

**The Death Penalty in Israel Part 1: A License to Kill Palestinians?**  
**By Halav Udvash**

*“A modern nation of laws isn’t supposed to act based on revenge. It’s legal system is founded on decency, justice and equality, not primitive concepts like hatred” -Yuval Shany*

On November 4<sup>th</sup>, 2018, Israeli Prime Minister Benjamin Netanyahu formally endorsed a controversial new bill calling for the death penalty for convicted Palestinian terrorists.<sup>1</sup> The bill, proposed by the Yisrael Beytenu party, won initial backing in a January preliminary reading in the Knesset. The bill is strongly supported by Defence Minister Avigdor Lieberman, an ultra-nationalist in the conservative coalition government, who advocates for tough action against Palestinian terrorists.<sup>2</sup> The bill also has backing from the families of terror attack victims, who feel that life imprisonment is not a sufficient punishment, and want to see a more tough on crime approach to terrorism.<sup>3</sup> The bill’s progress since January 2018 has been repeatedly delayed and it currently faces deliberations in the Knesset’s Constitution and Law Committee before being brought to a vote in the plenary.

History of Capital Punishment in Israel

Israel inherited the British Mandate penal code, which included the death penalty for several offences. As a result, the death penalty has always formally existed in Israeli law, however, it has only been used twice in the nation’s history.<sup>4</sup> The death penalty was first used in 1948 when Meir Tobianski, an Israeli army commander, was wrongfully convicted of espionage and sentenced to death.<sup>5</sup> Tobianski was exonerated one year after his execution. It was used a second time in 1962, when Adolf Eichman, one of the architects of the holocaust, was sentenced to death.

At present, the death penalty may be used under martial law in the West Bank and for matters concerning the IDF.<sup>6</sup> It requires a unanimous decision from three judges. Israel’s civilian courts reserve the use of the death penalty for Nazis and Nazi collaborators, and crimes against the Jewish people.<sup>7</sup> The proposed bill would make it easier to impose the

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<sup>1</sup> Raphael Ahren, “As Knesset Advances Death Penalty bill Israel at UN Joins Calls to end Practice” Timesof Israel (16 November 2018), online: < <https://www.timesofisrael.com/as-knesset-advances-death-penalty-bill-israel-at-un-joins-calls-to-end-practice/>.>

<sup>2</sup> Ori Lewis & Nidal al-Mughrabi, “Israeli Death Penalty Advocates win Preliminary vote in Parliament” Reuters (3 January 2018), online: <<https://www.reuters.com/article/us-israel-palestinians-deathpenalty/israeli-death-penalty-advocates-win-preliminary-vote-in-parliament-idUSKBN1ES1DT>>

<sup>3</sup> Daniel Estrin, “Why Israeli Courts Refuse Death Penalty for Terrorists” PRI (22<sup>nd</sup> April 2015), online: <<https://www.pri.org/stories/2015-04-22/why-israeli-courts-refuse-death-penalty-terrorists>>

<sup>4</sup> *Supra* note 2

<sup>5</sup> David Green, “This Day in Jewish History: An Israeli Captain Wrongly Charged with Treason and Shot” Haaretz (30 June 2016), online: <https://www.haaretz.com/jewish/1948-israeli-captain-wrongly-charged-with-treason-1.5403194>.>

<sup>6</sup> *Supra* note 2

<sup>7</sup> Yara Hawari, “How many more ways can Israel sentence Palestinians to death?” AlJazeera (17 December 2018), online: < <https://www.aljazeera.com/indepth/opinion/ways-israel-sentence-palestinians-death-181217105304720.html>>.

death penalty, by allowing both military and civilian courts to execute terrorists with just a simple majority of two out of three judges.<sup>8</sup>

### The Deterrent value of Capital Punishment

According to the bill's sponsors, the new death penalty law is designed to "create significant deterrence among those who carry out terrorist operations."<sup>9</sup> They also claim that the law will prevent the release of Palestinian prisoners from Israeli jails due to bargaining arrangements following the capture and hostage taking of Israeli citizens. For example, in 2011, Hamas arranged the release of over 1000 Palestinian prisoners in exchange for the release of one captive Israeli soldier.<sup>10</sup>

At the outset, the reasoning seems sound. After all, how can Palestinian terrorists walk free if they are executed first? However, according to Shin Bet (an Israeli security service), and the Israeli Defense Forces (IDF), the bill could have the opposite effect of deterrence. Both organizations say that it could cause unrest with the Palestinian Authority, and increase the potential for Israelis to be captured and held hostage in exchange for the release of Palestinians awaiting execution.<sup>11</sup>

Moreover, there is a wealth of empirical evidence to suggest that the death penalty is ineffective in preventing crime.<sup>12</sup> Given the extreme and permanent nature of capital punishment, research has suggested that deterrence should be accepted as a justification for the death penalty only if the effect is reliable, consistent and strong. If the deterrent effect is anything less than this, the death penalty produces nothing more than the deaths of those executed.<sup>13</sup>

Additionally, in the unique context of politically motivated terror acts, the deterrent effect of the death penalty may be different for criminals who are willing to risk their lives in crimes such as suicide bombings and attacks where the attacker is likely to be killed by security. Therefore, it may be the case that the prospect of death is not a deterrent at all. Given this uncertainty and the lack of empirical recognition for the death penalty's effectiveness, it is clear that academic literature cannot be used as support for the advancement of the bill.

### Capital punishment in Israel: An equal playing field?

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<sup>8</sup> *Supra* note 1

<sup>9</sup> Yuval SHany, "Should Israel Have a Terrorists- only Death Penalty?" Haaretz (16616 November 2018), online: <https://www.haaretz.com/opinion/.premium-with-the-death-penalty-israel-shouldn-t-act-like-a-street-gang-1.6658240>.>

<sup>10</sup> Ronen Begman, "Gilad Shalit and the Rising Price of an Israeli Life" The New York Times (9 November 2011), online: [https://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html?\\_r=0](https://www.nytimes.com/2011/11/13/magazine/gilad-shalit-and-the-cost-of-an-israeli-life.html?_r=0).>

<sup>11</sup> Tamar Pileggi, "Shin Bet Chief 'unequivocally' against Death Penalty for Terrorists" The times of Israel (6 November 2018), online:< <https://www.timesofisrael.com/shin-bet-chief-unequivocally-against-death-penalty-for-terrorists/>.>

<sup>12</sup> Dane Archer, Rosemary Gartner and Marc Beittel, "Homicide and the Death Penalty: A Cross-National Test of a Deterrence Hypothesis" (1983) 74:3 Journal of Criminal Law and Criminology at page 1013.

<sup>13</sup> *Ibid*.

Even if the bill overcomes the deterrence-based problems, it faces some serious issues when we consider the single demographic that will most commonly be put to death through the new regime: Palestinians. When asked by an Israeli Arab Knesset Member whether the bill would also apply to Jewish militants convicted of killing Palestinians, Netanyahu replied: “In principle, yes.”<sup>14</sup> While this statement seems to indicate that the law will apply equally to all citizens of Israel, Arab or not, it is of course the case that the majority of terror crimes are committed by Palestinians as compared to Jewish Israelis.<sup>15</sup>

### Capital Punishment: Security Policy or Political Statement?

According to Netanyahu, “when somebody slaughters and laughs (as he kills), he should not spend the rest of his time in jail and should be executed.” Netanyahu’s comments on the bill also imply that deterrence may not be the only motivation for the new law. Instead, it seems that the intent is to punish offenders for crimes that are particularly morally reprehensible. In the wake of what the Israeli government has officially called a “wave of terror”, this type of logic does not seem out of place. According to the Israeli Foreign Ministry, since September 2015, Israel has experienced “a wave of terror perpetrated by individuals, many of them very young, inspired by vicious incitement in Palestinian social and traditional media and urged on by the Palestinian leadership.”<sup>16</sup> The Israeli government estimates that since October 2015, 76 people have been killed in Palestinian terrorist attacks and 1187 have been wounded. There have been 202 stabbings, 147 attempted stabbings, 221 shooting attacks, 73 vehicular ramming attacks, and the use of 316 roadside/pipe bombs.<sup>17</sup>

It is undeniable that the violent attacks that took place in Israel and occupied territories are horrific. It is equally undeniable that this state of violence is unsustainable for Israeli citizens as well as those living in the occupied territories. Accordingly, using the law to combat violence is a laudable goal. However, this bill does not offer a progressive or plausible solution to realizing this goal. This bill is based not on research, but instead it is a politicized movement, which prioritizes revenge and retribution for the victims of those who have been affected by terror attacks.

### Conclusion

From a review of the proposed goals of the bill, opposition to the bill, and academic research, it is clear that the death penalty holds little deterrent or legal value. If passed, the proposed legislation will almost certainly result in the disproportionate execution of Palestinian prisoners. As the United Nations states, the death penalty is an irrevocable sentence, and no justice system is immune to judicial error.<sup>18</sup> Given the high price, and permanent nature of wrongful execution, combined with the possibility of causing unrest

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<sup>15</sup> Noemi Gal-Or, “Tolerating Terrorism in the West: An International Survey” (New York: Routledge 1991) at 61-62).

<sup>16</sup> Israel Ministry of Foreign Affairs, Wave of Terror 2015-2018 (Israel: Israel Ministry of Foreign Affairs, 2018), online: <<http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Wave-of-terror-October-2015.aspx>>

<sup>17</sup> *Ibid.*

<sup>18</sup> European Union External Action “World Day Against the Death Penalty” (10 October 2018), online: <[https://eeas.europa.eu/headquarters/headquarters-homepage/51905/world-day-against-death-penalty\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/51905/world-day-against-death-penalty_en)>

within the current conflict, there seems to be little upside to the introduction of such a law.

The proposed bill advances the ultra-nationalist position of its supporters by prioritizing a tough on terrorism mentality, and utilising the public yearning for revenge against terrorists who “laugh as they kill”. While deterrence for violent crimes is a laudable goal, the motive of this bill seems more aligned with revenge and retribution, than deterrence and progressive legal objectives. As Pierre-Henri Imbert, so aptly put it: “revenge is kindred with our nature and our instincts but not with the law. The law cannot obey the same rules as human nature. Murder may come naturally to mankind, but the law is not made to imitate or reproduce nature. The law is crafted to correct nature.”