordinance, includes detainees. Section 40(a) of the ordinance says, "Inmates are to be searched from time to time as established, and prohibited items are to be confiscated." The original version of the ordinance stated in Section 54(1) that, "Every prisoner shall be searched on admission and at such times subsequently as may be prescribed, and all prohibited articles shall be taken from him" [English original]. It seems to us that the [Hebrew] terms [for] "shall be

searched" or "every inmate shall be searched," alike the English term "searched," allow for a search of [over] the inmate's body. However, the plain language of these terms does not seem to allow for an invasion of [inside] the inmate's body. The distinction between the outside of the inmate's body and the inside of his body is not always easy and no scientific method of distinguishing has been suggested to us. In our opinion this distinction is grounded in common sense, and according to this, the administration of an enema, needle or a scalpel is not in the category of a "search."

7. The State's approach that a "search" includes a search inside the body of the person subject to the search may lead to harsh consequences to human freedom in Israel. The authority of the Prison service to conduct searches is not limited to detainees, but applies to those visiting the prisons as well (Section 40(b) of the Prisons Ordinance). Furthermore, this authority is not unique to the Prison services, as other authorities are authorized [to conduct searches] as well, according to various legislation *(See, e.g.*, Section 184 of the Tax Ordinance (new version); *see also*, LIBAI, RULES OF ARREST AND RELEASE 65 on). Above all, an arresting police officer may search the body and the belongings of an arrestee (Section 22(a) of the 5729/1969 Criminal Procedure Ordinance (arrest and search) (new version)), and the officer is permitted to check the belongings and the body of a person in the course of a house search (Section 29). If we are to allow searches to extend into the bodies of detainees via the authorization to search, we would be unable to prevent it in any other situation where searches are permitted. What would stop an officer who has reasonable suspicion that a suspect swallowed dangerous drugs from asking a doctor to obtain a blood sample, pump the person's stomach, administer an enema or even perform surgery? In *In re Guzzardi*, 84 F. Supp. 294, 295 (1949), Justice *Atwell* stated:

> If a stomach pump may be used, then the surgeon's knife may be used. If the stomach pump can be justified, then the opening of one's person by the surgeon's knife can be justified [.] We would then have returned to trial by ordeal which has long since been abolished by right thinking, liberty-loving people.

Citing the above case, Justice *Weinberger* said with regards to the use of a stomach pump via the authorization to search:

> We may venture a little further into the realm of conjecture than did the judge in the case just read from to consider whether if a search such as was made in the instant case may be approved would it not likewise follow that if the narcotics after being swallowed has passed from the stomach to the blood stream some officers might feel it incumbent upon them to drain the defendant of part of his life-blood in an effort to discover the hidden evidence?

(U.S v. Willis, 85 F. Supp 745, 748).

Indeed, this prediction became a reality in the United States in *Rochin*, where, after a violent exchange between police and a suspect and an unauthorized search of the suspect's home, an emetic was forced into the suspect through his nostrils, making him throw up the drugs he had swallowed. [In a decision written] by Justice *Frankfurter*, the Supreme Court invalidated that search, and added that it shocks the conscious and that such methods "are methods too close to the rack and screw to permit of constitutional differentiation."

Over the years this rule has been narrowed despite the vigorous opposition of a growing minority of U.S. Supreme Court justices such as Justices *Warren*, *Black*, *Douglas*, and *Fortas*. It was determined that it is not the mere invasion into the suspect's body that shocks the conscious, , rather it is the totality of the circumstances of the case. Therefore, the U.S. Supreme Court has held that drawing blood from a suspect -whether conscious or not - is not forbidden per se, because the act itself does not shock the conscious *(See Breithaupt v. Abrams*, 352 U.S. 408; *Schmerber v. California*, 348 U.S 757). Lower courts have extended these rules and have held

that a similar approach applies to various methods of stomach pumping used to uncover dangerous drugs (*See,* Barbour, *Constitutionality of Stomach Searches,* 10 U.S.F. L. REV.93 (1975), which discusses the extensive ruling in this matter). Recently, [a U.S. Court] has gone so far as to issue a search warrant allowing [authorities] to surgically remove a bullet from the body of a suspect (*See Crowder v. U.S.*, 543 F. 2d 312).

However, it is questionable whether these decisions are consistent with the few U.S. Supreme Court decisions addressing this matter, and, most recently. Indeed, the emerging trend is to limit the authority to conduct invasive body searches *(See Adams v. State of Indiana*, 299 N.E. 2d 834; *People v. Bracamote*, 540 P. 2d 624). Nevertheless, the authority of the government to administer an enema or pump someone's stomach has yet to be decided by the U.S. Supreme Court. The only time the U.S. Supreme Court has directly addressed this matter was in *Rochin* and the act was deemed illegal. I am in doubt as to whether the development of the rule in the lower courts which relied upon *Breithaupt* and *Schmerber* (which dealt with drawing blood and not the administration of an enema or stomach pumping), are consistent with the principles established by the U.S. Supreme Court in the aforementioned cases. Justice *Brennan*'s comments at the end of his decision in *Schmerber* should be noted (at 772):

> The integrity of an individual's person is a cherished value of our society. That we today hold that the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions.

8. We should be careful when looking towards U.S. law. Just as we are not as strict as them, as we do not exclude evidence that was obtained illegally on the basis of the illegality of its obtainment, we are also not as lenient as they are [in other respects]. Absent a statute permitting it, we cannot allow a search inside someone's body without his consent or a medical

justification, whatever the circumstances are. Our guiding principle is the one stated by U.S. Supreme Court President *Warren* who wrote the dissenting opinion in *Breithaupt v. Abrams*, 352 U.S 408, 414 (with Justices *Black* and *Douglas* joining):

> Law enforcement officers in their efforts to obtain evidence from persons suspected of crime must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids whether they contemplate doing it by force or by stealth.

Taking blood from an adult without his consent is illegal in England. The question arose in *S.v.S; W.v. Official Solicitor* (1972) A.C 24, 43, where Lord *Reid* stated the following, which is also appropriate for the case before us:

> There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will. In my view, the reason is not that he ought not to be required to furnish evidence which may tell against him. The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups détat but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions.

We will follow this path as well. We have already held that blood samples cannot be drawn from a suspect without his consent (*See* CrimA 184/62 *Peretz v. Attorney General*, [1963] IsrSC 17, 2104). In that spirit, we hold today that search authorization does not allow for an invasive search inside a person's body, whether a detainee, an inmate or a suspect. It may be true that the days in which a person's home is his castle have passed, but we have not reached the point where the inside of someone's body is open to all. In the Canadian case, *Le Lapurte and the Queen* (1972) 29 D.L.R 3d 652, the court determined that a justice is not authorized to issue a search warrant pursuant to which a suspect will be cut open in order to have a bullet removed from his shoulder which was necessary for his pending trial. Justice *Hugessen* wrote:

> If the police are today to be authorized to probe into a man's shoulder for evidence against him, what is to prevent them tomorrow from opening his brain or other vital

> organs for the same purpose. The investigation of crime would no doubt be thereby rendered easier, but I do not think that we can, in the name of efficiency, justify the wholesale mutilation of suspected persons. The criminal law has always had to -strike the precarious balance between the protection of society on the one hand and the protection of the rights of the individual members of such society on the other. Both rights are equally important, but any conflict between them must wherever possible be resolved in a manner most compatible with individual human dignity. Even if the operation proposed were minor, and the evidence is that it is not, I would not be prepared to sanction it and I do not do so. The Crowder case may or may not be the law in the United States; it is not the law in Canada.

This applies to our case as well.

9. The Prison service has been given extensive authority to maintain order and discipline within the prison *(See* Sections 76, 87 of the Prisons Ordinance). It is within this framework that the 5738/1978 Prison Regulations state:

> "A prison guard is permitted to use all reasonable means, including force, to maintain order, to protect a guard or an inmate, or to prevent an inmate's escape."

According to Ms. Naor, this regulation authorizes a prison guard to use force to find dangerous drugs that the detainee has swallowed. We do not accept this approach. This regulation was not enacted for this purpose, and even if it [the regulation] would purport to permit penetration into the inmate's body in order to find dangerous drugs, I would say that it is outside the bounds of the authority granted to the Interior Minister [who enacted this regulation] by the Prisons Ordinance. "Maintaining order" is not an authorization to administer an enema without consent.

10. Our conclusion is that the current policy, which allows the administration of an enema without consent, and the procedures performed in accordance with it it, are illegal. It is true that Respondent has a just and right motivation, but the means he used are not grounded in law. Our decision is not an easy one because it involves two important, but conflicting, interests in which a compromise is impossible. The first interest is that of every person, including detainees and

inmates, to physical well being and dignity, and the other is the interest of both inmates and the State to maintain order in the prisons and keep them free of the harm caused by dangerous drugs. These two interests are important to us. If it were possible, we would try to find the proper balance between them. However, the facts upon which we base our decision, as presented, do not allow for a balance of the interests. Therefore, there is no way for us to escape the fact that we must make a clear and definitive ruling, as our reasoning must be based upon the present legal framework.

We have concluded that the authorization to conduct searches on one hand and the authorization to maintain order on the other are not an appropriate legal instrument to settle the difficult issue presented by this petition *(Cf.* Bachelder, *Use of Stomach Pump as Unreasonable Search and Seizure*, 41 J. CRIM. L. CRIMINOLOGY AND POLICE 41 (1950)). Not only does the term "search" as it is normally used not allow for the intrusion into another's body, but also appropriate legal policy, which is aware of the severe consequences of accepting the Respondent's approach does not allow for it either. If, despite [our reasoning], the government believes that our decision is unsatisfactory regarding the situation in the prisons, it has the power to turn to the Knesset to solve the problem, and might even request urgent legislation addressing the matter. We believe that the best way to deal with this matter is through primary legislation which may authorize the [relevant] regulator to act (*See* LEIGN, POLICE POWERS ENGLAND AND WALES 193 (1975)). The legislative process, by its very nature, allows the legislature to thoroughly analyze the situation and examine all possible alternatives [and address questions such as:] is there choice other than performing an enema? Are there no better alternatives? Would it not be preferable to wait until [the inmate] defecates on his own *(See U.S v. Cameron*, 538 F.2d 254)? Are there no medical dangers in administering an enema especially in cases in

which the drugs are contained in an oversized container which may tear the inmate's bowels (as was the case in *Blefare v. U.S.*, 362 F.2d 870)? Are there no medical dangers in leaving the drugs inside the detainee's body as sometimes the wrapping tears open, causing the drugs to penetrate the [detainee's] circulatory system? What sort of suspicion justifies the use of an enema? These questions, along with others, should be analyzed in depth. If after doing so, the Knesset reaches the conclusion that there is no choice other than to continue using enemas as those administered by the procedures forming the basis for this petition, this will be the conscious determination of the elected representatives. This determination, by its nature, will be limited to its specific circumstances , without bearing directly upon other issues discussed in this decision.

If my opinion is followed, the temporary order will be made permanent and the Respondents will be required to refrain from administering enemas to the Petitioners without their consent.

No order is given for costs.

Vice President H. Cohen

I agree.

Sections 22 and 29 of the 5729/1969 Criminal Procedure Ordinance (new version) (arrests and searches) allows for the search of a person's body or property. Ms. Naor, who commendably argued for the Respondent, argued that these clauses allow for the invasive search of one's body in addition to external searches. The new version of the law says that "[searches may be conducted] in the body…" and not "on the body". Although all other versions of the law are no longer valid, it cannot be claimed that the new version changes anything that was written

on this matter in the original version (Section 16(g) of the 5724/1964 Government and Legal Procedure Ordinance); and the original version of the law (Sections 11 and 22 of the Criminal Procedure Ordinance, chapter 33 of the Law of the Land of Israel) permitted the search of the person […]. The new version of the law does not change anything written in the old law when it states "in the property or the body" instead of "the person." The intent of the law is, just as it was before, [to allow] for the search of a person including his clothing and the property that is with him. Nobody imagined that [such a search] would include an examination of his internal organs.

Even if we are to say that the text can tolerate such a broad (and deep) interpretation, it would be inconsistent with the intent of the legislature. Even if there is a court that dares to apply an interpretation which is inconsistent with the legislature's presumed intent, if the text justifies or requires such an interpretation, it would only be to increase the remedy, ensure justice and protect human rights. This would not be the case where such an interpretation would broaden the authority of the government and reduce human rights. In such circumstances, the court will [use] the legislature's intent as a fortified wall and barricade itself in order to protect human rights.

However, the Criminal Procedure Ordinance (arrests and searches) is not relevant to this case. The prison administration had no aspiration and no intent to search for illegal drugs outside of its powers emanating from the Prisons Ordinance and the relevant regulations enacted based upon it. Neither Section 5 nor Section 40 of the Prisons Ordinance (as cited by my colleague, Justice *Barak* in his opinion) use the term "in his body." Section 5 describes the search "of an inmate" [literally in Hebrew: "*in* an inmate"] and Section 40 describes the search "of every inmate." Therefore, there is no valid claim that [those terms also include invasive searches]. Furthermore, we obviously cannot use the [old] Criminal Procedure Ordinance (arrest and

searches) to understand the new version of the Prisons Ordinance although the English original uses the same idioms.

Nevertheless, the official translation of regulation 167 of the 1925 Prisons Regulations into Hebrew, which requires a thorough search of inmates when they are admitted to prison, states that "every inmate's body must be thoroughly searched before being admitted to prison." But, regulation 169, which also requires every inmate to be searched when returning from work outside of the prison, was not officially translated as requiring that inmates be searched "in their bodies" but rather that a search must be conducted "in them." This tells us that the official translator did not see any distinction between "in him" and "in his body" as both are phrases which mean search the inmate. These regulations, which date back to the period of the British Mandate of Palestine, have since been superseded (*see* 5727/1967 Prisons Regulations), but neither the superseding regulations, nor the 5738/1978 Regulations, explain how the search is to be conducted (truth be told, did the 1925 Regulations did not add much to [explain] the Ordinance's provisions). Also, Section 113 of the Prisons Ordinance permits the [Interior] Minister to enact regulations on different issues including the medical examination and treatment of inmates and the preventative treatment of inmates, but not regarding invasive searches of inmates' bodies, that is if you do not derive such power from the general and residual provision granting the minister the power to regulate anything "necessary for the efficient implementation of this Ordinance, the safety of guards, discipline and wellbeing of the inmates or the proper maintenance of the prison." In my opinion, like that of my colleague, Justice *Barak*, and for the same reasons, even if we could find a power that allows the minister the authority to regulate this matter, it is preferable that it would be done through legislation. I would also overturn the

administrative rules of July 31 1979, according to which the prison authorities may conduct their searches, even if they were regulations, because they are unreasonable.

The reasonableness of regulations and, even more so, of administrative rules, is measured according to the measure that is acceptable to most people in a democratic society and in a State governed by the rule of law. There is no better measure than the principle of human dignity. A free and enlightened society differs from a wild and deprived society in the amount of dignity recognized for each and every person. This is reflected in a classic and sublime manner by the Mishna which states, "Therefore, but a single person was created, to teach that anyone who destroys a single life is considered by scripture as having destroyed an entire world; and anyone who saves a single life is considered by scripture to have saved an entire world. Also, for the sake of peace among humankind, so that no person should be able to say to his fellow, 'My father is greater than your father…' Therefore, each and every person is obligated to say, 'For my sake was the world created.'" Babylonian Talmud, Sanhedrin, Chapter 4, Mishna 5. Just as everyone is obligated (not merely permitted) to say "for my sake was the world created," everyone is also obligated to say, "The world was created for him no less than it was for me." It was Hillel the Elder who said that the entire Torah can be summarized by one great rule of thumb: everyone is entitled to be treated with the same dignity that you would want to be treated with (Babylonian Talmud, Shabbat 31a). Treating others with dignity is not only a significant part of Jewish heritage, it is also a precondition for the guarantee of other rights and liberties, and it is the appropriate measure for reasonableness, as mentioned above.

My knowledgeable colleague, Justice *Barak*, cited very instructive examples from American and English jurisprudence to demonstrate that great justices and scholars in other countries also found that human dignity outweighs the legitimate needs of maintaining order. I

told myself, we need not [base our conclusion] only on these sources, as we may find a basis for this ruling in the teachings of our own Sages.

The obligation to follow not only the laws of the written Torah, but also the Rabbinical laws stems from the verse which states, "According to the laws that they teach you and the judgments that they tell you to do, you shall do; do not veer from what they tell you to the right or to the left." *(Deuteronomy* 17:11). This is the basis for the law that anyone who disobeys the words of the Sages is in violation of a negative commandment [a term referring to commands that are worded in a negative imperative], as the verse says "do not veer." (Maimonides, Laws of Rebelliousness 1:2). Our Sages have said that "[the importance of] human dignity is so great, it can set aside a negative commandment of the Torah." (Babylonian Talmud Birakhot 19b, and other sources). Rabbi Bar Sheva interpreted this rule in front of Rabbi Kahana as referring specifically to the negative commandment of "do not veer," meaning that human dignity trumps all Rabbinical commandments, which is to be distinguished from Biblical commandments, which are not set aside for the sake of human dignity.

However, this rule seems to contradict that which is stated in *Proverbs* 21:30, "There is no wisdom, understanding or counsel against God." If God commands us to fulfill the directives of the Sages, how can the Sages exempt us from this command whether for human dignity reasons or any other reason? The answer is, as the Babylonian Talmud states, "Anything the Rabbis command us to do is pursuant to their authority which stems from the verse which states: 'do not veer,' but when human dignity is at stake, the Rabbis added a dispensation to their enactment." The Rabbis who have the power to forbid something may also permit that which they have forbidden; and that which they have seen fit to forbid they decided to permit when human dignity is at issue.

The distinction between Biblical commandments, which are not superseded for human dignity, and Rabbinical commandments, which are, directly applies to this case as well. If we view a statute as a Biblical command and regulations as Rabbinical commands [when considering matters of human dignity], we may hold that concerns for human dignity may not override a statute, but may override a regulation. As we said, when we consider [the possibility of a forced invasion of a person's body, which involves infringement of human dignity], it is clear that only the legislature can regulate such an act. So long as [the legislature] has not permitted that, or as long as infringement of human dignity [it is not necessary in order to apply the law in good faith], human dignity is immune to all harms.

If this metaphor is not exact it is only because the written Torah is eternal and cannot be changed, while legislation is man-made and can be changed or annulled and is thus more like the oral law which was developed by the Sages. This can be a lesson for our legislature. Just as the Sages allowed for their prohibitions to be set aside when human dignity was at stake, the legislature should take care not to sacrifice human dignity on the altar of other needs.

The term “human dignity” has not been explicitly defined. However, wherever it is referenced [in Jewish sources], it suggests that harming one’s dignity refers to anytime a person is humiliated, shamed or shown contempt. This is how the [Talmud] views removing one’s clothes in public (Babylonian Talmud, Menahot 37b) or preventing one from reliving himself (Babylonian Talmud, Eruvin 41b). Likewise, a foul smelling body may be removed from a house on the Sabbath because of human dignity, as it is offensive to people and is dishonorable to the body (Maimonides, Laws of the Sabbath 26:23 (citing Babylonian Talmud, Shabbat 94b)). Similarly, while it is generally forbidden to move heavy stones on the Sabbath, and it is prohibited to move them from one domain to another, the Sages permitted moving sharp stones

to the roof, which were used to cleanse one's self after defecating, because of human dignity (Babylonian Talmud, Shabbat 81a-b). (Do not be surprised that these stones were used for this purpose. Their size was only about that of a nut according to Rabbi Meir, or an egg according to Rabbi Yehuda; Rabbi Yohanan forbade using a stylus for this purpose on the Sabbath because, as Rashi interprets, it removes hair due to its sharpness; but some say it is forbidden to use pottery shards for this purpose even on a weekday because it is too dangerous; one who cleanses himself with lime or clay is prone to a disease which hurts the eyes and can be agonizing (Babylonian Talmud, Nedarim 22a), but will be protected from intestinal diseases. I have only added this because it is related to our topic on enemas).

On the other hand, we are required to act in order to prevent others from sinning, even if it harms their dignity. For example, one who sees his friend wearing [clothing containing a prohibited mixture of wool and linen], which is a Biblical prohibition (*Deuteronomy* 22:11), must tear off the clothing even in public, "and even if it is his teacher who has taught him wisdom, because human dignity does not override an explicit prohibition in the Torah" (Maimonides, Laws of Forbidden Mixtures 10:29). However, this only applies when the sin is clear to all and there is no doubt as to the sin being committed and the identity of the sinner. This is not the case if we are in doubt whether an article of clothing contains a forbidden mixture, in which case it is forbidden to touch the suspect in any harmful manner (Babylonian Talmud, Menahot 37b). The same applies here. If it is acceptable to enforce a prohibition by removing drugs from inside a person, this can only be when we know for certain that they are hiding drugs inside their body. However, it is not permitted merely to conduct an invasive search on someone for the purpose of determining whether a crime has been committed. In other words, these measures taken to "prevent sin" are only permitted when used to put a stop to a crime that has

already commenced; they were not meant to prevent an anticipated crime from being committed [in the future].

In conclusion, maintaining human dignity is so important, that it trumps the [prohibition]of bringing drugs into prison, if the only way to prevent it is by infringement of human dignity and wellbeing of the inmate.

President Landau

I agree with everything my distinguished colleague, Justice *Barak*, wrote, and I also agree with the comments of my honorable friend, the Vice President, except for the advice he gives to the legislature when he says, "Just as the Sages allowed for their prohibitions to be set aside when human dignity is at stake, the legislature should take care not to sacrifice human dignity on the altar of other needs." Later, my honorable colleague provides the legislature guidance of sorts when he says:

> If it is acceptable to enforce a prohibition by removing drugs from inside a person, this can only be when we know for certain that they are hiding drugs inside their body. However, it is not permitted merely to conduct an invasive search on someone for the purpose of determining whether a crime has been committed.

In my opinion, it would be preferable for us not to provide the Knesset with guidance on how it should resolve this important issue and leave it with the difficult task of thoroughly researching the issue and determining when it is justified to conduct an invasive search inside a person's body against his will, which is something this Court cannot do in the framework of such a petition. The presumption is that the members of the legislature will make human dignity a priority and legislate in a way that will not harm human dignity unless absolutely necessary and only in the most specific circumstances as defined by the legislature.

A blind eye cannot be turned to the serious situation existing in State prisons, as described by the warden of the Ramla Detention Center in his affidavit, details of which were already cited by Justice *Barak* at the beginning of his opinion. We have a vital interest in preventing drug crimes in our detention facilities and prisons, not only to prevent lawlessness, but no less importantly to protect weaker prisoners from becoming the pawns of the stronger ones who may order them around and force them to unwillingly smuggle drugs into detention facilities or into prisons. The knowledge that an invasive bodily search may be conducted on any detainee or inmate returning to prison from a furlough or from court, based solely on a suspicion and not only when there is a clear proof that the individual is smuggling drugs, is likely to deter the stronger inmates from "enslaving" weaker ones and coercing them to carry the drugs in their bodies. This actually may protect their [the weaker prisoners'] dignity from being violated by their oppressors. As was stated in the affidavit, administering an enema, towards which we all feel understandable repugnance, has proven its effectiveness by the drastic reduction of drug consumption in detention facilities and prisons. It is therefore possible that we face vital interets that outweigh the importance of preserving one's privacy in one's own body. Finally, regarding the words of our Sages of blessed memory, they never closed their ears to a pressing need and always knew how to enact proper laws on a temporary basis as a preventative measure when they saw that the circumstances required such action in order to prevent bad things from happening (*See* ELON, MISHPAT IVRI VOL. 2, 413 on).

To summarize, it seems to me that this issue cannot be solved at either the administrative level, or at the regulatory level, due to the privacy right at stake. Only primary legislation which either speaks directly to the matter or explicitly authorizes another body to act can adequately address this matter. As to the content of such legislation, I would not pre-comit myself to a one

solution or another , nor would I make suggestions to the legislature as to how it should proceed on the matter.

The opinion of Justice Barak is accepted.

Decided Today, 24 Nissan 5740 (April 10, 1980).