

# The Right to Life in the Palestinian Society: The Case of the Death Penalty from Comparative Human Rights Perspectives

DISSERTATION

der Rechtswissenschaftlichen Fakultät  
der Universität Zürich

zur Erlangung der Würde eines Doktors der Rechtswissenschaft

vorgelegt von

Motaz Alnaouq

von

Palästina

genehmigt auf Antrag von  
Prof. Dr. Matthias Mahlmann  
und  
Prof. Dr. Andrea Bächler

Schulthess Juristische Medien AG, Zürich

# Table of Contents

The Right to Life in Palestinian Society: The Case of the Death Penalty from a Comparative Human Rights Perspective.....	I
Acknowledgments.....	VII
Table of Contents.....	IX
List of abbreviations.....	XIX
Bibliography.....	XXI
Arabic Books .....	XXXVII
Articles .....	XXXIX
Cases .....	XLIII
International cases.....	XLIII
National cases.....	XLVII
Palestinian cases.....	XLVIII
Constitutions, Legislations, laws & other legal instruments.....	XLIX
Other Sources.....	LVIII
List of figures .....	LVIII
Introduction .....	1
<b>Part I: Historical background .....</b>	<b>7</b>
<b>Chapter 1: Legal history of Palestine: From the Ottoman occupation to the formation of the Palestinian National Authority.....</b>	<b>9</b>
I. Ottoman occupation and the death penalty .....	10
1. The Ottoman legal reform ( <i>Tanzīmāt</i> ).....	12
II. British occupation, Mandate, and the death penalty.....	15
1. Crimes punished with death .....	21

1.1. Treason.....	21
1.2. Incitement to commit raids in Palestine .....	22
1.3. Murder.....	23
1.4. Other crimes .....	24
2. End of Mandate .....	25
III. Arab administration and the death penalty .....	26
IV. Israeli occupation and the death penalty .....	27
Conclusions .....	31

**Chapter 2: The death penalty under the Palestinian National Authority (PNA)..... 33**

I. The situation in Gaza after the Hamas government came to power .....	35
II. The situation in the West Bank after the June 2007 events in Gaza.....	40
III. The “new” reconciliation government .....	42
IV. The death penalty in Gaza: The post-Hamas period.....	43
V. Should the death penalty be abolished? The viewpoints of politicians and judges in Gaza .....	47
1. The viewpoint of Fatah, interviews with two members of the PLC .....	47
2. The viewpoint of the judiciary, three interviews .....	48
VI. The death penalty under the West Bank government.....	50
Conclusions .....	50

**Part II: Domestic legal framework ..... 51**

**Chapter 3: Comparative analysis of the domestic legal framework of the administration of the death penalty in Palestine and its neighboring countries ..... 53**

I. Legal mandate of the PNA .....	53
II. The legal structure of the PNA.....	54
III. The ambivalence of the relationship between the PNA and the PLO .....	55
IV. Comparative analysis of the death penalty under Palestinian laws .....	57
V. The Palestinian Basic Law (PBL) .....	58
1.1. Capital punishment under the PBL .....	59
1.2. Articles under the PBL pertaining to the rights of the accused .....	61
VI. The Palestinian Code of Criminal Procedures (PCCP) .....	66
1.3. Court rulings .....	67

Trial costs and expenses in the case of a death sentence .....	69
1.4. Appealing the death sentence .....	70
1.5. Retrial and the stay of the execution .....	72
1.6. Implementation of the death sentence .....	73
1.7. The ratification of the death sentence by the President .....	74
Persons who should be present at the execution.....	76
The right of the condemned to meet with his relatives before the execution ..	78
Fulfillment of the convict's religious wishes prior to the execution .....	79
Onsite procedural requirements and the convict's last statements before the execution .....	79
The execution of the pregnant .....	81
Methods of execution .....	82
Procedural conditions to be met ensuing the execution.....	83
The ban on implementing the death sentence on special days of the year .....	84
The place of the execution .....	85
The burial of the executed person and its associated expenses .....	86
Other procedural ordinary laws administering the death penalty in the OPT... 87	
VII. The Palestinian Law for Correction (Penitentiaries) and Rehabilitation Centers (LCRC) .....	87
VIII. Capital punishment under the criminal codes of Palestine .....	89
4.1. The penal code of Gaza (Palestinian Penal Code no. 74, 1936) (PPC).....	89
Working to compromise the independence of the country, its unity or territorial integrity .....	90
Joining enemy forces.....	92
Collaborating with a hostile, belligerent foreign state.....	93
Collaborating with a hostile foreign state in order to assist its military operations .....	94
Intervening for the benefit of an enemy state to weaken the spirit of resistance.....	94
Facilitating the enemy's entry into the country .....	95
Purposefully ravaging, spoiling or malfunctioning the country's means of defense .....	96
Provision, acquisition, exposure or destruction of national defense secrets....	97
Intentional breach of a supply agreement or works in time of war .....	100

Participating in a criminal conspiracy with the purpose of committing one of the crimes stipulated in the articles 77, 77 (a-e), 78 (a-e) and 80.....	101
The imposition of the death penalty if the crime was committed with intent and achieved its purpose .....	104
5. Jordanian Penal Code (JPC) of the West Bank (1960).....	104
5.1. Crimes committed against the external security of the state .....	105
5.2. Crimes committed against the internal security of the state .....	109
5.3. Murder.....	118
5.4. Felonies posing an extensive danger .....	120
5.5. Attacks on public roads, transportation, and industrial enterprises .....	123
5.6. “New” revised articles imposing the death penalty .....	126
5.7. Mitigating factors .....	130
6. Jordanian Explosives Law (JEL).....	133
7. PLO Revolutionary (military) Penal <i>Law</i> (RPL).....	134
7.1. List of offenses punishable by death under the RPL, in comparison with other laws in Palestine and adjacent countries.....	137
Bearing arms against the Palestinian revolution and joining hostile armed forces .....	137
Collaborating with the foreign enemy, state, or entity .....	138
Collaborating with a foreign enemy (continued).....	138
Conspiring with the enemy in order to assist its victory against the revolution .....	139
Impairing of revolutionary defenses.....	140
Intentionally sabotaging or impairing revolutionary means of defense.....	141
Surrendering a position to the enemy without exhausting all defensive means .....	142
Surrendering to the enemy in the battlefield .....	143
Compelling other commanders to abandon or surrender their positions .....	144
Laying down arms, ammunitions or war gear to the enemy in a dishonorable manner .....	145
Handing over information or offering a truce with a cowardly or traitorous intent.....	146
Providing the enemy with weapons, ammunitions or supplies, or the harboring of an enemy who is not a prisoner of war .....	146
Knowingly conducting any act jeopardizing the success of the military operations of the revolution or any of its allies.....	147

Voluntarily joining the enemy forces or performing any service for its benefit..... 148

Breaking the vow not to bear arms against the revolution ..... 148

Handing over documents or information that would impair the military operations or damage military sites or establishments of the revolution ..... 149

Sheltering or hiding spies or enemies..... 150

Handing out with traitorous intent passwords, keywords or response signals to unauthorized persons..... 150

Disclosing to the enemy the positions of the revolutionary or allied forces..... 151

Entering military establishments or positions in order to obtain documents or information for the benefit of the enemy. The crime of disguised entry into the previous places & the crime of stealing things, documents or information from these places. .... 152

Inciting individuals to join the enemy, or the recruitment of oneself or of others for the same purpose ..... 154

Recruiting soldiers for the benefit of a foreign enemy state without an authorization..... 155

Committing a felony that harms the reputation of the revolution..... 156

Attacking the life or freedom of the president or members of the supreme authority..... 159

Committing an act with the intention of provoking an armed rebellion or insurgency ..... 160

Carrying out an assault with the intention to prevent the existing revolutionary authority from executing its duties..... 162

Conspiring to commit felonies stipulated in the previous section ..... 163

Committing any terrorist act that results in the death of a human being or the demolition of an inhabited structure ..... 163

Forming a terrorist mob or taking over its leadership or command with the intention to take over lands, or plundering property or capital ... 165

Robbing or assaulting the people or their property or the commission of banditry ..... 166

Sedition and disobedience..... 167

Sedition or disobedience, which leads to an armed confrontation or life losses..... 168

Disobeying orders to attack the enemy ..... 168

Defecting or fleeing to the enemy ..... 170

The crimes of the embezzlement, stealing, illegitimate seizure or disposal of weapons, military hardware or missions owned by the revolution ..... 171

Public disaster crimes..... 172

Committing perjury that results in someone being sentenced to death ..... 172

Murder..... 173

Torching constructions, factories, workshops, warehouses or any other buildings or structures or means of transportation ..... 174

The application of the death penalty on the former offenses..... 176

I. Crimes detrimental to human health: Communicable diseases ..... 178

Spreading communicable human diseases ..... 178

Transgression against or forceful resistance of law enforcement officers..... 179

8. PLO Revolutionary Law of Criminal Procedures of 1979 (RLCP)..... 182

    8.1. All offenses administering capital punishment under the RLCP ..... 183

    The implementation of death sentences on the pregnant..... 190

    The ban on carrying out death sentences on special days of the year..... 191

    The method of carrying out the death sentence..... 192

    Persons who shall be present at the execution..... 192

    Onsite procedural requirements prior to and ensuing the execution..... 193

    Conditions to be met for the burial of the executed body..... 195

9. Military Justice Law (MJL)..... 195

    9.1. Articles under the MJL which administer the death penalty ..... 196

    The record of the implementation of the death sentence..... 199

    9.2. A special examination of the MJL ..... 199

10. Hamas new penal code..... 202

Conclusions ..... 205

**Part III: International and legal framework of the right to life ..... 211**

**Chapter 4: Scope and origins of the right to life..... 213**

I. The scope and legal origins of the right to life..... 213

II. Limitations on the right to life under international and regional instruments: The case of the death penalty..... 217

III. Religion, philosophy, and the right to life..... 220

    I. The right to life in the Judeo-Christian tradition ..... 221

2. The right to life in Islam.....225  
 3. The right to life in other religions .....228  
 4. Origins of the right to life in philosophy .....230  
 Conclusions .....235

**Chapter 5: International and constitutional case law of the right to life and capital punishment..... 237**

I. The death penalty under the European Convention on Human Rights (ECHR) and its protocols .....237  
 1. Case law of the European Court of Human Rights (ECtHR).....239  
 1.1 Cases brought to the court pertaining to the application of capital punishment as a violation of the ECHR .....240  
 1.2 Cases brought before the court pertaining to the application of capital punishment as a violation of the ECHR and Protocol No. 6 of the convention.....241  
 1.3 Cases brought before the court pertaining to the application of capital punishment as a violation of the ECHR, Protocol No. 6 or Protocol No. 13 of the convention .....243  
 II. The death penalty under the Inter-American Convention on Human rights (American Convention/Convention) .....244  
 1. Case law from the Inter-American Court of Human Rights (IACtHR/American Court/the Court).....246  
 III. The death penalty under the African Charter on Human and Peoples’ Rights (African Charter/the Charter).....247  
 1. Cases brought before the African Commission on Human Rights (ACHR).....250  
 IV. Juvenile offenders and the death penalty.....252  
 V. Offenders with mental illness or retardation and the death penalty .....257  
 VI. International criminal courts and the death penalty.....259  
 VII. The protection of the right to life in national constitutions .....260  
 VIII. Capital punishment as a form of torture .....272

**Chapter 6: The legal status of Palestine under international law and the death penalty..... 279**

I. Legality of the death penalty under international law .....279  
 II. International legal personality of Palestine .....281  
 III. What is international law?.....281  
 IV. Legal status of “Palestine” .....282



1. The status of Palestine under international law .....	284
2. The Montevideo Convention and international tribunals .....	285
2.1. Permanent population.....	286
Applicability to Palestine .....	287
2.2. Defined territory.....	288
Applicability to Palestine .....	289
2.3. Government.....	289
Applicability to Palestine .....	290
2.4. Capacity to enter into relations with the other states .....	291
Applicability to Palestine .....	292
3. Other criteria .....	292
3.1. Recognition .....	292
Applicability to Palestine .....	295
3.2 Self-determination.....	297
Applicability to Palestine .....	299
Conclusions .....	301

## **Part IV: Islam and the death penalty ..... 307**

### **Chapter 7: The death penalty in Islam: Can the death penalty be abolished in accordance with *Sharī'ah*? ..... 309**

I. <i>Hudūd</i> crimes .....	309
1. <i>Hirābah</i> .....	310
2. <i>Zinā</i> .....	311
3. <i>Baghī</i> .....	312
4. <i>Ridda</i> .....	314
II. <i>Qisās</i> crimes.....	315
III. <i>Ta'zīr</i> crimes .....	317
IV. Islamic <i>Sharī'ah</i> and the death penalty .....	319
1. The meaning and sources of <i>Sharī'ah</i> .....	319
2. Objectives of <i>Sharī'ah</i> .....	320
3. Can the death penalty be abolished in accordance with <i>Sharī'ah</i> ? .....	321
4. The suspension of the death penalty for <i>hudūd</i> crimes.....	323
4.1. The doctrine of <i>darura</i> and the suspension of <i>hudūd</i> .....	325

4.2. The application of hudūd in the case of shubha (doubt) and other practical examples of leniency in imposing hudūd punishments. ....	325
4.3 The suspension of the death penalty for qisās crimes.....	328
4.4 The suspension of the death penalty in ta'zīr crimes.....	331
Conclusions .....	331
<b>Chapter 8: Conclusion: Should the death penalty be abolished in Palestine?.....</b>	<b>335</b>
I. Concluding remarks .....	340
1. The legal framework within the Palestinian territories.....	340
2. The legal framework within international law .....	341
II. Can the death penalty be abolished in Palestine? .....	343
1. Arguments within Palestine .....	343
2. General arguments for and against the death penalty .....	344
<b>Appendix Annex I.....</b>	<b>347</b>