HCJ 1892/14

Petitioners:
1. **The Association for Civil Rights in Israel**
2. **The Ramat Gan College of Law and Business**
3. **Physicians for Human Rights**

v.

Respondents:
1. **Minister of Public Security**
2. **Prison Service Commissioner**
3. **Minister of Justice**

In the Supreme Court sitting as High Court of Justice

[June 13, 2017]

Before: Deputy President E. Rubinstein, Justices H. Melcer and U. Shoham

On behalf of the Petitioner: Advocates Anne Sucio, Oded Feller, Sigal Shahav

On behalf of the Respondents: Advocates Ran Rozenberg, Reuven Eidelman

Israeli cases cited:

[1] HCJ 337/84 *Hokma v. Minister of Interior*, IsrSC 38(2) 826 (1984).

[2] PPA 4463/94 *Golan v. Prisons Service*, IsrSC 50(4) 136 (1996).

[3] HCJ 2245/06 *Dobrin v. Prisons Service* (2006).

[4] HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance*, IsrSC 63(2) 545 (2009).

[5] LHCJA 4937/14 *Albazian v. Attorney General*, (2014).

[6] LHCJA 328/15 *Zalum v. Attorney General*, (2015).

[7] HCJ 161/94 *Atari v. State of Israel*, (1994).

[8] HCJ 4905/98 *Gamzu v. Yeshayahu*, IsrSC 58(3) 360 (2001).

[9] HCJ 10662/04 *Hassan v. National Insurance Institute*, IsrSC 65(1) 782 (2102).

[10] LCA 5368/01 *Yehuda v. Attorney Yosef Teshuva, Receiver*, IsrSC 58 (1) 214 (2003).

[11] HCJ 5578/02 *Manor v. Minister of Finance*, IsrSC 59(1) 729 (2004).

[12] AAA 3829/04 *Tuito, Chairman, Mikol Halev Association v. Jerusalem Municipality*, IsrSC 59 (4) 769 (2004).

[13] HCJ 1384/04 *B'tzedek Association – American-Israeli Center for Promoting Justice in Israel v. Minister of Interior*, IsrSC 59(3) 397 (2005).

[14] HCJ 366/06 *Commitment to Peace and Social Justice Society v. Minister of Finance*, IsrSC 60(3) 464 (2005).

[15] HCJ 1163/98 *Sadot v. Prisons Service*, IsrSC 58(4) 817 (2001).

[16] HCJ 451/94 *Miller v. Minister of Defence*, IsrSC 49(4) 94 (1995).

[17] HCJ 9134/12 *Gavish v. Knesset*, (2016).

[18] MApp 1/87 *Dananashvili v. State of Israel*, IsrSC 41(2) 281 (1987).

[19] CrimA 344/81 *State of Israel v. Segal*, IsrSC 35(4) 313 (1981).

[20] HCJ 5304/92 *Perah Association v. Minister of Justice*, IsrSC 47(4) 715 (1993).

[21] HCJ 114/86 *Weil v. State of lsrael*, IsrSC 41(3) 477 (1987).

[22] MApp 3734/92 *State of Israel v. Zaki Azazmi*, IsrSC 46(5) 72 (1992).

[23] FH 13/80 *Hendels v. Kupat Am Bank Ltd*., IsrSC 35(2) 785 (1981).

[24] CA 3616/92 *Dekel Computer Engineering Services Ltd. v. Heshev Inter-Kibbutz Unit, Agricultural Co-Operative Society Ltd*., IsrSC 51(5) 337 (1997).

[25] HCJ 5185/13 *Anonymous v. Great Rabbinical Court*, (2017).

[26] LCA 296/11 *Najar v. Aliyan*, (2012).

[27] CA 191/51 *Skornik v. Skornik*, IsrSC 8 141 (1954).

[28] LFA 7141/15 *A. v. B*., (Dec. 22, 2016).

[29] CA 8954/11 *Doe v. Doe*, (2014).

[30] CFH 7325/95 *Yediot Aharonot Ltd. v. Kraus*, IsrSC 52(3) 1.

[31] CA 294/91 *Hevra Kadisha Kehillat Yerushalayim v. Kestenbaum*, IsrSC 46(2) 464 (1992).

[32] CrimApp 537/95 *Ganimat v. State of Israel*, IsrSC 49(3) 355 1995).

[33] CA 522/70 *Alkutub v. Shahin*, IsrSC 25(2) 77 (1971).

[34] HCJ 2599/00 *Yated – Non-Profit Organization for Parents of Children with Down Syndrome v. Ministry of Education*, IsrSC 56(5) 834 (2003).

[35] HCJ 2065/05 *Maher v. Minister of Interior*, (2005).

[36] HCJ 6300/93 *Center for Training of Rabbinical Court Pleaders v. Minister of Religious Affairs*, IsrSC 48(4) 441 (1994).

[37] HCJ 6321/14 *"Ken Lazaken" – For the Advancement of the Rights of the Elderly v. Minister of Finance*, (2017).

[38] HCJ 221/80 *Darwish v. Prisons Service*, IsrSC 35(1) 536.

[39] HCJ 355/79 *Katlan v. Prison Service*, IsrSC 34(3) 294.

[40] HCJ 2442/11 *Shtanger v. Speaker of the Knesset*, (June 26, 2013).

[41] HCJ 6055/95 *Tzemach v. Minister of Defense*, IsrSC 53(5) 241 (1999).

[42] HCJ 5636/13 *Residents of Timorim – Agricultural Cooperative Society*, (May 20, 2014).

[43] HCJ 243/52 *Bialer v. Minister of Finance*, IsrSC 7 424 (1953).

[44] HCJ 4374/15 *Movement for Quality Government in Israel v. Prime Minister*, (March, 27, 2016).

[45] HCJ 3132/15 *Yesh Atid Party led by Yair Lapid v. Prime Minister*, (April 13, 2016).

[46] HCJ 430/08 *I.D.F. Disabled Veterans Organization v. Minister of Defense*, (July 18, 2010).

[47] HCJ 2902/11 *Association for Children at Risk v. Ministry of Health*, (Sept. 4, 2015).

[48] HCJ 4541/94 *Alice Miller v. Minister of Defence*, IsrSC 49(4) 94 (1995).

Judgment

Deputy President E. Rubinstein:

1. This petition concerns the conditions of confinement of prisoners and detainees, particularly in regard to the living space allotted to each prisoner and detainee.

Background

2. The problem of prison overcrowding is not new. It has existed for at least four decades. Various commissions have been established over the years to address the subject, among them the Commission for the study of Crime in Israel of 1978 (the Shimron Commission), the Commission of Enquiry for the Investigation of Prison Conditions in Israel of 1981 (the Kenet Commission), the Commission to Assess Methods for Alleviating Overcrowding in Prisons of 1987 (the Karp Commission) (for details, see the 43RD ANNUAL REPORT OF THE STATE COMPTROLLER FOR 1992 AND FINANCIAL REPORT FOR THE 1991 FISCAL YEAR, 345-346 (1993)). Since it was established, over two decades ago, the Public Defender's Office has addressed this issue in the framework of its periodic reports in regard to prison conditions in Israel (see, for example, THE PUBLIC DEFENDER'S REPORT ON PRISON OVERCROWDING OF 2013, hereinafter: THE PUBLIC DEFENDER'S REPORT). The findings of the various published reports show that overcrowding – and no one denies its very existence – derives from a lack of space in the prison facilities, on the one hand, together with a continual rise in the number of imprisonments and arrests, on the other. We should note that while new prisons and detention facilities have indeed been established over the last decades, and the it can be assumed that the Prison Service is making efforts in this regard, it cannot be denied that the tendency towards misbehavior by prisoners who enjoy good conditions would lessen. However, at the end of the day, this desirable effort has not – as yet – led to a significant increase in the average amount of living space allotted to each prisoner and detainee, which has remained at about 3 square meters per person for the last 25 years, and is now 3.16 square meters, as will be described below.

3. The legislature addressed the issue of prison overcrowding in 2012, in the framework of the Prisons Ordinance (Amendment no. 42) Law, 5772-2012 (hereinafter: Amendment 42), which establishes, inter alia, in sec. 11B(b) of the Prisons Ordinance: "A prisoner will be held in appropriate conditions that will not harm his health or infringe his dignity". Since 1996, there has been a similar section in the Criminal Procedure (Enforcement Powers – Arrests) Law, 5756-1996 (hereinafter: the Arrest Law) in regard to detention facilities. We should recall that the Arrest Law

was enacted under the influence of Basic Law: Human Dignity and Liberty, and the spirit of that law imbues it. Amendment 42 incorporated the Prisons (Imprisonment Conditions) Regulations, 5770-2010 (hereinafter: the Prisons Regulations), in which reg. 2(h) establishes a similar arrangement to that in reg. 3(e)(3) of the Criminal Procedure (Enforcement Powers – Arrests) (Conditions of Detention) Regulations, 5757-1997 (hereinafter: the Arrest Regulations), under which:

> The average area of a cell shall not be less than *four-and-a-half square meters* per prisoner. The calculation of the said area shall be in accordance with the area between the walls of the cell, including the area of the lavatory, the sink and the shower, to the extent that there is a shower in the cell, and divided by the number of beds in the cell (emphasis added – E.R.).

Regulation 8 of the Prisons Regulations, which establishes the application provision (similar to the parallel, final part of reg. 3(e)), instructs:

> (a) These regulations will apply to permanent construction. In this regulation, "permanent construction" – a structure that cannot be transported from place to place.
> (b) Sub-regulations (d), (f) through (h) will apply to places of imprisonment whose construction planning began *after the initial day* [June 2010 – E.R.], and *to the extent possible*, even to planning and renovation of *existing places of imprisonment* (emphasis added – E.R.).

Thus, according to the current normative situation, new prison facilities must provide at least 4.5 square meters of living space for each prisoner or detainee. But note that according to these legal provisions, the standard of 4.5 square meters per inmate will apply to existing facilities only in the framework of planning and renovation, and only if feasible ("to the extent possible").

4. Current data provided by the Prisons Service show that the average area per inmate in Israel is 3.16 square meters at present. In this framework, some 21% of the inmates are held in cells in which the average space per inmate is greater than 4.5 square meters; some 18% are held in cells in which the average space per inmate is between 4 and 4.5 square meters; and some 61% are held in cells in which the average space per inmate is less than 4 square meters, of whom two thirds –

some 40.5% of all inmates – are held in cells in which the average space per inmate is less than 3 square meters (see the State's supplementary notice of April 3, 2017, para. 32). It should be noted that the calculation of living space comprises the area of the entire cell, including beds and cupboards, as well as the areas of the lavatory and shower, to the extent that such are in the cell. For the sake of clarity, we would already point out that the petition argues for a minimum are of 4 square meters *not including the lavatory and shower areas*, while the said reg. 2(h) calls for 4.5 square meters *including* the area of the lavatory, sink, and shower.

5. Here are the primary points of the petition before the Court.

The Arguments of the Petitioners

6. The petition is premised upon the argument that the current living space allotted to most prisoners and detainees infringes their right to dignity, physical and emotional integrity, and privacy to a disproportionate extent and without express legal authority. It is further argued that we are concerned with an infringement of the right of the prisoners and detainees to liberty to an extent that exceeds what is necessary, and which the Petitioners argue is tantamount to cruel, inhuman and degrading punishment.

7. It is argued that as a consequence of the overcrowding in Israeli prison and detention facilities, the living space allotted to each inmate – an average of some 3.16 square meters – is too small to meet the most basic needs of the inmates. Moreover, the Petitioners are of the opinion that ensuring proper living conditions requires examining data in addition to the size of the cell alone, such as the number of hours during which an inmate is permitted to be outside of his cell, the number of inmates in a cell, the size of the area outside the cell that is accessible to an inmate, the length of imprisonment, and more. It is therefore argued that the living space in the cell particularly affects the quality of life of inmates held in closed wings, who compose some 50% of the total held in prison facilities. Such inmates are permitted to leave their cells for only a few hours, during which they eat their meals, use the lavatories, shower, and spend their free time.

8. The Petitioners argue that the average living space allotted to an Israeli inmate is far below the standard accepted in Western states, which runs between 6 and 12 square meters per inmate, as well as below the minimal appropriate space in accordance with Prisons Service's own position, which is 6.5 meters, as expressed in the National Master Plan for Prisons (hereinafter: NMP 24 or

the NMP). The Petitioners further argue that this area is even smaller than the standard established in the Arrest Regulations and the Prisons Regulations for new prison facilities, which stands, as noted, at 4.5 square meters per prisoner and detainee.

9. In addition to the living space allotted to each inmate, it is noted that the overcrowding in the prisons and detention facilities is also expressed in the number of prisoners or detainees held in the cells. In this regard, the Petitioners point to the data of the Prisons Service, which show that some 85% of the total number of inmates are held in cells of four inmates or more, of whom some 43% share their cell with 8 additional inmates. This is the case despite the standard established in reg. 3(e)(2) of the Arrest Regulations and reg. 2(g) of the Prisons Regulations for new prison facilities, under which there should be no more than 4 beds in a cell.

10. It is further argued that the overcrowding in the prisons harms the accessibility and availability of the services offered to the inmates. If more inmates are held in a facility relative to what was originally intended, the services provided in the facility – i.e., social assistance, medical and psychological treatment, educational and rehabilitation frameworks, as well as the various public infrastructures in the facilities, such as the cafeterias and the yard – are divided among a greater number of people. Citing academic publications in the area, and reports by the Public Defender in regard to the conditions in Israeli prison facilities, the Petitioners argue that each inmate indeed enjoys less of the resources offered to the general population of inmates in the prison as a result of the overcrowding.

11. According to the Petitioners, the existing normative foundation lacks a standard obligating the Respondents to supply prisoners and detainees a defined minimum living space. This is the case inasmuch as the Arrest Regulations and the Prisons Regulations refer to future prison facilities, and therefore do not address the minimum living space to which every prisoner and detainee is *currently* entitled. On the contrary, it is argued that since the establishment of the 4.5 square meter standard for detention cells in 1997, there has been no advancement toward meeting that standard, and the living space of detainees remains as it was. The Petitioners further argue that despite the widespread construction efforts made over the last years, in which eight new prisons were erected and many wings in existing prisons were renovated, the problem of overcrowding was only slightly improved – inter alia, due to the constant increase in the rates of imprisonment – such that the average living space per inmate increased from 2.9 square meters in 1992 to merely

3.16 square meters at present. It is argued that other means adopted over the last few years to reduce overcrowding, such as administrative release, contributed little to significantly increase the living space allotted to each inmate. The Petitioners are of the opinion that in the absence of an obligatory norm in regard to the appropriate living space to be provided to all prisoners and detainees currently held in Israeli prison facilities, this population continues to remain in unbearable living conditions, with no discernable solution. It is further argued that existing plans for minimizing overcrowding in the prison facilities are insufficient in and of themselves, even if they would be granted the appropriate approvals and budgets.

12. It is argued that the current overcrowding greatly influences the daily lives of the prisoners and detainees. The limited living space creates crowding and congestion in the cells, limits the movement of the inmates more than is necessary, increases friction among them and adds to their mental distress, exacerbates the violation of their privacy, and leads to poor hygiene and a rise in the spread of illness. The Petitioners argue that these stresses make living in the cells "inhuman". This argument is supported by affidavits taken from six prisoners and detainees in various prison facilities throughout the country, by affidavits taken from former senior Prisons Service employees, and by the reports of the Public Defender referenced above. Citing research published in the field, it is further argued that in addition to the direct influence upon the lives and health of the inmates, the overcrowding in the prisons also has consequences for public welfare by undermining the possibility of an inmate's rehabilitation under such conditions.

13. In light of the above, the Petitioners are of the opinion that the constitutional right of the prisoners and detainees to proper living conditions is infringed. This right is anchored in sec. 11B of the Prisons Ordinance, and in sec. 9(a) of the Arrest Law, respectively, which create an obligation to hold prisoners and detainees in appropriate conditions that will not harm their health and dignity. It is argued that every prisoner and detainee also has a right to adequate living space on the basis of the constitutional regime, inasmuch as it derives from the right to dignity. It is also argued that holding prisoners and detainees in the aforesaid living space violates other fundamental rights, among them the right to physical and emotional integrity, the right to privacy, and the right to liberty, all of which are, in the opinion of the Petitioners, infringed in these circumstances to an extent that exceeds what is necessary.

14. It is further argued that the living conditions of the majority of prisoners and detainees in Israel contravene the rules of international law, in view of the obligation to ensure appropriate living space, and the prohibition upon imposing cruel, inhuman or degrading punishment. In regard to appropriate living space, the Petitioners refer to art. 10(1) of the International Covenant on Civil and Political Rights of 1966, which states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". In this regard, reference is also made to the U.N. rules of 1955 that establish Standard Minimum Rules for the Treatment of Prisoners, and expressly note the right to minimum floor space, as well as similar rules in the European Prison Rules adopted by the Council of Europe in 1987.

15. According to the Petitioners, the average floor space per prisoner in Israel is lower that the accepted standard of democratic states, and even lower than the minimum established by the United Nations Committee against Torture, which is 4 square meters exclusive of the area of the lavatory and shower. That being the case, holding prisoners and detainees in Israel in an average living space of some 3 square meters per person (including the area of the lavatory and shower, and as noted, we are currently looking at 3.16 square meters per person) is, it is argued, tantamount to cruel, inhuman or degrading punishment, as defined under art. 7 of the International Covenant on Civil and Political Rights. In this regard, the petition cites several court decisions from around the world that addressed similar petitions against overcrowding in various prisons. Thus, for example, the petition cites the 2013 decision of the European Court of Human Rights in *Torreggiani v. Italy*, no. 43517/09, ECHR 2013 (hereinafter: the *Torreggiani* case)), which held that holding prisoners in living space less than 3 square meters per person constituted a violation of the prohibition upon cruel punishment and inhuman treatment, and held that Italy must find a solution to the problem of overcrowding within one year. Also cited is the United States Supreme Court decision in *Brown v. Plata*, 131 S.Ct. 1910 (hereinafter: the *Plata* case), which concerned the California prison system. The Court addressed the infringement of the rights of inmates due to overcrowding, and ordered the state to reduce the number of inmates by some 40,000 within two years. We are also referred to the 1998 decision of the Polish Constitutional Court (cited by the European Court of Human Rights in *Orchowski v. Poland*, no. 17885/04, § 85, EHCR 2009 (hereinafter: the *Orchowski* case)), that overturned legislation that permitted holding inmates in an area less than 3 square meters, and gave the prison authorities an eighteen-month period to increase the size of the prison facilities.

16. In light of the above, the Petitioners request an order nisi in the following language:

> A. Why will every prisoner and detainee (hereinafter: inmate) not be ensured appropriate living space in the cell within a reasonable time period, and that the following steps be taken to that end:
>
> 1. Establishing the appropriate living space for an inmate;
>
> 2. Preparing a plan that will establish the course of action for attaining appropriate living space for an inmate;
>
> 3. Establishing a reasonable timetable for realizing the plan that will be established.
>
> B. Why will the necessary steps not immediately be taken to ensure every inmate living space of 4 square meters (excluding the lavatory and shower areas) necessary to prevent cruel, inhuman or degrading punishment.

The Position of the Respondents

17. The Respondents are of the opinion that the petition should be dismissed for lack of an actionable cause for the intervention of the Court.

18. First and foremost, it is noted that a standard for the minimal cell area for each prisoner and detainee has already been established by the Israeli legislature in the framework of the Prisons Regulations and the Arrest Regulations, and it is 4.5 square meters. Therefore – according to the Respondents – the first remedy requested in the petition is superfluous. Moreover, it is argued that the arrangement under the regulations, according to which the standard will apply to new prison facilities, and to the extent possible, to the planning and renovation of existing facilities, expresses the balance struck by the subsidiary legislator between the need to increase the average cell size per inmate, on the one hand, and the required investment of resources for the immediate expansion of all the prison facilities, on the other hand. Inasmuch as the said standard was established in primary legislation by virtue of Amendment 42, the State's actions in accordance therewith – both in regard to the construction of new facilities and the renovation of existing facilities – is, it is argued, in accordance with the law.

19. As for the second remedy, concerning immediately ensuring 4 square meters of living space per inmate, the Respondents are of the opinion that there are no legal grounds for granting the petitioned remedy. It is argued that the appropriate criterion established for an inmate's living space – i.e., 4.5 square meters, subject to the said balance between the construction of new facilities, and the renovation of existing facilities, to the extent possible – expresses the entire complex of required considerations. It is not clear to the Respondents upon what basis the Petitioners derive a duty to establish an alternative standard to that decided upon by the subsidiary legislator on the basis of primary legislation. The State further explains that immediately ensuring an average living space of 4.5 meters for each inmate – the standard established, as noted, by the State – would require massive construction of new prison facilities, expansion of current prison spaces, and the addition of over 1,300 employees, at an estimated expense of some 2.7 billion NIS. Granting the requested relief would mean changing the government's budgetary priorities as established in the Budget Law, and this in regard to an issue that, as noted, the legislature specifically addressed.

20. It is further argued that the there is an inherent tension between the two heads of the petition that further militates against it. The first head employs valve concepts[1] ("*reasonable* time", "*appropriate* living space"), whereas the second head seeks to establish a *concrete* standard *immediately*. Moreover, the Respondents argue that these remedies were not defined in a manner that reflects their precise legal nature, inasmuch as they are located on the constitutional plane – in view of their inherent demand to change a legal arrangement established in primary legislation – and not in the administrative plane, as may appear from the language of the petition. It is argued that inasmuch as reasons for annulling the relevant regulations for unconstitutionality were not presented, the petition should be denied. The Respondents are further of the opinion that the first head actually seeks even more far-reaching intervention – *viz*., establishing an alternative standard to that established by the State, as well as a time frame, which would be tantamount to judicial legislation. It is argued that the rights of prisoners are not absolute but relative, and it is therefore necessary to balance the granting of those rights against competing considerations, like budgetary limitations, the security of the prisons, and so forth, as the legislature did in the present matter.

[1] Ed: Vague terms, also known as "*ventilbegriffe*" and "*concetti valvola*".

21. Lastly, the Respondents argue that extreme caution should be exercised in regard to the comparison that the Petitioners make between Israeli prison policy and that of other countries. In general, it is argued, comparative law is, at most, a source of inspiration, and the legislature is accordingly granted a particular constitutional margin that derives from the State's unique normative arrangements. This is particularly true where the question of the constitutionality of a specific legislative arrangement is concerned, and especially when we are concerned with a remedy that, if granted, would be tantamount to judicial legislation.

22. In response, the Petitioners are of the opinion that the Respondents' argument that the standard established under the regulations – i.e., 4.5 square meters of living space per inmate in prisons to be constructed in the future – renders the first remedy superfluous, should not be accepted. It is argued that the Prisons Regulations and the Arrest Regulations are irrelevant to the question of the conditions appropriate for current inmates, and thus the need for establishing a concrete standard – as recommended in the petition – that will apply immediately. It is also argued that granting the petition does not require a change in the existing normative situation.

The present proceedings

23. We will briefly describe the progression of the proceedings from the time of the submission of the petition. On July 13, 2015, the first hearing was held before President M. Naor and Justices H. Melcer and Z. Zylbertal. In the course of the hearing, the attorneys for the Respondents updated the Court in regard to a wide-ranging plan for the construction of new prisons that, they argued, had the potential of providing a response to the remedies requested in the petition. At the end of the hearing, the Court decided to grant the Respondents a four-month period to submit an updated notice on the matter.

24. On Jan. 8, 2016 – following the granting of a continuance – an updated notice was submitted. *First*, the Respondents informed the Court that an agreement had been reached between the Ministry of Finance and the Ministry of Public Security to double the annual construction budget of the Prisons Service for 2016 for the purpose of adding 200 new prison spaces. *Second*, we were informed that prior to the preparation of the State budget for 2017, long-term solutions for increasing the average living space per inmate would be considered – in a positive light – while also examining alternatives like building new prison facilities and renovating wings of existing facilities. *Third*, it was noted that in the course of deliberating the State budget for the years 2015-

2016, it was decided to grant an additional 86 million NIS to the Prisons Service for expanding rehabilitation and educational services for inmates in the framework of a plan to execute Amendment 42. The Respondents are of the opinion that this step can be expected to result in a reduction of recidivism, and thereby to a reduction in the number of inmates in looking to the future.

25. A second hearing of the petition was held on Jan. 25, 2016, before the same panel. At the outset of the hearing, the Petitioners argued that the position of the Respondents reflects a failure to internalize the seriousness of the problem at hand, and requires that an order nisi be granted to move the matter forward. For their part, the attorneys for the Respondents argued that the Petitioners' demand for an immediate increase in the living space of every inmate is dramatic, and would require a significant budgetary commitment. In view of the position of the Respondents that, in principle, the petition did not present a cause for judicial intervention, the State's attorneys argued that there is no room for an additional budgetary realignment beyond that already decided. At the conclusion of the hearing, an order nisi was granted as requested, as noted in para. 16, above.

26. The Respondents submitted a reply on Sept. 7, 2016. In that reply, they reiterated their position that the petition should be denied for lack of cause. It was further stated that the Respondents had made significant advances toward improving the living conditions of inmates in Israel since the date of the submission of the petition, such that the claims made in the petition had been blunted.

27. Pursuant to the above, the Respondents presented a list of steps that had been adopted to improve the living conditions of prisoners and detainees. *First*, they noted NMP 24, which had been approved by the Government on March 7, 1982, and which provided for constructing new prisons in seven sites around the country, and noted change no. 3 to that NMP, of June 8, 2015, that provided for adding additional prisons to the plan with the approval of the National Planning and Building Council. Under the provisions of the NMP, at least 75% of the planned cells are expected to be for individual inmates, and they will be no smaller than 6.5 square meters, while the others will be for three inmates, and each inmate will have at least 5 square meters. *Second*, a multi-year plan was presented that, in principle, would increase the average cell space allotted to an inmate. The plan was prepared by the Prisons Service following the filing of the petition

(hereinafter: the plan-in-principle). The plan focuses upon building new prison facilities, on one hand, and on closing old facilities that provide a low living standard, on the other. The plan was approved by Respondent 1, and was presented to the Government. It is argued that its realization will lead to a significant improvement in the living conditions of the inmate population, including an increase in the average cell size per prisoner. *Third*, our attention was directed to the Prisons Service's plan to execute Amendment 42, which has a budget of 86 million NIS for the years 2016-2018, and which will emphasize improvements in the treatment, rehabilitation, medical, and educational services offered in the prisons. *Fourth*, the Respondents noted Decision no. 1840 of the 34th Government, of Aug. 11, 2016 (hereinafter: Decision 1840), which established a series of steps for making the penal and rehabilitation policies more efficient, among them: expanding the community-court model, with a view to limiting punishment by means of imprisonment; a suggestion to enact authorization for the courts to order community service for up to nine months (rather than the current six months); the allocation of 75 additional electronic monitoring devices to the Rehabilitation Authority for prisoners on conditional release. *Fifth*, the Respondents noted that in preparing the State budget for the years 2017-2018, an agreement was reached between the Ministry of Internal Security and the Ministry of Finance for the establishing of a Prisons Service building fund that would be allocated 20 million NIS in the Prisons Service's basic annual budget, and that would rise to 60 million from 2019 onward. To summarize this matter, it was argued that the steps enumerated – which are being carried out, as noted, in accordance with the balance inherent in the application provisions of the regulations – provide a full response to the first remedy sought by the petition.

28. The Petitioners submitted their reply on Sept. 25, 2016. While the Petitioners were of the view that the steps enumerated in the Respondents' reply were welcome, they argued that there was no obligation to increasing the living space of inmates, even by mere centimeters, and certainly not in any defined time period. As for reducing the inmate population by means of alternatives to incarceration, the Petitioners are of the opinion that that provides no guarantee that the living space of inmates will be increased when it was not defined in advance as an independent objective, along with the establishing of a rigid standard and an orderly plan for its achievement. Thus, for example, it was argued that the administrative-release mechanism – in place since 1993 – has not itself led, as yet, to an improvement in the living conditions of the inmates. The Petitioners do not expect that the steps taken to reduce recidivism and the changes in penal policy will lead to a significant

reduction in the number of inmates. It is argued that these plans affect a very limited number of inmates, and therefore, cannot serve to increase the living space allotted to the general inmate population in any acceptable manner. As for the Respondents' updates on the matter of plans for constructing new prison facilities and the renovation of existing facilities, the Petitioners are of the opinion that these, too, cannot provide a response to the problem of overcrowding in the absence of a predetermined minimum standard for living space that will be allocated to each prisoner and detainee when the plans are realized. It was further argued in regard to the plan-in-principle, that the Respondents' reply lacks specifics as to its concrete objectives, the projected timeframe for its completion or its estimated budget, all of which the Petitioners believe are required in order to evaluate the actually expected effect on the living space of prisoners and detainees.

29. On Feb. 8, 2017, a hearing was held before the present panel on the objection to the order nisi. The attorney for the Respondents argued that tremendous progress had been made since the issue was brought before the Court, and this alone justifies denying the petition. The construction fund mentioned in the reply was specifically noted, and the Respondents requested additional time to provide a more detailed update in regard to the concrete timetables expected to be established in that regard. Given what was presented, the Respondents were granted 30 days to submit an updated notice, and the Petitioners were granted 10 additional days to reply.

30. On April 3, 2017 – after requests for continuances, and without blaming the "messenger" – an updated notice was submitted on behalf of the Respondents. It stated that following a complex administrative review by the Prisons Service, with the cooperation of the Attorney General, who was also involved in the matter, the plan for building additional prison spaces in a number of new, high-standard facilities was examined, as well as a proposal for increasing the living space in the existing prisons. It was submitted that as of the date of the filing of the notice, the Respondents were as yet unable to crystallize a final position as to the said alternatives, and more time was requested in order to update the Court on the results of the review. We granted the request in our decision of April 9, 2017.

31. The Respondents submitted a supplementary notice on April 21, 2017. That notice presented an update in regard to a number of solutions that had been developed, in addition to the steps already detailed in the reply. *First*, it was submitted that it had been decided to erect a new prison to replace the Neve Tirzah women's prison, which would comprise 311 prison spaces at a

cost of 171 million NIS. In this regard, it was noted that the living space allocated to prisoners in Neve Tirzah is currently 3.1 square meters on average, whereas building the new facility would lead to increasing the living space to some 6.5 square meters. *Second*, the Respondents updated the Court as to a plan for expanding cells in some of the existing prison facilities by removing 200-500 empty beds. *Third*, we were informed that the Prisons Service, in cooperation with the Ministry of Finance and the Ministry of Public Security, would begin detailed planning for the construction of a new prison – in addition to the facility intended for women – together with the closing of an old prison. It was stated that the sum of up to 15 million NIS would be allocated for the purpose of preparing the detailed plan for the facility, which would be addressed in the framework of the 2019 budget, and it was noted that there is already an approved development plan. The Respondents further updated the Court as to the progress made in regard to the execution of Decision 1840, and particularly in regard to the elements related to alternatives to imprisonment.

32. The Respondents submitted their reply on April 27, 2017. It stated that the Respondents' notice did not change their principled position according to which an order absolute should be granted. It was argued that the steps enumerated above do not constitute an undertaking in regard to increasing the living space of inmates, and are, in any case, far from providing a solution to the problem of overcrowding. That is the case inasmuch as some of them are – it was argued – of a theoretical and speculative character, whereas the concrete steps noted (such as building an alternative facility for Neve Tirzah) relate only to a limited prison population. That being the case, the Petitioners are of the opinion that even if these steps would increase the prison spaces by some amount – under what they deem the unreasonable assumption that the rate of incarceration and arrest will remain steady – it will not be an amount with the potential of achieving an appropriate average living space for each and every prisoner and detainee.

Review and decision

33. It is a fundamental principle that "every right of a person, as a person, is retained even when he is under arrest or imprisoned, and the fact of imprisonment alone is insufficient to deprive him of any right, except when necessary and deriving from the very fact of the deprivation of his freedom of movement, or when there is an express legal provision in that regard…" (HCJ 337/84 *Hokma v. Minister of Interior* [1] 832, *per* Justice M. Elon). And note: a prisoner – even if he is lawfully imprisoned and is not one of the thirty-six righteous – is deprived, first and foremost, of

his right to liberty, along with additional restrictions that derive from the purpose and nature of imprisonment. But the prisoner is not denuded of his rights as a person, and he does not lose those freedoms granted to every person as such, unless it is required for the purpose of incarceration. Prison walls are not a "normative black hole" beyond which there are no rights or protections. On the contrary. A prisoner – who is, of course, subject to certain duties of conduct in prison – is in the custody of the State, and the State has heightened responsibility for him:

> When a person enters prison, he loses his freedom. A person loses his freedom, but he does not lose his dignity. A person's dignity accompanies him wherever he goes, and his dignity in prison is the same as his dignity outside prison … Where an official unjustifiably violates the dignity of a prisoner — his dignity as a human being — the Court must speak out succinctly and clearly (PPA 4463/94 *Golan v. Prisons Service* (hereinafter: the *Golan* case [2]) 172, *per* Justice M. Cheshin).

And further on (at p. 175):

> … a person, every person, carries his constitutional rights in his knapsack, and wherever he goes, his rights go also. Even when he enters the prison as a prisoner a person is not stripped of his constitutional rights, and his rights remain in his knapsack.

34. However, as we know, the basic principle of the Israeli constitutional system that a person's – any person's – basic rights must not be infringed is not absolute, and such infringement is possible where there is "a recognized conflicting interest, whether private or public, that is of sufficient weight to justify this" (HCJ 2245/06 *Dobrin v. Prisons Service* [3], para. 13, *per* Justice A. Procaccia). However, "the loss of personal liberty and freedom of movement of an inmate, which is inherent in the actual imprisonment, does not justify an additional violation of the other human rights of the inmate to an extent that is not required by the imprisonment itself or in order to realize an essential public interest recognized by law" (HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance* (hereinafter the *Prison Privatization* case [4], 595, *per* President D. Beinisch).

35. Of course, in establishing the scope of the protection of the human rights of a prisoner, we must also address considerations inherent to incarceration and the duties imposed upon the Prisons Service: the need to protect all the prisoners and their rights; to maintain order and discipline in the prisons; and to ensure the welfare and security of the other prisoners and of the prison staff (the *Golan* case [2], 150).

Human dignity and the dignity of the prisoner

36. Another basic principle: the right to human dignity is anchored in Basic Law: Human Dignity and Liberty. The Basic Law establishes a prohibition upon violating the right to dignity, as well as a duty to protect it:

> 1A. The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.
>
> 2. There shall be no violation of the life, body or dignity of any person as such.
>
> …
>
> 4. All persons are entitled to protection of their life, body and dignity.
>
> …
>
> 11. All governmental authorities are bound to respect the rights under this Basic Law.

A prisoner does not enjoy liberty – one of the two elements of the title of the Basic Law – inasmuch as he is incarcerated. Section 5 of the Basic Law, which states: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise", does not apply to prisoners, particularly in view of the limitation clause entitled "Violation of rights" (sec. 8), which states: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required" (and see: LHCJA 4937/14 *Albazian v. Attorney General* [5], paras. 11-12; LHCJA 328/15 *Zalum v. Attorney General* (hereinafter: the *Zalum* case [6]), para. 35).

37. This Court has long held that human dignity comprises a broad field of rights, inter alia, and with nuances that this is not the place to elaborate, the right to freedom of religion and freedom from religion, the right to freedom of expression, the right to one's good name, and the right to family life (A. BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND ITS DAUGHTER RIGHTS (2014), chap. 13 (Hebrew), [published in English as HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015)]). The Basic Laws do not expressly recognize social rights, and the courts have refrained from unequivocally stating that the government has a duty to respect social rights (B. MEDINA, HUMAN RIGHTS LAW IN ISRAEL (2017) (Hebrew)). However, it has been held, and this is perhaps the main point, that the right to dignity also includes a right to basic dignified existence.

38. In HCJ 161/94 *Atari v. State of Israel* [7], and later in HCJ 4905/98 *Gamzu v. Yeshayahu* [8], the Court recognized the right to minimal dignified human existence – ensuring basic human subsistence (and see: HCJ 10662/04 *Hassan v. National Insurance Institute* [9]). These judgments, and in many subsequent judgments (LCA 5368/01 *Yehuda v. Attorney Yosef Teshuva, Receiver* [10]; HCJ 5578/02 *Manor v. Minister of Finance* [11], 736; AAA 3829/04 *Tuito, Chairman, Mikol Halev Association v. Jerusalem Municipality* [12], 779; *B'tzedek Association – American-Israeli Center for Promoting Justice in Israel v. Minister of Interior* [13]) recognized a basic right to a dignified human existence as a right to *dignified socioeconomic existence*, inasmuch as in "the free world", the right to a dignified existence is intimately tied to economic welfare, and the possibility of maintaining it requires economic means. As opposed to this, the subsistence of prisoners behind bars is not contingent upon their economic capabilities, and it is by nature more modest. It consists primarily of the possibilities available to maintain his daily life within the confines of the prison and the purpose of imprisonment. "Indeed, the human right to dignity is also the right to have living conditions that allow an existence in which he will realize his liberty as a human being" (HCJ 366/06 *Commitment to Peace and Social Justice Society v. Minister of Finance* [14], 480, *per* President A. Barak). The prisoner cannot, of course, realize his liberty while imprisoned, but he , of course, does not stop being a human being, and looking to the future, his humane treatment also benefits society and contributes to preventing recidivism, to the extent possible (see: H. COHN, THE LAW (1991) (Hebrew), hereinafter: COHN, THE LAW).

39. It would not be an exaggeration to say that an inmate's physical living space is one of his most basic existential needs. It is essential in every respect that there be a space in which the inmate can live his life within the limits deriving from his imprisonment. We are concerned with the core of human dignity, the nucleus of the right: "We are speaking of human dignity in its plain meaning, the core of human dignity, of human dignity as expressed and understood in plain language" (HCJ 1163/98 *Sadot v. Prisons Service* [15], 857, *per* Justice Cheshin). We should bear in mind that even were the conditions those established by the legislature, and every inmate were allocated 4.5 square meters of living space, it would hardly be wildly generous, and privacy would, nevertheless, be limited. But the word of the legislature, even if qualified, must remain before our eyes, and to it we must strive.

40. But the living space allocated to an inmate throughout the prison facilities stands at only 3.1 square meters. This space is "all included" – it comprises the beds (some 1.5 square meters), storage spaces, and lavatory and shower areas. In other words, the free space allotted to an inmate for his day-to-day activity does not reach 3 square meters. The overcrowding in the prisons "violates the movement and breathing space of the inmate in the prison compound" (the *Prison Privatization* case [4], para. 32 of the opinion of Justice Procaccia), infringes the inmate's privacy to the point of nullification, and allows only limited movement. The Petitioners enumerated a long list of the consequences of overcrowding for the lives of inmates, and well described how it can inherently lead to the spread of disease and to difficulties in maintaining good hygiene (see: THE PUBLIC DEFENDER'S REPORT, pp. 17-19). This is the case even if I do not doubt that the Prisons Service, its headquarters, district commanders and prison wardens work hard to improve the situation and maintain the health of the inmates. However, research shows that overcrowding leads to an increase in friction among the inmates, which in turn leads to violence and disciplinary breaches (Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U.J.L & POL'Y 265 (2206); Gerald G. Gaes, *The Effects of Overcrowding in Prison*, 6 CRIME AND JUST. 95 (1985). Truth be told, there is no need for research to know this – it is clear from experience and common sense. The research also points to the physical and psychological decline of inmates, an increase in the sense of pressure, tension and anxiety, as well as an increase in self-starvation (N. Dagan, "Early Prison Release: The Releasing Authority and its Discretion in Designing Penalties" (Ph.D. diss, 2013) (Hebrew); and see: Jack Call & Terence Thornberry, *Constitutional Challenges to Prison*

Overcrowding: The Scientific Evidence of Harmful Effects, 35 HASTINGS L.J. 313, 319 (1984)). It is superfluous to say that overcrowding impairs the availability and accessibility of various services in the prisons. These services are divided among a larger number of prisoners, and the same is true for public spaces. We will now turn to the "terrible overcrowding in the prisons" (not necessarily in regard to Israel, and see: COHN, THE LAW, 552).

41. THE PUBLIC DEFENDER'S REPORT (CONDITIONS OF DETENTION AND IMPRISONMENT IN THE PRISON FACILITIES OF THE PRISONS SERVICE IN THE YEARS 2013-2014 (2015) (Hebrew)) states, for example, in regard to ventilation conditions:

> **In the Maasiyahu Prison** [in which, according to the data of the Prisons Service, the living space per prisoner stands at 2.7 square meters – Appendix P/1 – E.R.] the cells were found to be dark, and there were no means for proper air conditioning and ventilation, other than in the staff offices. In a visit in July 2014, when the weather was very hot, the inspectors met inmates who all, without exception, complained of the severe heat in the prison, and noted that the few fans that were given to them were insufficient to alleviate it. The inspectors themselves suffered from the intense heat in the cells, and noted that some of the cells were dark (p. 47).

As for the sanitation and hygienic conditions:

> **In the Nitzan Detention Center** [in which, according to the data of the Prisons Service, the living space per prisoner stands at 2.4 square meters – Appendix P/1 – E.R], the inspectors were exposed to particularly severe sanitation conditions. The inmates complained of hard living conditions in terms of overcrowding, hygiene and the available equipment, and also showed the inspectors insect, lice and flea bites. According to them, the matter has not been addressed by the Prisons Service, and there has been no spraying of insecticide in the wing for over five months. The prisoners also complained of a lack of facilities for hanging laundry, such that they are required to hang wet laundry in the cell. In one cell, the inspectors saw many cockroaches around an empty plate, and there was a sense of severe suffocation and a stench that made it difficult to remain in the place for more

than a few minutes. In another cell, the inspectors found that there was no dining table and the inmates eat while sitting on the beds. There was no trash can, and the trash was thrown into a bag on the floor. There were signs of severe damp, the paint was peeling from the walls, and there was a water leak. In another cell, which held eight inmates, overcrowding and stench. The shower and lavatory were in an inner room, but the water continuously ran out of it into the cell. Insects and cockroaches were observed in the cell, which cause the inmates itching and sores. There is a large window in the cell, without glass due to the extreme heat in the room. It was reported that in the winter, rain water enters the room through the window and wets the beds… (p. 51).

And further:

> **In the Hadarim Detention** Center [in which, according to the data of the Prisons Service, the living space per prisoner stands at 3.6 square meters – E.R], the inspectors noted the lack of hygiene in the cells of detainees being held under day-to-day arrest. The bathroom was neglected and dirty, and the metal (stainless steel) toilet and sink were dull and stained, the floor was filthy, trash was spread about the cell, on the walls and ceiling there were mildew, dirt and stains. The walls of the cell are covered in graffiti, and are completely peeling. The mattresses on the beds were torn, dirty and full of holes, and were nothing more than bare pieces of foam. There were gray woolen blankets on the beds, which were also partly torn and covered in stains. A bad odor emanated from the mattresses and blankets. Some of the beds were broken. In another cell, visited by the inspectors at lunchtime, there were three inmates who sat on the beds around a plastic table. The inmates crowded their trays on the narrow table or held them in their laps, and it was clear that eating was uncomfortable. Next to the table, there was an improvised trash bin, made from a large food can. This cell, too, was filthy, the blankets were dirty, and the inmates complained that they were used and had been left in the cell by other inmates. The inmates told that

> they wanted to clean the cell, but instead of being given cleaning supplies, the prisoner detail sprayed a little water and soap in the middle of the cell, and they removed the water from the cell with a squeegee. The inmates noted that the only cleaning material around is dishwashing soap, and even that is not accessible to them (*ibid*.).

42. The Public Defender's Office also noted that many prison facilities lack a partition between the shower and the toilet, such that the inmates have to shower while standing over the place where other inmates relieved themselves.

43. The above is given concrete expression in the prisoners' affidavits appended to the petition. We will quote some of them:

> In that cell we were 8 inmates for 22 consecutive hours a day. Not enough daylight entered the room, so it was mostly dark. There was no air flow, so the room was suffocating and stank. There was no space in the room to stand and walk and stretch, so most of the time we would all lie on our beds … in 2005, I spent a year … in the Ayalon Prison. There we were twenty inmates in 35 square meters of living space, with only 14 beds in the room, and I had to sleep on a mattress on the floor. At night, inmates who went to relieve themselves stepped on me. Inmates threw things at me from their beds. There was a lot of violence in the room, and very frequently due to the severe overcrowding, and directly related to the issue of distributing the beds in the room and telephone times (P/11, Affidavit of Prisoner D).

And:

> The wings in which I was held for my 21 years of imprisonment until now were very crowded, filthy, not whitewashed, and certainly unfit for human habitation (P/12, Affidavit of Prisoner E).

44. And this is how the situation was described by Mrs. Gilada Hellman, who held various positions in the Prisons Service, including warden of the Hermon Prison and District Prisoners Officer for the Northern District:

> In a large part of the cells, there was such great overcrowding that there was no room to put a table or a chair in the cell, and the inmates, in such cases, had to eat while sitting on their beds with the plate on their knees, or they had to fight over the little available empty space … in a large part of the cells, there is also no room for keeping personal belongings … as a result, there are a lot of thefts and disputes among the inmates … the severe overcrowding conditions also negatively impacted the prisoners' hygiene … (P/14).

45. On a personal note: Over the years, beginning with my tenure as a District Court judge, and particularly during my term as Attorney General, and my tenure in this Court, I felt it was important to examine the living conditions of inmates by relatively frequent visits, without prior coordination other than a notice to the Legal Advisor of the Prisons Service immediately prior to the visit, and spontaneously choosing the prison. I also often wanted all the clerks in my office to see the prisons from the inside. I would note that a Supreme Court justice, as well as the Attorney General, may visit any prison in accordance with sec. 72 of the Prisons Ordinance. I recall what I was told by my late friend, and justice of this Court, Dr. Moshe Etzioni, who, when appointed to the Magistrates Court in 1945, asked the senior British judge for permission to visit a prison "in order to know where I am sending people". I would also add at this juncture that I greatly appreciate the Prisons Service for its work – important and hard work – and I have always been impressed by the efforts of the commanders and their staffs to treat the inmates properly and respectfully. What will be said here is not intended to detract from that in any way. In those visits, after speaking with the prison warden, I would randomly visit the cells in the various wings as I chose, and talk to the inmates. I was always impressed by the efforts of the staff and all involved in providing, to the extent possible, suitable conditions and various services that would afford the inmates a real opportunity to leave the cycle of crime for a normative life, as far as possible, and attain "local quiet" to the extent possible. However, I saw crowded cells, with hardly adequate ventilation, particularly in the hot summer days, and a lack of space heaters in the winter in the old buildings. Thus, for example, after visiting the Ayalon Prison on July 23, 2008, I wrote to the Deputy Commander of the Central District and the Warden of the Ayalon Prison: "The Ayalon Prison is based upon an old building from the Mandate period, and it is clear that parts of it that remain from that structure are completely inadequate in terms of the living conditions of the inmates, where 12-

14 inmates reside in a cell that is not large enough for such a number, and the shower is over the toilet. We understand that three new wings are currently under construction, and that there is an intention to upgrade the existing ones thereafter. It is to be hoped that this process will be accelerated, as it is hard to accept such cells in the 21st century … and this is not meant as criticism of the work of the staff, but rather of the unacceptable situation" (my letter dated July 24, 2008). After my visit to the Nitzan detention center on March 1, 2011, I wrote to the Prisons Commissioner that "in the renovated wing, living conditions are good and the lavatories are at a good level … in the 'old' wing as well, although it is much more crowded, we heard no complaints from the prisoners or detainees, and on the contrary, praise for the treatment by the staff. Nevertheless, the conditions require improvement, and it is to be hoped that the renovation will be carried out quickly" (my letter of March 2, 2011). After my visit to the Shatta (Shita) prison, I sent a letter to the prison warden in which I noted, among other things, that "at the basic level, we are concerned with old prisons, and the crowding is, therefore, not insignificant in some of the cells" (my letter of March 6, 2017). Actually, there is a high degree of overcrowding in certain Israeli prison facilities because they were built long ago, some in the British Mandate period, and there is even a remnant of the Ottoman period (the Russian Compound). Certain police stations that comprise detention rooms suffered from overcrowding. In the closing days of my tenure as Attorney General, I visited one of the police stations in the Judean foothills that comprised detention cells. A very crowded cell that was "intended" for six detainees in three bunk beds (and would even then be very crowded), held 12 people, and in addition to the six in the beds, two slept on the shelf over the shower that was in the cell, two shared beds with others (good lord), and two on the floor, who in certain conditions – if they did not pose particular danger – would be taken out into the hall to sleep in the air of the hallway rather than in a suffocating room. I turned, almost in a frenzy, to the Ministry for Public Security, and I was promised that the matter would be resolved quickly.

46. It cannot be denied that much has been done over the last few years to improve the situation. Prisons have been renovated and new ones have been built, and there are proven good intentions, but that is not enough. As noted, a number of reports addressed the issue of prison conditions over the years, committees were convened, and the complex reality of budgeting and logistics led to a situation in which, for years, efforts have been made, plans devised, and steps even taken – and I

say this with no intention to offend anyone – but an appropriate solution in the field has not been provided for a large part – too large a part – of inmates.

47. We will already state that we are aware that, at the end of the day, the hurdle is economic and concerns the priorities of the decision makers, and "the needs of your people are many".[2] None of the decision makers wishes to harm the prisoners and detainees, but the absolute majority of inmates "enjoys" living space that is lower, by any standard, from what is acceptable in a civilized state, as we shall elaborate below. While it is generally neither the practice nor the place of this Court to intervene in setting priorities for the division of state resources by putting ourselves in the authority's shoes, that is not what we are concerned with here. No one disputes that basic rights cannot retreat before budgetary considerations (HCJ 451/94 *Miller v. Minister of Defence* [16]), inasmuch as "the rhetoric of human rights must be backed up by a reality that places those rights at the forefront of national priorities. Protecting human rights costs money, and a society that respects human rights must be willing to carry the financial burden" (AHARON BARAK, INTERPRETATION IN LAW – CONSTITUTIONAL INTERPRETATION, vol. 3, (2013) 528 (Hebrew) (hereinafter: BARAK, INTERPRETATION IN LAW); and also see HCJ 9134/12 *Gavish v. Knesset* [17] and references there). As noted, the present matter stands at the core of human dignity— the realization of the right to a minimal dignified existence in the most basic sense – and budgetary considerations cannot justify their continued violation over the course of decades.

International and comparative law

48. In their petition, written responses, and oral arguments before the Court, the Petitioners made many references to international and comparative law. Indeed, the subject of the appropriate living space for prisoners and detainees has been addressed by many countries, of all types, both among those considered progressive and those that do not enjoy a good reputation in this area, and has been widely addressed by international enforcement agencies and other international bodies. While this is not lost upon the Respondents, who are of the opinion that caution should be exercised in comparing these laws to the balance struck by the Israeli legislature, and it is clear that every state has its own character, needs and abilities, I am of the opinion that the scope of comparative law's interest in the area – together with the fact that we are concerned, to a great extent, with a

[2] Ed: Tosefta Berakhot (Lieberman) 3:7.

universal question of human dignity – requires that we train our sites abroad. That clearly does not imply entirely adopting an arrangement of any particular country into our legal system. The survey is meant to enlighten us in our search for a solution to the problem we face. An incarcerated person, as such, is one and the same throughout the world. History and literature are laden with commentary and stories concerning imprisonment and the conditions of imprisonment in regimes to which we have never been, and will not be similar in any shape or form, not only in the distant past, but even in recent generations and in our own time, even close to us, whether a calaboose or a gulag. Israel seeks to be and to appear as the most civilized of nations, and while this area may physically be situated "behind closed doors", it is a moral showcase.

International law

49. We will, therefore, begin with the position of international law. The relevant requirement established under art. 10(1) of the International Covenant on Civil and Political Rights of 1966, states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". While the phrase "with humanity and with respect for the inherent dignity of the human person" is inherently of a general nature, minimal floor space is among the basic conditions to which every prisoner is entitled under the United Nations Standard Minimum Rules for the Treatment of Prisoners, last amended in 2015:

> All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, *minimum floor space*, lighting, heating and ventilation (rule 10, emphasis added – E.R.).

It should be noted that despite the express requirement to provide *minimum* living space, the rules do not specify a concrete standard that must be met.

50. An additional source for interpreting the requirement for the appropriate care of prisoners can be found in the work of the UN Human Rights Committee, whose task is to supervise the execution of the Covenant (not to be confused with the Human Rights Council and its well-known discriminatory attitude towards Israel). The Committee addresses the issue of prison overcrowding as part of its periodic review of the member states, as well as in reviewing petitions submitted to

it concerning the violation of their obligations under the Covenant and the Rules. An examination of cases reviewed by the Committee reveals that providing appropriate living space is indeed part of the obligation to treat prisoners "with humanity and with respect for the inherent dignity of the human person". However, it is difficult to discern any rigid standard for appropriate living space in the Committee's reports.

51. International law also examines the conditions of imprisonment from the perspective of the prohibition of cruel, inhuman or degrading punishment. This prohibition, while worded in a general manner, is anchored in art. 5 of the International Covenant on Civil and Political Rights, and in art. 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, ratified by Israel in 1991.

52. According to the Petitioners, providing less than 4.5 square meters of living space per prisoner, *independent of* lavatory and shower areas, in a shared cell constitutes a violation of the said prohibition. Support for this view can be found in the reports of the UN Committee against Torture, which note that member states must provide living space of at least that scope (see, for example: Comm. against Torture, Concluding observations on the fifth periodic report of Estonia at its Fiftieth Session, U.N. Doc. CAT/C/EST/CO/5 (Jun. 17. 2013)., para. 17; Comm. against Torture, Concluding observations on Bulgaria at its Forty-seventh Session, U.N. Doc. CAT/C/BGR/CO/4-5 (Oct. 31. 2011), para. 21). However, in most cases, the Committee does not require the reviewed state to meet a concrete objective in regard to the average living space per prisoner, but rather suffices with a general statement as to the need to observe the Rules (see, for example: Comm. against Torture, Concluding observations on the fifth periodic report of Colombia at its Fifty-fourth Session, U.N. Doc. CAT/C/COL/CO/5 (May. 29. 2015), para. 17; and see: Comm. against Torture, Concluding observations on the third periodic report of Philippines at its Fifty-seventh Session, U.N. Doc. CAT/C/PHL/CO/3 (Jun. 2. 2016), para. 27).

53. A minimum standard of 4 square meters per prisoner, excluding lavatory and shower areas, and a total 6 square meters per prisoner, including those areas, for a prisoner in a single-occupancy cell, was recently established by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), which is responsible for the execution of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1950. It is significant that while the UN Committee views 4 square meters as an

appropriate criterion, the European Committee regards that as a rigid minimum standard that is not, itself, sufficient to ensure proper living conditions:

> Clearly, the aforementioned examples suggest that the 4m² per prisoner standard may still lead to cramped conditions when it comes to cells for a low number of inmates. Indeed, given that 6m² is the minimum amount of living space to be afforded to a prisoner accommodated in a single-occupancy cell, it is not self-evident that a cell of 8m² will provide satisfactory living space for two prisoners. In the CPT's view, it is appropriate at least to strive for more living space than this. The 4m² standard is, after all, a *minimum* standard (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment, Living Space per Prisoner in Prison Establishments: CPT Standards, CPT/Inf (2015) 44, para. 15 (emphasis added – E.R.)).

54. In addition to the establishment of the said standard, the European Court of Human Rights – which acts under the authority of the European Convention – addressed a large number of applications in regard to the prison conditions in various states. In this framework, a clear rule was created on the question of when the incarceration of a prisoner would constitute a violation of the prohibition upon cruel, inhuman, or degrading punishment established under art. 3 of the Convention. Under the case law, meeting the standard of 4 square meters of living space per prisoner (exclusive of additional areas), as stated, is a central consideration in evaluating the conditions of imprisonment (*Karalevicius v. Lithuania*, no. 53254/99, § 36, ECHR 2005). Moreover, it was held that where the living space allotted to a prisoner is less than 3 square meters, the Court would view the *crowding itself* as grounds for a violation of the prohibition upon cruel, inhuman or degrading punishment (*Ananyev v. Russia*, no. 42525/07, § 145, ECHR 2012 (hereinafter: the *Anyanev* case); *Kalashnikov v. Russia*, no. 47095/99, § 97, ECHR 2002; *Badila v. Romania*, no. 31725/04, § 72, ECHR 2011 (hereinafter: the *Badila* case); *Ostrovar v. Moldova*, no. 35207/03, § 82, ECHR 2005; *Lonia v. Croatia*, no. 8067/12, § 76, ECHR 2014 (hereinafter: the *Lonia* case)). It should be noted that even when the allotted living space per prisoner is greater than 3 square meters but less than the 4 square meter standard, additional factors – such as the ventilation and heating of the cell, exposure to daylight, basic hygienic conditions and the

possibility of using the lavatory without an infringement of privacy – may tip the scales in favor of a finding of cruel, inhuman or degrading punishment (the *Badila* case; *Peers v. Greece*, no. 28524/95, § 70, ECHR 2001).

55. As for the consequences of such a violation, European law – as a rule – grants compensation for non-monetary harm to a person who suffered cruel, inhuman or degrading punishment; and see in this regard: *Olszewski v. Poland*, no. 21880/03, ECHR 2013, in which the Court awarded the applicant €5000 for his injuries due to the conditions of his imprisonment – foremost among them, being held in a space that was less than 3 square meters for a cumulative period of some 5 years; and see *Marin v. Romania*, no. 79857/12, ECHR 2014, in which the applicant was awarded €15,300, in part due to the crowding in the facilities in which he was held for a period of about 10 years; and see the *Lonia* case, in which the Court awarded the full sum requested – €10,000 – inter alia due to the fact that the plaintiff was held for a year of his overall incarceration in a living space that was smaller than 3 square meters.

56. It should also be noted that in some cases the Court exercises its authority under art. 46 of the European Convention, which permits instructing the member states to take operative steps, whose execution is supervised by the Committee of Ministers. Although the Court's judgments are declaratory in nature, the panel may – under the said authority – establish a timeframe for the execution of its instructions, or recommend concrete steps to be taken by the country to meet them. That was done in the *Orchowski* case, cited above, which examined the conditions of imprisonment of the applicant in eight different Polish prison facilities over the course of 6 years, as of the date of the judgment. In view of the finding that the applicant had been held for most of that period in an area that was less than 3 square meters, and at times he was allotted even less than 2 square meters, the Court ruled that the prohibition upon cruel, inhuman or degrading punishment had been violated in his regard. In addition to awarding damages for the applicant's injuries, the Court ruled that that the state had to establish long-term solutions for the problem of overcrowding in the prison system in order to meet acceptable standards. It was further held that if adequate steps were not adopted to improve the conditions of imprisonment, the state must adopt a more lenient penal policy or put in place a system of alternative means of punishment.

57. The *Ananyev* case concerned three complaints by Russian prisoners against the conditions of their imprisonment. In addition to the finding that the applicants' living conditions constituted

cruel, inhuman or degrading punishment, the Court ruled that the problem of overcrowding in Russia – which affects various prison facilities throughout the country – requires long-term solutions, with emphasis upon reducing the number of remands in custody, and granting early release to prisoners:

> … the Court considers it important for the purposes of the present judgment to highlight two such issues which need inevitably to be addressed by the Russian authorities in their ongoing struggle against persistent overcrowding of remand centres. The first issue concerns the close affinity between the problem of overcrowding, which falls to be considered under art. 3 of the Convention, and an excessive length of pre-trial detention … The second issue, which is closely linked to the first, concerns possible additional ways of combating the overcrowding through provisional arrangements and safeguards for the admission of prisoners in excess of the prison capacity (*ibid*., para. 196).

It was further required that Russia present a binding time-frame for the adoption of the said measures, within six months from the date on which the Court's judgment became final.

58. In the *Torreggiani* case, as well, which treated of the conditions in two Italian prisons, the court allotted the state one year to develop a plan for addressing the overcrowding issue, and recommended that the plan include means for reducing the number of remand prisoners, and early release. Another judgment in which the European Court exercised its authority under art. 46 was recently issued in *Varga and others v. Hungary* (no. 14097/12, ECHR 2015), which addressed the applications of six prisoners, each held in a different facility. The court held that the limited space allotted to the prisoners, along with other poor conditions, constituted cruel, inhuman or degrading punishment, and the state was given a period of six months to present a plan for remedying the conditions of imprisonment and reducing the number of prisoners and detainees.

The United States

59. The problem of overcrowding in prisons in the United States – generally viewed as one of the most civilized countries – is among the most severe in the Western world (Shepard Simpson & Lauren Salins, *Efforts to Fix a Broken System: Brown v. Plata and the Prison Overcrowding*

Epidemic, 44 LOY. U. CHI. L.J. 1153, 1157 (2012) (hereinafter: Simpson & Salins); and see, Paul Paulus, Garvin McCain & Verne Cox, *Prison Standards: Some Pertinent Data on Crowding*, 45 FED. PROBATION 48 (1981)). As a result, the question of the average living space per prisoner has not infrequently come up for review before the federal courts. In various petitions filed in regard to prison conditions, it was argued that overcrowding rose to the level of "cruel and unusual punishment", which is the American equivalent to the said cruel, inhuman or degrading punishment in international conventions, and which is prohibited under the Eighth Amendment to the U.S. Constitution.

60. The U.S. Supreme Court first addressed the issue in *Rhodes v. Chapman* (101 S. Ct. 2392 (1981) (hereinafter: the *Rhodes* case)), which concerned the constitutionality of the practice of "double-celling" – i.e., holding two prisoners in a cell intended for single occupancy. In denying the appeal, the majority held that the overcrowding did not constitute cruel and unusual punishment under the circumstances, inasmuch as the overcrowding did not lead to deprivations of the prisoners' essential living conditions, such as sanitation, food quality, medical care, and so forth, nor did it increase violence among inmates.

61. Since the reasoning in *Rhodes* was specific to the conditions of the concrete case, and refrained from drawing clear lines for a forward-looking comprehensive test, the federal courts were left broad discretion (see: Simpson & Salins, p. 1164), whose approaches could be divided into three primary views (Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351, 2362-2371 (2000). According to the *first* approach, overcrowding alone should not be viewed as a criterion for a violation of human rights, but rather the question to be addressed is whether the prison living conditions as a whole represent a violation of the prohibition upon cruel and unusual punishment. The *second* approach, which is substantively similar to the majority opinion in *Rhodes*, holds that the overcrowding must have a negative effect upon the prisoner's living conditions – e.g., the quality of food served, or the medical care provided – in order to be deemed unconstitutional. According to the *third* approach, reminiscent of the view of the European Court, holding a prisoner in a small living space may itself constitute cruel punishment.

62. In 2001, the U.S. Supreme Court was faced with an appeal by the governor of California in the *Plata* case, challenging the judgment of the federal court in a class action by inmates in the

state. That judgment ordered the State of California to reduce the number of prisoners in the state by no less than 38,000 to 46,000 inmates within a period of two years. By a five-to-four majority, the Court denied the appeal and upheld the decision of the appellate court. Although the majority did not reverse the *Rhodes* ruling that measured the constitutional infringement in terms of the basic living conditions of the inmates, it held that overcrowding constituted a primary cause of the violation of the prohibition upon cruel punishment, and therefore, there was no alternative but to reduce the number of inmates:

> The population reduction potentially required is nevertheless of unprecedented sweep and extent. Yet so too is the continuing injury and harm resulting from these serious constitutional violations. For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well documented result. Over the whole course of years during which this litigation has been pending, no other remedies have been found to be sufficient. Efforts to remedy the violation have been frustrated by severe overcrowding in California's prison system. Short term gains in the provision of care have been eroded by the long-term effects of severe and pervasive overcrowding (*ibid*., at p. 1923, *per* Kennedy, J.).

63. It should be noted that the Supreme Court's decision in regard to the existence of disproportionate overcrowding in the prison was not based upon a calculation of the average living space per prisoner, but rather upon data concerning capacity – 200% at the relevant time. Reducing between 38,000 and 46,000 inmates was thus intended to bring occupancy down to 137.5% of capacity, which represented the compromise reached by the appellate court between the demand of the prisoners (130% of capacity) and the limitations of the state. It was further held that it was not necessary that every facility achieve the said standard, but that it would suffice that it be achieved on average:

> There is no requirement that every facility comply with the 137.5% limit. Assuming no constitutional violation results, some facilities may retain populations in excess of the limit provided other facilities fall sufficiently

> below it so the system as a whole remains in compliance with the order (*ibid*., p. 1941).

64. It would seem that the decision in the *Plata* case expressed the Supreme Court's readiness to retreat from the demand of a direct causal connection between the size of an inmate's cell and a worsening of his basic living conditions, in favor of recognition – cautious as it may be – of overcrowding itself as a cause for a constitutional violation, in view of its inherent consequences for the services provided in the prison. And note: although the decision did not expressly recognize the right of every prisoner to minimal living space, its consequences were far-reaching in terms of the remedy ("perhaps the most radical injunction issued by a court in our Nation's history," *per* Scalia, J., dissenting) – ordering the state to reduce a concrete number of inmates (although leaving the manner of execution to the state's discretion) in a clear timeframe.

Canada

65. In Canada, too, petitions by prisoners against overcrowding are examined from the perspective of the prohibition upon cruel and unusual treatment or punishment anchored in sec. 12 of the Canadian Charter of Rights and Freedoms of 1982, to which this Court has referred on more than one occasion. The Canadian Supreme Court has yet to address the concrete question of average living space per prisoner, but a review of recent decisions of the Court of Queen's Bench of Alberta can cast some light on the position of Canadian law in principle on the issue before us.

66. The *Trang* case (*Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6) concerned a petition by some 25 prisoners for declaratory relief stating that the conditions in the facility in which they were being held pending trial constituted a violation of the said prohibition. It was argued, inter alia, that "double-bunking" of inmates in cells intended for single occupancy – ranging in size from 7.9 square meters to 8.1 square meters, i.e., some 4 square meters per inmate – constituted cruel punishment. This is how the court described the overcrowding in the facility:

> The evidence shows that the cells are all double-bunked (except medical and segregation), that the cells were originally designed for one person, that there is not enough room for both roommates to walk around or exercise in the cell at the same time, and that there was only room for one person to sit

> at the table, leaving the bunk bed for the other. There is no toilet privacy (*ibid.*, para. 1013).

It was held that although double-celling itself is not an inherently prohibited practice (in reliance upon the 1982 decision of the Federal Court of Canada in *Collin v. Kaplan* (CanLII 2982 (FC)), it could not be tolerated in the present circumstances:

> *By itself double bunking is not a Charter breach*. But many of the Applicants were on strict rotation schedules, which meant that they were only out of the cells for a half hour at a time, and that depending on the rotation, their total time out of cells ranged from 3 hours to 6 hours. Assuming an 8 hour sleep period, this means that they were awake and in the cells for 10 to 13 hours a day.
>
> …
>
> In my view, the amount of time spent reviewing disclosure, out at court, or for that matter, attending medical or dental parade, does not mitigate the fact that these Applicants spent a very significant amount of time in a very small cell, with little access to recreation or other activity. They could not even watch television, since the TVs were in the common area. I conclude that the s. 12 rights of these inmates were breached.
>
> Obviously, *it is the combination of double-bunking in small cells for 18-21 hours a day, with limited access to recreation and other activities* that leads to this conclusion (*ibid*., paras. 1013, 1024-1025, emphasis added – E.R.).

67. The *Walters* case (*R. v. Walters*, 2012 ABQB 83), which concerned petitions of remand prisoners being held in that same facility pending trial, addressed the question whether triple-celling – i.e., holding three in a cell intended for one – constituted a violation of the Charter prohibition upon cruel punishment. As noted, we are speaking of 8 square meter cells, such that the living space allotted to each detainee amounted to some 2.6 square meters. In addition, one of the detainees slept on a mattress due to insufficient space for an additional bed. When it was found that the only reason for the overcrowding of the facility was budgetary, the court ruled that holding

three people in a cell intended for one constituted cruel punishment, and *a fortiori* in regard to remand prisoners who enjoy a presumption of innocence.

68. In conclusion, no one denies that the problem of prison overcrowding exists in many countries – inter alia, as a result of the modern punitive policy that has led to a significant decline in executions and a rise in the number of prisoners – and they seek a variety of solutions to contend with it. Accordingly, the picture provided by the comparative survey is complex, and it is therefore difficult to draw a direct analogy to the situation in this country. However, despite the differences among the various laws in regard to the scope – and at times, even the very existence – of a minimum standard for living space, there would appear to be a growing willingness, both by international systems and the legal instances of the various states, to exercise active means to remedy the problem of overcrowding. Against this background, we will now return to address the present petition, but not before expressing the view of Jewish law on the subject of the treatment of prisoners.

The treatment of prisoners in the Jewish heritage

69. The Jewish conception of human rights derives, first and foremost, from the principle stated at the beginning of the book of Genesis in describing the outset of human history:

> Then God said, "Let us make mankind *in our image, in our likeness*, so that they may rule over the fish in the sea and the birds in the sky, over the livestock and all the wild animals, and over all the creatures that move along the ground." *So God created mankind in his own image, in the image of God* he created them; male and female he created them (Genesis 1:26-27; emphasis added – E.R.).

70. In the same spirit, the poet of the Psalms would later write: "*You have made him little less than divine*, and adorned him with glory and majesty" (Psalms 8:6; emphasis added – E.R). In the tannaitic period, Rabbi Akiva would explain: "Beloved is man for he was created in the image [of God]. Especially beloved is he for it was made known to him that he had been created in the image [of God], as it is said: For in the image of God He made man" (Mishna Avot 3:14).

71. With the passage of time, the principle "For in the image of God He made man" would become one of the most centrally important principles that Judaism gave to humanity, and

particularly to the free world. Human dignity and liberty are, therefore, a direct result of creation in God's image. This is a principle that "impliedly and expressly encompasses, instructively and beautifully, the basis and foundation of all society, the grounding of the fundamental norm of the legal world" (Justice M. Elon, *In the Image of God He created Him – Human Dignity and Liberty*, in PARASHAT HASHAVUA – B'resheet 1(A. Hacohen & M. Vigoda, eds. 1972) (Hebrew)). And as Prof. M. Elon also writes:

> These two fundamental values – human dignity and human liberty – are interconnected, one influencing the other and uniting as one in our hands. So it is in the sources of Jewish heritage, and so it is in the Western democratic world. In the Jewish world, these two fundamental rights derive from one source – the fundamental principle of the creation of humanity in the image of God (Menachem Elon, *Human Dignity and Liberty in Jewish Heritage*, 12(1) MAHANAYIM: "On Halakha and Law" 18 (1995) (Hebrew)).

In his article *Shelihut*, in YEMEI ZIKARON (1987) (Hebrew), Rabbi J.B. Soloveitchik writes: "The value of human dignity is a central axis of many *halakhot* … and it may well be that all the interpersonal *mitzvot* are based upon the value of human dignity … In his commentary on the verse 'Let us make mankind in our image, in our likeness' (Genesis 1:26), Nachmanides refers to the Psalms (8:6), where the expression 'in our image, in our likeness' is replaced by 'and adorned him with glory and majesty'. Thus, the image of God is replaced by the 'dignity of God', and its equivalent in the language of the sages is 'human dignity'." Also see, N. RAKOVER, GREAT IS HUMAN DIGNITY: HUMAN DIGNITY AS A SUPREME VALUE, 18-26 (1998) (Hebrew) and the many references there; and the Sages have said (Babylonian Talmud Berakhot 19b), "Great is human dignity, as it overrides a prohibition in the Torah"; and see the comprehensive entry in THE ENCYCLOPEDIA TALMUDIT, vol. 26, 477, *s.v.* "*kevod ha-beriyyot*" (which states, inter alia, "A person must be careful in regard to human dignity – and Aharonim [Jewish legal decisors living after the publication of the SHULHAN ARUKH (1563 CE) – ed.] have written that this is a mitzva – and it is forbidden to embarrass or degrade").

72. Under the principles of Judaism, the principle of the creation of human beings in the Divine image requires that prisoners must also be treated with dignity. Indeed, prisoners are incarcerated because of their crimes, which arouse our revulsion and disgust, but they remain human beings,

and they are entitled to be treated humanely, in accordance with the accepted criteria of a progressive society, as Israeli society seeks to be. The vulnerability of prisoners derives from two sources: *first*, from the very fact that they are deprived of their freedom – the greatest of all human rights, along with the right to life – and they are in the custody of the state (see, the *Prison Privatization* case [4], para. 20 of the opinion of Beinisch, P.); *second*, because – at least the criminal prisoners – largely "lack a lobby" in the political-public sense, although the Public Defender's Office fights on their behalf, as do rights organizations (as in the present case), and the Prisoner Rehabilitation Authority in carrying out its mandate. Jewish law in this area begins with the presumption that the rights of prisoners must be respected, and should not be violated except to the extent required by the purpose of their incarceration. "Beloved is man for he was created in the image [of God] – every person, great and small, anonymous and renowned – and we are commanded to protect and preserve all of their rights, *even if we are appalled by acts that they committed*" (MApp 1/87 *Dananashvili v. State of Israel* [18], 289, *per* Elon, J.; emphasis added – E.R.).

73. Before addressing the scope and nature of prisoners' rights in Jewish law, we will first note that, as a rule, imprisonment as a means of punishment was unknown to the sources of Jewish law, and it is absent from the list of punishments detailed in the Torah (see, I. Wahrhaftig, "*Then you shall select cities to be cities of refuge for you*" – *Exile as an Alternative to Imprisonment*, PARASHAT HASHAVUA – B'midbar, 289 (A. Hacohen & M. Vigoda, eds,) (hereinafter: Wahrhaftig) (Hebrew); CrimA 344/81 *State of Israel v. Segal* [19], 327 (hereinafter: the *Segal* case); and see, Rabbi E.Y. Waldenberg, *Imprisonment as Punishment*, B'TZOMET HATORAH V'HAMEDINA, vol. 1, 389 (Y. Shaviv, ed., 1991) (Hebrew); Rabbi M. Shelpovesky, *Imprisonment*, *op.cit.*, 401 (Hebrew); Rabbi L. Kaminer, *Imprisonment in Israel*, 9 TEHUMIN 147 (5748) (hereinafter: *Imprisonment in Israel*) (Hebrew)). The sages mention "prison" (see, e.g., Baylonian Talmud Pesachim 91a – and note the distinction there between a "prison of the gentiles" and "a prison of Israel" – which Rashi explains as concerning the compelling of a divorce or the payment of a debt, for example), and Maimonides lists imprisonment among the penalties that a court can impose (Laws concerning Murder, 2:5, and Sanhedrin 24:9). But see, A. KIRSCHENBAUM, JEWISH PENOLOGY: THE THEORY AND DEVELOPMENT OF CRIMINAL PUNISHMENT AMONG THE JEWS THROUGHOUT THE AGES, 428-429 (2013) (hereinafter: KIRSCHENBAUM) (Hebrew)), according to whom "imprisonment was a not a Jewish form of punishment" and was rarely mentioned in biblical

and talmudic literature as a form of punishment (*ibid*., 429)). Indeed, in principle, Jewish law prefers more "proportionate" forms of punishment that do not deprive a person of liberty (see, Aviad Hacohen, *Life Imprisonment that is not for Life, and Prisoner Dignity and Liberty: A Jewish Law Perspective*, 204 HASANIGOR 15 (2014) (hereinafter: Hacohen) (Hebrew)). According to Wahrhaftig, as opposed to imprisonment, "biblical punishment was a one-time penalty that prevented separating the offender from his natural surroundings, and facilitated his reincorporation into society immediately upon the conclusion of the legal process" (Wahrhaftig, p. 291; and see, HCJ 5304/92 *Perah Association v. Minister of Justice* [20], 744, *per* Elon, D.P. (hereinafter: the *Perah* case). This is so even though the Bible was aware of imprisonment as a form of punishment – with a trial or without – in the ancient world in general, and there is no lack of examples in the Bible, such as – in ancient, non-Jewish kingdoms – the story of Joseph in Egypt (Genesis 39-41) and the story of Hananiah, Mishael and Azariah in Babylonia (Daniel 3), and in the Judean kingdom in the case of Jeremiah (chaps. 32-33, 37); the imprisonment of King Jehoiachin (II Kings 25: 27-29); and King Jehoahaz (II Kings 23:37); and King Zedekiah in Babylonia (Jeremiah 52:11); and also see Ezra 7:26. As for the Talmudic period, KIRSCHENBAUM writes that "we have not found that the Sages instituted it for any offense whatsoever" (*ibid*., 429).

74. In their article *A City of Refuge in a Modern Penal System* (Hebrew) (I. Wahrhaftig and S. Rabinowitz, *Ir Miklat b'Maarekhet Anishah Modernit – Dugmah Yissumit, miTorat haAnihsah shel haMishpat haIvri*, 2 SHA'AREI MISHPAT 353–81 (2001) and the references there (hereinafter: Wahrhaftig & Rabinovitz), the authors quote various scholars on the subject of the purposes of punishment in Jewish law. Prof. I. Kirschenbaum is of the opinion that "the place of punishment in classical Jewish law, 'Torah law', is religious, mystical, educational: it is intended to refine the person, raise his spiritual level and bring him closer to the God of law". Prof. S. Albeck notes that "the laws of punishments and offenses in the Torah are not intended for society's good, to protect it from the threat of criminals, their purpose is not to benefit society and keep it from harm, but rather they are meant to teach the individual to conduct himself for his betterment, as offenses are but flaws in the offender … and punishment is but penance". On their face, these purposes of punishment in Jewish law are not consistent with imprisonment, which is particularly grounded upon the ideas of retribution and deterrence. However, in real life, matters are not so simple and direct. Every society sought means for its protection. Imprisonment is one such means for achieving that, and in the historical-halakhic sense there was a type of gradation.

75. Ancient Jewish law recognized imprisonment of a person primarily as a means of coercion, or as an intermediate period of detention in contemplation of another penalty imposed upon the offender. It can therefore be said that prisons were originally intended for remand rather than to serve as a criminal sanction (see, M. Elon, *Imprisonment in Jewish Law*, PINCHAS ROSEN JUBILEE VOLUME, (H. Cohn, ed., 1962) 174-178 (Hebrew) (hereinafter: *Imprisonment in Jewish Law*); and also see, Hacohen, p. 15). This is what Samson Raphael Hirsch (19th cent., Germany) stated in his commentary to the Bible:

> The punishment of imprisonment, with all its loss of hope and the corruption of the morals of those residing behind the prison walls, with all the sorrow and sadness that it brings to the wife and children of the prisoner – has no place in God's law. The place of the dismal prison towers of criminality are unknown in the kingdom of Torah. Torah law has only arrest and investigation, and this could only be short-term arrest (HIRSCH, COMMENTARY ON THE TORAH, Exodus 21:6).

This is lovely to say, and it lends support to the rehabilitative aspect of imprisonment today, which is intended to prevent a further decline into criminality and harm to the family. And yet the question remains, what of protecting society, retribution and deterrence, which are the basis for incarceration today. A brief discussion follows.

76. Indeed, situations of imprisonment and the attendant suffering of prisoners can be found in the Bible and the Talmud, in both Jewish and non-Jewish contexts. We learn of the sad state of prisoners at the time, and of the harsh conditions to which they were subjected, which are still to be found in some contemporary societies. Here are some examples:

Joseph's incarceration in Egypt is described as follows: "And Joseph's master took him and put him into *the prison, the place where the king's prisoners were confined*; he remained there *in prison*. But the Lord was with Joseph and showed him steadfast love; he gave him favor in the sight of the chief jailer" (Genesis 39: 20-21, emphasis added – E.R.). Nachmanides' commentary, *ad loc*., interprets the term "prison" as "a dungeon [or "pit"] built below ground, with a small opening above through which the prisoners enter, and which provides them light". And indeed, Joseph goes on to say: "For in fact I was stolen out of the land of the Hebrews; and here also I have done nothing that they should have put me into the *dungeon* [literally: "pit" – ed.]" (Genesis

40:15, emphasis added – E.R.). The dungeon would appear to have been the characteristic prison. The prison was a deep, dark dungeon in which people were bound in iron chains, and starved. It would seem that there are no few places in the world where prisons have remained unchanged since those ancient times.

The Bible tells of Joshua's request that Moses imprison Eldad and Medad, two who had prophesied in the camp, fearing that they might undermine Moses' leadership: "My lord Moses, restrain them!" (Numbers 11:28). Onkelos renders the Hebrew "restrain" [*k'la'em*] as Aramaic "*esarinun*", that is, imprison them, and see one of the two interpretations given by Rashi for the term "*k'la'em*": "Put them in prison …"; and also see, Elishai Ben-Yitzhak, *"Adoni Moshe K'la'em" – On Imprisonment in Jewish Law*, PARASHAT HASHAVUA – B'midbar 73 (A. Hacohen & M. Vigoda, eds,) and see the references in fn. 4 (hereinafter: Ben-Yitzhak) (Hebrew).

Here are additional verses from the Prophets and the Writings that teach us of the suffering of prisoners:

> "… to open the eyes that are blind, to bring out the prisoners from the dungeon, from the prison those who sit in darkness" (Isaiah 42:7).
>
> "Some sat in darkness and in gloom, prisoners in misery and in irons" (Psalms 107:10). Psalm 107 is the biblical source for the rule concerning *birkat hagomel* [the prayer of thanksgiving for deliverance from danger] or the prayer of personal thanksgiving (Babylonian Talmud Berakhot 54b; Shulhan Arukh OH 219) that four categories of people must express thanks, all of whom are derived from this psalm. One category is that of a person who was "incarcerated in prison and released".
>
> "As for you also, because of the blood of my covenant with you, I will set your prisoners free from the waterless pit. Return to your stronghold, O prisoners of hope; today I declare that I will restore to you double" (Zacharia 9:11-12).

Also see the Talmudic statement: "A prisoner cannot free himself from prison" (Babylonian Talmud Berachot 5b), that is, a person who has become used to the hardships of prison life cannot free himself from his chains of bondage, but requires outside assistance. Also see the

Talmudic story of Rabbi Akiva who was meticulous in his observance of the mitzva of handwashing while in prison to the point of endangering his life due to his very limited water ration (Babylonian Talmud Eruvin 21b).

77. In the talmudic period, prison was referred to as "*kipa*", which, as noted, was an innovation in terms of the halakhic understanding of punishment. The Mishna notes two situations in which a person is placed in *kipa*. The first is where the accused has repeatedly committed a severe offense punishable by *karet*,[3] although he has already been punished twice (or, according to one view, three times) by flogging. The second is where a murderer cannot be sentenced to death by the court due to a procedural flaw (also see, Wahrhaftig, p.3; Arie Reich, *The Punishment of Kipa in Jewish Law*, 7 MAALIOT 31 (1986) (Hebrew); *Imprisonment in Jewish Law*, 199; *Imprisonment in Israel*, 147). This is what the Mishna states as to the conditions of *kipa* imprisonment:

> He who was flogged and then flogged again is then placed by the court in *kipa* and fed barley until his stomach bursts. One who commits murder without witnesses is placed in *kipa* and fed the bread of adversity and water of affliction (Mishna Sanhedrin 9:5).

In his commentary to the Mishna, Maimonides explains that what is being referred to is "a cell in the prison that is equal in height to that of a man, and there is not enough room for him to undress or sleep (Commentary to the Mishna 9:5).

Maimonides states the halakha in this matter as follows:

> One who was flogged by the court for an offense punishable by *karet*, and flogged again for the very same *karet* offense, such as that he ate forbidden fat and was flogged for it, and ate forbidden fat again and was flogged for it, if he eats for a third time he is not flogged for it, but *he is placed in kipa, which is a confined space equal to his height, in which he cannot lie down, and he is given bread of adversity and water of affliction until his intestines narrow and shrink, and then he is fed barley until his stomach bursts* (Maimonides, Sanhedrin 18:4; emphasis here and below added – E.R.).

[3] Ed: Literally, "cutting off", on which see, e.g: Exodus 12:15, 31:14; Leviticus 7:20-21, 25, 27, 22:3, 23:29.

> … One who kills and there were no witnesses who saw him together, but rather each saw him one after the other, or who killed in the presence of witnesses but without being warned, or the witnesses were refuted in the examinations but not refuted in the interrogations, all such murderers *are placed in kipa and are fed bread of adversity and water of affliction until their intestines shrink, and then they are fed barley until their stomach bursts from the severity of the affliction* (Maimonides, Murder 4:8).

And see, THE ENCYCLOPEDIA TALMUDIT, vol. 31, 933-935, *s.v.* "*kipa*" and references there; and see KIRSCHENBAUM, chap. 9, 256*ff*, who explains that what is concerned is harsh prison conditions intended to accelerate the offender's death, as a sort of alternative to the death penalty that should appropriately have been imposed upon the offender, and so it should be understood. It should be noted that the Tosefta (Sanhedrin 12:4) and the parallel talmudic discussion bring an additional case of placing a person in *kipa*, but in which the means intended to hasten death are not imposed, but rather he is imprisoned until his death. Maimonides also refers to harsh, lengthy imprisonment for murder in circumstances in which the civil authorities did not impose the death penalty: "The [Jewish] court must, nevertheless, flog them severely almost to death, and *confine them under severe conditions for many years, and cause them all kinds of suffering* in order to frighten and deter other evildoers (Maimonides, Murder and the Preservation of Life 2:5, emphasis added – E.R.); for additional examples of imprisonment in the Talmud, see *Imprisonment in Jewish Law*, pp. 148-149).

78. According to some of the commentators, the term "*kipa*" refers to the harsh conditions that characterized imprisonment, particularly the living space allotted to the offender. According to Mishna commentator Rabbi Ovadia Bertinoro, what was concerned was "a place as high as a person's height and no more" (Sanhedrin 9:5). Rabbi Nissim Gerondi (14th cent., Spain) explained that *kipa* derived from the root *k-f-f*, which implies that the person in it was bent over [*kafuf*] (NOVELLAE OF THE RAN, Sanhedrin 81b (Hebrew)).

79. Undeniably, the conditions of prisoners as expressed in the talmudic descriptions and in the commentaries on *kipa*, were very harsh. However, as explained, imprisonment was employed in talmudic times only for the most serious crimes, and primarily as an alternative to the death penalty. In view of Jewish law's strict rules of evidence, it is reasonable to assume that we are

speaking of extremely rare cases (see, *Imprisonment in Jewish Law*, 134; Reich, 33-35). Nevertheless, in his primary work, Maimonides addressed the *human dignity* of those punished by the court, ruling:

> All of these measures should be applied in accordance with what the judge deems appropriate for the offender and is required in the circumstance of the time, and all he does must be for the sake of Heaven [without ulterior motive or extraneous considerations – ed.], *and let human dignity not be taken lightly, for it overrides a rabbinic prohibition* … He must be careful *not to harm their dignity* but only to increase respect for God, for whoever debases the Torah is degraded in the eyes of the people, and whoever respects the Torah will be respected by the people, and there is no greater respect for the Torah than following its laws and statutes (Maimonides, Sanhedrin 24:10, emphasis added – E.R.).

And see THE ENCYCLOPEDIA TALMUDIT, s.v. "*kevod hab'ri'ot*" (*ibid*., 494), in regard to the possibility deviating from the four cubits of the Sabbath boundaries due to human dignity.

80. Over time, and in consideration of changing times, the attempts of criminals to evade justice, and changes in methods of punishment in the various legal systems, by the 14th century Jewish law began to reconcile itself to imprisonment as a "regular" sanction in the framework of "*dina d'malkhuta*" [the "law of the land", i.e., the civil authorities – ed.]. From that time on, imprisonment was imposed for various offenses in many parts of the Jewish diaspora (KIRSCHENBAUM, 431-434, and the many references there; *Imprisonment in Jewish Law*, 190*ff*; and see Ben-Yitzhak, 4). While "we do not have many responsa treating of the prison conditions of prisoners" (HCJ 114/86 *Weil v. State of lsrael* [21], 494, *per* Elon, J. (hereinafter: the *Weil* case)), we can plainly say that Jewish law in this regard is clear, inasmuch as Jewish leaders throughout the generations took note and warned of the need to preserve the dignity of a person held behind bars (see: MApp 3734/92 *State of Israel v. Zaki Azazmi* [22], 79).

81. We have already referred to what Maimonides wrote. The words of Rabbi Hayim Palaçi (19th cent., Turkey) on the necessity to provide appropriate conditions for prisoners are particularly appropriate. Rabbi Palaçi ruled that the purpose of remand was only to prevent the prisoner from fleeing before trial, and he should not be subjected to any further suffering due to the conditions

of detention. Concerning a person convicted of a non-capital offense, and perhaps under the influence of the conditions in the prisons of the Ottoman Empire at the time, he wrote:

> He should not be incarcerated in a prison in which there is filth, that is a place of darkness and gloom, and where a person is in duress and wretchedness … for even if the Torah permits placing him in prison, it was not this type of prison that the Torah permitted … because even though he transgressed and was sentenced to prison, he remains part of the Jewish community (RESPONSA HIQEQE LEV, part 2, chap. 5 (Henrew); and see *Imprisonment in Jewish Law*, 185, fn. 1).

82. We also find that after the halakhic sages had to reconcile with the imprisonment of a debtor, the creditor was required to provide for the debtor's maintenance (see, the *Perah* case [20], 742-743 and references there). Also see Justice Elon's opinion in the *Weil* case [21], who turned to the biblical rules concerning the exile of a person who committed manslaughter to a city of refuge to conclude that his dignity should be maintained, and that "he should be provided possibilities for housing and sustenance, study and education, and other such necessities of life" (*ibid*., 495-497). Justice Elon further mentioned the rabbinic homily on the verse "lest your brother shall be dishonored before your eyes" (Deut. 25:3): "once he has been flogged he is considered your brother" (Mishna Makkot 3:15), and explained that "it is an important, beautiful principle that not only after he has served his sentence, but even while serving it, he is your brother and friend, and his rights and dignity as a person are preserved and remain" (*ibid*., 491). These words, even if we do not take the words "your brother and friend" as reflecting actual reality in their plain sense, but rather as an instance of a biblical expression ("For the sake of my family and friends, I will say, Peace be within you" (Psalms 122:8)), they convey the overtone of humanity, or remembering that the prisoner is a person like you and me even if, at present, he is deprived of his rights.

83. It is interesting to note that even in regard to the biblical story of Israel's descent to Egypt, one can find an approach that supports protecting the rights of prisoners and respecting their basic needs. When Joseph's brothers are accused of "spying", Simeon is placed in an Egyptian prison. The Bible describes the imprisonment as being carried out in public, stating: "And he picked out Simeon and had him bound before their eyes" (Genesis 42:24). But Rashi comments, *ad. loc*., "He

bound him only before their eyes. And when they left, *he released him and gave him food and drink*" (emphasis added – E.R.; also see in this regard, *Aviad Hacohen, Nishama Yetera Bamishpat – Human Dignity and Liberty in Genesis*, PARASHAT HASHAVUA – B'resheet 336 (A. Hacohen & M. Vigoda, eds. 1972) (Hebrew)).

84. Justice Elon well described the approach of Jewish law to prisoners and detainees in his opinions over the years (see in this regard, my article, *Justice Menachem Elon – Humanity, Jewish Law in a Jewish State and Justice in a Jewish and Democratic State*, 192 HASANEGOR (2013) (Hebrew) and references there; A. Hacohen, *Menachem Elon: Scholar of Law and Scholar in Law*, 6 SHA'AREI MISHPAT 9, 16-18 (2013) (Hebrew)). Justice Elon's statement in regard to penalties that the state sought to impose for illegal drug transactions are apt:

> … In view of the intolerable situation in some of the prisons in regard to maintaining minimally humane living and diet conditions … it would be proper to prefer imposing heavy, consequential fines rather than imprisonment, as long as this would not be severely inconsistent with the circumstances of the crime and the offender and the need to protect public order and safety. Often, a heavy fine will achieve its purpose of deterrence of the offender and of leading him to a productive life, whereas imprisonment under the current, regrettable conditions in some of the prisons will, in addition to leading the offender to an irreparable entry into criminal society, often result in the degrading of the offender's Divine image, and that, I fear, is not permitted to us (the *Segal* case [19], 327).

85. While the above was written in the early 1980s, and there have undoubtedly been welcome changes in the conditions provided to prisoners, the underlying principle remains pertinent.

86. In conclusion, underlying the long-standing principles of Jewish law in regard to the subject of prison conditions, beginning with a restrictive view of imprisonment in general, and a process of its acceptance as a necessary evil, stands the need to protect the dignity of prisoners and supply their elementary needs. In this sense, it would appear that the rules of Jewish law were relatively progressive in comparison the "classical" cruelty of imprisonment. "The adoption of imprisonment into Jewish law did not bring with it the attendant phenomena of cruelty and inhuman conditions in regard to diet, sleeping conditions, and so forth, that were common in

various countries into the 19th century" (*Imprisonment in Jewish Law*, 200). This can be extended even into the 20th century, from the Russian gulags to the Apartheid regime of South Africa. In any case, it would seem clear that Jewish law requires the maintaining of a balance between the prisoner's dignity and the punitive purposes of imprisonment. But most importantly for the present case, it seeks to protect the dignity of the vulnerable prisoner who requires rehabilitation. Jewish law would certainly support easing the conditions of prisoners to the extent that it does not undermine the purposes of punishment.

Jewish law in our legal system

87. Inasmuch as this judgment is being given on the day of my retirement from the Supreme Court, and out of a love for Jewish law, I will allow myself the liberty to devote a few words to the status, place and force of Jewish law in our legal system, concerning which there was – and remains to some extent – a dispute among public figures and jurists (see, FH 13/80 *Hendels v. Kupat Am Bank Ltd*.[23] (hereinafter: the *Hendels* case)); my book, PATHS OF GOVERNMENT AND LAW, 168 (2003) (hereinafter: PATHS OF GOVERNMENT AND LAW) (Hebrew); Hanina Ben Menahem, *Foundations of Law, 5740-1980 – Obligation to Comply or Obligation to Confer*, 13 SHENATON HAMISHPAT HA'IVRI 257 (1987) (Hebrew); and see the aforementioned article by Aviad Hacohen, *Menachem Elon: Scholar of Law and Scholar in Law*; and see my article, *Justice Menachem Elon – Humanity, Jewish Law in a Jewish State and Justice in a Jewish and Democratic State*, 192 HASANEGOR (2013) (Hebrew)). This dispute found expression, inter alia, in the debate between Justices M. Elon and A. Barak in regard to the interpretation of Foundations of Law, 5740-1980 (hereinafter: Foundations of Law) and of the Basic Laws treating of human rights. Briefly, the dispute focused upon the definition of the "Jewishness" of the State of Israel, and on the nature and character of the synthesis required by its being a "Jewish" state and a "democratic" state. The debate began with the meaning of the expression "the principles of freedom, justice, equity and peace of Israel's heritage", to which the Court is directed by sec. 1 of Foundations of Law in the case of a lacuna in the law. Justice Elon was of the opinion that the principles of "Israel's heritage" are the principles of Jewish law, and the legislature had, thereby, granted primacy to Jewish law in judicial interpretation. As opposed to this, Justice Barak was of the opinion that the legislature had not granted "supra-legal" status to Jewish law, and it is not preferred over other legal sources that are employed in statutory interpretation. Years later, with the enactment of the

Basic Laws concerning human rights, Justices Elon and Barak disagreed as to the interpretation of the purpose clauses of those Basic Laws, which establish that human rights are to be upheld in the spirit of "the values of the State of Israel as a Jewish and democratic state". Justice Elon was of the opinion that the Jewish values of the State of Israel specifically include Jewish law, whereas under Justice Barak's approach, they should be interpreted "at a level of universal abstraction", that is, in a more general, broad way (for more on this subject, see my article, *Malkhut Yisrael l'umat Dina D'malkhuta – Upon the publication of the Book in Honor of Judge Gershon German "Melekh Yisrael"*, 22 MEHKAREI MISHPAT 489, 496 (2005) (Hebrew) (hereinafter: *Malkhut Yisrael l'umat Dina D'malkhuta*)).

88. The opposing views presented by the learned Justices Elon and Barak were not resolved, and it is doubtful that they will be. Perhaps common sense allows that they need not be resolved as a binary opposition, but rather by the golden path of the middle road. In this regard, the words of philosopher Prof. Eliezer Goldman, in his article *The Law of the State and the Halakaha – Is there a Contradiction*, 65 SHEDEMOT 70-79 (1978) (Hebrew) (also published in his book THEORETICAL ENQUIRIES – JEWISH THOUGHT IN THE PAST AND THE PRESENT, 387 (D. Statman & A. Saguy, eds.) (1996) (Hebrew)), largely remain apt. He wrote (p. 388) that "…a large measure of tact and moderation is required of all parties. A stubborn insistence upon ideological principles of secularism or on the state's loyalty to halakha might lead to a disintegration of shared national life … no enduring national reality can embody a consistent stance in regard to the Jewish national character or the relationship between the state and halakha. It will reflect an attempt at mutual, practical adaptation among groups whose views on the desirable politico-legal regime for the Jewish State is only partially congruent, and is at odds on some central issues". Having said that, it would seem on the face of it that there is no dispute, in principle or in general, that Jewish law has a place of honor in our legal system. All would agree that Jewish law is an important source among the sources of Israeli law. All would agree that Jewish law is a treasure trove – particularly from the legal perspective – of intellectual richness and of fundamental values that remain relevant (also see, Aharon Barak, *The Place of Jewish Law in the Law of the State*, in SELECTED ESSAYS, vol. 1, 98 (2000) (Hebrew) (hereinafter: *The Place of Jewish Law in the Law of the State*). Indeed, on its face, the old dispute between Justices Elon and Barak focused upon the character of the State of Israel, its identity and values, and now is not the time to elaborate, as "For everything there is a season, and a time for every matter under heaven" (Ecclesiastes 3:1). However, in my view, it

would be appropriate to bridge the gap between the two views to a great extent, rather than say that there is an abyss between them. The Jewish Zionist basis of the rebirth of the nation in its land, and of human rights is shared by both views. President Barak, a Holocaust survivor, said on more than one occasion that for him there are two lessons: the need for a Jewish state so that Jews will have a home, and preserving human rights so that we not treat the other as in the Holocaust. Justice Elon was a liberal religious Zionist, whose devotion to human rights can be seen in his judgments and writings. To enrich the picture, I would note an additional opinion in regard to Jewish law, expressed by Justice Prof. Itzhak Englard (while still in academia, prior to his appointment to the Court), that the use of Jewish law presents the danger of its "secularization" (see, Y. *Englard, The Incorporation of Jewish Law in the Israeli Legal System*, JEWISH LAW AND THE STATE OF ISRAEL, 110 (Y. Bazak, ed., 5729) (Hebrew)). However, it would seem that during his tenure on this Court, Prof. Englard saw giving voice to Jewish law as something of a mission, as though "for such a purpose you were created" (Mishna Avot 2:8). Justice Turkel also addressed the subject (see, in this regard, Yuval Sinai, *Jewish Law in the Decisions of the Israeli Courts in the Years 1994-2006*, 7 MOZNEI MISHPAT 374 (5770) (Hebrew) (hereinafter: *Jewish Law in the Decisions of the Israeli Courts*); and see Justice Turkel's remarks at his retirement ceremony, as published in 23 MEHKAREI MISHPAT 5,8 (5764); and further see, CA 3616/92 *Dekel Computer Engineering Services Ltd. v. Heshev Inter-Kibbutz Unit, Agricultural Co-Operative Society Ltd*. [24], 353, where he quoted from Jewish law "in order to exalt the Torah"). Justice N. Hendel has also addressed this (see, e.g., HCJ 5185/13 *Anonymous v. Great Rabbinical Court* [25], paras. 4-7; LCA 296/11 *Najar v. Aliyan* [26], para. 9; and see, *Jewish Law in the Decisions of the Israeli Courts*, 401-402). In his article *Jewish Law for Benefit* (pending publication) (Hebrew), my colleague Justice N. Sohlberg emphasized the operative aspect, i.e., how Jewish law can be used in concrete cases, and provided examples. It would not be superfluous to bring a different perspective expressed by Justice Haim Cohn (5792 HAMISHPAT 10):

> The belief in the divine nature and eternity of the law prevented Jewish law from being accepted as the law of the State of Israel. There were those who were of the opinion that it would be unthinkable that we would live in accordance with anything but Jewish law in a Jewish state, and there were those who rightly argued that Jewish law is of sufficient flexibility and scope to be adapted to the needs of a modern democratic state. However,

> they were overcome by the objections of those who opposed any attempt at even the slightest change in the law of God and His commandments, even if only to adapt it to those needs. And since Jewish law, or any law, cannot be adopted in a democratic state without legislation, the legislature that would impart force to God's law would also have the power to amend or repeal it – and such power would be nothing other than trespass upon the bounds of the Divine legislator. They even said that the secular legislature lacks authority to change the word of the Sages, sanctified since ancient time, and translate the ancient laws into modern legal language. Thus, Jewish law remains – with the exception of matters within the scope of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953 – a broad, breathtaking field that is ploughed only by Torah scholars and legal historians.

These words express the opinion of a scholar who was born and raised in religious society, and who later changed his view and approach, but who had a great love for Jewish law.

89. I would like to briefly address the importance of appropriate recourse to Jewish law, and to employing it the interpretation of the law. Indeed, the State of Israel was founded upon "secular" law (with the exception of personal status law, which has, over the course of years, become restricted primarily to the laws of marriage and divorce that are under the jurisdiction of the various religious courts in accordance with their denomination, pursuant to Ottoman and Mandatory arrangements), and the courts do not decide the law on the basis of Jewish halakha, which particularly distressed Israel's first Chief Rabbi, Rabbi Isaac Halevi Herzog, and see his book THE CONSTITUTION FOR ISRAEL ACCORDING TO THE TORAH (I. Wahrhaftig, ed., 1999) (Hebrew), and see Dr. Wahrhaftig's comments at xxii*ff*; and see my article, *The Birth of the State and Jewish Law in light of the approach of Rabbi Herzog*, MASSU'A L'YITZHAK, vol. 2, 20 (Jerusalem, 5769) (Hebrew); and my book JUDGES OF THE LAND, 75-76 (1980) (Hebrew). Rather than carry coal to Newcastle by extensive praise of the virtues of Jewish law, which it does not require from me and those like me, I will say a few words concerning it use, which I believe presents a possibility for synthesis.

90. In my opinion, such a synthesis is certainly possible. It is primarily a conceptual message from a national, cultural perspective, whose use, of course, depends on the case. Jewish law should definitely not be conceived as "a matter for the religious". The Jewish library, the Bible, the Mishna and the Talmuds, the Geonic literature, the Rishonim [Jewish legal decisors active before the publication of the publication of the SHULHAN ARUKH (1563 CE) – ed.] – among them Maimonides and the Shulhan Arukh [i.e., Rabbi Josef Karo, 1488-1575 – ed.] – and the Aharonim, particularly the responsa literature, and in our generation, the religious literature and research produced by persons – I will name primarily those who are no longer among us – like Justice Prof. Menachem. Elon, Prof. Asher Gulak, Justice Dr. Moshe Silberg, Dr. Avraham Haim (Alfred) Freimann, and Prof. Aaron Kirschenbaum, may their memories be for a blessing, as well Prof. Shalom Albeck and Prof. Nahum Rakover, and other important researchers in the field of Jewish law, and so as not to slight, I will not name them all, and I ask forgiveness of those I have not mentioned – all of these are a treasure trove of the law. We would do well to follow the path of Justice Sohlberg of Jewish law for benefit, and where possible "how good and how pleasant it is" [Psalms 133:1]. But elsewhere, recourse to its legal and moral insights in various is areas is proper as part of the general Jewish cultural fabric.

91. My view in this regard, which is broadly more aligned with, although not identical to that of Justice Elon, argues for the middle road and for viewing Jewish law from two perspectives: the perspective of Jewish law as part of the national, cultural heritage upon which the State of Israel, as a Jewish and democratic state, may and should draw; and the perspective of its legal richness, overflowing with insights that, even if written long ago, often in archaic Hebrew, still remain vibrant. The Jewish character of the state should be expressed, inter alia, in the incorporation of Jewish law into our legal system (see: *Malkhut Yisrael l'umat Dina D'malkhuta*, 493). Indeed, from its very establishment, and even earlier, this spirit was expressed in declarations – sometimes only in declarations – by courts and scholars. Moreover, even prior to the establishment of the state, during the British Mandate, the Jewish law researcher, man of "the Hebrew Peace Court",[4] and one of those who argued for Jewish law as early as the 1920s for nationalistic rather than

[4] Ed: The Hebrew Peace Court – *Beit Mishpat Hashalom Ha'ivri* – was a system of arbitration tribunals founded by the Palestine Office (*Palaestinaamt*) of World Zionist Organization in 1909. It was originally headed by Arthur Ruppin, with S.Y. Agnon serving as its first secretary. Paltiel Daikan served as secretary of the Supreme Hebrew Peace Court from 1928 to 1938. The name *Beit Mishpat Hashalom Ha'ivri* was based upon Zacharia 8:16. *Beit Mishpat Hashalom* is now the Israeli term for a Magistrates Court.

specifically Orthodox religious reasons, was Israel Prize laureate Prof. Paltiel Daikan (Dickstein), who wrote:

> There can be no Jewish state without Jewish law. It is not just the army and power that establish the validity and power of a state, but rather its organizational and legal structure are decisive in the question of its existence and fortitude. And just as it is unimaginable that we might build the state upon foreign cultures and languages, so a Jewish state is inconceivable without Jewish law. We will not forget the precious treasure of the millennia old Jewish legal tradition, nor will we ignore it (*There cannot be a Jewish State without Jewish Law*, 4 HAPRAKLIT 329-330 (1947) (Hebrew)).

Several years later, in the early days of the State, Justice S. Agranat explained:

> I do this since the very moment that we admit – as we are obliged to admit – the continued existence of the Jews, in all generations and in all the lands of their dispersion, as a separate people, we must test the nature of Jewish law by the historic relationship of the Jewish people to this law. We shall then conclude – against our will – that the Jewish people really treated Jewish law, throughout their existence and their dispersion, as their special property, as part of the treasure of their culture. It follows that this law served in the past as the national law of the Jews, and even today possesses this national character in respect of Jews wherever they may be (CA 191/51 *Skornik v. Skornik* [27], 177).

Not long ago, Justice Barak wrote:

> The fundamental values of Jewish law shape our image as a nation and as a state …they are part of the fundamental values of our law … referring to the fundamental values of Jewish law is not referring to comparative law. It is a required reference. It is not a reference to all the values of Jewish law. It is to those values that constitute part of the law of the state (A. BARAK, THE JUDGE IN A DEMOCRACY, 290 (2004) (Hebrew)).

> The values of Jewish law are part of the values of Israeli law. The fundamental concepts of Jewish law – this cultural asset of the Jewish people – are the fundamental concepts of Israeli law. These values of Israeli law – among them the values of Jewish law – are part of the general purpose of every legislative act. This expresses the special status of Jewish law – our cultural asset whose values are our values (*The Place of Jewish Law in the Law of the State*, 102).

Dr. S.A. Wozner ends his book THE LEGAL THINKING IN THE LITHUANIAN YESHIVOTH – THE HERITAGE AND WORKS OF RABBI SHIMON SHKOP (2014) (Hebrew) with an examination of the legal theory of Rabbi Shkop (Lithuania-Poland, 19th-20th cent.) and the question of the validity of norms that are not prima facie of Divine origin (like those of a modern state). His answer is that the obligation to obey God's word derives from the law of human intelligence and the recognition of the autonomous understanding of the receiver (283). For me, this means that the roads of general law are also paved for the religious person, and this provides an entry to the present matter.

93. It is sometimes argued that the use of Jewish law sources is incompatible with democracy. I believe that such arguments are fundamentally mistaken. As for the interaction between Jewish law and the democratic values of the state, I believe that "we should aspire to harmony, synthesis, and to mutual reconciliation between the Jewish and democratic elements" (*Malkhut Yisrael l'umat Dina D'malkhuta*, 490). There may, indeed, be different views as to the appropriate balance. However, the effort should focus upon developing law that creates harmony between the elements, that prioritizes the similar and rejects the different. This is what Justice Barak said in his eulogy for Justice Elon: "The relationship between the values of Israel as a Jewish state and its democratic values require, in his view (Justice Elon – E.R.), synthesis and harmony. We agreed on that, and we walked hand in hand" (quoted in 26 *The Justice Shmuel Baruch Judges' Bulletin* (Feb. 2013) (Hebrew)). Harmony and synthesis must pave the way.

94. It would, therefore, appear to me that recourse to the system of Jewish law – whether to ground arguments and judgment, as a source of comparative law, or as a source of inspiration and to broaden the theoretical legal groundwork (and compare: N. RAKOVER, JEWISH LAW IN THE DECISIONS OF THE ISRAELI COURTS, 7 (Sifriyat Hamishpat Ha'ivri, vols. 1-2 (1989)), with due attention to the subject, the necessary meticulous examination, and the necessary care – plays a

central role in creating the required synthesis between Jewish law and our legal system, which is based upon the laws of the Knesset (compare: the *Hendels* case [23], 795).

95. Jewish law thus has national and cultural significance as the societal and moral heritage of the Jewish people from time immemorial. Indeed, it is grounded in the Jewish religion, but recourse to it does not, itself, express a religious or theological stance, and it should not be perceived as such, but rather through a national, legal lens. Jewish law is certainly not the exclusive legacy of religious Jewry, even if it is but natural, and somewhat sad, that most, although not all of those engaged in its study are observant Jews, which impresses it with a "religious stamp". It would be good and proper if those who are not religiously observant would join their ranks (and see: A. Hacohen, *Unjust Enrichment in Jewish Law*, 10 MISHPAT V'ASAKIM 183, 185 (5769) (Hebrew) (hereinafter: *Unjust Enrichment in Jewish Law*)). As I wrote in the past:

> What is referred to as "the Jewish bookshelf" is an incomparable treasure of many cultural areas, but perhaps first and foremost of law. In my opinion, one need not identify with a particular conceptual approach in order to be curious about it, learn from it, utilize it, take pride in it, and put it to moral use, each according to his own definition of the moral foundation (*Malkhut Yisrael l'umat Dina D'malkhuta*, 502).

At judges' conferences in Jewish law, I was overjoyed at the participation of judges who were not members of the religious community, and even more so when judges who are not of the religious community made recourse Jewish law in their judgments.

96. I therefore support the development of a national-cultural approach to Jewish law, its institutions and sources. "We must not close our minds to general cultural and legal legacies, and all the more so in regard to our own cultural legacy (the *Hendels* case [23], 798, *per* Elon, J.). Nevertheless, there is no denying that the rebirth of Jewish law, as expressed in our general legal system, remains meager. Recourse to the principles of Jewish law by the courts is not widespread, and their use – as a source of inspiration or as an interpretive tool – is not sufficiently common. Rhetoric that extols the virtues of Jewish law does not reflect reality (see: *Unjust Enrichment in Jewish Law*, 231). To date, the Foundations of Law did not meet with the success that its legislators had hoped.

97. Years ago, in my brief article *Jewish Law – A Law that calls out to Us* (published in the anthology ON THE INCORPORATION OF JEWISH LAW (N. Rakover, ed., 1998) (Hebrew), and in my book PATHS OF GOVERNMENT AND LAW, 168 (2003) (Hebrew)), I described three hurdles that an Israeli jurist, judge or lawyer must overcome in order to make proper, respectful use of Jewish law sources:

> The *first* is will. This entails a certain ideational approach. The polarization that divides Israeli society in the area of religion and state, like no small number of other issues, can – wrongly, in my opinion – swallow up this subject. That is to say that a jurist who decides in favor of using Jewish law may, at times, see himself as "taking a side" in an internal debate. This approach is – in my opinion – mistaken, as an incomparably rich cultural heritage is not, and should not be the property of any one person, but rather should be the property of the general public, without regard for public controversies. While the source of Jewish law is religious, its message is not necessarily so, and it need not be the legacy of the religiously observant alone. Perhaps the current trend of seeking the treasures of "the Jewish bookshelf" will help ameliorate this problem.
>
> The second hurdle is the need for a certain degree of *knowledge* in order to make proper, even if modest, use of the sources of Jewish law. The great, welcome contribution of contemporary jurists – among them the Jewish Law Department of the Ministry of Justice, headed by Prof. Nahum Rakover – helps to address this need. Today, the bookshelf of comprehensive research in various fields of Jewish law grows daily. The books are written in modern language, and thoroughly interrelate with the general Israeli law, which allows judges and lawyers who are ready to invest the necessary time, to make respectful, effective and convenient use of Jewish law as a source of inspiration, interpretation, and support for their work and the deepening of their understanding.
>
> And here arises the third hurdle – *time* – the most precious resource of all. Israeli judges and lawyers are overburdened to the point of collapse. Judges

> are faced with a heavy docket that must be completed in a timely way. That requires great effort. The same is true for lawyers. Jewish law is like a *neshama yeteira* – an added dimension of spirituality – whose attainment usually requires an investment of time that is not readily available. However, since the incorporation of Jewish law into legal and judicial work is a rewarding cultural and professional experience, and a challenge that involves reconnecting with thousands of years of Jewish creativity, if one is ready and willing, time will be found (emphasis added – E.R.).

As can readily be seen, I do not wish to divide the approach to these hurdles in a binary division between religious and non-religious, even if that may seem persuasive to some. On the contrary, if we approach the subject from the perspective of national culture, it need not be affected by the Israeli religious-secular tension, but resides entirely in the "harmony wing".

98. I have also had occasion to note:

> The Israeli legal system takes a dichotomous approach to Jewish law. On the one hand, all agree, in theory, that Jewish law forms part of our legal heritage, and that it should have a place in Israeli law, even if there is dispute in regard to the scope of the obligation to refer to it … while on the other hand, putting that theoretical statement about the place of Jewish law into practice encountered obstacles in the Israeli legal community, some of ideational and most of a practical nature (PATHS OF GOVERNMENT AND LAW, 168; on the various approaches to Jewish law, see: *Unjust Enrichment in Jewish Law*, 187-195).

Of late, there have been initiatives to increase support in this area by amending the Foundations of Law, a move that has led to some controversy (see the Israel Democracy Institute paper: Benjamin Porat, *A Proposal to Amend the Foundations of Law Act, with an Analysis and Critique*, and the accompanying response by M. Kremnitzer (2016) (Hebrew)). This is not the place for discussing that, but in my opinion, even the possibilities afforded by the current version

of that law have not been fully exploited,[5] and see in this regard the instructive words of my colleague Justice Melcer (dissenting in LFA 7141/15 *A. v. B.* [28], para. 18), in support of interpreting sec. 1 of Foundations of Law "as pointing to the basic principles of Jewish heritage as defined by Prof. Elon, but not necessarily to the particular legal arrangements established by halakha".

99. Ultimately, in my opinion, the effort to give expression to the intellectual richness and the values of Jewish law in our legal system is worthwhile and even necessary, subject, of course, to the circumstances of each case. "A proper Israeli legal policy is one that lends an ear and listens to the sentiment of Jewish law" (CA 8954/11 *Doe v. Doe* [29], para. 135, *per* Sohlberg, J.); and see: A. Maoz, *The Place of Jewish Law in the State of Israel*, 40 HAPRAKLIT 53, 66 (1991) (Hebrew)). For my part, I can say that from the day I began serving as a judge, I have tried to the best of my modest ability to give voice to the place of Jewish law, although I regret that I did not make greater use of Foundations of Law. I have often maintained an awareness of the intellectual treasures of Jewish law and the rich legal tradition that characterizes it, as well as the great value of its incorporation for Israeli law, without, of course, in any way compromising the autonomy of the courts under the state's law. In this sense, in opening its gates before it, the general law showed respect for Jewish law no less than Jewish law showed respect for the state's law by entering those gates.

100. Outlining the *aurea mediocritas* in all that relates to the extent and scope of recourse to Jewish law, its status and its normative force is a complex task. It requires "patience and tolerance, moderation, equanimity, good will and common sense" (E. Rubinstein & N. Sohlberg, *Religion and State in Israel in the Jubilee Year*, MINHA LEYITZHAK 339 (5759) (Hebrew), also published in PATHS OF GOVERNMENT AND LAW, 196 (Hebrew)). However, if we are willing to confidently address the national, cultural and moral significance of Jewish law, we will be rewarded by the development of the general law, and we will afford our ancient tradition the respect it deserves, or to paraphrase Rabbi Abraham Isaac Hacohen Kook, we will renew the old, and sanctify – in the

[5] Ed: Section 1 of Foundations of Law, 5740-1980, was amended as of May 2, 2018 to include the words "of Jewish Law". The section now reads: "1. Where the court, faced with a legal question requiring decision, finds no answer to it in statute law or case-law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Jewish law and Israel's heritage."

national sense – the new. I would add that I do not see this as being in conflict with the equality of Israel's minorities, but this is not the place to elaborate.

101. We shall now return to the merits of the matter before us.

The statutory provisions

102. I would first note that this judgment focuses upon the subject of living space, unrelated – except as anchored in law – to the severity of the offenses, which may be severe and horrifying, for which the prisoners are serving their sentence. Similarly, we are not addressing the distinction between inmates imprisoned for criminal offenses and those imprisoned for criminal security offenses (with all the complexity regarding the latter), between which the Basic Law makes no distinction. The same holds for the distinction between criminal detainees and administrative detainees, which is not the concern of this case.

103. The primary legal provisions with which we are concerned are sec. 11B(b) of the Prisons Ordinance, which was added by Amendment 42, and sec. 9(a) of the Arrests Law. Section 11B of the Ordinance states:

> A prisoner will be held in appropriate conditions that will not harm his health or infringe his dignity.

Section 9(a) establishes an identical provision in regard to detainees.

104. The Petitioners argue that placing a person behind bars without granting him a minimal living space of 4 square meters (that is, 4 square meters exclusive of the lavatory and shower areas) – in accordance with the various standards established under international law – does not meet the standard of appropriate conditions and violates his dignity in a manner repugnant to the said statutory provisions and Basic Law: Human Dignity and Liberty.

105. As earlier noted, the subsidiary legislator addressed this matter of appropriate living space. Regulation 2(h) of the Prisons Regulations – like reg. 3(e)3 of the Arrest Regulations), which concerns the living space of detainees – states:

> The average area of a cell shall not be less than *four-and-a-half square meters* per prisoner. The calculation of the said area shall be in accordance with the area between the walls of the cell, including the area of the lavatory,

> the sink and the shower, to the extent that there is a shower in the cell, and divided by the number of beds in the cell (emphasis added – E.R.).

106. But the difference between the standard established by the State itself and the actual situation is absolutely clear. According to the current data of the Prisons Service, presented in the updated notice submitted by the State on April 3, 2017, only 21%(!) of prisoners in the State of Israel are being held in prison cells that meet the standard of 4.5 square meters. In other words, despite the State's efforts that were described at length in its responses, the absolute majority of prisoners and detainees in the State of Israel do not enjoy the minimum standard established by the subsidiary legislator itself for a prison or detention cell in Israel. From a legal standpoint, the State relies upon reg. 8 of the Prisons Regulations, which states:

> Sub-regulations (d), (f) through (h) will apply to places of imprisonment whose construction planning began after the initial day [June 2010 – E.R.], and *to the extent possible*, even to planning and renovation of existing places of imprisonment (emphasis added – E.R.).

From the phrase "to the extent possible", the Respondents learn that the State has absolute discretion in deciding the living conditions of prisoners in the existing prison facilities, in accordance with budgetary considerations and priorities that it establishes.

107. The focus of our discussion is sec. 11B of the Ordinance. The question is whether the expression "appropriate conditions" should also be taken to comprise the minimum living space to which a prisoner – and similarly, a detainee – is entitled in the State of Israel. We are, therefore, concerned with an issue of interpretation.

108. As Prof. Barak wrote:

> A statute must be interpreted according to its purpose (subjective and objective). The purpose of a statute is the interests, goals, values, aims, policies, and the function that the statute is designed to accomplish. It is the ratio legis (BARAK, PURPOSIVE INTERPRETATION IN LAW, p. 398 [English edition (Princeton, 2005), p. 340].

To this I added in one case:

> Purposive interpretation also derives from common sense and life experience. The legislature, or the drafter of a text in general, cannot foresee every possibility, and reality invites a variety of occasions that "your fathers did not know" (Deut. 32:17), and therefore, interpretative tools make it possible to seek the purpose of the text. This is also true in Jewish law, for example, by means of the thirteen hermeneutical rules by which the Torah is expounded (Midrash Sifra, Parashat Vayikra, 13 Principles, chap. 1), or similar systems of interpretation (the *Zalum* case [6], para. 32).

109. The subjective purpose of the law is learned from its language and from the legislative intent. As for the language, the legislature established that "a prisoner will be held in appropriate conditions that will not harm his health or infringe his dignity". The legislative intent is learned from the Explanatory Notes to the Prisons Ordinance (Amendment no. 42) (Conditions of Imprisonment) Bill, 5772-2012 (650 Government Bills 298 (6 Shevat 5772, January 30, 2012)). These begin with the statement that "the purpose of the proposed law is to establish in the Prisons Ordinance [New Version], 5732-1971, *obligatory* provisions in regard to appropriate conditions of imprisonment for prisoners, and define *their basic rights*…" (emphasis added – E.R.). To my mind, common sense says that it is doubtful that "basic conditions" [*sic*] for a prisoner can be interpreted so as not to include minimal living space. By way of illustration, consider an extreme situation in which a prisoner resides in 2.5 square meters of living space, including his bed (a situation which, sadly, is not very far from the description of some Israeli prison facilities). Is it even conceivable that such a prisoner enjoys "appropriate conditions" for living? Thus, even if the food he is served meets the required standard, even if there are good educational services, even if visiting hours are reasonable – it would remain doubtful that without minimal living space, that prisoner could be deemed to have appropriate living conditions. On its face, it would appear that both the language of the law and the legislative intent show that the legislature sought to establish a minimum standard for a prisoner's living space, while leaving the precise standard to the subsidiary legislator, as we shall address below.

110. As opposed to this, there is some justice to the argument that when the legislature sought to establish concrete appropriate standards, it did so expressly. Thus, for example, sec. 11B(3) of the Ordinance refers to basic living conditions to which a prisoner is entitled: a bed and mattress

(sec. 11B(3)(2), water and suitable food (sec. 11B(3))3)), clothing and products for maintaining personal hygiene (sec. 11B(3)(4), etc. Additionally, the deliberations of the Knesset Internal Affairs and Environment Committee show that when Petitioner 1 raised a request to establish an express, statutory minimum for prisoner living space, the Legal Advisor of the Ministry of Public Security replied: "That is part of appropriate conditions" (p. 28 of the Committee protocol of Feb. 21, 2012). That and nothing more. Indeed, that can be understood to mean – as the Petitioners argue – that the Legal Advisor's response implies that the expression "appropriate conditions" includes minimal living space. However, it can also be interpreted to mean – albeit with some difficulty, and see the matter of common sense that we noted above – that minimal living space is one of many parameters for a prisoner's living conditions, such that – for the purpose of illustration – if in making the calculation, the prisoner is afforded fine food or an enhanced educational framework, it is possible to "compromise" on living space in the framework of ensuring "appropriate conditions". We should again note that we are not concerned here with interpreting the law in accordance with the fundamental principles of the legal system and the Basic Laws, which we will address below, but rather with an attempt to understand the original legislative intent.

111. To summarize thus far, I am of the opinion that the subjective purpose tends to the interpretation advanced by the Plaintiffs, i.e., that the State is required to provide a prisoner – and as noted, this equally applies to a detainee – "appropriate conditions", which includes an obligation to provide minimum living space. However, determining the legislative intent in this matter is not entirely doubt free, and it cannot be denied that, on the face of it, there is some logic to the contrary argument – not on the substantive-value level, but rather in terms of the "historical development". We will now proceed to examine the objective purpose of the law.

112. As for the objective purpose, it would appear that here – even more persuasively – statutory interpretation leads to the conclusion that sec. 11B of the Ordinance seeks to establish at least a minimal standard for a prisoner's living conditions, among them his living space in his cell. As opposed to its subjective purpose, the objective purpose of a legislative enactment tries to seek the intent of that reasonable legislator who is guided by the fundamental principles of the system, morality, fairness and justice. The words of Justice M. Cheshin are apt in this regard:

> In approaching a law of the Knesset, we do not come empty handed. We come with bag filled with language and terminology, interpretations and meanings, social customs and mores, conventions and axioms, justice and integrity, principles and tenets … all these tenets, values, and principles appear to be extra-legal, but they are the foundation of the statute – of every statute – and no statute can be conceived without them. A statute without that platform is like a house without foundations, and just as the latter will not endure, so a law that has nothing but itself is like a house hanging in midair … As we read a statute, our robes upon us, we carry on our backs "an interpretive quiver". Some will say an "interpretive kit". Inside this quiver are the values, principles, and doctrines without which we would not be who we are: fundamental values of the system, morality, fairness, justice. These – and others like them – are fundamental values, and from them subsidiary values are derived (CFH 7325/95 *Yediot Aharonot Ltd. v. Kraus* [30], 72-74).

It is additionally clear that the objective interpretation of a law must also be derived from the Basic Laws, and in the present case, Basic Law: Human Dignity and Liberty. Justice Barak addressed this in one case as follows:

> The centrality of the value of human liberty is not expressed merely in rhetoric about its importance. It translates into legal language in the positivist conception that human dignity gives rise to rights and obligations, determines authority and powers, and affects the interpretation of every legislative act. In Israel, human dignity is not a metaphor. It is a normative reality that requires operative conclusions (CA 294/91 *Hevra Kadisha Kehillat Yerushalayim v. Kestenbaum* [31], 526).

113. The "principle of constitutionality", as President Barak referred to it on the basis of its use in comparative law (and see: CrimApp 537/95 *Ganimat v. State of Israel* [32], 412), is a basic principle of our legal system, from which we learn that a statute should be interpreted, as far as possible, in a manner that is consistent with the provisions of the Basic Law. The normative hierarchy is clear and well-known, and the basic interpretive presumptions derive from it: it is

presumed that subsidiary legislation does not contradict a law, and that a law does not contradict constitutional provisions (BARAK, PURPOSIVE INTERPRETATION, 422).

114. In addition to the fundamental principles of the system and the Basic Laws that express them, we saw fit to turn to Jewish law and comparative law, which we discussed above. Jewish law teaches us "the principles and fundamental values grounding our culture and law" (BARAK, PURPOSIVE INTERPRETATION, 220). Comparative law teaches us about what has been done in similar situations abroad, in countries we would like to resemble (as opposed to those countries from which we seek to be distinguished). We should further bear in mind that in accordance with the presumption of constitutionality, we must also interpret Israeli law as compatible with the provisions of international law that Israel has adopted, to the extent possible (CA 522/70 *Alkutub v. Shahin* [33], 80; HCJ 2599/00 *Yated – Non-Profit Organization for Parents of Children with Down Syndrome v. Ministry of Education* [34], 846; T. Hostovsky Brandes, *Human Rights Law in Israel*, MEHKAREI MISHPAT 2017(Hebrew)).

115. In the present matter, I am of the opinion that all of the sources point to the fact that the objective purpose – and as noted, the subjective as well – of sec. 11B is to establish appropriate, minimal standards applicable to every inmate, as such, and that the area of his cell is among them. As we have shown, minimal living space is a necessary condition for preserving a person's dignity and his right to a minimally dignified existence. As stated, there is no dispute that the absolute majority of Israel's inmates live under conditions that by the standards established by the State itself – and as noted, this is also supported by international law and comparative law – are not consistent with minimal living conditions for an inmate's dignified existence. This is repugnant to the fundamental principles of our law, the constitutional right to dignity enshrined in Basic Law: Human Dignity and Liberty, Jewish heritage, the position of international law, and to what is acceptable according to comparative law, as we showed in detail above. Moreover, having found that the subjective purpose of the law is not unambiguous, but the objective purpose of the law clearly favors the position of the Petitioners, and since in interpreting a law concerning human rights, as in the present case, significant weight should be given, a priori, to the objective purpose (BARAK, PURPOSIVE INTERPRETATION, 255), we can only conclude that sec. 11B should be interpreted as establishing a principle of minimal living space that must be applied to every prisoner – and correspondingly, to every detainee – in Israel. I would add the following two points:

First, we must examine the subject of a prisoner's living space through the lens of basic human rights, and ask ourselves how we would feel living in a 3 square meter space over the course of years. *Second*, even were we to assume that the matter is open to different interpretations, when we are concerned with basic human rights, we must choose the one that realizes broader rights, rather than the opposite.

116. We would further add that the concrete criteria for the execution of sec. 11B were established in the Prisons Regulations. In the present matter, two primary regulations are relevant, and in view of their importance, I will repeat them. Regulation 2(h) of the Prisons Regulations – which establishes an arrangement similar to that in reg. 3(e) of the Arrests Regulations – states:

> The average area of a cell shall not be less than *four-and-a-half square meters* per prisoner. The calculation of the said area shall be in accordance with the area between the walls of the cell, including the area of the lavatory, the sink and the shower, to the extent that there is a shower in the cell, and divided by the number of beds in the cell (emphasis added – E.R.).

117. Regulation 8 of the Prisons Regulations, which establishes the application provision (similar to the parallel, final part of reg. 3(e)), instructs:

> (a) These regulations will apply to permanent construction. In this regulation, "permanent construction" – a structure that cannot be transported from place to place.
> (b) Sub-regulations (d), (f) through (h) will apply to places of imprisonment whose construction planning began *after the initial day* [June 2010 – E.R.], and *to the extent possible*, even to planning and renovation of *existing places of imprisonment* (emphasis added – E.R.).

118. One might raise the question – as the State holds – that the above is stated looking to the future "to the extent possible", so why should we not accept the view that what is possible comes in stages, and in the meantime has not been completely met? Before answering this, we would again note two basic principles of our jurisprudence in regard to the effect of these regulations upon the present matter: *First*, legislation should be interpreted in a compatible manner, and it is therefore presumed that subsidiary legislation is intended to realize the primary legislation, rather

than conflict with it (BARAK, PURPOSIVE INTERPRETATION, p. 422). This is particularly so when all of the purposes of the present provisions are meant to give sec. 11B concrete meaning, by virtue of sec. 11B(f), which states that "the Minister may establish regulations for the execution of this section". *Second*, from the other perspective (BARAK, INTERPRETATION IN LAW: STATUTORY INTERPRETATION, vol. II, 802-803). Therefore, I am of the opinion that we should grant importance to the standard that the subsidiary legislator saw fit to establish as the minimum standard for a prison or detention cell – 4.5 square meters, including the lavatory and shower area – which, in practical terms would appear to be similar to 4 square meters exclusive of the lavatory and shower area. Inasmuch as this criterion is similar to the minimum that the Petitioners seek to establish on the basis of information from comparative law, as noted – albeit less than the appropriate criterion according to the Prisons Service as presented in an internal presentation of the Strategic Planning Branch of the Prisons Service in 2010, which stands at 6.5 square meters (Appendix P/1 of the Petition) – I believe this to be the relevant criterion to which we should aspire as the minimal criterion in the present matter. We would note that many years have passed since the Regulations were enacted, which should also be accorded weight.

119. Indeed, inasmuch as the subsidiary legislator is presumed not to have intended to contradict the intent of the primary legislator, I am of the opinion that in employing the expression "to the extent possible" in reg. 8, the subsidiary legislator intended to say that the minimum standard would *gradually* be put into effect for all prisoners in all prisons within a *reasonable period of time*, as is customary when we are concerned with an administrative agency, and in accordance with the rule established under sec. 11 of the Interpretation Law, 5741-1981, that "any empowerment, and the imposition of any duty, to do something shall, where no time for doing is prescribed, mean that it shall or may be done with *due dispatch* …" (emphasis added – E.R.), and see in this regard, D. BARAK-EREZ, ADMINISTRATIVE LAW, vo. I, 407 (2020) (hereinafter: BARAK-EREZ) (Hebrew). In the present matter, some two decades have elapsed since the relevant regulation was established in the Arrest Regulations, and many years have also passed since the parallel regulation was enacted in the Prisons Regulations. That cannot be accepted as a reasonable time when we are concerned with a fundamental right of the first order, and where the infringement is severe and disproportionate, and surely when the State's response reveals that the matter is not expected to change substantially in the near future. As Justice Levy once noted: "The obligation to act reasonably – which applies to all the acts of the Respondent – is a primary obligation.

Reasonableness – we would again recall – means meeting a reasonable timetable" (HCJ 2065/05 *Maher v. Minister of Interior* [35]; and also see HCJ 6300/93 *Center for Training of Rabbinical Court Pleaders v. Minister of Religious Affairs* [36], 451). Moreover, we cannot accept an interpretation by which the subsidiary legislator intended to establish an arbitrary rule that would discriminate among prisoners in manner that would infringe their basic rights simply due to budgetary considerations, and under which there would be no minimum standard that would apply to every inmate as such, but rather would be subject to the (actually, absolute) discretion of the executive (in this regard, see: HCJ 6321/14 *"Ken Lazaken" – For the Advancement of the Rights of the Elderly v. Minister of Finance* [37], para. 38). In any case, the interpretation given by the subsidiary legislator is but one of the elements that the Court must consider in interpreting a statute, and as noted, an interpretation by which no minimum standard applicable to every inmate would be set would be incompatible with other sources by which the purpose is determined – fundamental principles of the system, our constitution as expressed in the Basic Laws, human dignity in Jewish law, and the comparative and international law cases cited. Having concluded that the purpose of the law leads to a clear conclusion in regard to the need for a minimal standard for the living space of the incarcerated prisoner, what is stated in subsidiary legislation cannot change that conclusion. A prisoner is a person, regardless of in what prison he is imprisoned, and the minimal standard must be universal.

120. We would note that the State wishes to shine the spotlight on sec. 3 of Amendment 42 to the Ordinance – a section that was not included in the original bill – which establishes: "The Prisons (Imprisonment Conditions) Regulations, 5770-2010, as they were prior to the entry into force of this law, shall be deemed as if they were enacted in accordance with sec. 11B of the Ordinance … and nothing in regulations enacted under the said section shall detract from their validity". The State therefore argues that this practice "essentially imported the Prisons (Imprisonment Conditions) Regulations, 5770-2010, into Amendment 42, and in so doing, the Knesset forged what is stated in the regulations in the furnace of legislation". This is nicely worded by the State Attorney's Office, and the State wishes to learn from this that the Prisons Regulations should be accorded added importance, essentially that of a statute, for the purpose of interpreting sec. 11B, inasmuch as "the Israeli Knesset set its sights on the arrangements detailed in the regulations, and established that those arrangements are appropriate for the implementation and execution of sec. 11B". I cannot accept that charming argument. Indeed, Amendment 42 did not

intend the entire repeal of the existing regulations, but that is not to say that those regulations enjoy a different normative status than other subsidiary legislation. Naturally, the legislature sought to create legislative continuity and not immediately repeal the prior arrangements under the regulations. I do not believe that we can understand that to represent the legislature's specific adoption of each of the arrangements in the regulations as they were prior to the amendment. The status of the regulations as being subject to judicial review that is not necessarily constitutional review remains, and all the more so when we are concerned with a basic human-rights issue. Moreover, an examination of the meetings of the Knesset Internal Affairs and Environment Committee, which deliberated the bill, shows that the proposal to incorporate what is established under the regulations under discussion, including the prisoner's living space, into the amended law was raised and *rejected*. Thus, as we noted above, when, in the course of the deliberations, the representative of Petitioner 1 requested that the living standard established in the regulations be established in primary legislation, the Legal Advisor of the Ministry of Public Security replied: "That is part of appropriate conditions [the wording of sec. 11B of the Ordinance – E.R.]. If you think that the law cannot be passed in this way, then we won't pass it. We simply won't pass it". Thus, inasmuch as it was the State itself that insisted that the amendment not establish the regulations by statute, I have some doubts as to whether it can have it both ways, and now argue that the regulations have the status of a statute (see Protocol 510 of the meeting of the Internal Affairs and Environment Committee, p. 28 (Feb. 21, 2012)). With all due respect, it would therefore appear that nothing in the routine wording of sec. 3 of the amendment can be seen to show that it grants *statutory* status to the regulations. Had the legislature wished to do so, it is presumed that it would have expressly done so by statute. In the present matter, it is clear that this was not the legislative intent, and all that the legislature sought to do was to avoid creating the normative confusion that may have resulted had the regulations been immediately repealed by the amendment to the law, prior to the adoption of new regulations. The regulations that are the subject of this matter should, therefore, be treated as regulations for all intents and purposes, as they were created and as promulgated, and viewed as but one element in the interpretation of the legislation. Having found that an examination of all the relevant sources indicates the need to establish a minimal standard for the living conditions of every prisoner and detainee, what is stated in the regulations in this regard cannot serve to alter that conclusion.

121. To summarize this section, we will simply say – is it conceivable that a prisoner or detainee who lies down to sleep and awakes morning after morning, week after week, month after month and year after year in a cell whose size is 2.2 square meters (Ofer Camp), 2.3 square meters (Megiddo Prison), 2.4 square meters (Nitzan, Ramon and Ketziot facilties), etc., lives "in dignity and health" as required by the law? Can we, Israel's judges, ignore reality and continue to subject those convicted of criminal offenses – *a fortiori* suspects or criminal defendants – as serious as their crimes may be – and I repeat, many are criminal and security offenses that arouse untold revulsion and disgust – to prison conditions that are unfit for human habitation, and as my colleague Justice (emeritus) Zylbertal stated in one of the hearings in this case – "to a place that no one among us could endure for two days" (court transcript of July 13, 2015, p. 5)? And I would note here that according to the data of the Prisons Service, Israel stands well under the average European threshold for floor space allotted to a prisoner (which is 8.8 square meters), and according to the Red Cross, even less that what is found in Mauritius (4.08 square meters), Kenya (3.7 square meters), and Senegal (3.55 square meters) (International Committee of the Red Cross, *Water, Sanitation, Hygiene and Habitat in Prisons*, p. 31 (April, 2012)). I believe that there can be only one answer to these questions, and it is no.

122. We held several hearings in the present case, and despite our pleas and the long time that has elapsed since the relevant statutory provisions and regulations were enacted, the overcrowding in prison and detentions cells sadly remains almost as it was prior to the enactment of the regulations, i.e., some 40% of all prisoners are held in cells that are less than 3 square meters on average. As the learned D. Barak-Erez observed, "there are limits to judicial flexibility that find expression when ongoing foot-dragging amounts to an evasion of the obligation to act in accordance with the requirements of law" (BARAK-EREZ, 409). We will say again that we do not, Heaven forbid, attribute ill-will or malice to those involved, but the priorities they have established require "reorienting". Under the circumstances, it is hard to assume, as the State asks, that improvement of the situation is at hand, and in any case, it is hard to imagine that the steps that were described – some theoretical – will soon bear fruit, and that a concrete solution will be found. Given the undeniably severe situation, judicial intervention is required.

123. I would therefore recommend that we grant the petition and make the order nisi absolute in the following manner:

A. The minimum living space for every prisoner and detainee shall be set at 4 square meters exclusive of the lavatory and shower area, as requested in the petition (or 4.5 square meters inclusive of the lavatory and shower area).

B. To that end, the State will do what is necessary so that, within 9 months of the issuing of this judgment, the living area of every prisoner and detainee will be at least 3 square meters, exclusive of the lavatory and shower area; within 18 months of the issuing of this judgment, the living area of every prisoner and detainee will be at least 4.5 square meters, including the lavatory and shower area, or 4 square meters without them.

124. Before concluding I would note that the ramifications of our decision are clear. As the State pointed out, immediately increasing the living space would impose a significant burden upon the state treasury. Indeed, one possibility – the "royal road" – is that the State will act to renovate and expand the prison and detention facilities in accordance with the above timetable. However, that is not the only option available to the executive and legislative branches for resolving part of the problem

125. As we know, the Arrest Law, enacted under the influence of Basic Law: Human Dignity and Liberty, sought to change the conception that had prevailed prior to its enactment, and "delineate rules for enforcing the law while protecting human rights", as well as to actually lessen the scope of arrests (see: RINAT KITAI-SANGERO, PRE-TRIAL DETENTION OF LIBERTY BEFORE CONVICTION 19-24 (2011) (Hebrew)). But intentions are one thing and reality another. Not only has the number of arrests not lessened, but has significantly increased (*ibid*., 28-29); CHAYA ZANDBERG, COMMENTARY ON THE ARREST LAW 19-24 (2001) (Hebrew)), together with a rise in the number of remand prisoners, as part of the police department's "turning-point plan" – so we were told – as a police objective (THE PUBLIC DEFENDER'S REPORT FOR THE YEAR 2015, pp. 35-36 (August 2016) (Hebrew)). Without addressing police plans with which I am unfamiliar, I would note that the Arrest Law provides – e.g., in sec. 21(b)(1) – that an order for pre-trial remand will not be issued, inter alia, unless "the objective of the arrest cannot be attained by release on bail and by release conditions of lesser impact on the defendant's freedom". It would seem that assimilating the legislature's message that arrest is the last resort in the list of possibilities available to the enforcement authorities could aid in reducing the number of arrestees and increasing the living space remaining for those whose arrest is unavoidable.

126. Clearly, the matter is more complicated in regard to imprisonment, as once a person is convicted of a crime, he no longer enjoys a presumption of innocence, and in many cases, there is no alternative to imprisonment, which may be long and even life imprisonment. But here, too, we must bear in mind that imprisonment is a means and not an end – it is a means for retribution, deterrence and for the rehabilitation of the offender. Thus, for example, according to the proposals of The Public Commission for examining the Policy for Punishment and Treatment of Offenders (hereinafter: The Dorner Commission) and the Government resolution to adopt its main points (Resolution 1840 of Aug. 11, 2016), the Parole Board can be authorized to transfer certain prisoners to halfway houses rather than keep them in prison; it can be decided that community service be extended so that it can be imposed as an alternative to 9 months imprisonment rather than 6, as it is at present, and thereby to reduce the number of prisoners (The Report of the Public Commission for examining the Policy for Punishment and Treatment of Offenders, 52-55 and 65-66 (Aug. 2015) (hereinafter: The Dorner Commission Report). As I recall, I raised this last proposal when I was serving as Attorney General, but various elements opposed it. Probation periods can also be extended in regard to certain offenses, fines for financial crimes can increased, and in appropriate cases, increased use of early release can be considered, together with the creation of appropriate supervision systems outside the prison walls. In this regard we would note that various studies in the United States – the holder of the "world record for imprisonment", which holds 25% of the world's prisoners, even though its general population is only 5% of the world population, which is seven times the prevailing rate in Western Europe – show that longer imprisonment does not necessarily lead to lower crime rates, and that the rate of imprisonment can be reduced together with reducing the crime rate, inter alia, because reducing the imprisonment rate reduces the rate of recidivism. Thus, for example, between 2011 and 2014, the number of prisoners in California went down 9%, pursuant to the judgment referred to above, which required that California release prisoners in order to provide every prisoner with appropriate living space, and which accordingly led to a change of the law and a change in the arrangements for probation and early release in the state. Concurrently, there was a 7% reduction in the crime rate. Similar trends were found in Mississippi, New Jersey, New York, South Carolina, and Texas (Iniami Chettiar & Laura-Brooke Eisen, *The Reverse Mass Incarceration Act*, p. 10 (Brennan Center for Justice, New York University, 2015)). Also see the comprehensive research by the National

Academy of Sciences in the United States in regard to the increase in the rate of incarceration in the United States, which found, inter alia:

> The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation (Jeremy Travis, Bruce Western & Steve Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, at pp. 334-337 (National Research Council of the National Academies, July 2014)).

Of course, the above should not be taken as a comprehensive discussion of the effect of incarceration upon crime rates. Rather, the purpose is to draw attention to additional ways of thinking about the issue other than building more prisons and detention centers, and as noted, the government has already chosen to take that course by adopting the Dorner Commission Report. The main conclusion of the Commission was that "we should act to reduce the use of incarceration in cases in which incarceration is not necessary to restrict offenders who present a high degree of danger to society, and the expansion of the use of cheaper, more efficient punishments that meet the principle of suitability, and thus to bring about efficient and more appropriate use of the resources earmarked for the subject" (*ibid*., p. iv). I can only agree with that as also reflecting the dictate of common sense.

127. Of course, in accordance with their discretion, the legislature and the government will decide how to give effect to what is stated in this judgment in terms of both substance and timetable, and in keeping with the order absolute. As noted, they have various possibilities, and they must act in accordance with their discretion and in a manner compatible with the law, case law, and the basic right of every person to dignity.

128. The proposed result is as stated in para. 120, above, in all its parts. In other words, the minimal living space of each prisoner and detainee shall be 4 square meters, exclusive of lavatory and shower, as requested in the petition (or 4.5 square meter including the lavatory and shower). In carrying that out, the State will do what is required so that within 9 months of this judgment, the living space of every prisoner and detainee will be at least 3 square meters, exclusive of the

lavatory and shower. Within 18 months of this judgment, the living space of every prisoner and detainee will be 4.5 square meters, including the lavatory and shower, or 4 square meters without them, at the very least.

129. Under the circumstances, we have decided not to issue an order for costs.

Justice U. Shoham:

1. It is my privilege to be a partner to the judgment of my colleague Deputy President E. Rubinstein on the day of his retirement. I will immediately state that I concur with my colleague's thorough, comprehensive opinion. This opinion reflects my colleague's social and human sensitivity, and well expresses the worldview that has always characterized him. Having known him over the course of many years, as Attorney General and later as Justice Rubinstein, I have great respect for his empathy for the weaker elements of society, who often cannot or do not know how to stand up for their rights, and in those cases that have come before my colleague, a true, honest effort was made to remedy their problems. Together with a sensitive, social worldview in regard to the sufferings of others, whether a citizen, a resident or an alien, we should also recall the instructive material interwoven into my colleague's opinion out of a love for Jewish law. Thus, in this important decision, as well, Justice Rubinstein dedicated a lengthy section (paras. 69-86) to the subject of "The treatment of prisoners in the Jewish heritage", and also wrote of the status and place of Jewish law in our legal system. Every time that I had the privilege of serving on panels over which Justice Rubinstein presided, I learned to appreciate and respect his expertise in the subject matter, his pragmatic approach, and his indefatigable attempts to bring the parties to a compromise in which neither party would leave in woe. When compromise could not be achieved, Justice Rubinstein would issue a clear, lucid, thoroughly reasoned opinion, and no less important, he would do so relatively quickly, to prevent any further injustice to the parties.

2. As for the present matter, it was saddening to read the harsh descriptions in paras. 41-44 of my colleague's opinion, in regard to the conditions in some Israeli prisons. During my tenure as a District Court judge, I came to know the harsh conditions in certain prisons, and especially in the detention facilities. I have not forgotten that situation while sitting in this Court. Sadly, not enough has been done to improve the sad situation in this regard, and thus judicial intervention is

required to remedy this wrong, even if somewhat gradually, as stated in para. 128 of my colleague's opinion.

In HCJ 221/80 *Darwish v. Prisons Service* [38], Deputy President H. Cohn addressed the conditions of security prisoners, and although he was in the minority, his moral stand would seem indisputable:

> It is the right of a person in Israel who has been sentenced to prison (or lawfully arrested) to be incarcerated under conditions that permit civilized human life. It means nothing that this right is not expressly established in any statute – it is a fundamental human right, and in a democratic state under the rule of law, it is so obvious that it is as if it were written in a statue. We have already had the opportunity to stress that while arrest – as an unavoidable evil – deprives a person of physical liberty, it is not intended to deprive him of his human character and status (*ibid*., 538-539).

The words of Justice A, Barak in HCJ 355/79 *Katlan v. Prison Service* [39], 298, are also apt:

> Every person in Israel is entitled to the fundamental right of physical wellbeing and to the protection of their right to human dignity… 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 many of the rights of a free individual … 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.

3. Establishing a minimum living space for every prisoner and detainee of 4 square meters, exclusive of the lavatory and shower, or 4.5 square meters, including the lavatory and shower, would appear to be a minimum requirement, and more would be better. Perusing the situation in this area in other Western countries, and even some less advanced countries, shows that the living space required for a prisoner is much greater than the area stated in the order absolute (see, e.g., a survey by the Information Services Unit of the Ministry of Public Security on the subject of

"Living Space for a Prisoner"). It is inappropriate that the State of Israel, which is true to individual rights and the values of equality and human dignity of every person as such, should be bringing up the rear, and not providing a suitable response to this important issue that is the focus of the petition.

4. In view of the above, I concur in the opinion of my colleague and with his conclusion.

Justice H. Melcer:

1. I concur in the comprehensive, impressive opinion of my colleague Deputy President E. Rubinstein, which reflects the humane judicial approach and unique style that have identified and characterized him over the years (and see para. 16, below).

2. In view of the importance of the subject of the petition and the legal issues it raises, as well as my colleague's interesting conclusions in regard to the place and status of Jewish law, I would like to add a few observations of my own.

The "living space" of a prisoner and a detainee

3. The prisoner criminally convicted and sentenced to incarceration behind bars is deprived of freedom in order to punish him and distance him from society. Incarceration has additional premises and purposes – deterrence (of the convict and of potential offenders), and providing an opportunity for rehabilitation.

The arrest and detention of a detainee, who enjoys the presumption of innocence, is contingent upon the grounds set out in the Criminal Procedure (Enforcement Powers – Arrests) Law, 5756-1996 (hereinafter: the Arrest Law), and in there being no way to achieve the purposes of detention by alternative means, or by electronically supervised arrest, which infringe the suspect's liberty to a lesser degree.

These deprivations of liberty do not mean that over and above them and the realization of their purposes, there is room or license to inflict harm upon the life, body, or dignity of a prisoner of detainee. These are basic interests of a person as such, and they are ensured and protected as fundamental rights by virtue of secs. 2, 4, and 11 of Basic Law: Human Dignity and Liberty. Infringing these rights is permitted only if the conditions of the "Limitations Clause" under sec. 8

of the Basic Law are met (in appropriate circumstances, the deprivation of liberty – by imprisonment or detention – *per se*, does meet the conditions of the Limitations Clause, see: HCJ 2442/11 *Shtanger v. Speaker of the Knesset* [40]).

Our point of departure for continuing the discussion is, therefore, that an inmate does not shed his basic rights at the prison gate, other than his right to freedom of movement and the restrictions that derive from and are directly related to his imprisonment (see: PPA 4463/94 *Golan v. Prisons Service* [2], 157; HCJ 2605/05 *Academic Center of Law and Business, Human Rights Division v. Minister of Finance* [4]).

4. The right of a prisoner or detainee to his own "living space" in the prison or detention cell (respectively) is among the above ensured and protected rights. This right is established at a sub-constitutional level in the provisions of secs. 11B(b) and 11C of the Prisons Ordinance (New Version), 5732-1971 (hereinafter the Prisons Ordinance), as enacted in the framework of the Prisons Ordinance (Amendment no. 42) Law, 5772-2012 (hereinafter: Amendment 42) and supplementary arrangements promulgated in the Prisons (Imprisonment Conditions) Regulations, 5770-2010 (hereinafter: the Prisons Regulations). There are similar provisions in regard to detainees, see: sec. 9 of the Arrest Law and Criminal Procedure (Enforcement Powers – Arrests) (Conditions of Detention) Regulations, 5757-1997 (hereinafter: the Arrest Regulations; the Prisons Regulations and the Arrest Regulations will collectively be referred to as the Regulations). This will be set out in detail in the following section.

5. The *standard* relevant to the present matter was adopted in the framework of sec. 11B of Amendment 42, and states as follows:

> A prisoner will be held in appropriate conditions that will not harm his health or infringe his dignity. (An identical *standard* was established for detainees in sec. 9(a) of the Arrest Law).

The *rule* pursuant to the *standard* was established in reg. 2(h) of the Prisons Regulations, which states as follows:

> The average area of a cell shall not be less than four-and-a-half square meters per prisoner. The calculation of the said area shall be in accordance with the area between the walls of the cell, including the area of the lavatory,

> the sink and the shower, to the extent that there is a shower in the cell, and divided by the number of beds in the cell. (An identical rule was established for detainees in reg. 3(e)(3) of the Arrest Regulations).

On the distinction between *standards* and *rules*, see: Menachem Mautner, *Rules and Standards: Comments on the Jurisprudence of Israel's New Civil Code*, 17 MISHPATIM 321 (1988) (Hebrew); Asaf Rentsler, USE VARIANCE (in the chapter on general norms and the problem of the special case) 65-78 (2009) (Hebrew). I will quote from the latter:

> "Legal norms are not cut from the same cloth." One of the accepted distinctions is that between norms in the form of a rule and norms in the form of a standard. A rule is a norm that establishes a particular legal result upon the meeting of certain factual conditions, where the question of whether or not they are met is relatively easy to decide (for example: "One may not drive at a speed exceeding 50 kph"). A standard is a norm that establishes a particular legal result in accordance with the application of a criterion that represents a particular value (for example: "One may not drive at an unreasonable speed bearing in mind the road conditions") (*ibid*., p. 66, footnotes omitted).

The distinction between a *standard* and a *rule* has several aspects and consequences, and I will address those relevant to the present matter below.

6. Sadly, the rule concerning the average cell area for a prisoner or detainee is *not* observed in most of Israel's prisons and detention centers, and the petition was filed in order to change the situation. The Respondents' response to the order nisi that was granted did not succeed in raising the burden transferred to them to justify the continuation of this situation, which deviates from the *rules* cited in para. 5 above, and therefore, the remedies proposed by my colleague Deputy President E. Rubinstein are, indeed, required under the circumstances, for the reasons and supporting data he presented, and other reasons that I will immediately set out below.

Additional background considerations that justify making the order absolute

7. Nelson Mandela, who knew what a jail is, once stated:

> It is said that no one truly knows a nation until one has been inside its jails. (Quoted in *The Economist*, May 27, 2017, which devoted a report and an article to overcrowding in the world's prisons, and various proposals for reform).

In view of Mandela's great sensitivity to the subjects of imprisonment and its conditions, the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, cited in the opinion of my colleague Deputy President Rubinstein, were, upon their amendment in 2016, named the Nelson Mandela Rules (hereinafter also the Standard Minimum Rules, or SMR, or the Mandela Rules). See: UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules): Resolution adopted by the General Assembly, A/res/70/175 (8 Jan. 2016). On this subject in general, see: Leslie Sebba & Rachela Erel, *"Freestyle Imprisonment": On the implementation of the Norms of International Human Rights in the Israeli Prison System*, 10 HUKIM 123 (hereinafter: Sebba & Erel) (Hebrew).

8. At this point we should clearly state that *only* after the order absolute is realized will we come close (in terms of the subjects of this petition) to the Mandela Rules and international treaties to which Israel is a party, and which she undertook to implement, as explained in my colleague's opinion (for a similar approach, see: Sebba & Erel). Other states also followed this path after decisions by their respective highest courts obligated them to do so (by orders and reasoning similar to those of this judgment), as I will show below:

A) **Italy**: Pursuant to a 2013 decision by the European Court of Human Rights, which held that, within *one year*, Italy must find solutions for the situation in which prisoners were being held in areas of less than 3 square meters, a plan was implemented that both reduced the number of prisoners, and brought the prisons into compliance with the judgment (see: Council of Europe, Execution of Judgment of the ECHR (*Torreggiani v. Italy* – 43517/09, 46882/09, 55400/09 et al.) (2014)).

B) **Hungary**: Following a 2015 decision of the European Court of Human Rights that gave Hungary *six months* to present a timetable for taking steps to prevent the violation of art. 3 of the European Convention (it was held that confining prisoners in an area less than 3 square meters constituted a violation of the prohibition upon inhuman or degrading treatment or punishment), the following steps were undertaken: within one year (by November 2015), the

number of prison spaces were increased by some 900 spaces through construction and renovation, and a number of legislative amendments brought about a reduction in the prison population by expanding the possibilities for the *early release of low-risk prisoners*, and allowing them to serve the final six months of their sentence at home, using electronic monitoring devices (some 500 prisoners within a year), and increased use of "house arrest". A plan was also developed for constructing 800 additional prison spaces by the end of 2017, and some 2000 additional spaces by 2019 (see: Committee of Ministers, Communication from Hungary concerning the *Istvan Gabor Kovacs* group of cases and the case of *Varga and others against Hungary* (Applications no, 15707/10, 14097/12) (14.11.2016)).

C) **Croatia** is currently undergoing a similar process pursuant to a judgment of the European Court of Human Rights of Oct. 20, 2016 in the matter of the Croatian prison system (European Court of Human Rights, *Mursic v. Croatia* (Application no, 7334/13) (20.10.2016)). In this case, the European Court of Human Rights, sitting as a Grand Chamber, reversed a decision from 2015 that held that if a prisoner could move freely outside of his cell during the day, then being held in a cell smaller than 3 square meters did not necessarily violate art. 3 of the European Convention in regard to being held in inhuman conditions (parallel to the prohibition established in the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment). In reversing that judgment, the court returned to the rule that *holding a prisoner in less than 3 square meters of floor space constitutes a violation of the prohibition against holding a person in inhuman conditions, regardless of the time spent outside the cell or other conditions*. We should emphasize that in that case the calculation of floor space for a prisoner was calculated after setting off the lavatory space, as opposed to the method of calculation in Israel, which includes the lavatory area as part of the "living space" allotted a prisoner in a cell.

D) **California, United States:** Pursuant to a decision of the Supreme Court of the United States in *Brown v. Plata* 563 U.S. 493 (2011), California took various steps that reduced the number of prisoners, and significantly lessened overcrowding in cells. See: Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191, 1197, 1203-1204 (2016).

9. Thus, the order absolute that we are issuing here is consistent with similar decisions in comparative law. Moreover, it grounds and is consistent with the values of the State of Israel as a Jewish and democratic state. I will now clarify this last statement.

As a Jewish State – How?

The Explanatory Notes to the bill that led to Amendment 42 (Government Bills 5772 No. 650, p. 298 of Jan. 30, 2012) state as follows:

> The principle of preserving the dignity and welfare of a prisoner was expressed, inter alia, in Jewish law, and was also implemented in Israeli law by Justice M. Elon. Thus, for example, in HCJ 337/84 *Hokma v. Minister of Interior* [1], 826, it was stated: "We hold as an important principle that every right of a person, as a person, is retained even when he is under arrest or imprisoned, and the fact of imprisonment alone is insufficient to deprive him of any right, except when necessary and deriving from the very fact of the deprivation of his freedom of movement, or when there is an express legal provision in that regard. This rule has its roots in Jewish heritage since time immemorial: In accordance with what is stated in Deuteronomy 25:3: "lest your brother shall be dishonored before your eyes", the Sages established an important principle in Jewish penal theory: "once he has been flogged he is considered your brother" (Mishna Makkot 3:15). It is an important, beautiful principle that not only after he has served his sentence, but even while serving it, he is your brother and friend, and his rights and dignity as a person are preserved and remain.

Now, my colleague the Deputy President, Justice E. Rubinstein, has ably expanded upon these words, and I have nothing to add to this.

As a Jewish State – How?

This subject was also clarified in the opinion of my colleague the Deputy President, Justice E. Rubinstein, and my colleague Justice U. Shoham concurred and saw fit to add to this point. I agree with both of them, but I would like to contribute an additional perspective in the following paragraphs.

10. The standard is established here pursuant to Amendment 42, as an *ameliorative amendment*[6] to the British Mandate Prisons Ordinance, as well as for the Arrests Law, both of which are Knesset legislation.

The *rule* is established at the level of *regulations* – as explained in para. 5 above – but it would appear that an exception to the *rule* was established along with it in the said Regulations, according to which the *rule* will only apply to cells whose planned construction will commence only after the entry into force of the Regulations, and to the extent possible, also to the planning and renovation of existing prisons or detention facilities (see: reg. 8(b) of the Prisons Regulations and reg. 3(e) of the Arrest Regulations). In other words, the *rule* applies prospectively, and is intended to be implemented only in the future (*sine die*), while for the present, as an exception, the current severe situation will continue.

Thus, the *Knesset* established a *standard*; the subsidiary legislator established a *rule* on that basis, and immediately tried to exclude it such that it would be exempt from the *standard's* application to the existing situation. What is the Court's role in such a case? It must *interpret* the norms (inter alia, against the background of Basic Law: Human Dignity and Liberty), and prioritize them such that the command of the constituent authority rise above the provisions of the legislature, and the legislative enactments of the *Knesset* prevail over the subsidiary legislation.

It would appear that the representatives of the executive branch sensed this necessary result that is required by the commands of the constituent authority and the legislative intent, and therefore tried to find a remedy by including a "validity of laws" provision in Amendment 14 [*sic*] (which is not mentioned in the bill), which was passed and which states as follows:

> The Prisons (Imprisonment Conditions) Regulations, 5770-2010, as they were prior to the entry into force of this law, shall be deemed as if they were enacted in accordance with sec. 11B of the Ordinance, as it appears in sec. 1 of this law, and nothing in regulations enacted under the said section shall detract from their validity.

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[6] Ed. – On "ameliorative amendment" see: HCJ 6055/95 *Tzemach v. Minister of Defense*, IsrSC 53(5) 241, para. 4(a) of the opinion of Justice Y. Kedmi (dissenting), defining an ameliorative amendment as "part of a process of bringing an old statute into conformity with the constitutional requirements that came into effect only after the statute was enacted".

This wording is vague, concealing more than it reveals, and appears, prima facie, to ignore Israel's international obligations (see: Sebba & Erel). The answer to whether the attempt succeeded against the background of Basic Law: Human Dignity and Liberty and the dictate of the legislature will be presented in the following chapter.

The validity of the validity-of-laws provision and the interpretation of the application provisions

11. The said validity of laws provision – found in both Amendment 42 and the Arrest Law – are *ameliorative laws* that were enacted after Basic Law: Human Dignity and Liberty, and therefore do not fall within the scope of sec. 10 of the said Basic Law, which treats of the validity of laws in force prior to the commencement of the Basic Law. This is also true in regard to the regulations promulgated pursuant to the Prisons Ordinance and the Arrest Law. (Compare to the majority opinion of the expanded panel in HCJ 6055/95 *Tzemach v. Minister of Defense* [41]; and see: Sebba & Erel, p. 47).

Therefore, an exception that deviates from the *standard* established in the above laws should not be recognized here, and moreover, the *standard* gives expression to the provisions of Basic Law: Human Dignity and Liberty. The same is correspondingly true for the basic *rule* in regard to the living space of a prisoner or detainee established in the Regulations promulgated pursuant to the above laws.

12. The Respondents are aware of these problems, and therefore argue that, by the validity of laws provision in Amendment 42, the legislature decided upon the priorities and the other living conditions appropriate for a prisoner – at present and in the future – and therefore, different criteria and manners of execution cannot be imposed (a similar argument is advanced in regard to detainees on the basis of the Arrest Law and the Arrest Regulations). In this regard, they purport to rely upon what was decided in HCJ 5636/13 *Residents of Timorim – Agricultural Cooperative Society* [42], paras. 9-10 of the opinion of my colleague Justice U. Vogelman, but the matter before us is not comparable to the said case, inasmuch as here we are concerned with the interpretation of *legislative acts* and establishing their hierarchy, whereas there the matter concerned the *considerations of a planning institution*.

Moreover, the interpretation that the Respondents sought to give to the validity of laws provision in Amendment 42 does not withstand scrutiny, as we shall immediately explain.

13. Section 3 of Amendment 42 establishes only this (I repeat the wording here so that the argument will be clear):

> The Prisons (Imprisonment Conditions) Regulations, 5770-2010, as they were prior to the entry into force of this law, shall be deemed as if they were enacted in accordance with sec. 11B of the Ordinance, as it appears in sec. 1 of this law, and nothing in regulations enacted under the said section shall detract from their validity.

In this regard, I would note:

A) New regulations have yet to be promulgated, and therefore, prima facie, the end of sec. 3 does not enter the discussion.

B) The validity of laws provision does not say that the Prisons Regulations enacted prior to the adoption of the said Amendment are *consistent* with the provisions of Amendment 42 (that is, with the *standard* it embodies), or that they have the same force as the said *Amendment* (and carefully compare to the wording of secs. 36(f) and (h) of Basic Law: The Government in regard to Emergency Regulations).

Thus, the *Bialer* rule (see: HCJ 243/52 *Bialer v. Minister of Finance* [43] (hereinabove and hereinafter: the *Bialer* rule) does not apply to the present matter, not to mention that the rule was the subject of severe scholarly criticism (see: Hans Klinghoffer, *On Emergency Regulations in Israel*, PINCHAS ROSEN JUBILEE VOLUME, (H. Cohn, ed., 1962) 86 (Hebrew); Benjamin Akzin, *The Bialer Decision and the Israeli Legal System*, 10 HAPRAKLIT 113 (1954) (Hebrew)). On the entire issue, also see: AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL, vol. 2, Government Authorities and Citizenship, 947 (2005) (Hebrew); and HCJ 4374/15 *Movement for Quality Government in Israel v. Prime Minister* [44], paras. 123 and 128 of the opinion of my colleague Deputy President E. Rubinstein, and see my dissenting opinion in HCJ 3132/15 *Yesh Atid Party led by Yair Lapid v. Prime Minister* [45]).

C) The term "*as if*" in sec. 3 of Amendment 42 is only intended to create a "legal truth", which is different from "the objective truth" (see: HCJ 430/08 I.D.F. *Disabled Veterans Organization v. Minister of Defense* [46]), and cannot serve to "upgrade" the status of the Prisons Regulations, or change the basic *rule* that they establish. Therefore, just as it was possible to

challenge the Prisons Regulations for the accepted causes for challenging subsidiary legislation, one can continue to challenge them as if they were promulgated under sec. 11B of the new Prisons Ordinance, by virtue of sec. 11B(f) therein, which states:

> The Minister may establish provisions for the implementation of this law in regulations, as well as provisions in regard to additional conditions to which an inmate will be entitled in the prisons.

We can thus state that the construction that the Respondents seek to pin on the above sec. 3 is flawed because it does not accord with most of the conditions of the validity of laws clause in sec. 8 of Basic Law: Human Dignity and Liberty (other than the condition that the violation be "by law or as prescribed by law", see: Oren Gazal-Ayal, *Restrictions of Basic Rights "By Law" or "As Prescribed by Law"*, 4 MISHPAT UMIMSHAL 381 (1998) (Hebrew)), and it also deviates from the basic *rule* regarding the "living space" of a prisoner established in the Prisons Regulations and is, therefore, ultra vires the provisions of the authorizing law.

Alternatively, if anyone might imagine otherwise, the correct interpretation of the provisions of the Regulations does not permit them to be read in a such a manner that the exception to the basic *rule* established in the Regulations might apply without setting a time limit. We will address this in the following section.

The exception to the basic rule established in the regulations has "run its course"

14. In my opinion, there are two reasons supporting the conclusion that the exception to the basic *rule* established in the Regulations has "run its course":

A) A deviation from a *standard* should not be preserved for an extended period, inasmuch as the *standard* derives from Basic Law: Human Dignity and Liberty, the provision of sec. 1 of Amendment 42, and what was established under the Arrests Law, not to mention that the matter is contrary to Israel's international obligations (see: Sebba & Erel).

This result derives from the legislative hierarchy and the rule concerning the need to update regulations that have "run their course" (whether by an act of the authority or by a decision of the Court). (See and compare: HCJ 2902/11 *Association for Children at Risk v. Ministry of Health* [47]).

B) The Respondents did not show that they had tried "*to the extent possible*" (as the expression is employed in the Regulations), to apply the basic rule established in the Regulations to the present situation, even after all the extensions granted them after the order nisi was issued. Moreover, the budgetary reasons that were raised in this regard did not justify the priorities chosen, in view of the alternatives that would have violated the relevant basic human rights to a lesser extent (in this regard, the aforementioned article in the *Economist* is instructive in showing that improving prison conditions and reducing overcrowding, ultimately lead to budgetary savings and achieve better results in terms of rehabilitation and reducing recidivism). (And see: HCJ 4541/94 *Alice Miller v. Minister of Defence* [48], and see para. 47 of the opinion of my colleague the Deputy President, Justice Rubinstein and the references there).

This contemporary modern approach, expressed in the recent studies quoted in the *Economist* and in my colleague's opinion, return us to Jewish law, inasmuch as the Sages and later scholars were opposed, a priori, to oppressive imprisonment for any but the most grave offences (in modern terms, we would say that they espoused a proper proportionality).

The status of Jewish law

15. My colleague the Deputy President, Justice E. Rubinstein, wrote an enlightening dissertation on the place of Jewish law in our prevailing law. I agree with the main points of his approach, and with his conclusion that:

> …in opening its gates before it, the general law showed respect for Jewish law no less than Jewish law showed respect for the state's law by entering those gates.

I will, nevertheless, permit myself some remarks.

A) I believe that we should make greater use of the referring provision in Foundations of Law, 5780-1980, in appropriate cases. In my view, the principles of freedom, justice, equity and peace of Israel's heritage refer to the *basic principles* of Jewish law, but not necessarily to *all* the specific legal arrangements it establishes (which should be updated and adapted to our present reality). I recently expressed this view in detail in my dissent in LFA 7141/15 *A. v. B.* [28].

B) In my opinion, we should turn to Jewish law at least to the extent that we make recourse to comparative law, and one who does so will discover that the legal thinking of the Sages, and of

the Rishonim [Jewish legal decisors active before the publication of the publication of the SHULHAN ARUKH (1563 CE) – ed.] and the Aharonim [Jewish legal decisors living after the publication of the SHULHAN ARUKH (1563 CE) – ed.] was exceptionally creative and profound, such that one can (directly or by analogy) find appropriate solutions for current issues in this prodigious source.

Having arrived at Jewish law, I should explain that the reason I saw fit to express my opinion here, rather than suffice in adopting the views of my colleague the Deputy President, Justice E. Rubinstein, merely by saying "I concur", is because I also acknowledge the statement of the Sages, who instructed us:

> One should only take leave of another with a matter of halakhah, so that he will be remembered by him thereby (TB Berakhot 21a).

Having done so, I will now proceed to some words of farewell.

Some words of farewell upon the retirement of the Deputy President, Justice E. Rubinstein

16. Before signing the judgment that my colleague the Deputy President, Justice E. Rubinstein, chose to deliver on the day of his retirement (and it is my privilege to join him in this creation), I would like to note that I first met Justice Rubinstein 44 years ago, when I was a senior attorney in the office of the Legal Adviser to the Ministry of Defense. Since then, our paths have crossed from time to time in his various official capacities: in the Ministry of Defense, during his service as Cabinet Secretary, as Attorney General and as a judge, and the closer I came him, the greater I came to respect and admire him. He is "a plastered cistern that loses not a drop" [Mishna Avot 2:8], and his talents and works are beyond description. He possesses that rare combination of a wise mind and a wise heart, and the manner in which he brought together the values of the State of Israel as a Jewish and democratic state with humane sensitivity has already earned him an honored place in Israeli case law for generations to come. We can only wish Justice Rubinstein what his name (Elyakim) suggests – that God will grant all that he asks, and that like his family name (Rubinstein – ruby), this bright gem (once set in the Priestly "breastplate of judgment") will continue to shine upon his family and upon all of Israel.

Decided in accordance with the opinion of Deputy President E. Rubinstein.

Given this 19th day of Nisan 5777 (June 13, 2017).