

# Legitimizing Imprisonment for Debt: Lawyers, Judges and Legislators

**ABSTRACT / INTRODUCTION**

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

Charles Dickens, *The Pickwick Club*

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

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

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<sup>1</sup> My thanks to Omri Yadlin, Menachem Mautner, Sandy Kedar, Yoram Shachar and Eyal Simchoni for their remarks on earlier versions of this paper, to Pnina Lahav for her critical reading of this chapter and to Adam Hofri and Gila Haimovic for their assistance in translating and editing the chapter.

What faced Elon was a reality that did not deal with marginal practice and few citizens, but with a legal and social phenomenon of wide scope, that led to the arrest of almost 24,000 debtors in the year preceding his decision. How is it possible to explain the enormous gap that Elon found between the Minister's 1949 directive and the legal framework and practice of the Execution of Judgment offices, in 1993?

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

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

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

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

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

The next section will address the meteoric rise of imprisonment for debt as a central means of execution of judgments between the enactment of the Execution Law in 1967 and 1992. The two final sections will address the 1993 *Perach* decision, which in absolute opposition to this process further limited imprisonment for debt considerably and the lawyers' reaction to this decision, which aimed at the return to normalcy - imprisonment - and resulted in two important amendments in 1994 and 1999.

The chapter will conclude with a discussion, on a number of levels, of the fundamental question: why hasn't imprisonment for debt been abolished in Israel?

I would like to make clear, at the very start, my personal conception of the imprisonment for debt issue, a conception which doubtless effected the narrative below. From a social, economic, and legal point of view, I hold that imprisonment for debt should be abolished in Israel, for reasons which this chapter will clarify. One last note before I begin. This chapter centers on the issue of the imprisonment of debtors for not paying a monetary debt. It does not deal with the imprisonment of debtors for the non-payment of alimony, which is a separate issue with special, family and gender-related characteristics, nor with the issues of non-monetary obligations, commonly addressed in discussions of contempt of court, or of debts to the State (fines, taxes, etc.). The discussion of other means and proceedings of execution of judgment, as well as of bankruptcy proceedings, does not purport to be exhaustive.