PPA 4463/94

**Avi Hanania Golan**

**v**

**Prisons Service**

The Supreme Court

[25 August 1996]

*Before Justices E. Mazza, M. Cheshin, D. Dorner*

Appeal with leave on the judgment of the Tel-Aviv–Jaffa District Court (Justice A. Even-Ari) on 15 July 1994 in MP 142/94.

**Facts:** The appellant asked the respondent for permission to publish articles about prison life in a local newspaper. The respondent refused. The appellant filed a petition in the District Court against this refusal, but his petition was rejected. Leave was given to appeal the District Court's decision to the Supreme Court.

**Held:** (Majority opinion — Justices E. Mazza, D. Dorner) The respondent has a duty to uphold human rights, and it must make reasonable efforts and devote reasonable resources to do this.

(Minority opinion — Justice M. Cheshin) The respondent's argument that it is not its task to censor newspaper articles is reasonable, and in view of the character of the appellant and his behaviour in the past, the respondent cannot reasonably be expected to rely on the appellant's undertaking to restrict himself to writing only about himself. The likelihood that allowing the appellant his desire will lead to infractions of prison discipline is not remote. In view of the very difficult task faced by the prison authorities, they should be allowed a broad discretion in deciding questions of prison order and discipline.

Appeal allowed by majority opinion, Justice M. Cheshin dissenting.

**Basic Laws cited:**

Basic Law: Freedom of Occupation, s. 4.

Basic Law: Human Dignity and Liberty, ss. 2, 4, 8.

**Statutes cited:**

Knesset Elections Law (Amendment no. 17), 5746-1986.

Prisons Ordinance [New Version], 5732-1971, ss. 1, 42, 43, 47, 56, 56(41), 62A, 71-72F, 131A, 132.

**Regulations cited:**

Prisons Regulations, 5738-1978, rr. 18, 19, 20, 24A, 24B, 25-34, 33, 49, chap. 5.

**Israeli Supreme Court cases cited:**

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

[2] CrimApp 3734/92 *State of Israel v. Azazmi* [1992] IsrSC 46(5) 72.

[3] HCJ 355/79 *Katlan v. Prisons Service* [1980] IsrSC 34(3) 294.

[4] PPA 4/82 *State of Israel v. Tamir* [1983] IsrSC 37(3) 201.

[5] HCJ 114/86 *Weil v. State of Israel* [1987] IsrSC 41(3) 477.

[6] HCJ 221/80 *Darwish v. Prisons Service* [1981] IsrSC 35(1) 536.

[7] CA 5942/92 *A v. B* [1994] IsrSC 48(3) 837.

[8] CrimApp 7223/95 — unreported.

[9] HCJ 540/84 *Yosef v. Governor of Central Prison in Judaea and Samaria* [1986] IsrSC 40(1) 567.

[10] HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [1953] IsrSC 7 871; IsrSJ 1 90.

[11] CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [1993] IsrSC 47(5) 189.

[12] HCJ 243/62 *Israel Filming Studios Ltd v. Geri* [1962] IsrSC 16 2407l IsrSJ 4 208.

[13] CA 723/74 *HaAretz Newspaper Publishing Ltd v. Israel Electric Company Ltd* [1977] IsrSC 31(2) 281; IsrSJ 5 30.

[14] HCJ 2481/93 *Dayan v. Wilk, Jerusalem District Commissioner* [1994] IsrSC 48(2) 456; [1992-4] IsrLR 324.

[15] HCJ 6218/93 *Cohen v. Israel Bar Association* [1995] IsrSC 49(2) 529.

[16] HCJ 215/59 *Geller v. Minister of Interior* [1959] IsrSC 13 1703.

[17] HCJ 144/74 *Livneh v. Prisons Service* [1974] IsrSC 28(2) 686.

[18] HCJ 543/76 *Frankel v. Prisons Service* [1978] IsrSC 32(2) 207.

[19] HCJ 96/80 *Almalabi v. Prisons Service* [1980] IsrSC 34(3) 25.

[20] HCJ 157/75 — unreported.

[21] HCJ 454/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; [1995-6] IsrLR **שגיאה ! מקור ההפניה לא נמצא.שגיאה ! הסימניה אינה מוגדרת.**.

[22] CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

[23] HCJ 881/78 *Mutzlach v. Damon Prison Commander* [1979] IsrSC 33(1) 139.

[24] CrimFH 2316/95 *Ganimat v. State of Israel* [1995] IsrSC 49(4) 589.

[25] HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [1994] IsrSC 48(5) 749; [1992-4] IsrLR 478.

[26] HCJ 987/94 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [1994] IsrSC 48(5) 412.

[27] HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [1995] IsrSC 49(5) 1.

[28] HCJ 4712/96 *Meretz – Israel Democratic Party v. Jerusalem District Commissioner of Police* [1996] IsrSC 50(2) 822.

[29] HCJ 453/94 *Israel Women's Network v. Government of Israel* [1994] IsrSC 48(5) 501; [1992-4] IsrLR 425.

[30] HCJ 7111/95 *Local Government Centre v. The Knesset* [1996] IsrSC 50(3) 485.

[31] HCJ 606/93 *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [1994] IsrSC 48(2) 1.

[32] HCJ 5118/95 *Meir Simon Advertising, Marketing and Public Relations Ltd v. Second Television and Radio Authority* [1995] IsrSC 49(5) 751.

[33] HCJ 399/95 *Kahana v. Broadcasting Authority Management Board* [1987] IsrSC 41(3) 255.

**Magistrates Court cases cited:**

[34] CrimC (TA) 7036/92 — unreported.

**American cases cited:**

[35] *Procunier v. Martinez* 416 U.S. 396 (1974).

[36] *Coffin v. Reichard* 143 F. 2d 443 (1944).

[37] *Brown v. Peyton* 437 F. 2d 1228 (1971).

[38] *Pell v. Procunier* 417 U.S. 817 (1974).

[39] *Jones v. North Carolina Prisoners' Union* 433 U.S. 119 (1977).

[40] *Bell v. Wolfish* 441 U.S. 520 (1979).

[41] *Turner v. Safley* 482 U.S. 78 (1987).

[42] *Thornburgh v. Abbot* 109 S. Ct. 1874 (1989).

[43] *Milwaukee Pub. Co. v. Burleson* 255 U.S. 407 (1921).

[44] *Nolan v. Fitzpatrick* 451 F. 2d 545(1971).

**Jewish law sources cited:**
[45] II Kings 4, 8-10.

For the appellant — D. Yakir.
For the respondent — Y. Shefer, Senior Assistant to the State Attorney.

## JUDGMENT

**Justice E. Mazza**

This is an appeal with leave on the judgment of the Tel-Aviv-Jaffa District Court (Justice A. Even-Ari), in which a prisoner's petition filed by the appellant (a prisoner at Ashmoret Prison) against the refusal of the respondent (the Prisons Service) to allow him to publish a personal column or articles written by him in the local newspaper *Mid-Netanya* was denied.

*Basic background*

2. The appellant is a prisoner currently serving terms of imprisonment to which he was sentenced after he was convicted in two trials: in the first trial the appellant was convicted of the offences of fraud, forgery, impersonation and escape from lawful custody. For these offences, he was sentenced (at the end of 1988) to six years imprisonment and was also given a suspended sentence. This was the fourth substantial term of imprisonment to which the appellant was sentenced; he has a string of past convictions for many offences of the same kind. After the appellant began to serve this term of imprisonment, the appellant escaped from lawful custody, and while he was outside the prison, he proceeded to commit additional offences of fraud. When he was caught, he was brought to trial once again and was convicted of escaping from lawful custody and of the other offences that he committed during the period of the escape. For his conviction on these offences, he was sentenced to an additional term of imprisonment and the suspended sentences were activated. The total term of imprisonment that the appellant was sentenced to serve, under the two sentences, amounts to ten and a half years, starting on 18 November 1988. The appellant served his first year of imprisonment at Ashkelon Prison. Afterwards, he was transferred to Ashmoret Prison, and since then he has been imprisoned there. Because of activity in which he was involved in the past, the appellant was classified as a

prisoner in need of maximum protection. Therefore he has been imprisoned, throughout his imprisonment, with a few prisoners of this type, in conditions of isolation from all the ordinary prisoners.

3. In 1989, while he was a prisoner at Ashkelon Prison, the appellant sent several articles that he wrote to a local newspaper *Mikol Makom*, which is published in Ashdod. In these he described prison life. The articles were published, and the owner of the local paper (the management of the newspaper *Yediot Aharonot*) even made a payment to the appellant as the author. In January 1994, the appellant asked the respondent to allow him to publish in the local newspaper *Mid-Netanya* a personal column, or a series of articles, about life at Ashmoret Prison. His request was refused. The appellant filed a petition against the refusal in the District Court, under section 62A of the Prisons Ordinance [New Version], 5732-1971. But the District Court saw no reason to intervene in the respondent's decision, and it denied the petition. Now we have before us an appeal, which was filed after leave was duly given.

*Disputes as to questions of fact*

4. Two of the appellant's contentions, in his petition before the District Court, raised a factual dispute. The District Court held that the appellant did not prove either of the two contentions, but the court did not ascribe much importance to this finding; in any event, it is clear that it was not because of the appellant's failure to prove either of the said contentions that the court decided to deny his petition. I think it advisable to remove these disputes from my path at the outset, since in my opinion too they are unimportant for the purpose of the decision.

5. The first dispute concerned the question whether, for the publication of his articles in the local newspaper *Mikol Makom* (while he was still a prisoner at Ashkelon Prison), the appellant obtained permission from the respondent. The appellant argued that Mr Johnny Tester, who was spokesman of the Prisons Service at the relevant time, gave him permission to send articles for publication in this local newspaper. However, shortly afterwards, without any reason being given for this, the permission was revoked, and then he was compelled to stop sending additional articles. The respondent, which denies this contention, based its position on the fact that in the appellant's personal file at the Prisons Service no documentation was found on the subject of granting the alleged permission. The Court gave the appellant time to file an affidavit in support of his aforesaid contention, but notwithstanding the time

that was given him for this purpose, the appellant did not file any affidavit. The District Court concluded from this omission that the appellant had not proved his contention.

I wonder whether, in the circumstances of the case, the decision with regard to this contention should have been based on the appellant's failure to file an affidavit in support thereof. Did not the appellant name the person at the Prisons Service who, according to him, gave him (and later revoked) the permission; I do not understand what prevented the respondent from ascertaining what this person had to say on the matter. But for the purpose of the proceedings, I will assume that the trial court was correct in its conclusion that the appellant did not prove his contention. What does this imply? In circumstances different from those in our case, I would indeed have inclined to attach some importance to this conclusion. Admittedly, as a rule it is correct to presume that a prisoner, who takes the law into his own hands and acts without permission from the Prisons Service, in a matter which, under the law applying to prisoners, requires permission to be granted, is likely to be found unworthy of receiving the permission, even if according to the ordinary criteria he ought to have been given the permission he seeks. But this is not the case with regard to the appellant's request. The respondent's refusal to give the appellant the permission he recently requested was not based on the reason that several years ago (in 1989) the appellant took the law into his own hands, in that he sent articles for publication in the local newspaper *Mikol Makom* without obtaining permission. The respondent did not even claim that the publication of those articles escaped its attention. In any event, from correspondence between the appellant and the editor of local newspaper *Mikol Makom*, which was filed in the District Court, it appears that when the appellant was told, by a representative of the respondent, that he was not entitled to send additional articles for publication in the local newspaper, the appellant immediately desisted.

6. The second factual dispute between the parties concerns the question whether the local newspaper *Mid-Netanya* has any interest in publishing articles written by the appellant. The appellant's contention was that recently, before he submitted his request to the respondent, he enquired and found that the local newspaper would be prepared to publish his articles. But the respondent claimed that it had not received any request from any newspaper that was supposedly prepared to publish articles written by the appellant. To prove his contention, the appellant summoned, as a witness on his behalf, the representative of the editor of the local newspaper. This journalist testified

that she did not know the appellant. Notwithstanding, she confirmed that about three months earlier the appellant wrote to her with an offer of publishing articles about prison life. When she asked the editor of the newspaper as to her position, the editor advised her to interview the appellant, for the purpose of finding out about him before making a decision whether to publish his articles. According to her, she asked the director of the prison to allow her to interview the appellant. First she was told that 'the matter was difficult' and afterwards that the appellant had filed a petition and that, therefore, she should wait. Finally she was summoned to the court to testify, before she succeeded in holding the desired interview. On the main issue, she said that the editor of the newspaper treats the appellant like any new reporter offering material for publication.

*Prima facie* this testimony implies that the appellant did not sufficiently prove his contention that the editor of the local newspaper *Mid-Netanya* was indeed prepared to publish his articles. However, an affidavit filed by the respondent, given by its spokesman, obscured the issue. The affidavit stated that this journalist (the witness for the appellant) had already met the appellant in the prison, without stating in the affidavit when she visited, and whether this was before or after her appearance in the court. The affidavit also alleged against the witness that she received permission to visit the appellant and that she used the visit to interview him, without obtaining permission for this as required by the procedure regulating the conditions of meetings between journalists and prisoners. But whichever is the case, the question in dispute is unimportant. The decision as to the right of the appellant to send his writings for publication in a newspaper does not depend at all on whether the newspaper is interested or prepared to publish the material; moreover, it has certainly been proved that the local newspaper under discussion was prepared in principle to examine and decide whether the appellant's articles merited publication.

*The main disputes and the decision in the District Court*

7. In his petition to the District Court, the appellant mainly based his position on the right of freedom of speech. The appellant argued that this basic right is shared also by someone who is a prisoner, and even he (while he is a prisoner) is entitled to realize it. In addition, the appellant relied also on his right of freedom of occupation. In this respect, he argued that his imprisonment in protective custody denies him the opportunity, which is available to other prisoners, of working and taking part in rehabilitation programmes. According to him, the possibility of writing and publishing his

articles will improve his condition from various perspectives. In this way, he can give expression to his feelings and escape from the anguish of the remoteness and the isolation. Moreover, with the income that will be paid to him in return for his articles he will also be able to improve somewhat his standard of living in the prison.

8. The respondent, in its response to the petition, did not expressly deny the appellant's contention that the right of freedom of speech is shared, in principle, also by prisoners. Notwithstanding, it based its case on its stated policy that as a rule contact should not be allowed between prisoners and journalists. In its view, it is possible to deviate from this rule only in rare cases where there is a manifest public interest in permitting such contact, or when the contact occurs within the framework of press tours initiated by the Prisons Service. On the question whether the appellant has the right of freedom of occupation, the respondent chose to address the matter on a specific level only. The appellant, it argued, cannot be allowed to engage in journalism. Such an occupation, which involves an external employer, can be allowed only within the framework of the rehabilitation plans designed for prisoners. The appellant, as a prisoner requiring protection, does not meet the criteria that determine the degree of suitability for rehabilitation; it necessarily follows that it is impossible to allow him to engage in work, apart from work carried out in full within the prison.

The respondent further argued that the appellant is a persistent offender and therefore cannot be trusted to give a faithful account in his articles of what happens inside the prison. In this context, it was stated that on the two occasions when he succeeded in making contact with journalists, the appellant abused these contacts. First, in 1987, after he escaped from a previous term of imprisonment, the appellant was interviewed by the newspaper *Yediot Aharonot*. In this interview, which was published in the newspaper under the headline 'Gangsters run the prison', the appellant gave false descriptions about what allegedly happened in the prison. On another occasion, the appellant telephoned various journalists from the prison and gave them unfounded reports about the preferential treatment of the Prisons Service authorities to the prisoner Ahmed Yassin; the appellant did this even though he did not know this prisoner at all and never met him. As a result of the report, many journalists contacted the spokesman of the Prisons Service and the governor of the relevant prison and asked them to comment on the information in their possession. As the Prisons Service discovered afterwards, it was the appellant who made contact with the journalists and gave them the

false report. In view of this experience, the respondent argued, there are grounds for concern that the appellant — wittingly or even unwittingly — will cause harm by his articles to the Prisons Service, the safety of other prisoners and also his own safety, and the reputation of prison warders and other staff. Moreover, giving the appellant a higher profile, because of his publications in the media, will give him a special status vis-à-vis the prison warders and other prison staff. These, fearing that they will be harmed by him, will be deterred from carrying out their duties and exercising their authority towards him. The authority of those in charge will be diminished, discipline will become lax and the running of the prison will be disrupted. Furthermore, the appellant, who is classified as a prisoner in need of protection, is guarded carefully. By becoming prominent among the prisoners, as a result of his access to publications in the media, he may increase the degree of personal risk to which he is exposed.

The appellant tried to calm the respondent's fears. He therefore gave notice that he undertook not to write about anyone other than himself, but to speak in his articles only about his personal life in the prison. He also declared that he was aware and agreed that all his articles would be scrutinized by the respondent before they were sent to the editor of the newspaper, and that the respondent would be entitled to disqualify any article whose content, in his opinion, might disrupt the running of the prison, the safety of the prison warders or the prisoners or the reputation of any of them. The respondent's reply to this was that the task of examining articles was outside the scope of his duties, and that doing this was, from his viewpoint, totally impossible.

9. In deciding the petition on its merits, the learned judge considered two conflicting interests: the right of the appellant, as a prisoner, to freedom of speech, against the need to maintain order and security in the prison. The trial judge did not address the broader issue, namely whether the stated policy of the respondent in refusing prisoners contact with the media and speaking to the media, is a policy that reflects a proper balance between the two aforesaid interests. For the judge it was sufficient to determine that in the case of the appellant there was nothing wrong in the respondent's decision. It would appear that the judge thought (although he did not say this expressly) that it was not reasonable to require the respondent to check the appellant's articles in order to ascertain that their content did not arouse any fear of harm to the running of the prison, discipline, security and additional values. This led, so it seems, to the finding that 'giving [the appellant] the right *of free access to*

*the media* would allow him to acquire considerable power' (emphasis supplied). Later, referring to the judgment of the Magistrates' Court in the most recent of the appellant's trials, in which the appellant's uncontrollable criminal inclination was described, the judge also found that 'giving a person like the [appellant] the opportunity of acquiring such power will have serious ramifications on the running of the prison'. In the circumstances of the case — the judge concluded — the decision not to allow the appellant to have contact with the newspapers is a reasonable decision.

*The arguments in the appeal*

10. Learned counsel for the appellant argued before us that the respondent's refusal to permit the appellant to publish his writings in a local newspaper that is prepared to publish the work is a violation of the appellant's freedom of speech and his freedom of occupation, and it violates his human dignity. These basic liberties, which are enshrined in the Basic Law: Human Dignity and Liberty, belong to the appellant even when he is a prisoner. Restricting them is permitted only to the extent that is required by the penalty of imprisonment, or according to the accepted rules for imposing such restrictions. The freedom of speech of a prisoner, like the freedom of speech of a free citizen, can be restricted only when there is an almost certain danger of real harm to public welfare or security. In its all-embracing fear that the appellant — wittingly or unwittingly — will publish remarks that will harm the running of the prison and the welfare of the prison warders and the prisoners, the respondent does not show an almost certain danger of such harm, and it does not even comply with less strict tests, such as a real fear or a reasonable possibility of such harm. The respondent's desire to prevent the publication of criticism of the Prisons Service, or prison conditions, does not justify imposing a prior prohibition of any speech on these subjects. Even the concern for harm to the reputation of a prison warder, or a prisoner, does not justify imposing such a prohibition. This is particularly so in our case, in view of the appellant's consent to restrict his writings solely to his impressions and experiences of prison life; his undertaking not to refer in his articles, personally, to any of the prison staff or prisoners; and his consent, *ab initio*, that the respondent may, at its sole discretion, not send to their destination any articles that breach any of these conditions. Counsel for the appellant also argued that, in the circumstances of the case, the appellant should be allowed to exercise also his right of freedom of occupation. Admittedly, as a rule, it is true that the imprisonment of a person prevents him from exercising his right to this freedom in the ordinary sense. However,

the appellant merely asks to be allowed to send his writings for publication, whereas the work of writing will be carried out inside the prison. Therefore it is argued that the fact that the appellant is a prisoner requiring protection, or unsuited for rehabilitation programmes that are the only framework in which prisoners are able to work outside the prison, should not have any influence on the considerations leading to the decision on his request.

11. Counsel for the respondent argued that a prison sentence not only denies a person his freedom of movement and thereby restricts his ability to realize his right to personal liberty, but it also prevents him from being able to exercise other basic liberties that he has. Somewhat differently from its position before the trial court, the respondent conceded before us that the fact of imprisonment, in itself, does not deprive the prisoner of those basic liberties that he has, when the imprisonment does not necessitate his being deprived of them. Notwithstanding, it argued that the ability of a prisoner to realize these and other liberties should be restricted to the degree required in order to enable the respondent to carry out the duties imposed on it vis-à-vis the public: to protect the safety and security of all prisoners, to maintain order, discipline and security in the prisons; and to ensure the welfare and security of the staff and prison warders serving in the prisons. The appellant's desire to publish articles in a newspaper is indeed based on his right to freedom of speech, but recognizing the appellant's right to do this involves a danger of harm to the running of the prisons, the safety and security of other prisoners and the safety and security of staff and prison warders. Although the respondent recognizes the right of the appellant to express in writing his impressions from his stay in the prison, it regards it as its duty to prevent him from publishing these. Granting the appellant's request will give him, vis-à-vis both prisoners and warders, a status of a 'journalist', and the great power embodied in such a special status may disrupt the discipline that must be maintained in the prison. There is also a fear that the appellant will write and publish things that may incite the prison population, cause disputes between prisoners, or endanger the safety or the reputation of prison warders and other prison staff.

Counsel for the respondent further argues that the appellant may exercise his right to correspond with addressees outside the prison only within the framework of the arrangements set out in the special law for the correspondence of prisoners — in other words, within the framework of the stipulated quota of letters to which he is entitled under section 47 of the Prisons Ordinance [New Version] (i.e., one every two months), the appellant

may send letters also to various newspapers. The appellant is also entitled, like every prisoner, to put his claims in writing (against prison conditions) in applying to various official bodies: the courts, members of the Knesset and the State Comptroller. The respondent does concede that it is no longer the practice to enforce the permitted quota of prisoners' letters, and that in practice they are permitted to write more than the quota (something which under regulation 19 of the Prisons Regulations, 5738-1978, constitutes one of the benefits that the director of the prison is authorized to allow some or all prisoners). But with regard to the appellant, who wishes to publish articles about prison life, the respondent intends to exercise its authority to the full. Under regulation 33 of the Prisons Regulations, the respondent is authorized to open and examine every item of mail sent by a prisoner and to prevent it being sent to its destination if it is found to contain information that is likely to harm prison security or discipline, or that makes it possible to identify a person, whether a prisoner or a warder, in circumstances in which such information may harm that person or the running of the prison. The respondent says that it is its intention to examine the appellant's mail and it intends not to allow the sending of letters (or articles to newspapers) that include harmful information. Counsel for the respondent did clarify in his arguments that the respondent's fears were aroused by the intention of the appellant to send articles to the newspapers about prison life; in other words, had the appellant asked for permission to send articles that he wrote to the newspaper on other subjects, it is most likely that the respondent would have seen no reason to deny him this.

The respondent further argues that even the appellant's reliance on freedom of occupation cannot give him a right to receive the desired permit. The violation of freedom of occupation is necessitated by his very imprisonment and the conditions of his imprisonment. As a prisoner, the appellant can ask to be employed, but only within the framework of the accepted procedures for the employment of prisoners of his category. Publishing a regular column or articles in a newspaper, in return for payment, constitutes, *de facto*, working for payment outside the prison. The appellant is not entitled to claim for himself such a freedom of occupation; what is more, the appellant does not meet the suitability requirements for rehabilitation programmes, and it is only within the framework of these that prisoners may be allowed to work outside the prison.

*A prisoner's human rights*

12. It is established law in Israel that basic human rights 'survive' even inside the prison and are conferred on a prisoner (as well as a person under arrest) even inside his prison cell. The exceptions to this rule are only the right of the prisoner to freedom of movement, which the prisoner is denied by virtue of his imprisonment, and also restrictions imposed on his ability to realize a part of his other rights — some restrictions necessitated by the loss of his personal freedom and other restrictions based on an express provision of law. As Justice Elon said in one case:

> 'It is a major rule of ours that each one of a person's human rights, as a human being, is retained by him even when he is under arrest or imprisoned, and the fact of imprisonment alone cannot deprive him of any right unless this is necessitated by, and derives from, the loss of his freedom of movement, or when there is an express provision of law to this effect…' (HCJ 337/84 *Hukma v. Minister of Interior* [1], at p. 832).

See also the decision in CrimApp 3734/94 *State of Israel v. Azazmi* [2], at p. 81, also given by Vice-President Elon.

The basic assumption is that the human rights 'package' of a prisoner includes all those rights and liberties conferred on every citizen and resident, except for the freedom of movement of which he is deprived as a result of the imprisonment. Notwithstanding, it is clear that the imprisonment also suspends the prisoner's ability to exercise some of his other liberties. With regard to some of these, where the ability to exercise them depends on the freedom of movement, the suspension of the right is 'inherent' to the imprisonment. Other liberties that can be exercised (at least in part) irrespective of freedom of movement and that can be realized even in a prison cell (or from it) continue to be enjoyed by the prisoner even when he is in the prison. If the authorities wish to suspend, or to restrict, his ability to exercise even liberties of this kind, it is required to show that its power to do so is enshrined in a specific provision of law. Take the basic human right not to suffer physical harm without one's consent, which was discussed by Justice Barak in HCJ 355/79 *Katlan v. Prisons Service* [3], at p. 298:

> 'The right to physical integrity and human dignity is also a right of a person under arrest and a prisoner. Prison walls do not separate the prisoner from human dignity. Prison life naturally requires a violation of many liberties enjoyed by the free man… but prison life does not require someone under arrest to be

> denied his right to physical integrity and protection against a violation of his human dignity. A person under arrest is denied freedom; he is not deprived of his humanity. Performing an enema on a person under arrest without his consent and not for medical reasons violates his physical integrity, tramples his privacy and violates his dignity as a human being… therefore, in order that the prison authorities may perform an enema without the consent of the arrested person, and thereby justify the criminal offence and civil tort of assault, they must point to a provision of statute that allows them to do this.'

But the existence of a power is insufficient. As with any administrative decision, the decision of the authority in charge of prisoners must be reasonable and based on relevant considerations and logical reasons. In other words, even when an express provision of statute gives the authority to violate a human right of a prisoner, the authority may not make use of its power before it examines the matter and is persuaded that, in the circumstances of the particular case, there are real reasons that justify depriving a prisoner of his right or restricting it. Take a person's human right to choose the type of medical treatment that the person thinks appropriate. This is a natural right that derives from the basic human right of a person to protect his physical and mental integrity and well-being. A person is not denied this right as a result of imprisonment; a violation of this right by the authority in charge of the prisons is possible and permissible only on the basis of an express provision of law and the existence of reasons that justify the violation. As Justice Elon said in PPA 4/82 *State of Israel v. Tamir* [4], at p. 206:

> 'This basic right of a person to his physical and mental integrity and well-being and to choose the medical treatment that he thinks appropriate for preserving them is retained by a person even when he is under arrest or in prison, and the mere fact of imprisonment does not deprive him of any right unless this is necessitated by the actual loss of his freedom of movement, or when there is an express provision of law to this effect. Consequently, when the prison authorities wish to deny the person under arrest or the prisoner of this right, they have the burden of proving and justifying that denying this right *is for good reasons and is based on law*' (emphasis supplied).

It is not superfluous to emphasize that suspending a prisoner's ability to exercise any of his other liberties (except for his right to freedom of movement) is always relative, not absolute. This rule applies not only to those liberties that the prisoner can exercise without necessarily having freedom of movement, but also to those liberties that he can exercise only with this freedom. What is the significance of a prisoner also retaining a right of the latter kind? The significance is that the prisoner has an opportunity to argue that, within the framework of the restrictions required by the imprisonment, he should be allowed to exercise, if only in part, this right too. As an example, let us again consider the right of a person to choose the type of medical treatment he thinks appropriate. Even a prisoner has this right, and by virtue thereof he may prefer to receive medical advice and treatment other than those offered to him by the Prisons Service. But the imprisonment suspends his ability to realize this right, since he does not have freedom of movement. It follows that in practice, and as a rule, the prisoner will indeed be compelled to be satisfied with the medical treatment given to prisoners in the prison. However, suspending his ability to exercise the right of choice that he has is not absolute, but relative; in appropriate circumstances, his request, that he be allowed to exercise his right, is likely to be treated sympathetically. This is the case, for example, when the treatment requested by him is of a type that can be given to the prisoner even inside the prison, and there are no objective reasons that justify refusing him this (see *State of Israel v. Tamir* [4], at p. 213).

13. In determining the extent of the protection given to the human rights of a prisoner, we must take into account, in addition to the considerations concerning general or special interests, also considerations concerning the imprisonment and the duties imposed on the Prisons Service: the needs of guarding all the prisoners; maintaining order and discipline in the prisons; protecting the rights and safety of other prisoners; the education and rehabilitation needs of prisoners; protecting the safety and the rights of staff and prison warders in charge of running the prisons, and protecting the safety of the prisoners imprisoned in them. The extent of protection of a prisoner's human rights derives from the necessary balance between the right and other interests, of the individual or the public, which in the circumstances of the case must be taken into account. The premise is that the right deserves protection and should be respected. Denying the right, restricting it or violating it are permitted only on the basis of objective reasons that have a basis in law. 'The greater the right that is violated, the greater the reasons

required to justify this violation' (*per* Justice Elon in *State of Israel v. Tamir* [4], at p. 212). With regard to several basic human needs, which prisoners require, the tendency is not to permit any violation, and these needs include 'not only the actual right of the prisoner to food, drink and sleep, but also minimal civilized human arrangements as to the *manner* of providing these needs' (*per* Justice Elon in HCJ 114/86 *Weil v. State of Israel* [5], at p. 492); see also what was said in *State of Israel v. Azazmi* [2], at p. 82). Everyone agrees that 'a person in Israel, who has been imprisoned (or arrested lawfully), has the right to be imprisoned in conditions that allow civilized human life' (*per* Vice-President H. Cohn in HCJ 221/80 *Darwish v. Prisons Service* [6], at p. 538); only 'very serious reasons' (in the words of Justice Y. Kahan, *ibid.*, at p. 542), such as the need to prevent a real danger to human life, may justify any deviation from the right to prison conditions that are considered essential. This is what happened in *Darwish v. Prisons Service* [6]: the decision of the Prisons Service that security prisoners should not be given beds but only improved mattresses was explained on account of the fear that they would dismantle the beds and use parts of them to harm warders and other prisoners. When it was ascertained that the fear was a real one and was based on past experience, the majority opinion saw no cause to intervene in the correctness of the decision. Notwithstanding, they ordered an investigation to be made for the purpose of 'improving, in so far as possible, the quality of the sleeping arrangements of those prisoners whom the Prisons Service was compelled to deprive of their beds' (*per* Justice Elon, *ibid.*, at p. 546).

It follows that in determining the extent of the protection given to the human rights of the prisoner, the nature of the violated right is important, and 'classifying the right according to the aforesaid criterion depends, to a considerable extent, on the attitude of society as to the character and fundamental nature of that right' (*per* Justice Elon in *Weil v. State of Israel* [5], at p. 492). The premise is that a prisoner is entitled to the protection of all of his human rights; a violation of a prisoner's human right, by the authority in charge of the prison, is lawful only if it complies with the authority test and the test of the proper balance between it and the legitimate interests entrusted to the authority. However, the more important and central the right being violated, the greater the weight it will be given within the framework of the balance between it and the conflicting interests of the authority. This approach has always guided our decisions. Today, after human rights in Israel have been enshrined in Basic Laws that have a super-legislative

constitutional status, we have a greater duty to ensure, even more than in the past, that the human rights of prisoners are respected. Recognition of the constitutional status of human rights requires their practical application in their living conditions. Recognition of their role in ensuring this must guide all the organs of government. The courts have, in this context, a central role. As President Shamgar said in CA 5942/92 *A v. B* [7], at p. 842:

> 'The constitutional message does not focus on the declaration of the existence of a basic right, but on the essence, degree and content of the realization of the right *de facto*.
>
> Human dignity will not be guaranteed by speaking of it but by giving a real and tangible expression to its protection. In this, an important role is played by the courts that in their decisions must ensure *de facto* protection of human dignity, of equality, which is one of the elements of human dignity, and the protection of those persons who are unable to protect their dignity without the help of the courts.'

We must remember and recall that the human dignity of a prisoner is like the dignity of every person. Imprisonment violates a prisoner's liberty, but it must not be allowed to violate his human dignity. It is a basic right of a prisoner that his dignity should not be harmed and all the organs of government have a duty of respecting this right and protecting it from violation (see CrimApp 7223/95 [8], *per* Justice Or). Moreover, a violation of a prisoner's human dignity does not merely harm the prisoner but also the image of society. Humane treatment of prisoners is a part of a moral-humanitarian norm that a democratic State is liable to uphold. A State that violates the dignity of its prisoners breaches the duty that it has to all of its citizens and residents to respect basic human rights. The remarks of Justice Barak in HCJ 540/84 *Yosef v. Governor of Central Prison in Judaea and Samaria* [9] are apt in this regard:

> 'Indeed, imprisonment by its very nature necessitates a loss of freedom, but it cannot by its very nature justify a violation of human dignity. It is possible to have imprisonment that maintains the human dignity of the prisoner. The prison walls should not separate the prisoner from humanity… a prison may not become a concentration camp, and a prisoner's cell may not become a cage. Notwithstanding all the difficulties involved, a civilized society must preserve a minimum human standard for

> prison conditions. It would be inhuman of us not to ensure a human standard for prisoners in our society. The objectives of criminal sentences cannot be achieved by violating the dignity and humanity of the prisoner.'

*Freedom of speech of a prisoner*

14. Freedom of speech is numbered among the basic liberties in Israel. Recognition of the status of freedom of speech as a basic right was established in Israel long before the enactment of the Basic Law: Human Dignity and Liberty. In HCJ 73/53 *Kol HaAm Co. Ltd v. Minister of Interior* [10], Justice Agranat gave freedom of speech the honorary title of a 'supreme right' (*ibid.*, at p. 878 {97}). Since this important ruling was given, the 'freedom of speech is an integral part of our legal ethos' (*per* Justice Barak in CA 105/92 *Re'em Contracting Engineers Ltd v. Upper Nazareth Municipality* [11], at p. 201). The source from which this recognition sprang was case-law: it is one of the 'basic rights that are "unwritten", but which derive directly from the character of our State as a democratic State that aspires to freedom' (*per* Justice Landau in HCJ 243/62 *Israel Filming Studios Ltd v. Geri* [12], at p. 2415 {216}). Later, however, Justice Shamgar emphasized that the character of freedom of speech 'as one of the constitutional basic rights gives it a supreme status in law' (CA 723/74 *HaAretz Newspaper Publishing Ltd v. Israel Electric Co. Ltd* [13], at p. 295 {243}). The Basic Law: Human Dignity and Liberty enshrined the case-law recognition of the constitutional status of freedom of speech. An express opinion to this effect was stated by Vice-President Barak in HCJ 2481/93 *Dayan v. Wilk, Jerusalem District Commissioner* [14] (see his remarks at p. 468 {336}); the same, I think, can be seen in the opinion of President Shamgar in HCJ 6218/93 *Cohen v. Israel Bar Association* [15]. This, with respect, is also my opinion. Admittedly, the Basic Law: Human Dignity and Liberty does not mention freedom of speech, nor does it define it expressly as a basic right. But this is immaterial: even without an express provision, freedom of speech is included in human dignity, according to the meaning thereof in sections 2 and 4 of the Basic Law. For what is human dignity without the basic liberty of an individual to hear the speech of others and to utter his own speech; to develop his personality, to formulate his outlook on life and realize himself?

15. The constitutional basic right of freedom of speech is not taken away from someone when he is imprisoned; a prisoner has it even in his prison cell. As Justice Marshall rightly said (in *Procunier v. Martinez* (1974) [35], at p. 422): 'A prisoner does not shed such basic First Amendment rights at the

prison gate'. Notwithstanding, it is clear that imprisonment very significantly restricts the ability of the prisoner to exercise his freedom of speech, and the freedom of speech given to him is, in practice, much more restricted than the freedom of speech of a free citizen. Some of the restrictions on a prisoner's freedom of speech are 'inherent' to the imprisonment. Exercising the right of freedom of speech is largely dependent on freedom of movement. Imprisonment distances the prisoner from the society in which he lived. Thus, he is deprived of the possibility of hearing and being heard by those persons or circles with whom he wishes to be in contact in order to exercise his freedom of speech. As a result of the imprisonment, he is also deprived of additional avenues of expression which he could have chosen and developed had he not been imprisoned. The prisoner has no protection against this restriction of his ability to realize in full his freedom of speech. The imprisonment to which he has been sentenced is intended to achieve sentencing objectives: to protect society from him, to deter him from further criminal acts, to reform him and rehabilitate him, and to deter also potential criminals. His removal from society, which results also in a reduction in the prisoner's ability to realize his right of freedom of speech, is one of the main purposes of the imprisonment; moreover, this distancing is often essential also for achieving its rehabilitative objectives.

But the prisoner's ability to exercise his freedom of speech is subject also to restrictions whose purpose is to further other unique interests, which are concerned with the proper management of the prisons: achieving the purposes of the imprisonment, maintaining security, order and discipline in the prison, protecting the safety of the prisoners and protecting the safety of prison staff and warders, etc.. These interests are also a part of imprisonment and derive from it, and protecting these also requires imposing restrictions on prisoners' freedom of speech. These restrictions, which are the product of a deliberate decision of the authority in charge of managing the prisons, make further inroads on the prisoner's (eroded) freedom of speech; these, to a larger extent than that required by his imprisonment and his loss of freedom of movement, change the normal balance to his detriment. Consider: the 'normal' protection of freedom of speech derives, of course, from the balance between the basic right of the individual to exercise this freedom and interests that are essential to society, such as national security and public safety, and other general and important values that the State is required to protect (see A. Barak, 'Freedom of Speech and its Restrictions', 40 *Hapraklit* (1991-92) 5, 13 *et seq.*); it should also be recalled that, in view of the

importance and centrality of freedom of speech, the tendency is usually only to restrict it on the basis of a probability on the level of 'near certainty' that exercising the right may cause real harm to an essential interest of the State and the public. A violation of freedom of speech, which properly upholds this balance, is considered and accepted as permissible. This rule, which applies to all citizens, applies obviously also to prisoners. But the freedom of speech of prisoners suffers in two more ways; this is because in determining the extent of the protection of the prisoner's right to freedom of speech we take into account — in addition to the normal protected interests — not only those restrictions that are a direct consequence of the actual imprisonment and the loss of freedom of movement, but also restrictions intended to further special interests involved in the proper management of the prisons. The additional restrictions imposed on prisoners' freedom of speech are intended to assist the authorities in charge of the prisons in achieving these goals. The key question, in any decision in this matter, is, what are the proper limits of these restrictions? The question is merely a question of the proper balance between conflicting legitimate interests. How is this balance to be made? It is obvious that applying the norm in this field, as in any other field, is a matter for a decision based on judicial discretion. But what are the criteria for exercising discretion? And when will we say that a restriction on the freedom of speech of a prisoner is 'reasonable' in that it satisfies the balancing test?

*A comparative perspective*

16. The case-law of the United States Supreme Court has formulated, in this matter, several guidelines. Let us consider, in brief, the main points. Some of these may be of assistance to us.

The premise in American law — just like the accepted approach in Israel — is that prisoners, too, enjoy all constitutional rights; if the violation imposed on the constitutional right of a prisoner is unlawful, the prisoner is entitled, like any 'normal' citizen, to protection of his right. This was stated in one case as follows:

> 'A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion' (*Coffin v. Reichard* (1944) [36], at p. 445).

This conceptual approach has guided the courts also with regard to the issue of prisoners' freedom of speech. But in the field of implementation, various approaches have appeared, some stricter and other more lenient. The strict approach has recognized a wide variety of interests that may establish a justification for imposing restrictions on this freedom. A concise summary of such interests, which apparently represents the stricter approach, can be found in the judgment of the Court of Appeals in *Brown v. Peyton* (1971) [37]. In that case, Justice Winter said, at p. 1231:

> '… in the case of prisoners incarcerated under lawful process, there are state interests to justify repression or restriction of First Amendment rights beyond the interests which might justify restrictions upon unincarcerated citizens. Prison officials have to confine dangerous men in unpleasant circumstances. They must protect the public at large, prison employees, and also other prisoners, who are almost totally dependent on the prison for their well being. Prison authorities have a legitimate interest in the rehabilitation of prisoners, and may legitimately restrict freedoms in order to further this interest, where a coherent, consistently-applied program of rehabilitation exists. Furthermore, many restrictions on First Amendment rights are undoubtedly justifiable as part of the punitive regimen of a prison: confinement itself, for example, prevents unlimited communication with the outside world but is permissible in order to punish and deter crime; additional restrictions may be imposed as part of the system of punishing misbehavior within prison. Finally, the state has an interest in reducing the burden and expense of administration. It may, for example, place reasonable restrictions on the number of publications received by each inmate in order to limit the burden of examining incoming materials. But the fact that interests of these sorts frequently arise does not excuse the necessity of a showing that they exist in particular cases.'

In several later cases, the United States Supreme Court examined the question whether regulations or administrative rules, which impose restrictions on prisoners' freedom of speech, pass the test of constitutionality; in a few of these judgments, several criteria for deciding cases were established. In *Procunier v. Martinez* [35], which considered the constitutionality of censoring correspondence between prisoners and parties

outside the prison, two conditions were laid down for permitting the violation: first, that the violation is necessary for furthering an important and substantial interest of the State, which is unrelated to the restriction of the freedom of speech; and second, that the extent of the violation of freedom of speech does not exceed the degree required to further the purpose for which it was imposed. In the words of Justice Powell, at pp. 413-414:

> 'Applying the teachings of our prior decisions to the instant context, we hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or the practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty. But any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.'

The case of *Pell v. Procunier* (1974) [38], which was considered soon after *Procunier v. Martinez* [35], examined the constitutionality of the prohibition imposed on prisoners against being interviewed by the media. In this case, the court recognized the existence of additional grounds for permitting the violation of prisoners' freedom of speech. The rule set out stated that —

> 'A prison inmate retains those First Amendment rights that are not inconsistent with his status as prisoner or with the legitimate penological objectives of the corrections system, and here the restrictions on inmates' free speech rights must be balanced against the State's legitimate interest in confining prisoners to deter crime, to protect society by quarantining criminal offenders for a period during which rehabilitative procedures can be applied, and to maintain the internal security of penal institutions' (*ibid.*, at pp. 817-818).

What can be seen from a comparison of the two tests, in brief, is the following: according to each of the approaches a proper balance is required between the freedom of speech and the conflicting protected interest. The difference between them lies in the definition of the nature of the protected interests: are considerations of security, order and discipline or the rehabilitation of the prisoners the only ones that constitute 'an important or substantial governmental interest', which are capable of justifying imposing restrictions on the freedom of speech of a prisoner, or are interests arising from all the penological and criminal rehabilitation needs or involved in the needs of the proper management of the prisons ('legitimate penological objectives of the corrections system') capable of justifying imposing such restrictions? This issue was considered once again in *Jones v. North Carolina Prisoners' Union* (1977) [39], which concerned the constitutionality of the prohibition imposed on meetings of the 'Prisoners' Union', prisoners joining this union and correspondence between them and it; and in *Bell v. Wolfish* (1979) [40], which concerned the restriction of the right of prisoners to receive hard-cover books if these were not sent to them directly by the publisher or the book club.

The decision as to the proper test was given in *Turner v. Safley* (1987) [41], in which it was held (*per* Justice O'Connor) that the test of the constitutionality of the violation of a prisoner's freedom of speech is whether it is 'reasonably related to legitimate penological interests' (see *ibid*., at p. 89). Relying on a synthesis of the previous case-law, this judgment delineated four main criteria, by means of which the constitutionality of the violation of a prisoner's human right should be examined (see *ibid*., at pp. 89-92). For the sake of brevity, I will satisfy myself by quoting the brief synopsis of the remarks from the book of J. W. Palmer, *Constitutional Rights of Prisoners* (Cincinnati, 4th ed., 1991), at p. 37:

> '… (a) whether there is a "valid, rational connection" between the regulation and a legitimate and neutral government interest put forward to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; (b) whether there are alternative means of exercising the asserted constitutional rights that remain open to inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections officials' expertise; (c) whether and the extent to which accommodation of the asserted right will have impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to corrections officials; and (d) whether the regulation represents an 'exaggerated response' to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at *de minimis* costs to valid penological interests being evidence of unreasonableness.'

The 'rational connection' test between the restriction imposed on the freedom of speech and legitimate goals in the field of the treatment of offenders and the proper administration of the prisons, which was delineated in *Turner v. Safley* [41], was adopted by the court in additional judgments (see, mainly, Justice Blackmun's opinion in *Thornburgh v. Abbot* (1989) [42], in which it was held that a practice authorizing the prison authorities not to deliver to prisoners publications that were received for them, if they thought that the publications endangered the security of the prison, *prima facie* stood up to the constitutionality test.

*The prisoner's freedom of speech and the problems faced by the authorities*

17. The penalty of imprisonment, which exists in Israel, and the method in which imprisonment is carried out *de facto*, are different from the 'corrections system' practised in the United States. But among the problems that concern the authorities in charge of the treatment of prisoners and the management of the prisons, in Israel and in the United States, there are also quite a few similar issues. There is no difficulty in determining that maintaining order and discipline in the prisons constitutes a legitimate interest of every State. This is certainly also the case in Israel. In so far as something is indeed required to prevent a danger to order and discipline in the prisons, this is sufficient to serve as a ground for restricting the freedom

of speech of (some or all) prisoners. Also the need to rehabilitate prisoners — where the success of a rehabilitation programme depends on this — may *prima facie* justify imposing a similar restriction. With regard to all of these, we can find support, *inter alia*, in the ruling given in *Procunier v. Martinez* [35]. But I am prepared to accept that not only maintaining order and discipline in the prisons, but also other considerations deriving from the needs of 'proper management', in its wider sense, may sometimes justify imposing certain restrictions. Assuming this premise, and adapting the other elements accordingly, we can avail ourselves also of the criteria established in *Turner v. Safley* [41]. In this spirit, we can summarize that in order to justify a violation of a prisoner's freedom of speech (and any other basic right), it is insufficient to show the existence of a conflicting interest that justifies a violation, nor even the existence of a regulation that permits a violation of the right, but it must also be shown that between the provision that allows the violation and the conflicting interest — on account of which it is proposed to violate the right — there is a logical connection and objective proximity. Remoteness or vagueness of the connection are a sign that the violation is unjustified. We must also consider specific questions of balance and proportion: does the extent of the violation of the right exceed the degree necessary for achieving the legitimate purpose that requires the violation? Does the provision that causes the violation leave the prisoner with alternative ways of enjoying his right, or what remains of it? Can the Prisons Service, by adopting reasonable steps within the framework of its limited resources, avoid or reduce the violation? The answer to each of these questions is likely to influence the decision on the question whether the statutory arrangement that allows the violation reflects a correct and proper balance.

Notwithstanding, it is important to emphasize that these rules are only guidelines. They are based on certain assumptions with regard to all the ethical questions that underlie them. They do not determine the weight that should be given to each of the conflicting interests. They do not determine the balancing point at which we should draw the line distinguishing between a permissible violation and a prohibited violation of a prisoner's human right. The definition of the balancing point is not a matter for a technical decision, but for a judicial decision. This determination is the result of a value decision, based on considerations of social policy. Within the framework of its decision, the court is called upon to determine the relative weight of each of the conflicting interests and to mark the proper balancing point between

them. The weight of the conflicting interests is not constant, and even the balance between them is liable to change. What was once correct and accepted is not necessarily correct now as well; and not everything that is acceptable to us and accords with our outlook is likely to be accepted and correct in a decade or two. We can illustrate this with an example from the past. Consider the right of prisoners to participate in elections for the Knesset. A petition to enable prisoners to exercise this important basic right was brought before the court at the end of the 1950s, but was denied on the ground that 'it is inconceivable that this should be possible from a practical viewpoint, in view of the number of persons in the prisons, and the police forces that will be required for an operation of this kind…' (HCJ 215/59 *Geller v. Minister of Interior* [16], at p. 1704). But another petition on the same issue, which was filed approximately twenty years later, resulted in a reversal. Admittedly, even on this occasion the court could not see a practical possibility of granting the relief sought by the petitioners; but this time it decided and clarified that the legislator and the authorities in charge of implementation should prepare themselves at an early date, from a statutory and administrative viewpoint, in order to enable prisoners and arrestees to exercise their right to vote (*Hukma v. Minister of Interior* [1]). And so, as a result of this judgment, the Knesset Elections Law (Amendment No.17), 5746-1986, was enacted, and this provides an arrangement that enables prisoners and persons under arrest to exercise their right to vote. This is a clear example of a change in ethical approach, which changed the relative weight of the conflicting interests and delineated a new balancing point between them (see the remarks of Justice Elon in *Weil v. State of Israel* [5], at pp. 492-493).

18. When balancing a basic right of a prisoner against a conflicting interest of the Prisons Service, the proper relative weight should be given to both side of the equation. The greater and the more important the right, the greater and more important must be the opposing interest that is required to overcome it. But the conflict is not always or necessarily symmetrical. Sometimes it will transpire that upholding the right of the prisoner is also beneficial to the public interest. Once again, consider the ability of prisoners to exercise their right to vote. No-one disputes that that this ability realizes an important part of freedom of speech. But the exercise of this right by the prisoner also furthers the goal of rehabilitation, from which not only the prisoner is likely to benefit, but also society. As Justice Elon said in *State of Israel v. Tamir* [4], at p. 212:

> 'Not violating the rights of the prisoner, which he had before he was deprived of his freedom of movement, is in the interests of the prisoner, in order to preserve, in so far as possible, the connection between him and free society, from which he came and from which he is temporarily separated, by the prison walls; it is also in the interests of society, in order to further, in so far as possible, the rehabilitation of the prisoner and thereby to facilitate his return and reintegration into society, of which, even while he is in prison, he is a part.'

It need not be said that the rehabilitation of prisoners is also one of the legitimate interests entrusted to the Prisons Service. It follows that protecting the ability of the prisoner to exercise his right is not always or necessarily in direct conflict with these interests. But let us not ignore the main point: the main significance in recognizing the ability of the prisoner to exercise his right of choice lies in preserving the basic value of human dignity.

19. Let us return to basic principles. Protecting the freedom of speech, as part of human dignity, is the main guarantee for safeguarding the individual's intellectual freedom. Within the framework of freedom of speech, man realizes his desires and aspirations that are part of his nature and that reflect his intellectual freedom: to be educated and acquire knowledge, to be involved in communal life, to hear the opinions of others and express his own views. Imprisonment denies the individual his freedom of movement, thereby imposing a serious restriction, not merely on his basic right to personal liberty, but on the practical ability to realize his intellectual freedom as he sees fit. Admittedly, imprisonment has no access to the inner sanctum of intellectual freedom — the ability of the prisoner to think, believe, and preserve his humanity. However, as we have already said (in paragraph 15 above), the ability of the prisoner to exercise his right to freedom of speech is far more restricted and limited than the ability of the free citizen. The (restricted) freedom of speech enjoyed by the prisoner should therefore be given the widest protection possible.

This approach is clearly reflected in case-law. Consider HCJ 144/74 *Livneh v. Prisons Service* [17]. In that case, the court set aside the decision of the prison governor not to allow (the petitioner in that case) to bring into the prison the writings of Marx, Engels, Lenin and Mao Tse-Tung. The governor based his decision on the fear that bringing these books into the prison would incite political arguments between the prisoners. In setting aside this ground, Justice H. Cohn said:

> 'We commend the prison governor for being continually mindful of keeping the peace inside the prison. But it has never been said that in order to "keep the peace" he may prevent arguments between the prisoners, and this includes political arguments; as long as discipline and order are maintained in the prison, the prisoners may argue among themselves on any subject that they choose; and if discipline and order are breached, those who commit the breach will have to answer for their breach, but they should not have to answer for the subject of their argument' (*ibid.*, at p. 689).

Further on, at p. 690, he added:

> 'The prison governor has not been given authority to prohibit bringing books into the prison in order that he may choose, according to his taste, what a certain prisoner ought to read and what he ought not to read.'

It is still clear and obvious that the Prisons service has the power to prevent bringing books into the prison. What then is the criterion for deciding when he may exercise this power? This issue was answered by the court in HCJ 543/76 *Frankel v. Prisons Service* [18]. This petition challenged a decision of the prison governor not to allow two books to be brought in. The court saw no reason to interfere with the decision with regard to one of the books, which was found to contain inciting material. This was not the case with regard to the second book. The decision to forbid this book also was set aside. Vice-President Justice Landau, explained the distinction, and to establish the test he availed himself of the decision of the court in *Livneh v. Prisons Service* [17], which set aside a decision of the prison governor not to allow the writings of Marx, Engels, Lenin and Mao Tse-Tung to be brought into the prison. The following are the remarks of Justice Landau in *Frankel v. Prisons Service* [18], at p. 209:

> 'Indeed, these writings urge revolution, but reading them does not amount to a near-certain danger to the peace that this court determined as the criterion in the leading decision of Justice Agranat in HCJ 73/53, *Kol HaAm v. Minister of Interior*. This test can also guide the governors of the prisons with regard to the inflammatory character of literary material. *But what was said there about keeping the peace in general should be translated here into a test of keeping the peace, order and*

> *discipline inside the prisons, with the special problems with which the prisons administrators must contend*' (emphasis supplied).

In *Frankel v. Prisons Service* [18], as stated, the court saw no grounds for intervention in the decision of the prison governor not to allow a book with inflammatory material to be brought into the prison. 'In the tense conditions that prevail in the prison' — the judgment says, at page 209 — 'a spark is sometimes sufficient to ignite passions to the point of a violent outburst, and words written in "black and white", more than the spoken words of cellmates, have their own power of persuasion that can lead to the enflaming of passions'. Once the book was found to contain inflammatory material, the court thought that the prison governor had broad discretion to act within the framework of his authority. It should be said that also in other cases where the court decided not to intervene in decisions that harmed the education or entertainment needs of prisoners, the decision was based on the recognition of the existence of security considerations. Thus, for example, in HCJ 96/80 *Almalabi v. Prisons Service* [19], no fault was found with a decision of the Prisons Service to prohibit prisoners convicted of security offences from having transistor radios. The reasoning underlying this decision was that a transistor radio in the possession of a prisoner convicted of a security offence could be used for transmitting broadcasts and messages that could lead to a breach of order and security inside the prison. The court saw no reason to intervene in the correctness of this consideration.

It follows that the prison authorities have the means that can impose restrictions on some possible expressions of intellectual freedom, but they are allowed to do this, usually and mainly, when there is a near certainty of real harm to public safety, or real harm to keeping the peace, order and discipline inside the prison. It is admittedly possible that, in the process of weighing up the matter, weight will also be given to other interests, which do not derive from security considerations or the need to maintain order and discipline, but which are concerned with the need for proper administration of the prisons in the broad sense (such as administrational efficiency, economy of resources, etc.). But taking into account the importance and centrality of freedom of speech, the relative weight of these additional interests is not great. In general, these alone will be insufficient to deny the right, and they may be considered only in determining the degree to which the prisoner will be allowed to exercise his right.

It need not be said that even when an authority has a solid reason for restricting the freedom of speech of a prisoner — i.e., when there is a real likelihood that the speech will harm public safety or endanger order and discipline in the prison — the authorities must still comply with the proportionality test, and may not violate the right of the prisoner more than is necessary to forestall the risk. The authority must remember that a violation of the freedom of speech of a prisoner is always a further violation, and it is particularly enjoined to resist the temptation of exercising its power unnecessarily or to an unnecessary degree. When it considers making use of this power, the person in authority in the Prisons Service would do well to be mindful of the remarks of Justice H. Cohn in *Livneh v. Prisons Service* [17], at p. 690:

> '… many evils, which are necessarily involved in prison life, are added to the loss of liberty. But let us not add to the necessary evils, which cannot be prevented, restrictions and violations that are unnecessary and unjustified. The powers given to prison governors to maintain order and discipline must be very broad; but the broader the power, the greater the temptation to use it unnecessarily and without real justification.'

*Freedom of speech in writing and publication*

20. Writing is one of the more basic forms of speech. As Justice Holmes said:

> '… the use of mail is almost as much a part of free speech as the right to use our tongues… ' (*Milwaukee Pub. Co. v. Burleson* (1921) [43], at p. 437).

Naturally, prisoners also have the right to express themselves in writing. The most common form is in the correspondence that the prisoner is entitled to have with his relations and friends. Our case-law has not yet considered the question of the right of a prisoner to express himself in the written media. But I see no reason to distinguish between this form of expression and other modes of expression available to the prisoner. The accepted criteria for restricting the freedom of speech of a prisoner are also appropriate for this form of expression. Note than I am not addressing the question whether prisoners should be allowed free and uncensored access to the media. Nor am I addressing the question whether the media should be allowed free and uncensored access to prisoners. I am considering only one possible channel of all the possible channels of communication between prisoners and the

media: the right of the prisoner to send from the prison to a newspaper editor (or another branch of the media) a letter or an article intended for publication, when the prisoner does this in the same way and within the framework of the same restrictions subject to which he is allowed to send other letters.

We should point out that in the United States there is no doubt as to the right of the prisoner to write to the newspapers and even to write critically of the prison authorities and prison conditions. Moreover, the accepted approach there is that criticism of a prisoner about his prison conditions not only upholds the right of the prisoner to express himself publicly (through the media) about a matter that concerns him, but also the right of the public to know about what happens in State prisons, since what happens in the prisons is not open for inspection, and because of the natural tendency of the authorities that administer the prisons to hide from the public even their good intentions to improve the conditions that prevail there. A statement of this approach can be found in the remarks of the Court of Appeals in *Nolan v. Fitzpatrick* (1971) [44], at pp. 547-548:

> 'We need not adopt the broad principle that a prisoner retains all First Amendment rights to conclude, as we do, that he retains the right to send letters to the press concerning prison matters. In so concluding, we rely primarily on the fact that the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear. This does not depend upon a determination that wardens are unsympathetic to the need to improve prison conditions. But even a warden who pushes aggressively for reforms or larger appropriations within his department and before appropriate officials and legislative committees may understandably not feel it prudent to push for more public laundering of institutional linen.'

The court was aware of the argument that publishing the letters of prisoners in newspapers, when the letters contained particularly harsh criticism of prison conditions, was liable to stir up passions among the prison population and create a near-certain danger of a violent outburst and a breach

of prison security. In its response to this argument, the court went so far as to say that the way to deal with such an extreme danger was to prohibit bringing into the prison the issue of the newspaper that contains the dangerous publication, and not by refusing *ab initio* to send it for publication. As the court said, at p. 549:

> 'The most that can reasonably be said is that, depending upon conditions in the prison when the letter or news story based on it *returns* to the prison, some particularly inflammatory letters may create a "clear and present danger" of violence or breach of security. In that extreme case, prison officials can cope with the situation by refusing to admit the dangerous issue of the newspaper to the prison rather than by refusing to mail the letter at the first instance.'

The authority may not censor a letter of a prisoner because its contents are uncomplimentary to the prison authorities, or even contain factually inaccurate information. This, it will be remembered, was discussed by the court in *Procunier v. Martinez* [35], at p. 413:

> 'Prison officials may not censor prisoner correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements.'

Also in *Pell v. Procunier* [38] the court considered the broad right of a prisoner to send letters to the media. In *Pell v. Procunier* [38], the court found no defect of unconstitutionality in the regulation prohibiting prisoners from conducting face-to-face media interviews, but the prohibition was recognized as reasonable in view of the opportunity available to prisoners to write to the media, a method that was less burdensome than allowing newspaper journalists into the prison (see *ibid.*, at p. 424).

Furthermore, counsel for the appellant argued that, according to the practice in force in Canada, prisoners are allowed to publish their writings in the press. As proof of this contention, he presented to us a series of eight items, written by a prisoner, which were published over a period of approximately two months in *The Globe and Mail*, which is published in Toronto. The contents of the articles (entitled 'Life in Prison') are a harsh criticism of the rehabilitation policy of the authority in charge of administering the prisons and of the effect of this policy on the lives of prisoners.

*From the general to the specific*

21. The appellant wishes to exercise his right of freedom of speech by publishing his writings in a local newspaper distributed in Netanya. The respondent, the Prisons Service, opposes the application. Do the considerations, upon which the respondent relies in its opposition, reveal a justification for preventing the appellant from publishing his articles in the newspaper? I believe that the answer to this question is no. Let us first say that the appellant admits that the respondent has the authority to hold back and not to send any article to its destination, if its publication (in the respondent's opinion) may harm the running of the prison, the security of the prison warders or prisoners, or even the reputation of any of them. Moreover, in order to satisfy the respondent in this regard, the appellant undertook not to say anything in his articles about any member of the prison staff, warders and prisoners, but to focus solely on a description of his life and experiences. In these circumstances, we are not required to decide that the appellant's freedom of speech gives him a right to write in the press about the running of the prison and the life of prisoners as he sees fit. We are also not required to consider the question whether the interest embodied in the public's right to know about prison conditions and what happens inside the prisons justifies restricting the authority and power of the respondent not to send a letter or article of a prisoner for publication merely for the reason that it contains criticism of prison conditions or of the Prisons Service. These questions deal with related issues from the field of freedom of speech: does the public's right to know about what is happening in the prisons justify reducing the restrictions placed on the freedom of speech of prisoners? Does upholding the public's right imply that the media should be given freer access to prisons and the possibility of communicating with the prisoners? These questions, which are significant in themselves, do not arise in this case and can therefore be left undecided. In order to decide the appeal, we may assume that the respondent has full authority not to send an article to a newspaper, if it believes that its publication may harm public security, the running and discipline of the prison and even the reputation of prison staff, a warder or a prisoner. The appellant has agreed to these assumptions, thereby defining the question that requires our decision in his appeal.

22. What, then, is the nature of the respondent's opposition? Why does it interest him whether the appellant is allowed to send articles to the local newspaper, in the same way that he may send letters to whomsoever he wishes, and to describe in his articles (in the way that he can and is entitled to do in his letters) his life and experiences in the prison?

The respondent's position is complex. On the one hand, it does not question the right of the appellant to write letters to the newspaper; and if the newspaper decides to do so, it can publish the appellant's letters in the form of articles; however, the respondent says that the appellant is entitled to do this only within the framework of the quota of letters to which he is entitled under section 47 of the Prisons Ordinance [New Version] (i.e., sending one letter every two months). On the other hand, the respondent admits that as a rule it no longer enforces the quota of letters that prisoners may send. But it intends to enforce this with regard to the appellant. Its reason for this distinction is that in his writings the appellant intends to describe his life in the prison. Were it not for this, the respondent candidly says, it would see no reason to treat the appellant more strictly with regard to the quota of letters. According to the respondent, if the appellant wishes to write about general matters, it can and is prepared to treat him more liberally. In other words, the main reason for refusing the appellant's request to be allowed to send his writings to the newspaper is not the writing itself, but the content of the writing. The respondent's position is based on the fear that publication of articles on prison life will undermine the running of the prisons, cause a breach of discipline and endanger the safety and security of the staff and warders. The respondent sees reason for concern that the publication of articles about the appellant's life in the prison will result in him being regarded by prison warders and prisoners as having the status of a journalist. Thus he would acquire power not enjoyed by other prisoners. This phenomenon would undermine discipline. It also believes that there is a fear that the appellant's articles would stir up the prisoners and cause strife between them and the prison staff or amongst themselves. The appellant's argument that the respondent can allay all these concerns by virtue of its authority to censor and disqualify written material that the prisoners send from the prison is dismissed by the respondent with the response that the task of examining the articles falls outside its duties and that doing this is, from its point of view, wholly impossible.

23. I cannot accept the respondent's position. Had it based its position solely on the provisions of section 47 of the Prisons Ordinance [New Version], which determines the quota of letters that a prisoner is allowed, we would be required to interpret this provision in order to examine whether the prisoner's right to correspond with the media is also limited to the same miniscule quota stipulated in the section (sending one letter every two months). However, the respondent admitted that the letter quota of prisoners

is no longer strictly enforced. Already in HCJ 157/75 [20] it was stated that the respondent no longer acts *de facto* in accordance with the provisions of section 47, but 'allows prisoners to write one letter every two weeks'. If the respondent does not even enforce this quota, it can only be commended for this. But the respondent cannot be allowed to make the argument that it does not enforce the letter quota for most prisoners, but it intends to enforce it vis-à-vis the appellant, and this not necessarily because of the appellant's desire and request to send articles that he writes to a newspaper editor, but merely because he intends to devote his articles to describing his life in the prison. There is nothing improper in the subject of the letters; and if the appellant does indeed abide by his declaration that he will devote his articles merely to his own life and experiences and will not write about specific prison officials or prisoners, it is difficult to see how publication of his remarks can arouse a fear of undermining the running and discipline of the prison, the reputation of the staff or any prisoner. However, the respondent does not trust the appellant to keep his promise to act as he undertakes and declares he will act. I have no difficulty in understanding this. The respondent is neither expected nor required to rely upon the appellant's word. It has clear authority — and no-one in this case disputes the validity of its authority — to examine and censor the appellant's articles, and if it discovers that the contents of a particular article pose a danger, on the level of near certainty, to order or discipline, it can withhold the article and prevent it from being sent. The respondent says that this task falls outside its duties and that in practice it cannot perform it. I do not believe that the respondent may make the argument that examining the articles falls outside the scope of its duties, since the authority given to it under regulation 33 of the Prisons Regulations — 'to open and examine any letter and any other document of a prisoner' — shows that its duties include also the examination of such articles. Therefore I cannot agree with the learned judge that granting the application of the appellant will give him 'free access to the media', thereby 'enabling him to acquire considerable power'. Subjecting the letters to the prior censorship of the respondent rules out the possibility that the appellant will have free access to any branch of the media. Under such conditions, there is no real basis for concern that the appellant will be able to 'acquire power'.

24. I could, perhaps, have understood the respondent's position had it been satisfied with the argument that a limit should be placed on the length or number of the articles that the appellant should be allowed to send to the newspaper. It is not for nothing that the respondent says that there it sees no

practical possibility of examining the articles. This is simply because, in view of the many and burdensome tasks that the Prisons Service is required to carry out, the means available to it for censoring the letters of prisoners are not unlimited. It is also conceivable that sending an article intended for publication in a newspaper may justify, from the respondent's viewpoint, more detailed consideration that that devoted to the ordinary letter. The need to examine long articles, or to do so on a frequent basis, is likely to be difficult for those concerned, and if the burden becomes too heavy, their ability to carry out their other duties properly will be affected. This difficulty raises a common problem: often the authorities face the difficult of finding the resources required by it in order to comply with its duty to uphold basic human rights. But even when the argument is expressly made, it is not usually given much weight. Not long ago I had the opportunity of addressing this question (in HCJ 4541/94 *Miller v. Minister of Defence* [21], at p. 113 {**שגיאה! הסימניה אינה מוגדרת.**}):

> 'I do not think that I need to dwell on these additional reasons, which have in common the unsurprising revelation that the absorption of women will necessitate the investment of additional financial resources. This is not because no approximate valuation of the size of the additional investment required was appended to this argument; nor even because budgetary considerations, in themselves, are unimportant; but because the relative weight of such considerations, in making an executive decision, is measured and determined when balanced against other considerations (see HCJ 3627/92 *Israel Fruit Growers Organization Ltd v. Government of Israel*, at pp. 391-392, and the references cited there). In any event, when we are concerned with a claim to exercise a basic right — and such is the case before us — the relative weight of the budgetary considerations cannot be great, since:
>
> > "The rhetoric of human rights must be founded on a reality that sets these rights on the top level of the scale of national priorities. The protection of human rights costs money, and a society that respects human rights must be prepared to bear the financial burden" (Barak, in his book *supra*, vol. 3, *Constitutional Interpretation*, Nevo, 1994, at p. 528).

> See also: P. W. Hogg, *Constitutional Law of Canada*, Toronto, 3rd ed., 1992, at p. 873.'

These remarks are also relevant in this case. The respondent — like every organ of government — has a duty to uphold basic human rights. It must take this duty into account when allocating and distributing its financial resources. Indeed, to tell the truth, I do not expect that in carrying out its duty, in the case of the appellant, the respondent will encounter any practical difficulties. The writings of the appellant that were originally published in the local newspaper *Mikol Makom* have been submitted to us. It transpires that all of the appellant's writings were brief, written in simple language, and dealt with everyday matters of prison life. If the writings of the appellant from now on are similar in format to his earlier articles, the respondent will not need great resources or efforts in order to carry out all the examinations required. Even the quantity of the anticipated articles need be no cause for concern. In any event, the respondent has the power to limit the quantity; had it proposed, in these proceedings, that the appellant should be limited to writing one article a week, I would have seen no reason to disagree with the reasonableness of its proposal.

*Freedom of occupation*

25. I have reached the conclusion that the appeal should be allowed, on the basis of the appellant's contention that the respondent's decision unlawfully violates his freedom of speech. This makes it unnecessary to consider in detail the additional contention of the appellant that the respondent's decision also violates its right of freedom of occupation. However, although it is not needed for reaching a decision, I feel I should say that even in this respect the respondent's position did not satisfy me. As a rule, within the limitations necessitated by imprisonment, even a prisoner enjoys the basic right of freedom of occupation, and the restrictions imposed on his right must comply with the conditions of the limitations clause in section 4 of the Basic Law: Freedom of Occupation (see: A. Barak, *Interpretation in Law*, vol. 3, *Constitutional Interpretation*, Nevo, 1994, at p. 600). The respondent's response, it will be recalled, was that the appellant — as a prisoner requiring protection and for that reason prevented from participating in a rehabilitation program and working outside the prison — cannot be allowed to engage in writing for a newspaper, since such an occupation involves an 'external employer'. I fear that this answer misses the point. The appellant did not ask to be allowed to take part in regular work outside the prison, nor did he ask to be allowed to leave the prison for the

sake of his work, like prisoners who are engaged in work within the framework of the rehabilitation programmes. His request was to be allowed to act as a 'freelance writer' and to send the articles that he will write inside the prison precincts to the editor of the newspaper. Activity of this kind is similar to a hobby that a prisoner is allowed to enjoy in his free time or in his cell. It is not part of the system of the ordinary activities of prisoners, which the respondent is required to administer, and the rules governing the occupations of the prisoners do not apply to it.

26. If my opinion is accepted, the appeal will be allowed, the judgment of the District Court will be set aside, and the appellant will be granted the relief sought.

**Justice M. Cheshin**

I have read with interest the profound and comprehensive opinion of my colleague, Justice Mazza. My colleague has discussed the subject in all its aspects, and has explored every horizon. My colleague has written a kind of *Magna Carta* of the Israeli prisoner, and this bill of rights includes both basic principles and also rules and doctrines implied by the basic principles. I agree with every word of my colleague, in so far as they serve as a foundation. Notwithstanding, I have difficulty agreeing with the conclusions that my colleague wishes to deduce from the basic principles, which are principles we all accept. Since I do not disagree with colleague as to the infrastructure, I shall not elaborate on the basic principles but I shall concentrate my remarks on applying those basic principles to this case.

*The question*

2. The question requiring a decision in this case is very simple: does a prisoner have the right to be a newspaper correspondent, and to write for a newspaper a regular weekly column about everyday life in the prison where he is imprisoned? Does the prisoner have the right to be a journalist, and to send regular and frequent articles about the prison where he is imprisoned to a newspaper — or newspapers? The appellant claims that a prisoner has this right, whereas the respondents reject the appellant's argument that he has the right. Let us emphasize and clarify from the outset: the question is *not* whether a prisoner has — or does not have — the right to engage in the profession of journalism while he is in prison. The respondents expressly stated before us that they do not dispute the right *in principle* of a journalist, who is a prisoner, to send articles to a large-circulation newspaper. This

would be the case, for example, were we speaking of articles about cooking or gardening, or articles about art, the Bible or literature. But the appellant is not interested in any of these. He has set his heart on writing particularly about prison life — and only about prison life — and the respondents strongly oppose this. The appellant claims he has a constitutional right. The respondents, for their part, deny he has a right, and they argue that writing for a newspaper, as the appellant requests, might undermine proper prison order and discipline. We must decide between these opposing interests.

*On the constitutional rights of a prisoner*

3. 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. See and compare, for instance, *Katlan v. Prisons Service* [3]; *Darwish v. Prisons Service* [6]; *Yosef v. Governor of Central Prison in Judaea and Samaria* [9]; *Weil v. State of Israel* [5]. Where an official unjustifiably violates the dignity of a prisoner — his dignity as a human being — the Court must speak out succinctly and clearly. This is human dignity, in the simple and ordinary sense of the concept.

Moreover, a prisoner is entitled to 'conditions that allow civilized human life' (*per* Vice-President H. Cohn in *Darwish v. Prisons Service* [6], at p. 539): food to eat, water to drink, clothes to wear, a bed to sleep in, fresh air to breathe, and sky to look at. By way of poetic analogy, let us recall the 'small attic' prepared and made for the prophet Elishah by that 'great woman', which contained 'a bed and a table and a chair and a lamp' (II Kings 4, 8-10 [45]). But other rights enjoyed by a free man must naturally be restricted inside the prison. When someone enters a prison, he loses his freedom; this needs no explanation. But a person does not only lose his freedom thereby, but also other rights, rights that naturally accompany freedom — that accompany it and are secondary to it. Thus, for example, there is the rigid and inflexible daily schedule of a prisoner, whether with regard to hours of sleep, whether with regard to hours of work and rest, whether with regard to eating times and whether with regard to everything that he is allowed to do inside the prison. This is also the case with the inability of a prisoner to continue to engage in his ordinary profession. The same is true of a prisoner's contacts with the world outside the prison, such as telephone calls or correspondence, and this is so, for example, with regard to family visits to the prison.

4. All these rights — these and others besides — are reduced automatically when a person enters a prison. The need to ensure the regular running of a prison, including security and order, neither allows nor facilitates recognition of the rights of a prisoner as though he were a free man. A main and basic consideration in the proper and regular administration of a prison is the supreme need to maintain security inside it, to protect the safety of the persons in its precincts — both prisoners and warders — and ensuring strict order and discipline. Below we shall call all of these 'order and discipline'. The way to accomplish all these objectives naturally implies a clear hierarchy of authority — and persons in authority — and strict obedience to orders given during the daily routine. On a smaller scale, prisons may be compared to an army or police force, but the strictness of order and discipline must be more rigid in the prisons, if only because of the segment of the population in them: a population of persons who have broken the law — some of whom are hardened and tough criminals — a population in which many are embittered and believe that society has done them an injustice and discriminated against them, aggressive and violent persons, persons with low anger thresholds and devoid of any motivation whatsoever to help others or to be helped by others. When we consider this prison population, it will become clear to us that the work of prison warders and administrators is work of the utmost difficulty. We will also realize —and this is directly relevant to this case — that order and discipline are the material of which a prison is built. Without order and discipline, in the broad sense of these concepts — which can only mean strict order and discipline — a prison cannot be run and the whole system will suffer the consequences.

Indeed, a reading of the Prisons Ordinance [New Version] and the Prisons Regulations (below we will refer to these as the Ordinance and the Regulations, respectively), shows us — as we already knew — that order and discipline are the essence of prison administration. The Ordinance and Regulations abound with provisions concerning order and disciple, and we shall mention, by way of example, only a few provisions. The first provision is that of section 56 of the Ordinance, which deals in its 41 subsections with 'prison offences'. In closing, section 56(41) says the following:

'Prison Offences

> 56. A prisoner who does one of the following has committed a prison offence:
>
> (1) …
>
> (41) Any act, behaviour, disorder or neglect that harm good order or discipline, even if

they are not set out in the previous paragraphs.'

The second provision we shall mention is that of section 132 of the Ordinance, concerning the authority of the responsible Minister to enact regulations:

'Minister's Regulations

132. ...

(1) ...

(17) Any other matter, with regard to which this Ordinance states that it is possible to enact regulations, and any other matter that must be regulated for the sake of the effective implementation of this Ordinance, the welfare and efficiency of prison warders, the proper administration of prisons and their discipline and the safe custody of prisoners inside the prison precincts and when they are working outside the prison precincts.'

This is also the case with regard to other provisions in the Ordinance and the Regulations, such as the provision of Regulation 18, which says:

'Purpose of order

18. Order and discipline shall be maintained in the prison strictly, while paying attention to maintaining security and a proper routine.'

This is followed by the provision of regulation 20:

'Use of reasonable force

20. A prison warder may use all reasonable means, including the use of force, to maintain good order, for the protection of a warder or prisoner and to prevent the escape of a prisoner.'

5. Before we examine the actual case before us, let us begin by saying that the contacts of a prisoner with the world outside the prison are subject to an express and detailed arrangement in the Ordinance and the Regulations. The broad rule in the Ordinance and the Regulations is that a prisoner does not have an inherent right to be in contact with persons outside the prison, except in so far as the Ordinance and the Regulations give him this right. Thus, for example, section 42 of the Ordinance provides:

'Prohibition

42. A person shall not transfer a prohibited

of transfer

object to a prisoner, nor shall he transfer a prohibited object to another person from a prisoner or on his behalf.'

The definition of a 'prohibited object' (in section 1 of the Ordinance) is:

> 'An object that this Ordinance or the Regulations do not allow to be brought into a prison, to be removed from a prison or to be in the possession of a prisoner.'

In other words: *prima facie*, a prisoner does not have a right to correspond with persons outside the prison, unless he has an express right to do so. A prisoner is unlike a free person in this respect: a free person may maintain contact with others, unless he is forbidden to do so, whereas a prisoner may not have contact with others who are outside the prison, unless he is permitted to do so. Such is the loss of liberty and such are the implications of this loss. Section 43 of the Ordinance further provides:

'Prohibition against placing

43. A person shall not place a prohibited object so that it comes into the possession of a prisoner, or the possession of another person on behalf of a prisoner, or by transfer from prisoner to prisoner.'

As to the actual question in our case, section 47 of the Ordinance provides and instructs us:

'Convicted prisoner

47. (a) A convicted prisoner may be allowed to write a first letter when he is admitted to the prison.

(b) At the end of the first three months of his imprisonment, and thereafter — every two months, he may be allowed visits from friends within the sight and hearing of a prison warder, and he may be allowed to write and receive a letter.'

A convicted prisoner is therefore entitled to send a letter every two months. In practice, the prison authorities are lenient with prisoners, and they allow them to send letters once every two weeks. But the principle remains: the rule is a prohibition against contact with the outside world, and the exception is a relaxation of the prohibition in so far as the Ordinance and the internal procedures allow, at the discretion of the prison authorities. This is

true of correspondence and it is true of visits to the prison. See, for example, chapter 5 of the Regulations on the subject of 'Visits and letters', which includes regulations 25 to 34.

6. In order to clarify our remarks and so that they may not be misconstrued, let us add the following: 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. Notwithstanding, the constitutional rights of a person inside a prison are not like his constitutional rights outside the prison. The force of the constitutional rights inside the prison is not like their force outside the prison, for the reason that inside the prison they must contend with interests that are weightier and stronger than the corresponding interests outside the prison. The constitutional rights may be compared to a beam of light travelling freely through space, which is the constitutional right in its pure form. While it is travelling freely through space in this way, the beam of light encounters a screen that lies as an obstacle in its path. As it passes through the screen, the intensity of the beam of light becomes weaker, and its intensity after the screen is not as it was before the screen. If the beam of light is freedom of speech, the question is to what extent is it weakened when it tries to penetrate the prison walls. Prison walls are the screen, and the screen is: provisions of statute and regulations, the scope of discretion given to the prison authorities, and in addition to all these — the special status of a prison as a prison. All of these were discussed by Vice-President Justice Landau in *Frankel v. Prisons Service* [18] (see below, in paragraph 9), from which we can learn and understand.

*The status that the appellant wishes to acquire for himself*

7. The respondents strongly object to the appellant's request that he be allowed to be a journalist who writes regularly (a weekly column) about prison life, and they base their denial of his request on reasons of order and discipline. The respondents' fear is that the appellant's writing may undermine the proper order and discipline in the prison — order and discipline that are the *sine qua non* of the proper running of the prison — and this is why they refused the request. The atmosphere in the prison is naturally tense and crowded. This everyone knows, and the respondents fear that by means of his occupation as a journalist continually reporting to the world about what is done in the prison, the appellant is likely to acquire for himself a special status inside the prison — a status whose very existence will

undermine all proper order and discipline. Indeed, in this context of a breach of order and discipline the special status that the appellant is likely to acquire arises in several different relationships. Let us examine this matter closely.

8. First, it arises in the relationship between the appellant and prison warders and staff. All of these will know and understand that, by having a regular channel of communication from the prison to the world outside the prison, the appellant gains excessive power, and this excessive power in itself will give the appellant an elevated status in his relationship with the prison warders and staff. What warder will agree to his being vilified in a newspaper? What warder will not wish to be mentioned favourably in a newspaper? Will it not be merely natural and human for the prison warders to seek to gain access to the appellant and to try to flatter him, each in his own way? And if this is the case, will we be surprised if we find that, within a short time, the appellant — merely because he is a journalist with a weekly column in a newspaper — enjoys privileges that others do not have?

Second, it arises in the relationship between the prison warders *inter se*. Not only will the prison warders try to give the appellant better treatment, even if only so that he is kindly disposed to them, but through the appellant they may try to settle scores with one another. Thus, for example, one warder may whisper a secret in the appellant's ear with regard to another warder — a secret that may be true or may be false — if only so that the appellant may publish it in the newspaper. Is this not likely to lead to unnecessary tension among the prison warders?

Third, by virtue of his new privileged status in the prison, various pieces of information will naturally be revealed to the appellant — information that would not have been revealed to him had it not been for the status that he has acquired. It need not be said that this information will give the appellant power whose significance cannot be overstated, in this case not by publishing the information but by refraining from publishing it, in return for receiving various benefits. After all, we know that there are some who make their living from information that they disclose to the public, and there are others who make their living from information that they do *not* disclose to the public.

Fourth, the appellant will acquire a special status among the prisoners — those who are his friends and those who are not — and one does not need much imagination to understand why this will occur. What we said about the prison warders — in their relationship with the appellant and their relationship with one another — applies to the prisoners a hundredfold.

It would appear that all these scenarios that may occur in the prison are not remote probabilities. They are likely to happen and not imaginary. And if they materialize — even in part — all proper order and discipline in the prison will be undermined, as has happened in the past. Thus, in *Pell v. Procunier* [38] a regulation (no. 415.071) was made that forbade journalists interviewing specific prisoners. The regulation says:

> '… press and other media interviews with specific individual inmates will not be permitted' (*ibid*., at p. 819).

Prisoners and journalists attacked this regulation, claiming that it was unconstitutional. In the course of the hearing, it transpired that, before the regulation was enacted, journalists were allowed to interview prisoners as they wished, and this led to a phenomenon whereby certain prisoners became 'public figures', and thereby gained considerable influence over their fellow prisoners. This status, which those prisoners acquired, led to serious infractions of prison discipline, and eventually these infractions of discipline deteriorated until there was an attempted escape from the prison, in which three warders and two prisoners were killed. In order to prevent a repetition of the phenomenon, the competent authorities decided to enact the regulation. Let us cite the remarks of the court itself (*ibid*., at pp. 831-832):

> 'Prior to the promulgation of § 415.071, every journalist had virtually free access to interview any individual inmate whom he might wish…
>
> In practice, it was found that the policy in effect prior to the promulgation of § 415.071 had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual "public figures" within the prison society and gained a disproportionate degree of notoriety and influence among their fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems. For example, extensive press attention to an inmate who espoused a practice of noncooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institution's ability to deal effectively with the inmates generally. Finally, in the words of the District Court, on August 21, 1971, "during an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press

> interviews, and on August 23, sec.415.071 was adopted to mitigate the problem." 364 F. Supp., at 198.'

If it happened there, why can it not happened here too? Who can say that the prison authorities are merely imagining this? Indeed, the possibility is not remote, for if the appellant's plan succeeds, everyone — warders and prisoners alike — will seek him out, and the prison will hang on his every word. Even if all of this does not happen, some of it will probably come to pass.

*On balancing rights and interests*

9. There are two interests struggling for supremacy: on one side, the prisoner's interest in sending articles to a newspaper about everyday life in the prison, and on the other, the interest of the prison authorities in maintaining order and discipline, which may, in their opinion, be undermined if the appellant has his way. In this context, we should cite the remarks of Vice-President Justice Landau in *Frankel v. Prisons Service* [18]. Vice-President Landau cites the rule in *Kol HaAm v. Minister of Interior* [10] — *per* Justice Agranat — and the test of 'near certain danger to public safety' laid down. He goes on to make the following remarks about the type of prison population, the tension that prevails inside the prison, and the discretion that should be given to the prison authorities:

> 'This test can also guide the governors of the prisons with regard to the inflammatory character of literary material. But what was said there about keeping the peace in general should be translated here into a test of keeping the peace, order and discipline inside the prisons, with the special problems with which the prisons administrators must contend. They are not dealing with persons who are free but with persons imprisoned in conditions that create great tension, which make it necessary to adopt effective measures to ensure order and discipline. Alongside this grave responsibility placed on the prison governor, the court must leave him proper discretion when exercising his powers under the law. As for bringing inflammatory written material into the prison, in the tense conditions that prevail in the prison, a spark is sometimes sufficient to ignite passions to the point of a violent outburst, and words written in "black and white", more than the spoken words of cellmates, have their own power of persuasion that can lead to the enflaming of passions. Notwithstanding, the prison

> governor can take into account the composition of the prison population in the prison run by him, and what the governor of one prison, where dangerous criminals are imprisoned, may prohibit, the governor of another prison, where prisoners are held in more liberal conditions, may permit' (*ibid.*, at p. 209).

See also *Almalabi v. Prisons Service* [19], at p. 27.

To these remarks let us say that we agree wholeheartedly. Let us apply the remarks which Vice-President Landau made with regard to bringing 'inflammatory written material' inside the prison to the special status that the appellant will acquire for himself if he is allowed, as he asks, to be a journalist with a weekly column who writes about prison life Can we say that a decision of someone who has the heavy burden of running a prison falls outside the zone of reasonableness? The answer, in our opinion, is a definite no.

The following are the remarks of Justice Elon in *Hukma v. Minister of Interior* [1], at p. 833:

> '… when a person who has been arrested or a prisoner have a right, the person with the right is entitled to enjoy his right and to demand the possibility of exercising the right, as long as exercising the right does not conflict with the duty of the prison authorities to deprive him of his freedom of movement and what derives from this duty, i.e., maintaining security rules and order in the prison. For this right is no stronger that any other basic right, which is not absolute but relative, and it is upheld and protected by finding the proper balance between the various legitimate interests of the two individuals or of the individual and the public, interests which are all enshrined and protected in the law…'

See also: *Weil v. State of Israel* [5], at pp. 490-491; *State of Israel v. Azazmi* [2], at pp. 81 *et seq.*.

10. The work of the Prisons Service involves many difficulties, and in the words of Vice-President Justice Landau in *Frankel v. Prisons Service* [18], they must contend with special problems that present themselves to them. In this context, it is appropriate to cite the remarks of the United States Supreme Court about the 'Herculean obstacles' facing the staff of the Prisons Service. In *Procunier v. Martinez* [35], Justice Powell described the work of prison warders in the following manner (at pp. 404-405):

> 'Traditionally, federal courts have adopted a broad hands-off attitude towards problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the government. For all these reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.'

Of course, this difficult work of the staff of the prison authorities does not justify ignoring the constitutional rights of prisoners. But in finding the proper balance between conflicting considerations, we should remember how difficult the task is and how heavy is the burden that the staff of the Prisons Service endure every day and every hour.

11. My colleague, Justice Mazza, mentions the 'near certainty' formula — the formula accepted by us since *Kol HaAm v. Minister of Interior* [10] — and he seeks to apply it to also to this case (see, for example, his remarks in paragraphs 15 and 19 of his opinion). We do not intend to argue with this premise. It is entirely acceptable to us and we accept it into our heart like a cherished child. But at the same time let us realize and understand that the status of an individual — and the status of the authorities vis-à-vis the individual — outside the prison is not the same as the status of an individual,

and the status of the authorities vis-à-vis the individual inside a prison. Taking matters to the extreme, we can say that an everyday demonstration — in a town or village — is not like a demonstration of prisoners inside a prison. Is there anyone who would conceive it possible to allow a demonstration of prisoners in a prison? The analogy to our case is self-evident. Vice-President Justice Landau already discussed it in *Frankel v. Prisons Service* [18] (see paragraph 9, *supra*) when he pointed out the charged atmosphere that normally prevails in a prison — and we too will say: the question is not a question of finding the right formula for the discretion of the authorities. The heart of the matter is in realizing and understanding that what happens inside a prison is not the same as what happens outside it, and *vice versa*.

12. Of course, the harm done to a prisoner may not be disproportionate; there must be a correlation between the anticipated evil and the attempt to prevent it. In the words of Justice Elon in *State of Israel v. Tamir* [4], at p. 212:

> '… When the prison authorities wish to violate one of the rights of a prisoner, for reasons of balancing one of the prisoner's rights against the duty of the authorities to deprive him of freedom of movement and to protect the needs of security and the prison, they shall decide upon such a violation unless they have a reasonable explanation and justification for it, for reasons of public security and prison order, which they are liable to maintain, and the extent and degree of the violation shall not be greater than what is absolutely essential on account of these reasons.
>
> …
>
> The greater the right that is violated, the greater the reasons required to justify this violation.'

Moreover, we have been commanded this also in the Basic Law: Human Dignity and Liberty, in section 8 (and also in section 4 of the Basic Law: Freedom of Occupation): we are required to examine whether the violation of someone's right befits the values of the State of Israel, is intended for a proper purpose, and does so to an extent that is not excessive. See also: CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [22], *per* President Shamgar, at pp. 342-349, and *per* Vice-President Barak, at pp. 434-441. However, it seems to us that the respondents' decision not to allow the

appellant to publish a weekly column satisfies all these minimum requirements, both in principle and in view of the character of the appellant.

*The appellant wishes to write about his 'personal life'; the appellant consents to censorship of his articles*

13. The appellant argues that the respondents' fears are unfounded and the weekly column he wishes to publish in the newspaper presents no danger. How is this so? First of all, he claims that he wishes to write a column about his life in the prison, and he promises 'to write only about his personal life' (paragraph 9 of the application for leave to appeal). As the record of the trial court says:

> 'I agree that my articles may be censored. I undertake that in my correspondence with the press, I will speak only of my personal life.'

In other words, the appellant does not intend to write about anyone else, but only about himself. If that is so, and if that remains the case, why are the respondents concerned?

This argument is no argument, especially when it is made by the appellant himself.

14. First of all, the appellant himself presented his right to write a weekly column to a newspaper as a constitutional right vested in him by law. Even my colleague, Justice Mazza, raised the appellant's case to the highest level, and from this highest level we will learn the nature of the rights of a prisoner. But if we are dealing with a right of this kind, of what significance is it whether the appellant undertakes or does not undertake to write about one subject and not to write about another subject? If the appellant has a vested supreme right, as he claims, his undertaking is totally irrelevant. Indeed, just as the appellant claims to have a supreme right, so too the respondents claim to have a supreme duty which was imposed on them by statute. If the appellant has a supreme right, it will not be the respondents who determine its scope, but at the same time neither will the appellant determine its scope by means of a supposed 'undertaking', made by him, that he will write about this and not write about that. The undertaking of the appellant to restrict his writing to a specific subject cannot therefore be of any significance.

Second, I find the appellant's argument that he intends to write about 'his personal life' problematic, if only for the reason that we do not know what his 'personal life' is. Does he intend to search the depths of his soul and write of his 'thoughts' — in the style of Marcel Proust — or does his 'personal life'

also include the prison staff and the prisoners around him — the warders and prisoners who after years and years in prison have become part of his 'personal life'? Indeed, the concept 'personal life' is a very broad term and we cannot know what it contains and what it does not contain.

15. The appellant goes on to ask the respondents: what cause do you have for concern because of a newspaper column that I will publish? After all, I agree that you may examine all the articles that I want to send to the newspaper beforehand. What is more, I agree that you will be entitled to disqualify any articles or parts of articles that may, in your opinion, harm the security, order and discipline in the prisons. If so, what concerns can the respondents have? This rebutting argument was accepted by my colleague, Justice Mazza. As he says (in paragraph 21 of his opinion):

> '… the appellant admits that the respondent has the authority to hold back and not to send any article to its destination, if its publication (in the respondent's opinion) may harm the running of the prison, the security of the prison warders or prisoners, or even the reputation of any of them. Moreover, in order to satisfy the respondent in this regard, the appellant undertook not to say anything in his articles about any member of the prison staff, warders and prisoners, but to focus solely on a description of his life and experiences.'

And further on:

> 'In order to decide the appeal, we may assume that the respondent has full authority not to send an article to a newspaper, if it believes that its publication may harm public security, the running and discipline of the prison and even the reputation of prison staff, a warder or a prisoner. The appellant has agreed to these assumptions, thereby defining the question that requires our decision in his appeal.'

Moreover (in paragraph 23:

> '… and if the appellant does indeed abide by his declaration that he will devote his articles merely to his own life and experiences and will not write about specific prison officials or prisoners, it is difficult to see how publication of his remarks can arouse a fear of undermining the running and discipline of the prison, the reputation of the staff or any prisoner.'

We see that the appellant has undertaken to write only about his 'personal life', and he agrees that if he does not abide by his undertaking, then the respondents are entitled not to send a particular article or a part of a particular article to its destination, the newspaper.

Reading this, I wonder: does the appellant really intend to make an agreement with the respondents, an agreement in which he undertakes to do certain things — and only those things — while at the same time he 'concedes' the authority of the respondents to censor the articles that he will write if he does not abide by what he undertook not to write? For my part, this set of reciprocal obligations that the appellant and the respondents are each supposed to undertake is totally unacceptable. We are concerned with liberties, rights and duties under the law, and this 'agreement' that the appellant alleges — an agreement between a prisoner and the authorities — should not be allowed.

Whatever the case, I accept the respondents' reply that it is not their task to occupy themselves on a permanent basis in examining the appellant's articles: they were not trained to do this, they have no facilities for this purpose, and they are not employed for this purpose by the Prisons Service. They were trained to be prison warders and not to be reviewers of manuscripts in a book-publishing house. It is indeed true that the respondents were given a power (under regulation 33 of the Regulations): 'to open and examine any letter and any other document of a prisoner', but this power was not originally intended for reviewing a regular column in a newspaper about prison. The power is concerned with letters that the prisoner writes to his family and friends, and the inspection is intended to erase a line or a word, here or there, when a prisoner tries to abuse his right to correspond with persons outside of prison, such as, for example, in order to smuggle drugs or weapons into the prison. But this power of review was not intended for a permanent review of the kind that the appellant wants to impose on the Prisons Service. Everyone will agree that inspecting a newspaper article is not the same as inspecting an ordinary letter that a prisoner writes to his wife. We should also mention that in HCJ 157/75 [20], the court approved a decision of the prison administrators to restrict the length of letters sent by prisoners to two pages only.

16. Moreover, the appellant promised to write only about his 'private life', but as we have seen above, this concept of 'private life' is fertile ground for disputes that will without doubt sprout in the future. The appellant's 'undertaking' to write only about his 'private life' is of no help to him, and in

any event, the 'inspection' of his writings cannot be of any avail on the scale required.

Indeed, if the appellant is given what he wants, it will not be long before the courts will be compelled to consider — on frequent occasions — the question why and for what reason a certain article was banned, or why a certain passage was deleted from a particular article. That time is not only not remote; it has already arrived. For we see that, alongside the appellant's arguments in the appeal that he intends to write only about his 'personal life' in the prison, we find that he adds the following:

> '23. The respondent's main consideration, which can be seen throughout the affidavit, is its desire to prevent the publication of criticism that the appellant wishes to utter, namely censorship because of the content of the speech, which is improper.
>
> 24. Even the consideration of possible harm to the reputation of members of staff is improper. The reputation of prison staff is no better than the reputation of other persons that may be harmed. They too have the opportunity of suing for any insult to them if it is necessary, but this does not constitute a reason that justifies prohibiting the speech *ab initio*.'

What is the meaning of this argument of the appellant and how are these remarks consistent with his intention to write only about his 'private life'? It follows that the 'private life' of the appellant includes, apparently, everything surrounding it, including prison warders and prisoners, and if they find themselves injured by the articles that are published in the personal column, they are welcome to go and ask for relief in the court.

The truth is revealed. The appellant intends to serve, in theory and in practice, as an 'internal auditor' of the prison — a kind of *revisor-general* — and within the framework of his weekly column, he will not refrain from writing about anything that, in his opinion, is part of his 'personal life'. If, then, we do not know what the appellant intends to write, we will not be surprised to find that the personnel of the Prisons Service fear that the appellant's column in the newspaper may lead to a breach of security, order and discipline. Incidentally, we should mention that under the law in force in England, prisoners are forbidden to mention explicitly the names of prison warders and prisoners. As stated in 37 Halsbury, *The Laws of England*, London 4th ed., by Lord Hailsham, 752-753, paragraph 1145 (subtitled 'prisons'):

> 'General correspondence may not contain any of the following matters:
>
> (1) ...
>
> …
>
> (12) material which is intended for publication or for use by radio or television (or which, if sent, would be likely to be published or broadcast) if it (a) is for publication in return for payment (unless the inmate is unconvicted)… (d) refers to individual inmates or members of staff in such a way that they might be identified;
>
> …'

If all this were not sufficient, let us also mention that, in his oral pleadings before us, Advocate Yakir also argued on behalf of the appellant that it is not the Prisons Service's job to 'censor falsehoods', and it would be 'improper' if 'false information' were deleted from articles that the appellant intends to send to his newspaper. The public ought to decide — the public, rather than the Prisons Service (see also the remarks of my colleague, Justice Mazza, in paragraph 20 of his decision). After all this, does the appellant continue to argue seriously that he is prepared to accept prior inspection of his articles? I think not.

17. Moreover, the appellant's deeds — shortly before the proceedings and during the proceedings — cast considerable doubt on his declarations and his good faith. In order not to elaborate on a description — the matter is lengthy and wearisome — let us cite some of the remarks of the trial court in this respect. The following were the remarks of Justice Even-Ari in his decision refusing the appellant's application:

> '… An inspection of the interview that was published in *Yediot Aharonot* on 20 November 1989 shows that *prima facie* the petitioner has indeed added insult to injury — not only has he escaped from lawful custody and returned to his life of crime, but he also besmirches the Prisons Service in an interview entitled "The gangsters run the prison".
>
> … Later in the proceedings, it became clear that the petitioner telephoned various journalists and distributed various information about what supposedly was happening in the prison, and the spokesman of the Prisons Service was required to

> respond to the various enquiries of journalists, all of which while the petition was *sub judice*.
>
> … It transpires that the petitioner is interested in a prisoner called "Ahmed Yassin". He does not know him at all and has never met him, but he asks for the intervention of the media in his case and even in the petition that is *sub judice* before this court (see exhibit B).
>
> *Prima facie* it would seem that the petitioner is still trying to make headlines — and he is spreading stories about a security prisoner whose case is very sensitive. *Prima facie* this is a sensitive case where unauthorized involvement may result in serious consequences. This constitutes irrefutable evidence of the irresponsible approach of the petitioner and *prima facie* strengthens the position that the petitioner should not be allowed the right of free access to the various branches of the media…
>
> … The newspaper interview that was published in *Yediot Aharonot* shows the petitioner's method in approaching the press. The respondent's decision to prevent the petitioner having access to this media channel is *prima facie* reasonable and logical. This consideration is a normative one, intended to prevent unrest inside the prison.
>
> … It is clear to us that giving the petitioner the right of free access to the media will allow him to acquire great power, and allowing a person like the petitioner (for a description of the petitioner's character, see CrimC (TA) 7036/92 [34]) to acquire such power will have serious implications for the running of the prison. Therefore I think that denying the right to contact the press, in the circumstances brought before us, is reasonable.' (parentheses supplied).

See a more detailed consideration of the matter in paragraph 7 of the opinion of my colleague, Justice Mazza. With regard to what was said by the Magistrate Court about the appellant, Justice Even-Ari was referring to the remarks of Justice E. Beckenstein concerning the appellant, that: 'I have no doubt that we are dealing with an accused who, even if he is currently serving a prison sentence for offences of the same kind, uses every minute of prison leave given to him in order to commit more offences, for it is in his blood.' Why then should the respondents put faith in the appellant?

18. In view of all this, taking into account the offences for which the appellant is serving his sentence in the prison, it is hardly surprising that the respondents are not prepared to accept the appellant's statements at face value. We should remember that the appellant is currently serving a prison sentence of ten and a half years for offences involving fraud, forgery, impersonation and escaping from lawful custody. The appellant has a terrible criminal record. He has many convictions for offences of the same kind, and he has previously served three prison sentences. Some of the offences for which he is serving his current sentence were committed when he escaped from lawful custody. What more can one expect of the respondents?

19. In this context we should add that the appellant — like any prisoner — is entitled to write to the court, Government ministers, members of the Knesset and the State Comptroller (the Public Complaints Commissioner). He may write whatever he pleases, and no-one will restrain him. Moreover, the prisons have an internal review system and this too is open to the appellant, just as it is for any other prisoner. See, for example, sections 71-72F and section 131A of the Ordinance and regulations 24A and 24B of the Regulations. Similarly, the appellant is permitted to write to the newspapers ('letters to the editor') — within the framework of the quota of letters that he is entitled to send — naturally with certain restrictions that are required because he is a prisoner in prison. In other words, the respondents are not intending to cut the appellant off from the world, to hold him incommunicado. They merely object to the weekly column that he wants to write, and they have explained in detail their concerns.

*On Israeli and American case-law*

20. My colleague reviews at length and in detail case-law made in Israel and the United States, and he wishes to learn from them in our case. As for me, I have not found in this case-law any authority that supports my colleague's approach. With regard to Israeli case-law, I have not found even one case that resembles this one. All the judgments concern a violation of human dignity — 'dignity' in its plain sense — or cases where the court was required to consider whether the discretion of the prison authorities was reasonable or unreasonable in the circumstances of each particular case. Wherever it was found that the respondents' discretion was unreasonable, the Court granted the petition. With regard to human dignity, let us mention *Katlan v. Prisons Service* [3] (performing an enema on a person under arrest); *Darwish v. Prisons Service* [6] (denying beds to prisoners, for fear that they would use them to do harm; the petition was denied by a majority); *Yosef v.*

*Governor of Central Prison in Judaea and Samaria* [9] (harsh prison conditions violating human dignity); *Weil v. State of Israel* [5] (the right of a prisoner to intimacy with his spouse); *State of Israel v. Azazmi* [2] (harsh prison conditions violating human dignity). One is led to ask: can the rights in these cases be compared to the 'right' of a prisoner to write a weekly column in a newspaper?

As to cases in which the court found that the discretion of the prison authorities was unreasonable: for example, in *Livneh v. Prisons Service* [17], the governor of the prison refused to allow the petitioner to bring various books into the prison, on the ground that these were likely to lead to incitement. With regard to the framework for the discretion of the prison governor, the court held that:

> '… no-one disputes that under regulation 44 of the Prisons Regulations, 5727-1977 [today regulation 49 of the Regulations], a prisoner is not entitled to bring books into the prison, unless the prison governor allows them to be brought into the prison. It follows that the governor is given discretion to allow or to forbid bringing a certain book into the prison; this Court will not interfere with his discretion, as long as he exercised it in good faith and in a reasonable manner' (square parentheses supplied).

On the merits, the court thought that the prison governor did not act reasonably, and it therefore held the governor liable to grant the petitioner's request.

In *Frankel v. Prisons Service* [18], *supra*, the petitioner was not allowed to bring two books into the prison. At the end of the hearing, the petition was granted with respect to one book and denied with respect to another. Again, the court only considered the reasonableness of the prison governor's discretion. The same is true of all the other cases, in some of which the petitioners were found to be justified and in some of which no justification was found for intervention in the discretion of the respondents, all of which according to the usual and proper criterion of the reasonableness of the discretion; see, for example, HCJ 157/75 [20] (the Prisons Service is entitled to restrict the length of outgoing letters); HCJ 881/78 *Mutzlach v. Damon Prison Commander* [23] (not providing compulsory education for prisoners); *Almalabi v. Prisons Service* [19] (the prohibition against a prisoner having possession of a transistor radio); *State of Israel v. Tamir* [4] (supplying drugs

to a prisoner on a prescription of a doctor who is not working for the Prisons Service).

With regard to the case-law that my colleague cited from the United States, I think that it contains nothing that changes the general picture. The basic considerations are known to all, and I do not find that the Prisons Service has departed from the general guidelines laid down by the courts in the United States (even if those guidelines were to bind them). This is especially so when the courts in the United States are not unanimous. Moreover, where prisons are the issue, I think that we should caution ourselves against drawing analogies from other legal systems, as long as we do not know that the sociological and psychological background there and here are identical, or at least very similar. In the final analysis, the legal norm reflects — at least in part — a given social position, and we should be careful not to draw analogies in matters that are not universally the same.

*The Basic Law: Human Dignity and Liberty and freedom of speech; the Basic Law: Freedom of Occupation*

21. My colleague, Justice Mazza, holds that the Basic Law: Human Dignity and Liberty 'enshrined the case-law recognition of the constitutional status of freedom of speech' (paragraph 14 of his opinion). How is this so? The Basic Law does not mention freedom of speech by name or by implication. 'This is immaterial', says my colleague:

> 'Even without an express provision, freedom of speech is included in human dignity, according to the meaning thereof in sections 2 and 4 of the Basic Law. For what is human dignity without the basic liberty of an individual to hear the speech of others and to utter his own speech; to develop his personality, to formulate his outlook on life and realize himself?' (*ibid*).

I will not enter into an argument with my colleague over this *possible* interpretation of the Basic Law: Human Dignity and Liberty, but at the same time I will not deny that there are other possible interpretations. The question does not allow of a simple solution, and the answer does not present itself to us as if of its own accord. The subject incorporates not only the meaning of the concept of 'human dignity' in its linguistic, moral, political, historical and philosophical senses, but also — or should we say, mainly — the meaning of the concept *in the special context* of the Basic Law: Human Dignity and Liberty. This special context — which is bound up with the relationship between the organs of the State — can also directly affect the sphere of

influence of 'human dignity'. In our case, we have not considered the whole picture, or even part of it, and I will caution myself against hasty decisions and *obiter dicta* on issues so important and far-reaching as the question of the interpretation of the concept of 'human dignity'.

22. Finally, the appellant claims he has a right of freedom of occupation — a right which he argues is given to him by the Basic Law: Freedom of Occupation. This argument was cast into the air of the court as if it were self-evident, and without counsel for the appellant trying to establish it on firm ground. Moreover, the right to freedom of occupation — like a person's right to freedom of speech, and in fact any other right — is a right that must contend with other interests that oppose it and seek to reduce it. The interests that are capable of overriding freedom of speech in this case are the very same interests that can lead to a restriction of the right of freedom of occupation as well. In any event, our case lies in the valley between the freedom of speech and freedom of occupation, but its centre of gravity lies in the freedom of speech. We have dealt with this at length and we will say no more.

23. Were my opinion to be accepted, we would deny the appeal.

**Justice D. Dorner**

1. I agree with the opinion of my colleague, Justice Mazza.

My colleague examined the wider issues. He showed that prisoners are also entitled to freedom of speech, and that a violation of this right — as with the other basic rights to which prisoners are entitled — 'is lawful only if it complies with the authority test and the test of the proper balance between it and the legitimate interests entrusted to the authority' (see paragraph 13 of his opinion). My colleague discussed the principles involved in making the balance, and he reached the conclusion that in our case the violation of the appellant's freedom of speech is unlawful.

My colleague, Justice Cheshin, agrees with the principles outlined by Justice Mazza, but his conclusion is that the concern of the respondent — the Prisons Service — that publication of the appellant's articles is likely to harm prison discipline overrides the appellant's basic right to freedom of speech, and that in order to dispel this fear the respondent need not trouble to read the articles, as the appellant suggested, in order to disqualify only those articles whose publication is expected to result in real harm to prison order and discipline.

2. In my opinion, the test of rhetoric about basic human rights, including basic rights retained by prisoners, lies in the willingness of society to pay a price in order to uphold them. I discussed this in one case:

> 'A basic right, by its very nature, requires society to pay a price. Where no price is paid for the exercising of an interest, there is no significance in enshrining it as a right, and certainly not as a constitutional basic right…
>
> … in our democratic regime, which recognizes individual liberty as a basic right, society waives, to a certain extent, the possible protection of public safety' (CrimFH 2316/95 *Ganimat v. State of Israel* [24], at p. 645).

In our case, if a certain amount of trouble that may be caused to the prison authorities is sufficient to deprive a prisoner of his right to freedom of speech, there is no meaning to the declaration that a prisoner retains this basic right.

3. Admittedly, no-one disputes that in a conflict between the freedom of speech and prison order and discipline, the right of the prisoner to freedom of speech yields. However, the status of freedom of speech as a basic right means that a violation thereof is permitted when it befits the values of the State of Israel, is for a proper purpose and is to an extent that is not excessive. Compare section 8 of the Basic Law: Human Dignity and Liberty (hereafter also — the Basic Law); the remarks of Vice-President Barak in HCJ 721/94 *El-Al Israel Airlines Ltd v. Danielowitz* [25], at p. 760 {488}, and what I wrote in *Miller v. Minister of Defence* [21], at p. 138 { **שגיאה! הסימניה אינה מוגדרת.**}.

4. In our case, no one disputes that the respondent has the authority to restrict the freedom of speech of prisoners, and that maintaining discipline in the prison is a proper purpose for exercising his authority. Notwithstanding, a violation of a prisoner's freedom of speech will not be permitted unless it is to an extent that is not excessive for maintaining discipline in the prison.

5. This rule of proportionality is complex, and includes several elements. See, for instance, HCJ 987/94 *Euronet Golden Lines (1992) Ltd v. Minister of Communications* [26], at pp. 435-436; HCJ 3477/95 *Ben-Atiya v. Minister of Education, Culture and Sport* [27], in the opinion of Vice-President Barak. In our case, the following requirements are particularly relevant:

*First*, a violation of freedom of speech will be permitted, as a rule, only when there exists a probability on the level of near certainty that allowing the

speech will lead to a real and serious violation of order and discipline in the prison. This test is implied by the preferred status of the freedom of speech, since in conflicts between competing rights it has the status of a 'supreme right' (*per* President Agranat in *Kol HaAm v. Minister of Interior* [10], at p. 878 {97}).

This test applies also to the freedom of speech of prisoners. See the remarks of Vice-President Landau in *Frankel v. Prisons Service* [18], at p. 209. This is also the position of my colleague, Justice Mazza (see paragraphs 15 and 19 of his opinion), and even my colleague, Justice Cheshin, agrees with this (see paragraph 11 of his opinion).

The near certainty test is not mere words. It reflects the price that society is prepared to pay in order to realize the freedom of speech of the prisoner, for the practical significance is that the possibility of a violation which is not on the level of near certainty or an anticipated violation which is small rather than real and serious will not give rise to a sufficient ground for a violation of the prisoner's freedom of speech.

The court addressed this issue in *Livneh v. Prisons Service* [17], at p. 689. In that case a prisoner was not permitted to bring certain books into the prison, on the ground that reading them might prompt political arguments between the prisoners, which would lead to unrest, thereby disrupting prison discipline. The prisoner's petition was granted. Justice H. Cohn wrote as follows:

> '… But it has never been said that in order to "keep the peace" he [the prison governor] may prevent arguments between the prisoners, and this includes political arguments; as long as discipline and order are maintained in the prison, the prisoners may argue among themselves on any subject that they choose; and if discipline and order are breached, those who commit the breach will have to answer for their breach, but they should not have to answer for the subject of their argument' (square parentheses supplied).

*Second*, denying the freedom of speech is contingent on it being impossible with a reasonable effort to allay or reduce the fear of a disruption to prison discipline, by means that do not involve a violation of freedom of speech or that violate it only minimally. See what I wrote in HCJ 4712/96 *Meretz – Israel Democratic Party v. Jerusalem District Commissioner of Police* [28]. In this matter, a mere financial outlay or burden entailed in these

efforts cannot, if they are reasonable, justify a violation of a basic right. See the remarks of Justice Mazza in *Miller v. Minister of Defence* [21], at pp. 113-114 {שגיאה ! הסימניה אינה מוגדרת.-שגיאה ! הסימניה אינה מוגדרת.}.

*Third*, the burden of proof, both with regard to the likelihood of a violation of prison discipline and its seriousness and with regard to the impossibility of removing or reducing this fear with a reasonable effort rests with the authority. See what I wrote in *Miller v. Minister of Defence* [21], at pp. 135-136 {שגיאה ! הסימניה אינה מוגדרת.}.

6. It should be emphasized that criticism of detention conditions, even if the authority considers them to be incorrect, is not in itself a ground for violating freedom of speech. Care must be taken that maintaining discipline in the prison does not become a cloak for silencing a prisoner so that the public do not become aware of prison conditions, which prisoners certainly do not need to learn from the newspaper. It is well known that the Prisons Service does not refrain from contact with the press through the spokesman of the Service or senior employees of the Service. The prisons also conduct planned press visits as part of the public relations of the Service, which wants to present itself at its best. In these circumstances, preventing a prisoner from expressing any criticism he may have is unfair, and may even harm the public, which is entitled to be exposed to the entire 'marketplace of ideas'. The remarks of Justice Shamgar in CA 723/74 [13], at p. 298, are relevant in this context:

> 'The existence of basic rights is not disputed when matters run smoothly and the various authorities merit compliments only. The true test of freedom of speech occurs when confronted with forceful and unpleasant criticism.'

7. My colleague, Justice Mazza, also relied on the Basic Law: Human Dignity and Liberty. In his view, even without an express provision the freedom of speech is included in the right of human dignity, within the meaning thereof in sections 2 and 4 of the Basic Law. See section 14 of his opinion.

I agree that a violation of a prisoner's freedom of speech *because he is a prisoner* violates human dignity within the meaning thereof in the Basic Law. It is another question whether freedom of speech in general is protected by the Basic Law. This question is a part of the broader question whether human rights that are not expressly mentioned in the Basic Law can or should be incorporated into the Basic Law by interpreting the word 'dignity', thereby

opening the door to judicial review of statutes that violate these rights. This question is not at all simple. See I. Zamir, *Administrative Power*, Nevo, 1996, at pp. 112-113.

In case-law various approaches have been expressed in this regard in *obiter dicta*. See, for instance, the remarks of Justice Mazza in HCJ 453/94 *Israel Women's Network v. Government of Israel* [29], at p. 522 {448} on the one hand, and the remarks of Justice Zamir, *ibid*., at pp. 535-536 {467-468} on the other; and what I wrote in *Miller v. Minister of Defence* [21], at pp. 131-133 {**שגיאה ! הסימניה אינה מוגדרת.-שגיאה ! הסימניה אינה מוגדרת.**}.

The question of freedom of speech has also been considered in case-law. Justice Zamir's reservation in *Israel Women's Network v. Government of Israel* [29] also referred to freedom of speech. By contrast, an opinion has been expressed that 'today it is possible to deduce freedom of speech from the protection conferred on human dignity and liberty in the Basic Law: Human Dignity and Liberty' (*per* Justice Barak in CA 105/92 [11], at p. 201; see also Y. Karp 'Some Questions on Human Dignity according to the Basic Law: Human Dignity and Liberty', 25 *Mishpatim* (1985), 129, 144).

8. Freedom of speech is a central basic human right and I do not believe that in Israel it can be regarded as being part of the right to dignity. Indeed, the Israeli legislator did not intend to incorporate the freedom of speech in the right of dignity. Quite the reverse.

Knesset Member Rubinstein, who sought to promote the enshrining of basic rights in Basic Laws by enacting Basic Laws with regard to those rights for which it was possible to obtain national consensus, proposed several Basic Laws, each of which referred to different rights. *Inter alia*, alongside the draft Basic Law: Human Dignity and Liberty, he submitted a draft Basic Law: Freedom of Speech (*Divrei HaKnesset* (Knesset Proceedings) 121, 1991, at p. 3748). At the Knesset debate on this draft, Justice Minister Dan Meridor said:

> 'If there is one central principle of democracy that is no less important, and possibly more important, than election mechanisms and other mechanisms, it is the freedom of speech. A state which has regular elections, and which has many other characteristics that are similar to a democracy, but which does not have freedom of speech, is not a democracy. A state which does not have freedom of the press is not a democracy.

> Consequently, this is one of the most significant basic rights that characterize a free society' (*ibid*., at pp. 3732-3733).

In the year 5754 (1993-1994), the Constitution, Law and Justice Committee of the Knesset submitted the draft Basic Law: Freedom of Speech and Assembly to the Knesset three times. The first two drafts were not approved on first reading, whereas the third draft was approved on first reading but was not submitted for a second reading.

Apparently, the national consensus required for enshrining freedom of speech in a Basic Law had not yet been reached, and the draft Basic Law: Freedom of Speech has not been enacted until today. In such circumstances, it seems doubtful to me whether it is possible, or at any rate appropriate, to confer super-legislative status on freedom of speech generally, by incorporating it in the right of dignity. In this matter I wrote, with respect to the principle of general equality, the following:

> 'Admittedly, the significance of the draft versions — which reveal the intentions of the members of the Knesset who enacted the Law — decreases with the passage of time since the legislation was passed, and the occurrence of political, social or legal changes that may justify a deviation from these intentions. But only a few years have passed since the enactment of the Basic Law, and *prima facie* the Basic Law should not be construed in a way that conflicts with its purpose as can be seen from the draft versions' (*Miller v. Minister of Defence* [21], at p. 132 {**שגיאה! הסימניה אינה מוגדרת.**}).

See also, Y. Karp 'The Basic Law: Human Dignity and Liberty — A Biography of Power Struggles', 1 *Mishpat Umimshal* (1992), 323, 338.

Nonetheless, there are cases where a violation of an individual's freedom of speech constitutes a violation of his right of dignity, within the meaning of the Basic Law: Human Dignity and Liberty. When denying freedom of speech humiliates the individual and violates his dignity as a human being, there is no reasonable way of interpreting the right of dignity prescribed in the Basic Law so that this humiliation is not deemed to violate it. See and compare the remarks of Justice Zamir in HCJ 7111/95 *Local Government Centre v. The Knesset* [30], at pp. 496-497; and what I wrote in *Miller v. Minister of Defence* [21], at pp. 131-133 {**שגיאה! הסימניה אינה מוגדרת.** - **שגיאה! הסימניה אינה מוגדרת.**}, where I referred to the distinction between the principle of general equality and the prohibition of discrimination against groups.

However, not every violation of freedom of speech involves humiliation. For instance, it has been held that freedom of speech also includes freedom of commercial expression. See HCJ 606/93 *Advancement Promotions and Publishing (1981) Ltd v. Broadcasting Authority* [31]; HCJ 5118/95 *Meir Simon Advertising, Marketing and Public Relations Ltd v. Second Television and Radio Authority* [32]. Notwithstanding, a violation of freedom of commercial expression, for example by banning an advertisement, does not usually involve humiliation, and is therefore not a violation of the right of dignity within the meaning thereof in the Basic Law. The disqualification of a newspaper item, as distinct from a literary work or an opinion, also does not usually violate human dignity. In this matter, there are grounds for examining what is the main reason underlying the principle of freedom of speech in the context of the specific speech under consideration. It is well-known that, alongside the importance of freedom of speech for human self-realization — a violation of which is a violation of human dignity — it is also required for uncovering the truth, upholding the democratic process and safeguarding social stability. See HCJ 399/85 *Kahana v. Broadcasting Authority Governing Board* [33], at pp. 270-277, and the sources cited there. With all the respect due to the social reasons that underlie freedom of speech, these are not necessarily derived from human dignity. An act that violates freedom of speech shall be deemed to violate the right of human dignity, within the meaning of the Basic Law: Human Dignity and Liberty, only if it clearly violates the 'personal' basis for freedom of speech, as distinct from the social reasons underlying it.

The 'silencing' of a prisoner by his warders *because he is a prisoner* violates his dignity. Prisoners, in the words of Justice Haim Cohn, 'are considered by the public as devoid of dignity, as though their criminal acts show that they chose to exchange their dignity for disgrace' (H. H. Cohn, 'The Values of a Jewish and Democratic State — Studies in the Basic Law: Human Dignity and Liberty', *Hapraklit* - Jubilee Volume, Israel Bar Association, 1994, 9, 33). What underlies the denial of freedom of speech to a prisoner is the assumption that because he is a criminal he is devoid of dignity — an inferior person. Such a denial therefore violates the basic right enshrined in the Basic Law: Human Dignity and Liberty.

10. From the general, let us return to the specific: in our case, the authority has not complied with even one of the requirements I listed above (in paragraph 5) concerning proportionality. As stated, the main concern raised by the respondent is that the status of the appellant as a 'journalist' will

give him the power to praise or criticize the prison warders, and as a result he will obtain preferential treatment to which he is not entitled, he will sow discord among members of the staff and cause unrest among the prisoners, thereby compromising prison discipline. This concern may, apparently, be allayed or significantly reduced by preventing the mentioning of names of prison warders in the articles. As stated, the appellant has gone further and is prepared to submit his articles to the respondent's censorship. The respondent's refusal to devote the time required for this censorship is inconsistent with his duty to make a proper effort in order to prevent a violation of a basic human right. Unlike my colleague, Justice Cheshin, I do not think that —

> '… it is not their [the prison authorities'] task to occupy themselves on a permanent basis in examining the appellant's articles: they were not trained to do this, they have no facilities for this purpose, and they are not employed for this purpose by the Prisons Service. They were trained to be prison warders and not to be reviewers of manuscripts in a book publishing house' (paragraph 15 of his opinion —square parentheses supplied).

In my opinion, it is a clear duty of government authorities in the State of Israel to do what is necessary to safeguard basic human rights. This is certainly the case with regard to the duty of prison warders to ensure that the basic rights of the prisoners under their authority are upheld, while minimizing violations of prison order and discipline. This role is no less important than any other role imposed on the Prisons Service, and it must ensure that the warders are trained to carry it out, just as it ensures that they are trained to carry out their other tasks. In our case, there is even an explicit provision — regulation 33 of the Regulations — which requires the respondent to carry out its role in balancing between the safeguarding of prisoners' freedom of speech and the need to maintain prison order and discipline.

Moreover, the fact that in 1989 the appellant published articles about his life in prison without the respondent showing that this publication resulted in a disruption of prison order and discipline, indicates that the respondent's fear, which is based on speculation only, does not have a sufficient basis. Most certainly we cannot conclude from past experience that there is a near certainty that publishing the appellant's articles will significantly and seriously disrupt prison discipline.

I therefore agree with the opinion of my colleague, Justice Mazza, that the appeal should be allowed.

Appeal allowed by majority opinion, Justice M. Cheshin dissenting.

10 Elul 5756.

25 August 1996.