

# The Chief Enforcement Officer and Insolvency in Israeli Law

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*Israeli enforcement law uses both direct and indirect enforcement — the former via attachment of assets, and the latter via imprisonment of the debtor. The use of indirect enforcement via imprisonment is problematic, as it violates the basic rights of the debtor. I will argue that in response to this problem, the law created a framework for the "debtor of limited means." I will demonstrate that not only does this create an improper definition of the task of the Chief Enforcement Officer, but that it is also an inefficient way of dealing with an insolvent debtor. I will propose that the system differentiate between debtors who cannot pay their debts and those who do not want to pay their debts. I believe that encouraging the insolvent debtor to file for bankruptcy will avoid the problem of imprisonment and enable the Chief Enforcement Officer to return to his natural role as judge of enforcement. Additionally, I suggest creating a separate track of "consumer enforcement," which would avoid the whole system of installments, imprisonment, and debtors of limited means, at least regarding consumer credit.*

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## INTRODUCTION

In Israel, the enforcement<sup>1</sup> process is regulated by the Execution Law, enacted in 1967, which replaced the Ottoman Temporary Law on Enforcement (1914),<sup>2</sup> and by the English Ordinance to Amend the Law with Regard to Imprisonment for Debt (1931).<sup>3</sup> As in most legal systems,<sup>4</sup> the enforcement process in Israel begins with the opening of a file in the Enforcement Office.<sup>5</sup> The enforcement proceeding pertains to any debt expressed in a legally binding document, referred to by law as a "title of enforcement."<sup>6</sup> In Israel, there are various types of titles of enforcement, including judgments (in civil, labor, or family matters), pledges, bills of exchange, as well as private documents of up to NIS 50,000, which were recently added to this category.<sup>7</sup>

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1 In this Article, the terms "enforcement" and "Chief Enforcement Officer" are substituted for the terms "execution" and "Chief Execution Officer," which are those used in the official English translation of Israeli statutes. See Execution Law, 1967, 21 L.S.I. 112 (1966-67). Statutes, including the Execution Law, are referred to by their official names.

2 Collection of Ottoman Laws in Force in Eretz Israel (M. Laniado ed., 1929) (Hebrew).

3 The Laws of Palestine 613 (Robert Drayton ed., 1934).

4 Regarding enforcement in different legal systems, see Salvatore Mazzamutto, *L'Esecuzione Forzata* (1998); Konstantinos Kerameus, *Enforcement Procedure*, in 16 International Encyclopedia of Comparative Law, ch. 20 (2002); Leo Rosenberg et al., *Zwangsvollstreckungsrecht* (1997); Othmar Jauernig, *Zwangsvollstreckungs und Insolvenzrecht* (21st ed. 1999); Peter Kaye, *Methods of Enforcement of Orders and Judgments in Europe* (1995); Gary Envis & Judith Jackson, *Enforcing Money Judgments* (1995); Wendy Kennett, *Enforcement of Judgments in Europe* (2000); Hervé Croze, *La Loi n. 91-650 du 9 juillet 1991 portant Réforme des Procédures Civiles d'Exécution*, 66 *La Semaine Juridique* 59 (1992).

5 Execution Law § 2.

6 It is possible to define a title of enforcement as a document that declares, with legal force, the existence of a debt. The credit receives legal force via the title of enforcement. See Giuseppe Campeis, *Arrigo de Pauli*, in *Le Esecuzioni Civili* 27, 34 (2d ed. 1998). Regarding the *titre exécutoire* in France, see Serge Guinchard & Tony Moussa, *Droit et Pratique des Voies d'Enforcement* 6 (2004); Roger Perrot, *Institutiones Judiciaires* 491 (11th ed. 2004). Regarding German Law, see Christoph Paulus, *Zivilprozessrecht* 223 (3d ed. 2004); Ernst-Otto Bruckmann, *Die Praxis der Zwangsvollstreckung* 79 (4th ed. 2002).

7 Certain types of debts are outside the sphere of the enforcement office, such as taxes, which have their own track for enforcement. See Tax (Collection) Ordinance, 1929, 2 *Hukei Eretz Yisrael*, ch. 157, at 1374. Taxes are included in the bankruptcy procedure.

According to the Execution Law,<sup>8</sup> a magistrate court judge is responsible for the Enforcement Office. His title is Chief Enforcement Officer (CHEO). As common practice, the CHEO is appointed at the rank of registrar. There is a long-standing discussion regarding whether the CHEO's tasks should be defined as judicial, administrative, or perhaps quasi-judicial.<sup>9</sup> A belief gaining much popularity in Israel is that the system can be made more efficient, and can provide better solutions for creditors, by defining the function of the CHEO as solely administrative.<sup>10</sup>

In my view there is another question that is more important than the characterization of the CHEO as administrative or judicial: whether the CHEO should deal solely with questions that have direct bearing on enforcement. This question may seem obvious, but it is not so, since Israeli enforcement focuses not only on the realization of the resources of the debtor, but also on the personal obligation of the debtor to pay the debt. As a result, the CHEO deals not only with enforcement measures with respect to the property of the debtor (i.e. direct enforcement), but also against the debtor himself (indirect enforcement). As a result, the CHEO actually fulfills three functions: in addition to being *judge of enforcement* (his natural function), he is also *judge of contempt* and *judge of insolvency* (without being a judge of bankruptcy).<sup>11</sup> I will try to show why this situation falls short of affording a reasonable solution to the enforcement of judgments.

In Part I, I will introduce the topic with a brief discussion of the different criteria used to evaluate the aims of the enforcement process; this will help us understand the relationship between the proposed aims of the enforcement process and the way we define the task of the CHEO in practice. I will then focus my analysis on *indirect enforcement* — enforcement not via attachment of the debtor's assets, but rather via measures taken against his person, principally imprisonment. My analysis will explore the problem stage by stage: First, I will discuss the legal framework of indirect enforcement,

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<sup>8</sup> Execution Law § 3.

<sup>9</sup> See David Bar Ophir & Meir Gilboa, *Tafkid Rosh Hahozaa Lapoal Bezirat Hahitmodedut ben Hazohe Lahayav* [*The Function of the Chief Enforcement Officer in the Arena of Confrontation between the Creditor and the Debtor*], 19 *Hamishpat* 66, 68 (2005) (Hebrew) (presenting the CHEO's task as chiefly administrative).

<sup>10</sup> It is clear that the CHEO is not a judge, in the sense that he is not permitted to revise a judgment or even clarify it if it is open to interpretation; the interpretive power is in the hands of the judge who handed down the judgment, although the very decision about whether a judgment is clear or not is in the hands of the CHEO. See Execution Law § 12.

<sup>11</sup> Bankruptcy in Israel is in the hands of the District Courts.

which is based on the establishment of installments in enforcement files (Part II). I will try to explain why this system of payment in installments rarely serves the creditors' interests, and why it causes the CHEO to deviate from his natural task of enforcement and instead deal with questions of contempt (Part III). In fact, I will argue that the "contempt of enforcement" instrument is only a justification for the existence of imprisonment, and that it is alien to the natural aims of the enforcement process. Since indirect enforcement is predicated upon the obligation of the debtor to pay his debts, enforcement must be limited when the debtor cannot pay the installments required of him. Accordingly, the Israeli system has created the institution of the *debtor of limited means*. I will analyze the debtor of limited means procedure at length since this analysis is cardinal to understanding the difficulty resulting from an improper definition of the role of the CHEO (Part IV). In my view, the debtor of limited means mechanism was created as a corrective to indirect enforcement, intended to address the problem of the insolvent debtor. My claim is that — at least to a certain extent — a better definition of the competencies of the CHEO would be achieved if we were to distinguish between the enforcement of titles of enforcement and the problem of insolvency, which must be dealt with in a comprehensive framework that the procedure of the debtor of limited means falls short of affording. I do not hide my disagreement with the very idea of indirect enforcement, since it usually creates unjust situations for the debtor, and does not usually afford any solution to the creditor, especially when the creditor is a financial institution. Therefore, I will propose a certain reform of the Israeli Execution Law, and argue that an improvement of the system will be achieved if indirect enforcement is excluded, at least in cases in which the creditor is a bank or a financial institution (Part V).

### I. THE ROLE OF THE CHEO AND DIFFERENT APPROACHES TO ENFORCEMENT

The task of the CHEO should be defined within a general understanding of the aims of the enforcement process. The policy of enforcement is influenced by social factors, political and economic circumstances, and even religious attitudes.<sup>12</sup> One cannot simplistically define a policy as "good" or "bad," since this valorization depends upon a wide range of considerations. Nevertheless

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<sup>12</sup> Thus, for example, puritanism has been suggested as one of the causes of the peculiar relationship toward the debtor in American law. See Sophie Schiller, *L'Effacement*

we can draw certain guidelines as to the way enforcement should be carried out pursuant to the aims of the system. Without pretending to exhaust the topic, it is important to have a clear understanding of what we expect of the enforcement system as a background against which we can analyze the task of the CHEO and measure the degree of the system's success.

One possibility is to frame the analysis of enforcement policy as a question of the ethics of payment, and to view the enforcement system as structured to fulfill the principle that "debts should be paid." The non-payment of debts was traditionally linked to moral condemnation due to the fact that the debtor had not honored his word.<sup>13</sup> Accordingly, the objective of the enforcement system should be to realize the payment of the debt, or at least to induce the debtor do all he can to pay the debt. Thus, in Israeli law, the powers granted to the CHEO should fulfill these aims, taking the debtor (and not only his or her assets) as the *object* of enforcement, and allowing personal measures to be taken against his or her person. This criterion was dominant in the past in most legal systems,<sup>14</sup> and it is accepted today in Israeli law.<sup>15</sup> Enforcement is seen as the outcome of the freedom of contract, or aimed at materializing the freedom of contract, and, in principle, the purpose of the enforcement system is to lead to the fulfillment of obligations, since it is in society's best interest that obligations be honored. In my view, this criterion affords, at best, a partial explanation of the problem of enforcement. The Israeli courts have understood that this criterion alone cannot cope with the gamut of circumstances that may lead a debtor to be unable to fulfill his obligations, and does not afford a response to the distinction between debtors who do not *want* to pay and those who *cannot* pay.

In more recent years in Israel, there have been attempts to mitigate this strictly ethical approach. The Israeli Supreme Court has tried to redefine the aim of the enforcement process as seeking a balance of interests between debtor and creditor.<sup>16</sup> Accordingly, the Israeli Supreme Court has sought to

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*des Dettes Permet-il un Nouveau Départ? Comparaison Franco-Américaine*, 56.3 *Revue Internationale de Droit Comparé* 654, 667 (2004).

13 See Éric Perdu, *L'Impayé* 23 (2005).

14 For an historical point of view, see Christoph Bergfeld, *Über die Aufhebung der Schuldhafte in Frankreich und in Deutschland*, in *Wechselseitige Beeinflussungen und Rezeptionen von Recht und Philosophie in Deutschland und Frankreich* 329 (Jean-Francois Kervegan & Heinz Mohnhaupt eds., 2001); G. Kisch, *Der Deutsche Arrestprozess* (1914); Edmond de Bieville, *Du Retablissement de la Contrainte par Corps* (1904).

15 It is accepted by at least part of the Israeli legal community. See David Bar Ophir, *Bagatz Perach and Its Aftermath*, in Menachem Elon, *Human Dignity and Freedom in the Methods of Enforcement of Judgments* 326 (1999) (Hebrew).

16 See, e.g., H.C. 5304/92, *Perach v. Minister of Justice*, 47(4) P.D. 715; C.A. 770/95,

formulate the enforcement policy, which the CHEO should follow, in a manner that balances debtor and creditor interests. This shift may have been affected by the trend towards the constitutionalization of private law, a process that we find in countries such as Germany,<sup>17</sup> the United Kingdom,<sup>18</sup> Greece,<sup>19</sup> and to a certain extent in Israel also.<sup>20</sup> The balance of interests leaves room for complex questions to be answered by the CHEO, such as whether the defended interests are on the same level, and how equilibrium should be achieved. A system that is too debtor-biased could be at odds with a more liberal credit market, although it may be commensurate with what could be defined as a welfare orientation. It is particularly difficult to achieve the desired balance in a system based upon indirect enforcement, since the obligation to pay is likely to be detached from the real financial capability of the debtor. Indirect enforcement may, in the end, result in the use of coercive measures against the debtor, even when the procedure lacks effectiveness to collect the debt.

The role of the CHEO and, more generally, the whole system of enforcement, should be evaluated in terms of efficiency as well.<sup>21</sup> Defining efficiency is not an easy task since it involves many considerations, such as judicial economy, effectiveness, and administrative efficiency — i.e. whether the system is time-efficient and cost-effective. For the sake of discussion, we might say that the enforcement system's level of efficiency can be gauged according to the level of money collected and the time and resources that the system uses to achieve this aim. In this case, we can argue that the system is an efficient system to the degree that it succeeds in collecting all files in a reasonable amount of time, and involves low costs. This sort of system may

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Nagola v. Chazan, 50(1) P.D. 338; C.A. 4905/98, Gamzo v. Ishiau, 55(3) P.D. 360; C.A. 3553/00, Aloni v. Zand Tal, 57(3) P.D. 577.

17 See Rosenberg et al., *supra* note 4, at 16.

18 Enforcement procedures in England have been regulated by the Human Rights Act, 1998, c. 42 (Eng.). See Ian Fletcher, *The Law of Insolvency* 23 (3d ed. 2002).

19 See Pelaya Yessiou-Faltsi, *Civil Procedure in Hellas* 387 (1995).

20 Particularly after the enactment of Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, 150, and Basic Law: Freedom of Occupation, 1992, S.H. 1454, 90. Regarding the constitutionalization of private law, see Aharon Barak, *Constitutional Human Rights and Private Law*, in *Freedom of Contract and Constitutional Law* 105, 144 (Alfredo M. Rabello & Petar Sarcevic eds., 1998). See also Yoseph Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson from Mistakes and Achievements*, 53 *Am. J. Comp. L.* 77 (2005).

21 Regarding the use of efficiency as a legal argument, see Ugo Mattei, *Comparative Law and Economics* 20 (1996). See also Robert Kuttner, *Development, Globalization and Law*, 26 *Mich. J. Int'l L.* 19, 27 (2004). Cf. Alon Harel, *Efficiency and Justice in Criminal Law*, 22 *Mishpatim* 499 (1992) (Hebrew).

also diminish the number of enforcement files, assuming that an effective system will deter potential debtors from avoiding the payment of debts, knowing that in the end they will have to pay their debts and then some. This model is certainly purely hypothetical, since we will never reach 100% successful debt collection.<sup>22</sup> Nevertheless, I think that enforcement policy should be guided by a coherent understanding of the relationship between the resources invested in the enforcement process, the work of the CHEO, and the final aim of the enforcement, that is, the collection of debts.<sup>23</sup>

Israeli courts have traditionally stressed the importance of efficiency,<sup>24</sup> although it is doubtful whether this rhetoric of efficiency has been accompanied by a corresponding policy of enforcement implemented by the legislature; the latter has fallen short of affording an efficient statutory arrangement. In addition to the technical side of efficiency — which is still complex despite the recent computerization of the enforcement system — there is at least one structural aspect of the enforcement procedure that is clearly at odds with efficiency, on which I will focus: the confusion that exists regarding the principles that should guide the enforcement process. In my opinion, this lack of a coherent understanding as to the aims of enforcement finds expression in the fact that the CHEO deals not only with questions of enforcement, but also with the problem of debtors who are insolvent, wasting time and resources on investigations as to the means of debtors,<sup>25</sup> and establishing symbolic monthly payments, all of which ultimately yield very poor results to creditors.

I think that to try to cope with these problems, we should adopt a more comprehensive approach, that takes into account that at least a portion of the problems with enforcement are the result of overindebtedness, which is the consequence of large offers of credit allowed by the financial market — offers linked not only to the needs of debtors, but also to the interest of the credit system (banks and credit companies). The financial system creates a situation that allows overindebtedness, and then tries to find a solution via enforcement when the debt cannot be paid. Financial institutions, interested in enlarging the offer of credit, are sometimes willing to offer money beyond

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22 The collection of money depends on many factors, such as the general economic conditions of the country. Cf. Todd Zywicki, *An Economic Analysis of the Consumer Bankruptcy Crisis*, 99 Nw. U. L. Rev. 1463 (2005).

23 Naturally, goals unrelated to efficiency must be kept in mind as well.

24 See C.A. 2097/02, Itung v. Chadid, 57(4) P.D. 211. For an economic analysis, see Ron Harris, *From Imprisonment to Discharge: Setting an Agenda for Reform in Debtor-Creditor Law*, 23 Tel-Aviv U. L. Rev. 641 (2000) (Hebrew).

25 See *infra* Section III.B.2.

the debtor's real capability to repay. Additionally, changes in the economic situation of the debtor (health problems, unemployment or divorce) may make it impossible for the debtor to return the loan or cover the overdraft. In these cases, we should understand that the unpaid debt is often not the outcome of the dishonest or irresponsible behavior of the debtor, but rather the upshot of market failure,<sup>26</sup> caused by an overly generous offer of credit on the part of financial institutions. From this perspective, enforcement should be understood as an institutionalized response to credit, or perhaps to the pathology of credit. Accordingly, when dealing with "professional" creditors, that is, banks and financial institutions, which are in the business of loaning money, enforcement policy should take into account the particular allocation of risks between debtors and creditors. Banks and financial institutions are expected to take into account the possibility that the debtor will not be able to return the money loaned, and therefore they typically limit the amount loaned without security.<sup>27</sup> If, due to various circumstances, the debtor cannot afford to return the debt, the legal system should provide an instrument necessary to cope with this irregular situation. But we should not assume that this instrument must be found within the enforcement system, because we are not dealing with a problem of enforcement but rather of insolvency.

It should be pointed out that, as a model of analysis, the market failure approach cannot be used to create a suitable policy for all enforcement procedures. It will hardly find justification in cases of tort or maintenance claims, where the credit is not the consequence of an agreement between the parties, and where the creditor cannot calculate the risks he assumes before "granting" the credit. Moreover, regarding maintenance obligations, there may be social considerations that should guide the policy of enforcement of the obligation.<sup>28</sup>

I suggest that to define the task of the CHEO, all the above considerations be intertwined. The ideas that guide the enforcement process, and consequently the way we define the profile of the CHEO, should try to take into account all of the criteria mentioned: The system should surely afford the creditor an instrument to recover his debt, without violating the

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26 Market failure goes hand in hand with the social problems created by overindebtedness. See Johanna Niemi-Kiesiläinen, *Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem?*, 37 Osgoode Hall L.J. 473 (1999).

27 They also usually insure credit by collateral, or internalize the risk factor in the price of credit.

28 That is why I propose to distinguish between the cases of voluntary and involuntary creditors. I will refer to this point below, *infra* Part V.



basic rights of the debtor; the system should try to distinguish, to the extent possible, between debtors who cannot pay their debts and those who do not want to pay and even act fraudulently, allowing criminal sanctions in the latter case. Finally, the system should distinguish between different types of creditors.

As I pointed out, the Israeli system has traditionally focused principally on one aspect of the enforcement procedure: the debtor and his behavior.<sup>29</sup> Certainly this "ethical approach" is not unique to Israel, and we find it in various forms in European jurisdictions. It is even possible to say that the main difference between the European and the American approach to insolvency is that the former is more "ethics-based."<sup>30</sup> However, what sets the Israeli solution apart from other models is the blurring of boundaries between enforcement and insolvency. This blurring, which is reflected in the definition of the CHEO's task, is a consequence of the use of both direct and indirect enforcement to achieve the fulfillment of judgments.

## II. BETWEEN DIRECT AND INDIRECT ENFORCEMENT

In principle, we refer to direct enforcement as that directed towards the property of the debtor, via attachment, garnishment, and/or sale of his assets. Indirect enforcement is carried out via personal availability, which materializes in imprisonment of the debtor<sup>31</sup> in order to force him to fulfill the judgment and pay the obligation.

By law, the CHEO deals with both direct and indirect enforcement, short of cases such as debts secured by mortgages or pledges, in which the

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29 Despite changes in the Israeli economy and the increased complexity of Israeli society today, the ideology behind the law is the same as that of the Ottoman and British periods. See Ron Harris, *The Fall and Rise of Imprisonment for Debt*, 20 Tel-Aviv U. L. Rev. 439 (1996) (Hebrew). Cf. David Skeel, *Debt's Dominion: A History of Bankruptcy Law in America* (2001) (distinguishing different periods in the ideology of American Bankruptcy Law).

30 See Niemi-Kiesiläinen, *supra* note 26, at 474; Jason Kilborn, *La Responsabilité de l'Economie: What the United States Can Learn from the New French Law on Consumer Over-Indebtedness*, 26 Mich. J. Int'l L. 619, 666 (2005).

31 Imprisonment is not the only method of indirect enforcement. The prohibition of leaving the country may be seen in certain circumstances not only as based on the need to protect the interest of the creditor in collecting his money but also as a way of putting pressure on the debtor. Likewise, the confiscation of driver's licenses, a measure that has been raised as an alternative to direct enforcement, belongs in this category as well.

enforcement file may be carried out only on the basis of direct enforcement<sup>32</sup> (since the file is aimed at realizing the object of the mortgage or of the pledge thereof).<sup>33</sup> It is only within the framework of direct enforcement that the CHEO assumes the role of a *judge of enforcement*,<sup>34</sup> although the majority of activities related to direct enforcement are not carried out by the CHEO but rather by the Receiver<sup>35</sup> (*kones nekhasim*) and the Enforcement Officer<sup>36</sup> (*motzi lapoal*). The CHEO has judicial discretion regarding direct enforcement in two areas: supervision of those who carry out the attachment, and determination of the scope of exempted property.<sup>37</sup> Concerning most of the tasks involved with direct enforcement, we can roughly define the CHEO as an "administrator" of the procedure, not as a "true" judge.

The CHEO becomes a real adjudicator when he deals with indirect enforcement and, more particularly, with the power to limit the freedom of the debtor via imprisonment. According to the letter of the law, indirect enforcement should be made possible only where direct enforcement is not

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32 Were the system exclusively based upon mortgages and pledges, there would be no option but direct enforcement. See Peter Coleman, *Debtors and Creditors in America* 261 (1999) (arguing that one of the factors that reduced the value of debtor imprisonment in the United States was that chattel mortgages became common).

33 Direct enforcement is also the sole enforcement method in case of judgments that obligate the debtor to perform a certain activity or to handle the creditor's specific property.

34 I am not using the term judge in a formal sense but in a material one. The CHEO is a registrar, not a magistrate.

35 Execution Law, 1967, § 53, 21 L.S.I. 112 (1966-67).

36 Section 5 of the Execution Law. In Israel, creditors have a choice between private and public bailiffs. The attachment of movable property is carried out by the Enforcement Officer (a public servant who works in the Enforcement Office), or by private bailiffs, who are generally paid by the creditor's lawyers to levy the attached property. In other legal systems the bailiff is exclusively private, as in France and Germany, or exclusively a public servant, as in Austria, Greece, and Spain. See Peter Angst et al., *Exekutionsordnung* 53 (13th ed. 2002); Marc Donnier, *Voies d'Enforcement et Procédures de Distribution* 50 (5th ed. 1999); Kaye, *supra* note 4, at 6; Yessiou-Falsi, *supra* note 19, at 391.

37 This Article will not analyze the different questions regarding direct enforcement, including the problems of attachment. For sources on this subject, see David Bar Ophir, *Hotsa'a Lapo'al: Halichim Vehalachot [Enforcement of Judgments, Procedure and Theory]* 391 *passim* (6th ed. 2005) (Hebrew); Amit Moor, *Ba'ayot Bema'arechet Ha'ikul [Problems in Israeli Exemptions from Seizure]*, 1 *Din Udvarim* 579 (Hebrew); Pablo Lerner, *Al Chayavim Uba'aley Chaim [Debtors and Animals: Pets as Non-Attachable Assets]*, 4 *Aley Mishpat* 205 (2005) (Hebrew); Pablo Lerner, *Al Ikul Maskorot Bamishpat Hayisraeli [The Garnishment of Wages in Israeli Law]*, 48 *Hapraklit* 30 (2004) (Hebrew).

possible. Section 8 of the Execution Law establishes the need to avoid extreme measures.<sup>38</sup> However, this section is insufficient and is rarely used by the courts. In Israel, the debtor is personally liable for the payment of the debt, empowering the creditor to ask for an order of arrest against the reluctant debtor.<sup>39</sup>

In the past, the practice of arresting the debtor was common in various legal systems, and debtors who could not pay their debts remained in jail for long periods of time. However, today this understanding of enforcement has lost all relevance. Indirect enforcement, and more precisely, civil arrest for the non-payment of debts, disappeared in Western countries during the nineteenth century.<sup>40</sup> Civil arrest was abolished not only due to its abhorrent character, but also as the outcome of social and economic changes, including the role that credit assumed in modern society. There was a depersonalization of credit, as a consequence of the growth of financial institutions in the process of industrialization, an increase in the number of debtors, and even a change in the identity of the insolvent debtor: debtors were no longer only middle class men who could not return loans; some debtors were now industrial workers, women, and even minors who had independent ways to obtain money, become consumers, and go into debt.<sup>41</sup> Due to these changes, civil arrest could no longer be seen as supporting commercial integrity, and it lost its justification.<sup>42</sup> Civil arrest also lost its

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38 See Steven Goldstein, *The Reciprocal Relationships Among Methods of Enforcing Non-Monetary Judgments*, 16 *Mishpatim* 176 (1986) (Hebrew).

39 Imprisonment is up to seven days. In cases of maintenance debts, imprisonment is up to twenty-one days. I am not dealing with criminal imprisonment in cases of fraud or dishonest behavior, which exists in all legal systems.

40 In France, for example, civil arrest was abolished in 1867. See Perdu, *supra* note 13, at 23. In England, the process was slower. Civil imprisonment was replaced by the Debtor's Relief Act, 1869, 32 & 33 Vict., c. 62 (Eng.), although as a matter of fact the number of imprisoned debtors did not really diminish. Debt imprisonment was formally abolished only in 1970, by the Administration of Justice Act, 1970, c. 31 (Eng.). The writ of *capias ad satisfaciendum* was abolished by the Supreme Court Act, 1981, c. 54, § 141 (Eng.). See Margot Finn, *The Character of Credit Enforcement: Personal Debts in England Culture 1740-1914*, at 187 (2003); Richard Thompson, *Islands of Law* 200 (2000); R.M. Jackson, *The Machinery of Justice in England* 100 (1972); J. Baker, *An Introduction to English Legal History* 67 (4th ed. 2002); Harris, *supra* note 29, at 457.

41 See Finn, *supra* note 40, at 317; Evelyn Kolysh, *Imprisonment for Debts in Lower Canada 1791-1840*, 32 *McGill L.J.* 602, 630 (1986-87).

42 Coleman comments on the evolution of civil arrest in the United States: Most fair-minded critics condemned the debtors' prison on practical and moral grounds rather than humanitarian ones. They noted that it was an inefficient way to collect debts. It probably worked in barely a tenth of the cases and least

effectiveness since the number of debtors that could not pay back their debts increased, and the enforcement system could no longer be based on it, both due to the lack of prison space, and due to the understanding that the debtor would be better able to return the debt if he were out of prison. Leaving the debtor within the economic circle instead of in prison became an interest of creditors as well. Today it is understood that civil arrest lacks justification, and it is even forbidden by international conventions.<sup>43</sup>

Although there are some occidental countries whose laws still include the possibility of imprisonment within the framework of enforcement, this is a means used in rare circumstances,<sup>44</sup> generally only if there is a risk that the debtor might jeopardize the enforcement of a judgment and there is no other way to avoid this. The examples of imprisonment we find in the legal systems of Britain,<sup>45</sup> Greece,<sup>46</sup> Germany,<sup>47</sup> and Austria<sup>48</sup> are hardly paradigmatic since they are not used; they are, as a matter of fact, dead letters. Israel is the only occidental country in which indirect enforcement, and particularly imprisonment, plays a central role.

Israeli creditors make a number of arguments regarding the limitations of enforcement of property. They argue, for instance, that many debtors have no assets, that it is difficult to locate them, or that debtors evade enforcement via deceit or sham transactions. Moreover, it is also argued that movable property in many houses has no value, and that in most cases enforcement using the debtor's dwelling is not feasible. Direct enforcement, it is said,

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well for debts exceeding fifty dollars. They also complained that the fear of imprisonment encouraged deceit and fraud, and that honest defaulters went to jail while rogues often went free . . . .

Coleman, *supra* note 32, at 254.

43 See Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 1, Eur. T.S. No. 46, 7 I.L.M. 978.

44 In Germany, section 918 of the ZPO (the Civil Procedure Statute) recognizes the *persönliche Arrest*, but only as an extreme, subsidiary means in case a debtor tries to jeopardize the enforcement of a judgment. See Rosenberg et al., *supra* note 4, at 995, 1003; Paulus, *supra* note 6, at 317. By no means can this sort of imprisonment be understood as indirect enforcement, since it is aimed only at avoiding the fraudulent behavior of the debtor and is not considered a proper means of enforcement.

45 In Britain, imprisonment remains today only in cases of statutory obligations and maintenance. See *Woodley v. Woodley*, [1993] 4 All E.R. 1010, 1019 (C.A.).

46 Imprisonment for debt, in Greece, applies only to merchants. In any case it is seen as a judicial measure and not as part of the enforcement procedure. See Yessiou-Falsi, *supra* note 19, at 387.

47 § 918 ZPO.

48 § 360 Exekutionsordnung (EO) *passim*. See Angst et al., *supra* note 36, at 453.

is cumbersome, and there is very little chance of collecting the money via attachment.<sup>49</sup>

It is hardly clear how the above arguments justify indirect enforcement. The same problems are found in other countries<sup>50</sup> — enforcement creates difficulties everywhere — but we do not see them finding relief in indirect enforcement. Take, for example, the deficiency of information regarding the assets of the debtor. The problem of discovering property is indeed a serious one, and the situation is no different in other legal systems. In Europe, all the legal systems try to offer the creditor different methods of collecting information about the debtor and his assets, since information is a necessary condition for efficient and successful enforcement.<sup>51</sup> Despite the fact that none of these methods is completely successful, there is no use of indirect enforcement in Europe. In Israel, there are voices arguing for the need to connect the different information systems, like those of National Social Security or of the Tax Authority, in order to facilitate the CHEO's access to information about the assets of the debtor, and this suggested measure undoubtedly raises acute questions regarding privacy.<sup>52</sup> However, even a very sophisticated information system cannot afford relief to a creditor who has to collect money from a debtor with no economic means, nor can it always appreciate whether the seemingly poor debtor is trying to deceive his creditor. Since 2004 a law has been in force regarding credit information that can provide more information to creditors before they decide to grant credit.<sup>53</sup> We will be able to evaluate in the future whether this reduces the number of enforcement files opened.

Both the Israeli judiciary and Israeli legal scholarship have strongly criticized personal enforcement as being against the debtor's basic rights.<sup>54</sup>

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49 The issue is certainly a complex one, since the difficulties of collecting money via the enforcement process are used as a justification for the use of "non-official" means to collect money, which sometimes may include the use of violence against the debtor. See Christoph Paulus, *Die Privatisierung der Zwangsvollstreckung oder: wie des Rechtsstaat an seinen Fundament erodiert*, 33 *Zeitschrift für Rechtspolitik* 296 (2000).

50 See Kilborn, *supra* note 30, at 630.

51 See Kennet, *supra* note 4 *passim*; Bruckmann, *supra* note 6, at 124.

52 See the recommendations of the special Government commission regarding non-payment of maintenance obligations (2004) (unpublished report).

53 Service of Credit Information Law, 2002, S.H. 1825, 104; See also Service of Credit Information Ordinances, 2004, K.T. 6308, 422.

54 H.C. 5304/92, Perach v. Minister of Justice, 47(4) P.D. 715. The clinical department of the Faculty of Law at Tel-Aviv University has presented a new petition against imprisonment, *Halev Bamishpat v. Ministry of Justice*. The High Court has not yet opened proceedings. The petition challenges the last reform of the Execution

However, I would like to argue that indirect enforcement is not only at odds with the basic rights of the debtor, but also blurs the aims of enforcement, and therefore results in the deviation of the CHEO from his natural role as judge of enforcement and in his assumption of the role of judge of contempt and judge of insolvency. I will focus my analysis on these two issues.

### III. BETWEEN ENFORCEMENT AND CONTEMPT

The central rule regarding debtor imprisonment appears in section 70 of the Execution Law, which replaced section 131 of the earlier Ottoman law.<sup>55</sup> Section 70 provides that the creditor may ask for an imprisonment order of seven days<sup>56</sup> should the debtor evade the payment of the debt, should he not pay the sum established by the CHEO in a payment order, or should he not appear before the CHEO to establish a monthly sum to be paid, after receiving a warning of impending enforcement.

The legislature stressed in the very title of the section that the imprisonment is not for the non-payment of the debt, but rather due to "contempt of enforcement" (*bizaion hotzaha lapoal*). The use of this term is relatively new. In the original text of the law, the title of the section was straightforward, "Imprisonment of Judgment-Debtor for Non-Payment."<sup>57</sup> I believe that the characterization of enforcement as contempt is significant.<sup>58</sup>

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Law, whereby the creditor may ask for an imprisonment order even without an investigation as to the debtor's means.

55 The Ottoman law read,

The judgment-debtor, on receipt of the notice served upon him, must submit to the Enforcement Officer a proposal for the settlement of the amount decreed, according to his means. If he fails to do so, or if the decree-holder does not accept the installments or settlement proposed and prove such claim the president shall order that he be imprisoned. The imprisonment of the judgment-debtor shall not bar the right to recover the amount decreed from his property.

56 As noted in *supra* note 39, in cases of maintenance orders, the maximum time period for imprisonment is twenty-one days.

57 The Execution Law was reformed after the decision of the Supreme Court in *Perach*, in 1992, in which the imprisonment rule was declared void. Arrest was brought back, though in a more moderate way: up to seven days for each imprisonment order and in no case more than thirty days altogether. As noted in *supra* note 39, in cases of maintenance orders the imprisonment is up to twenty-one days.

58 We find examples of this characterization of imprisonment in England as well: In 1846, with the creation of the County Courts system, the offense of committed by petty debtors who hadn't paid their debts was defined in terms of contempt rather than as failure to pay their debts. See Finn, *supra* note 40, at 178.

It could be argued that the need to define civil arrest in terms of "contempt of enforcement" may perhaps be related to an almost psychological need to present civil arrest in softer terms than imprisonment, thereby avoiding the negative connotation of "arrest," but this explanation is a somewhat trivial one. If we wish to clarify the distinction between contempt and enforcement, it is necessary to be fully aware of the nature of section 70 of the Execution Law.

### A. The Concept of Contempt

The Israeli Contempt of Court Ordinance, enacted in 1929, distinguishes between criminal and civil contempt.<sup>59</sup> The concept of civil contempt is related to the British tradition,<sup>60</sup> and its basic aim is to place sanctions on a party who does not comply with a judicial writ or a judicial decision. Civil contempt may be understood as being on the border between adjudication and enforcement,<sup>61</sup> but not as the very instrument for enforcement. In principle, the idea of contempt of court is linked to the need to ensure the success of the legal process and respect for the judicial power. In monetary conflicts, the judgment is the recognition of an obligation. The fulfillment or lack of fulfillment of the obligation, which has obtained judicial recognition, does not influence the judicial decision, but rather the patrimony of the creditor. The non-fulfillment of a judgment does not violate the legal recognition of the obligation, but rather the rights created on the basis of the principle of fulfillment of obligations, itself an important concept in society.

In Israel, in the matter of enforcement of judicial decisions (civil contempt), the use of contempt is restrained and subsidiary, that is, contempt should be used only in a cases where enforcement is not possible.<sup>62</sup> However,

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59 Contempt of Court Ordinance, 1929, § 6, 1 Hukei Eretz Yisrael 356. See Moshe Keshet, *Contempt of Court: The Israeli Law for Enforcement of Judiciary Judgment* 48, 59 *passim* (2002) (Hebrew).

60 In continental law we find an alternative remedy: the *Astreintes* or *Zwangstrafen* in Germany. See Guinchard & Moussa, *supra* note 6, at 157 *passim*; Enzo Vullo, *L'Esecuzione Indiretta tra Italia, Francia e Unione Europea*, 59 *Rivista di Diritto Processuale* 726 (2004); Donnier, *supra* note 36, at 111.

61 Cf. Kerameus, *supra* note 4, at 11.

62 This is why Israeli jurisprudence has established very clearly that there is no place for civil contempt where the creditor may open an enforcement file. See C.A. 519/82, Grinberg v. Israeli Government, 37(2) P.D. 187; H.C. 490/82, Bank Leumi v. National Labor Court, 37(4) 578 (1983); C.A. 3888/04, Sharbet v. Sharbet (unpublished). In Europe, too, we see that the *Astreintes* is not used as a substitute for enforcement. See Vullo, *supra* note 60, at 774.

in the enforcement process, contempt is seemingly not a secondary method, and there are even those who seek to grant it a more central place. Civil contempt may be applied via arrest or fine,<sup>63</sup> while contempt of enforcement is applied only via arrest. Civil contempt will generally be related to a decision or judgment requiring a certain action, and not regarding a monetary judgment. Contempt of enforcement, on the other hand, applies only in cases in which a sum of money to be paid has been established, or in which the CHEO established a sum to be paid in installments, with contempt the result of non-payment. The determination of these installments, in effect, determines the border between enforcement and insolvency. I will explain how these payments by installments are fixed, and discuss the shortcomings involved in this system.

## **B. Payment in Installments**

Payment of debts in installments has a long tradition in the Israeli legal system, and we find such an arrangement in the Ottoman Execution Law, dating back to 1914. The Ottoman law required that the debtor render the creditor a reasonable offer to pay his debt.<sup>64</sup> Since that time, the system has undergone a series of technical changes, but the idea of installments as regulators of indirect enforcement still exists to a great degree.

### *1. Types of Installments*

In Israeli law, installments are related to enforcement in three different types of situations, and each has a particular nature, as well as different consequences regarding enforcement against the debtor.

*a) Maintenance Installments.* These are established by a Family Court or Rabbinical Court and are a constitutive part of their judgment. The installments are based on the needs of the creditor (the child or wife) and the income of the debtor. The monthly payments constitute the obligation itself. Should the debtor fail to pay maintenance installments, the creditor may open an enforcement file, and here the CHEO has no discretion to change the sum established by the Family or Rabbinical Court.

*b) Judicial Installments.* In these cases, the judgment itself establishes the payment of a sum (not related to maintenance) that will be paid in installments. The underlying assumption is that it will be easier for the debtor to fulfill the judgment in this way. In this type of case, the payment

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<sup>63</sup> Contempt of Court Ordinance § 6.

<sup>64</sup> Ottoman Law of Enforcement, 1914, § 131.



of the installments leads to the payment of the obligation. If the debtor pays the installments, the creditor will not need to carry out enforcement of the judgment. Should the debtor not pay the judicial installments, the creditor will be entitled to open an enforcement file to enforce the payment of the judicial installments or the whole debt, according to the terms of the judicial decision.<sup>65</sup> In any case, the CHEO, should he find justification for doing so, may refer the parties to the court to apply for a change in the installment sum.<sup>66</sup>

*c) Enforcement Installments.* These installments are established in the framework of an enforcement file, and are not linked to the obligation, but rather to the presumed economic ability of the creditor. While in the first two cases the installments constitute the very fulfillment of the obligation, in the case of enforcement installments the installments have no correlation to the original obligation, or to the sum established in the judgment or the bill of exchange; rather, they are set according to the debtor's economic viability when he cannot immediately pay his debt in full. In the first two cases, payment of the installments avoids enforcement, since there is no need for attachment or garnishment when the debtor is actually paying the debt. In the third case, the installments are aimed at preventing the imprisonment of the debtor, the creditor being entitled to direct enforcement via attachment unless the CHEO has forbidden it expressly. It is these enforcement installments to which we will now turn our attention, since the methods used to establish them, and the consequences of their non-payment, will help us depict the desirable frontier between enforcement and insolvency.

## *2. Determining the Enforcement Installments*

In principle, enforcement installments are automatically established with the very opening of the file.<sup>67</sup> If the debtor claims he cannot pay the debt involved, or if he or the creditor believe that there is room to establish a new sum to be paid, the sum will be determined after an investigation as to means, sometimes just with the debtor,<sup>68</sup> and sometimes in the presence of the creditor and his attorney, taking into account the debtor's options and economic situation. The decision concerning the amount that the debtor should pay every month is

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<sup>65</sup> If the debtor cannot pay, the CHEO will establish enforcement installment payments, as in every case of non-fulfillment of a judgment.

<sup>66</sup> Execution Law, 1967, § 69(d), 21 L.S.I. 112 (1966-67).

<sup>67</sup> Up to the sum of NIS 1,000 (approximately \$220) per month.

<sup>68</sup> In the office where the file has been opened or in another enforcement office. *See* Execution Law, 1967, § 7A, S.H. 1479, 235 (section enacted by the Execution Law (Amendment No. 15), 1994, S.H. 1479, 284); Enforcement Ordinances, 1979, § 12(a), K.T. 5991, 1068.

not based upon a clearly defined set of rules. In fact, the determination of the sum is, by and large, a consequence of the intuitive discretion of the CHEO,<sup>69</sup> unless the creditor can show that the debtor has economic resources.<sup>70</sup> Should the debtor fail to pay the installments established, the CHEO will decide whether the reluctant debtor will remain in jail for up to seven days, or, as usually happens, be released if he pays a small sum of the installment owed.

Sometimes the investigation as to means enables discovery of the debtor's assets, but the bottom line is that, particularly for big creditors (banks or finance companies), the investigation as to means does not usually add new information to that which is already in the hands of the creditor, who often uses the services of a private investigator, especially in cases of relatively large debts. I do not overlook the fact that this investigation as to means may also serve as a framework to help the debtor find a way to pay his debt.<sup>71</sup> However, I think that within the framework of enforcement reform it would be more useful to think about a more sophisticated approach to debt counseling, in order to reach solutions for overindebtedness.

We find formal methods of investigation in the systems of enforcement in different legal systems such as those of Germany, Austria, and Portugal.<sup>72</sup> However, in these countries, the investigation as to means is linked to discharge,<sup>73</sup> since it allows the creditor to know about assets of the debtor, to roughly evaluate the extent to which the debt might be totally or partially repaid, and to choose the most suitable repayment track. The function of the investigation as to means in the Israeli enforcement process fills a different role. More than affording a real solution to creditors, through which they can collect money, the investigation links the enforcement proceeding to moral patterns of enforcement that suggest the need to put pressure on the debtor to repay.

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<sup>69</sup> See Harris, *supra* note 24, at 676.

<sup>70</sup> However, in such a case there is no need for installments, since the creditor may ask for attachment or garnishment.

<sup>71</sup> Bar Ophir & Gilboa, *supra* note 9, at 78.

<sup>72</sup> See Kennet, *supra* note 4, at 105 *passim*.

<sup>73</sup> Jacob Ziegel, *Comparative Consumer Insolvency Regimes* 67 (2003). Some legal systems permit only investigation as to the assets of the debtor, without allowing the creditor to inquire about other debts or the economic situation of the debtor. This enlarged investigation should be carried out only within a bankruptcy procedure. See Code of Civil Procedure, R.S.Q., ch. C-25, § 544 (1977) (Can.); Yves Lauzon, *Droit Judiciaire Prive* 27 (1983).

### *3. Installments and the Limits of Indirect Enforcement: The Debtor of Limited Means*

The payment of enforcement installments will rarely lead to full payment of the debt,<sup>74</sup> and in many cases may result in the payments lasting extended periods of time, even throughout the debtor's entire life. Although in certain circumstances, the debtor may have the potential to pay,<sup>75</sup> and the decision could be made to leave him in the framework of the enforcement, in general, the creditor will not find relief in the installment system, even if the debtor pays the monthly installments regularly.

Should the system focus only on direct enforcement, the debtor's lack of assets would lead him to bankruptcy. This is not so in indirect enforcement, which in most cases results in long-term payment regimens, and therefore a time limit for payment of installments must be established. Israeli law did in fact set such a time limit, and if a debtor cannot ensure his ability to pay back his debt within this limit he is declared a debtor of limited means. Therefore, installments do not only determine the framework of contempt (for debtors who do not pay them), but also constitute the border of insolvency: should a debtor prove unable to afford repayment of the debt in the time established by the law he will be considered a debtor of limited means.

The debtor of limited means procedure — which, to my knowledge, appears in this form only in the Israeli legal system — should be understood in light of the evolution of the Israeli Law of Enforcement. For those not familiar with the Israeli enforcement system, a brief account is in order. In the original system, enacted in 1967, a procedure known as "unification of files" was aimed at concentrating all of a debtor's enforcement files in one Enforcement Office and thus avoiding a cumbersome enforcement procedure. The debtor was allowed to concentrate all of his files in one Enforcement Office, and, following an investigation of his means, a monthly payment was imposed on him. What began as an administrative solution, aimed at avoiding confusion and inconvenience to debtors, also became, through the years, a way of fraudulently avoiding fulfillment of a debtor's obligations. On one hand, imprisonment was a menace for reluctant debtors; but on the other hand, debtors who had several files could achieve almost complete immunity via the "unification of files," since after the unification of files the debtor usually paid only a symbolic monthly sum, to be distributed

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74 Particularly if we take into account that in addition to the original debt, there is also interest to pay.

75 Cf. John Duns, *Insolvency: Law and Policy* 87 (2002).

among the creditors, and there was no effective control of his income, or economic activities.<sup>76</sup>

To put an end to this anomalous solution, the Israeli legislature decided to circumscribe the unification of files procedure, and in 1991 the law was reformed. The regulation of the unification of files was formally incorporated in the law,<sup>77</sup> the idea being to limit the amount of time<sup>78</sup> that a debtor could be in a unification of files order. The proposal was that the unification of files tool be used for its original purpose, that is, helping the debtor pay his debts in an orderly way and avoiding the need to pay different sums in different files, but in no way giving an exemption from payment. As was pointed out in the explanatory notes to the amending bill, insolvency should be dealt with within the bankruptcy framework.<sup>79</sup>

However, the District Courts, which in Israel deal with bankruptcy, rejected every bankruptcy petitioner who could not afford an arrangement with his or her creditors, arguing that bankruptcy proceedings should be carried out only when they are useful to creditors.<sup>80</sup> This doctrine, which is clearly at odds with the right of debtors to find some sort of solution to their insolvency, including the possibility of discharge,<sup>81</sup> closed the doors of bankruptcy and sent debtors back to the Enforcement Office, with its attendant menace of imprisonment.

The Israeli Supreme Court in *Perach*<sup>82</sup> found that the regulations permitting imprisonment were *ultra vires*, and annulled the imprisonment

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76 It was also common that in cases where the debtor had guarantors and he was declared a debtor of limited means, the creditors would try to collect the money from the guarantors.

77 See Harris, *supra* note 24.

78 At the time to the limit was three years. Today it is four years. See text accompanying *infra* note 88.

79 See Execution Law (Amendment No. 11), 1991, S.H 184; C.A. 2097/02, Itung v. Chadid, 57(4) P.D. 211.

80 The bankruptcy procedure was completely creditor-oriented. This situation changed, to a certain extent, after the reform of 1996. See *infra* note 100.

81 Bankruptcy aims to cope with the insolvent debtor, creating a track to allow the creditor to recover all he can from the debtor, but at the same time allowing the debtor to find a solution to his problems and not be persecuted by creditors throughout his entire life. Therefore, usefulness to creditors should not be understood as the only aim of bankruptcy.

82 H.C. 5304/92, *Perach v. Minister of Justice*, 47(4) P.D. 715.

rule.<sup>83</sup> In response to this decision,<sup>84</sup> the Ministry of Justice prepared an amendment to the Execution Law, re-establishing imprisonment by law.<sup>85</sup> The accumulated negative experience regarding imprisonment, and the clear statements of Justice Elon, left no room for a return to the old regime of civil imprisonment, and therefore the lawmakers tried to find a way to allow imprisonment<sup>86</sup> (within the framework of contempt of enforcement<sup>87</sup>), and at the same time cope with the problem of the insolvent debtor.

A time limit was established for the payment of the debt — up to four years, depending on the amount of the whole debt.<sup>88</sup> Establishing a limit for the payment of debts is not particularly problematic. However, this "up to four years" framework within which the debt can be paid is seemingly arbitrary.<sup>89</sup> Should the debtor be unable to repay all of his debts within this timeframe,<sup>90</sup> the CHEO will declare him a debtor of limited means and various limitations will be imposed upon him. He will not be permitted to leave the country, use checks or credit cards, or be the director of a company. Also, his name will be included in a register of debtors of limited means.<sup>91</sup> He will be required to pay a symbolic monthly sum, and so long as he pays there will be no imprisonment order against him.

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83 It is noteworthy that Basic Law: Human Dignity and Liberty, 1992, S.H. 1391, 150, does not allow the annulment of acts enacted before it. The Supreme Court could not claim to void section 70 of the Execution Law, enacted in 1967; therefore, the decision focused on the way the pertinent regulations implement the rule. Nevertheless, the Supreme Court considered it necessary to reinterpret section 70 of the law according to the principles envisaged in the Basic Law.

84 To be accurate, at the time *Perach* was decided there were already some preliminary efforts made by the Ministry of Justice to reform the Execution Law, but the decision triggered the need to reform the system of imprisonment.

85 Enacted into Israeli Law as Execution Law (Amendment No. 15), 1994, S.H. 1479, 284.

86 Clearly at odds with the decision in *Perach*.

87 And in a more moderate way, since, as noted in *supra* note 39, the maximum period for imprisonment orders was reduced from twenty-one to seven days.

88 According to the Execution Law, 1967, § 69(c), 21 L.S.I. 112 (1966-67), debts of up to NIS 20,000 must be paid within two years; debts of up to NIS 100,000, within three years; and debts of over NIS 100,000, within four years.

89 In Germany, for example, the time-limit for the arrangement of the debt is seven years. *Insolvenzordnung (InsO)*, v. 5.10.1994 (BGB1. I S.2866) § 287. See Christoph G. Paulus, *The New German Insolvency Code*, 33 *Tex. Int'l L.J.* 141, 153 (1998).

90 If the debtor does not pay his debts within the four year time-limit he remains in *unification of files (ichud tikim)*, and no particular limitations are imposed to him.

91 I am skeptical that in Israeli social reality the threat of including debtors' names on a "black list" would have a shaming effect and result in deterring would-be debtors from overindebtedness.

#### IV. BETWEEN ENFORCEMENT AND INSOLVENCY

I believe that the whole concept of the debtor of limited means procedure is at odds with the rationale of the enforcement process, and that it was created to avoid imprisonment in cases in which the debtor cannot pay monthly installments, i.e. when the debtor is insolvent. I believe that the institution of the debtor of limited means does not afford a comprehensive solution to the problem of insolvency and does not serve the interests of creditors, and therefore, I consider the added competencies that the law grants to the CHEO unnecessary.

To understand the shortcomings of the framework of the debtor of limited means, let us recall the general distinctions between enforcement and bankruptcy. One is individual, and the other is collective. The aim of enforcement is the fulfillment of a judgment, whereas bankruptcy is based upon the fact that there is no way for creditors to get a complete fulfillment of the obligations toward them. An enforcement file can only be opened by a creditor, while bankruptcy can be filed either by the debtor or by the creditor.<sup>92</sup> If we see enforcement as the realization of the principle of freedom of contract, then bankruptcy represents an amelioration of this principle, furthering other community principles.<sup>93</sup>

The debtor of limited means procedure is, purportedly, a simpler framework than bankruptcy,<sup>94</sup> as the insolvent debtor is not obliged to cope with all the hurdles involved with bankruptcy. There are indeed certain similarities between the two proceedings. Both proceedings intend to afford a solution to insolvent debtors, and in both cases the distinction between secured and unsecured creditors is maintained, since pledges and mortgage credits are included neither in bankruptcy nor in the debtor of limited means track.<sup>95</sup> But it is better to refrain from understanding the debtor of limited means framework in terms of insolvency. First, the very concept of debt

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92 Regarding bankruptcy in Israel, see Shlomo Levin & Asher Gronis, *The Law of Personal Bankruptcy in Israel* (2d ed. 2000) (Hebrew).

93 See Robert Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 *Stan. L. Rev.* 99 (1990).

94 Perhaps it is possible to draw certain similarities to the Danish system, established in the Debt Arrangement Act of 1994, which established a system parallel to bankruptcy. According to Professor Niemi-Kiesiläinen, the conditions and aims of these two systems are nevertheless different. See Niemi-Kiesiläinen, *supra* note 26, at 488.

95 We may also find somewhat analogous the relationship between the debtor of limited means track and bankruptcy, and the distinction accepted in other legal systems

in the case of the debtor of limited means framework differs from that in bankruptcy. In the debtor of limited means procedure, the debt is only one recognized in a judgment or in a bill of exchange. Bankruptcy, on the other hand, includes *all* debts, whether or not they are recognized by judicial decision, accrued by the date of the receiving order (*tzav kinus*).<sup>96</sup> All debts — even those judicially recognized — are controlled by the trustee of bankruptcy, who guarantees the basic rights of the debtor and of the creditors. The control of the debt title is essential in cases of insolvency since it ensures transparency, avoiding cases of unscrupulous creditors who inflate debt owed them. The debtor of limited means track does not allow proof of debts, yet the CHEO is not entitled to scrutinize the judgments involved. Unlike the bankruptcy trustee, the CHEO cannot intervene in the judgment or change the sum owed. Moreover, bankruptcy allows a gamut of different remedies to ameliorate the situation of the debtor (such as the arrangement before the receiving order), which the debtor of limited means procedure does not offer. Finally, maintenance and tax obligations fall outside the debtor of limited means framework, while they are included in bankruptcy proceedings.<sup>97</sup>

Why therefore, if the debtor of limited means track falls short of affording a solution to insolvency, do we find it in the Execution Law? Because it was not created as a response to insolvency, but rather as a *corrective to indirect enforcement*. On the one hand, the Israeli lawmaker has always supported the use of indirect enforcement, but on the other hand, it is clear that the use of indirect enforcement must be limited. Therefore, the system of the debtor of limited means should be understood as a corrective to the use of indirect enforcement, and not as a comprehensive framework for insolvency. I am not arguing that every case of insolvency should lead the debtor to bankruptcy,<sup>98</sup> but I see no reason to leave a debtor within a framework that perpetuates his insolvency. The Israeli Bankruptcy Law offers a defined process of discharge (*hefter*),<sup>99</sup> in which the debtor fulfills a series of conditions, including good faith. The possibility of a fresh start, which today

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between short-term insolvency and balance sheet insolvency. Fletcher, *supra* note 18, at 6.

96 Although in bankruptcy, too, alimony debts and taxes enjoy special status.

97 Enjoying particular privileges, such as preference in the order of distribution. See Bankruptcy Ordinance (New Version), 1980, § 78, Dinei Medinat Yisrael No. 34, at 639.

98 Cf. Fletcher, *supra* note 18, at 5.

99 Regarding the fresh start policy, see Rafael Efrat, *Global Trends in Personal Bankruptcy*, 76 Am. Bankr. L.J. 81, 82 (2002); Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 Santa Clara L. Rev. 1065 (2004).

is an integral part of Bankruptcy Law,<sup>100</sup> does not exist at all in the case of the debtor of limited means. Being declared a debtor of limited means by the CHEO is an easy way to enter into insolvency, but it does not afford any way out, since it includes no prospect of a formal discharge.

Sometimes, however, rather paradoxically, the debtor of limited means procedure may in practice result in an informal form of discharge, especially when the creditors are banks: after a certain period of time some creditors will close their files, and the debt will be declared a "lost debt" (*chov avud*).<sup>101</sup> But this is a very poor and incomplete solution for the problem of insolvency. Firstly, if the status of debtor of limited means may lead to a *de facto* discharge,<sup>102</sup> would it not be better to encompass it within the framework of bankruptcy, establishing clear-cut criteria for discharge and allowing the debtor to find a coherent path to solve his problem of insolvency? Furthermore, creditors, too, should have room to prefer bankruptcy to the procedure of the debtor of limited means. After all, we should not forget that entering into the framework of debtor of limited means might actually be a good solution for dishonest debtors interested in paying symbolic sums without undergoing the more detailed scrutiny of the Official Receivership authorities. Bankruptcy is also a more suitable procedure for creditors since it copes with deception regarding property, and may make possible the discovery of disguised property and even annulment of transactions performed by the debtor aimed at violating the creditor's rights.<sup>103</sup> In fact, the CHEO does not have the means to accurately gauge the economic situation of the debtor, since the decision about whether or not to declare a debtor a debtor of limited means is carried out during a short investigation as to means. The CHEO has no

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100 A more flexible system of fresh start has been established in Israeli law since 1996. Nevertheless, and notwithstanding the letter of the law, the Israeli debtor will find that he has to surmount a series of obstacles before the Official Receiver recommends and the court grants the *hefter* (discharge). The Official Receiver demands a series of conditions before giving his consent to a discharge. The debtor must obtain the agreement of the creditor assembly and receive judicial authorization. Therefore, it is not surprising that there has been no dramatic increase in the number of discharges granted by courts in recent years. See Rafael Efrat, *Legal Culture and Bankruptcy: A Comparative Perspective*, 20 *Emory Bankr. Dev. J.* 351, 370 (2004).

101 Although the bank recovers part of the money via tax discounts.

102 Cf. Udo Reifer, "Thou Shalt Pay Thy Debts": *Personal Bankruptcy and Inclusive Contract Law*, in *Consumer Bankruptcy in Global Perspective* 143, 147 (Johanna Niemi-Kiesiläinen et al. eds, 2003).

103 See Bankruptcy Ordinance (New Version), 1980, § 98 *passim*, *Dinei Medinat Yisrael* No. 34, at 639; Levin & Gronis, *supra* note 92, at 355 *passim*.



investigators at his disposal,<sup>104</sup> and can only evaluate the partial information he receives from creditors,<sup>105</sup> the debtor himself, or public institutions about the assets of the debtor. In short, the CHEO's knowledge about the debtor's capacity to pay the debt is at best limited.

There is another point that should not be overlooked: The Execution Law defines the debtor of limited means in static terms, while the dynamic aspect, that is, the creation of new debts, is not clearly defined. The Israeli Supreme Court dealt with this problem in *Itung*.<sup>106</sup> The issue before the Supreme Court was the extent of the power of the CHEO to reject the incorporation of new debts in a debtor of limited means file, when the debts were assumed by the debtor after the opening of the file. In bankruptcy, there is no room for new debts within an existing file; however, in unification of files this limitation does not formally exist; according to the letter of the law, the CHEO can allow new debts to be added to a file at a later date.<sup>107</sup>

According to Justice Gronis, the unification of files (and this conclusion is applied to the case of the debtor of limited means as well) is a privilege that the law grants the debtor: the debtor under unification of files (or the debtor of limited means) will not be exposed to the menace of imprisonment orders as long as he pays the monthly payments established by the CHEO. But unification of files is not an "automatic" privilege since "the unification is an amelioration whose granting is conditioned upon the price of specific behavior . . . ." <sup>108</sup> In *Itung*, the Supreme Court decided to return the enforcement file to the CHEO in order to decide whether, according to the circumstances and the behavior of the debtor, the new debt should be included in the debtor of limited means file or not. In this way, the form in which a debtor's insolvency is resolved depends to a great extent on whether his debts have been incurred in good faith.

It is possible to argue that, to a certain extent, this decision narrows the gap between enforcement and bankruptcy, since good faith is also central in

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104 In contrast to those at the disposal of the Official Receiver, who is in charge of bankruptcy in Israel. The Official Receivership Office relies on investigators who can provide information about the real economic situation of the debtor. Pursuant to the Execution Law, the Enforcement Office is also supposed to have investigators, but due to different administrative and budgetary problems this has not yet materialized.

105 Sometimes all of the creditors take part in declaring a debtor a debtor of limited means and provide information; other times they are indifferent.

106 C.A. 2097/02, *Itung v. Chadid*, 57(4) P.D. 211.

107 See Execution Law, 1967, § 74(12)(b), 21 L.S.I. 112 (1966-67).

108 "[A]nd therefore there is no reason not to ask for that also in the case of a debtor of limited means." *Itung*, 57(4) P.D. at 223 (author's translation).

granting the debtor the benefits of bankruptcy. The debtor's honest behavior will certainly not stop direct enforcement; attachment cannot be avoided on grounds that the debtor is honest, so long as he has not paid the debt. However, when we are dealing with indirect enforcement, it may seem logical to link the CHEO's decision about imprisonment with the behavior of the debtor. I do not reject the integration of the good faith criterion into the enforcement proceeding, since it grants the courts discretion to balance the interests of debtor and creditor.<sup>109</sup> But the problem is that this discretion granted to the CHEO, to evaluate the behavior of the debtor, enhances his task not as a judge of enforcement but rather as a judge of insolvency, who must evaluate whether the debtor should be allowed to resolve his problem of insolvency; whereas, in my opinion, the task of the enforcement system should be detached from the questions which arise due to insolvency.

Professor Ron Harris has explained that there is no problem with the existence of different tracks for dealing with the problem of insolvency.<sup>110</sup> In principle I agree with this view, since there is no need to deal with insolvency within a unique and strict framework. Other legal systems provide several alternative paths to debtors who cannot repay their debts. This is, for example, the case in the United States, where the debtor can use Chapter 7 (under which the debtor loses all of his non-exempt assets and obtains immediate discharge) or Chapter 13 (under which the debtor retains his assets but must fulfill a court approved payment plan).<sup>111</sup> In France, as well, there are different ways to deal with insolvency,<sup>112</sup> although the trend today is toward simplification. The existence of multiple paths creates the flexibility to offer different solutions, one of which can be chosen according to the means of the particular debtor. Perhaps it would be more accurate to say that the problem is not that of the choice between unique or different tracks; but, rather, the extent to which the system allows different solutions to different problems of indebtedness. Even a single personal enforcement track may be carried out by different organs or according to different criteria. In my mind, the problem in Israeli law is that

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109 From this point of view, the Israeli system bears a certain likeness to the European approach. This is the case, for example, in French law. *See* Niemi-Kiesiläinen, *supra* note 26, at 484.

110 Harris, *supra* note 24, at 663.

111 *See* Teresa Sullivan et al., *As We Forgive Our Debtors* 25 (1999); Brian Blum, *Bankruptcy and Debtor/Creditor* 433 (3d ed. 2004); Richard Mann & Barry Roberts, *Business Law and Regulation of Business* 821 (7th ed. 2004); Kilborn, *supra* note 30, at 632.

112 Schiller, *supra* note 12, at 654, 658.

we find different frameworks with overlapping and difficult comprehensive solutions.

In order to improve the situation, I wish to suggest differentiation between different indebtedness situations. My idea is, specifically, to add another track: *consumer enforcement*. In practice, what I propose is to abolish the entire system of installment payments, imprisonment, and the debtor of limited means, at least regarding consumer credit.

## V. TOWARDS A CONSUMER APPROACH TO ENFORCEMENT

My proposal (which should be seen not as complete, but rather as a basis for future discussion of the topic) is that Israeli enforcement law should be based on a broader understanding of the aims of enforcement. As I have tried to explain, the system should focus on the assets of the debtor (direct enforcement). Nevertheless, the complete abolishment of indirect enforcement, which is tantamount to the definitive annulment of civil arrest, will find harsh opposition; we will immediately hear voices of mothers raising the issue of child maintenance debts,<sup>113</sup> and small creditors, victims of fraudulent debtors, raising various arguments that could justify imprisonment.<sup>114</sup> Personally, I oppose civil arrest; however, I agree that the situation of financially vulnerable creditors may justify a particular framework of enforcement,<sup>115</sup> and especially in cases of a maintenance obligation there are considerations that justify preserving the option of civil arrest. But I am quite sure that the claims of mothers and small creditors can be differentiated from claims of those who make a profession out of lending money.

Since it is likely to assume there will not be any radical changes made to the Israeli enforcement system, I propose at least to begin with a partial reform, distinguishing between consumer creditors, i.e. those who make giving credit to individuals rather than incorporated businesses their professional activity, and non-consumer creditors.<sup>116</sup> In the first case, the entire enforcement process

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113 The maintenance creditor enjoys a preferential place vis-à-vis the consumer creditor. In addition to the longer imprisonment time, the maintenance creditor has a formal privilege regarding distribution of money as a consequence of attachment. In the case of attachment of property by several creditors, if the value of the asset is not sufficient to cover all of the claims, the maintenance creditor will be satisfied before the others. Execution Law § 76 (b).

114 See text accompanying *supra* note 49.

115 Cf. Brian Leach, *The Unfinished Business of Bankruptcy Reform: A Proposal to Improve the Treatment of Support Creditors*, 115 Yale L.J. 247 (2005).

116 The Romans used to say that all definition is dangerous. Indeed the very definition of

will only be carried out through *direct enforcement*; the CHEO will focus on attachment and garnishment of property, and will no longer carry out investigations of means; there will be no payment of installments, except through the express agreement of debtor and creditor. The system will provide credit institutions with all the means to make direct enforcement efficient. However, the path of bankruptcy will be allowed in case of insolvency, especially where the indebtedness was not the outcome of the debtor's dishonest behavior.

In Europe and surely in the United States we find what is known as a "consumer approach" to overindebtedness.<sup>117</sup> This approach views overindebtedness as the result of an excessively free supply of credit. Seventy years ago, when the idea of consumer protection was not yet as developed as it is today, the French jurist Georges Ripert wrote about the "right of non-payment of debts."<sup>118</sup> I am neither arguing for absolute forgiveness of all obligations<sup>119</sup> (since I believe that a system that is too debtor-oriented may create an unjust situation for creditors and hamper access to credit, housing and so on), nor claiming to adopt a catchall system of discharge for consumer debtors. Instead, what I am suggesting is that severance of indirect from direct enforcement is necessary if we wish to transform enforcement into a more fair and rational system.

At present, a *de facto* distinction appears in the Israeli legal system of enforcement whereby indirect enforcement is applied only against small debtors. Large debtors, such as commercial firms, stores, industrial entities,

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consumer credit or the consumer creditor involves a certain degree of uncertainty. We could refer to consumer enforcement in terms of the consumer debtor or consumer debt as well. "Consumer debt (also known as personal debt) is debt for which legal repayment responsibility lies with a person, rather than an incorporated business, regardless of the purpose for which the debt was incurred." Saul Schwartz, *The Empirical Dimensions of Consumer Bankruptcy: Results from a Survey of Canadian Bankrupts*, 37 Osgoode Hall L.J. 83, 86 (1999). See also text accompanying *infra* note 126.

117 Ziegel, *supra* note 73 *passim*. However, it must be noted that this approach is not free of criticism: "There continues to be an absence of broad support in England and Wales for the idea of bankruptcy as a routinised procedure for the over-indebted consumer." Ian Ramsay, *Bankruptcy in Transition: The Case of England and Wales*, in *Consumer Bankruptcy in Global Perspective*, *supra* note 102, at 205, 225. For a discussion and critical analysis of the consumer approach to overindebtedness, see Reifer, *supra* note 102. See also Zywicki, *supra* note 22.

118 See Schiller, *supra* note 12, at 657.

119 Cf. Karen Gross, *Failure and Forgiveness* (1977); Karen Gross, *Demonizing Debtors: A Response to the Honsenber-Ziegel Debate*, 37 Osgoode Hall L.J. 263 (1999).

and even banks, are outside the realm of indirect enforcement since they are legal entities and cannot be imprisoned.<sup>120</sup> In fact, indirect enforcement is useful only for big firms of lawyers who represent banks and financial entities against relatively small debtors. It is easier for them to collect some money from the debtor via an imprisonment order than to "waste" time and resources on attachments. Should this sort of consideration justify indirect enforcement?

As a considerable number of the files in the Israeli enforcement offices are related to bank and finance credit, if we limit these, at least, to direct enforcement, this will ease the burden on the enforcement system, which is overcrowded with questionnaires, and which invests thousands of hours a year in investigations of means,<sup>121</sup> achieving minimal benefit at best.

The first step toward this new approach should be to define which debts would be considered "consumer debts." This demands an exhaustive analysis. However, it is possible to formulate some guidelines, at least as a tentative approach to the definition of the legal framework. We might identify a *consumer enforcement file* as one in which: (1) The creditor is an institution issuing credit as a profession (banks, credit companies, and non-bank lenders); (2) The debtor is a natural person, and the debt is not related to business activity;<sup>122</sup> (3) The source of the obligation is an agreement between creditor and debtor;<sup>123</sup> and (4) Perhaps a distinction between consumer and non-consumer enforcement according to the sum of the loan or credit given should also be drawn. Thus large debts, over a certain sum, would not come under consumer enforcement.

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120 This article focuses principally on individual debtors, and does not deal with questions of corporate law, although some of the questions discussed certainly are relevant to it.

121 All banks have more accurate information about the debtor than that available through an investigation of means, since they generally use private investigators who afford better and more accurate information than can be achieved during the short investigation conducted by the CHEO.

122 This criterion was adopted by the German regulations on this issue. *See* *Insolvenzordnung (InsO)*, v. 5.10.1994 (BGBI. I S.2866) § 304. Perhaps it is rather strict, and there may be room to adopt a more flexible framework. It should be pointed out that in Germany, too, this requirement has created a series of problems. I wish to thank Professor Christoph Paulus for bringing this point to my attention.

123 Since the idea of consumer enforcement is debtor-oriented, there is room to distinguish between the situation of the voluntary creditor, that is, one who, for example, loans money to the debtor voluntarily, and what is known as a "reluctant" creditor, who is entitled to compensation as a result of a nonconsensual obligation, such as being the victim of an accident. Only the first type of debtor should be encompassed within consumer enforcement.

I am aware that the above definitions fall short of being clear, and that the legal basis for a separate enforcement system for consumer creditors is not particularly firm. I am also aware that this sort of proposal assumes a clear distinction between the voluntary creditor and the reluctant creditor (for instance, as consequence of a tort case).<sup>124</sup> Moreover, the implementation of the proposed reforms may require a distinction between loan credit and sale credit,<sup>125</sup> putting the latter outside the framework of consumer enforcement. Notwithstanding these difficulties, a particular framework for indebtedness originating in consumer credit is justified not only in terms of protection of the weak debtor vis-à-vis the financial system, but also because, as was suggested by Professor Giuseppe Tarzia, a just enforcement process should take account of the different economic interests at stake.<sup>126</sup>

Banks and financial companies should be entitled to rely only on direct enforcement, based upon the economic condition of the debtor at the time the money was granted, or when an overdraft or a loan were provided. It is clear that a credit policy based exclusively upon reliance of creditors on the assets of debtors might result in credit issued only to those who can offer mortgages and pledges to secure the debt. The practical meaning of this policy would be a dramatic shift in credit policy, since part of the credit system in Israel (principally the overdraft) is based upon credit lines (though limited) given without any real security. This policy may perhaps diminish, to a certain extent, the number of unrecoverable debts; however, its application may cause far-reaching consequences in a wide sector of the Israeli population. Nevertheless, insolvency cannot find a solution via indirect enforcement, which in any case has not deterred debtors from becoming overindebted until now.

Representatives of the financial system will surely argue that the consequence of limiting enforcement to direct enforcement will be a limitation of credit or an increased requirement of securities, including a demand for guarantors for every overdraft. I believe that this sort of argument can be refuted. A more efficient system could ensure better collection of money. Even today banks ask for guarantors when the economic situation of a borrower does not allow the bank to completely rely on his assets. The financial system has all of the necessary means to evaluate the allocation of

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<sup>124</sup> See Sullivan et al., *supra* note 111, at 293.

<sup>125</sup> As to the distinction between loan and sale credit, see Roy Goode, *Principles of Corporate Insolvency Law* 2 (1997).

<sup>126</sup> See Giuseppe Tarzia, *Il Giusto Processo di Esecuzione*, *Rivista Di Diritto Procesuale* 329, 333 (2003).

risks created by providing credit to a client (a privilege which is not shared by non-voluntary creditors).

The granting of credit is not only in the client's best interest; it is also in the best interest of the financial system, which needs the credit market to develop its activities.<sup>127</sup> It should be noted that recently the overdraft in Israel has been limited, and is now made possible only on the basis of express authorization of a credit framework. It will be interesting to see whether this new policy diminishes the use of the enforcement procedure.

It should be noted that this "consumer approach" is not so foreign to the Israeli enforcement system, as we already find different frameworks used when the creditor is a bank or a financial firm. Thus, regarding guarantors of banking loans, the Guarantee Law does not allow the bank to begin any procedure against the guarantor until it has exhausted the means available against the principal debtor.<sup>128</sup> Another example is a relatively recent reform of the Execution Law, which allows the mortgaged debtor (when the mortgage is based on a bank loan for the purchase of a dwelling) not to be to avoid enforcement until six months of non-payment have passed, and allows him to sell the house without the intervention of the receiver.<sup>129</sup> In both cases, we see that banks and financial entities have a different status than other creditors, affording enhanced protection to debtors. In the competition between "professional creditors" and debtors or third parties who have bought assets in good faith, Israeli courts have afforded stronger protection to debtors or third parties, underscoring the fact that the bank did not rely upon the debtor's property when it granted the loan. Moreover, in one case, the Israeli Supreme Court expressly rejected the right of a bank that had loaned money to attach assets that the debtor had sold, since the buyer was a good faith buyer and the bank did not rely upon the property of the debtor when issuing the loan.<sup>130</sup>

The reform of the Execution Law and the definition of the task of the

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127 The link between credit policy and the welfare state, and the relationship between credit and social security, should not be ignored. However, discussion of this topic is beyond the scope of this article.

128 Distinguishing between simple loans and mortgage loans. *See* Guarantee Law, 1967, § 18 *passim*, 21 L.S.I. 41 (1966-67). The reform was enacted in 1992.

129 *See* Execution Law, 1967, § 81B, 21 L.S.I. 112 (1966-67).

130 *See* C.A. 790/97, *Bank Mizrahi v. Gadi*, 2004(4) TakEl 2248 (Barak, C.J.); *Cf.* Nina Zaltzman & Ofer Grosskopf, *Charges Over Obligations* 100 *passim* (2005) (Hebrew). This is a question of competition of rights between the bank (the creditor) and the buyer of good faith. The analysis of this question is beyond the scope of this article. *See* Hanoch Dagan, *Property at a Crossroads* 197 *passim* (2005) (Hebrew).

CHEO should be followed by a reform of the Bankruptcy Law aimed to make bankruptcy more accessible to debtors. Perhaps it is worth developing the notion of "small bankruptcy" that exists in the Israeli Bankruptcy Ordinance.<sup>131</sup> It could be used as a framework that would afford relief to consumer debtors even within the current scheme, in which the CHEO performs the role of judge of enforcement, on the condition that the law provide the right legal instruments for dealing with insolvency. Perhaps it is also necessary to go further and create a special bankruptcy court, according to the American model. In addition, we should not forget the need for a more developed network of credit counseling,<sup>132</sup> which does not exist in Israel.

### CONCLUSION

Questions of insolvency should be resolved within the framework of the Bankruptcy Law, and the Israeli Bankruptcy Ordinance may offer a catchall solution to a debtor's economic difficulties, including, in cases in which he has acted in good faith, the opportunity for a fresh start.

The problems and solutions of the enforcement process are related to general questions, such as the method for obtaining credit, the system of securities, consumer habits, and the information that a creditor may obtain from a debtor. But in any case, we must not underestimate the importance of improving the system of enforcement. A comprehensive reform of the Execution Law should define the status of the CHEO more precisely, grant more efficient means for direct enforcement, and provide a more suitable framework for enforcement than the one currently in place. A clear distinction between direct and indirect enforcement will sharpen the distinction between enforcement and insolvency, and consequently will afford a more complete theoretical basis for the definition of the role of the CHEO in the Israeli legal system.

A focus on the assets of the debtor coupled with a better understanding of the complex relationship between enforcement and insolvency will enable us to create a more reasonable framework for the task of the Chief Enforcement Officer.

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131 Bankruptcy Ordinance (New Version), 1980, § 201, Dinei Medinat Yisrael No. 34, at 639. I suggest that small bankruptcies should be administered by a judge of enforcement, who should be empowered with the power of a real judge of insolvency, and "big bankruptcies" should remain — where they are today — in the district courts.

132 See Ziegel, *supra* note 73, at 166.