

האגודה לזכויות האזרח בישראל
جمعية حقوق المواطن في إسرائيل
The Association for Civil Rights in Israel



June 6, 2013

To:

Ms. Tzipi Livni,
Minister of Justice and
Chairwoman of the Ministerial Committee for Legislation and
Jerusalem

Members of the Ministerial Committee for Legislation

Urgent – for the Ministerial Committee for Legislation – June 9, 2013

Re: The Counter-Terrorism Bill, 5771-2011

In preparation for the deliberations of the Ministerial Committee for Legislation on Sunday June 9, 2013 on the Counter-Terrorism Bill, we would like to draw your attention to some of the primary issues in the bill that concern us.

The Association for Civil Rights in Israel (ACRI) recognizes the importance of the fight against terrorism and the State's obligation to protect its citizens and residents from acts of serious violence, but this fight must not make unlimited use of the means at the State's disposal. Precisely because it is a democracy, Israel must fight terrorism in a manner consistent with the basic principles and fundamental rights on which it was founded.

Indeed, the time has come for Israel to revoke the constant "state of emergency" that has been in effect here since the founding of the state, and adopt proportionate norms in the fight against terrorism – norms appropriate to a democratic state in the twenty-first century.

The Counter-Terrorism Bill in its present form, however, does not achieve this important objective. Rather than undertaking significant reform, the Bill seeks to perpetuate and "normalize" the anti-democratic measures currently provided for by emergency legislation and by draconian defense ordinances from the time of the British Mandate, by enshrining them in the permanent law of the State of Israel. As such, it threatens to cause severe and irreversible damage to the state of human rights in Israel.

Therefore, we call on you to oppose this Bill in its current form.

Among the injurious measures included in the Bill (and it should be emphasized that these are just a few of the most serious problems that the Bill raises), are the following:

1. Administrative Detention and Control Orders - Enshrining in law the authority to arrest people indefinitely, and to impose significant restrictions on their freedom of movement

Administrative detention – incarcerating an individual for extended periods of time (even permanently) on the basis of unpublished and classified material, and without due process – tangibly threatens some of the most fundamental principles of democracy. In addition to the fatal blow to the human right of freedom from arbitrary detention, the incorrect and groundless assumption that we as a society can or are permitted to predict a citizen's future actions undermines the status of each and every one of us as an independent moral agent, responsible for his/her actions and able to make decisions freely. Fundamentally, administrative detention reflects a utilitarian willingness to take a calculated risk to imprison an innocent person, which in and of itself expresses a dangerous disregard for human dignity.

This route, which bypasses criminal proceedings, allows the State to imprison a person for an extended period of time without a fair trial to prove that he/she is deserving of imprisonment, and is inconsistent with a basic commitment to the values of human rights. The basic assurances guaranteed in criminal proceedings are meant to limit the authority of the State to deprive a person of his/her freedom based on the allegation that he/she is involved in illicit acts that endanger the public and to ensure that it is only done when the allegations are adequately proven.

Most of the time, as is well known, administrative detention is based on classified material, with many of the details of the allegations – and not only the evidence on which they are based – hidden from the suspect. Under these conditions, even if formally there is a process of judicial review, this process does not constitute a sufficient guarantee to prevent arbitrary arrests, errors or abuse of draconian authority. A person who does not know the details of the allegations against him/her and does not know what they are based on can only grope in the dark, and is deprived of any real ability to defend him/herself. In this situation, even the best judge cannot maintain justice.

Administrative detention does not stand up to the test of Israel's Basic Law: Human Dignity and Liberty. It constitutes a violation of a person's freedom and dignity and does not meet the conditions of the Basic Law's limitation clause – namely, it is not consistent with the values of the State of Israel, and does not make use of the principle of proportionality. Any newly proposed reform must stand the test of constitutionality, and any arrangement that seeks to "normalize" administrative detention will certainly fail this test.

The proposed application of administrative detention runs counter to international law, to which Israel is obligated. International human rights law only allows for preventive detention, if at all, in temporary and extreme states of emergency. Moreover, even in a state of emergency which justifies derogation from the State's obligations according to section 4 of the International Covenant on Civil and Political Rights, administrative detention which is not strictly required by the severity of the situation, which does not allow for effective judicial review, and which does not include basic guarantees to prevent arbitrary detention, does not meet the minimal requirements of international law.

In February 2009, the European Court of Human Rights handed down a precedent-setting decision in *A. and Others v. the UK*, in which it held that even in a state of emergency justifying derogation from the European Convention on Human Rights (the equivalent of the International Covenant on Civil and Political Rights, to which Israel is a signatory), it is impermissible to deny a person's liberty without giving him/her a fair chance to defend him/herself in court.¹ The current administrative detention procedure in Israel, which allows for broad reliance on secret evidence and accusations concealed both from the suspect and his lawyer, clearly does not meet this condition.

The Counterterrorism Bill further seeks to anchor in permanent legislation extensive and harmful use of "control orders." which could be utilized to place various restrictions on a person's freedom of movement without fair trial and based on secret evidence.

2. Widespread use of secret evidence in various proceedings – from administrative detention to proceedings surrounding the designation of "terrorist organizations" and proceedings for forfeiture of property:

The Bill preserves the widespread, routine and improper use of secret material in sensitive proceedings such as administrative detention, proceedings for designating a group a terrorist organization, forfeiture of property proceedings, and more. It does so without even a minimal disclosure requirement to ensure due process, and without considering the use of other alternative mechanisms that could mitigate, even slightly, the injury to human rights entailed in this practice.

The problems inherent in the use of classified material are obvious – an individual is placed in a position in which he/she is charged, but he/she does not know with what. There is no more serious injury to due process than to deny a suspect the opportunity to confront his/her accusers and to respond to the charges leveled against him/her. The judicial process is supposed to be adversarial, but when secret evidence is submitted, the court can only hear one side of the story.

¹<http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=24704&sessionId=26399324&skin=hudoc-en&attachment=true>

Proceedings that rely on secret evidence do not involve the minimal guarantees required for due process and discovering the truth. Sweeping discretion together with a lack of due process are a guaranteed formula for arbitrariness, abuse of authority, discrimination, selective enforcement, errors, etc.

The Bill even includes an alarming escalation in this context – it proposes allowing reliance on classified material in the framework of permanent civil forfeiture proceedings (section 68 of the Bill). In the past, during the deliberations on the Prohibition on Terrorist Financing Law, 5765-2005, it was decided to limit the use of classified material in forfeiture proceedings to provisional remedies, with a clear preventative purpose. The establishment of a civil proceeding in which classified evidence may be relied upon which denies the defendant's right to properly defend him/herself takes us another big step down the dangerous slippery slope of damaging the essence of the judicial process in Israel.

Other democratic countries which after 9/11 adopted the use of secret materials in proceedings are currently re-examining the basic conditions required in order to ensure due process. The time has come for Israel, too, to re-examine these proceedings.

3. Broad, all-encompassing definitions for a "terrorist organization," "a member of a terrorist group," and "acts of terror"

The Bill establishes overly broad definitions for terms such as "terrorist act," "terrorist organization" and "member of a terrorist group," thus granting the state authorities overly broad discretion in determining "who is a terrorist." The ambiguity of these definitions and their broad application violate the principle of legality, inviting selective and discriminatory enforcement on the part of the authorities.

For example, under Article 2 of the proposed legislation, "a member of a terrorist group" is not only someone who takes an active part in a terrorist organization, but also anyone who "declares his consent to join a terrorist organization to another, about whom there are reasonable grounds to believe that he is a member of terrorist organization or is acting on its behalf." The Bill adds evidentiary presumptions to this definition which impose the burden of proof on the suspect or the accused to show that he is "no longer" a member of a terrorist organization or that he has not carried out any activities on behalf of such an organization for a number of years. Criminalizing a person's "declaration", regardless of the practical implications of the statement on the organization's activity, comes dangerously close to violating the core of freedom of speech and freedom of conscience, without strong justification. Firstly, the mere statement of an ordinary person that he is willing to "join" a terrorist organization does not, in and of itself, constitute any real danger to state security. Secondly, such a statement could have been made under any of a number of circumstances, including social pressure, under threat, etc. Furthermore, because the accusation here applies entirely to what a person said to another person, ostensibly in private,

there exists a real danger here of incrimination on the basis of a false accusation, against which it would be difficult or even impossible to mount a defense. How can a person bear the burden of proof in such a situation (as in the saying, “prove that you don’t have a sister”)?

The proposed definition of a terrorist organization is also overly broad. It covers, for example, a group of people engaging in legal and legitimate activity, but who conducted, or acted “with the goal of enabling or promoting” an act defined as a “terrorist act” or an act which constitutes a “serious terrorist offense.” The problem stems, inter alia, from the fact that the definitions of “terrorist act” and “serious terrorist offense” are overly broad (a “serious terrorist offense,” for example, includes a wide variety of offenses, including actions such as failing to report a suspicion of a property transaction by a terrorist organization (section 37 of the Bill) and publishing praise or sympathy for a terrorist act (section 27(b)(2) of the Bill). The ambiguity of these definitions and their broad application create an alarming uncertainty regarding the manner in which they will be interpreted and applied in practice – uncertainly whose practical implication is providing the executive branch with the discretion to decide who they “catch” under these definitions and who they do not. In this context it should be noted that in the proposed bill published in the past by the Ministry of Justice, the definition of a terrorist organization was even broader, and it was slightly narrowed following ACRI’s comments. Thus, while the general definition of a terrorist organization in the proposed bill included also a group of people promoting or enabling the activity of an organization which is a terrorist organization (a “shell” organization), in the current proposal, these kinds of organizations can only be considered terrorist organizations if declared as such after considering the nature of the relationship between them and the organizations engaged in terror and the extent of their problematic activity. We welcome this change, but it does not provide a sufficient answer to the problematic nature of the broad definition.

In light of the far-reaching consequences of these definitions, special care should be taken to ensure that they will apply only to organizations and people who indeed engage substantively in terrorism.

4. Enshrining draconian powers in investigations of security suspects, which could lead to the use of improper interrogation methods and to the conviction of the innocent

The Bill seeks to adopt into the permanent law of Israel a harmful temporary security order which allows suspects accused of various security crimes to be “denied a meeting with a judge.” This practice allows for a detainee to be incarcerated without being brought before a judge for up to 96 hours in exceptional cases, and even allows for lengthening incarceration in absentia under certain circumstances. Given that current law allows a security suspect to be prevented from meeting an attorney for up to 21 days, this practice means that suspects can be interrogated while cut off from the outside world for significant periods of time. The interrogation of a suspect without reasonable external supervision opens the door to the use of improper interrogation methods and is likely to lead to obtainment of false confessions and the conviction of innocent people.

5. Definition of criminal offenses that undermine freedom of speech

The Bill contains various provisions that severely curtail freedom of speech. For example, section 27(a) of the Bill imposes a prison sentence of three years upon anyone “whose actions express identification with a terrorist organization, including through publication of praise, support or sympathy, waving its flag, display or publication of a symbol, or displaying, playing, or publicizing its slogan or anthem, when such an expression is made in public.” This prohibition severely infringes freedom of speech, especially given the broad definition of "terror organization" contained in the Bill.

6. New rules that contradict the basic principles of criminal law

The Bill establishes a series of new rules that deviate from fundamental principles of criminal law. For example, section 47 provides an exception to the usual prohibition on admitting hearsay, allowing for the submission of a person's statement as evidence when that person cannot be present in court because he is physically in the Palestinian Authority or in a hostile country. According to the proposed provision, it will not be possible to convict someone solely on the basis of this kind of hearsay evidence, but it could be used as supporting evidence, and under some circumstances, even be recorded as corroborating evidence. It should be recalled that in many security crimes, the case against the accused ultimately relies on confessions extracted during intense interrogations, while the accused was prevented from meeting with a lawyer. Under such circumstances, it might have been expected that legal reform designed to increase the chances of achieving justice would seek to tighten the requirements for admissibility of evidence and reliance on dubious confessions of these kinds, instead of weakening the already scant evidence requirements in order to strengthen them.

Conclusion

The Bill contains broad and sweeping provisions which unreasonably broaden the scope of criminality and threaten to turn law-abiding citizens and organizations (with no connection to terror whatsoever) into “terrorists.” The Bill grants the executive branch unchecked, draconian powers to use harsh measures against individuals and organizations – all this without trial, on the basis of mere suspicion, and without establishing the minimal guarantees for the defense of the rights of the accused. The Bill opens the door for improper state intervention in the country's political discourse and in the freedom of association of its citizens. Furthermore, it seeks to "normalize" the improper use of administrative detention and control orders and make them an integral part of the permanent and modern legislation of the State of Israel.

Any new legislative initiative seeking to address these issues should begin by squaring Israel's existing procedures with the constitutional principles set out in Israel's Basic Law: Human Dignity

and Liberty, and with the principles of international law, to which Israel has committed itself, while ensuring the powers provided correspond to their appropriate purposes.

Unfortunately, the Bill in its current formula not only misses this mark entirely, it seeks to perpetuate – and in some cases even exacerbate – the improper procedures currently in place. The promotion of this bill in its current form is likely to undermine basic constitutional rights and the principles of Israeli democracy, and we therefore call on you to oppose it.

Respectfully,
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