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'Death penalty law marks moral break, may face challenge'

INTERVIEW

• By SARAH BEN-NUN

The Knesset's passage of the new death penalty law for terrorists on Monday night has reopened one of the deepest arguments in Israeli law: Not only whether the state should ever execute, but whether this law was written in a way that will, in practice, apply unequally.

Under the new law, death by hanging becomes the default sentence in military courts for certain lethal terror offenses, while the statute also amends Israel's penal code in parallel.

For Prof. Yoram Rabin, a criminal and constitutional law scholar and president of the College of Management of Academic Studies, Rishon Lezion, the law is both a moral rupture and a legally vulnerable one.

YORAM RABIN
(Idan Gross)

"I was saddened," Rabin said in an interview with *The Jerusalem Post*, calling the development "a moral stain" and saying he had once believed capital punishment would never return in this form to Israel's statute books.

Rabin placed the law against the backdrop of Israel's long and uneasy history with capital punishment.

During the British Mandate, death sentences existed both for murder and for security offenses such as treason, espionage, and aiding the enemy, he said. Israel inherited those provisions, but in 1954 abolished the death penalty for murder – a move he stressed was led in significant part by religious lawmakers.

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Since the state's founding, he noted, capital punishment remained on the books for a narrow group of offenses but was carried out only once, in the case of Adolf Eichmann.

That history, in Rabin's telling, is precisely why the new law is more than just another anti-terror step. It marks a departure from a long-standing Israeli pattern in which death sentences formally survived in limited areas of the law but were, in practice, almost never used.

Background material Rabin shared after the interview reflects the same broader view: that democratic systems have moved away from executions over time; that the right to life lies at the heart of the constitutional difficulty; and that Israel's own legal tradition developed toward near-total non-use even where capital punishment technically remained available.

At the center of Rabin's criticism are two separate legal questions. The first is the broad constitutional issue: whether the death penalty itself can be reconciled with Basic Law: Human Dignity and Liberty. "There is no dispute," he said, "that the death penalty contradicts the constitutional right to life."

The legal question, he said, would be whether that violation could survive scrutiny under the limitations clause of Basic Law: Human Dignity and Liberty – the constitutional test that allows rights to be infringed only if the infringement serves a proper purpose and does so to an extent no greater than required.

In practice, that means the court would have to ask not only whether combating terrorism is a legitimate aim, but whether the death penalty is a proportionate way of pursuing it, including whether a less harmful alternative – such as life imprisonment – could achieve the same purpose.

But Rabin suggested the sharper challenge may lie elsewhere – in what he described as the discrimination built into the law itself. The statute creates a specific track for cases in which a person intentionally causes death in an act of terror "with the aim of denying the existence of the State of Israel."

In the military-court framework for "residents of the area," death is the default sentence, with life imprisonment left only as an exception if the court finds special circumstances and gives written reasons. The law's definition of "resident of the area" excludes Israeli citizens and Israeli residents.

That, Rabin argued, is where the law becomes especially vulnerable. Terror under Israeli law is a broader category than this statute suggests, he said. It can include, for example, ideologically motivated violence by Jews as well as by Palestinians.

Rabin pointed to the assassination of Prime Minister Yitzhak Rabin and to the murder of Mohammed Abu Khdeir as examples of political or nationalist violence that fit terrorism logic, even though the new law was framed around a narrower formulation tied to denying Israel's existence. "What will happen in practice," he said, "is that there will be differentiation, and it will be a death penalty for Arabs."

That argument has already moved beyond academic debate. Two petitions have been filed with the High Court so far, opening what is expected to be the first round of legal challenges to the measure. Critics have said that the law is designed to target Palestinians tried in military courts, while the Knesset described the bill as a deterrent measure against future terrorists.

Rabin said he believed the equality question could ultimately prove harder for the court than the broader theoretical issue of capital punishment itself. Some judges, he suggested, may hesitate to say that the death penalty is always unconstitutional in every circumstance.

But a law that creates a regime likely to operate almost exclusively against Arab defendants may be much harder to defend. "I think the difficult question will be the discrimination," he said.

The law's supporters argue that it is needed for deterrence. That claim, however, is heavily disputed. Materials provided by Rabin point to a large body of scholarship questioning whether capital punishment reduces murder rates at all, let alone terrorism. He further argued that whatever deterrent case exists in ordinary criminal law is even weaker in Israel's reality, where terror attacks are often rooted in religious fundamentalism and martyrdom.

A more immediate security concern was raised as well: that executions could backfire. Among the risks cited were retaliatory spectacle killings of Israelis, in an ISIS-style pattern of filmed revenge, and reduced room for future prisoner-exchange or hostage arrangements.

Rabin situated Israel within the broader Western legal landscape. Europe, he noted, has abolished the death penalty. The United States remains the major Western outlier, though even there the practice is contested, limited by state law, and increasingly uneven in use; the modern trend is one of long-term retreat from executions, even where the death penalty formally remains.

For now, the new law stands. But its future is likely to be decided not only in the political arena, where it was championed by the coalition as a long-promised anti-terror measure, but in court, where its opponents will test both its constitutionality and its equality.

Rabin's own view is blunt: The question is not only whether Israel should execute, but what kind of legal order it creates if it does so through a framework that appears designed to fall most heavily on one population. •