

## The Catch-22 in Israel's Parole Law

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Abstract: This article reviews the general legal framework governing risk assessment of prisoners in the Israeli parole process. It highlights the excessive power the Israeli courts have accorded to the professional body responsible for providing risk assessments, which severely limits the parole board's discretion to order conditional release when prisoners persist in denying their crimes. Such prisoners, especially sex offenders, tend to be precluded from participation in treatment courses, thus substantially reducing their prospects of obtaining parole.

Key words: parole, conditional release, sex offenders, crime denial, risk assessment, feminism, fair trial, legal fairness, Israeli law.

This article reviews the general legal framework governing risk assessment of prisoners in the Israeli parole process. It shows that, like other countries, Israel conceives of parole as a privilege that a prisoner may earn and, in the decision whether to grant parole, public safety considerations carry far more weight than the prisoner's interests. This article

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\* Faculty of Law, University of Haifa. We are greatly indebted to Dr Jay P. Singh for his useful advice throughout the writing of this paper, and to Lior Frank and Hadiya Kayoof for providing excellent research assistance within unreasonable time limitations. Thanks are also due to Maria Jammal, Arwa Hleihel, Liran Ohayon, Kovi Skier and Eyal Gruner for their contributions to this article.

highlights the injustice to which prisoners who persist in denying their crimes, especially sex offenders, may be subject, as they tend to be precluded from participation in treatment courses. Without such opportunities, their prospects of having their parole applications approved approach zero. This is a reflection of the excessive power the Israeli courts have accorded to the professional body responsible for providing risk assessments, which severely limits the parole board's discretion.

### **The Parole System in Israel**

#### **Background**

According to the Prison Service's latest publication (December 2013), there are 12,353 criminal prisoners in Israel, with a ratio of 154 prisoners per 100,000 residents (ranking 5th in the world after the United States, Russia, Singapore and Hungary). Violent crime, including armed robbery, accounts for 31.3% of the prison population, property crime for 18.7% and sexual offenses for 11.3% (Israeli Prison Service official website). As of 2009, women and juveniles occupied a very small segment of that population (2% each), while minorities accounted for 48%, more than double their proportion in the general population (Prisoners Rehabilitation Plans (PRP), 2010). Of the prisoners released in 2010, 19.8% were released on parole, and another 9.6% on medical grounds (1454 and 710, respectively, out of 7350) (Data on Prisoners' Rehabilitation (DPR), 2011).

The low percentage of releases brought about through parole should be read in light of the fundamental principle that punishments are to be borne fully. When a punishment is prescribed by a court of law as correct and appropriate in the circumstances, there is no entitlement to a discount in the form of conditional release. Parole should be regarded, rather, as an exception, a bonus or a privilege (*State of Israel v Ghanamah*, 2008; *Yeager v Prison Service*, 2011; *Chief Military Attorney v Zaher*, 2011), whose primary purpose is to provide

an incentive for prisoners to behave responsibly, benefit from activities designed to reduce re-offending, and receive therapies that can help to smooth their reintegration into society within a proper and well functioning rehabilitation scheme (Sharon, 2003). Parole is part of a more general policy that offers prisoners opportunities, through performance, to earn privileges above the statutory minimum and, conversely, denies such privileges if they fail to maintain acceptable standards of behavior. Such privileges may include going on furloughs, receiving visitors, posting mail, making telephone calls, having various personal items, or wearing their own clothes (PCO no. 04.17.00). The ultimate goal of such a scheme is to achieve a more disciplined, better-controlled, and safer environment for prisoners and staff (*R v Secretary of State*, 2012). Thus, the burden is on the prisoner to prove that he deserves the boon and that granting him parole serves the public interest. The Israeli understanding of parole as a privilege is consistent with the law in other jurisdictions, such as Ireland (*Dowling v Minister for Justice, Equality and Law Reform*, 2003) and the United States (*Greenholtz v Inmates of Nebraska Penal and Correctional Complex*, 1979).

### **Parole Boards: Structure and Eligibility**

The Israeli parole system is regulated by the Parole Act 2001, which provides a detailed scheme for the decision-making process, including eligibility and decision criteria, terms of parole, and other procedural and institutional aspects.

In order to be eligible for consideration, a prisoner must have completed two-thirds of his sentence or a term of 25 years. Prisoners sentenced for three to six months may apply to the Prison Commissioner, the administrative officer responsible for prison management. Those sentenced to a term longer than six months may apply to a parole board, comprising: a judge, who presides; two expert members, representing criminology, social work, psychology,

psychiatry, or education;<sup>1</sup> and an official from the Prison Service, in an advisory capacity, without the right to vote. Life prisoners who seek conditional release must apply to a special board composed of judges and experts who have greater seniority (§§2–5, 32–33 of the Parole Act).

### **The Criteria for Parole**

The primary criterion for granting conditional release is that the applicant “deserves to be released,” and “his release poses no risk to public order” (§§2,3,5). This is supplemented by a detailed though not exhaustive list of considerations that a parole board may take into account (§9). First, it should consider the risk posed to the prisoner’s family, his victims, and the general public. In addition, it should take into account his conduct while incarcerated, and his prospects for rehabilitation. To this end, the following factors are to be examined:

- (1) The specifics of the applicant’s crime—its nature, severity, circumstances and effects.
- (2) His criminal record, taking into account the nature, number, and severity of acts committed, including charges pending.
- (3) Any past paroles, and the extent to which he abided by their conditions.
- (4) The prisoner’s personal situation, including age, family and social conditions.

In evaluating the candidate’s conduct in prison, the parole board is required to consider such factors as drug use or treatment for addiction, any misconduct or violation of rules, breach of order, harm to other inmates or officers, jail break or late arrival from furlough, and suspected criminal activity. Also important is the attitude he has displayed toward labor or other rehabilitative opportunities. Implicit in this last factor is the concept that the prisoner must show remorse for his actions and recognize the need to change his criminal

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<sup>1</sup> An expert is defined as someone with five or more years’ experience. Each board is supposed to have two of the five listed disciplines represented.

orientation before his application can be granted. Indeed, his attitude in this respect is typically reported by social workers and the board accords this factor serious weight in its decision. As we shall see, the prisoner's attitude toward the crime becomes a critical condition for granting parole where domestic violence and sex offenses are involved. When the prisoner is seeking parole from a life sentence, there is an express requirement to consider this attitude, suggesting that this consideration is of particular importance when the crime is of such severity (§10(b)).<sup>2</sup>

### **Risk-Assessment Procedures**

In addition to the considerations outlined above, a parole board must take into account a series of risk-assessment reports that are prepared prior to the hearing (§9(7)). One report, prepared by prison social workers, reviews the prisoner's personality traits, and his attitude to his crime and to the rehabilitative options offered to him. Another, drafted by the prison authorities, provides general information on the applicant, including personal data as well as his conduct while incarcerated. A third report, by the police or other security forces, assesses the risk the prisoner may pose to the public. Both prison and police reports may draw on intelligence obtained from within the prison and outside. Further expert reports are also required in certain situations, which will be delineated later in this article.

If the offense committed was sexual or violent, the victims are also entitled to be heard on the potential risk that would be posed to them if the prisoner were released (§19 of the Rights of Crime Victims Act 2001). The Supreme Court has broadly interpreted this right, holding that a parole board must take into account not only any physical threat the prisoner may pose (which may be addressed by preventive orders or other measures) but also the

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<sup>2</sup> It is also possible to release prisoners on medical or humanitarian grounds (§7 of the Parole Act), which are not discussed in this article.

psychological distress and insecurity that the victim may experience as a result of the offender's release, and the negative impact such feelings may have on the victim's own rehabilitation efforts (*State of Israel v Ghanamah*, 2008; *Yeager v Prison Service*, 2011; *Chief Military Attorney v Zaher*, 2011).

The parole process may also include reports from the Prisoner Rehabilitation Authority (PRA), a statutory body that may prepare an assessment of the prisoner's need for rehabilitation throughout the parole period and, where appropriate, develop a rehabilitation plan. Such plans are prepared for prisoners who demonstrate strong rehabilitative prospects—that is, who cooperate with the authorities while incarcerated and invest effort in reforming their criminal lifestyles. A rehabilitation plan typically includes an employment plan and/or participation in a therapy group. The PRA supervises the parolee's compliance with the plan and immediately informs the authorities if he violates the terms of his release. Due to severe resource shortages, the PRA falls short of providing services to all prisoners who might deserve them. As a result, some prisoners engage private specialists to prepare rehabilitation plans in support of their applications. According to the latest data, in 2010, 69% of parolees were released with PRA plans, and 17% with private plans (DPR, 2011).

### **Public Confidence in Law Enforcement as a Ground for Withholding Parole**

The crime for which the prisoner is imprisoned—its nature, severity, circumstances, and effects—may be considered not only for risk assessment but for proportionality. A parole board may refuse to grant parole if doing so would render the time spent actually incarcerated disproportionately short relative to the severity of the prisoner's actions and the length of the original sentence (§10). However, the Parole Act limits the scope of this ground to cases in which granting parole would *substantially* undermine the values of deterrence and public confidence in the law enforcement system. This limitation is important because, otherwise, the very concept of parole could be seen as undermining public confidence by shortening

what has been determined to be the correct and appropriate punishment. Limiting the scope of public-confidence considerations highlights the forward-looking emphasis in the parole proceedings; instead of deterrence and retribution, they are meant to focus on possibilities for rehabilitation, which is also in the public interest.

### **The Conditions of Parole**

Release on parole is by definition conditional, but the terms may vary (§13). The primary condition is that the prisoner must not commit a felony or a misdemeanor during his parole.<sup>3</sup> While this non-discretionary condition is imposed automatically, there are additional conditions imposed by default, but which the parole board may decide to waive or vary. These discretionary conditions enable the authorities to keep a close watch on the parolee, who is expected to keep the authorities apprised of his current address, to register with the police once a month, and to refrain from leaving the country. A parole board may impose additional conditions as it sees fit, including a financial bond (redeemable in case of a parole violation), evening house arrest, electronic handcuffs, or a requirement to receive therapy or comply with a rehabilitation plan.<sup>4</sup>

Failing to comply with the parole terms is considered a breach of trust, with serious consequences. If a parolee commits a crime during his parole, the parole will normally be

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<sup>3</sup> According to Israeli Criminal Act 1977 (s 24), a 'felony' is a criminal offense that is punishable by a prison term longer than three years, whereas a 'misdemeanor' is a criminal offense that is punishable by a prison term longer than three months and not exceeding three years, or by a fine, or both. If the offense is punishable by a prison term not exceeding three months, then the offense would be a 'sin,' which is the simplest form of criminal behavior.

<sup>4</sup> All the conditions imposed on a sex offender prisoner according to the Control and Supervision of Sex Offenders Act 2006 are deemed part of the parole terms too; §13(d) of the Parole Act.

revoked and he will have to complete the balance of his sentence from the date of his conditional release (§20).<sup>5</sup> If other conditions are violated, the board may have discretion to impose a lesser penalty, such as extending or restarting the term of the parole, or merely issuing a warning (§21).

### **Judicial Review Against a Decision on Parole**

The parole board's decisions may be challenged before the Administrative Court by means of a judicial review (§25) that is purely concerned with administrative matters, as distinct from an appeal, in which the court would scrutinize the merits of the decision. The Administrative Court intervenes only when the board is shown to have exceeded its power as defined by law, or to have rendered a decision that was manifestly unreasonable, based on irrelevant considerations, or overlooked relevant considerations. As a general rule, judicial intervention in parole decisions is limited to extremely rare instances (*State of Israel v Ghanamah*, 2008; *Mor-Hai v Attorney General*, 2012).

This conservative intervention policy is of utmost constitutional importance, dictated by two fundamental principles: the rule of law and separation of powers. The rule of law requires courts to ensure that the executive does not exceed its legal powers or violate the demands of fairness and justice (e.g., equality, transparency, impartiality, the right to be heard, the duty to provide reasons). The separation of powers requires that courts not intervene in the content of administrative decisions, even when it disagrees with them. Also, administrative agencies are perceived to possess specialized expertise that a court lacks.

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<sup>5</sup> According to Part C of the Parole Act, the parole board may refrain from revoking the parole in exceptional cases and merely restart the parole period, unless the prisoner was sentenced to prison for the crime committed while on parole. This option can be exercised only once. Furthermore, in exceptional circumstances, the parole board may order that the prisoner spends only part of the parole period in prison (but not less than half).

### Special Risk Assessment

There are three categories of parole applicant for which professional risk assessments are required by statute: sex offenders, domestic violence offenders, and the mentally compromised (§§11–12). For a domestic violence prisoner, a report assessing the risk to the prisoner's victims or other family members is required from the Inter-Ministerial Committee for the Prevention of Domestic Violence (MCPDV). This body, which includes expert representatives from the Welfare and Labor Ministry and the Prison Service, is likely to consult with welfare officers in the affected local community to make its determination. In the case of a sex offender or mentally compromised prisoner, a report must be obtained from the Forensic Psychiatry Division of the Mental Health Centre (MHC), a medical division of the public hospital in Beer-Yacov that operates within the Prison Service and offers psychiatric services to prisoners. Incest crime requires, in addition to an MHC report on the risk that release poses to the general public, an additional assessment from the Regional Committee for the Treatment of Incest (RCTI) on the specific risk to the prisoner's victim (*Yezer v Prison Service*, 2011). Each of these reports may include a part that is not disclosed to the prisoner or his counsel, containing sensitive information collected from the victim or the prisoner's own family. It must be noted that the MCPDV and RCTI risk assessments are based on information provided by the prison, including its on-site social worker, without interviewing the prisoner.

When an MHC report is required, a parole board may grant parole only if the report rules out dangerousness to the public. Otherwise, if the board wishes to grant parole without first obtaining an MHC report, or in the face of one that establishes any degree of dangerousness, it must articulate "special reasons" for such a decision and also stipulate suitable supervisory measures to guarantee public safety. As we shall further see below, the

Supreme Court has limited this course of action to such rare and exceptional circumstances that this option seems merely theoretical (*Aslan v State of Israel*, 2002).

When a MCPDV or RCTI report is required, the law does not require that it rule out dangerousness to the victim(s) as a condition for parole, but it does provide that such reports must be furnished to the parole board. This ensures that parole is granted only after careful deliberation and thorough examination of a comprehensive information base that takes into account the victim's specific interests and needs. In practice, parole boards decide against MCPDV/RCTI reports only in the most rare and exceptional circumstances (*Yeager v Prison Service*, 2011). Thus, the law treats sex offenders, the mentally compromised and domestic violence offenders in much the same manner; in each of these categories, if any of the professional assessments point to high risk, parole is unlikely to be granted.

### **Psychiatric Risk Assessment of Sex Offenders**

Sex offenders are subject to a strict requirement to obtain a favorable report from the same body that evaluates mentally ill prisoners. This has been justified on the ground that some sex offenders suffer from psychiatric problems that are expressed in deviant sexual activity, and are subject to intense sexual urges that they can neither control nor express in acceptable forms. While acknowledging that this diagnosis may not apply to a significant portion of sex offenders, the MHC defends this general requirement by arguing that even non-psychiatric sex offenders are prone to sex recidivism more than other criminals and that, in any case, an examination must take place to rule out psychopathology (*Al-Obeid v Prison Service*, 2001; *Aslan v State of Israel*, 2002).

This practice and its underlying rationale raise a few legal difficulties. First, a general requirement for psychiatric assessment may be questionable if we consider situations where psychiatric aspects seem to be clearly irrelevant, such as in prohibited consent intercourse

within a work place, or date rape when no violence was exerted or when the victim's clear consent remained ambiguous. Furthermore, psychopathology is not universally accepted as the typical motivation for sex crime. Feminists insist that rape is not a type of sex deviancy (Curra, 1984); rather, it is "a type of pervasive patriarchal violence against women" and, accordingly, rapists are "far from being 'deviates', they are all-too-normal" (Bryden & Grier, 2011). Finally, the MHC's risk assessment is not limited to the parole period, but measures it also beyond, taking perhaps too far the idea that parole operates as an incentive for a whole life-change.

We shall now see that the requirement of psychiatric examinations for sex offenders becomes particularly problematic in the context of prisoners who insist on their innocence.

### **Sex Offenders Who Deny the Crime**

There are various paths for rehabilitation offered by the Prison Service, ranging from educational activity, labor inside or outside prison, and treatment. Generally, all prisoners are interviewed by social workers and, if found cooperative, willing and able to change, may be integrated into a suitable rehabilitation activity (PCO no. 04.54.02). Therapeutic treatment offered by the Prison Service, especially to violent and sex offenders, may include individual or group therapy, anger management, social and interpersonal skills development, social sensitivity, and victim and crime understanding (Birger et al, 2011; Margolin et al, 2013). These usually target those who are willing to take responsibility and express genuine regret for their actions, and who are determined to correct their ways. No other psychotherapeutic treatment is offered for those who persist in denying their crime. The authorities reason that in a world of scarce public resources, it is better to invest in those who are more likely to succeed in reducing their recidivism risk (*Chief Military Attorney v Zaher*, 2011). The underlying philosophy is that successful rehabilitation requires a comprehensive and unconditional confession as a necessary first step. Thus, prisoners who deny their crime

remain outside the rehabilitation circle and, as a result, their prospects of obtaining parole are diminished.

This matter has received significant attention in relation to sex offenders. From a legal point of view, conviction of a sex crime creates a presumption of dangerousness that the prisoner should rebut. However, as a matter of general policy, the MHC refuses to assess the dangerousness of deniers. Since the law requires an MHC report ruling out dangerousness as a condition for granting parole, the MHC's position strips the prisoner of any realistic ability to rebut the presumption of dangerousness. The result is that, for all practical purposes, the parole prospects of deniers are near zero.

This legal framework is problematic. It totally discounts the scenario of a wrongful conviction and, worse still, the prospect of conditional release creates a powerful incentive for prisoners to confess, regardless of whether they committed the crime or genuinely regret their actions (the MHC's ability to detect such maneuvers remains an open question) (Tsadik, 1996). This is not implausible, considering the well-established incidence of criminal suspects making false confessions even when the adverse consequence of conviction is attached (Kassin & Wrightsman 1985). Furthermore, making confession into a virtual threshold requirement for parole of sex offenders is discriminatory, since all other prisoners may insist on their innocence without parole boards being formally precluded from granting them parole. The flip-side is that there are other types of offenders whose criminal activity may be rooted in compulsion—illegal gamblers, serial killers, or thieves, for example—yet they are not required to undergo psychiatric examination (it might be understandable if the law identified a broad range of potentially compulsive offenders and, citing resource limitations, merely gave priority attention to sex criminals as posing the most serious threat, but this has not occurred).

Moreover, to require a full and comprehensive confession as a condition for admission to treatment, rather than allowing for confession and remorse to be potentially one of its

goals, seems to put the cart before the horse. Early data shows that, if admitted to treatment, deniers can be helped to admit guilt, suggesting that denial should be an issue for treatment rather than a barrier to it (Marshall, 1994; Maletzky, 1996). In addition, the literature recognizes various types and degrees of denial (including absolute denial of commission of the act, blaming the victim or a third party for causing the commission, or denying that harm was caused) that may not merit the same treatment. There is also a wide range of personal and social reasons why a rightly convicted person may nevertheless deny his actions (Cooper, 2005; Tsadik, 1996)—because he is ashamed of his actions and wishes to avoid social stigma; because he wishes to protect his family; or because certain offenses make him a target for harassment by other inmates. For that matter, a prisoner may also wish to remain consistent with his original defense strategy, especially when there is a prospect of appeal. These alternative explanations for the refusal to confess a crime demonstrate the rigidity of a ‘no-confession-no-parole’ rule such as the one currently in place in Israel.

Furthermore, research does not conclusively support denial as a risk factor for recidivism, its importance as a treatment target, or its impact on treatment outcome (Lund, 2000; Yates, 2009). Although some challenge the very existence of a correlation between recidivism and factors such as denial, lack of remorse, lack of victim sympathy, and lack of motivation to seek treatment (Hanson & Morton-Bourgon, 2005), others have debated the magnitude and conclusiveness of such an association. For example, some studies show that the validity of the denial factor as a predictor of recidivism may depend on other factors, such as the degree of risk otherwise ascribed to the offender, or the victim’s relationship to the offender (Harkins et al, 2010).

Aside from concerns over the unequal treatment accorded to this category of offender, from a public policy standpoint, it should be considered that it is the public at large who stand

to suffer if sex offenders are released from prison at the end of their full sentence without having received any treatment.

### **The Alleged Importance of Confession**

The MHC stands by the present state of law, arguing that it is necessary to hold a clinical interview to establish whether the prisoner suffers from a psychological condition that predisposes him to sex crimes. The interview is meant to ascertain the prisoner's attitude to his crime, whether it was premeditated, whether similar incidents occurred in the past, and so on.. When the prisoner denies the very commission of the crime, the clinical interview is futile and it is not possible to fathom his psychological world (Cohen, 1996, 1997).

The MHC's approach has been disputed by senior Israeli psychiatric experts, who maintain that confession-based interviews are not the only method to assess risk. Alternative methods may include psychodiagnostic tests and clinical interviews aimed at assessing the prisoner's personality, impulsiveness, sexual inclinations, sources of arousal, and so on. Statistical or actuarial assessment tools that attribute the prisoner to various risk groups based on static factors, such as criminal record, personal status, age, sex, or attributes of the victim, may also be useful. (*Al-Obeid v Prison Service*, 2001; Tsadik, 1996; 1998; 2003).

The MHC responds to this criticism by challenging the reliability of alternative assessment tools (Cohen, 1997; *Al-Obeid v Prison Service*, 2001). In its view, statistical assessments are insensitive to the prisoner's individual and personal experience, are highly unreliable in predicting recidivism and, in any case, require a database of a size that is unavailable in Israel. As for "indirect discussion" interviews and psychodiagnostic tests, the MHC maintains that they do not provide access to the prisoner's "internal world," since those who deny committing a crime tend to provide false information on issues unrelated to that crime in order to portray a positive and undangerous profile. The MHC further observes that

even tests that try to elicit physical reactions by means of exposure to images or videos (rather than relying on self-reported answers) are much more reliable when administered to someone who admits the crime than to someone who does not. Furthermore, in the MHC's view, denial of a sex crime may indicate a personal failure to concede a psychosexual compulsion, which in turn undermines the prospects of effective treatment; a prisoner in denial is incapable of demonstrating shame, guilt, or empathy, and often confronts reality with great anger.

The MHC's response to its critics is insufficient. Research reviews have repeatedly shown that structured clinical assessment is more reliable and valid than unstructured assessment (e.g., Monahan, 1981) and, in any case, the use of actuarial tools cannot be dismissed in such a categorical fashion as suggested by the MHC. It might be worth considering the application of such well-validated models of offender rehabilitation as the Risk-Needs-Responsivity or Good Lives models (Bonta & Andrews, 2007).

### **The Supreme Court's Stance on the Debate**

For many years the MHC applied an absolute assumption that, absent an admission of guilt, it was not possible to assess the prisoner's dangerousness. This policy was affirmed by the Supreme Court on a number of occasions, until the case of *Al-Obeid v Prison Service* (1998), concerning a prisoner whose conviction on charges of murder and rape had been one of the most controversial in Israel's history. Pressed by the Court during the proceedings, the MHC amended its policy so that admission of guilt will no longer be the *sine qua non* for preparing a risk-assessment report. Prisoners will be assessed individually and, in suitable cases, given further examination in greater depth, including inpatient observation in a mental hospital.

However, under the revised policy, admission is still a major factor in the MHC's assessment and little practical change seems to have emerged. Indeed, in the case of *Aslan v*

*State of Israel* (2002) the Supreme Court established that not a single sex offender who insisted on his innocence had been assessed by MHC. Despite this finding, the Supreme Court approved of the MHC's stance by reference to the separation of powers principle, whereby the court is precluded from intervening in the professional debate between the MHC and its critics on risk-assessment methodology, unless the MHC had subscribed to an unreasonable school of thought, which was not the case.

The Supreme Court reinforced this position by stressing that, not only should the MHC not be blamed for insisting on a confession, it was proper for it to presuppose that the prisoner has committed the actions of which he was convicted, because this was the finding of a final judgment delivered by a court of law. When guilt is presumed, it is legitimate to view denial as an alarm signal that should be taken into account in assessing the prisoner's dangerousness.

The Court's refusal to take into account the wrongful-conviction scenario might be explained as reflecting a mindful willingness to sacrifice on the altar of public safety the interests of innocent prisoners wrongly imprisoned. This may be based on an inevitable working assumption that the MHC has no adequate tools or authority to re-examine a court judgment, and on the idea that, in any case, parole is a privilege, not a right. However, the Court's firm position that convictions create an automatic presumption of high risk might also be said to reflect a dogmatic belief that all convictions are correct (as might be implied in *Ghanamah v Parole Board*, 2010).

Be that as it may, the Israeli law is not unique in this respect. For example, the United States Supreme Court has ruled that sex offenders form a special class of prisoners that may be subject to additional scrutiny and rehabilitation (*Kansas v Hendricks*, 1997), and that there are legitimate therapeutic purposes in requiring an admission of guilt in the treatment of sex offenders and as a prior condition for granting parole (*McKune v Lile*, 2002; *Newman v*

*Beard*, 2010). Curiously, English courts have developed a more nuanced approach. The general principle is that it is unlawful for a parole board to deny parole solely on the ground that the prisoner continues to deny his guilt and refuses to express remorse for his actions. It may do so only in specific circumstances, including cases of serious and persistent violent or sex crimes, where there is concrete evidence to suggest that denial of guilt means that risk is either high or incapable of being objectively assessed. That said, since access to therapy in English prisons usually requires an admission of guilt as a condition for participating, the prospects of deniers to obtain parole remain diminished, even if not as much as in Israel (*R v Parole Board, ex parte Oyston*, 2000; *R (on the application of Hepworth and others) v Secretary of State for the Home Department*, 1997).

### **Why the Power Accorded to the MHC is Excessive**

The MHC's powerful position may be best exemplified by the case of *Nagar v State of Israel* (2011), where most of the relevant conditions for parole were favorable, except for an MHC report. The prisoner was not held on remand during his trial, suggesting that he was not assessed by the court as being sufficiently dangerous to justify arrest. Furthermore, the prisoner had no criminal record, and his crime concerned a single incident of partial sex contact based on fraudulently obtained consent. He was sentenced for a relatively short term of 14 months, during which his conduct was exemplary. He also admitted some of the actions and made a convincing expression of regret, while his failure fully to admit guilt was later attributed to a wish to avoid embarrassment before his family. However, since his confession was incomplete, he was denied treatment and therefore the MHC assessed his risk level as low-medium. Even so, the Prison Service agreed to grant him regular furloughs on conditions that were strictly observed by him. The parole board was likewise favorably impressed and decided to grant him parole. However, this decision was faulted by the court for being

extremely unreasonable by virtue of its failure to pay sufficient regard to the MHC's risk assessment.

The court's willingness in this instance to depart from its traditional reluctance to intervene in an administrative decision, setting aside the preponderance of positive indications, suggests that whatever limited discretion remains for a parole board to consider whether the risk may be controlled or supervised effectively despite a presumption of dangerousness, is largely theoretical. Parole boards and courts may therefore become a rubber stamp, largely unable to supervise the MHC's activity. This concern is significant if we consider that the Supreme Court has characterized the MHC as a neutral, official and professional body whose experience has no equivalent in Israel, which means that its risk assessments must be treated as decisive and trump any evidence to the contrary produced by the prisoner, including private expert opinion (*Al-Obeid v Prison Service*, 2011). Automatically preferring the MHC's report over any other evidence strips prisoners who insist on their innocence of any realistic chance to obtain parole.

Faced with the authorities' refusal to allow them access to treatment, deniers have attempted to overcome this hurdle by offering to enter into private rehabilitation and treatment plans once they were released on parole. The Supreme Court rejected such attempts as a matter of principle (*Chief Military Attorney v Zaher*, 2011). It reasoned that the risk-assessment process is better served by in-prison treatment, because when the prisoner appears before the parole board he will have completed the treatment, allowing his success to be measured on a more comprehensive and reliable basis. Allowing prisoners to utilize private plans that offer treatment only after parole is granted removes the incentive to admit guilt and prove their rehabilitation intentions through in-prison treatment. The Court expressed a further concern that such a course of action would create an inequality between prisoners who could afford the expenses of a private plan and those who could not.

This reasoning has its logic, but it cannot justify blind reliance on the MHC and absolute refusal to consider private risk-assessment reports. For one thing, judicial tribunals regularly consider private expert opinions brought by criminal defendants or civil litigants, whether to challenge official experts or to establish a scientific or professional finding; thus, automatically granting greater credence to a state-appointed expert undercuts a fundamental principle of adversarial justice (Fuller & Randall, 1958). For another, if treatment inside the prison is considered preferable, and lends itself better to monitoring by the authorities, but the Prison Service denies non-admitters the opportunity to participate in that treatment, they should at least have the option of receiving private treatment inside the prison, if they can afford it. However, as we shall see, attempts to break the Prison Service's monopoly over treatment have faced difficulties. As for the financial inequity concern, this gives rise to a leveling-down objection: To say that private therapy should be impermissible because not all prisoners can afford it is tantamount to saying, for example, that a right to legal representation should not exist because not all people can afford it.

### **Recidivism Rates in Israel**

Unfortunately, empirical research on recidivism among Israeli prisoners is still in its infancy. As of 2009, the general recidivism rate reported by the Prison Service was 62%, when the follow-up time was unlimited (PRP, 2010). When measured upon a period of five years (Ben-Zvi & Walk, 2011), the recidivism rate among prisoners released in 2004 was 43.3% (36% returned to prison in their first year). Furthermore, the highest recidivism rate was in property crime (57.4%), whereas violent crime ranked fifth (46%) and sex crime ranked ninth (19.3%) of 12 crime categories. As for prisoners on parole, the latest data from 2009 shows that 33.1% return to prison within five years of their release, as opposed to 48.1% of the non-parolees.

These figures deserve a few comments. First, the lower recidivism rate among parolees (33.1% as opposed to 48.1%) does not necessarily suggest that granting parole reduces recidivism. It may simply be that those who are granted parole are initially selected for their lower recidivism potential or higher rehabilitation prospects. In other words, these numbers do not establish a “parole effect” that operates independently of a possible “selection effect.” Furthermore, these figures tell nothing about what proportion of those who are denied parole on the basis of their risk assessments would have stayed crime-free if they had been released (a false positive) or have recidivated since serving out their sentences. Nor is there data on whether there is a correlation between denial of guilt and re-offending.

Second, the finding of relatively low recidivism rates among sex offenders is consistent with findings from other jurisdictions. For example, a study in England and Wales found a rate of 4.3% after four years, and 8.5% after six years (Hood et al, 2002; Shute, 2004). In the US and Canada, a meta-analysis study found an average recidivism rate of 13.7% in an average follow-up period of 5-6 years (Hanson & Morton-Bourgon, 2005; Harris & Hanson, 2004). These findings are not necessarily reassuring. It stands to reason that many more property complaints are filed than sex crime complaints, which are harder to detect and prosecute. As is well-known, sex crimes are underreported because victims face tremendous difficulty in reporting such crimes to the authorities (Tjaden & Thoennes, 2006). Moreover, sex crimes can pose special evidentiary difficulties— when, for example, the victim is a child too young to give reliable testimony or when no physical force was exerted to coerce the victim. The offender’s awareness of such probative difficulties may make punishment seem unlikely, undermining its deterrent effect.

In *Chief Military Attorney v Zaher* (2011), the Supreme Court approved of the MHC’s unfavorable position concerning parole of deniers, holding, among other things, that the recidivism rate of 33.1% among parolees is still a high one; thus, it reasoned, if even those

who had been determined to pose a low risk were highly prone to recidivism, even more caution should be exercised when the MHC has pronounced the risk to be high. However, as noted above, the 33.1% figure represents the general recidivism rate among all offenders who obtained parole (not only sex offenders), whereas the sex offenders' recidivism rate was substantially lower—19.3% (which includes those who obtained parole and those who did not). What is missing is the rate of recidivism among *sex offenders who were paroled* (which could also be broken down to two rates: those who recidivate on sex crimes and those who recidivate on other crimes). If this figure turned to be high, it could have suggested that even those who were assessed as low risk were prone to higher recidivism than other offenders. Such a figure could have also provided some indication of the extent to which confession-based treatment actually reduced recidivism, and whether the MHC's predictions of low risk were accurate.

An attempt to measure such factors was conducted in England and Wales. Hood et al (2002) found that 92% of the sex-offender prisoners who had been identified by at least one member of the parole board as 'high risk' were not convicted of a further sex crime at the end of a four-year follow-up period, and 87% were not convicted of any serious violent offense. When measured over six years, the rates were 78% and 72%, respectively. Furthermore, with one exception, all the prisoners in this study who were subsequently convicted of a further sexual crime were *not* deniers of guilt (the difference was statistically different). While it is true that the re-conviction rate does not entirely overlap with recidivism, as many offenses remain undetected, these findings provide strong reasons to investigate and empirically substantiate the presumption of Israeli parole law that denial is associated with risk.

### **Signs of Change**

The Supreme Court's approval of the MHC's position has not been totally unqualified. On a number of occasions, the Court has expressed concern over the serious consequences

suffered by deniers as a result of the MHC's policy (*Aslan v State of Israel*, 2002; *Al-Obeid v Prison Service*, 2001). Denial, says the Court, should not create an absolute presumption of dangerousness or an insurmountable barrier to treatment. The Court made it clear that the MHC should conduct an individual examination of the prisoner and consider whether dangerousness could be ruled out *despite* the denial of the crime. Most importantly, the Court has invited the MHC and the Prison Service to consider launching a treatment course tailored specifically for those who do not admit their crimes. In doing so, it called upon them to reconsider the position that the prisoner who denies his crime cannot be treated and that such denial indicates a level of dangerousness that cannot be controlled outside prison.

However, these calls have remained unattended for more than a decade. This led the Court in the recent case of *Chief Military Attorney v Zaher* (2011) to issue what might be interpreted as a final warning heralding a change in its stance. Zaher was a senior military officer, sentenced to a prison term of six years for sexually assaulting his secretary. Based on the Supreme Court's holding that the MHC needed to reconsider its policy, the parole board ordered the MHC to establish a therapy group for denying prisoners, in which Zaher might be included. The MHC ignored this request for some time, eventually explaining that it refused to establish such group because its low prospects could not justify the significant resources it might require. The MHC's dismissive response to the parole board's order led the board to give greater weight to the private-expert report presented by the prisoner and, accordingly, grant parole.

While still deferring to the MHC's professional stance, and thus revoking the board's decision, the Supreme Court reiterated the need to consider establishing a treatment course for denying prisoners. The Court held that this possibility should be explored seriously in light of the severe practical consequences of the crime denial. It may become too difficult, the Court went on to say, to sustain a policy that deprives prisoners of parole on the ground of their

failing to undergo treatment for which they are not eligible in the first place. Insisting on not offering such treatment may constitute, in the Court's view, a heavy consideration in favor of granting parole. The Court further held that the Prison Service's policy against allowing such prisoners to receive private treatment while in prison, on the ground that treatment is offered by it, is unsustainable because denying prisoners are not eligible for the treatment it offers.

The issue of private treatment in prison has witnessed some recent developments, not only in relation to sex offenders. In 2011, the Prison Commission issued an Ordinance (PCO no. 04.41.00) regulating the procedure for visits by private therapists for the purpose of diagnosis, treatment and the preparation of a rehabilitation plan. However, in 2013, the Prison Commission abolished this Ordinance, mainly on the ground that it undermined their managerial power by diluting the prisoner's incentive to cooperate with the rehabilitation bodies operated by the Prison Service. The Prison Service's position was that rehabilitation plans should be prepared only by the PRA, and to this end the prisoner must cooperate. This decision was challenged before the Administrative Court, which rejected the Prison's position and ordered it to allow prisoners to receive private treatment in prison. An appeal to the Supreme Court was withdrawn by the Attorney General (*Ben-Hayon v Prison Service*, 2014).

### **Conclusion**

This article has reviewed the general legal framework that governs the Israeli parole system, focusing in particular on sex offenders and procedures for assessing the risks that their early release might pose. As we have seen, the MHC's refusal to assess sex offenders who deny their crime, coupled with the preclusion of such prisoners from in-prison treatment, have in fact stripped sex offenders of any viable chance to rebut the presumption of dangerousness created by their conviction. Their insistence on their innocence is thus likely to cost them any realistic chance to obtain parole. While the MHC's professional justification has its own logic, the resulting Catch 22 situation demands a critical reinvestigation. This

revision cannot be seriously undertaken without further empirical research on recidivism among Israeli sex offenders and prisoners in general. Recent case law shows that the Israeli Supreme Court is losing patience with the MHC's failure to follow its advice and set up therapy for non-admitters. Indeed, as Lord Acton (1834–1902) put it more than a century ago:

"Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men."

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