

Israel: Legal Aspects of Prisoner Exchanges

November 2014



The Law Library of Congress, Global Legal Research Center
(202) 707-6462 (phone) • (866) 550-0442 (fax) • law@loc.gov • <http://www.law.gov>

Israel: Legal Aspects of Prisoner Exchanges

Ruth Levush
Senior Foreign Law Specialist

SUMMARY Israel has engaged in prisoner-swap deals numerous times throughout its history. The release of members of organizations it considers to be terrorist organizations and of those convicted of terrorism-related offenses has been increasingly contested by the Israeli public.

In 2010 in response to public concerns, the Minister of Defense appointed a committee to review Israel's past practices of prisoner releases and determine principles for conducting negotiations for the release of captives. The committee's report was presented to the Israeli government in 2012. The report, however, remains classified, and the guidelines proposed by the committee have not been published.

Prisoner releases based on state or security considerations have also been the subject of judicial review. In response to claims made by members of victims' families and victims' organizations, the Supreme Court has established requirements for mandatory prior notice and disclosure of the names of prisoners whose release is being considered. The Court has also recognized the procedures that must be followed to enable members of victims' families to object to the release of the killers of their loved ones. The Court, however, refrained from reviewing the merits of governmental decisions to release prisoners or to determine that they were adopted without legal authority and refused to order the government to adopt any fixed rules that would determine principles for future negotiations.

On July 29, 2014, the Knesset (Israel's Parliament) passed the Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations), 5774-2014 (Amendment Law). The Amendment Law limits governmental discretion and authority to release prisoners on the basis of state or security considerations. It further authorizes the rearrest of any prisoner who has been released as long as the period of his/her original incarceration has not lapsed and the considerations for his/her release no longer exist. The Amendment Law similarly authorizes the rearrest of any prisoner who has violated the conditions of his/her release or has committed a new offense under conditions enumerated by the Law as long as the period of his/her original incarceration has not lapsed.

On November 3, 2014, the Knesset Plenum approved a bill introducing additional restrictions on the release of prisoners as part of prisoner exchange deals by the government and parole boards. The new legislation prohibits commuting a life sentence to less than forty years' imprisonment for prisoners convicted of committing an exceptionally heinous act of murder.

I. Introduction

There has been an ongoing public debate in Israel over the “cost” of releasing nationals held by groups considered by Israel to be terrorist organizations. The debate over prisoner exchanges in Israel reflects a moral as well as religious dilemma. The rescue of those in captivity, known in Hebrew as *pidyon shevuyim*, has traditionally been considered a basic obligation under Jewish law and has been followed in Jewish communities for generations. The obligation to rescue captives under Jewish law is not, however, without limits.¹

Israel has engaged in prisoner-swap deals with terrorist organizations numerous times during its history.² While the circumstances that have led to the capture of Israelis by terrorist organizations have varied, the cost involved in their release has steadily increased. The last release in 2011 involved the exchange of 1,027 Palestinian prisoners, including hundreds that had been convicted of murder-related offenses in Israeli courts, for the release of one Israeli soldier. The soldier, Gilad Shalit, had been abducted by the military wing of Hamas from inside Israel’s borders in June 2006 and held captive by Hamas for over five years.³

Public concerns over the lopsided prisoner exchanges have increased over the years. According to the Israeli media, in an effort to prevent Israeli soldiers from falling captive in the first place, the Israel Defense Forces (IDF) has instituted what is known as the “Hannibal Directive.” Accordingly, “[i]n case of capture, the main mission becomes rescuing our soldiers from the captors, even at the cost of hitting or wounding our soldiers.”⁴ Originally drafted in mid-1986, this highly controversial Directive does not appear to have resulted in serious “public backlash,” allegedly because it was generally tolerated as “a reasonable measure to take in order to prevent [a soldier’s] . . . falling into the hands of Hamas or Hezbollah,” organizations said to have denied Israeli soldiers regular Red Cross visits, proper medical attention, and notifications of families.⁵

The lack of “public backlash” over the Directive seems to coincide with the rising public objections to prisoner exchanges and to the release of members of terrorist organizations as gestures of good will in the course of negotiations with the Palestinian Authority. Since August 2013 Israel has released seventy-eight Palestinians “in three batches as part of a framework deal that led to eight months of negotiations with the Palestinian Liberation Organization (PLO).

¹ See Baruch S. Davidson, *Is Prisoner Exchange A Jewish Value? Judaism’s Take on Redeeming Prisoners*, CHABAD.ORG, http://www.chabad.org/library/article_cdo/aid/1668252/jewish/Is-Prisoner-Exchange-A-Jewish-Value.htm (last visited June 12, 2014).

² A partial list covering prisoners exchanges, from the hijacking of the 1968 El-Al and the 1969 TWA flights up to the kidnapping of two Israeli soldiers near the Lebanese border in 2006, is available in Ariel Gilboa, *The Influence of “The Cost” in Negotiations for Release of Kidnapped [Persons] from Terrorist Organizations* (Final Thesis for the Degree of Masters in Public Policy, The Hebrew University, Jan. 2010), http://public-policy.huji.ac.il/upload/Thesis_HE/Ariel_Gilboa_thesis.pdf (in Hebrew).

³ See Ruth Levush, *Prisoner Swap Deals Under Israeli Law*, IN CUSTODIA LEGIS (Nov. 16, 2011), <http://blogs.loc.gov/law/2011/11/prisoners-swap-deals-under-israeli-lawwhats-the-worth-of-one-life-prisoner-swap-deals-under-israeli-law/>.

⁴ Anshel Pfeffer, *The Hannibal Directive: Why Israel Risks the Life of the Soldier Being Rescued*, HAARETZ (Aug. 3, 2014), <http://www.haaretz.com/news/diplomacy-defense/.premium-1.608693>.

⁵ *Id.*.

Israel refused to release a final batch of 26 terrorists when it appeared the talks would not be extended past their nine-month deadline.”⁶

The appropriateness of releasing terrorists in exchange for Israelis held by terrorist organizations has been the focus of a review by a special committee appointed by the Minister of Defense. In addition, various aspects of prisoner releases have been reviewed by Israel’s Supreme Court in response to petitions filed by members of families of terrorism victims and by victims’ organizations.

Discontent with the mounting cost of prisoner exchanges has led to the introduction of a number of bills in the Knesset. These bills have called for limiting the power of the President of the State to grant clemency and commute sentences of terrorists convicted of murder, as well as for generally restricting governmental discretion on the release of terrorists.⁷

The bill that was finally approved on July 29, 2014, refrained from directly limiting Presidential powers of pardon. Instead, it introduced restrictions on the power of the government and its members to initiate or act in pursuit of the release of prisoners based on “state or security reasons.”⁸ The approved bill further authorizes the rearrest of prisoners whose release had been previously approved under conditions enumerated by the Law.⁹

An additional legislative restriction on the early release of prisoners was approved on November 3, 2014. This bill prohibits commuting a life sentence to less than forty years’ imprisonment for prisoners convicted of committing an exceptionally heinous act of murder. The legislation includes additional restrictions on the release of such prisoners by the government based on state security or foreign affairs considerations.¹⁰

This report analyzes the legal aspects of both the release and rearrest of terrorism detainees and of those convicted by Israeli courts of terrorism-related offenses.

⁶ Herb Keinon & Lahav Harkov, *Cabinet Okays Bill Curbing Presidential Powers to Free Terrorists*, JERUSALEM POST (June 8, 2014), <http://www.jpost.com/Diplomacy-and-Politics/Israel-okays-bill-that-would-limit-pardons-of-Palestinian-terrorists-355657>.

⁷ See e.g., Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19, available on the KNESSET website, at <http://www.knesset.gov.il/privatelaw/data/19/2113.rtf>.

⁸ Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations), 5774-2014, Knesset Bill, Issue No. 567 (July 22, 2014), <http://www.knesset.gov.il/Laws/Data/BillKnesset/567/567.pdf> (in Hebrew); for the approved legislation see the Government Law (Amendment No. 9), 5774-2014, SEFER HAHUKIM [Book of Laws] [SH] (official gazette) 5774 No. 2467 p. 730, http://www.knesset.gov.il/laws/data/law/2467/2467_1.pdf (in Hebrew).

⁹ *Id.* For information on the new legislation, see Part III of this report.

¹⁰ Press Release, Knesset, Final Approval: People Who Commit Exceptionally Severe Acts of Murder Will Not Be Freed Until They Serve At Least 40 Years of Their Sentence (Nov. 4, 2014), http://www.knesset.gov.il/spokesman/eng/PR_eng.asp?PRID=11474; the full text of the new law had not been released at the time this report was completed).

II. Shamgar Committee on Determination of Principles for Conducting Negotiations for Release of Captives

In response to increasing concerns voiced by the Israeli public, in 2010 then-Israeli Minister of Defense Ehud Barak appointed Retired Supreme Court Justice Meir Shamgar to head the Committee on Determination of Principles for Conducting Negotiations for the Release of Captives. The Shamgar Committee reviewed Israel's past prisoner exchanges and was tasked with proposing new principles for conducting negotiations for the release of Israeli captives in the future.

The Shamgar Committee determined that its recommendations would not apply to the release of Gilad Shalit, who was in captivity at the time of its appointment. The Committee did, however, interview senior military officials after Shalit's release and considered the lessons learned from the negotiations for his release before adopting its recommendations. According to Shamgar, the Committee deliberated not only on "how to conclude negotiations, but also on whether to conduct negotiations, and on what are the permitted boundaries and the [relevant] determining authorities."¹¹

The Shamgar Committee presented its report to the government in January 2012.¹² The first time the military cabinet reportedly conducted a hearing to discuss the Shamgar Committee's recommendations, however, was two and a half years later, on June 5, 2014. The recommendations were discussed in connection with the introduction of various bills regarding prisoner releases.¹³ Having been classified as "highly secret," the Shamgar Committee's report has not been disclosed to the Israeli public.

In a press conference held on January 5, 2012, subsequent to the issuing of the report, Committee Chairman Shamgar disclosed that the Committee had recommended the transfer of responsibility from the Prime Minister's Office to the Ministry of Defense for both negotiating on prisoner releases and maintaining contact with captives' families. The Committee had further recommended that prisoner-swap deals in the future would be brought to the government for approval only after reaching an understanding with the "kidnapping" side.¹⁴

¹¹ Gili Cohen, *The Shamgar Committee: There Is a Need to Toughen Positions in Future Negotiations on Release of Captives*, HAARETZ (Jan. 6, 2012), <http://www.haaretz.co.il/news/politics/1.1610579> (this and all other translations from Hebrew in this report are by the author, R.L.).

¹² *Id.*

¹³ See e.g., Barak Ravid, *The Cabinet Will Discuss the Recommendations of the Shamgar Committee on Captives' Deals*, HAARETZ (June 5, 2014), <http://www.haaretz.co.il/news/politics/.premium-1.2340159> (in Hebrew); for information regarding the proposed legislation, see Part III of this report.

¹⁴ Amir Buchbut, *Shamgar: "To Expropriate the Issue of Captives from the Prime Minister,"* WALLA NEWS (Jan. 5, 2012), <http://news.walla.co.il/?w=/9/1891423> (in Hebrew).

Reacting to the Shamgar Committee's recommendations, Minister Barak commented at the time that it was important

to stop the slippery slope on which we have gradually found ourselves since the first Gibril deal, through the second Gibril deal and Tenenbaum and up to Gilad himself. . . . [I]n the area where we live, a state that cherishes life will not be able to act efficiently and ensure in the long run the general interests of all [its] citizens if we do not change the rules, the reality, or the results as they were in the swap deals in the last 25 years.¹⁵

III. Judicial Review of Prisoner Releases

Family members of terrorism victims and victims' organizations have contested in court the release of terrorists, especially those involved in the killing of their loved ones. In response to petitions on their behalf, the Supreme Court has introduced some procedural requirements but has repeatedly refrained from intervening in decisions to release prisoners either as part of prisoner-swap deals or as an expression of good will in negotiations because such decisions involved political affairs. The Court has similarly refused to force the government to adopt clear guidelines for such releases or for the rearrest of released prisoners under predetermined grounds. Such guidelines appear to have been provided under the Amendment Law, which also introduces procedures for the rearrest of prisoners under qualified circumstances.

The following is a summary of the most recent decisions rendered by the Supreme Court on petitions filed by terrorism victims' families and organizations prior to the passage of new legislation on the early release of prisoners.

A. HCJ 8646/13 Schijveschuurder v. State of Israel

The latest decision by the Supreme Court on this issue was rendered on December 26, 2013.¹⁶ The petitioners lost five members of their family in the terrorist bombing on August 9, 2001, at the Sbarro restaurant in Jerusalem.¹⁷

Among other things, the petitioners requested the Court to determine that granting clemency to convicted prisoners, including two of the perpetrators of the bombing whose release they objected to, could only be made in accordance with Basic Law: The President of the State¹⁸ and with Victims of Crime Rights Law 5761-2001.¹⁹ They also argued that any release of convicted

¹⁵ Cohen, *supra* note 11.

¹⁶ HCJ 8646/13 Schijveschuurder v. State of Israel [Dec. 26, 2013], <http://elyon1.court.gov.il/files/13/460/086/c03/13086460.c03.pdf> (this and all other cited court decisions are in Hebrew).

¹⁷ For information, see Suzanne Goldenberg, *The Street Was Covered with Blood and Bodies: the Dead and the Dying*, GUARDIAN (Aug. 9, 2001), <http://www.theguardian.com/world/2001/aug/10/israel1>; see also Omri Efraim, *Decade Later, Sbarro Attack Still Haunts Victims*, YNETNEWS (Oct. 8, 2011), <http://www.ynetnews.com/articles/0,7340,L-4106884,00.html>.

¹⁸ Basic Law: The President of the State § 11(B), SH No. 428, p. 118 (5724-1964), English translation available at http://knesset.gov.il/laws/special/eng/basic12_eng.htm.

¹⁹ Victims of Crime Rights Law 5761-2001, SH No. 1782, p. 183, as amended (in Hebrew).

terrorists must be made in accordance with clear criteria that have been properly adopted. The petitioners further requested the disclosure of the Shamgar Committee's report on Determination of Principles for Conducting Negotiations for the Release of Captives.²⁰

Expressing sympathy with the petitioners' pain, Justice Miriam Naor nevertheless rejected the petition. She held that the issues raised by the petitioners in this petition had already been addressed in two earlier decisions, H CJ 5413/13 Almagor v. State of Israel,²¹ and H CJ 5606/13 Schijveschuurder v. State of Israel.²²

B. H CJ 5413/13 Almagor v. State of Israel

On August 11, 2013, the Israeli High Court of Justice rejected a petition by Almagor, the Association of Victims of Terrorism, and by members of victims' families to void a governmental decision to release Palestinian prisoners convicted of terrorism offenses as a goodwill gesture during the course of renewed peace negotiations between Israel and the Palestinians.²³

The subject of the petition is Government Decision No. 640, which was adopted by the Israeli government on July 28, 2013.²⁴ This Decision authorized the government to convene a ministerial team that would determine the conditions, timing, and criteria for selecting prisoners to be released during peace negotiations, but required the names of those selected to be publically published.²⁵

The Court rejected the petitioners' claims regarding the ministerial committee's alleged lack of jurisdiction and noncompliance with notice requirements. Court President Asher Grunis, with Justices Elyakim Rubinstein and Zvi Zilbertal concurring, held that the government was authorized to adopt a decision on entering into political negotiations and on the release of prisoners, and that there was no need for an explicit authorization to this effect in primary legislation.

This conclusion, according to Grunis, was based on two earlier decisions by the High Court.²⁶ Grunis held that, unlike a declaration of war, for which a decision of the full government is

²⁰ H CJ 8646/13 Schijveschuurder v. State of Israel.

²¹ H CJ 5413/13 Almagor v. Government of Israel, <http://elyon1.court.gov.il/files/13/130/054/s04/13054130.s04.pdf>.

²² H CJ 5606/13 Schijveschuurder v. State of Israel, <http://elyon1.court.gov.il/files/13/060/056/101/13056060.101.pdf>.

²³ H CJ 5413/13 Almagor v. Government of Israel.

²⁴ Approval of Opening of Political Negotiations Between Israel and the Palestinians in Accordance with the Prime Minister's Announcement Regarding the Negotiations and Authorization of the Ministerial Team for the Release of Palestinian Prisoners in the Course of the Negotiations, Government Decision No. 640 of July 28, 2013, <http://www.pmo.gov.il/Secretary/GovDecisions/2013/Pages/des640.aspx> (in Hebrew).

²⁵ *Id.*

²⁶ H CJ 5413/13 Almagor v. Government of Israel ¶ 6 (referring to H CJ 1539/05 & 5272/05 Institute for Research of Terrorism and Assistance for its Victims v. the Prime Minister, <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx> and <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>, respectively (both in Hebrew)).

mandated by Basic Law: The Government,²⁷ a decision to release prisoners or enter into political negotiations does not require a full quorum under any law.²⁸

Grunis also rejected the petitioners' claim that their rights under the Victims of Crime Rights Law 5761-2001²⁹ had been violated because they had not been afforded the opportunity to express their objections in writing. He reiterated the previously established principle that rights under this Law are not fully applicable to cases where clemency is not obtained through "a regular" criminal process but rather through a political agreement.³⁰

Considering the tight time frame applicable under the circumstances and the state's willingness to follow the established practice of allowing victims to express objections within forty-eight hours prior to the release of prisoners, Grunis refused to require that the state permit victims to object in writing under the procedures established by the Law. He also concluded that there was no need to extend the period available for objections beyond the forty-eight hour period offered by the state.³¹

Further rejecting the petitioners' claims, Justice Grunis determined that decisions regarding the release of prisoners, especially those adopted in the course of political negotiations, are within the authority and discretion of the government based on its responsibility to further the state's foreign relations and ensure public security.³²

Considering the circumstances that prompted Government Decision No. 640, the Court rejected the claim that the decision to release the prisoners by the method determined in Government Decision No. 640 was affected by an extreme lack of reasonableness. The Court also rejected the claim that Government Decision No. 640 in this regard suffered from any other defect that required judicial intervention.³³

C. HCJ 5606/13 Schijveschuurder v. State of Israel

On August 13, 2013, two days after rendering the decision in HCJ 5413/13 Almagor v. State of Israel, the Supreme Court rejected a petition by members of the Schijveschuurder family,³⁴ the same petitioners in the previously discussed decision in HCJ 8646/13 Schijveschuurder v. State of Israel. The Court reiterated its previous decisions that it would refrain from intervening in

²⁷ Basic Law: The Government (2001) § 40(a), http://knesset.gov.il/laws/special/eng/basic14_eng.htm.

²⁸ HCJ 5413/13 Almagor v. Government of Israel ¶ 6.

²⁹ Victims of Crime Rights Law 5761-2001, SH No. 1782, p. 183, as amended.

³⁰ HCJ 5413/13 Almagor v. Government of Israel ¶ 7 (referring to HCJ 7523/11 Almagor – Organization of Victims of Terrorism v. the Prime Minister, <http://elyon1.court.gov.il/files/11/230/075/n05/11075230.n05.pdf> (in Hebrew)); for information on the *Almagor* decision, see Levush, *supra* note 3.

³¹ Victims of Crime Rights Law 5761-2001, SH No. 1782 p. 183, as amended.

³² *Id.* ¶ 10.

³³ *Id.*

³⁴ HCJ 5606/13 Schijveschuurder v. State of Israel, <http://elyon1.court.gov.il/files/13/060/056/101/13056060.101.pdf>.

decisions to release prisoners either as part of prisoner-swap deals or as an expression of good will in negotiations because such decisions involved political affairs.³⁵

The Court further rejected the petitioners' claims that the planned prisoners' release to which they objected violated the clemency authorities of the President. According to the Court, the procedures that applied to the prisoners' release in this case complied with the requirements established in the earlier case of HCJ 9446/09 Karman v. Prime Minister of Israel.³⁶ According to these requirements the petitioners as well as other bereaved families have a right to obtain information on prisoners that might be released and to direct their objections to their release to the clemency department of the Ministry of Justice. Their objections must also be forwarded to the President of the State.³⁷

The Court rejected the petitioners' request to require the adoption of fixed criteria for prisoner releases. Justice Tzvi Zilberstein stated for the Court that "there is a difficulty in tying the discretion of the determining agency to harsh criteria when it is impossible to foresee in which future cases, and under which conditions it will have to adopt decisions on these difficult issues."³⁸

IV. New Legislation Regulating Governmental Authority to Release Prisoners Based on State or Security Considerations

As noted in Part I, above, several bills have been introduced by Knesset members in recent years to limit presidential and executive powers to engage in the release of prisoners in exchange for Israeli nationals or as a gesture of good will in negotiations.³⁹ On June 11, 2014, for example, the Knesset preliminarily approved Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill.⁴⁰

The effort to directly limit prisoner releases by removal of the President's clemency power "to pardon offenders and to lighten penalties by the reduction or commutation thereof" under Basic Law: President of the State,⁴¹ however, has not gained sufficient support at the Knesset Plenum. Instead, the Knesset passed two separate amendments that directly restrict governmental rather than presidential powers of clemency.

³⁵ *Id.* ¶ 5.

³⁶ HCJ 9446/09 Karman v. Prime Minister of Israel, <http://elyon1.court.gov.il/files/09/460/094/n03/09094460.n03.pdf>.

³⁷ HCJ 5606/13 Schijveschuurder v. State of Israel ¶ 7.

³⁸ *Id.* ¶ 8.

³⁹ *See, e.g.*, Release of Hostages and the Kidnapped, Private Member Bill No. 2437/19, <https://www.knesset.gov.il/privatelaw/data/19/2437.rtf>.

⁴⁰ Basic Law: President of the State (Amendment – Prohibition on Release of Murderers) Bill No. 2113/19, <http://www.knesset.gov.il/privatelaw/data/19/2113.rtf> (in Hebrew).

⁴¹ Basic Law: President of the State (1964), §§ 11(b)–12, http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm (in English).

A. Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations), 5774-2014

On July 29, 2014, the Knesset passed the Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations), 5774-2014 (Government Amendment Law).⁴² According to explanatory notes of the Government Amendment Law Bill,⁴³ the objective of clemency is to examine the individual rehabilitation of a prisoner and his/her personal circumstances. These circumstances, according to the bill's proponents, must be balanced against the interest of the public and that of the victims in the offender's continued incarceration. According to the explanatory notes,

[c]lemency to a group of prisoners or even to a single prisoner for considerations that are unrelated to punishment and rehabilitation violates the principle of punishment. This applies also to application of authorities by the President of the State or the military commander in the area under circumstances where the determination is in fact made by the government. In addition, application of the clemency power under such circumstances does not enable the rearrest of prisoners who have been released as long as they have not violated their individual release conditions, even if the political or security circumstances have fundamentally changed.⁴⁴

Accordingly, the Government Amendment Law introduces restrictions on the power of the government and its members to authorize, initiate, or pursue prisoner releases for "state or security reasons."⁴⁵ In addition the Government Amendment Law authorizes the rearrest of prisoners in accordance with conditions enumerated by the Law.⁴⁶

The authority of the government to release a prisoner for reasons of managing the State's foreign affairs and its security depends, under the Amendment Law, on whether the release is conducted

- (1) in exchange for the release of hostages or kidnapped persons who are Israeli citizens or residents, including the return of their bodies, or receipt of information regarding hostages, kidnapped persons, or missing persons who are either Israeli citizens or residents;
- (2) as a state gesture; or
- (3) as a state agreement, including an interim agreement or a memorandum of understanding.⁴⁷

⁴² Government Law (Amendment No. 9) (Release of Prisoners for State or Security Considerations), 5774-2014, SH 5774 No. 2467 p. 730, available at http://www.knesset.gov.il/laws/data/law/2467/2467_1.pdf, amending the Government Law, 5761-2001, SH 5761 No. 1780, p. 168, as amended (both in Hebrew).

⁴³ Government Law (Amendment No. 9) (Release of Prisoners for State or Security Reasons) 5774-2014, Knesset Bill No. 2568/19, KNESSET BILLS No. 567 p. 146-47, <http://www.knesset.gov.il/laws/heb/OneResDoc.asp?Type=3&LawNum=567&SubNum=1> (in Hebrew).

⁴⁴ *Id.* p. 146.

⁴⁵ Government Amendment Law, adding § 8(B) to the Law.

⁴⁶ *Id.*, adding § 8(B)(c) to the Law.

⁴⁷ Government Amendment Law, adding § 8(B)(a)(1-3) to the Law.

While the Government Amendment Law allows the government to make such decisions, it prohibits the government, its members, or those “subject to its authority or instructions” (referring to government coalition members) from directly initiating efforts or acting in any way to obtain the release of a prisoner held in Israel for any purpose, including those purposes enumerated above, and by any means, including by clemency or reduction of sentence.⁴⁸

The prohibition on initiating efforts or acting to bring about such a release, however, does not apply to activities that are needed for the President to grant clemency or reduce a sentence under the Basic Law: President of the State. It similarly does not apply to implementing the Basic Law’s requirement for a counter-signature of the “Prime Minister or of such other Minister as the Government may decide” that is required to be added to that of the President “on an official document, other than a document connected with the formation of a government.”⁴⁹

The Government Amendment Law establishes a committee (the Committee) for examining the merits of voiding the early release of prisoners. The Committee is composed of a chairperson who is appointed by the Prime Minister and is a retired judge; a representative of the Minister of Justice; and an employee of either the Defense Ministry or the Ministry of Public Security appointed by the appropriate Minister.⁵⁰

The Government Amendment Law determines that as long as the period of a prisoner’s original incarceration has not lapsed, a prisoner’s release may be voided on the basis of

- (1) a government decision that there is no longer any state or security interest in continuing the prisoner’s release;
- (2) a Committee determination that the prisoner has committed an offense punishable by at least three months’ imprisonment during the period he or she would have served if not released earlier; or
- (3) a Committee determination that the prisoner violated one of the conditions for release that were established by the government.⁵¹

The Government Amendment Law provides that a decision by the Committee to detain a prisoner until it reaches a decision or a decision to void the prisoner’s release based on the above grounds constitutes a warrant for the prisoner’s arrest.⁵²

According to the Government Amendment Law, upon finding that the released prisoner has either committed an offense that triggers voidance of the early release or has violated the conditions for his/her release, the Committee may order resumption of the sentence under the

⁴⁸ *Id.*, adding § 8(B)(b) to the Law.

⁴⁹ *Id.*; *see also* Basic Law: President of the State (1964), §§ 11(b)–12, http://www.knesset.gov.il/laws/special/eng/basic12_eng.htm.

⁵⁰ Government Amendment Law, adding § 8(B)(c) to the Law.

⁵¹ *Id.*, adding § 8(B)(d) to the Law.

⁵² *Id.*, adding §§ 8(B)(e) & (g)(2) to the Law.

original or under additional conditions. Among other steps, the Committee may also extend the sentence that had been imposed on the released prisoner prior to the release.⁵³

A released prisoner is entitled to be present at any hearing held by the Committee unless the hearing involves the disclosure of information that the Committee has determined would possibly harm state or public security and the “nondisclosure [of which] is found to be preferable to that of its disclosure for the purpose of doing justice.”⁵⁴ The Government Amendment Law establishes appeal procedures against the Committee’s decision on nondisclosure.⁵⁵

A Committee decision regarding rearrest may be appealed to the district court by either the prisoner or the Attorney General. Such an appeal must be heard before a panel of three judges. The district court decision in this matter may be appealed to the Supreme Court when the decision authorizes such an appeal or the appeal is approved by a Supreme Court justice.⁵⁶

B. Parole (Amendment No. 14) Law, 5775-2014

On November 4, 2014, the Knesset Plenum approved the second and third reading of the Parole Bill (Amendment No. 14), 5775-2014 (Parole Bill).⁵⁷ Like the Government Amendment Law, the Parole Bill does not directly “take away from the authority of the President [the ability] to pardon prisoners.”⁵⁸

The Parole Bill prohibits the Parole Committee⁵⁹ from reviewing requests for early release by prisoners who have received a life sentence for acts of murder the courts have determined to be exceptionally heinous, unless

- at least fifteen years have passed from the day of the sentencing, and
- the sentence cannot be commuted to less than forty years.

In addition to prohibiting the review of parole requests from prisoners under the above-described conditions, the Parole Bill further establishes that the government will not have the authority to free prisoners on the basis of its general authority to manage foreign relations or the security of the state.⁶⁰

The Parole Bill has reportedly proposed the creation of “a transitional provision according to which the law will apply to someone who had not been sentenced yet, as long as the court has

⁵³ *Id.*, adding § 8(B)(h) to the Law.

⁵⁴ *Id.*, adding § 8(B)(k) to the Law.

⁵⁵ *Id.*, adding §§ 8(B)(k–p) to the Law.

⁵⁶ *Id.*, adding § 8(B)(r) to the Law.

⁵⁷ Press Release, Knesset, *supra* note 10.

⁵⁸ *Id.*

⁵⁹ The Parole Committee was established under the Parole Law, 5761-2001, SH 5761 No. 1795 p. 410, as amended.

⁶⁰ Press Release, Knesset, *supra* note 10.

allowed for the sides to present their arguments on whether the accused committed an exceptionally severe murder.”⁶¹

Opponents of the Parole Bill argued that the legislation would, in their view, have a negative impact on “any future diplomatic process”⁶² and on the morale of soldiers who would “know [that] if they are taken captive it will now be much harder to free them.”⁶³ In response, Member of Knesset (MK) Ayelet Shaked of the Habayit HaYehudi political party reportedly stated as follows:

It pains me that the members of the opposition do not recognize the principle of the separation of powers and that the judicial branch needs to have the ability to judge. This law is able to prevent terrible murderers, like the ones of the Fogel family, from being freed in the future. I very much hope that there will not be a need for this law, but history teaches us that there will be.⁶⁴

Following the approval of the Parole Bill, Minister Naftali Bennett of the same party added that the Bill’s passage “sends a message to a society that praises murderers and names after them [public] squares, that the policy of “you have murdered and also been released” that was in place until now has ended, and whoever harms the citizens of the State of Israel will spend the rest of his life behind bars.”⁶⁵

V. Conclusion

The release of convicted violent terrorists or members of terrorist organizations in prisoner exchanges or as good-will gestures has been the subject of fierce public debate in Israel.

Objections to prisoner releases have mounted in view of the constant rise in the cost associated with such transactions. Public disagreement was particularly vocal over the number of Palestinians released by Israel—1,027—in exchange for Gilad Shalit.

Arguments against the cost associated with prisoner exchanges have focused on their utility—namely, the increased motivation of terrorist organizations to kidnap Israeli soldiers to free their members—thereby affecting Israeli counterterrorism deterrence efforts. Strong objections were similarly expressed to “lessening the severity of terrorists’ actions and the authority of the legal

⁶¹ *Id.*

⁶² See statement by MK Esawi Frij (of the Meretz party), *id.*

⁶³ See statement by MK Nitzan Horowitz (of the Meretz party), *id.*

⁶⁴ Statement by Ayelet Shaked (of the Habayit HaYehudi party), *id.*; see also Yair Altman, *Itamar Massacre: Fogel Family Butchered While Sleeping*, YNETNEWS (Mar. 13, 2011), <http://www.ynetnews.com/articles/0,7340,L-4041237,00.html>.

⁶⁵ See Moran Azulai, *Knesset Approves Second and Third Reading of Initiative That Will Restrict the Possibility for Early Release of a Prisoner who Committed a Murder Under Extremely Severe Circumstances Even If the Government Wishes to Do So*, YNETNEWS (Nov. 3, 2014), <http://www.ynet.co.il/articles/0,7340,L-4587626,00.html> (in Hebrew).

system in Israel,”⁶⁶ as a result of commuting the sentences of murderers, specifically those who committed offenses that are extraordinary in their severity, such as the murder of children. In addition, many Israelis, particularly families of terrorism victims, have rallied against the release of these killers. They have demanded the adoption of transparent criteria and procedures for terrorists’ release.

In response to the mounting concerns associated with prisoner-swap deals, the Shamgar Committee was appointed to study Israel’s experience in this area and to propose new principles for conducting negotiations for the release of Israeli captives in the future. The Committee’s report was issued in 2012 but has not been publically disclosed and remains classified. According to media reports, however, there is no doubt that among its recommendations was the introduction of a more conservative approach to Israel’s future engagement in prisoner-swap deals and a limitation on the price that can be paid to obtain the freedom of captives.

The implementation of presidential authority to grant clemency and commute sentences, and of governmental compliance with procedural requirements involving prisoner releases, has been repeatedly reviewed by the Supreme Court. The Court has established specific requirements with regard to providing notice to victims’ families, disclosing the names of prisoners considered for release, and providing opportunities to object to the release. The Court refused, however, to order the government to adopt criteria that would limit governmental discretion in the future. It has similarly refused to order public disclosure of the Shamgar Committee report and its recommendations.

In the absence of a judicial restriction on prisoner releases, opponents of prisoner releases have sought legislative restrictions on the authority of the President of the State and of the government to engage in prisoner’s releases based on state or security considerations. On July 29, 2014, the Knesset adopted new legislation that significantly narrows the government discretion and authority to engage in future prisoner-swap deals. The legislation is expected to limit the number of security prisoners released “in return for one Israeli captive, in order to prevent [future] mega deals for prisoner exchanges.”⁶⁷

The most innovative reform introduced by the new legislation, however, seems to be the introduction of a procedure for the rearrest of former prisoners if the security or political considerations for their release no longer exists, or if the former prisoners have violated the conditions for their release or committed additional offenses. The ability to rearrest former prisoners may address public concerns over the release of persons known to have reengaged in terrorist activities following their release.⁶⁸

⁶⁶ See, e.g., Press Release, Knesset, Approved in Preliminary [Plenum Vote]: Clemency for Murderers Will Not Be Possible (June 11, 2014), <http://main.knesset.gov.il/News/PressReleases/Pages/press110614-aq.aspx> (in Hebrew).

⁶⁷ Cohen, *supra* note 11.

⁶⁸ According to *Haaretz* newspaper, within the first two years following the Shalit deal, the Israeli secret service “has identified and preempted about 80 plans for attacks in the West Bank, plans that originated with individuals released as part of the Shalit deal. The plans have been ambitious: attacks with explosives, kidnappings, shootings...”; see Amos Harel, *Hamas Is Alive and Kicking in the West Bank – but in Remote Control* (Dec. 21, 2013), <http://www.haaretz.com/weekend/week-s-end/.premium-1.564568>.

The introduction of additional legislation to substantially limit the authority of the government and of parole boards to release those convicted of committing heinous murders appears to address similar concerns that the release of such convicted felons may encourage the perpetration of similar acts, partly because of the likelihood of these felons being released in the not so distant future.