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## ARRESTED CHILDHOOD

### The Ramifications of Israel's New Strict Policy toward Minors Suspected of Involvement in Stone Throwing, Security Offenses, and Disturbances

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Arrested Childhood

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## Introduction

The Youth Law (Adjudication, Punishment, and Means of Treatment), 5731-1971 (hereinafter: **the Youth Law**) is the law that regulates the handling of minors involved in criminal acts. In 2008, Amendment No. 14 to the Youth Law was enacted with the intention of adjusting its provisions to the international Convention on the Rights of the Child (1989) and Israel's Basic Law: Human Dignity and Liberty.

The Youth Law reflects a progressive approach to the rights of minors in the criminal process, seeking "to enshrine the minor's rights as a suspect and defendant in criminal offenses, taking into account his developing capacities, and under the overall principle of the good of the minor, as well as the aspiration that underlies the Law to rehabilitate a young offender through the means of treatment and punishment detailed therein".<sup>1</sup> These norms delineate the required manner of treatment by the police, the State Prosecutor's Office, and the judicial authority.

As part of Amendment No. 14 to the Youth Law, a general principle was added to section 1a of the Law establishing that:

The realization of a minor's rights, the exercising of powers and the instigation of proceedings against him will be undertaken while guarding the minor's dignity and granting due weight to considerations of his rehabilitation, treatment, integration into society, and compassionate justice, and with attention to his age and extent of maturity.

This basic principle has lost its relevance in recent years concerning minors suspected or accused of involvement in stone throwing, security offenses, or various offenses related to disturbances. As will be detailed below, a series of legislative changes and guidelines show that the central – and perhaps even the sole – consideration the authorities take into account is the deterrence of minors, and not their rehabilitation and return to normative conduct. This alarming trend is contrary to the principles of the Convention on the Rights of the Child and erodes the provisions and principles of the Youth Law. Moreover, and as we will discuss below, it is doubtful whether this strict policy will achieve its underlying deterrent purpose.

We should emphasize at the outset that we certainly do not belittle the significance and implications of the phenomenon of stone throwing, nor more serious phenomena of nationalistic violence that have become particularly common among young people. In order to eradicate these phenomena, to process suspects and defendants, and to facilitate the rehabilitation of convicted youths, we believe that it is important to use the diverse

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<sup>1</sup> Proposed Law: Youth Law (Adjudication, Punishments, and Methods of Treatment) (Amendment No. 14), 5766-2006, Government Proposed Law 244, June 12, 2006, p. 468).

tools that are already delineated and facilitated by the Youth Law. This is particularly true with regard to minors with no prior criminal involvement, as well as minors close to the age of criminal liability – 12 years.

This document will review the policy and legislative changes that have been introduced since 2014. We will provide a timeline detailing these changes (a **Detailed Review** is offered at the end of this document). We will then discuss the problems raised by these policies, as well as our recommendations. The policy changes described in the report include diverse changes to acts of legislation and guidelines, some of which relate to specific offenses and/or populations, while others have a general character. This document also devotes particular attention to minors from East Jerusalem, who are more susceptible to the policy changes due to the rising number of children from the area involved in disturbances and security offenses.

## Timeline: Changes to Legislation and Guidelines

- July 21, 2008      Enactment of the Youth Law (Adjudication, Punishment, and Means of Treatment), [Amendment 14](#), 5768-2008. The amendment introduced significant changes to the Law consistent with the spirit of the Convention on the Rights of the Child, the best interest of the minor, the possible harm caused by legal proceedings to the minor's body and maturation, providing alternatives for rehabilitation, and an emphasis on a return to normative functioning. These changes were based on the recommendations of the Committee for the Evaluation of the Basic Rights of Children and the Law, and Their Implementation by Legislation, headed by Judge Savyona Rotlevi, and in particular the recommendations in the report of the Subcommittee on Children in the Criminal Proceeding, also headed by Judge Rotlevi.<sup>2</sup>
- December 24, 2009      Publication of the first version of the [Enforcement Policy in the Offense of Stone Throwing](#), *State Prosecutor's Office Guidelines* 2.19, 5770. The guidelines defined the relevant typical instance – a 16-year-old minor who threw stones without causing damage, and who has no previous criminal background. The starting penalty in this instance was three to four months' actual imprisonment (not to be commuted to community service). In addition, the policy was established that the prosecution would consider if at all to submit a request for detention until the end of legal proceedings in each case.
- June 29, 2014      Publication of Decision 1776 of the 33<sup>rd</sup> Government [Strengthening Enforcement in Offenses of Stone Throwing](#) (June 26, 2014). The decision established that the above-mentioned guidelines of the State Prosecutor's Office “fail to provide an optimal response for the prevailing security reality in East Jerusalem.” The decision seeks to impose a strict policy of indictment, including requests for detention until the end of proceedings, “**with the goal of increasing the customary punishment**, and with the intention of leading to the imposition of significant periods of actual imprisonment, suspended imprisonment, and considering the imposition of fines in appropriate cases, including the imposition of a fine or payment of compensation on the parents of a minor, when possible in accordance with the provisions of the law.”

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<sup>2</sup> The full report (in Hebrew) is available at:  
<http://www.justice.gov.il/Units/YeutzVehakika/NosimMishpatim/Global/DOCHPLILY.pdf>

- July 29, 2015      Enactment of the Penal Code ([Amendment No. 119](#)), 5775-2015, which added the offense of throwing stones / other objects at a police officer / police vehicle, an offense incurring a penalty of up to five years' imprisonment; the offense of throwing stones / other objects at vehicles, an offense incurring a penalty of **up to 10 years' imprisonment**; an offense of throwing stones / other objects with the goal of hitting a passenger or a person in his vicinity, an offense incurring a penalty of **up to 20 years' imprisonment**. The two latter offenses are considered "felonies," and accordingly are heard in the district court before judges who were given the authority to hear juvenile cases, but who, unlike the youth judges in the magistrates' courts, do not specialize exclusively in such cases.
- September 9, 2015      Publication of an [updated version](#) of the Enforcement Policy in the Offense of Stone Throwing," *State Prosecutor's Office Guidelines* 2.19, 5770, updated in August 2015. This detailed version also addresses the legislative changes and is stricter than its predecessor. The most significant change in the guidelines is the declared policy to request detention until the end of proceedings for any person suspected of stone throwing, and the effective elimination of alternatives to detention, contrary to the spirit of the Youth Law. This policy is also reflected in the statistics of the Ministry of Welfare, which show a rise in the number of requests for reviews for detention until the end of proceedings in the year 2015.
- November 2, 2015      [Combined enactment](#) of:  
  
Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment No. 20), 5776-2015, which establishes the possibility to impose on the minor's parents **a fine, legal expenses**, and payment of compensation to a person injured by an offense caused by a minor, following the conviction and sentencing of the minor (hereinafter: **the Fines Amendment**).  
  
Indirect Amendment no. 163 of the National Insurance Law [Combined Version], 5755-1995, permitting the **denial of payment of benefits** from the parents of a minor who committed security / stone-throwing offenses and was sentenced to actual imprisonment (including child benefits, study grant, child supplement to the supplementary income benefit, or payment of alimony from National Insurance, child supplement to a disability benefit, survivors', dependents, and old age benefit).

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Penal Code (Amendment No. 120 and Temporary Provision), 5776-2015. The law (as a temporary provision for three years) establishes a **minimum punishment for offenses of stone throwing** – one-fifth of the maximum penalty. The court may only deviate from this minimum for special reasons, to be recorded. **It should be noted that this amendment does not apply to minors** due to the exclusion clause in the Youth Law (section 25(b) of the Youth Law). However, its enactment forms part of the general mindset that encourages stricter penalization – an approach that is also manifested in the authorities' handling of minors.

November 18, 2015 [Memorandum](#): Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment) (Means of Punishment), 5776-2015. This legislative memorandum proposes that in serious manslaughter offenses, it will be possible **to impose actual imprisonment on minors who are sentenced before they reach the age of 14**. The sentence will be served in a secure juvenile center until the age of 14, after which the minor will enter jail. The proposed law has a dramatic impact on the means of punishment for minors under the age of 14. At present, if a child has committed one of these offenses and has been sentenced to the maximum sentence prior to reaching the age of 14, he is released from the secure facility at the age of 20, after intensive therapeutic and rehabilitative work over the intervening years. If the new amendment is approved, the minor is liable to released from prison up to 20 years later.



## Minors in East Jerusalem

The policy changes concerning minors suspected of stone throwing, security offenses and disturbances are felt in East Jerusalem more than anywhere else, due to the significant increase in the numbers of Palestinian minors arrested in Jerusalem. According to police figures, 792 Palestinian minors were arrested in East Jerusalem in 2014. Indictments were served against 178 of these minors, i.e. 22 percent of the minors arrested in East Jerusalem in 2014. According to police figures, during the first half of 2015, 338 minors were arrested in East Jerusalem, 88 of whom have been indicted to date.<sup>3</sup> More updated figures show that from September 13, 2015 through December 15, 2015 – a three-month period that was one of the most violent Jerusalem has experienced – 398 Palestinian minor residents of East Jerusalem were arrested.<sup>4</sup>

Ongoing monitoring by ACRI over the years shows that police practices concerning the arrest, detention, and interrogation of minors in East Jerusalem are marred by repeated violations of the provisions of the Youth Law and effectively denude the Law of its content through the frequent use of the exceptions clauses in the Law and the abandonment of its underlying guiding principles. A report published by ACRI in 2011 and updated in 2013<sup>5</sup> detailed these practices, which have since become more virulent.

Thus, for example, the rule for **summoning to interrogation** by the police appears in section 9f(a) of the Youth Law, alongside the rule that **the detention of minors shall be a last resort** (section 10a of the Youth Law).<sup>6</sup> However, these rules are not implemented in practice in East Jerusalem. The police do not summon the minor suspect for interrogation, accompanied by his parents, but instead arrests the minors in their home, often by way of **nighttime arrest**, even if this is only for the purposes of interrogation. A further example is the sweeping use of the exception permitting **the interrogation of minors without their parents being present**. The suspicion is that the use of such means is intended to frighten the minors and to serve as a routine tool for intimidation and the collection of

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<sup>3</sup> Police reply to the Association for Civil Rights in Israel dated Oct. 19, 2015.

<sup>4</sup> Response of the Police Spokesperson to Ha'aretz reporter Nir Hasson.

<sup>5</sup> See the ACRI report Violations of the "Youth Law (Adjudication, Punishment and Methods of Treatment) – 1971" by the Israeli Police in East Jerusalem" (2011):

[http://www.acri.org.il/en/wp-content/uploads/2011/05/Youth-Law-Violation-in-East-Jerusalem\\_ACRI.doc](http://www.acri.org.il/en/wp-content/uploads/2011/05/Youth-Law-Violation-in-East-Jerusalem_ACRI.doc)

<sup>6</sup> "It shall not be decided to detain a minor if it is possible to secure the purpose of the detention by a means less injurious to his liberty, and the detention shall be for the shortest time required for the purpose of securing the said purpose; in making a decision on the arrest of a minor, his age and the impact of the detention on his physical and psychological wellbeing and on his development shall be taken into account."

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information. There are also numerous testimonies to the **use of violence against detained minors**, as well as **the detaining of children under the age of criminal liability** in East Jerusalem.<sup>7</sup>

These practices weaken the implementation of the Youth Law in East Jerusalem and reflect a failure on the part of the police to internalize the Law's purpose. The new policy changes, whose ramifications will be described below, reduce still further the possibility of implementing the purpose of the Law in East Jerusalem. Moreover, the new strict provisions that will be discussed below emphasize punishment and deterrence and are not supported by options for treatment. In any case, such options barely exist in the case of children in East Jerusalem: There is an enormous shortage of rehabilitative hostels suitable for young people from the area; there are virtually no reasonable alternatives to prison detention for children from East Jerusalem; and there are no therapeutic programs for young people held in preliminary detention nor for those held in detention until the end of proceedings.

A genuine response to offenses of violence and disturbances among minors in East Jerusalem requires an examination of the full range of contexts that characterize the harsh reality facing children and young people in the area. These children grow up against the background of a bloody political conflict of which Jerusalem forms the core. The Israeli approach regards the territory of East Jerusalem as an integral part of the state de jure, but not always de facto. The prevailing perception among the residents of East Jerusalem is that their city is an occupied territory annexed by Israel unlawfully and against their will. Accordingly, the Israeli authorities are perceived as hostile.

In addition to the conflict, which forms an important component in the children's lives, most of the residents of East Jerusalem also suffer from poverty and exclusion. Studies have shown that impoverished and excluded communities are liable to produce higher rates of criminality.<sup>8</sup> The residents of East Jerusalem suffer from extreme poverty and neglect. Approximately 79 percent of residents and **some 84 percent of children** in East Jerusalem live below the poverty line.<sup>9</sup> The state of education in East Jerusalem is disgraceful: there is an acute and ongoing shortage of classrooms, and many schools operate in residential buildings that are ill suited to serve as educational institutions. Only 41 percent of students attend the official education system, which cannot accommodate all the children of East Jerusalem. The dropout rate among Palestinian school students in East

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<sup>7</sup> For further details, see ACRI, *East Jerusalem: Facts and Figures*, May 2015 (hereinafter: **Facts and Figures 2015**), p. 13: <http://www.acri.org.il/en/wp-content/uploads/2015/05/EJ-Facts-and-Figures-2015.pdf>

<sup>8</sup> For example, see: Becker, G. S. (1968). "Crime and Punishment: An Economic Approach," *Journal of Political Economy*, 76(2), pp. 169-217, Bjerck, D. (2010). "Thieves, Thugs, and Neighborhood Poverty," *Journal of Urban Economics*, 68(3), pp. 231-46., Patterson, E. Britt. (1991). "Poverty, Income Inequality, and Community Crime Rates," *Criminology* 29: 755-76.

<sup>9</sup> See *Poverty Levels and Social Gaps – Annual Report 2014* (National Insurance Institute, December 2015) (in Hebrew).

Jerusalem is significantly higher than in Israel, and is also higher than in the Palestinian Authority.<sup>10</sup> The combination of a serious conflict with acute exclusion and neglect means that the rehabilitation of young people from East Jerusalem is a critical need.

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<sup>10</sup> For details, see *Facts and Figures 2015*, pp. 3-7.

## The Problems Created by the Policy Changes

### 1. A Policy of Detention until the End of Proceedings is Liable to Impair Due Process and Encourage False Confessions

The new policy of requesting detention until the end of proceedings in cases of stone throwing is evident in the statistics provided by the Ministry of Welfare. These show that in 2015 the courts asked that **320** requests for reviews of detention until the end of proceedings be submitted regarding minors from East Jerusalem, compared to 210 during the previous year.<sup>11</sup> According to police figures, the number of requests for detention until the end of proceedings in 2014 relating to minors from East Jerusalem was almost double the number of requests during the previous year: While in 2013, 65 minors were detained until the end of proceedings, in 2014 this figure rose to 118. In the first half of 2015, which was considered a relatively quiet period, 49 minors from East Jerusalem were detained until the end of proceedings.<sup>12</sup>

The new policy of detention until the end of proceedings in all instances of stone throwing, together with the slow pace of progress in the legal proceeding due to the pressure on the court system, create a situation whereby minors are held in detention for many months. An increasing number of these minors prefer – sometimes with the encouragement of their defense attorneys – to reach a plea bargain and confess to the charges against them, in the hope that the months they have already spent in prison will count as their punishment, rather than risking protracted prison sentences. Concern at this reality is intensified given the minors' vulnerability due to the harsh and traumatic experience of detention, particularly in the younger age groups. The growing tendency to reach a plea bargain without hearings of proof and so forth is liable to cause disastrous damage to the right to due process.

In his book *Convicting the Innocent in Israel and Worldwide: Causes and Solutions*,<sup>13</sup> Prof. Boaz Sangero discusses the growing frequency of plea bargains.<sup>14</sup> He argues that the plea bargain arrangement is one of the central mechanisms that enable the conviction of large numbers of innocent people. Since the overall conviction rate in Israel is already

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<sup>11</sup> See paragraph 2 of the letter from the Ministry of Welfare and Social Services entitled "Information about the Youth Probation Service in the East Jerusalem District – Request from the Association for Civil Rights in Israel," dated Jan. 17, 2016 (hereinafter: **the Welfare Ministry Letter**), available (in Hebrew) at: <http://www.acri.org.il/he/wp-content/uploads/2016/01/EJminors170116.pdf>

<sup>12</sup> According to the reply of the Israel Police to a request in accordance with the Freedom of Information Law dated Oct. 23, 2015.

<sup>13</sup> Boaz Sangero, *Convicting the Innocent in Israel and Worldwide: Causes and Solutions*, Resling (2014) (in Hebrew).

<sup>14</sup> *Ibid.*, pp. 218-20.

very high, many defendants prefer to admit the charges against them in the framework of a plea bargain rather than risk excessive punishment. Detention until the end of proceedings, as a form of pressure, certainly have a crucial influence on this decision. As Judge Mordechai Levy suggests in his article “The Danger of False Convictions in Israel – Key Factors and Proposals for Limiting the Danger.”<sup>15</sup> “The innocent defendant may agree to the plea bargain due to fear that without the bargain he is liable to remain in detention and even be convicted of the offenses that appear in the original indictment, and to receive a penalty of actual imprisonment greater than the penalty proposed in the framework of the plea bargain. He may even believe, incorrectly, that following his release from detention he will be able to fight for his innocence through an appeal or retrial.”<sup>16</sup>

These comments are particularly pertinent in the case of minors from a weakened population, for several reasons: many of these minors do not speak Hebrew – the language in which the legal proceeding is conducted; they are the subject of strict policy that seeks to take a hardline approach with them even if they are still young; and there are no appropriate alternatives to detention for them (as discussed below). We believe that the strict policy that is currently inculcated creates an undesirable and dangerous situation of judicial distortion, impairing the ability and desire of these minors to prove their innocence.

## **2. A Stricter Punishment Policy is Liable to Foster Recidivism among Young People**

The legislator and the authorities seek to deter the public, including minors, from committing offenses of stone throwing by imposing protracted periods of imprisonment. This is achieved by introducing a stricter policy for punishment in such offenses; by introducing minimum penalties (for adults); and by introducing a component of imprisonment even for minors sentenced before reaching the age of 14. However, studies show that protracted imprisonment does not realize the purpose of deterrence. Indeed, imprisonment at a young age increases the rate of recidivism.

The Public Committee to Examine Penal Policy and the Treatment of Offenders, headed by Supreme Court Justice (ret.) Dalia Dorner, recently published its report.<sup>17</sup> The report begins by noting that “most studies (...) have not found a correlation between stricter levels of punishment and advancing individual or general deterrence (...). Accordingly, it is futile to attempt to promote deterrence by means of the expanded use of imprisonment

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<sup>15</sup> Mordechai Levy, “The Danger of False Convictions in Israel – Key Factors and Proposals for Limiting the Problem,” *Ma’azanei Mishpat* 10 (2015) (in Hebrew).

<sup>16</sup> *Ibid.*, p. 48.

<sup>17</sup> Public Committee to Examine Penal Policy and the Treatment of Offenders, *Report* (2015), available (in Hebrew) at: <http://bit.ly/1IWFK6M>

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or by means of the use of more protracted imprisonment.” This issue is discussed at length in the body of the report.<sup>18</sup> One of the committee’s conclusions was that:

“The effective use of imprisonment as a tool for preventing offenses must distinguish between offenders who can be expected to commit offenses again and those who cannot be expected to do so. In addition, consideration must be given (...) **to the fact that imprisonment in general, and protracted imprisonment in particular, encourage a tendency to criminality and increase the probability that the prisoner will commit offenses following their release.**”<sup>19</sup>

In the context of Amendment 120 of the Penal Code, as described above, which establishes (by way of a temporary provision) minimum penalties for stone-throwing offenses, it is worth noting that the committee also recommended refraining from establishing minimum penalties for offenses, since such a penalty impairs the principle of appropriateness for instances toward the lower threshold of the defined offense.<sup>20</sup>

A survey by the Israel Prison Service (IPS) published in February 2015<sup>21</sup> examined the recidivism rate among prisoners who were released in 2008, and found that **the highest rate of recidivism is among minor prisoners**: some 75 percent of minors imprisoned before the age of 18 will be imprisoned again at a later stage.<sup>22</sup> This figure is consistent with the previous report on recidivism by the IPS, and also reflects the finding in the research literature that the earlier the age of imprisonment, the higher the recidivism rate.<sup>23</sup>

This discussion is particularly pertinent in light of the **legislative memorandum for the Penal Code** (which has not yet been brought to a vote in the Knesset) providing for the introduction of a component of **imprisonment for minors sentenced before the age of 14 for serious offenses of murder, attempted murder, and manslaughter**. At present, the law only permits the imposition of a penalty of incarceration in a secure facility, and solely up to the age of 20. The amendment seeks to create a situation whereby the same minor may be sentenced to an extremely severe penalty of decades-long imprisonment. Imposing such imprisonment is liable to have a dramatic impact on the rehabilitation prospects of the young person concerned, and on the chances for a return to normative life.

We should emphasize that in the large majority of cases addressed by the memorandum, the minors involved committed the offense at a very early stage of their maturation,

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<sup>18</sup> See page iii of the Dorner Committee report abstract and pp. 18-22 of the body of the report.

<sup>19</sup> See page iv of the Dorner Committee report abstract; emphasis added.

<sup>20</sup> Ibid., p. 31.

<sup>21</sup> See Research and Strategy Department, Planning Administration, Israel Prison Service, *Recidivism of Criminal Prisoners Released in 2008* (2015) (in Hebrew): <http://www.ips.gov.il/Items/11144.reci.pdf>

<sup>22</sup> Ibid., p. 5.

<sup>23</sup> Ibid., p. 16, including the references mentioned there.

sometimes on the border of criminal liability. At this stage in a minor's life, the prevailing rule is that even if they have committed an extremely serious offense, the court – under the legislator's guidance – will do everything possible “as long as it sees a fragment of light at the end of the tunnel and a chance to return [the minor] to normative functioning in society.”<sup>24</sup> As Supreme Court Justice Yoram Danziger established in one case:

The younger the defendant, the greater the Court's tendency to activate in his case rehabilitative means rather than punitive means, on the basis of the approach that the younger the offender's age, the greater the weight that should be given to the prospects for rehabilitation.<sup>25</sup>

Supreme Court Justice (retired) Ayala Procaccia provided a succinct definition of the desirable punitive policy for minors convicted of both lesser and more serious offenses:

The current and desirable punitive policy generally grants considerable weight to the minor status of defendants, in two principal respects: Firstly, a defendant's young age influences the level of gravity with which his actions are to be observed. **Even in the presence of criminal liability, a defendant's young age, prior to maturation, may indicate a lack of natural personal maturity to understand profoundly the significance and consequences of the criminal act.** This immaturity is granted alleviating weight in penalizing minors. Secondly, **the involvement of minors in criminal offenses, and even the most serious thereof, always leaves a sense of a commitment on the part of society to find every way to rehabilitate the minor offenders and set them on a normative and proper life course.** This commitment has a combined purpose: to rehabilitate the individual and open up the normative course of life for him, and to ensure that the general public enjoys a life of security and calm in a society that acts to reduce the scope of crime. **Even adult criminality leaves a possible and important opening for rehabilitation, but the criminality of a minor imposes an obligation on society to do everything possible in order to exhaust the young offender's chances of rehabilitation before it is too late. Society's obligation to act to rehabilitate the young offender and the need to exhaust the path of rehabilitation are weighty**

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<sup>24</sup> Judge E. Sharon, quoted in the memorandum from his book *Youth in Crime – Adjudication, Means of Treatment and Punishment* (edition 2, 1998), p. 421 (in Hebrew).

<sup>25</sup> Crim.App. 49/09 *State of Israel v Anonymous* (published in Nevo, Mar. 8, 2009), para. 5 of Justice Danziger's ruling.

**considerations in sentencing a minor in both a lesser and a serious offense.**<sup>26</sup>

The legislative memorandum for the proposed Penal Code acts in a manner that is diametrically opposed to the above principles. It must be hoped that it will not be promoted, and action must be taken to ensure this.<sup>27</sup> Imposing a penalty of imprisonment on a young minor, even if the punishment will be served after the minor reaches the age of 14 or above, significantly erodes the principle in the Youth Law that due weight is to be given to considerations of rehabilitation and treatment, and to returning young people to a normative course after they have committed offenses – even in the case of serious offenses of the type discussed.

It is worth emphasizing that it is important not to minimize the significance of the protracted deprivation of liberty, even if this takes place in a secure juvenile center rather than a prison. This is a serious punishment that has significant ramifications for children and young people during important and formative years in their maturation. Indeed, the courts regard secure juvenile centers as a framework that is essentially similar to a prison, and which realized the punitive, as well as the rehabilitative, objective. As Supreme Court Justice (ret.) Edna Arbel noted: “I do not believe that this should be considered a penalty that is significantly more lenient on the offender, since **the deprivation of his liberty is identical to that behind bars and bolts**, with the possible exception of certain conditions.”<sup>28</sup> In another case, Supreme Court Deputy President Elikim Rubinstein defined the secure juvenile centers as “a means of punishment that, in accordance with the Youth Law (Adjudication, Punishment, and Means of Treatment), 5731-1971, permits **the serving of punishment in a therapeutic framework that, on the one hand, is secure, thereby including a dimension of incarceration**, but, on the other hand ... constructs a scale of stages of care and rehabilitation that is supposed to direct the young man or woman who committed offenses toward normative life.”<sup>29</sup> In this context, and as will be explained below, it is important to emphasize that there is only a single secure juvenile center for all the Arab youth in Israel, and the facility can accommodate only a limited number of minors.

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<sup>26</sup> Crim.App. 10715/05, *Anonymous v State of Israel* (published in Nevo, Sept. 4, 2007), para. 12 of the ruling (emphases added).

<sup>27</sup> For further discussion, see ACRI’s comments on the legislative memorandum: <http://www.acri.org.il/en/wp-content/uploads/2015/12/ACRI-position-paper-Imprisoning-minors-under-age-141.pdf>

<sup>28</sup> Crim.App. 7113/08, *Anonymous v State of Israel*, para. 9 of Justice Arbel’s ruling (Dec. 15, 2008) (emphasis added).

<sup>29</sup> Crim.App. 9120/11, *Anonymous v State of Israel*, para. 22 of Justice Rubinstein’s ruling (May 8, 2012) (emphasis added).



### 3. The Absence of Alternatives to Detention and Shortage of Rehabilitation and Supervision Programs, with an Emphasis on East Jerusalem

At present, alternatives to detention are very rarely discussed or examined, in light of the new policy mandating detention until the end of proceedings in offenses of stone throwing and disturbances. In the exceptional cases in which such alternatives are discussed, it emerges that the alternatives to detention available for minors from East Jerusalem are meager and limited.

- ❖ **Electronic shackling:** Attorneys who represent minors assert that, in practice, the alternative of electronic shackling is not available in East Jerusalem. The reason is that the company that operates this mechanism refuses to enter the neighborhoods of East Jerusalem.<sup>30</sup>
- ❖ **House arrest:** The courts are not inclined to release minors to house arrest, even in a neighborhood other than that in which the incident occurred, since disturbances frequently take place in many of the East Jerusalem neighborhoods. Accordingly, this alternative is often eliminated.
- ❖ **Secure juvenile center:** There are virtually no secure centers that can provide an alternative to detention for Arab youths in Jerusalem. The only options that exist for Arab youths in Israel as a whole are placement in a secure juvenile center in Yarka, in the north of the country, which accommodates just a few dozen youths and therefore has a waiting list of around four months (during which time the youths are held in detention); a single center in the neighborhood of Beit Hanina in Jerusalem; and a number of open juvenile centers in the north.<sup>31</sup> The court has on more than one occasion noted the acute lack of secure juvenile centers. Justice Rubinstein remarked:

I must insist on reiterating the comment that this Court has already made on more than one occasion, almost by way of supplication to the state authorities, that there is a need to add places in secure juvenile centers, as a matter of saving souls; as far as we have seen, the Youth Custody service is interested in increasing the number of places under its auspices, in order to expand the possibilities to absorb Jewish and Arab youth in secure centers (...) The legislator has explicitly established a “rehabilitative approach” toward youth (...), and if the aspiration is that a given minor will become a useful citizen rather than an offender returning to his sordid crimes, the

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<sup>30</sup> For example, see Sun.Crim.App. 6177/11, *Hadi Salameh v State of Israel* (Aug. 30, 2011); App.Det.EndProc. (Haifa) 38996-04-12, *State of Israel v Guabi* (May 9, 2012).

<sup>31</sup> See para. 7 of the Welfare Ministry Letter.

presence of an educational framework that can also protect the public, since it is locked, is vital.<sup>32</sup>

The State Comptroller has also discussed this matter twice in his reports (in 2000 and 2008).<sup>33</sup> In his last examination in 2008, it emerged that hundreds of minors were waiting for many months to be placed in Youth Custody centers. It also emerged that there is a shortage of professional staff in these centers, and that most of the “graduates” of these centers are not monitored later on, despite the requirement in the Youth Law. A recent article in the Haaretz<sup>34</sup> newspaper shows that the situation remains difficult, and that the Ministry of Welfare’s plan to provide 400 additional places in order to address the problem has been delayed in the planning and building committees.

- ❖ **Absence of Probation Service therapeutic programs for preliminary detention and detention until the end of proceedings:** Rehabilitative and therapeutic programs are available for young people, and can absorb a small number of young people who are not imprisoned and who are in alternatives to detention, or have been released (conditionally or unconditionally).<sup>35</sup> To the best of our knowledge, children from East Jerusalem held under preliminary detention, or in detention until the end of proceedings, do not participate in any therapeutic programs run by the Probation Service. Moreover, the increase in the number of detainees in Jerusalem, the policy of detention until the end of proceedings, and the load of work weighing on the Probation Service are liable to lead to delays in the submission of reviews.<sup>36</sup> This can lead in turn to the extension of the period during which minors are held in detention facilities without any real alternative to detention. Very young detainees are particularly affected by this situation.

#### **4. The Problematic Nature of the Imposition of Penalties on the Parents of Convicted and Imprisoned Children**

**In the past**, it was possible to impose fines, legal expenses, demands for financial compensation, or undertakings regarding the future conduct of a minor only in cases when a minor was not convicted, within the framework of alternative means and in order to provide a second chance before criminalizing a minor. According to the late Judge Eli Sharon, “this is an unusual authority that is unique in criminal law, and is found only in the Youth Law as one of the means of treatment the court is entitled to order without the

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<sup>32</sup> Sun.Crim.App. 6033/12, *Anonymous v State of Israel*, para. 13 (published in Nevo, Aug. 26, 2012).

<sup>33</sup> State Comptroller, Annual Report 51B (2001), pp. 95-102; State Comptroller, Annual Report 59B (2008), pp. 907-38 (both in Hebrew).

<sup>34</sup> Lee Yaron, “State Completes Privatization of Institutions for Youth at Risk: 370 Waiting for a Place,” *Haaretz*, Dec. 28, 2012 (in Hebrew): <http://www.haaretz.co.il/news/education/.premium-1.2808185?=&ts= 1451295970308>

<sup>35</sup> See para. 6 of the Welfare Ministry Letter.

<sup>36</sup> See para. 4 of the Welfare Ministry Letter.

conviction of the minor.”<sup>37</sup> **The proposed amendment** effectively permits the imposition of all these financial sanctions on parents **even when a minor was convicted**. It thereby uproots one of the most important tools that were available to the judicial system in order to facilitate the rehabilitation of a minor on the basis of a confession of the charges, but without criminalization.

The new legislation permitting the imposition on parents of financial sanctions (in all offenses) and the denial of benefits (for security and stone-throwing offenses) constitutes double punishment. Not only is the family punished by the disconnection from the minor and his placement in detention, with all this implies, but their punishment is doubled in the form of financial sanctions and, in some cases, the denial of benefits. This is particularly serious in the case of populations from a difficult socioeconomic background. As already noted, 79 percent of the residents of East Jerusalem live below the poverty line. Some scholars argue that laws that impose such economic sanctions not only fail to solve juvenile delinquency, but also exacerbate the already difficult problems facing families who live in poverty.<sup>38</sup>

Moreover, the purpose of the amendment is diametrically opposed to penal law, in which criminal liability is imposed on the person who commits the offense, and not on anyone else. The imposition of liability on a third person, such as a guardian, constitutes the exception in Israeli criminal legislation, and in most cases is activated on account of negligence or serious harm.<sup>39</sup> Furthermore, it is difficult, and indeed virtually impossible, to establish that a child’s behavior is a direct consequence of his parents’ actions, or alternatively of the parents’ failure to take steps that might have improved the child’s behavior. In the context of East Jerusalem, this problem is exacerbated. The imposition of parental liability in this context ignores additional relevant factors, such as the social environment, defective educational infrastructure, and a difficult socioeconomic situation – aspects for which the State of Israel is responsible.<sup>40</sup>

The explanatory comments to the proposed **Fines Law** state that “the imposition of a fine or compensation on the parent of a minor as stated, during the course of a legal proceeding to which the parent is party, may restore responsibility to the parent and even reinforce his authority toward the minor.” Apart from the paternalistic approach inherent in this comment, and the fact that studies have shown that the attempt to define “good

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<sup>37</sup> Sharon, *Youth in Crime*, note 24 above, p. 326.

<sup>38</sup> Jerry E. Tyler and Thomas W. Segady, “Parental Liability Laws: Rationale, Theory, and Effectiveness,” *Social Science Journal*, Volume 37, Number 1, 2000, pp. 79-96, at pp. 87-8.

<sup>39</sup> For example, see sections 323, 337, 362, and 365 of the Penal Code.

<sup>40</sup> See Leonie Le Sage and Doret de Ruyter, “Criminal Parental Responsibility: Blaming Parents on the Basis of their Duty to Control Versus their Duty to Morally Educate their Children,” *Educational Philosophy and Theory*, Vol. 40, No. 6, 2008, pp. 789-802, at pp. 790, 799.

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parenting”<sup>41</sup> is both problematic and ineffective, the amendment effectively neutralizes the recognition of the minor as a distinct and autonomous being. This is contrary to the spirit of the Convention on the Rights of the Child and the Youth Law itself, which prioritized the minor’s free will.<sup>42</sup>

The justification presented for the denial of benefits in specific security offenses and in stone-throwing offenses was that “the National Insurance Institute is based on an approach of solidarity and mutual liability, and when a person commits an act of terrorism intended to create an existential threat to the residents of the state and to society, social responsibility toward that person should be restricted.”<sup>43</sup> It should be noted here that every criminal offense is an offense against a protected value defined by the state in the Penal Code. The choice to deny benefits for certain security offenses and not for others creates an irrelevant and problematic distinction. The Israel National Council for the Child vigorously opposed the law.<sup>44</sup> Attorney Carmit Pollak-Cohen, deputy legal advisor to the Council, claimed during a discussion of this matter in the Constitution, Law, and Justice Committee that the use of benefits as a punitive tool – regardless of the content of the change – is mistaken:

If our goal is truly to deter the parents [and] deter the minors in the form of a significant financial sanction, this is not the situation. So how can we justify the denial of benefits that have far-reaching ramifications in the future? It is important to understand, as anyone who is slightly familiar with the state’s conduct knows, that today these benefits go up and tomorrow they go down. Tomorrow they will be used against someone who fails to vaccinate their child. It is not right to use benefits as any form of weapon or punishment – it isn’t right.<sup>45</sup>

It is indeed not appropriate that benefits be denied as a means of reward and punishment, particularly when this is applied regarding certain offenses and not others, and even more

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<sup>41</sup> On this subject, see the position of Tomaszewski, who discusses the legal problems inherent in the definition of “parental liability” by the court: Amy L. Tomaszewski, “From Columbine to Kaza: Parental Liability in a New World,” *University of Illinois Law Review*, 2005, pp. 573-600, at p. 598.

<sup>42</sup> See sections 1a and 1b of the Youth Law and articles 12 and 14 of the Convention.

<sup>43</sup> Background document from the legal advisors of the Knesset Constitution, Law and Justice Committee ahead of the committee’s discussion of the Proposed Law: Penal Code (Amendment No. 122 and Temporary Provision) and the Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment No. 20) (Means of Treatment after Conviction), 5776-2015, Oct. 15, 2015: [bit.ly/1PH7mz2](http://bit.ly/1PH7mz2).

<sup>44</sup> See the detailed comments of the National Council for the Child dated Oct. 8, 2015 (in Hebrew): [bit.ly/1lzjf1S](http://bit.ly/1lzjf1S).

<sup>45</sup> Minutes of Meeting No. 45 of the Constitution, Law and Justice Committee, 20<sup>th</sup> Knesset, Oct. 20, 2015, p. 16.

so in instances when no one was harmed (as in certain cases of stone throwing).<sup>46</sup> It is worth noting that studies suggest that it is unsurprising that the proposals relate to specific offenses identified with a national group distinct from the dominant majority. Such groups constitute a ready target for legislation imposing parental liability and a population whose rights can more readily be denied.<sup>47</sup>

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<sup>46</sup> For further discussion of the problematic nature of parental punishment, see Dina Tzadok and Lior Ben-David, *Parental Liability for Offenses Committed by Their Minor Children – A Comparative Review* (Knesset, Information and Research Center, 2011), pp. 14-17 (in Hebrew): <https://www.knesset.gov.il/mmm/data/pdf/m02932.pdf>

<sup>47</sup> Tammy Thurman, "Parental Responsibility Laws: Are They the Answer to Juvenile Delinquency?," *Journal of Law & Family Studies*, 5, 2003, pp. 99-111, at pp. 103-5.

## Recommendations

The state bears an obligation to act in order to protect public wellbeing and public order. This obligation must be fulfilled while ensuring proper balances and minimizing the injury to rights and liberties. The means of treatment the state chooses to employ in the case of minors involved in offenses of stone throwing and disturbances would seem to be confined to an extremely harsh approach and the extensive use of the exceptions granted by law. The result is mass detentions, most of which do not result in indictments, and the imposition of protracted penalties of imprisonment on minors, including young children. Instead of helping children and young people to return to a normative course of life, this policy encourages recidivism among minors, and thereby acts against the very deterrent purpose it seeks to advance. The picture painted by observing the latest policy changes is depressing and entails grave injury to the rights of minors.

In order to realize the principles of the Youth Law and the Convention on the Rights of the Child, we recommend the following policy changes:

- A. **The guiding principle – what is in the best interest of the minor:** All authorities, including the police, the State Prosecutor's Office, and the judiciary, should act in the spirit of the Youth Law and the Convention on the Rights of the Child in each case on its own merits, with attention to all the specific circumstances. Above all, they should implement the guiding principle of providing treatment and rehabilitating, and returning minors to a normative course.
- B. **Detention until the end of proceedings:** The State Prosecutor's Office should end its policy of requesting detention until the end of proceedings in every case relating to stone throwing by minors, in order to give the young people involved the chance to exhaust their rights and ensure due process, facilitate their proper rehabilitation, and avoid unnecessary detentions. As a first step, the State Prosecutor's Office should refrain from issuing sweeping guidelines mandating detention until the end of proceedings for minors, and should address exceptions and specific circumstances with the required gravity in offenses committed by minors.
- C. **Alternatives to detention:** Appropriate alternatives to detention should be promoted for young people. Action should be taken to ensure that the company that provides electronic shackling operates in all neighborhoods in East Jerusalem. Urgent action should be taken to forward the necessary budgets to the Ministry of Welfare in order to provide open juvenile centers and secure juvenile centers, with an emphasis on centers for Arab children in Jerusalem, thereby enabling the provisions of therapeutic programs for young people. The authorities should provide rehabilitation programs adapted to the culture and society of the children.

- D. **Young minors involved in serious manslaughter offenses:** The government should refrain from advancing the enactment of the amendment of the Penal Code that would permit the introduction of an imprisonment component for minors sentenced before the age of 14. This is the only way to ensure that these minors have an opportunity to rehabilitate themselves.
- E. **Juvenile courts:** At present, indictments against young people suspected of stone throwing and disturbances are often submitted to the district court (the type of offense and its accompanying penalty determine whether the case is heard by a magistrate's or district court). The district court does not function exclusively as a juvenile court, as is the custom in the case of the juvenile magistrate's court; instead, the district judges receive a juvenile adjudication order, and some of them undergo specific training relevant to youth. In light of the growing number of cases of young people whose preliminary hearing in the alleged offense is held at the district court, and in light of the distinct attention required to the youth population and the need to expedite hearings, the State Prosecutor's Office should consider submitting an indictment to the juvenile magistrate's court in cases of stone-throwing offenses in accordance with section 332a(a) of the Penal Code. This is consistent with section 3(b) of the Youth Law, which establishes that "notwithstanding the content of any law, the Minister of Justice is entitled to empower by order a juvenile magistrate's court to judge minors for felonies in accordance with the items detailed in the order." It is also consistent with the Youth Law (Adjudication, Punishment, and Means of Treatment) (Empowerment of the Juvenile Magistrate's Court to Hear Minors for Felonies), 5750-1990. The latter law establishes that a district prosecutor is empowered to order the submission of an indictment to the juvenile magistrate's court for any felony, with the exception of murder and with the exception of the offenses stipulated in chapter G of the Penal Code (which do not include stone throwing).
- F. **Exceptions to the law:** The conduct of the police in its dealings with minors should be supervised, including a reduction of the use of the exceptions in the Youth Law to instances that are actually exceptional; a reduction in night arrests and interrogations at unreasonable hours; strict attention to the presence of the parents during interrogation; and attention to providing reliable information to parents concerning their child's place of detention.<sup>48</sup> In addition, senior officers must respond firmly to the use of violence against minor detainees by police

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<sup>48</sup> On this subject, see the section "Arrests and Violence" in *Facts and Figures 2015*, note 4 above, p. 12. See also the ACRI Report *Violations of the Youth Law (Adjudication, Punishment, and Means of Treatment) – 1971 by the Israeli Police in East Jerusalem*, March 2011: [http://www.acri.org.il/en/wp-content/uploads/2011/05/Youth-Law-Violation-in-East-Jerusalem\\_ACRI.doc](http://www.acri.org.il/en/wp-content/uploads/2011/05/Youth-Law-Violation-in-East-Jerusalem_ACRI.doc)

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personnel, and must undertake the necessary investigations to uproot this phenomenon.

- G. **Imposing penalties on parents:** Insofar as the court chooses to employ this option, considerable weight must be given to the far-reaching ramifications of the imposition of liability on a third party on account of a criminal act by others. Attention must also be given to the financial condition of the family before subjecting it to financial sanctions.
- H. **Regarding minors from East Jerusalem:** Action should be taken to advance young people in East Jerusalem, including in the fields of education, welfare, and culture. Steps should be taken to create community therapeutic and rehabilitation programs adapted to the cultural codes of Arab youth.



## Detailed Review of the Legislative and Policy Changes

### 1. Background: The State Prosecutor's Guidelines of December 2009 – Enforcement Policy in Stone-Throwing Offenses

As far back as December 2009, the State Prosecutor published guidelines concerning stone-throwing offenses.<sup>49</sup> The goal of the guidelines was “to shape a uniform and appropriate policy for handling offenses of stone throwing. This policy must provide an appropriate response to the gravity of the offenses and the great danger they entail, and yet take into consideration the common profile of the perpetrators of the offenses, who in many cases are youths/minors without prior criminal involvement.”

The guidelines defined the relevant typical case as a 16-year-old minor who threw stones without causing damage, and who has no prior criminal background. The starting penalty in this case was delineated at three or four months' actual imprisonment (not to be commuted to community service). In addition to gravity, one of the considerations for leniency noted in the guidelines was a particularly young age (12-15 years). The guidelines delineated strict policy mandating the consideration of submitting a request for detention until the end of legal proceedings in any instance of stone throwing, with a reservation noting that individual and sensitive discretion should be exercised, for example in the case of particularly young age, when detention entails particular distress, when a rehabilitation process is underway, and so forth.

As will be detailed below, the government felt that this policy was too soft, and acted to amend it.

### 2. Government Decision No. 1776, June 2014 – The “Strengthening” of Enforcement Begins

On June 29, 2014, shortly before the outbreak of the war in Gaza (Israel's Operation Protective Edge), the government published Decision No. 1776, entitled “Strengthening Enforcement in Offenses of Stone Throwing.” The decision was based on the recommendations of an interministerial committee appointed to discuss the security situation in East Jerusalem.<sup>50</sup> The decision instructed the Ministry of Justice to act to legislate an amendment of the Penal Code establishing a new and specific offense concerning stone throwing.

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<sup>49</sup> The full guideline is available (in Hebrew) at the link:  
<http://www.acri.org.il/he/wp-content/uploads/2015/09/stonethrowing2009.pdf>

<sup>50</sup> The full decision is available (in Hebrew) at the link:  
<http://www.pmo.gov.il/Secretary/Decisions/2014/Pages/dec1776.aspx>

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In addition, the State Prosecutor's Office was instructed to amend the State Prosecutor's Guidelines of December 2009 concerning the enforcement policy in stone-throwing offenses, which the interministerial committee believed "fails to provide an optimal response for the prevailing security reality in East Jerusalem." The decision seeks to impose a strict policy of indictment, including requests for detention until the end of proceedings, "**with the goal of increasing the customary punishment**, and with the intention of leading to the imposition of significant periods of actual imprisonment, suspended imprisonment, and considering the imposition of fines in appropriate cases, including the imposition of a fine or payment of compensation on the parents of a minor, when possible in accordance with the provisions of the law."<sup>51</sup> The State Prosecutor's Office was further instructed to present a police opinion concerning the phenomenon of stone throwing "in order to increase the severity of the punishment and the detention policy in appropriate cases."

It should be noted that the interministerial committee that discussed the subject noted in one of its recommendations that in order to improve the security situation in East Jerusalem, integrated work and investments were required in the fields of education, welfare, higher education, and employment, as well as in the development of public infrastructures.<sup>52</sup> The government decision initiated work to prepare changes to legislation and guidelines. However, approximately six months later the Knesset was dissolved and the process frozen.

### 3. Enactment of Amendment 119 of the Penal Code – Stone-Throwing Offenses

On March 17, 2015, the Twentieth Knesset was elected. The first bill promoted by the new Justice Minister, MK Ayelet Shaked, provided for the introduction of stricter penalties for stone throwers.<sup>53</sup> On July 29, 2015, Penal Code (Amendment No. 119), 5775-2015 (hereinafter: **Amendment 119 of the Penal Code**) was published in the Official Records. The amendment added two sections to the Penal Code:

The first establishes the offense of throwing a stone or other object at a police officer / police vehicle with the goal of interfering with the performance of a police officer's duty, an offense incurring a **penalty of five years' imprisonment** (section 275a of the Penal Code).

The second establishes two offenses (section 332 of the Penal Code):

- ❖ The offense of throwing a stone or other object at moving vehicles, endangering the safety of the passenger or a person in his vicinity, or liable to cause fear or alarm, an

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<sup>51</sup> Section 2.c f the decision.

<sup>52</sup> Section 8 of the team's recommendations, attached as an appendix to the government decision.

<sup>53</sup> Moran Azulay, "Shaked's first bill proposal: Harsher punishment for stone throwers," *Ynet*, May 28, 2015: <http://www.ynetnews.com/articles/0,7340,L-4662323,00.html>

offense incurring a penalty of **up to 10 years' imprisonment** (section 332a(a) of the Penal Code).

- ❖ An offense that adds a psychological element of intent to the offense of throwing a stone or object, establishing that if the stone was thrown with the intention of injuring a passenger or person in his vicinity, **the penalty will be up to 20 years' imprisonment** (section 332a(b) of the Penal Code).

Prior to the enactment of Amendment 119 of the Penal Code, stone throwers were accused of the offense of “willfully endangering human life on a transportation route,” an offense incurring a penalty of up to 20 years' imprisonment. The government argued that this offense “does not include the range of situations of stone throwing at vehicles as stated, and the accompanying penalty – 20 years' imprisonment – does not permit the manifestation of the differing scale of severity in these diverse situations.”<sup>54</sup>

Thus the declarative goal of the legislative amendment was to create a ranking of offenses in order to address the subject of stone throwing directly, as distinct from endangering life on a transportation route. A further declarative goal of the legislation was to encourage the courts to adopt a stricter approach in penalizing stone throwers, or, as the proposed law puts it:

The gap between the maximum penalty accompanying the offense and the instances that may be included therein is manifested in the relatively light penalties that are sometimes imposed on those convicted of this offense. Thus, for example, in several rulings the courts have imposed sentences of just a few months on persons convicted of the offense of endangering human life on a transportation route. This fact emphasizes the need to create a legislative ranking in accordance with the nature of the circumstances in which the stone throwing occurred.<sup>55</sup>

It is important to note that offenses incurring a penalty of more than seven years' imprisonment (“felony”-type offenses) are heard by the district court, which is not a juvenile court. Minors appear before judges who have received a warrant to hear juvenile cases, some of whom undergo training for adjudicating minors. However, these judges do not specialize exclusively in such cases, unlike the juvenile courts that operate alongside the magistrates' courts.

During the discussion of the law in the Constitution, Law, and Justice Committee in the Twentieth Knesset, the representatives of the state clarified that 97 percent of stone

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<sup>54</sup> See the proposed government decision, draft of Penal Code (Throwing of a Stone or Object) (Amendment No. ....), 5775-2014:  
<http://www.pmo.gov.il/Secretary/sederyom/gov33/Documents/N392.pdf>

<sup>55</sup> Proposed Law: Penal Code (amendment – Endangering Human Life by Means of Throwing a Stone or Other Object), 5775-2014.

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throwing incidents are committed against what they defined as a nationalist background. Attorney Nurit Blobstein, director of the Criminal Department in the Jerusalem District Prosecutor's Office, emphasized that there is a "mass" of files involving stone throwing by minors, and noted: "In the case of such offenses, where there is a mass, a phenomenon, a plague and a need for deterrence, we are talking about files in which we request actual imprisonment, including regarding minors."<sup>56</sup>

During the discussion held by the Knesset Constitution, Law, and Justice Committee during the first attempt to enact the law (in the Nineteenth Knesset), Attorney Hagit Lernau of the Public Defender's Office emphasized the problems that could be expected in such legislation regarding minors:

On the broad front, we have no argument with the idea of ranking offenses, nor with the assumption that we need to find solutions to a situation that must be addressed. Our comment focuses on the basic offense, the offense in which, by definition, there is no intention to cause harm. We think that the punitive threshold there is too high – ten years' imprisonment. What we thought should be done is to reduce the basic offense to five years' or seven years' imprisonment, so that it will be heard by a magistrates' court rather than a district court. **Since these are offenses that are often committed by minors and youths, it is clear that the hard core of stone throwers will be handled according to the more severe offense, while the lesser offense is supposed to respond to the margins, to the softer core, of people who join in almost by chance. In the case of young people, in these circumstances our thought is that serving them with such a severe indictment and seeking to adjudicate them in a district court for such an offense is wrong in terms of perception and in terms of the impact on the course of their life.**

Attorney Lernau added:

I am not trying to say that we should set a penalty of a fine only, but I think that five or seven years' imprisonment also grants the court considerable leeway and allows it to administer a serious penalty, and it increases the severity of the punitive threshold at present. To define it in advance as 10 years on the one hand, and on the other to define a very broad offense – that's an incorrect and undesirable tension. And I understand the circumstances outside this room in which I am speaking.<sup>57</sup>

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<sup>56</sup> Minutes of Meeting No. 24 of the Constitution, Law, and Justice Committee, Twentieth Knesset, July 15, 2015: <https://oknesset.org/committee/meeting/10293>

<sup>57</sup> See Minutes No. 272 of the Constitution, Law, and Justice Committee, Nineteenth Knesset, Dec. 3, 2015: [http://www.nevo.co.il/lawhtml/Law103/19\\_ptv\\_304320.htm](http://www.nevo.co.il/lawhtml/Law103/19_ptv_304320.htm)

Two months after it was published in the Official Records, an initiative was published by Internal Security Minister MK Gilad Erdan to establish that judges who impose light sentences on stone throwers will not receive promotion.<sup>58</sup> Supreme Court President Justice Miriam Naor sharply condemned the proposal,<sup>59</sup> which has not been promoted to date.

#### 4. State Prosecutor's Guidelines concerning "Enforcement Policy for Stone-Throwing Offenses" – Comparison of Versions

In September 2015, immediately following the publication of Amendment 119 of the Penal Code, the State Prosecutor's Office published updated guidelines directly reflecting the state's new policy to adopt a stricter approach to the phenomenon of stone throwing in general, and specifically with regard to minors.<sup>60</sup> The most significant change in the guidelines, in comparison to the 2009 guidelines, is the declarative policy of requesting **detention until the end of legal proceedings for all persons suspected of stone throwing, and the effective elimination of alternatives to detention**, contrary to the spirit of the Youth Law.

It should be noted that the updated version of the guidelines emphasizes more clearly than its predecessor that it relates solely to stone-throwing offenses, and not to more serious cases involving the throwing of Molotov cocktails. In the latter cases, the guidelines note that "a significantly stricter enforcement policy will be adopted."

The following are the main relevant aspects of the guidelines:

❖ The prosecution's policy in proceedings for detention until the end of proceedings

The new guidelines detail and expand on the instances, characteristics, and circumstances on account of which the prosecution will request detention until the end of proceedings. In effect, these provisions **leave almost no possibility for exceptions, even in the case of minors.**

The following are some examples of cases in which the new guidelines in this context are significantly stricter than the previous ones:

- **Requests for detention until the end of proceedings:** The new version establishes a rule that a request for detention until the end of proceedings is to be submitted, and the prosecution is to oppose alternatives to detention, in all cases of stone-throwing offenses in accordance with the new sections,

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<sup>58</sup> "Supreme Court President Slams Bid to Block Promotion of Judges Lenient on Stone Throwers," *Haaretz*, Sept. 14, 2015: <http://www.haaretz.com/israel-news/1.675907>

<sup>59</sup> *Ibid.*

<sup>60</sup> For the full guideline (in Hebrew), see: <http://www.justice.gov.il/Units/Advocacy/Hanchayot/219.pdf>

excluding exceptions.<sup>61</sup> By contrast, the previous guidelines stated that it should be considered whether to submit a request for detention until the end of proceedings.

- **Alternatives to detention:** The new version includes an instruction to avoid alternatives to detention, whereas the previous version stated that it may sometimes be appropriate to consider such alternatives.<sup>62</sup>
- **Indictment for less serious offenses:** The new version includes reference to instances in which, due to a lack of evidence, it is decided to accuse defendants of less serious offenses than the earmarked ones legislated in Amendment 119 of the Penal Code. It is stated that in these cases, too, consideration should be given to submitting requests for detention until the end of proceedings, in accordance with the circumstances of the incident and of the minor, and while attributing a “certain” weight to the defendant’s age.<sup>63</sup> It should be noted that in the case of defendants aged 16 to 18 with a criminal record, a request will be submitted for detention until the end of proceedings and the prosecution will not agree to an alternative – an identical policy to that regarding adults. This aspect was not addressed in the previous version.

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<sup>61</sup> The new version states that “**as a rule**, a request for detention until the end of proceedings **is to be submitted** (...) and the release of the defendant to an alternative to detention opposed.” The guidelines state that “in appropriate cases, attention should also be given to considerations relating to the defendant’s personal circumstances – such as particularly young age, particular distress in detention, an existing rehabilitative proceeding, and so forth, in which case agreement to an alternative to detention may be considered, by way of an exception.” The previous version stated: “In each case **consideration is to be given to requesting** that the court order the detention of the stone thrower until the end of proceedings,” **with an emphasis on the assessment of danger and the exercising of discretion**.

<sup>62</sup> The new guidelines state: “In light of the ideological motive underlying this conduct and the inherent risk of its recurrence, **it is difficult, as a rule, to secure the purpose of detention by an alternative means**.” The new guidelines also note that **agreement to an alternative to detention will be solely in exceptional instances** (sections 16-17). By contrast, the previous version stated that: “in the decision, **weight** will also be given **to the location of the alternative to detention and to the ability** of the police **to inspect** the defendant’s conditions of release. In addition, **“alongside the strict policy, it will sometimes be proper to refrain from requesting the detention of the defendant until the end of proceedings”** (sections 11-12).

<sup>63</sup> Section 18 of the new guidelines.

Statistics provided by the Ministry of Welfare show that, in 2015, the court requested that **320** requests for reviews of detention until the end of proceedings be submitted regarding minors from East Jerusalem, compared to 210 during the previous year.<sup>64</sup>

❖ The prosecution policy regarding penalties

The previous guidelines did not include structured discussion of the punitive policy. Instead, reference was made to a “typical instance” of a 16-year-old minor who threw stones without causing damage, and who has no previous criminal background. The starting penalty in this instance was three to four months’ actual imprisonment (not to be commuted to community service).<sup>65</sup>

The new guidelines include specific reference to minors. Regarding the offense of stone throwing in section 332a of the Penal Code, the prosecution will request conviction and imprisonment in every case for every defendant over the age of 14. The length of imprisonment requested depends on the circumstances and the question as to whether actual harm was caused. In the case of an offense in accordance with section 275a (offenses involving attacks on police personnel), the guideline is to demand conviction and actual imprisonment and a suspended sentence, regardless of criminal record, beginning from the age of 16. It is also emphasized that during periods of heightened tension, when large-scale disturbances take place, the level of danger posed by defendants rises, and accordingly imprisonment should be requested even in instances when this will not usually be the case, as well as imprisonment for longer periods.

**The updated guidelines are a product of government policy, and create a de facto situation in which a minor arrested for the offense of stone throwing will probably remain in detention until the end of proceedings, often for many months until the decision in his case is made, and thereafter will be imprisoned for a protracted period. The guidelines do not make even the slightest mention of the need to address the rehabilitation of these suspects and defendants, the large majority of whom are minors. The deterrent and punitive purpose sets the tone.**

### **5. Denial of Benefits for the Parents of Minors Who Committed Security Offenses (Including Stone Throwing)**

On November 5, 2015, Indirect Amendment No. 163 was added to the National Insurance Law [Combined Version], 5755-1995. The amendment permits the denial of benefits to

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<sup>64</sup> See paragraph 2 of the letter from the Ministry of Welfare and Social Services entitled “Information about the Youth Probation Service in the East Jerusalem District – Request from the Association for Civil Rights in Israel,” dated Jan. 17, 2016 (hereinafter: **the Welfare Ministry Letter**), available (in Hebrew) at: <http://www.acri.org.il/he/wp-content/uploads/2016/01/EJminors170116.pdf>

<sup>65</sup> Sections 5-6 of the previous version.

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the parents of minors who committed security offenses, including the offense of stone throwing, and who have been sentenced to actual imprisonment. These benefits include child benefit, study grant, supplementary child benefit for supplementary income, payment of alimony from National Insurance, the child supplement for a disability benefit, survivors, dependents, and old age pension.

During the discussion of this issue in the Constitution, Law, and Justice Committee,<sup>66</sup> arguments were raised against the distinction between minors who committed security offenses (including stone throwing) and minors who committed other serious criminal offenses, such as rape or murder. Committee Chairperson MK Nissan Slomiansky justified the distinction, remarking that:

A murderer did not do something to the state so that the state says – it can't be that he will go against me and I will continue to pay him money. Even if it isn't a lot of money, 2,000 shekels for example, it sounds absurd that you slap me and I continue to pay you money for it. That can't be. It doesn't have anything to do with murder, which is a different story. We don't want to encourage murderers, but it's a murder that a person committed – he didn't go against the state while the state continues to pay him, as it were. It's true that if he went to murder someone, and the person he murdered used to maintain that person and pay them money every month, then he'd surely stop financing them at the point. That's the way the state looks at it, too.

In other words, according to the logic offered by the chairperson of the committee – a youth who murders or rapes does not injure the state, but rather a private individual, in contrast to a youth who throws a stone, even if it does not actually harm anyone. As we noted above, the National Council for the Child strongly opposed this legislative amendment.

Despite this opposition, the committee adopted the law as noted, and it passed its Second and Third Readings in the Knesset.

### **6. Imposition of Fines, Expenses, and Compensation on the Parents of a Minor, in Addition to Conviction**

A further amendment adopted on the same date is the Youth Law (Adjudication Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment No. 20), 5776-2015 (hereinafter: **the Fines Amendment**). This amendment establishes the possibility to impose a fine, legal expenses, and payment of compensation on the parents of a minor convicted of **any offense**. Through this amendment, the state increased the severity of the penalization of minors by imposing indirect liability on their parents, enabling the juvenile courts to order the receipt of an undertaking from the minor's parents regarding the

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<sup>66</sup> Minutes of Meeting No. 51 of the Constitution, Law, and Justice Committee, 20<sup>th</sup> Knesset, Oct. 10, 2015.



minor's future conduct, or imposing a fine of up to NIS 10,000 on the parent, as well as legal expenses or compensation.

The parent is granted the right to a hearing,<sup>67</sup> but bears the burden of proof to show that he or she took all possible steps and means in order to ensure the minor's positive conduct and to prevent him/her from deviating from the proper path, but was nevertheless unsuccessful for reasons not dependent on the parents. Only if the parents overcome this hurdle will they be exempt from this liability.

### **7. Establishing Minimum Penalties for Stone-Throwing Offenses by Adults**

At the same time, Penal Code (Amendment No. 120 and Temporary Provision), 5776-2015 was published. This provision establishes minimum penalties for stone-throwing offenses – one-fifth of the maximum penalty. The court may only deviate from this minimum for special reasons, to be recorded. After its First Reading, the law passed rapidly on to a quick discussion in the Knesset Constitution, Law, and Justice Committee.<sup>68</sup> Despite the attempts by the committee's legal advisor to soften the amendment so that it would not apply to cases in which there was no danger to human life, and the attempts by MK Benjamin Ze'ev Begin to change the duration of the temporary provision to one year, rather than three as eventually determined, it was advanced and passed.<sup>69</sup> The discussion in the committee was directed by MK Nissan Slomiansky, the chairperson of the committee, who noted that the government's central and declared goal was to guide the State Prosecutor's Office regarding punitive requirements. As he stated:

I think that there is also a policy that you have to declare. In this law we want to declare – to the judges, but also to the State Prosecutor's Office to the same extent – that you, the Prosecutor's Office, if there are minimum penalties, then you can't submit a request for a penalty less than the minimum penalty. I understand that this is at least reasonable, so that this law speaks to judges, but also to the Prosecutor's Office.

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<sup>67</sup> See Proposed Law: Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment No. 20) (Means of Treatment after Conviction), 5776-2015, Oct. 15, 2015, Government Proposed Laws 959, 88: [http://www.nevo.co.il/Law\\_word/law15/memshala-959.pdf](http://www.nevo.co.il/Law_word/law15/memshala-959.pdf)

<sup>68</sup> Minutes of Meeting No. 51 of the Constitution, Law, and Justice Committee, 20<sup>th</sup> Knesset, Oct. 20, 2015.

<sup>69</sup> See MK Begin's remarks on p. 10 of the minutes: "We might at least think that if this is a case of legislation brought to the committee with some urgency against the background of these events, I would very much like to think that the steps – all the steps – their broad sweep as proposed by the government and which are implemented not through legislation, but by operational means, will lead to the dissipation of this wave of terror events speedily and in our days – but not in three years from now. Accordingly, I think that it may be reasonable, and I shall be cautious, that this be a temporary provision for one year only."

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This amendment does not apply to minors due to the exclusion clause in the Youth Law (section 25(b) of the Youth Law). This clause establishes that: “A person who was a minor on the date of the committing of the crime will not be sentenced to death, and notwithstanding the content of any law, there is no obligation to impose a life sentence, compulsory sentence, or minimum sentence on him.” Nevertheless, this temporary provision sends a clear sign to judges and to the State Prosecutor’s Office that they should impose stricter sentences on minors suspected of throwing stones. This message has already permeated through into the rulings of the Jerusalem District Court.<sup>70</sup>

### **8. Memorandum: Youth Law (Adjudication, Punishment, and Means of Treatment), 5776-2015**

On November 9, 2015, Member of Knesset Anat Berko (Likud) tabled a private bill<sup>71</sup> according to which section 25(d) of the Youth Law, which establishes that imprisonment will not be imposed on a minor who was not yet 14 at the time of sentencing, will not apply to minors convicted of terror offenses, and that the sentence imposed on such minors will be served in a secure juvenile center until the age of 14, after which they will be transferred to prison. The bill was submitted in response to the involvement of a Palestinian boy aged 13 and a half in a stabbing attack in the Pisgat Ze’ev neighborhood of Jerusalem. The boy was indicted on a charge of attempted murder.

The proposal was passed at its Preliminary Reading with the support of the government, on the condition that MK Berko subsume her bill to that tabled by the government on the

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<sup>70</sup> For example, see the ruling in CC 40049-05-15 *State of Israel v Anonymous (Minor)* (published in Nevo, Nov. 3, 2015), in para. 17: “And we should add to all the above the particular and difficult reality we are facing at this time. As noted, counsel for the prosecution argued before me, and the remarks were not refuted, that this amounts to “a real plague in the city.” Therefore, and as noted, it was requested that such offenses meet with a deterring a punitive manifestation. This is indeed reflected in various legislative amendments (see section 332a of the Penal Code, following its amendment (Amendment 119, dated July 20, 2015), and regarding the fifth charge (the seventh charge) – which indicates the stricter approach in the matter (although this does not apply to the defendant). **See also Proposed Law: Penal Code (Amendment 122 (Temporary Provision), 5776-2015, PL 84), which was passed at its Second and Third Reading on Nov. 2, 2015, and which does not apply to the defendant, but establishes minimum penalties concerning some of the acts of which the defendant has been convicted**). Although the actions of which the defendant has been convicted occurred during a period one year prior to the submission of the indictment in May 2015, and not during the later period closer to the date of sentencing; and although the above-mentioned stricter legislative amendments do not apply to the defendant – it is impossible to ignore the importance of deterrence in these offenses, which according to the indictment itself have continued over a long period, with all this implies in terms of public damage and the ability to maintain such an urban fabric of life per se – in both senses.” (Emphases added).

<sup>71</sup> Proposed Law: Youth Law (Adjudication, Punishment, and Means of Treatment) (Amendment – A Minor Who Committed an Act of Terror), 5776-2015: <https://www.knesset.gov.il/privatelaw/data/20/2207.rtf>

matter.<sup>72</sup> On November 18, 2015, a legislative memorandum was duly tabled on behalf of the Ministry of Justice, proposing the amendment of the Youth Law so that it will be possible **to sentence minors convicted of offenses of manslaughter, murder, and attempted murder** (i.e. not only terror offenses) **to imprisonment**, even if they have not yet reached the age of 14 at the time of sentencing.<sup>73</sup> This imprisonment will be served in a secure facility between the ages of 12 and 14, and thereafter the minor may be transferred to a juvenile prison, and then, at the court's discretion, to an adult prison. This legislative memorandum is expected to be promoted over the coming months.

The Association for Civil Rights in Israel submitted an objection to the memorandum for the bill, detailing the range of problems it raises, both regarding domestic law and by comparison to other countries.<sup>74</sup> At present, if a minor commits one of the above-mentioned offenses between the ages of 12 and 14 and is sentenced to the severest sentence, he is released from the secure facility at the age of 20, after intensive therapeutic and rehabilitative work over the intervening years. If the new amendment is approved, the minor is liable to be released from prison up to 20 years later. Thus the proposed change will have a dramatic and crucial impact on the lives and futures of young people.

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<sup>72</sup> Decision No. 429/HQ of the Ministerial Committee for Legislative Affairs dated Nov. 22, 2015: <http://www.pmo.gov.il/Secretary/GovDecisions/2015/Pages/dec816.aspx>

<sup>73</sup> For the full memorandum (in Hebrew), see: [http://www.tazkirim.gov.il/Tazkirim\\_Attachments/42586\\_x\\_AttachFile.pdf](http://www.tazkirim.gov.il/Tazkirim_Attachments/42586_x_AttachFile.pdf)

<sup>74</sup> ACRI's comments on the Youth Law legislative memorandum to sentence and imprison youth under the age of 14: <http://www.acri.org.il/en/wp-content/uploads/2015/12/ACRI-position-paper-Imprisoning-minors-under-age-141.pdf>