

## Capital Punishment in Judaism

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The morality and ethics of capital punishment – i.e., the death penalty for murder – has been greatly discussed in the past few years, especially in the United States where it was ruled illegal for a short time (between 1972-1976), but now its legality is decided by each state. Twenty-seven states currently allow it and twenty-three do not. Several prominent states abolished the death penalty only recently, such as New York in 2007 and Virginia in 2021, so the debate rages on. Internationally, of the 194 United Nations member countries, 98 have abolished capital punishment completely, and another 49 states still have it “on the books” but have not been implemented in the last few years. As the debate about the ethics and morality of such punishment continues in the world, it is important to understand the Jewish view on this subject, and to show that this is an ancient Jewish ethical discussion that has continued throughout the ages. In Israel the question of the death penalty for terrorists has been revived after the recent exchange of many killer terrorists for Gilad Schalit, which resulted in Arab terrorists becoming less afraid of being apprehended for murdering Israelis, as they count on being freed in a future exchange for another captured Israeli soldier. Capital punishment for terrorists would eliminate this assumption. Is this sufficient reason to institute the death penalty for captured terrorists who are known to have committed horrendous acts of murder on civilians? What, then, is the traditional Jewish view on the death penalty?

### **THE RATIONALE AND CAPITAL PUNISHMENT IN THE TORAH**

What is the rationale for killing a human being who kills someone else? The traditional arguments in favor of capital punishment for an act of murder are threefold: The first is deterrence. When those who may potentially commit murder know that the punishment if they are caught is death, this may prevent many potential killers from carrying out the act. The second is retribution or justice. If a person takes the life of a human being, the logical punishment for such an act is to lose his or her own life. This is the most “fair” punishment for murder. It also provides a feeling of justice and closure for the family of the victim, who suffer the most when a relative is brutally murdered. The third argument is safety – i.e., it is important to keep a murderer away from an innocent population since this person may murder again. However, this argument is negated if a policy of imprisonment without the possibility of parole for murderers exists, because it is an alternative punishment to the death penalty that addresses this concern. But if we look at the Torah, Judaism offers a fourth rationale for capital punishment.

Even before the Torah addresses capital punishment for crimes and sins in an all-Jewish society, the Torah makes it clear that even for non-Jews, the punishment for murder is death. When speaking to Noah, G-d says that he who sheds blood – i.e., the person who murders – should die as a result of his crime.<sup>1</sup> But then the Torah gives a specific reason for this punishment: it is because man was created in the image of G-d. Thus, in addition to the other rationales for capital punishment, the Torah says that because every person has a “piece” of G-d within him or her, if a person takes the life of another human being (who also had a piece of G-d within), that person forfeits his or her “image of G-d,” and is no longer

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<sup>1</sup> Genesis 6:9

worthy to be called a human being with G-d's image. It is for this reason that the Torah says he does not deserve to live.

But the Torah, which later on describes a Jewish society that does not distinguish between man to man and man to G-d crimes/sins, lists numerous other sins whose punishment is also the death penalty. In addition to murder, the death penalty is listed for striking one's parent, kidnapping, bestiality, violating the Shabbat, idol worship, adultery, homosexual behavior and cursing G-d.<sup>2</sup> All these sins are heinous from a Jewish perspective, and the seriousness of their punishment attests to that. However, it would be foolish to form the Jewish view of capital punishment based on these verses alone. Why is this so?

According to Jewish tradition, the corpus of Oral Law was given along with the written Torah at the very same time, in order to render the barebones legal system of Torah verses into a working Jewish system of law for society. Therefore, if we examine the details of capital punishment along with the details of its Oral Laws, we will discover that it was almost impossible to actually punish a perpetrator of any of these crimes or sins with the death penalty. For example, while the Torah says that a court needs two witnesses to convict a murderer,<sup>3</sup> it does not set down the conditions or details about those witnesses or what they saw. The details of all the conditions that need to occur, specified in the Oral Law, make it almost impossible to actually convict a murderer or perpetrator of any of the sins mentioned above.

The Talmud in tractates Sanhedrin and Makkot discuss the specific elements and conditions of all that must occur in order to convict a murderer in a Jewish court. For example, the two witnesses have to be adult Jewish men who keep the commandments, know the Oral Law fairly well and have legitimate professions. Both witnesses must be able to see each other at the time of the act or sin. The witnesses must be able to speak clearly, without any speech impediment or hearing deficit. They are invalidated if they are related to the accused or to each other. In addition, the witnesses have to give a warning to the person right before the sin, saying that the sin he or she is about to commit is a capital offense. If the warning is not delivered within approximately ten seconds before the sin/crime, it is not valid. In that short time period after the warning, the sinner has to respond that he or she is familiar with the punishment, is going to commit the crime/sin anyway, and then begin to act immediately thereafter.

In court, the following conditions must also be present: The judges have to examine each witness separately, and even if one point of their evidence is contradictory (even the eye color of the sinner), the witnesses' testimony is not admitted. Of the 23 Jewish judges presiding over a capital case, a simple majority of 12 to 11 is not enough to convict (it needs to be at least 13 to 10) and if all 23 unanimously vote to convict, the sinner goes free (based on the logic that if at least one judge cannot find something exculpatory about the accused, then there is something wrong with the court). Thus, it would be nearly impossible to satisfy each and every one of these conditions. While the punishment of death for sins or crimes is clearly stated in order to show the severity of each sin or act, and while the person who commits such crimes may indeed deserve to be killed, in practice, Judaism and Jewish courts could almost never actually convict and put someone to death.

### **THE AMBIVALENCE ABOUT THE DEATH PENALTY IN THE TALMUD**

After showing the vast difference between the Torah's verses about the death penalty and the ability to actually carry out such a sentence, we also see that the Rabbis in the Talmud were conflicted about this practice. In one Mishna alone, some of the greatest Rabbis in the history of Judaism argued

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<sup>2</sup> Exodus 21:12, 15-17, 31:14, Leviticus 20:2, 10, 13, 24:16

<sup>3</sup> Deuteronomy 17:6

about the morality of the death penalty.<sup>4</sup> One opinion is that any Jewish court that puts to death one sinner in seven years is considered a bloody court. Rabbi Eliezer disagreed and says that one death penalty in seventy years renders it a bloody court. Rabbi Tarfon and Rabbi Akiva say that had they been in the Sanhedrin judging capital crimes, no one would have ever been put to death. But then, Rabbi Shimon, who was on a par with these other Rabbis, answers them all and implies that capital punishment should indeed be used on a regular basis in order to deter murders. If Judaism were to follow your ideas, he tells the other Rabbis, you would be actively causing more people to murder innocents. Thus, we can see the battle about this issue right within the Mishna. On the one hand, the extreme sensitivity to life – all life, even that of a murderer – compels some Rabbis not to put him to death. On the other hand, that very sensitivity to life of innocents leads Rabbi Shimon to conclude that having no death penalty in practice will cause a lack of deterrence, and will lead to a proliferation of murder by Jews.

This ambivalence about capital punishment (between showing mercy for the murderer by a Jewish court vs. the need to deter others from murdering) continues in the period after the Mishna as is evident from a number of statements in the Talmud, Midrash and in Jewish law. Various conflicting passages show the two views. On the one hand, the Midrash states that Judaism should not adopt (today's) liberal view not to kill a murderer, simply because by killing him, the victim will not be brought back to life.<sup>5</sup> But another Mishna states that two of the conditions of being a judge on capital cases are that each judge must be married, have children and not be too old. The reason for these conditions, explain the commentaries, is that someone who never had any children will not have the required mercy to know what it feels like to put someone's child to death, and someone too old may have forgotten how to be merciful with children.<sup>6</sup> Maimonides quotes these two conditions as part of Jewish law.<sup>7</sup>

#### **SOLVING THE PROBLEM WITHIN JEWISH LAW**

In the latter years of the period under Roman rule, the incidence of murders in the Jewish community apparently proliferated greatly. The Rabbis, the majority of whom were already averse to putting convicted killers to death, did not want to continue the practice at all. Changing Jewish law regarding capital punishment was out of the question, as Jewish law could not be altered or amended simply because a problem arose or conditions changed. So, the leading Rabbis of the Sanhedrin, the Jewish High Court, needed to find a solution within Jewish law. The Torah states that when a convicted murderer was taken out to die, part of Jewish law was that the location of where the convicted murderer had to be taken from, i.e. the Sanhedrin-High Jewish court, had to be next the Altar, in the Temple.<sup>8</sup> Because of this verse, it was a law<sup>9</sup> that the Sanhedrin could only meet to decide capital (and therefore all) cases in the *Lishkat HaGazit*, the chamber within the Temple next to the Altar where the Jewish High Court sat. Then, the Talmud tells us<sup>10</sup> that when murders proliferated under Roman rule, forty years before the destruction of the Second Temple (around 30 C.E.), the Rabbis decided to abandon the home of the Sanhedrin in the Temple because it was forbidden to judge capital cases outside the Temple.<sup>11</sup> In this way, the Rabbis avoided having to try capital cases without having to change previously established Jewish law. This also shows us their rationale for the death penalty (in addition to the reasoning cited above based on the Torah verse). The death penalty was only effective as long as it provided a deterrence

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<sup>4</sup> Mishnah Makkot 1:10

<sup>5</sup> Midrash Sifri, Shoftim 44

<sup>6</sup> Mishna, Horayot 1:4, with commentaries of Tosafot Yom Tov and Maimonides

<sup>7</sup> Maimonides, Hilchot Sanhedrin 2:3

<sup>8</sup> Exodus 21:14

<sup>9</sup> Midrash Mechilta on Exodus 21:14

<sup>10</sup> Avodah Zara 8b

<sup>11</sup> Sanhedrin 52b

to minimize people's incentive to commit murder. Once murder became so common in the Land of Israel under Roman rule, there was no point in continuing the death penalty, since the deterrence was no longer effective. It was then that the Rabbis decided to move their court in order to avoid capital punishment altogether.

Once there was no Sanhedrin in the Temple or no Temple at all, then no Jewish court was even allowed to pronounce a death sentence for a capital crime. When Imarata, the daughter of a Kohen-priest, committed adultery, Rabbi Chama pronounced a death sentence upon her, even though it was after the Temple's destruction. Rabbi Yosef and all the Talmudic Rabbis castigated Rabbi Chama because it was a well-known Jewish law that when there is no Kohen-priest serving in the Temple or no Temple at all, capital punishment as the penalty for those sins outlined in the Torah is forbidden.

### **THE DEATH PENALTY FOR NON-CAPITAL CRIMES IN JUDAISM**

Although the death penalty was very rarely used to begin with and the era of the Jewish court using the penalty for capital sins in the Torah formally came to a close when the Sanhedrin moved outside of the Temple (and finally with the Temple's destruction), there is another set of instances when Jewish courts may use the death penalty, although not on a regular basis. When Judaism itself and the system of Jewish law are being threatened, Jewish law allows Jewish courts to pronounce the death penalty for sins and crimes that normally do not incur the punishment of death. This is permitted simply in order to demonstrate to the people the importance of upholding Jewish law and the power of the court. But this can be done only on a one-time or very sporadic basis.

Thus, during the Greek period, when many Jews were attracted to Hellenism and began abandoning traditional Judaism and observance of the details of Rabbinic law, the Rabbis made an example of one person who was caught riding a horse on Shabbat, which was forbidden by the Rabbis as a fence around the Torah law in order not to tear off leaves from a tree. (A person riding a horse may easily do this and therefore the Rabbis forbid riding a horse in any place on Shabbat, even in the desert where there are no trees.) When this person intentionally defied the Rabbis and rode a horse on Shabbat, the Jewish court ruled the death penalty for him, even though this act normally would result in the maximum punishment of lashes. Why? They wanted to demonstrate to the people the severity of ignoring Rabbinic law.<sup>12</sup> But this specific death penalty was enacted for this purpose and as a one-time legislation. Maimonides cites this example from the Talmud and rules<sup>13</sup> that any Jewish court overseeing the laws of a Jewish/religious community has this right to enact the death penalty in order to establish the primacy of Torah law, but only as a one-time pronouncement. Similarly, elsewhere, Maimonides rules<sup>14</sup> that if a murderer who had escaped the official death sentence because of the myriad of technicalities cited above, then seemed to be flaunting the fact that he had literally "gotten away with murder," the king has the authority to pronounce the death sentence upon this individual, as does the Jewish court, if they felt it was necessary in a particular situation.

### **THE DEATH PENALTY AFTER THE TALMUDIC PERIOD**

If the death penalty was generally forbidden after the Temple's destruction, then what happened in those rare instances when Jews committed murder in the Jewish community? During the period of the Gaonim (approximately 550-1000 CE), this question arose numerous times. Rabbi Nutrani Gaon (800's) was asked what should happen to someone who is guilty of a capital crime or sin, now that capital

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<sup>12</sup> Sanhedrin 46a

<sup>13</sup> Maimonides, Hilchot Sanhedrin 24:4

<sup>14</sup> Maimonides, Hilchot Sanhedrin 2:4

punishment is banned.<sup>15</sup> He answers that since his punishment should have been death, the Jewish court cannot give him lashes as a Torah punishment, which is a lesser punishment than he deserves. However, he can be given Rabbinic lashes (a slightly different punishment than Torah lashes in terms of number and other details), and this person is excommunicated from the Jewish community, which meant that no one could speak to or have dealings with him or her (at a time period where moving out of the community was almost impossible and conversion was not an option). Thus, the punishment of excommunication from the Jewish community was severe indeed.

About one hundred years later (during the 900's), Rabbi Sherira Gaon was asked the same question about a sinner.<sup>16</sup> He writes that the Jewish community cannot punish this person physically at all. However, one may not have anything to do with this person, and one may not pray with him or look at him, and he may never testify in a Jewish court. In a later period, during The Middle Ages, it was apparently known that in certain circumstances, the local court did administer the death penalty,<sup>17</sup> not as an "official" punishment but as a one-time act to warn the community about the severity of the sin, as seen in the Talmud and Maimonides (above). When a Jew informed on other Jews to the government, it usually meant certain death for those Jews. This was one example of the kind of sin that would engender the death penalty in some cities by certain Jewish courts during various periods.

During The Middle Ages, Rashba (1250-1310) was asked what should be done with a Jew who was pardoned by the king (because of "connections" or a payoff) even though he killed another Jew.<sup>18</sup> Rashba states what we already know – that the Jewish court cannot officially put this person to death. However, he gives them permission to do almost anything short of killing this murderer. He permits a Jewish court to give him lashes or even to cut off one limb. They can excommunicate him or remove him from the community (and other surrounding communities would also know what he did and comply with the ban as well). They could even put him in jail and feed him only a little bit of food. Maimonides similarly states<sup>19</sup> that since it is forbidden to kill him, the most a court can do is excommunicate him, give him lashes or incarcerate him.

### **THE PHILOSOPHICAL AND PRACTICAL DEBATE CONTINUES UNTIL TODAY**

The ambivalence about capital punishment can be seen by examining the words of one Rabbi, Maimonides, who seems to state both sides of the argument in two separate passages. In one place, he says<sup>20</sup> that if a killer cannot be killed because of a technicality, but you are sure that "he did it," you can put this person in jail and feed him little food until he gets sick and even dies. He adds that although the Torah listed numerous sins that incur the death penalty (like adultery and idol worship), he is only speaking about the sin and crime of murder, which is so much worse than any other crime or sin. G-d will take care of the man-to-G-d "capital crimes" like violation of Shabbat and idol worship, but a murderer is so heinous that he is called completely evil and any of the commandments he has fulfilled during the rest of his life can never outweigh this one act. But in another passage,<sup>21</sup> Maimonides speaks about the necessity of being absolutely sure in a Jewish court that a crime was committed before any punishment is allowed. Thus, even if the circumstantial evidence is overwhelming, a Jew may not be punished until his or her guilt is definitively ascertained. Maimonides cites the noted case of a Jew who is chasing his enemy

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<sup>15</sup> Teshuvot Rav Nutrani Gaon, Choshen Mishpat 375

<sup>16</sup> Rav Sherirah Gaon, Takanot HaGeonim, chapter 12

<sup>17</sup> Takanot HaGeonim, chapter 12, page 106

<sup>18</sup> Responsa Rashba, 349

<sup>19</sup> Maimonides, Commentary on the Mishna, Chulin 1:2

<sup>20</sup> Maimonides, Hilchot Rotzei-ach 4:8-9

<sup>21</sup> Maimonides, Sefer HaMitzvot, Negative Mitzvah 290

with a knife and they both go into a house, then the one being chased is then found dead and the chaser, who is covered in blood, is standing over him with a bloody knife. All this circumstantial evidence is still not enough to convict the chaser as a murderer in a Jewish court unless there is a witness who actually saw the murder take place. (This is based on the Talmudic discussion in Sanhedrin 37b of an identical case that says it is possible the chased person accidentally tripped and fell on the knife and the chaser then pulled it out of him.) Maimonides states, "It is better to let 1000 killers go free than to kill one innocent person." All these laws show both sides of the capital punishment issue and the attitude to murderers, all within the point of view of one great Talmudic scholar, as well as his genuine attitude toward the court system in general and capital punishment in particular.

The experiences of Rabbeinu Asher (1250-1327) are particularly noteworthy because he was a famous Ashkenazic Rabbi and decisor of Jewish law who at the age of 53 was forced to run away from Germany due to anti-Semitism. He wound up as a Jewish community leader in Spain. Thus, he witnessed first-hand the practices of both Ashkenaz and Sephard communities. Concerning capital punishment, he writes<sup>22</sup> that he was very puzzled when he came to Spain and saw that the Jewish courts there actually administered the punishment of death, even though the Sanhedrin and Temple no longer existed. When he inquired about this from the local Jewish judges, he was told that if they did not try, convict and execute Jewish murders, then the local non-Jewish government threatened to do so and they would certainly kill many more Jews. Thus, they actually instituted this practice in order to save the lives of countless Jews. Rabbeinu Asher concludes that although he never approved of this practice, he also never stepped in as the leader of the community to ban capital punishment from the Jewish courts in Spain.

This debate did not subside in the twentieth century either. Rabbi Moshe Feinstein, recognized as the leading Torah authority on Jewish law in the USA and possibly the entire Jewish world during the latter half of the twentieth century, was asked by an American government official about the Jewish attitude towards capital punishment (when the debate was raging in the courts and in State legislatures). He responds<sup>23</sup> by demonstrating the importance of every Jewish life in Judaism, which has infinite value, and then traces the history of capital punishment in Talmudic times, as mentioned above. Rabbi Feinstein explains that only the Jewish High Court could administer the death penalty because they had the wisdom and sensitivity to know when to kill a person for committing murder and when not to. But, since we have no Temple and no Jewish High Court, there is no capital punishment today. He concludes by pointing out that this holds true when murderers are not common and murders are rare occurrences. However, when people do not value human life and kill in a barbaric manner, perhaps capital punishment is necessary as a deterrent. In the same time period, Rabbi Aharon Soloveitchik, another noted authority in Jewish law in the United States, was asked the very same question by the Orthodox Union, and he sent a letter<sup>24</sup> in which he states that "[I]t is irresponsible and unfair to submit a statement in favor of capital punishment in the name of Orthodox Jewry. In my humble opinion, from a Halachik point of view, every Jew should be opposed to capital punishment. It is true . . . that the Torah recognizes capital punishment. However, the Torah delegates the authority to mete out capital punishment only to the Sanhedrin, not to anyone else. Even the Sanhedrin are [sic] not able to mete out capital punishment if there is no Beis Hamikdash (Temple)." Two noted Rabbis, with the same tradition, but they still differ on the use of the death penalty when murder is very common in society. The debate continues.

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<sup>22</sup> Responsa Rosh 17:8

<sup>23</sup> Responsa Igrot Moshe, Choshen Mishpat 2:68

<sup>24</sup> Tradition 38:1 2004. "Judaism and the Death Penalty: Of Two Minds but One Heart," Page 78, Letter from Rabbi Ahron Soloveitchik to David Luchins at the Orthodox Union, 1970's.

In the State of Israel today, the laws of capital punishment are clearly part of the country's statutes. Although Israel's court system generally does not operate according to strict Jewish law, and although hundreds or possibly thousands of Arab murderers of Jews have been tried and convicted over the years (with most still sitting in Israeli jails), the State of Israel has executed only one person in its entire existence of close to 70 years – the mass murderer of Jews during the Holocaust, Adolf Eichman. This policy seems to mirror the opinion of Rabbi Eliezer (cited above) about a Jewish court that kills once in 70 years.

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